

The Public Lawyer



STATE BAR OF NEVADA

Shauna Hughes Receives the James M. Bartley Distinguished Public Lawyer Award

Public Lawyers Section

May 2008

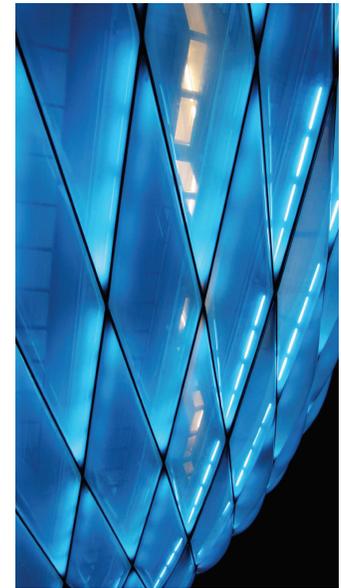
The State Bar of Nevada Public Lawyers Section has presented the 2008 James M. Bartley Distinguished Public Lawyer Award to Shauna Hughes at its annual Lake Tahoe Conference.

This award is presented annually by the Section to a government attorney in the civil practice of law based upon the following criteria:

- Practice in a federal, state, or local government

office or agency or a non-profit legal aid office

- Dedication to public service
- Duration of public service
- A range of experience in different fields of civil practice
- Notable contributions to public service (reported cases, litigation, presentations, publications, etc.)



Inside this issue:

<i>Nevada Supreme Court Cases</i>	3
<i>Depression Among Lawyers</i>	6
<i>Dann 's Days Numbered</i>	6
<i>Dann is Done</i>	8
<i>Ninth Circuit Cases</i>	9
<i>How to Guard Your Laptop</i>	19
<i>Help Make the Bluebook Better</i>	20

- Leadership on legal or public policy issues or leadership within an office

Shauna was appointed City of Henderson City Attorney in 1983. She provides legal representation to the Mayor and City Council as well as to the entire city government. Shauna specializes in areas of law relating to planning, zoning, labor law and municipal law. She supervises the civil and criminal divisions of the City Attorney's office as well as the Environmental Programs Division and Office of Court Programs. During her tenure the office has grown from two attorneys and one support staff to an office with more than twenty attorneys.

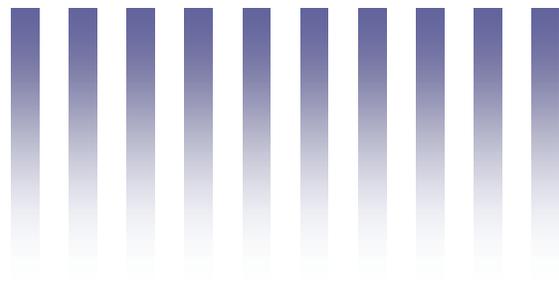
A resident of Nevada since 1981, Shauna was born in New York and raised in Ohio and Connecticut. She earned her bachelor's degree from John Carroll University and received her Juris Doctor from Vermont Law School. Previously, she was the Assistant City Attorney for the City of Henderson and a judicial law clerk for the 8th District Court, Las Vegas.

In addition to her legal responsibilities, Shauna is active in community matters. Among other things, she has served as a board member of the Henderson Boys and Girls Club since 1988. She is a founding member of S.A.F.E. House, Inc., a non-profit organization dedicated to providing aid and shelter to victims of domestic abuse in Henderson. Shauna also serves on the Advisory Board for the Henderson Police Athletic League, dedicated to preventing juvenile crime by providing education and

sports involvement. Most recently, Shauna joined the Board of Directors for the Nathan Adelson Hospice.

Melanie Bruketta, Chief Deputy District Attorney with the Carson City DA, was the 2007 recipient of the award .

Jim Bartley mentored numerous generations of young civil attorneys during his years in Las Vegas. His unvarying method was to identify the problem prior to searching for a solution. He stressed brevity and clarity and did not admire the over-eloquent and disingenuous. For him, a good lawyer had as much common sense and foresight as legal knowledge and acuity. He worked from an encyclopedic knowledge of municipal law, which he used to mentor young public lawyers. Beneath his notably gruff exterior was a genuinely nice man with a rare sense of humor. He taught the importance of being forthright, of being held to a higher standard as a public lawyer, and of doing the work and getting it done right, without worrying who got the credit for it. He was a distinguished public lawyer, and this award honors his legacy.



Nevada Supreme Court Cases

Bob Allyn Masonry v. Murphy, 124 Nev. Adv. Op. No. 27 (May 8, 2008) “On his day off, respondent David Murphy, at his employer’s request, delivered equipment from his employer’s construction yard to his employer’s job site. After departing from the job site, he was injured in an automobile accident. In this opinion, we consider whether the injuries of an employee who, like Murphy, is involved in a vehicular accident while on the return journey of a special errand undertaken at the employer’s request, arise out of and in the course of employment, entitling the employee to workers’ compensation benefits.

In so doing, we adopt the street-risk rule, which provides that, when an employee is required to drive as a component of employment, the risks and hazards associated with the roadways are incident to that employment, and thus injuries sustained due to risks associated with those roadways arise out of the employment. We also clarify that our workers’ compensation jurisprudence includes an employee’s return journey within the special errand exception to the going and coming rule, which provides that, even though going and coming from work generally is not in the course of employment, an employee is acting within the course of employment when completing a ‘special errand’ for the employer. Thus, depending upon the facts, an employee’s injuries sustained in a vehicular accident during the return journey of a special errand may arise out of and in the course of employment.”

Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc., 124 Nev. Adv. Op. No. 26 (May 8, 2008) “This appeal presents us with the opportunity to clarify the circumstances under which the unclean hands

doctrine will bar a party from obtaining an equitable remedy. We now conclude that the unclean hands doctrine should only apply when the egregiousness of the party’s misconduct constituting the party’s unclean hands and the seriousness of the harm caused by the misconduct collectively weigh against allowing the party to obtain such a remedy. Applying our conclusion to this case, we reject appellant’s contention that its abuse of process judgment against respondent automatically barred respondent from obtaining a judgment against appellant based on unjust enrichment.

Mclellan v. State, 124 Nev. Adv. Op. No. 25 (May 1, 2008) “Curt Mclellan was convicted of 22 counts of sexual assault of a minor under 14 years of age and 20 counts of lewdness with a child under 14 years of age. He now appeals those convictions on the basis of the district court’s admission into evidence of a wiretapped phone call placed by California police to Mclellan in Nevada. Mclellan argues that such evidence would be considered unlawful and inadmissible if obtained by wiretap in Nevada because he did not consent to the interception. We hold that Nevada law allows the admission of evidence legally obtained in the jurisdiction seizing the evidence. Moreover, Mclellan contends that the district court should not have admitted evidence regarding uncharged acts occurring in California because they constituted evidence of prior bad acts, rather than evidence of the crimes for which he was charged. We conclude that the district court did not abuse its discretion in admitting the evidence, but we take this opportunity to clarify the type of limiting instructions district courts should administer regarding the limited admission and use of prior bad act evidence and hold that a defendant may waive his right to a limiting instruction at the time the evidence is introduced at

Nevada Supreme Court Cases

trial.”

Father & Sons & A Daughter Too v. Transp. Servs. Auth., 124 Nev. Adv. Op. No. 24 (May 1, 2008) “NRS Chapter 706 defines fully regulated common motor carriers as including persons who hold themselves out to the public as willing to be employed to transport household goods by vehicle within Nevada. Nevada law further defines the “transportation of household goods’ as including the movement of such household goods by use of a rented vehicle that is driven by someone associated with an entity that has a commercial or financial interest in providing services related to the movement of those goods.

Based on these statutory definitions, we conclude that a company that is financially inter-

ested in providing extended referral services to the public to facilitate intrastate moves through individuals who are paid to load, drive, and unpack vehicles containing household goods may qualify as a fully regulated common motor carrier even though the company itself does not physically move the goods.”

Attorney General v. Nevada Tax Comm’n, 124 Nev. Adv. Op. No. 22 (April 24, 2008) “Nevada’s Open Meeting Law, NRS 241.020, provides that all meetings of public bodies must be open to the public unless a statutory exception clearly and unambiguously exempts a particular proceeding. Respondents claim that the version of NRS 360.247 in effect at the time of the events in issue created a complete exception to the Open Meeting Law and granted respondent



Nevada Supreme Court Cases

Nevada Tax Commission the discretion to close an entire taxpayer appeal. We conclude that respondents' overbroad interpretation of the statutory exception would eviscerate the Open Meeting Law's mandate that public bodies deliberate and vote in public meetings.

This matter arises from the Tax Commission's decision, following a series of hearings that it closed to the public, to grant respondent Southern California Edison a refund of use taxes it paid from 1998 to 2000. Thereafter, believing that the Tax Commission violated the Open Meeting Law by deliberating and voting on Edison's appeal in closed sessions, appellant, the Attorney General filed a complaint in district court under NRS 241.037 to void the Tax Commission's refunds to Edison. The district court ultimately dismissed the complaint.

We consider on appeal the extent to which the Tax Commission could close its proceedings to the public under the exception to the Open Meeting Law set forth in former NRS 360.247. Because we strictly construe exceptions to the Open Meeting Law in favor of openness, we conclude that the exception in NRS 360.247 permitted the Tax Commission to close only the portion of its sessions at which it received confidential evidence and questioned the parties and heard argument concerning the confidential information. Therefore, the Tax Commission violated the Open Meeting Law to the extent that it received nonconfidential evidence, deliberated, and voted on Edison's tax appeal in closed sessions. Accordingly, because actions taken in violation of the Open Meeting Law are void, we reverse the district court's judgment."

Turner v. Mandalay Sports Entm't, 124 Nev.

Adv. Op. No. 20 (April 17, 2008) "In this appeal, we address whether baseball stadium owners and operators have a duty to protect spectators against injuries caused by foul balls that are errantly projected into the stands. We conclude that stadium owners and operators have a limited duty to protect against such injuries and that respondent satisfied its duty as a matter of law under the facts presented in this case. Accordingly, we affirm the district court's judgment in respondent's favor."

Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. Adv. Op. No. 21 (April 17, 2008) "In this appeal, we examine whether a landowner may assert a cause of action for precondemnation damages that arise when a municipality announces its intent to condemn a parcel of land and then unreasonably delays instituting an eminent domain action. We conclude that a municipality's announcement of intent to condemn a parcel of land may give rise to a cause of action by the landowner for damages based on allegations that, under the circumstances, the municipality acted improperly in making the announcement before instituting an eminent domain action. In this, we expand our ruling in *State, Department of Transportation v. Barsity*.

In addition to the precondemnation damages claim, we also consider claims of inverse condemnation, estoppel, abuse of eminent domain laws, prejudgment interest, severance damages, and attorney fees. For the reasons stated below, we reverse the district court's order to the extent that it dismissed the landowner's claim for precondemnation damages, and we remand this matter to the district court for further proceedings with respect to that claim. We nevertheless affirm the remaining portions of the district court's order dismissing the remaining causes of action."

Depression Among Lawyers: Chicken or Egg?

law.com blog

Lawyer depression is one of those topics that seems to reappear on a regular basis here at Legal Blog Watch, and the latest sighting comes by way of an article this month in the *California Bar Journal*, "Depression Takes a Heavy Toll on Lawyers." Consider this excerpt:

According to a Johns Hopkins University study, lawyers suffer the highest rate of depression among workers in 104 occupations. A University of Washington study found that 19 percent of lawyers suffered depression compared to 3 percent to 9 percent in the general population. And a University of Arizona study of law students found that they suffer eight to 15 times the anxiety, hostility and depression of the general population.

Richard Carlton, deputy director of the State Bar of California's Lawyer Assistance Program, sees those numbers and says, "There's something about the practice of law that attracts a certain personality that is prone to experiencing these problems." But is it the chicken or the egg? Is it that law attracts people who are prone to depression or that those who choose law find themselves depressed by their work? As the California LAP's director, Janis Thibault, puts it, "I've never seen such a lonely profession -- the inability to connect with other people at a deep level because there's so much of an adversarial relationship."

Tim Willison, a licensed clinical therapist who works with the California bar, says that lawyers typically come to him in their 40s and 50s because the pressures they face have reached the boiling point. "It's cumulative," he says, "there's a creeping paralysis." How could anybody, he

wonders, be happy in such a demanding, high-pressure job? His observations would seem to lend support to the theory that law tends to be a depressing job, as opposed to lawyers tending towards depression. Therapy, of course, is part of the answer for lawyers suffering from depression. But the article suggests that another route out from under depression might be for the lawyer to refocus on personal and interpersonal matters -- on personal growth, close relationships, helping others and improving their communities. Those who do that, research shows, tend to be happier and more satisfied with their lives.

Your thoughts? Why are lawyers more depressed than others? What, if anything, can they do about it?

Dann's Days Numbered as Ohio AG

When Marc Dann announced his candidacy for Ohio attorney general in 2005, he vowed to be an AG in the mold of Eliot Spitzer. That promise has proven more prescient than he could have known, as he faces pressure to step down over sexual infidelity and mismanagement. On Friday, Dann admitted to having had an extramarital affair with a subordinate, just hours after the release of an internal-investigation report detailing lewdness, profanity and sexual harassment in the AG's office under his watch. The only question now is whether Dann will follow in Spitzer's footsteps and resign quickly, or stick with his assertion Friday that he would not.

In a news conference Friday, Dann conceded, "I have not conducted myself in a way that is consistent with my values as a husband, a father and my responsibilities as attorney general." But he said he would stay on and "work tirelessly to re-

Dann's Days Numbered as Ohio AG

gain the public's trust." He'd have to work at a superhuman pace. Over the weekend, editorials in four major Ohio newspapers called for Dann to resign, as did the state Republican deputy chairman Kevin DeWine, who said Dann had turned the AG's office into a "raunchy frat pad." In an editorial Sunday, the *Cleveland Plain-Dealer* said that Dann has turned the AG's office "into a laughing-stock," and it called on him to do what is best for the state, not what is best for himself. "Marc Dann has disgraced himself far more than he seems to realize. He has fallen so far, so fast, that it's impossible to see how he can recover, personally, politically or professionally," the editorial said. "That's why he needs to go." Also on Sunday, an editorial in *The Columbus Dispatch* said that the AG "must be able to provide leadership, command respect and exercise strong judgment.

Marc Dann has failed miserably in all three and is not fit to serve." *The Cincinnati Enquirer* on Saturday urged him to step down, calling him "a disgrace" whose "hypocrisy is breathtaking. Meanwhile, Ohio Gov. Ted Strickland and Ohio Democratic Party

Chairman Chris Redfern have both called for an independent investigation of the AG's office.

As if this was not all sufficiently bizarre, Dann, during his press conference Friday, admitted that he was surprised he ever won election as AG in the first place, adding, "I was not as well prepared for the office as I should have been." Given how the on-the-job training has gone so far, Dann really should consider another line of work.



DANN IS DONE

Thursday, May 15, 2008 6:27 AM
By Alan Johnson and James Nash
THE COLUMBUS DISPATCH

After resigning, former Ohio Attorney General Marc Dann holds the hand of his 23-year-old daughter, Mavilya Chubarova, as they leave the news conference in the Governor's Cabinet Room at the Statehouse. Dann left to return to Youngstown and the rest of his family.

In the end, the "culture of corruption" in state government that Marc Dann battled so fiercely to become attorney general consumed him, too.

It cost him his job, his reputation and probably his political career.

Dann, a Democrat elected in 2006, resigned yesterday, 51/2 weeks after The Dispatch published the first story about sexual-harassment complaints in his office and hours after Inspector General Thomas P. Charles and a dozen investigators raided attorney general's offices in Columbus and Youngstown. They seized equipment, including the Blackberries of Dann and other top officials, as well as computers and numerous documents.

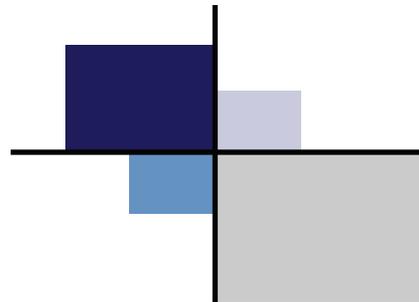
Dann looked pale but spoke in a steady voice as he stood beside Gov. Ted Strickland and announced his immediate resignation at a jammed Statehouse news conference. He had been in office just 17 months.

"My conduct has caused the creation of a firestorm of negative publicity that has reached a

point where it is preventing the great professionals in the office from doing their important work," Dann said.

"The only way I can ensure that the great work in the office can continue is to take responsibility by resigning."

STALKER
THE COLUMBUS DISPATCH 2008



NINTH CIRCUIT CASES

Levine v. City of Alameda, No. 06-15480 (May 13, 2008) “Edward Levine filed this action under 42 U.S.C. § 1983 against the City of Alameda and James M. Flint, both individually and as City Manager, alleging that the defendants violated his due process rights under the Fourteenth Amendment. On February 17, 2004, Flint told Levine, a property manager for the City, that he was going to be laid off. Levine wrote Flint a letter in which he requested a pre-termination hearing regarding his lay off. Levine believed that the lay off was a pretext and that he was being terminated because Flint disliked him.

After receiving the letter, Flint gave it to the City’s Human Resources Director, Karen Willis, and told her to make sure that Levine’s due process rights were respected. Willis then wrote Levine a letter stating that he was not entitled to a pretermination hearing under his union contract because he was being laid off and not discharged for cause. In the letter, Willis offered to meet with Levine to discuss lay off procedures and retirement benefits. Willis and Levine later ran into each other in the Human Resources Department where they had a five-minute talk and visited in general according to Willis.

After the parties filed cross motions for summary judgment, the district court granted summary judgment in part (1) for Levine, finding that his procedural due process rights were violated and he was entitled to a full evidentiary hearing before a neutral third-party, and (2) for defendants, finding that Flint was not personally liable based on qualified immunity and that the City was not liable as a municipality. Both parties appealed. We affirm the district court.”

“In this case, the district court properly found that Levine was a civil servant who had a property interest in continued employment under the Due Process Clause. *See id.*; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985). As an employee with a property interest under the Due Process Clause, Levine was entitled to have a hearing before his lay off to allow him to present his side of the story. *See Clements*, 69 F.3d at 331-32; *Loudermill*, 470 U.S. at 542-43. Defendants refused to provide a hearing. The Director of Human Resources’ offer to meet with Levine to discuss lay off procedure, and the random five-minute encounter between Levine and the Director, failed to give Levine a meaningful opportunity to respond to the lay off decision. *See Clements*, 69 F.3d at 331-32. Thus, Levine’s due process rights were violated by the failure to provide a pretermination hearing. *See id.*; *Loudermill*, 470 U.S. at 542-45.

Because Levine’s due process rights were violated, it was not improper for the district court to order a full evidentiary hearing to remedy the violation. *See Brady v. Gebbie*, 859 F.2d 1543, 1551 (9th Cir. 1988) (stating that the appropriate remedy for the deprivation of due process rights is to order the process which was due). The Supreme Court has held that an employee with a property interest is entitled to a limited pretermination hearing which is to be followed by a more comprehensive post-termination hearing. *Loudermill*, 470 U.S. at 547. Levine was entitled to a full post-termination hearing because there was no way to give Levine the process that he had been due, which was an opportunity to respond before the termination occurred.”

North Pacifica LLC v. City of Pacifica, No. 05-16069 (May 13, 2008) “These appeals arise out of a convoluted series of events illustrating the

NINTH CIRCUIT CASES

friction that can grow between a developer trying to secure approval of a condominium project as quickly as possible, and a city trying to use development permit procedures to avoid all foreseeable future problems. The plaintiff-developer is North Pacifica LLC and the defendant is the City of Pacifica. The conduct on the part of both sides has led to moving targets for litigation activity, and the entire project is still tied up in proceedings before the California Coastal Commission.

The case presents a remarkable series of ironic twists. The developer originally sued the City for delays in approving its application for development permits, but because of a citizen's appeal to the Coastal Commission, the development is still on hold, long after City approval. The district court awarded damages to the developer, not on the basis of any harm alleged in its original complaint, but because of a condition in the permit to which the developer never voiced any objection in the hearing before the City Council. The condition in question was inserted by outside counsel the City hired in order to avoid litigation, and the condition has, of course, had the opposite result. Finally, the district court correctly dismissed the substantive due process claim in the original complaint, but for the wrong reason, incorrectly treating it as a takings claim that required exhaustion of state court remedies, rather than as a substantive due process claim for delays that, contrary to the complaint's allegations, were not unreasonable. *See N. Pacifica, LLC v. City of Pacifica*, 234 F. Supp. 2d 1053, 1064-66 (N.D. Cal. 2002).

The disputes before us boil down to first, the developer's contentions that we should resurrect its substantive due process claim and that we should remand for the award of additional damages on the equal protection claim, and second, to the City's arguments that the developer was not entitled to

judgment, damages, or attorneys' fees in the first place. The City is correct. We agree with the City that the developer was not entitled to judgment on the equal protection claim that is before us, because the City did not intentionally treat this developer differently from any other developer. Outside counsel inserted the now-controversial provision in the recommended permit and the developer raised no opposition at the hearing during which the City Council considered the permit application. There can be no compensatory damages attributable to the provision in any event, because the developer still has not obtained the requisite approval from the Coastal Commission.

We also agree with the City that the due process claim should not be resurrected because the developer has not alleged any irrational delay in the City's approval of its permits. Accordingly, we vacate the district court's award of attorneys' fees and costs to North Pacifica and remand for entry of judgment in favor of the City."

Jacobs v. Clark County School Dist., No. 05-16434 (May 12, 2008) "Public school districts across the country have increasingly turned to the adoption of mandatory dress policies, sometimes referred to as 'school uniform policies,' in an effort to focus student attention and reduce conflict. These policies are not without controversy, and many students, as well as their parents, find them offensive to their understanding of core First Amendment values. In a case of first impression in this circuit, we address just such a set of challenges and largely conclude that public school mandatory dress policies survive constitutional scrutiny.

In 2003, the Clark County School District

NINTH CIRCUIT CASES

promulgated Regulation 5131, which created a standard dress code for all Clark County students and established a means by which individual schools in the District could establish more stringent mandatory school uniform policies. These uniform policies were to be established ‘for the purpose[s] of increasing student achievement, promoting safety, and enhancing a positive school environment.’ A number of schools in the District instituted such uniform policies. For example, Liberty High School instituted a policy requiring all students to wear ‘solid khakicolored bottoms and solid-colored polo, tee, or button-down shirts (blue, red or white) with or without Liberty logos.’ Kimberly Jacobs, then an eleventh-grader at Liberty, repeatedly violated Liberty’s uniform policy (at least once by wearing a shirt containing a printed message reflecting her religious beliefs). As a result of these violations,

Jacobs was repeatedly referred to the Dean’s office and was ultimately suspended from school five times for a total of approximately twenty-five days. Although Liberty provided Jacobs with educational services during her suspensions—and, in fact, Jacobs’s grade point average improved during that time period—Jacobs claims that she missed out on classroom interactions, suffered reputational damage among her teachers and peers, had a tarnished disciplinary record, and was unconstitutionally deprived of her First Amendment rights to free expression and free exercise of religion because of Liberty’s enforcement of its mandatory school uniform policy.”

“Plaintiffs raise three speech-related claims. First, Plaintiffs contend that the District’s school uniform policies (which prohibit stu-



NINTH CIRCUIT CASES

dents from displaying any printed messages on their clothing save for, in some cases, the school logo) unconstitutionally restrict students' rights to engage in 'pure speech' while in school. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ('[S]tudents [do not] . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'). This claim is best exemplified by Liberty's refusal to allow Jacobs to wear t-shirts containing written messages expressing her religious beliefs in school.

Second, Plaintiffs claim that the uniform policies unconstitutionally restrict students' rights to engage in 'expressive conduct.' *See id.* This claim is best exemplified by Bridger's refusal to allow Dresser to express his individuality (and his objection to forced uniformity) by wearing clothing different from his classmates. Third, Plaintiffs claim that requiring students to wear a uniform amounts to unconstitutional compelled speech.' *See W. Va. State Bd. of Educ. v. Barnette*, 319

U.S. 624 (1943); *see also supra* note 18. This claim is best exemplified by Dresser's contention that he is being forced to convey a message of uniformity (with which he strongly disagrees) by wearing the same clothing as his classmates.

We agree with the district court that none of Plaintiffs' free speech claims survive summary judgment. *Ballen v. City of Redmond*, 466 F.3d 736, 741 (9th Cir. 2006) (reviewing grant of summary judgment in free speech case de novo). We reach this conclusion because, as explained in more detail below, the District's encroachment upon its students' rights to free speech and expression via its content-neutral school uniform policies need only survive intermediate scrutiny to be constitutional—a level of scrutiny we find the uniform policies easily withstand. Moreover, enforcement of the mandatory uniform policies does not amount to 'compelled speech' because, under the circum-

stances, it is unlikely anyone viewing a uniform-clad student would understand the student to be communicating a particular message via his or her mandatory dress."

United States v. Caruto, No. 07-50041 (May 12, 2008) "Elide Caruto was convicted of one count of importation of cocaine in violation of 21 U.S.C. §§ 952 and 960 and one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841. She argues that her trial was fundamentally unfair because the district court allowed the prosecution to emphasize in its closing argument omissions in the brief post-arrest statement she gave before invoking her *Miranda* rights. This closing argument, she contends, improperly penalized her for cutting the interview short by exercising her *Miranda* rights. We hold that the prosecutor's argument, emphasizing omissions from Caruto's post-arrest statement that exist only because she invoked her right to counsel under *Miranda*, constitutes a violation of Caruto's right to due process."

Miller v. Blacketter, No. 06-36090 (May 12, 2008) "We are called upon to decide whether a defendant, whose attorney moved on the morning of trial to withdraw from the case and to postpone proceedings, was denied his right to the counsel of his choice when the trial judge denied the motions."

"The Supreme Court has emphasized, however, that the right to counsel of choice is 'circumscribed in several important respects.' *Wheat v. United States*, 486 U.S. 153, 159 (1988). Indeed, there are four specific situations in which the Sixth Amendment does not entitle a defendant to preferred counsel: A defendant does not have the right to be repre-

NINTH CIRCUIT CASES

sented by (1) an attorney he cannot afford; (2) an attorney who is not willing to represent the defendant; (3) an attorney with a conflict of interest; or (4) an advocate (other than himself) who is not a member of the bar. *Id.* In addition, the Court has established that a trial court requires ‘wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar.’ *Gonzalez-Lopez*, 126 S. Ct. at 2565-66 (citation omitted). As such, trial courts retain the discretion to ‘make scheduling and other decisions that effectively exclude a defendant’s first choice of counsel.’ *Id.* at 2566.”

United States v. Chapman, No. 06-10316 (May 6, 2008) “The district court dismissed an indictment against Daniel Chapman, Sean Flanagan, and Herbert Jacobi after the prosecution admitted that it had failed to meet its obligations to disclose over 650 pages of documents to the defense. We must decide whether the government’s appeal of the dismissal is precluded by the Double Jeopardy Clause of the Fifth Amendment, *see* 18 U.S.C. § 3731, whether the dismissal was proper, and whether Defendants are entitled to fees and costs under the Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (codified at 18 U.S.C. § 3006A Note). We conclude that the Double Jeopardy Clause does not bar the government’s appeal under the circumstances presented here, and we affirm as to both the dismissal of the indictment and the denial of fees and costs.”

Torres v. City of Madera, No. 05-16762 (May 5, 2008) “In this interlocutory appeal, we face an issue remarkably similar on its facts to that faced by the Fourth Circuit in *Henry v. Purnell*, 501 F.3d 374 (4th Cir. 2007). There, a deputy sheriff, intending to deploy a Taser device holstered near his firearm, instead drew and fired his service weapon, wounding a suspect fleeing arrest. Here,

Madera City Police Officer Marcy Noriega made the same mistake with even more tragic consequences: she shot and killed Everardo Torres, an arrestee sitting handcuffed in the back of a patrol car. We conclude that Everardo was seized within the meaning of the Fourth Amendment, and further conclude, as did our sister circuit, that the officer’s mistake is governed by Fourth Amendment reasonableness analysis.”

“We agree that this is the appropriate inquiry. The Supreme Court has applied a reasonableness analysis to honest mistakes of fact in a variety of situations. *See, e.g., Maryland v. Garrison*, 480 U.S. 79, 87 (1987) (mistaken but reasonable search of the wrong premises); *Hill v. California*, 401 U.S. 797, 803-04 (1971) (mistaken but reasonable arrest of the wrong person). Although Everardo was already ‘seized’ at the time of the shooting, it is Officer Noriega’s mistaken use of her Glock—not the preceding acts of placing Everardo under arrest and handcuffing him—that the district court must examine for reasonableness. This is in keeping with our ‘continuing seizure’ cases, where our focus is on the aspect of the seizure the plaintiff alleges is ‘unreasonable.’ *See Robins*, 773 F.2d at 1010 (analyzing officer’s post-arrest excessive use of force en route to police station as aspect of seizure alleged to be unreasonable); *Fontana*, 262 F.3d at 880-81 (analyzing officer’s post-arrest inappropriate physical touching and sexual propositioning as aspect of seizure alleged to be unreasonable).

Henry concluded, and we agree, that five factors were relevant to the reasonableness determination: (1) the nature of the training the officer had received to prevent incidents like this

NINTH CIRCUIT CASES

from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training. *Henry*, 501 F.3d at 383.

While these factors are relevant to the determination of whether Officer Noriega acted reasonably, we also stress that 'the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments.' *Graham*, 490 U.S. at 396-97. Since the parties did not brief the issue of whether Officer Noriega's mistake was a reasonable one, the factual record is insufficiently developed for this court to make this determination, and we remand to the district court to determine in the first instance whether Noriega's conduct was unreasonable under *Graham*, 490 U.S. at 396-97, and to otherwise proceed with the matter."

Brown v. Farwell, No. 07-15592 (May 5, 2008) "At Petitioner Troy Brown's trial for sexual assault, the Warden and State's deoxyribonucleic acid expert provided critical testimony that was later proved to be inaccurate and misleading. Respondents have conceded at least twice that, absent this faulty DNA testimony, there was not sufficient evidence to sustain Troy's conviction. In light of these extraordinary circumstances, we agree with District Judge Philip M. Pro's conclusions that Troy was denied due process, and we affirm the district court's grant of Troy's petition for writ of habeas corpus."

Doran v. 7-Eleven, Inc., No. 05-56439 (May 2, 2008) "DUFFY, District Judge, dissenting:

I respectfully dissent.

Today the majority holds that an ADA plaintiff has standing to sue for things that did not injure him. In holding that a plaintiff who has encountered or has specific knowledge of one barrier at a facility may sue for any unknown barrier on the premises related to his disability, the majority reasons that '[i]t makes no sense to require a disabled plaintiff to challenge, in separate cases, multiple barriers in the same facility, controlled by the same entity, all related to the plaintiff's specific disability. We do not believe Congress would have intended such a constricted reading of the ADA which could render the benefits it promises largely illusory.' The majority's approach compromises longstanding constitutional principles for the sake of convenience, and ignores the fact that no one—not even Congress—can preempt the Constitution and confer standing to a party for things that have not injured him."

Pinholster v. Ayers, No. 03-99008 (May 2, 2008) "Scott Lynn Pinholster faces a death sentence in California for murdering Thomas Johnson and Robert Beckett on January 9, 1982, robbing Johnson and Beckett with intentional infliction of great bodily injury and with personal use of a knife, robbing Todd Crutch with a firearm, and burglarizing Michael Kumar's residence. The jury found two special circumstances: Pinholster, in the same proceeding, was convicted of more than one murder, Cal. Penal Code § 190.2(a)(3) (1984), and he committed the murders during a robbery and a burglary, *id.* § 190.2(a)(17)(i), (vii). The jury fixed Pinholster's penalty at death, and on June 4, 1984, the Los Angeles County Superior Court so sentenced him.

NINTH CIRCUIT CASES

On automatic appeal, the California Supreme Court, in an opinion written by Justice Stanley Mosk, set aside one multiple-murder special-circumstance finding but otherwise affirmed the judgment. *See People v. Pinholster*, 824 P.2d 571 (Cal. 1992). Pinholster sought a writ of habeas corpus. He challenged his convictions and death sentence. The California Supreme Court summarily denied Pinholster's state petition for habeas corpus. Pinholster filed a federal habeas corpus petition but the district court dismissed it when the parties stipulated that the petition contained unexhausted claims. Pinholster returned to state court to exhaust those claims. On October 1, 1997, the California Supreme Court de-

nied Pinholster's second habeas petition. Pinholster then filed an amended federal habeas petition and requested an evidentiary hearing on several claims. The district court granted the State's motion for summary judgment on Pinholster's claims challenging the constitutionality of his convictions. Pinholster appeals the district court's denial of his request for an evidentiary hearing on his guilt phase ineffective assistance of counsel claims. However, the district court concluded that his counsel inadequately investigated and deficiently presented mitigating evidence at the penalty phase and granted Pinholster's habeas petition with respect to the death penalty. The State cross-appeals the district



NINTH CIRCUIT CASES

court's judgment setting aside Pinholster's death sentence.

We affirm the district court's denial of an evidentiary hearing on Pinholster's claims of ineffective assistance during the guilt phase. We reverse the district court's grant of habeas relief on Pinholster's death sentence."

United States v. Tapia-Romero, No. 05-50121 (May 1, 2008) "In this opinion, we hold that the district court correctly concluded that the cost to society of imprisoning a defendant is not a factor to be considered in determining the appropriate length of a defendant's term of imprisonment under 18 U.S.C. §§ 3553(a) and 3582(a). Accordingly, we affirm."

Gregory v. County of Maui, No. 06-15374 (April 29, 2008) "We must decide whether police officers used excessive force in violation of the Fourth Amendment in attempting to restrain an individual."

"To determine whether the force used by the officers was excessive under the Fourth Amendment, we must assess whether it was objectively reasonable 'in light of the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation.' *Graham v. Connor*, 490 U.S. 386, 397 (1989).

"Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.' *Id.* at 396 (internal quotation marks omitted). In this analysis, we must consider the following factors: (1) the severity of the crime at issue; (2) whether Gregory posed an im-

mediate threat to the safety of the officers or others; and (3) whether Gregory actively resisted arrest. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921 (9th Cir. 2001).

'Because such balancing nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom . . . summary judgment or judgment as a matter of law . . . should be granted sparingly' in cases involving claims of excessive force. *Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003).

"Here, the officers had substantial grounds for believing that some degree of force was necessary in confronting Gregory. Upon arriving at the scene, the officers were informed that Gregory had assaulted Finazzo and that he possibly was under the influence of drugs; it is undisputed that Gregory acted in a bizarre manner throughout the confrontation. When the officers entered the studio, they saw Gregory holding a pen with its point facing toward them. While the pen is not always mightier than the sword, a properly wielded writing instrument may inflict lethal force. *See United States v. Bankston*, 121 F.3d 1411, 1412 n.1 (11th Cir. 1997) (noting that a pen held by a bank robber was a 'dangerous weapon' where the robber threatened to use it to kill a teller).

The officers did not immediately engage in a physical confrontation with Gregory. Rather, they first asked him to drop the pen. Only after Gregory repeatedly and expressly refused to comply did they attempt to disarm him, and they only sought to restrain Gregory once he resisted. There is no showing that the officers ever struck Gregory, or that they drew or used a weapon. *See Arpin*, 261 F.3d at 922 (holding that officers did not use excessive force in 'using physical force to handcuff' an unarmed suspect who resisted by

NINTH CIRCUIT CASES

stiffening her arm).

Accordingly, although the confrontation came to a tragic end, we must conclude that the officers did not use excessive force. The severity of Gregory's trespass and of the threat he posed were not overwhelming, but we are satisfied that the force used by the officers was proportionate to both. The Fourth Amendment does not require more.

United States v. Arnold, No. 06-50581 (April 21, 2008) "We must decide whether customs officers at Los Angeles International Airport may examine the electronic contents of a passenger's laptop computer without reasonable suspicion. On July 17, 2005, forty-three-year-old Michael Arnold arrived at Los Angeles International Airport after a nearly twenty-hour flight from the Philippines. After retrieving his luggage from the baggage claim, Arnold proceeded to customs. U.S. Customs and Border Patrol Officer Laura Peng first saw Arnold while he was in line waiting to go through the checkpoint and selected him for secondary questioning. She asked Arnold where he had traveled, the purpose of his travel, and the length of his trip. Arnold stated that he had been on vacation for three weeks visiting friends in the Philippines. Peng then inspected Arnold's luggage, which contained his laptop computer, a separate hard drive, a computer memory stick (also called a flash drive or USB drive), and six compact discs. Peng instructed Arnold to turn on the computer so she could see if it was functioning. While the computer was booting up, Peng turned it over to her colleague, CBP Officer John Roberts, and continued to inspect Arnold's luggage.

When the computer had booted up, its desktop

displayed numerous icons and folders. Two folders were entitled 'Kodak Pictures' and one was entitled 'Kodak Memories.' Peng and Roberts clicked on the Kodak folders, opened the files, and viewed the photos on Arnold's computer including one that depicted two nude women. Roberts called in supervisors, who in turn called in special agents with the United States Department of Homeland Security, Immigration and Customs Enforcement. The ICE agents questioned Arnold about the contents of his computer and detained him for several hours. They examined the computer equipment and found numerous images depicting what they believed to be child pornography. The officers seized the computer and storage devices but released Arnold. Two weeks later, federal agents obtained a warrant.

A grand jury charged Arnold with: (1) 'knowingly transport[ing] child pornography, as defined in [18 U.S.C. § 2256(8)(A)], in interstate and foreign commerce, by any means, including by computer, knowing that the images were child pornography'; (2) 'knowingly possess[ing] a computer hard drive and compact discs which both contained more than one image of child pornography, as defined in [18 U.S.C. § 2256(8)(A)], that had been shipped and transported in interstate and foreign commerce by any means, including by computer, knowing that the images were child pornography'; and (3) 'knowingly and intentionally travel[ing] in foreign commerce and attempt[ing] to engage in illicit sexual conduct, as defined in [18 U.S.C. § 2423(f)], in a foreign place, namely, the Philippines, with a person under 18 years of age, in violation of [18 U.S.C. § 2423(c)].'

Arnold filed a motion to suppress arguing that the government conducted the search without reasonable suspicion. The government countered that: (1)

NINTH CIRCUIT CASES

reasonable suspicion was not required under the Fourth Amendment because of the border search doctrine; and (2) if reasonable suspicion were necessary, that it was present in this case. The district court granted Arnold's motion to suppress finding that: (1) reasonable suspicion was indeed necessary to search the laptop; and (2) the government had failed to meet the burden of showing that the CBP officers had reasonable suspicion to search. The government timely appealed the district court's order granting the motion to suppress.

"Finally, despite Arnold's arguments to the contrary we are unpersuaded that we should create a split with the Fourth Circuit's decision in *Ickes*. In that case, the defendant was stopped by Customs agents as he attempted to drive his van from Canada into the United States. 393 F.3d at 502. Upon a ' cursory search ' of defendant's van, the inspecting agent discovered a video camera containing a tape of a tennis match which ' focused excessively on a young ball boy. ' *Id.* This prompted a more thorough examination of the vehicle, which uncovered several photograph albums depicting provocatively-posed prepubescent boys, most nude or seminude. *Id.* at 503. The Fourth Circuit held that the warrantless search of defendant's van was permissible under the border search doctrine. The court refused to carve out a First Amendment exception to that doctrine because such a rule would: (1) protect terrorist communications ' which are inherently " expressive " ' ; (2) create an unworkable standard for government agents who " would have to decide—on their feet—which expressive material is covered by the First Amendment ' ; and (3) contravene the weight of Supreme Court precedent refusing to subject government action to greater scrutiny with respect to the Fourth Amendment when an

alleged First Amendment interest is also at stake. *See id.* at 506-08 (citing *New York v. P.J. Video*, 475 U.S. 868, 874 (1986) (refusing to require a higher standard of probable cause for warrant applications when expressive material is involved)). We are persuaded by the analysis of our sister circuit and will follow the reasoning of *Ickes* in this case."

Seven Up Pete Venture v. Schwietzer, No. 06-35384 (April 21, 2008) "The primary question before us is whether the Eleventh Amendment precludes federal jurisdiction over an action seeking compensation under the Fifth and Fourteenth Amendments for a taking of property by a State.

The factual setting of this case is simple enough; the procedural context is more complicated. Seven Up Pete Venture and other plaintiffs acquired leases of Montana state property for the purpose of mining gold, silver and other trace minerals. Subsequently, voters of Montana enacted Initiative 137, which banned open-pit mining for gold or silver by the cyanide heap leaching process. The Venture then brought this reverse condemnation action in federal district court against the Governor of Montana and the Director of the Montana Department of Environmental Quality in their official capacities. The Venture contended that I-137 effected a regulatory taking of their property, for which the State of Montana must pay just compensation under the Fifth and Fourteenth Amendments of the United States Constitution. At the same time, the Venture brought a reverse condemnation action in Montana state court. The Venture then obtained a stay of the federal proceedings pending resolution of the state claims. After the Montana Supreme Court rejected the Venture's claims, the district court dismissed the federal takings claims under the Eleventh Amendment and, in the alternative, under the doctrine of issue preclusion. The

How to Guard Your Laptop From a Suspicionless Search

Venture now appeals that dismissal.

We join a number of our sister circuits and hold that the Eleventh Amendment bars a reverse condemnation action brought in federal court against state officers in their official capacities. We therefore affirm the district court's dismissal of the Venture's takings claims on that ground without reaching the question of issue preclusion."

Long Beach Area Peace Network v. City of Long Beach, No. 05-55083 (April 15, 2008) "We review the constitutionality of § 5.60 of the City of Long Beach Municipal Code. Appellees Long Beach Area Peace Network and Diana Mann challenged § 5.60 under the First Amendment after the City of Long Beach sought payment of administrative fees associated with a march and rally held by the Peace Network on March 22, 2003. The district court held that § 5.60 in its entirety unconstitutionally restricts the right to free speech and permanently enjoined the City from enforcing it. We affirm in part and reverse in part.

We hold that five challenged features of § 5.60 are constitutional: (1) the provisions distinguishing between expressive activity and other activity; (2) the provision allowing the City Manager to impose conditions to meet stated purposes; (3) the provision authorizing the City Manager to obtain proof of indigent status; (4) the provision authorizing the City Manager to require a permittee to obtain insurance; and (5) the provision authorizing criminal penalties for violations of the Ordinance. However, we hold that four other features are unconstitutional: (1) part of the provision defining 'special events'; (2) the provision applicable to 'spontaneous' events; (3) the hold-

harmless and indemnification provision; and (4) the provisions authorizing waiver of permit fees and departmental services charges. We remand to allow the district court to determine whether the unconstitutional provisions are severable from the remainder of § 5.60."

Law.com blog

How to Guard Your Laptop From a Suspicionless Search

Now that the Ninth Circuit has given border patrol agents the go-ahead to conduct suspicionless searches of travelers' laptops or other digital devices when they enter the country, lawyers need to figure out ways to safeguard confidential and privileged information from an agent's scrutiny. Jennifer Granick of the Electronic Freedom Foundation offers these tips to protect yourself (and your clients' data) from suspicionless searches while traveling. First, Granick suggests that you encrypt your hard drive, which at the very least will make it "prohibitively expensive to access confidential information." But Granick adds that encryption is an imperfect solution, because border patrol agents may attempt to force travelers to enter their passwords so they can continue their search. And while Granick argues that agents cannot force you to decrypt your data or turn over a password, that won't stop them from detaining you or even preventing you from entering the country.

A second option that many law firms and corporations now implement is providing employees with a forensically clean laptop loaded only with the data necessary for a particular trip. However, this approach does not work where trade secrets or client information are the reason

Help Make The Bluebook Better

for the trip. Alternatively, lawyers can bring a clean laptop and access the information they need over the Internet once they've arrived at their destination. Of course, here, the Foreign Intelligence Surveillance Act (FISA) now allows surveillance of people located outside the United States without a warrant -- which means that your e-mail could be intercepted. Thus, it's important to encrypt online transfers of confidential data.

Lawyers can face liability for disclosure of confidential client data, even if inadvertent or, in the case of a border search, through no fault of the lawyer. Clients harmed by the disclosure can sue for malpractice or violation of the duty of confidentiality. And there's always the chance that they might pursue an ethics complaint as well. The bottom line is that even though the Constitution doesn't protect citizens from searches of confidential information at the border, as lawyers, we must guarantee that protection, nonetheless.

Help Make The Bluebook Better

If there is something about *The Bluebook* that makes you see red, here is your chance to weigh in and perhaps change it. *The Bluebook*, of course, is the Bible of legal citation, the inside-baseball of the legal profession that separates a proper citation from an abomination. Formerly formally known as *A Uniform System of Citation*, *The Bluebook* is compiled by the editors of the *Columbia Law Review*, the *Harvard Law Review*, the *University of Pennsylvania Law Review* and *The Yale Law Journal*, and it is published and distributed by the Harvard Law Review Association.

There have been 18 editions of the citation guide

since publication of the first in 1926. The 19th is slated to come out in the summer of 2010 -- just in time for the lucky 2013 law school graduating class -- and as the editors sharpen their red pens and roll up their sleeves, they are inviting users to contribute suggestions by way of a survey:

The editors of *The Bluebook: A Uniform System of Citation* are about to embark on the exciting task of making revisions for the forthcoming Nineteenth Edition which is scheduled for release in the Summer of 2010. We need your help! We rely on user input to revise *The Bluebook* and this Survey is an opportunity for you to share your ideas with us as we update *The Bluebook* in a way that works best for you.

As if contributing to the improvement of this law school classic were not incentive enough, the editors will pick 10 respondents at random to receive a free copy of the next edition along with a year's subscription to the online version. Only surveys submitted by June 30 will be considered.



“No brilliance is required in law, just common sense and relatively clean fingernails.”

John Mortimer

