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Public Lawyers Section

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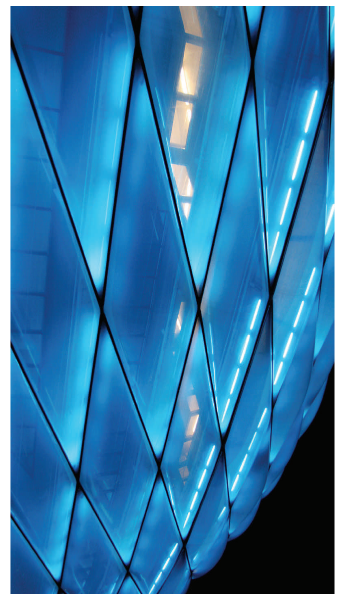

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Garcia v. Scolari's Food & Drug No. 50046 (January 29, 2009) "This appeal seeks our review of a district court order denying a petition for judicial review of an administrative decision that denied occupational disease benefits. During the district court proceedings, appellant sought to have the matter remanded to the appeals officer pursuant to NRS 233B.131(2), which provides that the district court may order additional evidence to be taken before an administrative agency if the evidence is material and good reasons exist for failing to present it during the administrative proceeding. Appellant argued that her attorney negligently failed to introduce material evidence during the administrative proceedings. The district court denied appellant's request, however, after determining that appellant had failed to establish good reasons.

We take this opportunity to provide guidance on the good reasons standard set forth in NRS 233B.131(2). We conclude that good reasons do not exist when a party's attorney deliberately decides not to present available evidence during the course of an administrative proceeding and that party then seeks remand for reconsideration with that evidence after an adverse decision by the administrative agency. Here, appellant did not establish good reasons for her failure to present the additional evidence to the appeals officer, and therefore, the district court did not abuse its discretion in denying appellant's motion to remand the matter for consideration of additional evidence. Moreover, having reviewed the record, we conclude that the appeals officer did not commit clear error or an abuse of discretion in determining that appellant had failed to show that her condition was work-related. We therefore affirm the district court order denying appellant's petition for judicial review."

Attorney General v. Phillip Morris No. 49426 (January 29, 2009) "In 1997, the State of Nevada instituted an action against four major tobacco companies

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stemming from allegations of wrongdoing in the manner that the tobacco companies marketed and advertised their products. The parties ultimately settled during the litigation when, in 1998, they entered into a Master Settlement Agreement (MSA). The MSA is a settlement agreement between tobacco manufacturers and 46 states, including Nevada, which instituted similar actions against certain tobacco manufacturers.

Under the MSA, tobacco companies that were party to the settlement were required to make annual payments to states that were party to the settlement. The amount of the tobacco companies' annual payment to a state depended, in part, on whether the state enacted and 'diligently enforced' a so-called qualifying statute. Under the MSA, a qualifying statute is one that requires tobacco manufacturers selling cigarettes in a state to either join the MSA or place funds into an escrow account to help cover any of the state's future tobacco-related liability. A state's failure to enact and diligently enforce a qualifying statute may substantially reduce the annual payment it is otherwise entitled to receive under the MSA.

In April 2006, in response to allegations by certain tobacco companies that Nevada was not diligently enforcing its qualifying statute during 2003 and, thus, subject to a reduction in the annual payment amount that it received under the MSA, the State filed a complaint for an enforcement order or a declaratory order. Specifically, the State sought an enforcement order or declaration that Nevada had diligently enforced its qualifying statute during the 2003 calendar year.

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In response, the tobacco companies moved the district court to compel arbitration to settle the matter. According to the tobacco companies, the clear terms of the MSA required the parties to arbitrate whether Nevada was diligently enforcing its qualifying statute. The district court ultimately granted the motion to compel arbitration. The State now petitions us for a writ of mandamus, directing the district court to vacate its order compelling arbitration and to consider the issues raised in the State's complaint on their merits.

In considering this petition, we determine whether Nevada state courts can resolve disputes arising under the MSA with respect to diligent enforcement of Nevada's qualifying statute or whether the MSA compels arbitration of such disputes. *See generally* NRS Chapter 370A and NRS 370A.140 (detailing that tobacco companies selling products in the State of Nevada must either become participating manufacturers under the MSA or must make deposits into a qualified escrow fund based on the number of units sold). In so doing, we first address the State's argument that the MSA's arbitration clause does not include such issues within its scope. We next address the State's corresponding contention that a separate provision of the MSA expressly requires that the parties submit such issues to state court.

We conclude that under the MSA's plain language, issues concerning the adjustment of Nevada's annual payment from the tobacco companies based on Nevada's enforcement of its qualifying statute must be arbitrated. Accordingly, we deny the State's petition."

Department of Motor Vehicles v. Terracin No. 48598 (January 29, 2009) "NRS 483.460 provides for the mandatory revocation of a person's driver's license if that person has been convicted of driving under the influence of intoxicating liquor (DUI). The length of the revocation period depends on the particular subsection of NRS 483.460 under which the conviction falls. In this case, respondents' driver's licenses were revoked under NRS 483.460(1)(b)(5), which provides for a 1-year revocation period, because they previously had been convicted of DUIs. The 1-year revocation period was imposed even though respondents were most recently charged, convicted, and sentenced as first-time DUI offenders, which typically requires only a 90-day revocation period. Disagreeing that the statute required a 1-year revocation period under these circumstances, however, the district court granted respondents' petitions for judicial review. These appeals followed.

In these consolidated appeals, we consider whether NRS 483.460, as amended in 2005, bases the period of revocation on the number of DUI convictions within a 7-year period or on the level of punishment prescribed by NRS 484.3792. We conclude that the plain and unambiguous language of NRS 483.460 bases the period of revocation on the level of punishment prescribed by NRS 484.3792, and thus, we affirm the district court's orders granting judicial review and reducing the period of revocation of respondents' driver's licenses from 1 year to 90 days."

Stalk v. Mushkin No. 48201 (January 29, 2009) "In this appeal, we consider which statutes of limitation apply to claims for intentional interference with prospective business advantage, intentional interference with contractual relations, and breach of fiduciary duty arising from an attorney-client relationship. We determine that claims for

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intentional interference with prospective business advantage and contractual relations are claims for injuring personal property and are subject to the three-year statute of limitations in NRS 11.190(3)(c). A claim for breach of fiduciary duty arising from an attorney-client relationship is a legal malpractice claim and is therefore subject to the statute of limitations contained in NRS 11.207(1). Based on these determinations, we affirm the district court's summary judgment on the claims for intentional interference with prospective business advantage and contractual relations, and we reverse the district court's summary judgment on the claim for breach of fiduciary duty arising from the attorney-client relationship."

Savage v. District Court No. 50445 (January 29, 2009) "In these original proceedings, we primarily consider whether district courts in Elko County and Lyon County manifestly abused their discretion when they refused to consider petitioners' applications for treatment pursuant to NRS 484.37941. In doing so, we also consider the following: (1) whether the statute requires counties to create a treatment program, (2) whether the district court has jurisdiction to order the Division of Parole and Probation (DOPP) to supervise offenders who enter a program of treatment pursuant to NRS 484.37941, and (3) whether NRS 484.37941 violates the separation-of-powers doctrine by requiring the district court to perform duties reserved to the executive branch.

We conclude that the plain language of NRS 484.37941 requires the district court to consider the merits of an offender's application for treatment. In reaching this conclusion, we agree with the State's argument that NRS 484.37941 does not require counties to create a 'program of treatment.' Rather, a review of NRS 484.37941 reveals that the statute only requires district courts to oversee the procedures and conditions of probation imposed upon the offender at the time the district court accepts the offender's application for treatment; it does not require counties to create treatment facilities or a 'program of treatment.' We further conclude that the district court has jurisdiction to order the DOPP to supervise any offenders whose applications for treatment are granted pursuant to NRS 484.37941. And, finally, we conclude that NRS 484.37941 does not violate the separation-of-powers doctrine. The district courts manifestly abused their discretion by refusing to consider petitioners' applications for treatment. We therefore grant these petitions and direct the district courts to consider petitioners' applications for treatment."

Stromberg v. District Court No. 50079 (January 29, 2009) " In this original petition for a writ of mandamus, we address two issues related to NRS 484.37941, which allows a district court to accept a plea of guilty to a third-offense DUI and subsequently enter a judgment for a second-offense DUI if the offender successfully completes a treatment program. First, we consider whether the plain language of NRS 484.37941 allows an offender entering a plea of guilty on or after that statute's effective date to apply for treatment. We conclude that it does, reaffirming our recent decision in Picetti v. State, 124 Nev. ___, 192 P.3d 704 (2008). Second, we reject the State's contention that NRS 484.37941 is unconstitutional because it violates the separation-of-powers doctrine by giving the district court powers that are reserved to the prosecutor. Because we conclude that the district court manifestly abused its discretion when it refused to consider petitioner Michael Lynn Stromberg's request to

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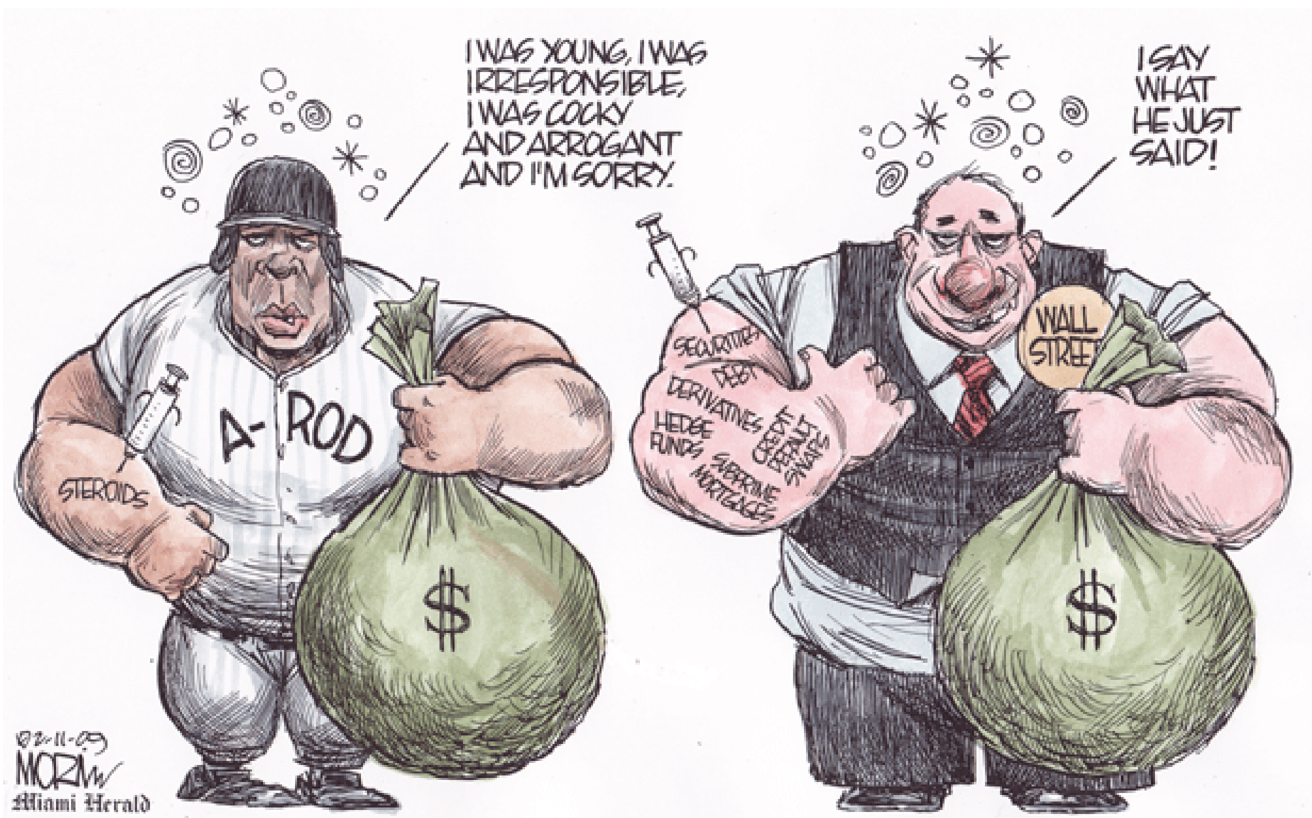
plead guilty and apply for treatment, we grant Stromberg's petition and direct the district court to consider Stromberg's request to plead guilty and apply for treatment pursuant to NRS 484.37941."



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**Attention Geeks:
You Are Not Lawyers**

Apparently, there are enough geeks out there with misguided notions about the law that Paul Ohm thinks he ought to do something about it. Ohm, an associate professor of law at the University of Colorado Law School, is launching a new series of posts on Freedom to Tinker, a blog hosted by Princeton's Center for Information Technology Policy, that he is calling YANAL, for "You Are Not a Lawyer." "In this series," he explains, "I will try to disabuse computer scientists and other technically minded people of some commonly held misconceptions about the law (and the legal system)."

He kicks off the series with a brief primer on the difference between the criminal law standards for acquittal and search. Why? Because these same misguided geeks apparently are so focused on beating the rap that they forget how much trouble they can get into well before going to trial.

When techies think about criminal law, and in particular crimes committed online, they tend to fixate on this legal standard, dreaming up ways people can use technology to inject doubt into the evidence to avoid being convicted. I can't count how many conversations I have had with techies about things like the "open wireless access point defense," the "trojaned computer defense," the "NATted firewall defense," and the "dynamic IP address defense." Many people have talked excitedly to me about tools like TrackMeNot or more exotic methods which promise, at least in part, to inject jail-springing reasonable doubt onto a hard drive or into a network.

But the people who place stock in these theories are neglecting a key drawback, Ohm says. While the standard of proof for conviction may be tough, the standards governing search and seizure are more lenient.

So by the time you've had your Perry Mason moment in front of the jurors, somehow convincing them that the fact that you don't enable WiFi authentication means your neighbor could've sent the death threat, your life will have been turned upside down in many ways: The police will have searched your home and seized all of your computers. They will have examined all of the files on your hard drives and read all of the messages in your inboxes. ... They will have arrested you and possibly incarcerated you pending trial. Guys with guns will have interviewed you and many of your friends, co-workers, and neighbors. The moral of Ohm's inaugural message to all those legally misguided geeks out there is simple. Even if they can't put you away, they can sure mess up your life. And that sounds like something even a geek can understand.

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Ahlmeyer v. Nevada System of Higher Education, 06-15654 (February 18, 2008) "Congress passed the Age Discrimination in Employment Act ('ADEA'), 29 U.S.C. § 621 et seq., to promote the employment of older persons and prohibit arbitrary discrimination by employers based on age. See 29 U.S.C. § 621(b). Congress crafted a detailed administrative scheme with complex enforcement mechanisms to accomplish these goals. When a district court dismissed Linda Ahlmeyer's ADEA claim because it was barred by the Eleventh Amendment, Ahlmeyer moved to amend her complaint so she could vindicate the same alleged wrong—workplace discrimination based on her age—through 42 U.S.C. § 1983. The district court denied Ahlmeyer's motion as futile and, pursuant to the parties' stipulated dismissal of Ahlmeyer's remaining claims, entered an order dismissing the claims with prejudice. Because we hold the ADEA is the exclusive enforcement mechanism for claims of age discrimination in employment, we affirm."

Winterrowd v. American General, 07-56541 (February 17, 2008) "We consider in this appeal whether the Plaintiffs can recover attorney's fees generated by a distinguished member of the Oregon Bar who assists a member of the California Bar in litigating a case before the federal district court in the Central District of California (Central District), but who (a) is not a member of the California Bar, (b) does not physically appear before the Central District, (c) does not sign pleadings in the case before the Central District, (d) has minimal contact with his clients, and no direct contact with opposing counsel in the case, (e) is supervised by Wheatley, Jr., an attorney who is licensed to practice law in California and is the person who alone remained responsible to the Plaintiffs, and (f) is not admitted pro hac vice in connection with the case before the Central District, but no evidence in the record shows that he would not have routinely been so admitted had he applied. We hold that the Plaintiffs can recover such fees. With respect to this issue, we reverse and remand, and with respect to the other issues addressed in this opinion, we affirm in part, and remand in part."

Rohr v. Salt River Project, 06-16527 (February 13, 2008) "Larry Rohr appeals the district court's grant of summary judgment in favor of his former employer, Salt River Project Agricultural Improvement and Power District ('Salt River'). Rohr, who is an insulin-dependent type 2 diabetic, brought suit for employment discrimination in violation of the Americans with Disabilities Act ('ADA'), 42 U.S.C. §§ 12101, et seq. Because the district court erred in concluding that Rohr was neither 'disabled' nor a 'qualified individual' under the ADA, we vacate the district court's order of summary judgment and remand for further proceedings consistent with this opinion.

At the outset, we note that on September 25, 2008, while this decision was pending, the ADA Amendments Act of 2008 ('ADAAA') was signed into law in order '[t]o restore the intent and protections of the Americans with Disabilities Act of 1990.' Pub. L. No. 110-325, 122 Stat. 3553 (2008). In the ADAAA, Congress emphasizes that when it enacted the ADA in 1990, it 'intended that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage.' Id. § 2(a)(1), 122 Stat. at 3553 (emphasis added). The ADAAA rejects the Supreme Court's interpretation of the term 'disability' in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Wil-*

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liams, 534 U.S. 184 (2002), and thereby expands the class of individuals who are entitled to protection under the ADA. *Id.* § 2(b), 122 Stat. at 3553. Indeed, Congress signifies that as a result of these Supreme Court cases, 'lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities.' *Id.* § 2(a)(5), 122 Stat. at 3553. Although the ADAAA, if applicable, would provide additional support for Rohr's claims in this case, we hold that, even under our pre-ADAAA case law, Rohr provided sufficient evidence that he was a 'qualified individual' with a 'disability' under the ADA to survive summary judgment. We therefore need not decide whether the ADAAA, which took effect on January 1, 2009, applies retroactively to Rohr's claims."

Lakeside-Scott v. Multnomah County, 05-35896 (February 12, 2009) "This appeal involves an alleged retaliatory discharge of an employee after she complained about co-workers and one of her supervisors and presents a question that this circuit has not yet answered: Can a final decision maker's wholly independent, legitimate decision to terminate an employee insulate from liability a lower-level supervisor involved in the process who had a retaliatory motive to have the employee fired? We conclude that, on the record in this case, the answer must be yes, because the termination decision was not shown to be influenced by the subordinate's retaliatory motives. The plaintiff-appellee, Lea Lakeside-Scott ('Scott'), was fired from her position as an information systems specialist at Multnomah County's Department of Community Justice ('DCJ'), ostensibly for her improper use of DCJ's computers and email system. Scott then brought this lawsuit alleging that her termination was actually in retaliation for her engaging in speech protected under the First Amendment and by Oregon's whistleblower protection statute. While she was employed at DCJ, Scott had complained about co-workers' violations of County policies, including by one of her supervisors — Jann Brown — whom she also accused of favoring gay and lesbian employees in hiring and promotion decisions. Brown played a role in the process that led to Scott's termination, although the ultimate decision was made independently by Joanne Fuller, director of DCJ's information systems department. Scott contends that Brown wanted to retaliate against Scott for her accusations against Brown, and thus unlawfully influenced Fuller's decision to fire Scott.

Scott filed her retaliatory discharge claim against the County and Brown in federal district court. After a trial, a jury found in Scott's favor, awarding her $650,000 in compensatory and punitive damages against Brown. The district court denied Brown's motion for judgment as a matter of law ('JMOL'), and this appeal followed. We conclude there was insufficient evidence to support the verdict against Brown, given the evidence that it was Fuller's independent decision to terminate Scott. We therefore reverse the district court's denial of Brown's JMOL and remand for entry of judgment in her favor."

Amalgamated Sugar Co., LLC v. Johanns, 07-35971 (February 10, 2009) "We are asked for the first time to review the construction and application of certain provisions of the Agricultural Adjustment Act (the 'Act'), specifically7 U.S.C. §§ 1359dd(b)(2)(E)-(F). We conclude that the disputed provisions of the Act to be unambiguous; therefore, the district court erred in granting Chevron deference to the interpretation advanced by the

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U.S. Department of Agriculture (the 'USDA'). Within the Act, we hold that a 'processor' is an entity who processes sugar, as defined by the USDA's own regulations and entirely within the natural and ordinary meaning of the word. The Act requires the USDA to eliminate a processor's sugar marketing allocation ('allocation') when the processor has 'permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor).' § 1359dd(b)(2)(E). We hold that Pacific Northwest Sugar Company ('Pacific') permanently terminated operations prior to and not in conjunction with the purported sale of assets to Defendant-Intervenor American Crystal Sugar Company ('American Crystal'). Therefore, we conclude that the USDA erred in approving the transfer of the allocation to American Crystal, and Pacific's sugar marketing allocation must be redistributed pro rata among all processors. § 1359dd(b)(2)(E). We reverse the district court's summary judgment in favor of the USDA and American Crystal."

Midwest Express Holdings, Inc. v. Braun, et al. 07-55063 (February 9, 2009) "We consider whether, and to what extent, the Federal Aviation Act, 49 U.S.C. §§ 40101 et seq., preempts an airline passenger's personal injury claims.

A pregnant woman fell from an airplane's stairs, injuring herself and her fetus. She sued the airline, Midwest Express, and the airplane's manufacturer, Fairchild Dornier and related companies, alleging that the stairs were defectively designed because they had only one handrail. Midwest Express settled the claim for $8 million, and now seeks indemnity from the manufacturer. Relying on *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007), the manufacturer argues that the Federal Aviation Act preempts the passenger's personal injury claims and, consequently, Midwest Express' indemnity claim.

The Federal Aviation Act has no express preemption clause. The personal injury claim here conflicts with no provision of the act or regulation promulgated under it. The manufacturer's argument thus rests on implied field preemption."

"Following *Burbank*, the circuits have generally analyzed FAA preemption by looking to the pervasiveness of federal regulations in the specific area covered by the tort claim or state law at issue. Claims regarding airspace management, pilot qualifications and failure to warn have been declared preempted. *French v. Pan Am. Express, Inc.*, 869 F.2d 1 (1st Cir. 1989); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380 (5th Cir. 2004). But several defective product claims, such as the claim here, have not. *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993); *Public Health Trust of Dade County, Fl. v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993). See also *Air Transp. Ass'n of Am. v. Cuomo*, 520 F.3d 218 (2d Cir. 2008) ('we have acknowledged that the FAA does not preempt all state law tort actions').

"Airstairs are not pervasively regulated; the only regulation on airstairs is that they can't be designed in a way that might block the emergency exits. 14 C.F.R. § 25.810. The regulations have nothing to say about handrails, or even stairs at all, except in emergency landings. No federal regulation prohibits airstairs that are prone to ice over, or that tend to collapse under passengers' weight. The regulations say nothing about maintaining the stairs free of slippery substances, or fixing loose steps before passengers catch their heels and trip.

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It's hard to imagine that any and all state tort claims involving airplane stairs are preempted by federal law. Because the agency has not comprehensively regulated airstairs, the FAA has not preempted state law claims that the stairs are defective. For the reasons set forth in the accompanying memorandum, the airline did not waive its right to indemnity through the sales contract. REVERSED."

Regal-Beloit Corp. v. Kawasaki Kisen Kaish 06-56831 (February 4, 2009) "This case requires us to determine which federal statute governs 'a maritime case about a train wreck,' where the parties' agreement for carriage of goods from China into the United States by sea and then by rail included a Tokyo forum selection clause that would violate one federal law, but would be enforceable under another. *See Norfolk S. Ry. Co. v. Kirby*, 543 U.S.14, 18 (2004). Regal-Beloit and several other named plaintiffs contracted with defendant Kawasaki Kisen Kaisha, Ltd. ('K-line') to ship their goods from China to various American Midwestern destinations via the Port of Long Beach in California. K-line issued a through bill of lading to each shipper to cover the shipment from China all the way to the inland destinations, choosing the Carriage of Goods by Sea Act as the law to govern the carriers' responsibility during shipment. Although K-line's own ocean liner carried the goods from China to Long Beach, its United States agent, Kline America ('KAM'), subcontracted with United Pacific Railroad Company ('UPRR') to transport these goods from Long Beach to the inland destinations. K-line is KAM's corporate parent, handling its domestic business dealings through KAM, including dispatching and receiving vessels and negotiating its inland shipping with domestic carriers like UPRR. Plaintiffs' cargo was allegedly damaged when UPRR's train derailed in Oklahoma. Plaintiffs filed a breach of contract suit against Defendants in California Superior Court. After UPRR removed the case to the district court, K-line and KAM moved to dismiss under the Tokyo forum selection clause in K-line's initial agreement with Plaintiffs. The district court granted the motion to dismiss, determining that the parties successfully avoided the strict venue limitations that apply by default to the rail portions of these shipments as a matter of federal law under the Carmack Amendment. The dismissal provides us jurisdiction under 28 U.S.C. § 1291.

The outcome of this case turns on the answers to two questions, the *first* being which statutory framework should apply: the Carmack Amendment ('Carmack'), which provides the default rules governing the inland rail leg of a shipment between a foreign country and a point in the United States, or the Carriage of Goods by Sea Act ('COGSA'), which is what the parties contractually agreed would govern? A reasonable forum selection clause typically is enforceable under COGSA, but such a clause is valid under Carmack *only* if the parties fulfill one of Carmack's two statutory methods for contracting out of the statute's venue restrictions. Applying this circuit's precedent dictates that contractually extending COGSA to the inland rail leg cannot trump the statutory force of Carmack's default responsibility regime unless the parties properly agree to opt out of Carmack and thereby remove the statutory barrier to choosing COGSA as the governing law. We therefore reach a *second* question: which of Carmack's two statutory opt out provisions applies to a contract for rail service that, like the contract here, has been exempted from regulation by the Surface Transportation Board? Unlike the district court, we conclude that the applicable requirements for opting out of Car-

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mack are found in 49 U.S.C. § 10502, instead of § 10709. We thus reverse and remand to the district court to determine whether the parties contracted out of Carmack's venue restrictions under § 10502 so as to make the Tokyo forum selection clause valid and enforceable.

Gibson v. Office of the Attorney General, 07-56124 (January 27, 2009) "Plaintiffs Paula Lauren Gibson and Annette D. Goode- Parker work for the Office of the Attorney General of the State of California ('OAG') as a lawyer and a paralegal, respectively. In violation of an internal policy of the OAG, Gibson represented Goode-Parker in a private legal malpractice case without first having obtained permission from the OAG. The OAG informed Gibson that she would be fired if she continued the private representation. Plaintiffs then filed this action against the OAG and individual decision-makers, alleging a violation of their First Amendment rights and a breach of contract. We hold that the district court properly dismissed the action under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, but erred in awarding attorney fees to Defendants."

"Plaintiffs filed suit against the OAG and a number of employees within the OAG. Plaintiffs claimed a breach of contract by Defendants and, under 42 U.S.C. § 1983, a violation of Plaintiffs' First Amendment rights. Defendants filed a motion to dismiss, arguing that they were entitled to qualified immunity because Plaintiffs failed to allege that they had engaged in any protected First Amendment activity. The district court agreed with Defendants, but gave Plaintiffs an opportunity to file an amended complaint to address the protected activity at issue and the adverse employment actions taken. With regard to the contract claim, the district court held that Plaintiffs failed to allege conduct that was inconsistent with the terms of the transfer agreement. The district court also held that, even if Plaintiffs had alleged breach of a particular contractual term, they failed to allege any foreseeable contract damages. As a result, the district court dismissed Plaintiffs' contract claim with prejudice but allowed Plaintiffs to file an amended complaint with regard to their § 1983 claims.

Plaintiffs did not file an amended pleading. Accordingly, Defendants asked the district court to dismiss the entire action, and the district court did so. Plaintiffs timely appealed. When the district court issued its order granting attorney fees of $21,803.52 to Defendants, Plaintiffs timely appealed that decision as well. We consolidated the appeals."

"Because Plaintiffs' speech here, filing a private malpractice action, does not qualify as an 'issue of public concern,' it is not constitutionally protected speech in the context of public employment. In the absence of a violation of their constitutional rights, Plaintiffs' 42 U.S.C. § 1983 claim against Defendants on First Amendment grounds must fail. Therefore, we hold that Defendants did not violate Plaintiffs' constitutional rights when they denied Gibson permission to represent Goode-Parker in her private malpractice action."

"Plaintiffs' argument that the OAG's policy is a prior restraint on speech lies at the heart of their action. Although we agree with the approach taken by the Williams case, no similar precedent in our circuit would have signaled to Plaintiffs that they should not bring this claim at all. Because Plain- tiffs raised a question that was not answered clearly by our precedent, we hold that their claim was not frivolous and, accordingly,

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that Defendants are not entitled to any attorney fees. DISMISSAL OF ACTION AFFIRMED; FEE AWARD VACATED. The parties shall bear their own costs on appeal."

Taco Bell v. TBWA, Inc. 07-56532 (January 23, 2009) "Taco Bell Corp. ('Taco Bell') appeals the district court's summary judgment in favor of its former advertising agency, TBWA Worldwide, Inc. ('TBWA'), in Taco Bell's lawsuit seeking indemnification. This case follows a judgment issued against Taco Bell in the federal district court for the Western District of Michigan for breach by Taco Bell of an implied contract for using a third party's Chihuahua character in its advertising developed by TBWA. Taco Bell sought indemnification from TBWA on the ground that the liability Taco Bell incurred in favor of the third party was caused by TBWA. We have jurisdiction under 28 U.S.C. § 1291, and we affirm."

In June 1996, Ed Alfaro, a licensing manager at Taco Bell, attended a trade show in New York where he first discovered a cartoon depiction of a Chihuahua dog character ('Psycho Chihuahua') being marketed by its creators, Tom Rinks and Joe Shields of Wrench LLC, a Michigan corporation (collectively, 'Wrench'). Alfaro told Rinks and Shields that he wanted to explore the use of Psycho Chihuahua by Taco Bell. During the Summer and Fall of 1996,

Wrench provided Taco Bell with goods bearing Psycho Chihuahua's image. From that time through June 1997, Alfaro tried to build support within Taco Bell for its use of Psycho Chihuahua in its advertising. He showed the goods to Taco Bell's senior managers and advertising agency at that time, Bozell Worldwide ('Bozell'). Taco Bell conducted a focus group study which included Psycho Chihuahua and several other designs. Alfaro reported to a senior Taco Bell executive that Psycho Chihuahua was the most popular out of all the designs."

"In March 1997, Taco Bell changed advertising agencies from Bozell to TBWA. Taco Bell commissioned TBWA to create a new advertising campaign for 1998. Between February and April 1997, Alfaro continued to work with Wrench to develop possibilities for Taco Bell's use of Psycho Chihuahua.

In May 1997, TBWA presented approximately thirty advertising ideas to Taco Bell for its new campaign. One of the ideas involved a male Chihuahua dog passing a female Chihuahua dog to get to Taco Bell food. The executives to which the ideas were presented included Taco Bell's president, Peter Waller, and its chief marketing officer, Vada Hill. Waller and Hill selected TBWA's Chihuahua idea as one of the five advertisements that would be test-marketed during the Summer of 1997. Months later, market research demonstrated favorable results for the TBWA Chihuahua test advertisement and Waller and Hill chose that character as the center of its new advertising campaign starting in January 1998.

Meanwhile, Alfaro believed the character Wrench had created from the original Psycho Chihuahua closely resembled the TBWA Chihuahua to be used in Taco Bell commercials. He alerted Taco Bell's in-house counsel that Wrench would likely sue because of the similarities between the characters. Taco Bell sent a box of Psycho Chihuahua materials to TBWA at some point between June 27, 1997 and July 26, 1997. Alfaro drafted a memorandum that accompanied the materials, describing the paral-

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lel path he had taken with Wrench and their idea of using a Chihuahua to advertise Taco Bell food.

By January 1998, Taco Bell began using a Chihuahua to advertise its food. Wrench then sued Taco Bell, claiming that Taco Bell was using Psycho Chihuahua in its advertising without providing compensation to Wrench. *Wrench LLC v. Taco Bell Corp.*, 51 F. Supp. 2d 840 (W.D. Mich. 1999).

In February 1998, Taco Bell and TBWA entered into a joint defense and confidentiality agreement ('Joint Defense Agreement'). They also executed a contract controlling their business relationship ('Agency Agreement'). The Agency Agreement was executed January 19, 1999 but the parties agreed to make the effective date retroactive to April 1, 1997 to include all of TBWA's services to Taco Bell from the beginning of their business relationship.

In its defense in Wrench, Taco Bell alleged there was no contract with Wrench because Alfaro had no authority to bind the company, the Chihuahua character used by Taco Bell was not Psycho Chihuahua, and the Chihuahua character used by Taco Bell was independently created by TBWA. TBWA created and broadcast over forty more Chihuahua commercials between January 1998 and June 2000. In June 2003, the Wrench jury determined that Taco Bell had breached animplied contract by using Psycho Chihuahua without compensating Wrench. All copyright claims were dis- posed of prior to trial. A judgment was entered against Taco Bell in the amount of $30,174,031.00, and the court subsequently amended the judgment to account for pre-judgment and post-judgment interest, bringing the total to over $42,000,000.00.

Taco Bell requested full indemnification from TBWA for its liability to Wrench. Within weeks of the Wrench trial, Taco Bell filed this lawsuit against TBWA, suing it for breach of the Agency Agreement, express indemnification, and declaratory relief. Both sides moved for summary judgment. The district court denied Taco Bell's motion and granted TBWA's cross-motion. Summary judgment was entered in favor of TBWA, and this appeal followed."

"Section 2778(6) does not apply here. TBWA is not an indemnitor under the undisputed facts of this case because no fault or negligence of TBWA caused the duty to indemnify to arise. Taco Bell's argument assumes the Wrench verdict established TBWA's fault but, as previously discussed, it did not. Therefore, TBWA does not constitute an 'indemnifying person' and § 2778(6) does not apply. The district court properly concluded there is evidence only of Taco Bell's fault in its liability to Wrench. As a result, no indemnification obligation from TBWA to Taco Bell arose. AFFIRMED."

Phillip Morris USA, Inc. v. King Mountain Tobacco Company, Inc. 06-36066 (January 20, 2009) "This case is yet another of the difficult Indian jurisdiction cases considered by this court. The precise question presented is whether there is colorable tribal court jurisdiction over a nonmember's federal trademark and related state law claims against tribal defendants for alleged passing off of cigarettes on the Internet, on the reservation of another tribe, and elsewhere. Philip Morris USA, Inc. manufactures and markets Marlboro cigarettes, one of the most recognized brands in the United States. King Mountain Tobacco Company, Inc., a tribal corporation on the Yakama Indian Reservation, along with

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Delbert L. Wheeler, Sr. and Richard 'Kip' Ramsey, company founders and members of the tribe (collectively, 'King Mountain'), sell King Mountain cigarettes in packaging that Philip Morris claims infringes and dilutes its trademarks and trade dress.

We are faced with dueling lawsuits. Philip Morris sued King Mountain in federal court, alleging various federal and state law claims and seeking, among other things, injunctive relief against King Mountain's continued sale of its products. King Mountain followed with an action for declaratory relief against Philip Morris in Yakama Tribal Court, which prompted Philip Morris to seek an injunction in federal court against the tribal proceedings. King Mountain asked the district court to stay its proceedings pending the Tribal Court's determination of its jurisdiction.

The district court granted King Mountain's requested stay, concluding there was a colorable claim to tribal court jurisdiction under the formulations found in Montana v. United States, 450 U.S. 544 (1981), Strate v. A-1 Contractors, 520 U.S. 438 (1997), and Nevada v. Hicks, 533 U.S. 353 (2001). We agree that these cases provide the foundation for our analysis, but we disagree that they point to a colorable claim of jurisdiction. Rather, we conclude that the Tribal Court does not have colorable jurisdiction over nonmember Philip Morris's federal and state claims for trademark infringement on the Internet and beyond the reservation."

Ramkissoon v. AOL LLC, 07-15323 (January 16, 2009) "On July 31, 2006, AOL LLC (formerly America Online, Inc.) made publicly available the internet search records of more than 650,000 of its members. The records contained personal and sometimes embarrassing information about the members. Plaintiffs, members of AOL, brought an action in federal district court in California on behalf of themselves and a putative nationwide class of AOL members, alleging violations of federal electronic privacy law, 18 U.S.C. § 2702(a). A subclass of AOL members who are California residents also alleged various violations of California law, including the California Consumers Legal Remedies Act, California Civil Code § 1770.

Under the AOL Member Agreement, all plaintiffs agreed to a forum selection clause that designates the 'courts of Virginia' as the fora for disputes between AOL and its members. The Member Agreement also contains a choice of law clause designating Virginia law to govern disputes.

AOL moved to dismiss the action for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3), on the basis of the parties' forum selection clause. AOL contends the clause permits plaintiffs to refile their consumer class action in state or federal court in Virginia. Plaintiffs contend the forum selection clause limits them to Virginia state court, where a class action remedy would be unavailable to them; this, they contend, violates California public policy favoring consumer class actions and renders the forum selection clause unenforceable.

The district court granted AOL's motion and dismissed the action without prejudice to plaintiffs refiling it in a state or federal court in Virginia. We hold the district court erred when it interpreted the forum selection clause to permit actions in either state or federal court in Virginia; the plain language of the clause—courts 'of' Virginia—demonstrates the parties chose Virginia state courts as the only fora for any disputes. We

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reverse and remand for further proceedings." *United States v. Selby,* 07- 30183 (January 15, 2009) "Jane Selby, a former official of the Bonneville Power Administration ('BPA') appeals her jury conviction for honest services wire fraud, in violation of 18 U.S.C. § 1343; making false claims and statements, in violation of 18 U.S.C. § 1001; and felony conflict of interest, in violation of 18 U.S.C. § 208. Selby contends the district court erred by denying her motions for judgment of acquittal because the evidence was insufficient to convict. We affirm the district court's decision.

Jane Selby held a significant administrative position at the BPA, a federal agency which produces and transmits power throughout the Pacific Northwest. She was one of three 'Tier 3 managers' in the Transmission and Marketing Division and appears to have been the most trusted of the three by her supervisor, Charles Meyer, BPA's Vice President of Transmission and Sales. At the time of the events at issue here, Meyer had assigned Selby to a special detail to determine why various information technology projects were behind schedule and over budget, and to work alongside other Tier 3 managers in the department to help complete the projects. Selby's assignment was to help manage the transition to the new computer system, along with Mark Reynolds, the Tier 3 manager in charge of BPA's information technology staff, and Lorie Hoffman, the Tier 3 manager in charge of the transmission scheduling staff. Selby also served as acting Vice President when Charles Meyer was away.

Jane Selby is married to Scott Selby. In March 2002, Scott Selby was hired as a salesman by a software company called Knowmadic, Inc., during the time it was seeking to expand the scope of an existing agreement to sell software ('ASCI' or 'ASCI/CWI') to BPA. Jane Selby had approached Knowmadic's Vice President about hiring her husband, telling him that Scott was 'very computer literate and savvy. And that he had been unemployed for quite a long time, and was looking for a job.' Knowmadic then hired Scott and assigned him to the BPA account to work on-site at BPA's Vancouver, Washington, office. Scott earned a base salary plus commissions. His duties included the sale of Knowmadic products to BPA and persuading other public power customers to sign up to use the ASCI system.

BPA and Knowmadic entered into an initial agreement on May 11, 2001, for the purchase of ASCI software. Jane Selby was not involved in the negotiations for this initial procurement agreement. However, she subsequently promoted extensive additional use of Knowmadic's software and participated in the decision-making process to implement further use of Knowmadic's products. This activity led to her indictment for violating 18 U.S.C. § 208, which prohibits covered federal employees fromcertain kinds of participation in the decision making process on federal contracts or matters in which the employee or her spouse as a financial interest, and related counts of wire fraud in violation of 18 U.S.C. § 1343, making a false statement during the course of an inspector general investigation of her conduct in violation of 18 U.S.C. § 1001, and witness tampering in violation of 18 U.S.C. § 1512.

A jury in the United States District Court for the District of Oregon returned a guilty verdict on the conflict of interest, wire fraud, and false statement counts, and a not guilty verdict on the witness tampering count. Selby was sentenced to five years probation on each count of conviction. On appeal, she challenges the sufficiency of the evi-

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dence on each of the three counts."

"Selby argues that § 208 does not apply because her participation with the ASCI project occurred 'post-procurement, i.e., after BPA had signed a contract with Knowmadic and after BPA had committed itself financially to the endeavor.' Because her conduct 'occurred during the implementation of the ASCI project, and had nothing to do with contracting, invoicing, or the taking of delivery of goods and services,' she argues that the type of activity in which she engaged was 'not proscribed by the statute.' Id. The statute is broader than the narrow interpretation Selby urges upon us.

We have not previously considered the precise scope of § 208's 'participation' requirement. In *United States v. Irons*, 640 F.2d 872 (7th Cir. 1981), the Seventh Circuit undertook an extensive analysis of the legislative history of 18 U.S.C. § 208, and concluded that it 'demonstrates an intention to proscribe rather broadly employee participation in business transactions involving conflicts of interest and to reach activities at various stages of these transactions . . . [The scope of 18 U.S.C. § 208 includes] acts which [lead] up to the formation of the contract as well as those . . . which might be performed in the execution of the contract.' Id. at 877."

We reiterate our agreement with the Seventh Circuit. The wording Congress chose is broader than the narrow interpretation Selby urges. We hold that where, as here, an employee suffers from a conflict of interest, liability may lie for actions taken after the initial procurement is authorized. Where Selby continued to actively participate in BPA's internal agency deliberations leading up to its decisions to expand the scope of the work to be done by Knowmadic, and where Selby continued to recommend or urge co-workers to recommend expansion of the contract, and the result was additional procurement resulting in additional sales commissions to be paid to her husband, Selby violated § 208."

"Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of all three crimes beyond a reasonable doubt. Because the evidence established that the defendant knowingly violated § 208 and the related provisions of Title 18 with which she was charged, her judgment of conviction is AFFIRMED."

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Practice Points: Improve the Quality of your Document Review through Adequate Preparation

Document review is known as one of the most dreaded aspects of litigation – a truly daunting process that, almost overnight, can devour discovery budget dollars in attorney review costs. Moreover, some trial lawyers find themselves in the quandary of having to choose between missing discovery deadlines or settling for an inadequate review in which the likelihood of inadvertent production of privileged documents is high. Despite challenges inherent in document review, there is good news: thoughtful and proactive planning can minimize review costs and provide a timely and complete examination of the evidence you need to win your case.

The critical first step of any document review project is to map or scope the project. Key issues to consider include the number of document pages (or data size) that must be reviewed, the types of media involved, time and budget constraints, and the substantive complexity of the information to be reviewed. Once the project is properly scoped, the next step is to develop a document review plan that encompasses all aspects of the review process. The plan should include detail regarding the people selected for the review team, the level of review expertise required in each phase of the review, whether contract or in-house attorneys are best suited, and production deadlines.

Once the document review team is identified, it must be properly trained. Training the review team involves technical training on the review tool as well as substantive training regarding the case itself. Creating a comprehensive training manual including a case summary, categorization and privilege instructions, and timeline milestones promotes accurate and consistent treatment of documents and a timely production schedule.

Quality control (QC) is an important aspect of a successful document review. QC serves as a protection against inadvertent privilege waiver and also provides documentation of your work quality. The key to successful QC is to sample your production data set early and often. Attorneys best positioned to QC documents are those who demonstrate a substantive understanding of the underlying case as well as the plan for review.

Document review is an integral and vital aspect of the litigation process. Proactive attorneys will improve the quality of the review and avoid unnecessary costs by properly scoping and planning the process from the outset. Once the document review plan is determined, savvy practitioners will take the time to adequately train the review team and put strong quality control measures in place. A poorly managed document review can produce disastrous results, while a strategically managed review will improve the likelihood of a positive case outcome. As such, prudent attorneys will take the time to get their document review plan and team positioned for success – before the first document is examined.

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Court Splits Costs of Privilege Review Due to Failure of Both Parties to Cooperate

Covad Comm. Co. v. Revonet, Inc., 2008 WL 5377698 (D.D.C. Dec. 24, 2008). In this trade secrets misappropriation litigation, the plaintiff moved to compel the defendant to reproduce e-mails in native format that were previously produced in hard copy. Having been written prior to the effective date of the amendments to the Federal Rules, the plaintiff's document production request did not explicitly include electronically stored information and failed to request a particular format for production. Magistrate Judge Facciola held that both parties played with fire by producing and accepting documents in hard-copy form, as they were not reasonably kept in hard copy form in the ordinary course of business. Therefore, Judge Facciola ordered the defendant to produce the requested information in native format on a CD and split the costs of privilege review (capped at $4,000) between the parties. Judge Facciola concluded by stating that, "two thousand dollars is not a bad price for the lesson that the courts have reached the limits of their patience with having to resolve electronic discovery controversies that are expensive, time-consuming, and so easily avoided by the lawyers' conferring with each other on such a fundamental question as the format of their productions of electronically stored information."

Court Denies Motion for Production of Metadata

Kingsway Fin. Serv's, Inc. v. Pricewater-house-Coopers LLP, 2008 WL 5423316 (S.D.N.Y. Dec. 31, 2008). In this fraud action, the plaintiff moved to compel the production of metadata for a number of produced documents. The court denied the motion, citing the plaintiff's failure to raise any issue as to the authenticity of the produced documents. Additional factors giving rise to the denial of the motion included the plaintiff's failure to identify the types of metadata sought and the failure to explain why metadata was relevant to the matter.

Court Adopts Magistrate Judge's Denial of Taxation of Costs Regarding E-Discovery Expenses

Klayman v. Freedom's Watch, Inc., 2008 WL 5111293 (S.D.Fla. Dec. 4, 2008). In this litigation, the defendants moved the court to tax the costs of their electronic discovery collection to the plaintiff. The defendants requested the plaintiff pay the $150,000 they spent for expenses incurred in hiring an outside firm to collect their electronic documents, including travel expenses. Applying 28 USC §1920, which provides for the taxation of costs for "fees for exemplification and copies of papers necessarily obtained for use in the case," the court denied the motion. The court refused to tax costs not specifically authorized by the statute, such as the hourly costs of collection at issue here.

Court Applies Federal Evidence Rule 502 and Declines to Find Waiver of Attorney-Client Privilege

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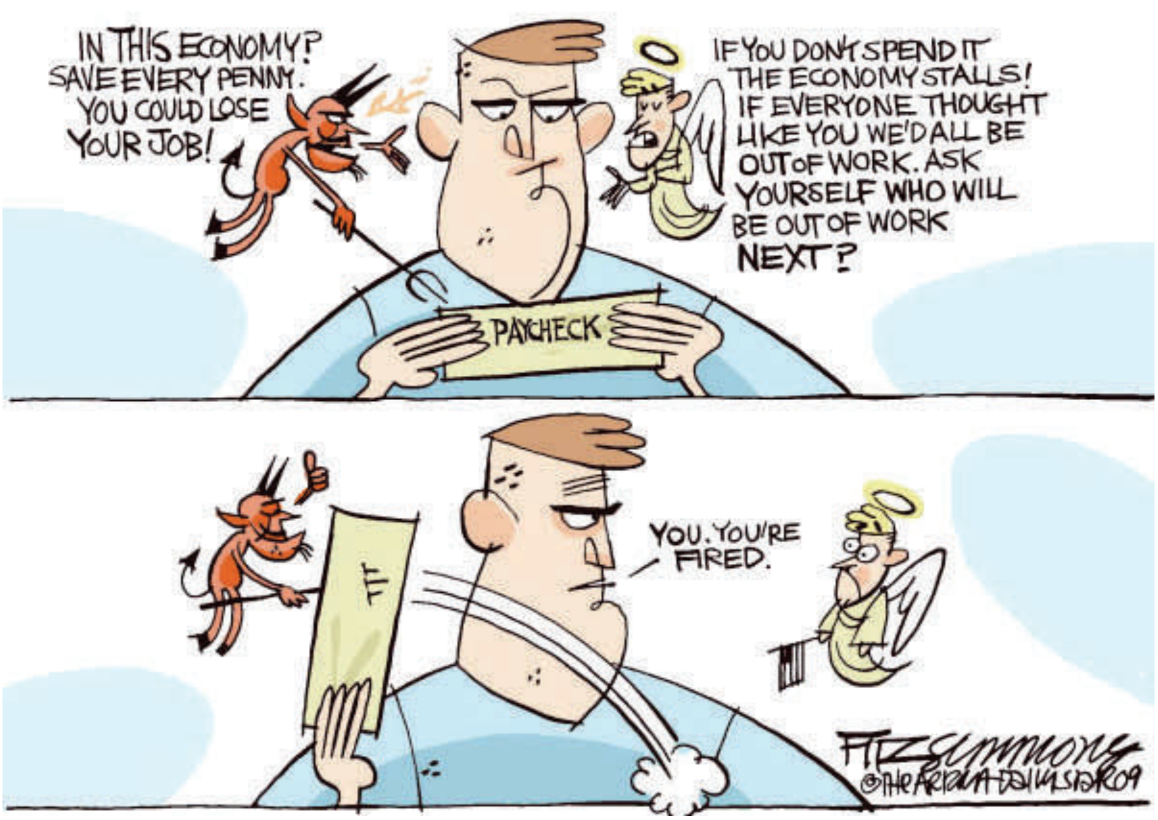
Reckley v. City of Springfield, Ohio, 2008 WL 5234356 (S.D.Ohio Dec. 12, 2008). In this employment litigation, the defendant produced five e-mails of which it later claimed were protected by the attorney-client privilege and inadvertently produced. Therefore the defendant sought return of the e-mails and the plaintiff argued that the production waived the privilege. Applying Fed.R.Evid. 502(b), the court held that privilege was not waived. The court noted that at least some of the inadvertently disclosed e-mails were labeled "attorney-client privileged" and that the defendant took prompt steps to claim privilege and seek return of the e-mails after they were disclosed. The court also noted that the disclosure took place in the context of electronically stored information; a context particularly intended to be addressed by Rule 502.



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Van de Kamp v. Goldstein, No. 07–854 (January 26, 2009) "Respondent Goldstein was released from a California prison after he filed a successful federal habeas petition alleging that his murder conviction depended, in critical part, on the false testimony of a jailhouse informant (Fink), who had received reduced sentences for providing prosecutors with favorable testimony in other cases; that prosecutors knew, but failed to give his attorney, this potential impeachment information; and that, among other things, that failure had led to his erroneous conviction. Once released, Goldstein filed this suit under 42 U. S. C. §1983, asserting the prosecution violated its constitutional duty to communicate impeachment information, see Giglio v. United States, 405 U. S. 150, 154, due to the failure of petitioners, supervisory prosecutors, to properly train or supervise prosecutors or to establish an information system containing potential impeachment material about informants. Claiming absolute immunity, petitioners asked the District Court to dismiss the complaint, but the court declined, finding that the conduct was "administrative," not "prosecutorial," and hence fell outside the scope of an absolute immunity claim. The Ninth Circuit, on interlocutory appeal, affirmed.

Held: Petitioners are entitled to absolute immunity in respect to Goldstein's supervision, training, and information-system management claims. Pp. 3–12.

(a) Prosecutors are absolutely immune from liability in §1983 suits brought against prosecutorial actions that are "intimately associated with the judicial phase of the criminal process," Imbler v. Pachtman, 424 U. S. 409, 428, 430, because of "concern that harassment by unfounded litigation" could both "cause a deflection of the prosecutor's energies from his public duties" and lead him to "shade his decisions instead of exercising the independence of judgment required by his apply when a prosecutor is not acting as "an officer of the court," but is instead engaged in, say, investigative or administrative tasks. Id., at 431, n. 33. To decide whether absolute immunity attaches to a particular prosecutorial activity, one must take account of Imbler's "functional" considerations. The fact that one constitutional duty in Imbler was positive (the duty to supply "information relevant to the defense") rather than negative (the duty not to "use . . . perjured testimony") was not critical to the finding of absolute immunity.

(b) Although Goldstein challenges administrative procedures, they are procedures that are directly connected with a trial's conduct. A prosecutor's error in a specific criminal trial constitutes an essential element of the plaintiff's claim. The obligations here are thus unlike administrative duties concerning, e.g., workplace hiring. Moreover, they necessarily require legal knowledge and the exercise of related discretion, e.g., in determining what information should be included in training, supervision, or information-system management. Given these features, absolute immunity must follow."

Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, No. 06–1595 (January 26, 2009) "In response to questions from an official of respondent local government(Metro) during an internal investigation into rumors of sexual harassment by the Metro School District employee relations director (Hughes), petitioner Crawford, a 30-year employee, reported that Hughes had sexually harassed her. Metro took no action against Hughes, but soon fired Crawford, alleging embezzlement. She filed suit

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under Title VII of the Civil Rights Act of 1964, claiming that Metro was retaliating for her report of Hughes's behavior, in violation of 42 U. S. C. §2000e–3(a), which makes it unlawful "for an employer to discriminate against any . . . employe[e]" who (1) "has opposed any practice made an unlawful employment practice by this subchapter"(opposition clause), or (2) "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (participation clause). The court granted Metro summary judgment, and the Sixth Circuit affirmed, holding that the opposition clause demanded "active, consistent" opposing activities, whereas Crawford had not initiated any complaint prior to the investigation, and finding that the participation clause did not cover Metro's internal investigation because it was not conducted pursuant to a Title VII charge pending with the Equal Employment Opportunity Commission.

Held: The antiretaliation provision's protection extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation. Because "oppose" is undefined by statute, it carries its ordinary dictionary meaning of resisting or contending against. Crawford's statement is thus covered by the opposition clause, as an ostensibly disapproving account of Hughes's sexually obnoxious behavior toward her. "Oppose" goes beyond "active, consistent" behavior in ordinary discourse, and may be used to speak of someone who has taken no action at all to advance a position beyond disclosing it. Thus, a person can "oppose" by responding to someone else's questions just as surely as by provoking the discussion. Nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when asked a question. Metro unconvincingly argues for the Sixth Circuit's active, consistent opposition rule, claiming that employers will be less likely to raise questions about possible discrimination if a retaliation charge is easy to raise when things go badly for an employee who responded to enquiries. Employers, however, have a strong inducement to ferret out and put a stop to discriminatory activity in their operations because Burlington Industries, Inc. v. Ellerth, 524 U. S. 742, 765, and Faragher v. Boca Raton, 524 U. S. 775, 807, hold "[a]n employer . . . subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with . . . authority over the employee." The Circuit's rule could undermine the Ellerth-Faragher scheme, along with the statute's " 'primary objective' " of "avoid[ing] harm" to employees, Faragher, supra, at 806, for if an employee reporting discrimination in answer to an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses.

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Bards of Law I: Poetry in Practice

What is it about law that makes people ask, "What could be verse?" Lawyers, judges, litigants and legal scholars all are tempted at times to turn their legal prose into legal poetry. This week brings two examples. This post tells of a litigant who used rap lyrics to win his appeal. In a second post today, we tell of a man who has an odd fascination with putting intellectual property law into verse.

"Justice might be blind, but apparently it has good rhythm," opens the AP story reporting on the successful appeal of Gregory Royal, a non-lawyer who used rap lyrics in his legal brief to Wisconsin's District IV Court of Appeals. The tangled tale stems from a federal lawsuit Royal filed against La Crosse county officials after a state court ruled against him in a custody dispute. After the federal court dismissed his case, the county officials went back to state court to force Royal to pay their fees and costs. When the trial judge ordered Royal to pay $3,750, he appealed.

In his brief, he explained that he decided to use rap in order "to better emphasize strong concept points." Among the lyrics:

"Regarding frivolous filings, one thing is clear. Notice to show cause and proper service before you appear."

"And if *Industrial vs. Marquardt* is any measure, it's the frivolous allegations, not the venue of your endeavor."

"A domestic relations exception, I was supposed to know. Appellee would know too, so why did he spend so much doe?"

"Appellee dissed 814.04 for his 3 grand justification. But he forgets that 977.08 puts the brakes on his compensation."

The three-judge appellate panel appellate panel sided with Royal, although it made no mention of his use of rap. Royal nonetheless believes his rap lyrics tilted the scales of justice in his favor. In fact, he suggests that lawyers could benefit from following suit. "Imagine a real attorney who can actually capitalize and perfect that expression and throw some heavy stuff in there," he tells AP. "It's like Einstein's theory of relativity. It's so short but so perfect there's nothing you can say about it."