

The Public Lawyer



STATE BAR OF NEVADA

Nevada Supreme Court Cases

Collins v. State of Nevada 50104 (March 5, 2009) “In this appeal, we address whether NRS 0.060(2)’s definition of substantial bodily harm as ‘prolonged physical pain’ is unconstitutionally vague. In light of the well-settled and ordinarily understood meaning of the phrase ‘prolonged physical pain,’ we conclude that NRS 0.060(2) is not unconstitutionally vague.

After being asked to leave the victim’s convenience store, appellant Maurice Collins struck Ahmad Peyghambarav in the face, knocking him unconscious. While Ahmad was unconscious, Collins rifled through Ahmad’s pockets and took his cellular phone.

A short time later, with Ahmad’s cell phone in his possession, Collins was apprehended and transported to a detention center. During these events, Collins became extremely irate and threatened multiple public officers with physical violence.

In the meantime, after regaining

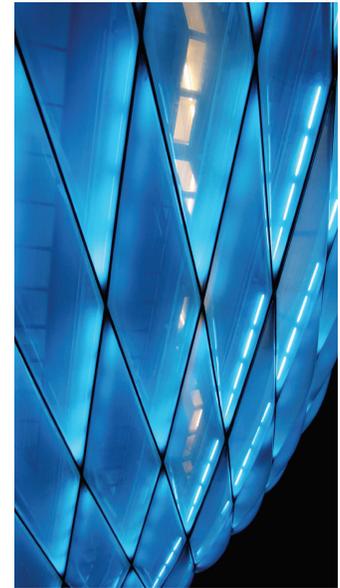
consciousness, Ahmad experienced an extreme amount of pain in his head and drove to a local hospital for medical attention. Based on a CT scan image, the examining neurosurgeon concluded that Ahmad had suffered a right temple fracture as a result of trauma. Although he seemed alert and coherent, Ahmad was prescribed a one-week course of anticonvulsant medication due to the risk of seizures associated with his closed head injury.

For the next few weeks, Ahmad experienced dizziness and could not bend over without almost losing consciousness. Moreover, for a month and a half following the incident, Ahmad experienced intermittent headaches. However, despite these symptoms, and doctor instructions for ongoing checkups, Ahmad never sought further medical attention regarding his injuries.

Collins was charged with one count of battery with substantial bodily harm, one count of rob-

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bery, and three counts of intimidating public officers. Following a two-day trial, Collins was found guilty on all but two counts of intimidating a public officer. After being adjudicated a habitual criminal, Collins was sentenced to two concurrent prison terms of 240 months with parole eligibility after 96 months on the robbery and battery counts to run concurrent with a 12-month jail term on the intimidating a public officer count. This appeal followed.

On appeal, Collins contends that NRS 0.060(2), which defines substantial bodily harm as ‘prolonged physical pain,’ is unconstitutionally vague. We disagree and conclude that the phrase ‘prolonged physical pain’ has a well-settled and ordinarily understood meaning and, as a result, is not unconstitutionally vague.

‘The constitutionality of a statute is a question of law that we review de novo. Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity.’ *Silvar v. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

A statute is deemed to be unconstitutionally vague if it ‘(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.’ *Id.* at 293, 129 P.3d at 685.

The first prong of the vagueness test is designed to provide notice of conduct that is prohibited under the statute so that ordinary citizens can conform their conduct to comport with the law. *Gallegos v. State*, 123 Nev., 163 P.3d 456, 459 (2007). Notice is insufficient, however, if the ‘statute is so imprecise, and vagueness so permeates its text, that persons of ordinary intelligence cannot understand what conduct is prohibited.’ *Id.* (internal quota-

tions omitted). When drafting statutes, the Legislature is not required to exercise absolute precision but, at a minimum, it must draft statutes that delineate the boundaries of prohibited conduct. *Id.* In instances where the Legislature does not define each term it uses in a statute, the statute will not be deemed unconstitutional if the term has a well-settled and ordinarily understood meaning. *Id.*

In this case, Collins argues that NRS 0.060(2)’s definition of ‘prolonged physical pain’ fails to provide notice because it does not delineate any temporal period of how long the pain must last, the severity of the pain, or the frequency with which it occurs, and is so imprecise that an ordinary person has to guess at its meaning. For support, he cites statutes from other jurisdictions that, in his opinion, use more precise language to define serious or substantial bodily harm or injury.

Problematically, in making this argument, Collins ignores the fact that NRS 0.060 provides two alternate definitions of the term ‘substantial bodily harm.’ The first definition is set forth in NRS 0.060(1) and uses language substantially similar to the language utilized by the Arizona and Minnesota Legislatures, as well as the Model Penal Code, to define ‘substantial bodily harm.’ Specifically, NRS 0.060(1) defines ‘substantial bodily harm’ as ‘[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.’ It is the second definition of ‘substantial bodily harm’ as ‘prolonged physical pain’ that Collins challenges as unconstitutional. As a result, Collins’ state-by-state comparison does not assist us in resolving his claim that the term ‘prolonged physical pain,’ as set forth in NRS 0.060(2), is

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unconstitutionally vague.

In contrast, the State argues that the phrase ‘prolonged physical pain’ has a well-settled and ordinarily understood meaning. Although it acknowledges that pain may very well be subjective, the State argues that there must be something more than mere pain under the statute—it must also be of a physical nature and of sufficient duration. Conceding that there is no precise way to determine the temporal standard for prolonged pain, the State alleges that the plain meaning of ‘prolonged,’ at a minimum, rules out any pain or suffering that is of an immediate or short duration. For the reasons set forth below, we agree with the State.

The term ‘pain’ has multiple meanings, ‘rang[ing] from mild discomfort or dull distress to acute often unbearable agony.’ Webster’s Third New International Dictionary 1621 (4th ed. 1976). Therefore, by its very nature, the term ‘pain’ is necessarily subjective and cannot be defined further. Cf. *Matter of Phillip A.*, 400 N.E.2d 358, 359 (N.Y. Ct. App. 1980) (‘Pain is, of course, a subjective matter. Thus, touching the skin of a person who has suffered third degree burns will cause exquisite pain, while the forceful striking of a gymnast in the solar plexus may cause him no discomfort at all.’). The term ‘prolonged’ means ‘to lengthen in time[;]’ ‘to extend in duration’ or ‘to lengthen in extent, scope, or range.’ Webster’s, *supra*, at 1815. In NRS 0.060(2), the term ‘prolonged,’ a temporal term, modifies ‘physical pain.’ Consequently, the phrase ‘prolonged physical pain’ must necessarily encompass some physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act. As a result, ‘prolonged physical pain’ under NRS 0.060(2) has a well-

settled and ordinarily understood meaning. Accordingly, we conclude that NRS 0.060(2) provides sufficient notice of prohibited conduct.

Under the second prong of the test, a statute is unconstitutionally vague if it ‘lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.’ *Gallegos*, 123 Nev. at ___, 163 P.3d at 460-61 (internal quotations omitted). This prong is designed to prevent ‘standardless sweep[s], which would allow the police, prosecutors, and juries to pursue their personal predilections.’ *Id.* (internal quotations omitted). Because the phrase ‘prolonged physical pain’ has a well-settled and ordinarily understandable meaning—i.e., there must be at least some physical suffering that lasts longer than the pain immediately resulting from the wrongful act—it is not so lacking in specific standards as to allow arbitrary or discriminatory enforcement. Accordingly, we conclude that NRS 0.060(2) is not unconstitutionally vague.

In this appeal, we conclude that NRS 0.060(2), which defines ‘substantial bodily harm’ as ‘prolonged physical pain,’ is not unconstitutionally vague. Accordingly, we affirm the judgment of conviction.



THE ONION

Year Of Law School Now Mandatory For Nation's 25-Year-Olds:

WASHINGTON—Under the provisions of a bill approved by Congress and signed into law Tuesday, every 25-year-old American, regardless of prior life commitments, is now legally obligated to enroll in a full year of study at one of the nation's accredited law schools. "This new measure gives us the means to compel 25-year-olds to simultaneously placate their parents, impress their friends with complex-sounding legal jargon, and effectively avoid any real-world responsibilities for another full year," said Rep. Steve Buyer (R-IN). "We can think of no better way for our young people to squander their post-collegiate aimlessness." Congress is reportedly seeking further legislation that would provide for an additional nine months of grumbling over LSAT prep, and up to five years of whining about paying off student loan debt.



NINTH CIRCUIT CASES

Federal Trade Commission v. Stefanchik 07-35359 (March 13, 2009) “We must decide in this case whether the district court correctly granted summary judgment to the Federal Trade Commission (‘FTC’) in this suit brought against John Stefanchik and Beringer Corporation under the Federal Trade Commission Act and the Telemarketing Sales Rule. The FTC alleged that the defendants made false and deceptive claims while marketing a program purporting to teach purchasers how to become wealthy by buying and selling privately held mortgages. Concluding that the defendants failed to meet the FTC’s overwhelming evidence of deceptive claims with evidence to create a triable issue of fact, we AFFIRM the district court’s judgment.

John Stefanchik is the author of a book entitled *Wealth Without Boundaries*. The purpose of the book, as well as related video and audio tapes, course materials, and workshops, was to present Stefanchik’s method for making substantial amounts of money by working very few hours in one’s spare time. Stefanchik’s method called for a person to search local real estate records, locate holders of privately held mortgages, or ‘paper,’ and then either purchase the paper or broker deals with companies interested in purchasing the paper. Stefanchik touted his method in direct mail marketing materials as ‘[t]he easiest way to make \$10,000+++ every 30 days . . . guaranteed.’”

“The FTC alleged that the defendants violated the Federal Trade Commission Act (‘FTC Act’), 15 U.S.C. § 45(a), by making false, misleading, and deceptive claims that consumers could quickly make large amounts of money in their spare time by purchasing the Stefanchik Program and that the coaches were experienced and readily available to assist them in the paper

business. It also alleged that the defendants violated the Telemarketing Sales Rule (‘TSR’), 16 C.F.R. § 310.3(a)(2)(iii) and (a)(4), by making these misleading representations.

In support of a motion for summary judgment, the FTC introduced evidence tending to show that, contrary to Stefanchik’s marketing claims, it was in fact very difficult for individuals to amass wealth using the Stefanchik method, and that the claims of making substantial amounts of money in one’s spare time were deceptive and misleading. The FTC’s evidence included declarations from individual consumers who purchased the program only to find that the method was extremely time consuming and yielded little, if any, profit. The FTC also introduced the following: survey results from a marketing expert showing that only a small percentage of customers were able to broker deals using Stefanchik’s method; a declaration from a former Stefanchik coach who averred that few consumers made money using the program and that Stefanchik had been informed that the telemarketers were misleading consumers; and evidence from Beringer’s company database that also showed a lack of results by consumers.

In opposing summary judgment, Stefanchik and Beringer challenged the FTC’s method of compiling the survey data but did not offer any consumer declarations, contrary survey information, or other evidence showing that the followers of the Stefanchik method actually amassed substantial wealth as claimed in the marketing material. The district court concluded that the FTC’s consumer declarations and survey, as well as the defendants’ own advertising and marketing materials, were sufficient to show that the defendants made false and unsubstantiated earnings claims that led consumers to believe they could earn

LAW.COM

A True Tale of Two Nastygrams

Since 1994, Randy Cassingham has published offbeat news stories at his Web site [This is True](#). When a reader suggested he would go to hell because of one of the stories he wrote, he came up with the [Get Out of Hell Free](#) card, a take-off on the Get Out of Jail Free card used in the popular Hasbro game [Monopoly](#). He claims to have since sold more than 1 million of the cards, which show Monopoly mascot Rich Uncle Pennybags being ejected from the gates of hell. But the cards have also put Cassingham in the middle of an unusual legal story perfect for This is True. As a matter of fact, he [tells it there](#).

Last week, Cassingham writes, he received a cease-and-desist letter from Hasbro's lawyers:

We recently became aware that you are offering for sale "Last Chance - Get Out of Hell Free" cards and stickers on your website at www.goofh.com that depict the famous MR. MONOPOLY® character and are obviously derived from the MONOPOLY® "Chance" card. ...

We therefore demand that you immediately cease and desist from any further use of the MR. MONOPOLY® character, remove the cards and stickers from your website, and provide us with a written assurance that in the future you will refrain from any further unauthorized use of the elements and characters of the MONOPOLY® property trading game.

But here's the rub: It appears the lawyers who sent that letter forgot that they had sent him a letter nearly nine years ago. In 2000, the firm [Patterson Belknap Webb & Tyler](#) wrote him to demand that he discontinue publishing the cards. In the true spirit of This is True, the letter was sent certified mail but arrived with several

dollars of postage due, Cassingham says. He refused to pay it so the letter was returned unopened. Two months later, the lawyers sent it to him by e-mail. His lawyer responded to Hasbro's lawyers, contending that his cards were parody and that he was within his rights to publish them. He also added a disclaimer to the card noting that it is in no way affiliated with the Hasbro product.

That was the last he heard from Hasbro's lawyers until last week, when they apparently rediscovered what they'd already known. Cassingham's understanding nine years ago was that Hasbro had decided not to go any further. Last week's letter came as a surprise. "They didn't check their own files and see that Hasbro clearly decided *not* to move forward against us many years ago?" He doesn't believe that, he writes. He suspects this latest salvo is due to the rough economy and the company's attempt to "squeeze out a few more bucks." His response to their latest demand is to keep selling the cards, only stamped on each one is the word "void."

And in a final strange-but-true twist, this week Cassingham came across a MarketWatch story about the economic downturn, "[Adopting a Bunker Mentality](#)." Who should the story use to illustrate Wall Street's anxiety? None other than Rich Uncle Pennybags, now holed up in a bunker eating beans. "So now," he writes, "Hasbro's lawyers get to turn their attention to someone with very deep pockets: Rupert Murdoch."



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large amounts of money in the paper business with little or no effort. The court concluded that the coaching claims were also deceptive because the evidence showed that the coaches lacked basic knowledge of the real estate industry and were unable to help the consumers with questions. The court determined that Beringer and Stefanchik were jointly and severally liable under the FTC Act and the TSR for misrepresentations in marketing the program. In addition to ordering injunctive relief, the court determined that the damages amounted to \$17,775,369 and entered judgment for that amount.”

“We stress again that on summary judgment the movant must show the absence of a genuine issue of material fact, while the non-movant must meet that showing with affirmative evidence to create a fact issue. Here, the FTC presented a declaration from Atlas’ president that the net sales for Atlas during the two and one-half years that it processed sales for Stefanchik were \$17,775,369. It also submitted a report from Atlas’ accounting database reporting this amount. Stefanchik and Beringer have offered no affirmative evidence whatsoever to controvert this amount.

We are unpersuaded by the defendants’ assertion that they should not be liable for the full amount of Atlas’ sales because Atlas paid them only a percentage as a royalty. Equity may require a defendant to restore his victims to the status quo where the loss suffered is greater than the defendant’s unjust enrichment. Moreover, because the FTC Act is designed to protect consumers from economic injuries, courts have often awarded the full amount lost by consumers rather than limiting damages to a defendant’s profits. Stefanchik and Beringer were the driving force behind the marketing scheme for the Stefanchik Program,

with authority to control its key components, and they benefitted significantly from the sales induced by material misrepresentations. We conclude that the district court did not abuse its discretion by holding the defendants liable for the full amount of loss incurred by consumers. The district court’s judgment is AFFIRMED.”

Fisher v. City of San Jose 04-16095 (March 11, 2009) “We address the Fourth Amendment’s exigent circumstances doctrine in the context of armed standoffs. Steven Fisher triggered a standoff with San Jose police after he pointed a rifle at a private security guard who was investigating loud noises in Fisher’s apartment complex. When the police arrived at his apartment, a noticeably intoxicated Fisher pointed one of his eighteen rifles at the officers and threatened to shoot them. The ensuing standoff lasted more than twelve hours and ended peacefully when Fisher finally emerged and allowed himself to be taken into custody. We hold that Fisher’s civil rights were not violated when police arrested him without a warrant.

Fisher and his wife sued under 42 U.S.C. § 1983 naming the City of San Jose, its police department, and several of its officers (collectively, ‘police’). The suit alleged, among other claims, that police violated Fisher’s Fourth Amendment right to be free from unreasonable seizure by arresting him in his home without a warrant. The case went to trial, and the jury found that exigent circumstances excused the need for a warrant. The district court nonetheless granted Fisher’s renewed motion for judgment as a matter of law, holding that no reasonable jury could have found that there was insufficient time to obtain a warrant. The police appeal.

We consider whether sufficient evidence sup-

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ports the jury's verdict. We believe so, and in reaching this conclusion, we take the opportunity to clarify our jurisprudence relating to the Fourth Amendment's application to armed standoffs. We hold that, during such a standoff, once exigent circumstances justify the warrantless seizure of the suspect in his home, and so long as the police are actively engaged in completing his arrest, police need not obtain an arrest warrant before taking the suspect into full physical custody. This remains true regardless of whether the exigency that justified the seizure has dissipated by the time the suspect is taken into full physical custody. We therefore reverse the district court and remand with directions to reinstate the jury's verdict and enter judgment in favor of the police."

State of Washington v. Chu 06-35227 (March 10, 2009) "Between 1943 and 1987, the United States produced plutonium for use in nuclear weapons manufacture at the Hanford Nuclear Reservation in southeastern Washington near the confluence of the Columbia, Snake, and Yakima Rivers. Plutonium production and related activities at Hanford created enormous amounts—in the millions of tons—of radioactive, hazardous, and 'mixed' radioactive and hazardous wastes, much of it still at Hanford awaiting treatment and/or disposal. The Department of Energy ('DOE') is responsible for the treatment, storage, and disposal of this vast waste inventory. This suit arises out of a longstanding dispute between the State and DOE concerning DOE's management of Hanford's existing backlog of mixed radioactive and hazardous waste, commonly known as TRUM, and DOE's decision to ship additional 'off-site' TRUM to Hanford for storage pending the future disposal of such waste at the Waste Isolation Pilot Plant ('WIPP'), a nuclear waste

repository in southeastern New Mexico where the wastes are expected to be placed in a salt bed approximately 2,150 feet below the earth's surface.

The State contends that DOE's management of this TRUM violates provisions of the State's Hazardous Waste Management Act ('HWMA') and its implementing regulations, which act in lieu of the federal provisions of the Resource Conservation and Recovery Act of 1976 ('RCRA'), 42 U.S.C. §§ 6901-6992k. *See* 51 Fed. Reg. 3782 (Jan. 30, 1986) (authorizing the State of Washington to administer its HWMA in lieu of RCRA); Wash. Rev. Code §§ 70.105.020, 70.150.130; Wash. Admin. Code 173-303-140(2)(a). DOE argues that it no longer has an obligation under HWMA to treat TRUM waste or to limit the length of time such waste is stored at Hanford or any other location, because the waste has been 'designated' by the Secretary of Energy 'for disposal at WIPP,' in accordance with the WIPP Land Withdrawal Amendment Act of 1996, Pub. L. 104-201, § 3188(a)(1) (also referred to as the '1996 WIPP Amendments' or the 'amended Act.').

After agreeing to dismiss without prejudice Counts 1 and 2 of the State's amended complaint, the parties filed crossmotions for summary judgment on the remaining claim of whether TRUM 'designated for WIPP' was exempt from HWMA provisions by virtue of the amended Act. The district court rejected DOE's interpretation of the amended Act and found that neither the plain text nor the legislative history demonstrated that the 'designation exemption' reached waste at any location other than WIPP. *See Washington v. Abraham*, 354 F. Supp. 2d 1178, 1187 (E.D. Wash. 2005). Because the district court found that the amended Act applied only to WIPP, it declined to reach the preemption issue and awarded summary judgment for the State. *Id.* We review *de novo*, and affirm."

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Walker v. Geico Insurance Company 07-15357 (March 10, 2009) “The plaintiff-appellant Johnnie Walker does business as PJ’s Auto Body (‘Walker’). He filed these putative class actions against two major insurance companies doing business in California: USAA Casualty Insurance Company (‘USAA’) and GEICO General Insurance Company, et al. Walker claimed violations of various California statutes in connection with volume discount agreements the insurers had with other automotive body repair shops (‘direct repair providers’). Walker similarly challenged the inclusion of negotiated prices in price surveys that insurance companies are permitted to conduct pursuant to California law. See Cal. Code Regs. tit. 10, § 2698.91. The district court dismissed the actions for failure to state a claim on which relief could be granted, and we affirm.

All issues arise under California law. The district court’s decision in Walker’s suit against USAA is published at *Walker v. USAA Cas. Ins. Co.*, 474 F. Supp. 2d 1168 (E.D. Cal. 2007). Walker first contends on appeal that the district court erred in ruling that he lacked standing under California’s Unfair Competition Law (‘UCL’), Cal. Bus. & Prof. Code § 17200, et seq. As amended pursuant to the 2004 voter approval of Proposition 64, the UCL in § 17204 now requires a plaintiff to establish that it has ‘suffered injury in fact and has lost money or property.’ See *Californians for Disability Rights v. Mervyn’s, LLC*, 138 P.3d 207, 209-10 (Cal. 2006). Walker’s position is that, although he cannot establish the requisite ‘lost money or property’ for purposes of monetary relief under the UCL, he is nevertheless entitled to an injunction effectively requiring these insurers in the future to pay higher rates for their insureds’ auto body repairs. His argument is supported

neither by the language of the amended statute nor its purpose. See *Buckland v. Threshold Enters. Ltd.*, 66 Cal. Rptr. 3d 543, 557 (Cal. Ct. App. 2007) (‘Because remedies for individuals under the UCL are restricted to injunctive relief and restitution, the import of the requirement is to limit standing to individuals who suffer losses of money or property that are eligible for restitution.’). The history and purpose of the law are outlined more fully in the district court’s opinion, with which we agree. See *Walker*, 474 F. Supp. 2d at 1172.

Next, Walker maintains that the district judge erred in dismissing his cause of action for ‘unjust enrichment,’ and that the district court should have analyzed his complaint as one attempting to plead a cause of action for restitution. See *McBride v. Boughton*, 20 Cal. Rptr. 3d 115, 121-22 (Cal. Ct. App. 2004). Because the defendants have no money or property that belongs to Walker, he has no stronger claim for the equitable remedy of restitution than he has for unfair competition under California law. See *Buckland*, 66 Cal. Rptr. 3d at 557-58.

Finally, Walker contends he has adequately alleged a violation of California’s Cartwright Act, Cal. Bus. & Prof. Code § 16720. He essentially claims that the defendants conspired with direct repair providers for the purpose of restraining trade by agreeing to provide the providers more business in exchange for negotiated rates. He further alleges the agreements wrongfully enabled the insurers to include these negotiated rates in surveys in order to set lower prices for auto body repairs than the prices Walker would like to charge. As the district court correctly pointed out, however, the discounts negotiated between the insurance companies and the direct repair providers reflect the proper functioning of the market to bring about lower prices to consumers. ‘[Walker’s] desire to charge more than

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the market will bear does not transform [defendants'] lawful formation of service contracts into a forbidden conspiracy to destroy competition.' Walker, 474 F. Supp. 2d at 1175. AFFIRMED."

Tortu v. The Las Vegas Metropolitan Police Department 06-16663 (March 3, 2009)

"Christopher Tortu appeals the district court's order granting defendant Officer Eugene Engle's motion for judgment as a matter of law and, in the alternative, his motion for a new trial. After the jury returned a verdict in favor of Officers Richard Cashton and Duane Cowley but finding Engle liable, the district court granted Engle's Fed. R. Civ. P. 50(b) motion for judgment as a matter of law and, alternatively, his Rule 59 motion for a new trial. However, neither Engle nor the other two officers filed a Rule 50(a) motion for judgment as a matter of law. Tortu claims this procedural error should have prevented Engle from filing a Rule 50(b) motion, and further claims the district court abused its discretion when it granted Engle's motion for a new trial. Alternatively, Tortu argues the district court erroneously found Engle protected by qualified immunity.

We have jurisdiction pursuant to 28 U.S.C. § 1291 and hold that the district court should not have entertained Engle's Rule 50(b) motion because he failed to file a Rule 50(a) motion, which must be filed before a court can consider a Rule 50(b) motion. We also conclude the district court abused its discretion when it granted Engle's Rule 59 motion for a new trial because the verdict was not against the clear weight of the evidence. For the reasons discussed below, we reverse the district court and remand with instructions to reinstate the jury's verdict and enter judgment accordingly.

"Tortu, along with his traveling companion Kiley Fox, arrived at the airport early for their Southwest Airlines flight to Los Angeles. While playing video poker and waiting for the plane, Tortu misplaced their tickets. The tickets were discovered by an airport employee and turned in at the security checkpoint. Fox left to retrieve the tickets at the security checkpoint where the tickets were being held.¹ As Fox was retrieving the tickets, the gate agent closed the jetway door and Tortu went up to the agent and asked to board the plane. The gate agent told him he could not board the plane without a ticket. Disregarding this instruction, Tortu followed the agent and boarded the plane as the agent led another passenger down the jetway.

Once on the plane, the Southwest employees asked him to leave because he had no ticket. He refused. A Southwest official then called the police, and an officer escorted Tortu off the plane. As he was exiting the jetway, Tortu yelled at a Southwest manager and angrily walked away from the gate. The officers at the scene walked toward Tortu and asked him to stop walking away. Once he finally stopped, Tortu and the officers engaged in a verbal altercation that grew in severity. Tortu testified that at least three officers then jumped him from behind and handcuffed him. The officers, however, stated that Tortu forcibly resisted their questioning and arrest attempt, requiring the officers to force Tortu onto the ground to handcuff him. Tortu contended that, after securing the handcuffs, the officers continuously beat him—a claim the officers denied. The three defendant officers, Cashton, Cowley and Engle, then took Tortu to an empty jetway."

"After being thrown on the ground, Tortu testified that the officers threw him on the hood of the police SUV and forced him into the back seat of the SUV. With Tortu still handcuffed, the officers sat

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him between Officers Cashton and Cowley in the back seat. Tortu testified that Officer Engle then reached back between the two front seats and squeezed Tortu's testicles as hard as he could for about ten seconds. Tortu stated the pain was so severe that he could not breathe. All three officers denied squeezing or in any way intentionally harming Tortu's testicles. After this final incident, Engle drove Tortu, along with Cashton and Cowley, to the airport police substation and then on to the Clark County Detention Center. The Southwest employees did not observe the incidents on the tarmac or in the vehicle."

"Eleven days after the incident, the urologist's exam revealed a hematoma in Tortu's scrotum, a significant bruise on the scrotal skin, and tenderness along the spermatic cords on both sides of his testicles. The urologist further noted Tortu experienced extreme pain and tenderness when he touched Tortu's testicles. The urologist testified that squeezing Tortu's testicles could have led to these testicular and scrotal injuries."

"In finding the jury's decision mistaken and ungrounded, the district court took its own view of the medical evidence in place of the jury's—an impermissible practice. See *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001). In its order, the district court noted that it did not believe Tortu suffered significant injuries because he did not return for follow-up visits. While the district court may view the case in this light, the jury, on the basis of reasonable evidence, viewed the facts in a different light. The district court cannot substitute its 'evaluations for those of the jurors.' *Terrible Herbst, Inc.*, 331 F.3d at 743; see also *Silver Sage Partners, Ltd.*, 251 F.3d at 819 ('[A] district court may not grant a new trial simply because it would have arrived at a different ver-

dict.'). Here, the district court did that when it discounted Tortu's medical evidence. We conclude that the jury's verdict on the issue of liability is not against the clear weight of the evidence."

For the reasons stated above, we REVERSE the district court and REMAND with instructions to reinstate the jury's verdict and enter judgment accordingly."

Maldonado v. Kempton 06-15657 (February 25, 2009) "Nano Maldonado has raised a number of constitutional challenges to the California Outdoor Advertising Act. Cal. Bus. & Prof. Code § 5200, et seq. As a consequence of a legislative amendment in 2008, the Act bars offsite commercial advertising but does not restrict non-commercial speech. Cal. Bus. & Prof. Code § 5275. Although some of Maldonado's claims are now moot because of this amendment, he continues to challenge application of the Act to his effort to display offpremises advertising on a highway billboard. This appeal is Maldonado's second trip to our court and requires us, once again, to reiterate our commercial speech jurisprudence involving billboards. We dismiss as moot Maldonado's appeal from the district court's injunction and affirm the district court's grant of summary judgment on his other claims."

Canyon Ferry Road Baptist Church v. Unsworth 06-35883 (February 25, 2009) "Canyon Ferry Road Baptist Church challenges certain provisions of Montana's campaign finance law requiring reporting and disclosure of campaign contributions or expenditures. The Church challenges the statutory provisions both facially and as applied to its activities of *de minimis* economic effect in support of a 2004 state ballot initiative. Following an adverse administrative decision by

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the Montana Commissioner of Political Practices, the Church brought this action in federal court, claiming that the Commissioner's decision violated its First Amendment and due process rights and seeking declaratory relief as well as nominal damages. On crossmotions for summary judgment, the district court upheld the Montana law against all challenges. We reverse.” “On May 26, 2004, an advocacy group called ‘Montanans for Families and Fairness’ filed a Campaign Finance and Practices Complaint against the Church. The complaint alleged that the Church, by its ‘expenditures’ in connection with the May 23 event to support CI-96, had created an ‘incidental political committee’ within the meaning of Montana’s campaign finance laws but had not filed the required disclosure forms. After completing an investigation, the state Commission of Political Practices (‘Commission’) issued an administrative decision. It found that ‘it is clear that when the Church and pastor Stumberg chose to engage in activities supporting the effort to place CI-96 on the ballot, the Church became an incidental political committee under Montana law, with corresponding reporting obligations. Use of the Church’s facilities to obtain signatures on CI-96 petitions, along with Pastor Stumberg’s encouragement of persons to sign the CI-96 petitions during regularly scheduled Church services, obviously had value to the campaign in support of CI-96. Pastor Stumberg was not acting as a volunteer when he engaged in the activities supporting CI-96, since those activities occurred in the Church building and during regularly scheduled Church services.’

The Church and Stumberg (collectively, the ‘Church’) brought this action under 42 U.S.C. § 1983 for declaratory relief and nominal damages. The Church challenges the Commissioner’s ap-

plication of Montana’s disclosure and reporting provisions. It argues that, as interpreted by the Commission, Montana’s disclosure and reporting provisions are impermissibly vague, in violation of the Due Process Clause of the Fourteenth Amendment. It also argues that the provisions are overbroad and violate the Church’s First Amendment rights of free speech, association, and free exercise of religion. The parties filed cross-motions for summary judgment and the district court dismissed the complaint, rejecting all the claims asserted by the Church. The Church appeals. We have jurisdiction under 28 U.S.C. § 1291.”

“We conclude that, by applying its disclosure provisions to the Church’s de minimis in-kind contributions in the context of a state ballot initiative, the Commission violated the Church’s First Amendment rights. We limit our holding to this formulation. In this case, we are not concerned with—and express no view about—the constitutionality of Montana’s disclosure requirements in the context of candidate elections or as applied to monetary contributions of any size. We also do not purport to establish a level above de minimis at which a disclosure requirement for in-kind expenditures for ballot issues passes constitutional muster. The fixing of any such level is for the Montana authorities in the first instance. We are satisfied, however, that the application of Montana’s disclosure requirements to the Church because of its de minimis activities in this case impermissibly infringes on the Church’s free speech rights.”

Virginia Mason Medical Center v. The National Labor Relations Board 07-73851 (February 25, 2009) “Virginia Mason Medical Center (‘Virginia Mason’) appeals the National Labor

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Relation Board's ('NLRB' or 'the Board') finding that it committed an unfair labor practice. The Board found that Virginia Mason unlawfully withdrew recognition from the United Staff Nurses Union Local 141 ('the Union') within the protected certification year period. Virginia Mason argues that the certification year elapsed prior to its withdrawal of recognition. We have jurisdiction pursuant to 29 U.S.C. §§ 160(e) and (f), and we affirm."

"The *Chevron* doctrine requires that this court defer to the NLRB's interpretation of the NLRA if its interpretation is rational and consistent

with the statute.' *UFCW, Local 1036 v. NLRB*, 307 F.3d 760, 766-67 (9th Cir. 2002); see *Chevron USA, Inc. v. Natural Re-*

sources Def. Council, Inc., 467 U.S. 837, 843-44 (1984). In addition, the Board's interpretation of its own remedial order 'enjoys a good deal of discretion.' *NLRB v. Nat'l Med. Hosp. of Compton*, 907 F.2d 905, 909 (9th Cir. 1990).

Once a labor union is certified as the exclusive bargaining representative of a unit of employees, the union is entitled to a non-rebuttable presumption of majority status for a reasonable time, typically one year. *Id.* at 907. During this

'certification year' period, the employer must recognize and bargain with the union; it may not withdraw recognition. *Id.* A perceived loss of majority status, as demonstrated through a decertification petition or otherwise, does not entitle the employer to withdraw recognition during this year. *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

"Virginia Mason withdrew recognition from the Union on September 26, 2003, but the certification year did not end until October 1, 2004 — one year from the parties' first bargaining session. Virginia Mason's contention that the certi-

fication year started when the D.C. Circuit certified the Union is plainly wrong. It is within the Board's discretion to decide when the one-year

period should start. *Compton*, 907 F.2d at 909 (citing *Brooks*, 348 U.S. at 104). In this case, the Board's remedial order clearly stated that, 'we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union.' (*Emphasis added.*) Indeed, this language is 'more or less standard' in remedial orders. *Compton*, 907 F.2d at 907. Virginia Mason cannot avail itself of the argument that it lacked notice as to when the certification year would start.



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Furthermore, providing requested information to a union does not constitute bargaining. It is true that responding to information requests is a requisite component of good faith bargaining, but it is not sufficient in and of itself. The Board has previously held that the parties must actually hold a bargaining meeting in order to trigger the certification year. *Van Dorn Plastic Mach. Co.*, 300 N.L.R.B. 278, 278 (1990), *aff'd*, 939 F.2d 402 (6th Cir. 1991). ‘If the certification year were to begin when an employer furnishes information, a union could, in effect, be penalized for requesting information prior to negotiations, because that could result in less time for negotiations than if the union had not requested the information.’ *Id.* at 278. We hold that the certification year started with the first bargaining meeting, and not when Virginia Mason complied with just one component of bargaining.

Finally, we reject Virginia Mason’s argument that it should be excused from penalty because it withdrew recognition just four days before the certification year expired. There is no *de minimis* exception for technical noncompliance with Board orders. We are especially wary of such arguments when employers invoke employee Section 7 rights as justification for an unfair labor practice. See *Brooks*, 348 U.S. at 103 (‘To allow employers to rely on employees’ rights in refusing to bargain with the formally designated Union is not conducive to [industrial peace], it is inimical to it.’). *LTD Ceramics, Inc.*, 341 N.L.R.B. 86 (2004), is inapposite, because there the employer waited until after the expiration of the certification year to withdraw recognition from the union. We therefore affirm the Board’s finding that Virginia Mason committed an unfair labor practice by withdrawing recognition from the Union during the certification year.

A union’s non-rebuttable presumption of majority status during the certification year may be lost if the union causes an inexcusable delay in bargaining. *Compton*, 907 F.2d at 909. Inexcusable delay is an affirmative defense to an unfair labor practice charge, and the burden of proof is on the party seeking to invoke this defense. *Id.* (looking to the evidence proffered by the employer on delay); *c.f. Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 183 (D.C. Cir. 2006) (finding that loss of majority status is an affirmative defense to a premature withdrawal charge).

Virginia Mason has offered no evidence of bad faith delay by the Union, other than the bare assertion that four months is an inexcusably long time to wait to start bargaining. We agree with the Board’s finding that four months is a reasonable amount of time for the Union to re-establish contacts with the unit employees, and to process the information received from Virginia Mason. Therefore, we hold that the Union was entitled to retain its presumption of majority status during the certification year. The decision of the NLRB is hereby AFFIRMED. We remand the matter to the Board to oversee implementation of the affirmative bargaining order contained in its decision.”

Simpson v. Burkart 07-15626 (February 23, 2009) “Debtor Bruce Simpson claims that his single-premium annuity is exempt property. His bankruptcy trustee objected to the exemption, the bankruptcy court sustained the objection, and the Bankruptcy Appellate Panel (‘BAP’) affirmed. We conclude that, under the circumstances presented by the case, the annuity does not qualify as exempt property, either as life insurance or as a private retirement account, and we affirm.”

“Simpson’s sole argument in support of his

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claimed exemption is that the annuity constitutes a private retirement plan under section 704.115(a)(1), because he subjectively intended to use it as one. As we have noted, a debtor's subjective intent for or use of the asset is irrelevant to this analysis. *Lieberman*, 245 F.3d at 1095. Rather, section 704.115(a)(1) applies only to retirement plans set up by private employers, 'not by individuals acting on their own, outside of the employment sphere.' *Simpson*, 366 B.R. at 74 (citing *Lieberman*, 245 F.3d at 1093). As we explained in *Lieberman*: [T]he legislature intended § 704.115(a)(1) to exempt only retirement plans established or maintained by private employers or employee organizations, such as unions, not arrangements by individuals to use specified assets for retirement purposes. 245 F.3d at 1095. The Keyport Annuity was not established for *Simpson* by an employer. Rather, *Simpson* purchased it as an individual. Thus, regardless of his intentions, *Simpson* is not entitled to claim an exemption for the annuity as a private retirement plan under section 704.115(b).

Because the single-premium annuity does not qualify under California law either as life insurance or a private retirement plan, the BAP and the bankruptcy court correctly concluded that the property was not exempt property under federal bankruptcy law. AFFIRMED."

United States v. Kincaid-Chauncey 06-10544 (February 20, 2009) "Mary Kincaid-Chauncey appeals her convictions for honest services wire fraud, aiding and abetting honest services wire fraud, conspiracy to commit honest services wire fraud, and Hobbs Act extortion under color of official right. Kincaid-Chauncey raises three claims of error: She claims that the district court precluded her from calling witnesses to support her defense and that the district court gave erro-

neous instructions on both the honest services fraud and the extortion counts. For the reasons that follow, we affirm the district court's judgment.

"Kincaid-Chauncey first argues that the district court erred in refusing to permit her to call seven of nine proposed witnesses to advance her theories of defense. For the reasons explained below, we find that the district court did not deny Kincaid-Chauncey the opportunity to present a defense or abuse its discretion in refusing to admit the testimony of each of the seven contested witnesses."

"The district court ruled that the testimony of these seven witnesses was inadmissible because it constituted impeachment of cross-examination testimony by contradiction. Kincaid-Chauncey asserts that this was error."

"The district court's decision to exclude the testimony of the seven witnesses is well within our rule in *Castillo* and thus was not an abuse of discretion. Nor did the district court abuse its discretion by admitting some of the defendant's witnesses and not others. The district court plainly could have excluded all nine of the witnesses; even if, in its discretion, the court decides to admit the testimony of one or more witnesses, the court is not obligated to admit the testimony of all proffered witnesses."

"Next, Kincaid-Chauncey argues that the testimony of the witnesses was admissible under Federal Rule of Evidence 404(b) as proof of Malone's common scheme or plan to steal money from Galardi, which supported her Theft Theory."

"The defendant's remedy was to impeach Galardi by cross-examining him on his own inconsistent

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statements, not by calling additional witnesses. Accordingly, the district court did not err in ruling that Boggs-McDonald's testimony was not admissible under Rule 404(b)."

"Finally, Kincaid-Chauncey makes an overarching argument that the district court's refusal to admit the testimony of these witnesses deprived her of her Fifth Amendment right to due process and her Sixth Amendment right to present a defense, claims that we review *de novo*. See *United States v. Lynch*, 437 F.3d 902, 913 (9th Cir. 2006) (*en banc*) (*per curiam*)."

"We cannot see how Kincaid-Chauncey was denied her right to due process or to present a defense. As we discussed above, the rules against permitting impeachment by contradiction serve important trial management interests by keeping the trial focused on germane issues. Moreover, the district court permitted Kincaid-Chauncey to call two of the three witnesses (Reilly and Scofield) who would have advanced the Theft Theory. Kincaid-Chauncey ultimately called Reilly, but not Scofield. It is difficult to see how Kincaid-Chauncey was denied due process or an opportunity to put on her defense when she chose not to put on one of the witnesses she claims she needed. A third witness Kincaid-Chauncey argues would have advanced her Theft Theory was Boggs-McDonald. But, as we pointed out in the previous section, Galardi did not make any statements on either direct or cross-examination that he gave Malone any money to give to Boggs-McDonald. The only statements in the record concerning payment to Boggs-McDonald via Malone are statements that Galardi made to the FBI. As unsworn prior inconsistent statements, these statements could only be admitted to impeach Galardi, not to establish that Galardi in fact did give money to

Malone to give to Boggs-McDonald. Nothing in the Constitution requires that Kincaid-Chauncey be permitted to introduce extrinsic evidence under these circumstances.

None of the six witnesses proffered for the Liar Theory would have advanced that theory, either. As noted above, three of the witnesses would have disputed whether Galardi gave them campaign contributions (Goodman, Roger, and Gates); one would have disputed the amount of a series of gifts (Mosley); and one would have disputed whether she made a collateral statement (Atkinson-Gates). The final proffered witness, Jorgensen, would have directly contradicted Galardi's cross-examination testimony, but Kincaid-Chauncey was permitted to impeach Galardi with his prior inconsistent statement concerning the payment to Jorgensen. The marginal value that would have accrued to the defense from Jorgensen's testimony does not make the rule governing impeachment by contradiction 'arbitrary' or 'disproportionate to the purposes [it is] designed to serve.' Scheffer, 523 U.S. at 308."

"The district court's instruction that 'the Government is not required to link any particular payment to a specific act on the part of the public official,' contrary to Kincaid-Chauncey's argument, did not remove the necessary link between the receipt of the item of value and the intent to be influenced. The Third Circuit has used nearly identical language to describe the 'stream of benefits' theory of honest services fraud. See *Kemp*, 500 F.3d at 282 ('[T]he government need not prove that each gift was provided with the intent to prompt a specific official act.'). This instruction, though thin, was sufficient to convey the idea of an implicit quid pro quo.

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Second, we are required to review the jury instructions as a whole, *Frega*, 179 F.3d at 806 n.16, and the instructions here contain numerous references to the specific intent to defraud the public, which strengthen the quid pro quo element in the instructions. For example, the district court cautioned the jury that ‘[a] public official does not commit honest services fraud if his or her intent was limited to the cultivation of a personal, business, or political friendship.’ Rather, the official must have had an intent ‘to be improperly influenced in his or her official duties.’ The jury was also instructed that ‘[a] public official’s receipt of hospitality does not defraud the public of its right to honest services unless the public official accepts such hostility [sic] with the intent to be influenced or to deceive the public.’ The instructions required that the jury focus on ‘the fraudulent and deceptive conduct of the public official who abuses a position of trust.’ To satisfy the specific intent to defraud, the instructions required the government to prove beyond a reasonable doubt ‘that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension.’ The jury thus could not convict for mere influence or political friendships. Accord *Kemp*, 500 F.3d at 281-82 (approving an instruction that ‘left no danger that the jury would convict upon merely finding that [the defendants] provided benefits to [a public official] in a general attempt to curry favor or build goodwill’). Instead, conviction required ‘fraudulent and deceptive conduct.’ Thus, while the instructions stated that all a finding of guilt required was receipt of an item of value coupled with an intent to be influenced, the rest of the instructions prevented a conviction based on the type of legitimate ‘influence’ that is necessary to the functioning of any political system. The district court did not use the words ‘quid pro quo,’ but

the instructions, on the whole, adequately conveyed ‘the idea that ‘you get something and you give something.’ ‘ *Giles*, 246 F.3d at 973. Because the instructions, taken as a whole, contained an implicit quid pro quo requirement, they adequately stated the elements of honest services fraud on a bribery theory.

The second theory on which the jury instructions permitted a finding of guilt on the honest services fraud counts was the failure to disclose a conflict of interest. This portion of the instruction specifically notes that the mere failure to disclose a conflict of interest is inadequate, but that the government must also prove that Kincaid-Chauncey acted with the specific intent to defraud in her failure to disclose a conflict of interest. The instruction permitted conviction if ‘the public official participated in the matter without disclosing her conflict of interest, provided that the non-disclosure was coupled with an intent to defraud.’ The instruction thus required that Kincaid-Chauncey satisfy the requisite mental state for an honest services fraud conviction based on a non-disclosure theory. As we stated above, this theory of honest services fraud does not require demonstration of a quid pro quo to prove the required intent to defraud.

We conclude that the instructions adequately stated the elements of § 1346 for both theories of prosecution. The judgment of conviction is AFFIRMED.”

Video Software Dealers Association v. Schwarzenegger 07-16620 (February 20, 2009)

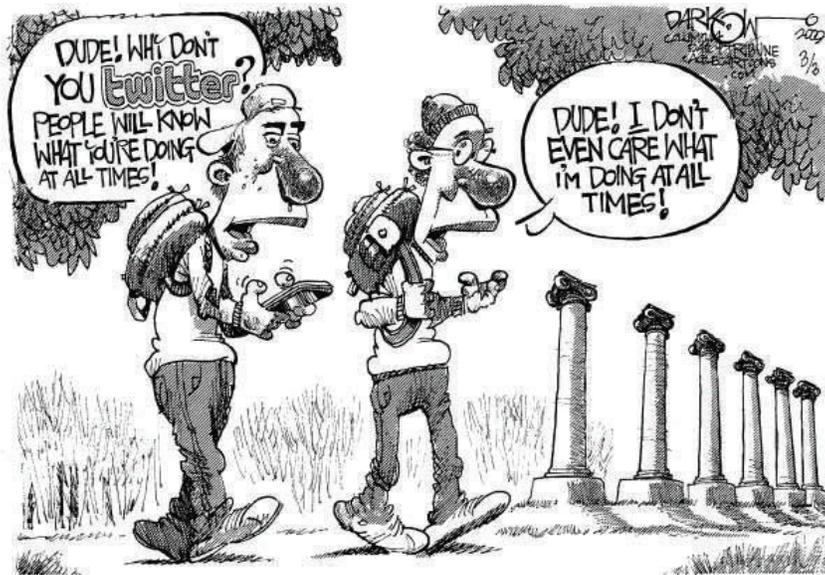
“Defendants-Appellants California Governor Schwarzenegger and California Attorney General Brown (the ‘State’) appeal the district court’s grant of summary judgment in favor of Plaintiffs-Appellees Video Software Dealers Association

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and Entertainment Software Association (‘Plaintiffs’), and the denial of the State’s cross-motion for summary judgment. Plaintiffs filed suit for declaratory relief seeking to invalidate newly-enacted California Civil Code sections 1746-1746.5 (the ‘Act’), which impose restrictions and a labeling requirement on the sale or rental of ‘violent video games’ to minors, on the grounds that the Act violates rights guaranteed by the First and Fourteenth Amendments.

We hold that the Act, as a presumptively invalid content-based restriction on speech, is subject to strict scrutiny and not the ‘variable obscenity’ standard from *Ginsberg v. New York*, 390 U.S. 629 (1968). Applying strict scrutiny, we hold that the Act violates rights protected by the First Amendment because the State has not demonstrated a compelling interest, has not tailored the restriction to its alleged compelling interest, and there exist less-restrictive means that would further the State’s expressed interests. Additionally, we hold that the Act’s labeling requirement is unconstitutionally compelled speech under the First Amendment because it does not require the disclosure of purely factual information; but compels the carrying of the State’s controversial opinion. Accordingly, we affirm the district court’s grant of summary judgment to Plaintiffs and its denial of the State’s cross-motion. Because we affirm the district court on these grounds, we do not reach two of Plaintiffs’ challenges to the Act: first, that the language of the Act is unconstitutionally vague, and, sec-

ond, that the Act violates Plaintiffs’ rights under the Equal Protection Clause of the Fourteenth Amendment.”



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Average Intelligence of Lawyers On the Decline By Harrison Bergeron, Esq.

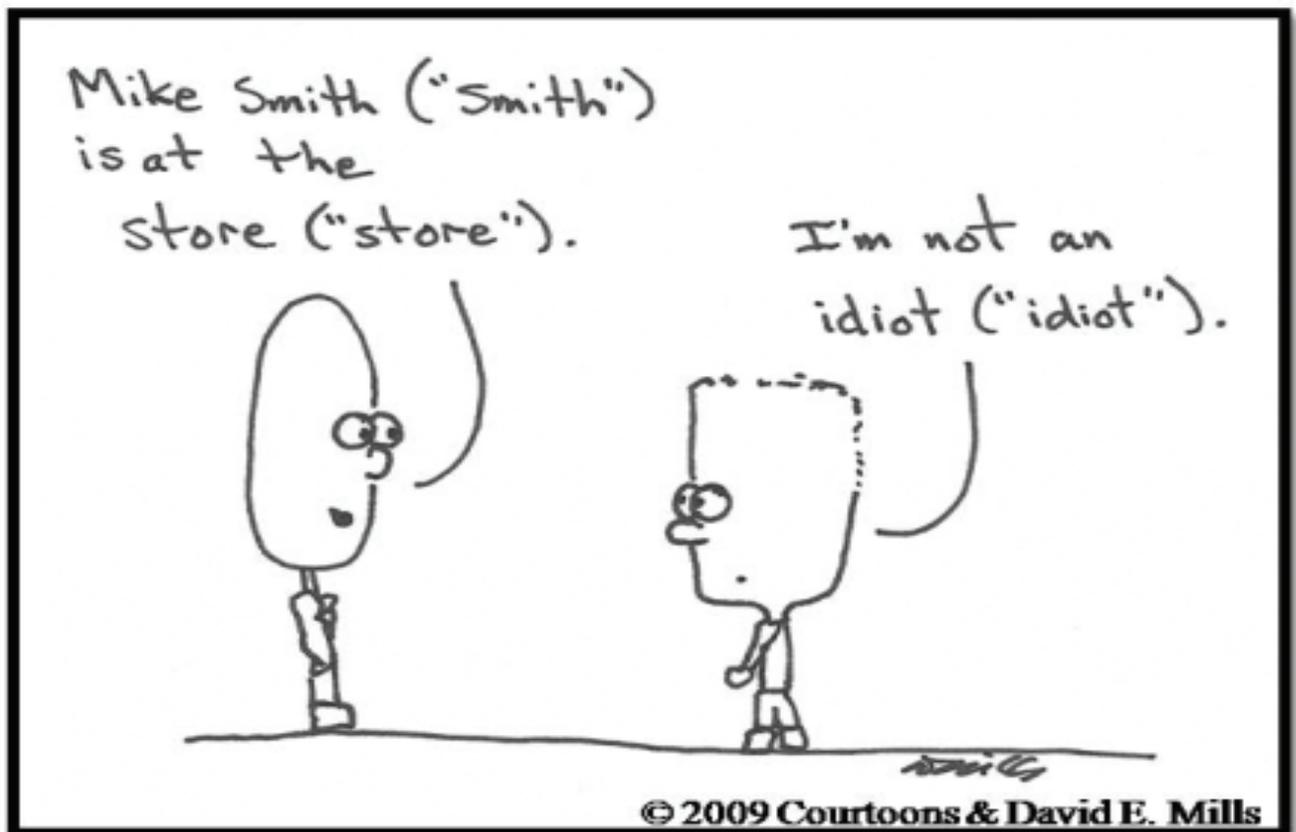
Is the average intelligence of lawyers on the decline? In the U.K., *The Lawyer* reports on a study carried out by the [Centre for Market and Public Organisation](#) at the University of Bristol that suggests lawyers have moved closer to average intelligence over the past 12 years. The findings, when first reported, raised quite a stir at *The Lawyer's* site, with [commenters insisting](#) that the law continues to employ "the finest minds in the City."

Ironically, the study was originally carried out to identify barriers preventing many people from poorer backgrounds from succeeding in certain careers. Law firms have traditionally argued that

they hire based on merit alone, regardless of background. But the study seems to prove otherwise, showing that the average IQ of lawyers born in 1970, as compared to 1958, has declined.

Of course, the intelligence drain isn't unique to lawyers. IQs have dropped across the board for other professions as well.

What could account for the apparent drop in average intelligence? Do you think today's lawyers are less intelligent than those of yore, or could it be that the IQ tests themselves are outdated?



If lawyers talked like they wrote.

KROLLONTRACK.COM eDISCOVERY CASES

Court Denies Non-Party's Attempt to "Claw Back" Privileged Documents

SEC v. Badian, 2009 WL 222783 (S.D.N.Y. Jan. 26, 2009). In this securities litigation, a non-party corporation, Rhino, moved to "claw back" approximately 260 privileged documents allegedly produced inadvertently in 2003. Rhino claimed that language accompanying the production, which certified that production of any document shall not be construed as waiver of any privilege, required the SEC to return the documents. To determine whether privilege was waived, the court analyzed the four factors set forth in *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985): (1) reasonableness of the precautions taken to prevent inadvertent disclosure; (2) time taken to rectify the error; (3) extent of the disclosure; and (4) overarching issues of fairness. Factor one weighed in favor of privilege waiver as Rhino presented no evidence of privilege review prior to the production. Factor two weighed in favor of waiver as Rhino waited five years before it sought to "claw back" some of the production. Factor three also weighed in favor of waiver as the court found 260 documents to be a significant number of documents. The last factor also weighed in favor of waiver as the court was unable to find a reason to disregard Rhino's carelessness. With all four factors weighing in favor of privilege waiver, the court concluded that Rhino waived any privilege it may have asserted on the production.

Court Advises Government Agencies to Be Prepared to Follow Same Discovery Rules as Private Parties

SEC v. Collins & Aikman Corp., 2009 WL 94311 (S.D.N.Y. Jan. 13, 2009). In this securities fraud litigation, the defendant objected to the SEC's production of 1.7 million documents

maintained in thirty-six separate databases. The defendant asserted the SEC produced a "document dump" of unorganized documents and failed to perform adequate searches for e-mails. The SEC argued the production format was in accordance with how the documents were maintained in the usual course of business and that nearly all responsive e-mails would be privileged, protected or non-substantive. Rejecting the SEC's arguments, District Judge Shira A. Scheindlin found that Fed.R.Civ.P. 34's "usual course of business" requirement for production requires the documents to be organized and therefore ordered re-production with documents responding specifically to defendant's requests. Furthermore, as e-mails are inherently searchable, the court found the SEC's blanket refusal to produce any of them to be unacceptable. Accordingly, the court ordered the parties to meet to resolve the scope and design of a search with respect to e-mails. The court noted that a government agency which initiates civil litigation must generally follow the same discovery rules that govern private parties.

Court Denies Request for Production of Metadata as a Public Record

Lake v. City of Phoenix, 2009 WL 73256 (Ariz.Ct.App. Jan. 13, 2009). In this special action to compel the defendant City to produce public records, the plaintiff appealed a lower court decision denying his motion to compel the production of metadata. The plaintiff argued metadata was necessary to determine whether the produced notes were backdated and for authentication purposes. The defendant argued that metadata is not a public record. Agreeing with the defendant, the court affirmed the lower court's holding that metadata is not a public record and need not be produced.

Court Declares Patents in Suit Unenforceable Due to Intentional Destruction of Evidence

KROLLONTRACK.COM eDISCOVERY CASES

Court Declares Patents in Suit Unenforceable Due to Intentional Destruction of Evidence

Micron Tech., Inc. v. Rambus, Inc., 2009 WL 54887 (D. Del. Jan. 9, 2009). In this patent infringement litigation, the plaintiff sought sanctions claiming the defendant spoliated relevant documents. In 1998, the defendant implemented a document retention policy whereby relevant documents were destroyed. Finding the defendant was an "aggressive competitor," the court determined that litigation was inevitable and reasonably foreseeable since December 1998. Therefore, the court determined that any document destruction following December 1998 was intentional and in bad faith. As the plaintiff established that the documents that were destroyed were discoverable and relevant to the instant litigation, the court concluded that the plaintiff was prejudiced by the defendant's conduct. The court therefore sanctioned the defendant by declaring the patents in suit unenforceable against the plaintiff.

Court Affirms Sanction Order Finding Non-Compliance with Discovery Deadlines

In re Fannie Mae Sec. Litig., 2009 WL 21528 (C.A.D.C. Jan. 6, 2009). In this litigation, the Office of Federal Housing Enterprise Oversight (OFHEO), a non-party, appealed the district court's order finding it in contempt for failing to comply with a discovery deadline in a stipulated scheduling order. OFHEO argued that the defendant's decision to supply four hundred keyword terms was outside the scope of "appropriate search terms," thereby extending the time needed to comply with its production requirements. However, aware of the deadlines, OFHEO sought several discovery extensions, hired 50 contract attorneys and spent over \$6 million – 9% of the agency's entire annual

budget – to comply with the defendants' discovery requests. Finding OFHEO's efforts legally insufficient, the court compared its treatment of the discovery deadlines as "movable goal posts" and directed OFHEO to supply documents withheld for privilege that were not logged by the deadline as a sanction for their discovery misconduct. However, the court ruled that any privileged documents that are produced and identified as such will be promptly returned to OFHEO.

Court Imposes Adverse Inference and Strikes Expert Testimony as Spoliation Sanction

Arista Records LLC v. Usenet.com, Inc., 2009 WL 185992 (S.D.N.Y. Jan. 26, 2009). In this copyright infringement litigation, the plaintiffs moved for sanctions for spoliation. The plaintiffs alleged the defendants deliberately destroyed and failed to preserve highly relevant materials that would have provided evidence of the "wide-scale infringement." The defendants argued that the evidence sought was not relevant to the plaintiffs' claim, the data was transient in nature and their systems did not have the capacity to preserve the data. Regarding the duty to preserve, the court found that the defendants had an obligation to preserve the requested data and defendants' failure to preserve was in bad faith. Therefore, the court imposed an adverse inference against the defendants and awarded attorneys' fees and costs.



UNITED STATES SUPREME COURT

PLEASANT GROVE CITY, UTAH v. SUMMUM, No. 07–665. (February 25, 2009). This case presents the question whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected. The Court of Appeals held that the municipality was required to accept the monument because a public park is a traditional public forum. We conclude, however, that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.

YSURSA v. POCATELLO EDUCATION ASSOCIATION, No. 07–869 (February 24, 2009). Under Idaho law, a public employee may elect to have a portion of his wages deducted by his employer and remitted to his union to pay union dues. He may not, however, choose to have an amount deducted and remitted to the union’s political action committee, because Idaho law prohibits payroll deductions for political activities. A group of unions representing Idaho public employees challenged this limitation. They conceded that the limitation was valid as applied at the state level, but argued that it violated their First Amendment rights when applied to county, municipal, school district, and other local public employers.

We do not agree. The First Amendment prohibits government from “abridging the freedom of speech”; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression. Idaho’s law does not restrict political speech, but rather declines to promote that speech by allowing public employee check-offs for political activities. Such a decision is reasonable in light of the State’s interest in avoiding the appearance that carrying out the public’s business is tainted by partisan political activity. That interest extends to government at the local as well as state level, and nothing in the First Amendment prevents a State from determining that its political subdivisions may not provide payroll deductions for political activities.



Edited by Justin.Tully@lvvwd.com.

