

The Public Lawyer



STATE BAR OF NEVADA

Nevada Supreme Court Cases

Dictor v. Creative Management Services, 126 Nev. Adv. Op. No. 4 (February 4, 2010). In this appeal, we consider two legal doctrines: first, the application of the law-of-the-case doctrine, and second, the proper choice-of-law analysis for defenses to the subrogation of underlying tort claims.

When an appellate court explicitly or by necessary implication determines an issue, the law-of-the-case doctrine provides that the determination governs the same issue in subsequent proceedings in the same case. Because our unpublished order in a previous appeal involving these same parties and stemming from the same lower court case narrowly addressed a single issue, we conclude that the district court did not violate the law-of-the-case doctrine and the district court was not precluded from applying the Missouri Property and Casualty Insurance Guaranty Association Act, Missouri Revised Statute section 375.772 (Mo. Rev. Stat. § 375.772), and other alternate legal defenses on

remand. We also affirm the district court's choice-of-law conclusion, that the Missouri statute barring tort claims against an insured of an insolvent insurer precludes appellant CPCI's subrogation claims.

Fernandez v. Fernandez, 126 Nev. Adv. Op. No. 3 (February 4, 2010). This is an appeal by the father of minor children from an order denying a motion to modify child support under NRS 125B.145. The trial court held that it was "not bound" by NRS 125B.145 because the parties "previously agreed in a stipulation and order modifying the Decree of Divorce that neither party [would] seek modification of child support." In the trial court's view, this made the child support order nonmodifiable, so long as the father had "sufficient means (assets and/or income) to meet the agreed upon child support obligations."

The motion to modify alleged that the father's monthly gross income had dropped more than 80 percent, to the point his child

Public Lawyers
Section

February 2010



Inside this issue:

<i>Law.com</i>	3
<i>Ninth Circuit Cases</i>	6
<i>Krollontrack</i>	9

Nevada Supreme Court Cases

support obligation exceeded it. The mother's circumstances, meanwhile, had improved to the extent that her assets and gross monthly income equaled or outmatched his. Declining to apply NRS Chapter 125B's modification provisions to these facts was error. Stipulated or not, the obligation the father sought to modify was incorporated and merged into the decree as an enforceable child support order. State and federal statutes give child support orders super-legal reach. Because children's needs and parents' circumstances can change unpredictably over the life of a child support order, NRS Chapter 125B provides for their periodic review and modification—up or down—as changed circumstances dictate. The statutory scheme does not admit a child support order that cannot be modified based on a material change in circumstances.

The father's motion presented facts that, if true, qualified for relief. He did not need to wait until he was missing court-ordered child support payments or in financial peril before being heard under NRS 125B.145 and its related statutes, NRS 125B.070 and NRS 125B.080. We therefore reverse and remand.

Great Basin Water Network v. State Eng'r, 126 Nev. Adv. Op. No. 2 (January 28, 2010). In this appeal, we must determine a narrow, yet fundamental question: whether the State Engineer violated his statutory duty under NRS 533.370(2) by failing to rule on Southern Nevada Water Authority's (SNWA) 1989 water appropriation applications within one year. NRS 533.370(2), as it existed in 1989, required the State Engineer to approve or reject each water appropriation application within one year after the final protest date. The State Engineer, however, could postpone taking action beyond one year if he obtained written authorization from the applicant and protestants or if there was an ongoing water supply study or

court action. None of those conditions occurred by the end of 1991. However, in 2003, the Legislature amended NRS 533.370 to permit the State Engineer to postpone action on pending applications made for a municipal use. The district court summarily determined, among other issues, that the amendment applied to SNWA's 1989 applications, thus enabling the State Engineer to take action on applications filed 14 years earlier.

The parties to this appeal dispute whether SNWA's 1989 applications were "pending" in 2003 under the legislative amendment and, therefore, whether the amendment applied retroactively to those applications. We conclude that "pending" applications are those that were filed within one year prior to the enactment of the 2003 amendment. And, in the absence of statutory language and legislative history demonstrating an intent that the amendment apply retroactively to SNWA's 1989 applications, we determine that the State Engineer could not take action on them under the 2003 amendment to NRS 533.370.

Because we determine that the 1989 water appropriation applications were not pending in 2003, we conclude that the State Engineer violated his statutory duty by failing to take action within one year after the final protest date. Thus, we reverse the order of the district court and remand for a determination of whether SNWA must file new groundwater appropriation applications or whether the State Engineer must re-notice SNWA's 1989 applications and reopen the period during which appellants may file protests.

Higgs v. State, 126 Nev. Adv. Op. No. 1 (January 14, 2010). In this appeal, appellant Chaz Higgs challenges his conviction of first-

Law.com

degree murder for the death of his wife, Kathy Augustine. Higgs asserts that his conviction should be overturned for the following reasons: (1) the district court abused its discretion when it denied his motion to continue the trial, (2) sufficient evidence does not support his conviction, (3) the district court abused its discretion when it admitted the testimony of the State's scientific expert, (4) the district court abused its discretion when it refused to give Higgs' proffered jury instruction regarding the spoliation of tissue samples, and (5) numerous alleged instances of plain error deprived him of a fair trial.

We note from the outset that we originally decided this appeal in an unpublished order filed on May 19, 2009. Amicus curiae Nevada Justice Association subsequently moved for publication of our disposition as an opinion. Cause appearing, we grant the motion and publish this opinion in place of our prior unpublished order. In so doing, we use this opportunity to reaffirm the standard for the admissibility of expert testimony in Nevada, as it is articulated by NRS 50.275. While Nevada's statute of admissibility tracks the language of its federal counterpart, Federal Rule of Evidence (FRE) 702, we see no reason to part with our existing legal standard. In so deciding, we decline Higgs' invitation to adopt the standard of admissibility set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Further, we reject the notion that our decision in *Hallmark v. Eldridge*, 124 Nev. ___, ___, 189 P.3d 646 (2008), adopted the standard set forth in *Daubert* inferentially. We conclude, therefore, that Higgs' challenge to the testimony of the State's scientific expert fails, as do all the other arguments he raises on appeal. Therefore, we affirm.

Not Gonna Charge Anyone? That Really Burns My Ass!

Proving once again that stupidity is not a crime, police and prosecutors in Breckenridge, Colo., have [decided not to file charges](#) against any of the esteemed members of the [Texas Christian University](#) Kappa Sigma chapter who, while on an obviously successful bonding trip to the mountains, decided to brand the buttocks of one of their brothers with a red hot coat hanger.

The student, Chance Carter, the great-grandson of [publishing magnate Amon G. Carter](#), had hired attorney [Jerry Loftin](#), who [went spouting off](#) about charging many people for their roles in the alleged assault and cover-up, despite the fact that Carter admitted asking to be branded. But authorities have determined that Carter was a "willing participant" in the branding incident. Perhaps not the best decision, considering that it ended with third degree burns requiring plastic surgery to repair.

Maybe Loftin can concoct some civil claim based on failure to deliver the promised results, because I can't make out a Kappa or a Sigma anywhere. Can you?



Law.com

How to Say 'Please Rob Me' on Twitter

Most homeowners are familiar with the practice of putting certain lights in their home on a timer. The idea is that when they are on vacation or out of town, the lights will go on and off per the timer, hopefully giving any would-be robbers the impression that the house is still occupied rather than temporarily vacant.

That makes sense. But would you ever do the opposite? Would you intentionally send a message out to the burglars of the world that you are *not* home and, further, tell them exactly where you were and when (i.e., "Attention criminal underworld: I'm at the beach right now, 1,000 miles from my house.")?

You may not think you would do such a thing, but a new Web site that became a hot topic in the blogosphere yesterday has set out to demonstrate that hundreds of thousands of people are doing this everyday. As discussed in [this post](#) on [TechCrunch](#), the provocatively named "[Please Rob Me](#)" has launched with the mission of raising awareness of a possible downside of using the new geolocation services such as [Foursquare](#), [Brightkite](#), Google Buzz, etc. Those of you on Twitter have no doubt seen people using these services to announce things like, "I'm at the Grand Canyon" or "I'm the new mayor of the Reston Sport and Health Club." Please Rob Me highlights the flip-side of these services: If you are at the Grand

Canyon then you aren't at home. Its homepage states the site is "Listing all those empty homes out there," and features a real-time feed of "opportunities" (for robbers) in the form of people who have announced their locations through one of the geolocation services.

Enjoy Your Last Meal, and for Dessert: A Summons and Complaint

Well this isn't your average race to the courthouse. [Judge Craig Estlinbaum](#), on the Adjunct Law Prof Blog, brings us the news that the state of Louisiana decided to [go on the offensive](#) in response to a challenge to its lethal injection procedures. A serious offensive. The state sued each and every one of the 84 inmates currently on death row, seeking a declaratory judgment that its method of executing the condemned is just dandy, thank you very much.

The suit is [described in greater detail](#) on Solitary Watch, and, like most things you read about on the Internet, raises a few questions. Apparently, the state named the 84 inmates in "counterclaims," as part of a suit instituted by one of them, Nathaniel Code, who challenged the lethal injection protocol as a violation of Louisiana's Administrative Procedure Act. By casting the net wide enough to capture 83 prisoners who presumably were just minding their own business training for the upcoming [Spring prison rodeo](#) (I have

Law.com

been to the October version, and, think what you will about the concept, I must say [Warden Cain](#) puts on a hell of a show), the state seeks to have the court "formally declare, once and for all" that the lethal injection procedure is not subject to the state APA. The Corrections Department's attorney referred to it as "sort of an internal management decision." Yes, the Corrections Department manages the internal organs of its inmates in such a manner as to ensure they stop working.

Not surprisingly, the Louisiana District Attorneys Association thinks this suit is [a great idea](#), and even gives the media a little nudge, linking to a [Huffington Post story](#) (which essentially does no more than link to the Solitary Watch post) it refers to as "predictably negative."

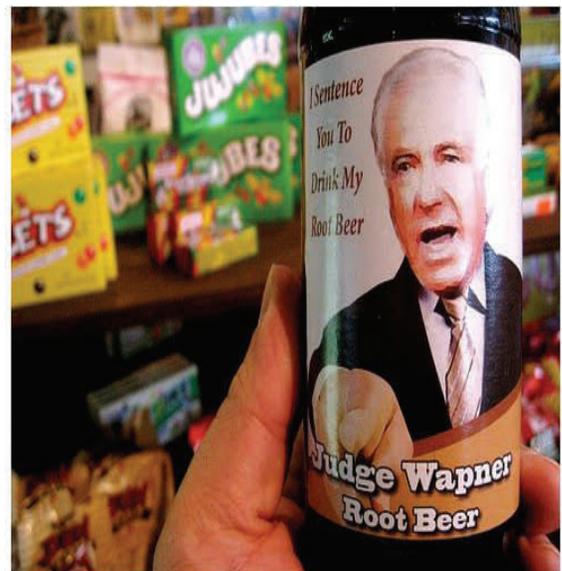
The comments are open for the larger capital punishment debate, without question. But, Louisiana lawyers, can y'all help me out now, y'hear, with a couple of fundamental civil procedure questions? Is it a foregone conclusion that it's proper to name all 84 inmates as counterclaim defendants in this suit? Especially in light of the fact that the plaintiff's [claims were dismissed](#) over a month before the counterclaims were filed? I understand the governor's instinct to strike first so as to prevent all those anti-death penalty lawyers and activists from clogging up

the phone lines [Callin' Baton Rouge](#), but it seems a bit strange to someone who's filed most of his papers in county courts, rather than parish courts.

Snow Day Bonus -- Where Are They Now: Judge Joseph Wapner

A friend wondered aloud last night over a beer whether Judge Wapner, of "[People's Court](#)" (and, as such, "[Rain Man](#)") fame, was still alive, and if so, what he was up to. I thought it a question worthy of investigation. So, yes, according to Wikipedia, Judge Wapner is [still kicking at age 90](#). He has a star on the Hollywood Walk of Fame and, wait for it . . .

[.. his own root beer](#). With the weather being what it is today, I heartily endorse the idea of sitting back on your couch, lighting a fire and enjoying an icy cold Wapner, something that, unlike the law, you can safely "take into your own hands."



NINTH CIRCUIT CASES

Marez v. Bassett, No. 08-56035 (February 18, 2010). On this appeal, the question addressed is whether, as appellant Candido Marez contends, the district court's grant of summary judgment in favor of defendants was in error. Candido Marez was the owner of Montrose Supply, a vendor of a wide variety of products to the Department of Water and Power of the City of Los Angeles, from the late 1980s until 2007, when he sold the business. In 2006, plaintiff, proceeding under 42 U.S.C. § 1983, sued DWP in the Central District of California, alleging that the agency had violated the First Amendment by engaging in adverse action against him because of his public criticism of DWP's procurement procedures.

Defendants contend that plaintiff is barred by *Garcetti v. Ceballos*, 547 U.S. 410 (2006), from claiming a violation of the First Amendment. *Garcetti* provides that if a government employee speaks out publicly in a statement made "pursuant to [his] official duties," "the Constitution does not insulate [his] communications from employer discipline." *Id.* at 421. Defendants argue that when Marez "took the concerns of vendors and employees to the City Council, he did so pursuant to his official duties, not as a private citizen for First Amendment purposes." In defendants' view, Marez's statements about Empire were "part and parcel of his responsibilities as co-chair" of the subcommittee—responsibilities akin to those of a government employee—and thus, like Ceballos, he was precluded from asserting a constitutional violation.

In *Alpha Energy Savers, Inc. v. Hansen*, we explained that, in addressing a section 1983 retaliation claim, "a business vendor operat[ing] under a contract with a public agency" is to be treated with "the same basic approach" as if "the claim had been raised by an employee of the agency." 381 F.3d 917, 923 (9th Cir. 2004) (citing *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 684-85 (1996)). This means requiring "the contractor [to] establish" three elements: "(1) [he] engaged in expressive conduct that addressed a matter of public concern; (2) the government officials took an adverse action against [him]; and (3) [his] expressive conduct was a substantial or motivating factor for the adverse action." *Alpha Energy*, 381 F.3d at 923. We examine each of these factors in turn.

United States v. Borowry, No. 09-10064 (February 17, 2010). Defendant Charles A. Borowry appeals the denial of his motion to suppress and seeks to vacate his guilty plea because of a violation of Rule 11 of the Federal Rules of Criminal Procedure. He argues that the evidence recovered by an FBI agent who accessed his shared files on the peer-to-peer filesharing service LimeWire was unconstitutionally obtained and that the district court should have suppressed this evidence. He argues further that, because he was misinformed as to the term of supervised release to which he was subject, this court should vacate his guilty plea. We have jurisdiction under

NINTH CIRCUIT CASES

28 U.S.C. § 1291 and affirm.

Bull v. City and County of San Francisco, No. 06-155 (February 9, 2010). The San Francisco Sheriff's Department oversees six county jails in the San Francisco Bay Area, through which approximately 50,000 individuals are booked and processed each year. To address a serious problem of contraband smuggling in the jail system, Sheriff Michael Hennessey instituted a policy requiring the strip search of all arrestees who were to be introduced into San Francisco's general jail population for custodial housing. In a class action lawsuit challenging this policy on its face, a district court held that it violated the Fourth Amendment rights of the persons searched, and denied Sheriff Hennessey qualified immunity. Hennessey, the San Francisco Sheriff's Department, and the City and County of San Francisco brought this interlocutory appeal, challenging the denial of qualified immunity. A divided panel of this court affirmed the district court's denial, *Bull v. City & County of San Francisco*, 539 F.3d 1193 (9th Cir. 2008), and we granted rehearing en banc. Because we conclude that San Francisco's policy did not violate plaintiffs' constitutional rights, we reverse the district court's denial of Sheriff Hennessey's motion for summary judgment based on qualified immunity, and in doing so necessarily reverse the district court's grant of plaintiffs' motion for partial summary judgment as to Fourth Amendment liability.

Mortimer v. Baca, No. 07-55393 (February 5, 2010). Plaintiffs brought this action under 42 U.S.C. § 1983 against the Los Angeles County Sheriff, Leroy Baca, in his official capacity. Plaintiffs allege that their civil rights were violated when they were kept in custody by the Los Angeles County Sheriff's Department for periods of time ranging from twenty-six to twenty-nine hours after the court had authorized their releases, and that their overdetentions were the result of a policy of deliberate indifference to their constitutional rights. We determine that our prior opinion in this litigation, *Berry v. Baca*, 379 F.3d 764 (9th Cir. 2004), did not preclude the district court from considering defendant's motion for summary judgment on its merits, and that the court properly granted defendant's motion for summary judgment because the proffered evidence would not support a finding of deliberate indifference.

Waggy v. Spokane County, No. 09-351 (February 5, 2010). Plaintiff-Appellant Robert Mark Waggy, a convicted sex offender, was arrested on harassment charges while serving part of his original sentence on community placement in Spokane, Washington. The day after he posted bond and was released, he was again arrested pursuant to a bench warrant issued due to his failure to progress in his court-imposed sexual deviancy treatment program. Based on this latter arrest for violation of his required supervision, he brought suit under 42 U.S.C. §

NINTH CIRCUIT CASES

1983, claiming that the Spokane County prosecuting attorneys and the county violated his constitutional right to be free from arrest without probable cause. The district judge awarded absolute immunity to the deputy prosecuting attorney and found that the plaintiff had failed to allege sufficient facts to warrant trial against the county. We affirm.

Mahach-Watkins v. Depee, No. 08-15694 (February 1, 2010). California Highway Patrol Officer Larry Depee shot and killed John Watkins while on duty in Crescent City, California. Watkins's mother, Sylvia Mahach-Watkins, filed suit under 42 U.S.C. § 1983 and various provisions of state law on her own behalf and on behalf of her son's estate. A number of Mahach-Watkins's claims were dismissed before trial. Two § 1983 claims and a state-law wrongful death claim went to trial. The jury returned a favorable verdict on one of the two § 1983 claims and on the wrongful death claim. The jury awarded nominal damages of one dollar on each of these two claims.

Mahach-Watkins thereafter sought almost \$700,000 in attorney's fees under 42 U.S.C. § 1988. The district court awarded \$136,687.35. The court reduced the amount of attorney's fees because of the limited success achieved in Mahach-Watkins's § 1983 claim. Depee appeals the award of attorney's fees. He contends under *Farrar v. Hobby*, 506 U.S. 103 (1992), that because of her limited success Mahach-Watkins is entitled to no attorney's fees at all. For the reasons that follow, we affirm.

United States v. Palos-Marquez, No. 08-50498 (January 19, 2010). We must decide whether an in-person tip by an unidentified informant provided reasonable suspicion to support border patrol agents' investigatory stop of a vehicle. We hold that such a tip can have significant indicia of reliability, and in light of the totality of the circumstances, there was reasonable suspicion to justify the stop at issue. Therefore, we affirm the judgment of the district court.



Krollontrack.com

Court Finds E-Mails Stored on Old Archiving System Reasonably Accessible; Costs Exaggerated

Starbucks Corp. v. ADT Sec. Servs., Inc., 2009 WL 4730798 (W.D. Wash. Apr. 30, 2009). In this discovery dispute, the plaintiff sought production of e-mails from a specified time period. The defendant argued the e-mails were archived on the company's "cumbersome" old system and were not reasonably accessible under Fed.R.Civ.P 26(b)(2)(B). In support of the position, the defendant's information technology representative made several claims, including that accessing the e-mails would be disruptive to business operations and would take nearly four years to restore. The representative also provided an initial cost estimate for the work of \$88,000, but upped the ante six months later to \$834,285. The court noted that the representative "provided exaggerated reasons and exaggerated expenses as to why the [defendant] allegedly [could not] or should not be ordered to comply with its discovery obligations." The court found that the plaintiff should not be disadvantaged since the defendant, a "sophisticated" company, chose not to migrate the e-mails to the now-functional archival system and thus determined that the e-mails were reasonably accessible. Furthermore, the court explained that even if the information was ruled not reasonably accessible, good cause existed to order production.

Court Finds \$8 Million Default Judgment for Discovery Violations Not

Abuse of Discretion

Magaña v. Hyundai Motor Am., 220 P.3d 191 (Wash. Nov. 25, 2009). In this personal injury action, the Supreme Court of Washington reviewed the Court of Appeals' reversal of the trial court's imposition of a default judgment sanction on the defendant corporation. Among the defendant's violations: the defendant limited the search for documents to its legal department; made false, misleading and evasive responses; and willfully violated discovery rules. Arguing that the plaintiff's discovery requests were overly broad, the defendant claimed that the harshness of a default judgment sanction was not warranted. The court noted that the defendant is a "sophisticated multinational corporation experienced in litigation," and it analyzed the three factors assessed by the trial court to determine the appropriateness of a default judgment sanction – willfulness of violation, substantial prejudice to opposing party and availability of lesser sanctions. The court found that the record reasonably and substantially supported the trial court's conclusion, and it reinstated the \$8 million default judgment.

Government Failure to Produce Forensic Images Not Sufficient for Brady Violation

United States v. Kimoto, 588 F.3d 464 (7th Cir. Dec. 2, 2009). In this criminal case, the defendant appealed his conviction, arguing that the government had

Krollontrack.com

destroyed or withheld exculpatory evidence and failed to provide forensic copies of hard drives, which resulted in a *Brady* violation. Specifically, the defendant claimed the government did not provide e-mails that he claimed would demonstrate the existence of a conspiracy between a witness and another party. The government rebutted these claims, asserting that copies of all electronic evidence reviewed and all original evidence to be used at trial was provided to the defendant. In affirming the conviction, the court determined there was no *Brady* violation. To support its ruling, the court noted that no destruction or spoliation on behalf of the government existed, there was a material lack of proof that certain alleged evidence was missing, and the defendant failed to make a request for forensic copies until immediately prior to trial.

Court Refuses to "Gut Rule 502 Like a Fish," Cites Failure to Take Reasonable Steps to Prevent Disclosure Grounds for Waiver

Amobi v. District of Columbia Dep't of Corr., 2009 WL 4609593 (D.D.C. Dec. 8, 2009). In this litigation, the court addressed the parties' motions related to the production of a memorandum created by an attorney for the defendants. The defendants argued the disclosure was inadvertent and steps were taken to rectify the error immediately, whereas the plaintiffs argued the memorandum was either not privilege-protected or privilege had been waived. After determining that the document was protected by the work product doctrine, the

court used the three-part test set forth in Fed.R.Evid. 502(b) and found privilege was waived. In support of this finding, the court cited the defendants' failure to explain the methods used to prevent disclosure in order to establish the magnitude of the error. The court reasoned that "defendants' failure to take reasonable efforts to prevent the disclosure in the first place doom[ed] their reliance on the rule." However, the court refused to endorse the plaintiffs' argument that lawyers could never make inadvertent mistakes, claiming that would "gut [Rule 502] like a fish."

Court Holds Party in Contempt of Court and Issues Sanctions for Use of Wiping Software

TR Investors, LLC v. Genger, 2009 WL 4696062 (Del. Ch. Dec. 9, 2009). In this stockholders litigation, the plaintiffs sought default judgment sanctions, citing the defendant's destruction of electronic evidence in violation of a court order. The plaintiffs asserted that, following review and encryption of electronic evidence by a third-party firm, the defendant used wiping software to permanently delete temporary files in the unallocated space not reviewed by the neutral party for relevance. The defendant, an "international man of mystery" who performed sensitive tasks for the Israeli government and was concerned about the confidentiality of personal documents, claimed that he believed the wiping software only deleted duplicate copies. Finding the use of wip-

Krollontrack.com

ing software to be a clear violation of the unambiguous court order, the court determined sanctions were appropriate. The court declined to impose a default judgment and held the defendant in contempt, ordering him to pay \$750,000 in attorneys' fees and costs. The court also ordered production of documents previously subject to a claim of privilege, elevated the defendant's required burden of persuasion on any counterclaims or defenses, and prohibited the defendant from prevailing on any material matter based solely on his uncorroborated testimony.

Parties' Failure to Rectify Erroneous Disclosure of Privileged Material Results in Subject Matter Waiver

Silverstein v. Federal Bureau of Prisons, 2009 WL 4949959 (D. Colo. Dec. 14, 2009). In this discovery dispute, the plaintiff filed a motion for determination of privilege waiver regarding a single relevant document, arguing its production resulted in a subject matter waiver. After its initial determination that the document was protected by both attorney-client privilege and work product, the court relied on Fed.R.Evid. 502(b) to establish the scope of the waiver. First, the court determined the disclosure was intentional—not inadvertent—as defined by Rule 502, since it was originally examined and withheld by the defendants' counsel. Citing the defendants' knowledge of the production and failure to take reasonable steps to rectify the erroneous disclosure, the court held that the defendants had intentionally disclosed the

material to gain advantage in litigation, which justified a subject matter waiver. Noting the plaintiff was not entitled to a "discovery free-for-all," the court also held opinion work product would remain protected.

Court Imposes Adverse Inference Sanction for Party's Failure to Preserve Telephone Message

Vagenos v. LDG Fin. Servs., LLC, 2009 WL 5219021 (E.D.N.Y. Dec. 31, 2009). In this action brought under the Fair Debt Collection Practices Act, the defendant moved to prevent the plaintiff from offering at trial an alleged duplicate of the automated telephone message that served as the basis of the suit. The defendant asserted that the original message was destroyed with malicious intent and therefore was inadmissible. In opposition, the plaintiff maintained that the destruction of the original message was due to a change in cellular service providers and testified that the recording reflected the original. Despite finding no evidence of bad faith, the court determined that the plaintiff's duty to preserve evidence was breached. The court declined to preclude the evidence since it would be the "death knell" of the case, but it found an adverse inference sanction appropriate. In making this determination, the court noted that the destruction and the plaintiff attorney's failure to inform his client of the preservation duty were especially "egregious" and "highly troubling."