ADVICE FOR GOLDILOCKS WHEN HIRING GOOD HELP: DON'T ASK TOO MUCH; DON'T ASK TOO LITTLE

RECENT DEVELOPMENTS IN EMPLOYMENT LAW FOR THE DEFENSE ATTORNEY
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Several weeks ago, I stumbled into the bewildering process of making sausage. Well, not the sausage we all enjoy at a summer outing, but the metaphoric sausage of legislation. As Germany’s Chancellor, Otto von Bismark (1815-1898) once remarked, “there are two things you don’t want to see being made, sausage and legislation.” From my experience, the saying is still accurate.

The legislation I’m referring to was authored by Representative Atkins and has been championed as the Good Faith Insurance bill. The bill would allow direct action against insurance companies in Minnesota and more importantly create a first-party cause of action for bad faith. It is an expansive bill which appears to nullify existing law, introduces a new standard of care and allows for an award of attorney fees to a prevailing claimant. Similar bills in the past have been unsuccessful but at the time of this article the Atkins bill, in one form or another, appears to have a chance of success.

Whether Minnesota needs or doesn’t need such legislation is an issue better left for others to grapple with. If the bill passes, it would create a new cause of action in Minnesota and arguably lead to a significant increase in litigation. Borrowing a quote from past MDLA President Dick Pemberton, Rich Thomas testified before the House Committee that, ‘the threat of such legislation to defense attorneys is like threatening a farmer with a good crop.’ Nevertheless, the MDLA is committed to preserving a level playing field for legislation that affects civil litigation. Consequently, Rich Thomas, Dale Thornsjo, Jerry Abrams and others have testified before House and Senate Committees concerning their analysis of the bill and its potential affects in an effort to preserve that basic degree of fairness.

I appeared before the House Committee as an attorney with experience handling and trying bad faith cases. I naively assumed the Committee would be interested in learning how the proposed bill might affect the current state of affairs, particularly when it represents a major shift in Minnesota law. No one on the Committee appeared interested. The fact the proposed standard of care of “objectively reasonable” is an oxymoron which could take years to sort out, didn’t raise a question. The sounds of crickets would have gotten more attention than any discussion of the downstream effect the bill would have on existing law, such as the Fair Claims Practice Act, No-Fault arbitration, or the decades of judicial decisions which created third-party bad faith in Minnesota. Moreover, there wasn’t any concern expressed over the provision allowing for an award of attorney fees despite its enormous potential to expand litigation. The 2-1/2 minutes I was allotted to testify ended in stone silence. Sound bites and amusing quips seemed to be the order of the day rather than any discussion of substance. Had I known then what I know now, perhaps I could have used a catchy phrase to make an impact on the process. Instead, I was left with the same feeling I’ve experienced following an expert’s deposition, where I come up with the “best questions” on the drive home.

Apart from the merits of the bill, my experience at the Legislature was more positive than negative. Following the actual committee hearing, I spoke with a number of representatives including past MDLA members Paul Kohls and Tom Emmer, both who appeared knowledgeable about the issues. It was also encouraging to observe the efforts of the
insurance industry to evaluate the bill and attempt to project the bill’s long term effect on policyholders, the court system, and general commerce in Minnesota. But perhaps the most encouraging part of my visit was to see the effort expended by Sandy Neren who monitors legislation for MDLA and members of the MDLA Law Improvement Committee. I applaud each of them.

I cannot end this column without a special thanks to Becky Moos and Chuck Lundberg who spoke at the Medical Malpractice Conference on April 19, 2007. This has been a very successful seminar both in terms of the collegiality it creates with other members of the Bar and the positive financial contribution it makes to our organization. Likewise, I want to strongly encourage your participation in the Trial Techniques Seminar in Duluth, which kicks off the evening of August 16, 2007. Paul Rajkowski is putting together an outstanding program of speakers and events. Please consider supporting the MDLA by making plans now to attend. We had a large turnout for the 2006 TTS and the MDLA Board Members will be contacting many of your firms in late May or early June to encourage your support of this year’s program. Until then, should we talk about sausage, let’s assume it’s a bratwurst!

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Membership Application on Page 25

Your MDLA Membership...
Imagine you are the on-site inspector of steel columns for a new public stadium. Under one set of rules, you are charged with the duty to certify the steel is fit to be used to build the stadium where thousands of fans will sit; under another set of rules, you can ask the supplier for only one type of proof of the steel’s integrity or risk being sued by the supplier. Do your best, just don’t mess up.

Now imagine you hire all the labor to build and operate the same stadium. Under one set of rules, you are required to ask about the applicant’s ability to legally work; ask too much, and you discriminate; ask too little and you risk other liabilities. Goldilocks falls from the high-wire without a net.

Minnesota employers are faced with the same high-wire each business day when determining who may be hired. The following article seeks to draw out the issues Minnesota employers face, offer practical suggestions in dealing with hiring laws, and propose legislation to change the current result, at least under Minnesota workers’ compensation law.

BACKGROUND

The diversity of Minnesota’s population has increased significantly over the last few decades, due in large part to the rapid influx of people from other states and countries.\(^1\) Not all of these new residents, however, are authorized or legal. In fact, according to a 2005 report, an estimated 80,000 to 85,000 unauthorized aliens were residing in Minnesota in 2004 - a 515% increase since just 1990.\(^2\) This reflects a recent trend whereby more aliens are choosing to bypass those states traditionally thought of as being heavily populated with unauthorized aliens (i.e. California, New York, Texas, Illinois, Florida and New Jersey) and, instead, moving into areas such as the Midwest.\(^3\)

As the unauthorized alien population seeks employment opportunities within Minnesota, employers are presented with a vast number of job applicants from which to choose. When deciding who to hire, however, employers are faced with the possibility of being fined or criminally sanctioned should they hire an unauthorized worker, while also being prohibited from making hiring decisions based upon an applicant’s race, color, national origin, or citizenship.\(^4\) Employers are, in effect, first required to make non-discriminatory hiring decisions. They are then obligated to determine whether the employees just hired are authorized to work in the United States.

Since employers cannot take a person’s appearance, dress, accent, or name into consideration when hiring, or ask questions during an interview that might reveal the applicant’s national origin or citizenship status, it is perhaps not so surprising that an estimated 55,000 to 65,000 unauthorized aliens were working in Minnesota in 2004, despite enactment of the Immigration Reform Control Act (IRCA), 8 U.S.C. §1324a, in 1986.\(^5\) This Act is intended to prevent unauthorized aliens from obtaining employment in the United States by making it illegal for a person or entity to: 1) knowingly hire, recruit, or refer for a fee for employment an unauthorized alien; or 2) hire an individual without complying with IRCA’s employment verification system.\(^6\)

Following the Act’s enactment, however, only minimal effort was made to enforce it, thus contributing to the rapid increase in unauthorized alien workers in Minnesota and elsewhere. Current events and pending legislative changes, however, indicate that immigration issues are again of great concern, and U. S. Citizenship and Immigration Services (USCIS) now appears to be making more effort to hold employers of unauthorized aliens responsible through the imposition of monetary and criminal penalties. It is therefore particularly timely for employers - or their legal counsel - to be reminded of their responsibilities under IRCA and the costs and consequences of failing to fulfill these obligations.
A. IRCA’S Employment Eligibility Verification Process

In order to prevent unauthorized aliens from obtaining employment in the United States, IRCA mandates that employers follow a specific verification system, which basically requires employers to complete an Employment Eligibility Verification Form (Form I-9) for every employee hired. While the form itself seems relatively simple and straightforward, there are some potential pitfalls into which employers might fall, thereby exposing them to criminal penalties or fines. Below is a summary of the verification process and some suggestions related thereto.

1. **Complete a Form I-9 for each and every employee hired**, not just those one might suspect of being an unauthorized alien based upon appearance, dress, name, or accent. Among the very few exceptions to the Form I-9 requirement is for persons providing domestic services in a private home on a sporadic, irregular, or intermittent basis.

   A person or business entity also does not have to complete a Form I-9 for persons providing services to them pursuant to a contract or subcontract. The contractor (i.e. a temporary employment agency or a general contractor on a building project) is that person’s employer for purposes of the verification process. The entity receiving the benefit of such person’s services, however, cannot use a contract as a means of obtaining labor knowing that the person is an unauthorized alien. A person doing so will be deemed to have hired the alien in violation of IRCA and, therefore, subject to penalties.

   Likewise, a person or business entity is not obligated to verify the employability of an independent contractor or its employees. While a cautious person might be inclined to ask to review the records completed for an independent contractor’s employees, this practice is not recommended as the person may be deemed to have known of any hiring or verification violations.

   Entities using the services of an independent contractor for commercial or residential building construction in Minnesota, however, must also be are of the fact that they might still be deemed the employer for purposes of providing workers’ compensation. Minnesota law presumes that such persons are employees, rather than independent contractors, unless all of nine statutory exceptions set forth in Minn. Stat. §176.042, subd. 2, can be shown.

2. **Verify that employees fully complete Section 1 of Form I-9 by the end of their first day of work**, including signing and attesting to the information provided therein. While employers are responsible for ensuring that Section 1 is fully completed, employers cannot require employees to provide any documentation to verify the accuracy of the information they provide.

3. **Within three days of hire, review the documents provided by employees to establish their identity and employability and complete Section 2 of Form I-9**. Employees must present either one of the accepted “List A” documents or one document from both “List B” and “List C” for employers to review. Employers cannot specify which documents employees provide, nor can employers ask to review more or different documents than those employees choose to bring or documents other than those on the approved lists. Doing so is considered an unfair immigration-related employment practice for which employers can be fined between $100 and $1,000 for each individual discriminated against.

   The reviewed documents must be originals. The only exception is a certified copy of a birth certificate. Employers, however, are not expected to be experts in identifying false or forged documents. Rather, if the documents reasonably appear to be genuine and to relate to the person who is presenting them, employers must honor the documents provided. Employers who refuse to honor documents that appear genuine may again be subject to the above-stated penalties for an unfair immigration-related employment practice.

   Employers must complete Section 2 by listing the title of the documents provided, the document numbers, and any expiration dates on the documents; the person reviewing the documents must also sign the certification section. With the exception of a U.S. passport and the documents on “List B,” employers cannot accept any documents which have expired. Conversely, employers cannot refuse to hire employees simply because their documentation contains a future expiration date. It is an unfair immigration-related employment practice to do so, which again exposes employers to possible fines.
Employers, however, must make note of any expiration dates and should establish a system to remind themselves when any expiration dates are approaching, since employers are required to re-verify employees’ employment eligibility prior to the date of expiration. A failure to do so may result in a finding that the employer continued to employ an unauthorized alien in violation of IRCA.

4. **Keep photocopies of the reviewed documents.**

   Employers are not required to keep photocopies of the documents they review, but doing so is permitted and is probably good practice in case future questions arise as to the legitimacy of the documents or in the event some information is erroneously written onto the form. If employers decide to keep photocopies of the reviewed documents, however, they must make it a policy to do so for all employees and they should keep these documents with I-9 Forms. (It should be noted that retaining copies of the reviewed documents does not negate an employer’s obligation to complete Section 2 of Form I-9.)

   It is also recommended that employers keep I-9 Forms in files separate from employees’ personnel files. The main reason for this is that, upon request, employers must be able to provide the forms to the USCIS within three days. This will be much easier if the forms are kept separately rather than disbursed throughout each employee’s personnel file. A second reason, however, is to avoid any disclosure issues should a request be made for a copy of an employee’s personnel file, as regularly happens in litigation.

5. **Maintain a completed Form I-9 for three years from an employee’s hire date or one year after termination, whichever is later.**

6. **Do not ask or require employees to provide a bond or indemnity against any potential liability under IRCA.** Anyone who does so shall be subject to a civil penalty of $1,100 for each violation occurring after September 29, 1999 and will also be required to reimburse the employee for any amounts the employee paid.

7. **Do not hire, recruit, refer for a fee, or discharge employees based on their national origin or citizenship status.** While it might seem safe and easier to simply forego employing all aliens, employers with four or more employees are prohibited from discriminating against persons based on their national origin or citizenship status if the person is a protected individual (i.e. a U.S. citizen or national, an alien lawfully admitted for personal residence, an alien lawfully granted temporary residence, or a refugee).

A person or entity who follows the above employability verification guidelines, in good faith, will not only be safe from any verification violation charge but, moreover will have established an affirmative defense that it did not violate IRCA by hiring, recruiting, or referring an employee even if it turns out that the employee was, in fact, an unauthorized alien. This affirmative defense is unavailable to an employer who does not comply with the verification process in good faith and, accordingly, a noncompliant entity is subject to the following penalties or sanctions:

- a failure to properly complete, retain, and/or present I-9 Forms for inspection upon request is subject to a monetary penalty ranging between $110 and $1,100 per employee violation occurring after September 29, 1999;
- knowingly hiring, recruiting, or referring for a fee - or knowingly continuing to employ - an unauthorized alien after September 29, 1999 subjects employers to a cease and desist order and a civil fine for each unauthorized alien as follows: a) $275 to $2,200 for the first violation; b) $2,200 to $5,500 for a second violation; and c) $3,300 to $11,000 for the third and each subsequent offense;
- employers found to have engaged in a pattern or practice of knowingly hiring unauthorized aliens, or continuing to employ aliens knowing that they have become unauthorized to work, are subject to a fine not to exceed $3,000, six months of imprisonment, or both.

Just how quickly employers must act in order to avoid being sanctioned when it discovers that a hired employee does not have the proper work authorization? There is actually very little guidance as to these issues, though it appears that employers are surprisingly not required to immediately suspend or terminate such employees. Instead, it is generally suggested that employers first give non-compliant employees a second chance to present
proper documentation and to complete a new Form I-9. The few cases that have considered these issues indicate that employers are entitled to a reasonable amount of time in which to investigate this documentation, but employers should act diligently since employers who fail to terminate an unauthorized alien worker in a timely manner also run the risk of being charged with knowingly continuing to employ an authorized alien.15

Even with the best efforts, not every unauthorized alien will be discovered via the verification process. In fact, it is possible that an unauthorized alien worker is hired and later laid off the job for reasons completely unrelated to their immigration status, such as completion of a project. Such employee might then apply for unemployment benefits, but Minnesota law provides that aliens who are not eligible to work in the U.S. are not entitled to unemployment benefits. Minn. Stat. § 268.085, subd. 12. 16

By rather curious contrast, however, Minnesota is not nearly as restrictive with respect to an unauthorized alien employees’ right to claim and recover workers’ compensation benefits. The second part of this article considers unauthorized alien employees’ rights and, in turn, employers’ liabilities when an unauthorized alien employee is injured on the job.

B. Scope of Workers’ Compensation Benefits

With a significant number of unauthorized aliens in the Minnesota workforce, employers are increasingly faced with questions regarding the scope of workers’ compensation benefits available to such persons when injured in the workplace. While the Minnesota Supreme Court in Correa v. Waymouth Farms, Inc. found unauthorized aliens were entitled to benefits under the Minnesota Workers’ Compensation Act (“WCA”), the Court also invited legislative action to address public policy issues concerning the scope of available benefits to unauthorized aliens.17 In addition to benefits, workers’ compensation litigation involving unauthorized aliens raises significant concerns regarding liability pursuant to Minn. Stat. § 176.82 and Minn. R. Prof. Conduct 8(d). The following sets forth how we got to this point, addresses pitfalls employers and attorneys may experience when dealing with unauthorized aliens, and offers recommendations for amendments to the state WCA to define benefits available to injured unauthorized aliens.

To better understand the context of the Correa decision, it is necessary to look to the backdrop of federal law. In Sure-Tan, Inc. v. NLRB, the U.S. Supreme Court addressed the propriety of an order providing back pay and reinstatement to unauthorized aliens discharged in violation of the National Labor Relations Act (“NLRA”).18 While finding the unauthorized aliens entitled to protection under the NLRA, the Court found the lower court’s order granting back pay (without consideration of the discharged employees legal availability to work in the U.S.) to exceed the scope of its authority.

Two years later in 1986, Congress enacted IRCA which prohibited the employment of unauthorized aliens in the U.S.19 Then, in Hoffman Plastic Compounds, Inc. v. NLRB, the U.S. Supreme Court addressed whether to uphold an award of back pay to an unauthorized alien who had never been legally authorized to work in the U.S.20 The Court found the award of back pay ran askew to the underlying policies of IRCA, trivialized immigration laws, and condoned and encouraged future IRCA violations.

The Minnesota courts however have interpreted the state’s WCA to extend its protections to unauthorized aliens.21 In Correa, the Minnesota Supreme Court construed the WCA to include unauthorized aliens within its definition of “employee.”22 It also found IRCA did not prohibit an unauthorized alien from accepting work in the U.S.23 While noting policy considerations regarding this issue were more properly left to the legislature, the Court concluded unauthorized aliens were entitled to temporary total disability compensation conditioned upon a diligent job search. The dissent, on the other hand, concluded an unauthorized alien was incapable of conducting a diligent job search without violating IRCA, and that a job search that could never result in legal employment failed to satisfy the WCA’s diligent job search requirement.24

Following Correa, in Rivas v. Car Wash Partners, the WCCA addressed whether an unauthorized alien was eligible for temporary total disability benefits after refusing an offer of gainful employment because of his immigration status.25 Affirming the decision of the compensation judge, the WCCA rejected the employee’s immigration status as a reasonable excuse for his refusal of an offer of employment, finding that to allow unauthorized alien status to provide reasonable grounds to refuse work was inconsistent with the policies of IRCA and the WCA.
To complicate matters, employers may also face liability under Minn. Stat. §176.82. Employers must think twice before presenting unauthorized aliens with ultimatum job offers such as “Accept this job or I will call the INS,” “Accept this settlement or I will call the INS” or “Don’t file a workers’ compensation claim or I will call the INS.” Such statements may trigger liability under Minn. Stat. §176.82, subd. 1.26

While Minnesota courts have recognized a plaintiff must establish the subject conduct was outrageous to prevail under Minn. Stat. §176.82, it is not difficult to imagine a court finding a threat of deportation outrageous.27 Employers involved in workers’ compensation claims of unauthorized aliens must be aware of possible liability under this section before making statements that could be construed as an obstruction of benefits in violation of Minn. Stat. § 176.82, subd.1.

In addition to liability under Minn. Stat. § 176.82, subd. 1, threatening an illegal alien with deportation also raises significant ethical concerns for an attorney. Such conduct, which may reflect on an attorney’s honesty and integrity, may be a violation of the Minnesota Rules of Professional conduct and may result in sanctions against the offending attorney.28

The current Minnesota Rules of Professional Conduct do not contain a specific prohibition regarding threats of criminal charges to gain advantage in a civil matter.29 However, the Minnesota Lawyers Professional Responsibility Board (“Board”) continues to view the threat of criminal prosecution as conduct warranting sanctions in some circumstances as conduct prejudicial to the administration of justice under Minn. R. Prof. Conduct 8.4(d).30

During the pendency of a workers’ compensation matter involving an unauthorized alien, attorneys must be cognizant of their statements to an unauthorized alien. Statements which could be construed as threats may be considered prejudicial to the administration of justice under Minn. R. Prof. Conduct 8.4(d) and subject the offending attorney to sanctions.

C. Recommendations for Legislative Amendments to the WCA

The application of the WCA to unauthorized aliens poses numerous challenges to employers and attorneys. While Correa addressed some relevant issues, it deferred to the legislature regarding the public policy considerations raised in the case. The following discussion highlights areas of the WCA in which legislative action is necessary to further define the scope of workers’ compensation benefits available to unauthorized aliens.

1. Medical and Permanent Partial Disability Compensation

Under WCA employees are entitled to payment of reasonable and necessary medical expenses and in some cases permanent partial disability compensation (“PPD”).31

Recommendation: No legislative change is recommended, except unauthorized aliens as family members would not be entitled to make nursing service claims under Minn. Stat. § 176.135.

2. Temporary Total Disability Compensation

Temporary total disability compensation (“TTD”) is used to replace income lost by employees who become temporarily totally disabled from work as a result of an occupational injury and is directly linked to the ability of an employee to be employed.32 Receipt of TTD is conditioned on a diligent job search.33

Recommendation: Amend the WCA to provide language clearly establishing TTD ceases once an unauthorized alien is released to return to work by a physician.

3. Temporary Partial Disability Compensation

Temporary partial disability compensation (“TPD”) is intended to supplement wages an injured worker is able to earn in a partially disabled condition.34

Recommendation: Amend the WCA to provide an unauthorized alien is not entitled to TPD unless he/she can establish ability to be legally employed in the U.S.

4. Permanent Total Disability Compensation

The WCA also provides for permanent total disability compensation (“PTD”) to replace income lost by employees who become permanently totally disabled from work as a result of an occupational injury.35 After $25,000.00 of PTD benefits has been paid, an employer is entitled to offset the amount of
the PTD benefit by the amount paid by any government disability benefit program for disability benefits occasioned by the same injury which gave rise to the workers’ compensation liability.36

**Recommendation:** Amend the WCA to provide an employer is entitled to impute the maximum Social Security Disability (“SSDI”) benefit to the unauthorized alien.

5. **Dependency Benefits**

The WCA provides dependency benefits to compensate dependent survivors of work-related injuries resulting in death.37 Similar to PTD benefits, a reduced dependency benefit is allowed when the combined weekly workers’ compensation benefit and governmental dependency benefits exceed 100% of the weekly wage being earned by the deceased employee at the time of the injury causing death.38

**Recommendation:** Amend the WCA to provide an employer is entitled to impute the maximum SS survivor benefit to the unauthorized alien.

6. **Rehabilitation Benefits**

Rehabilitation benefits available under the WCA may include job placement and/or retraining, and are intended to restore the injured employee to a job related to the employee’s former employment or which will provide a standard of living as close to that which the employee would have enjoyed without the disability.39

**Recommendation:** Amend the WCA to provide entitlement to vocational rehabilitation is contingent upon proof of ability to be legally employed in the U.S.

**CONCLUSION**

Minnesota Unemployment Law already comports with IRCA. Currently, Minnesota Workers’ Compensation Law, however, may be seen as running askew of IRCA, trivializing IRCA, and encouraging future IRCA violation. While Minnesota’s legislature cannot change federal policy regarding immigration, it can change its Workers’ Compensation Statute to comport with IRCA. This can be done without taking away a single right of those employees who already play by the rules.

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**ENDNOTES**

1. The Immigration Reform Control Act, discussed further below, uses the term “unauthorized aliens” rather than “illegal immigrants” and defines an “unauthorized alien” as an alien that is not then lawfully admitted for permanent residence or authorized to be employed. See 8 U.S.C. §1324a(h)(3).


3. Id.

4. Title VII of the Civil Rights Act of 1964 prohibits employers with 15 or more employees from discriminating against any person based upon race, color, religion, sex, or national origin. See 42 U.S.C. §2000e et seq. Similarly, the Minnesota Human Rights Act makes it an unfair employment practice to consider a person’s race, color, creed, religion, national origin, sex, or marital status. See Minn. Stat. §363A.08, Subd. 2. Neither of these Acts, however, made it illegal to discriminate based upon citizenship. Thus, the Immigration Reform and Control Act was amended in 1996 and prohibits discrimination based upon citizenship or national origin. See 8 U.S.C. §1324b(a).


6. “Knowingly” includes not only actual knowledge but knowledge “which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition” (i.e. constructive knowledge). 8 C.F.R. §274a.110(1). Such knowledge, however, cannot be inferred from an employee’s foreign appearance or accent. 8 C.F.R. §274a.110(2).

7. The employment verification system is set forth at 8 U.S.C. §1324a(b).

8. The current Form I-9 is dated May 31, 2005. The form states that it will expire on March 31, 2007 but, at present, no new forms have been published. Nevertheless, employers would be wise to check the U.S. Citizenship and Immigration Services website (www.uscis.gov) as that date approaches and to see whether the Form I-9 which can be downloaded from that website differs from those presently available.

9. Although the government issued Form I-9, a copy of which is provided, includes a “List of Acceptable Documents,” employers should be aware that some of the listed documents have recently been deemed unacceptable. Specifically, under “List A” the documents listed at 2. (Certificate of U.S. Citizenship); 3. (Certificate of Naturalization); 8. (Unexpired Reentry Permit); and 9. (Unexpired Refugee Travel Document) are no longer acceptable documents. The documents at 4. (Unexpired foreign passport with either an I-351 stamp or Form I-94 indicating unexpired employment authorization) are also now only acceptable if the employee is authorized to work for a specific employer. Finally, the document at 10. (Unexpired Employment Authorization Document) may also be seen in a newer form, Form I-766. The most current list of acceptable documents is located at 8 C.F.R. §274a.2(b)(10(v).


11. IRCA explicitly provides that the information contained on the requisite Form I-9, and any documents attached thereto, are not to be used for any purposes other than enforcement of the Act. See 8 U.S.C. §1324a(b)(5). Discovery into an employee’s alien status, moreover, is typically precluded,
even in a discrimination lawsuit, at least until the case reaches the remedies stage. See e.g. Equal Employment Opportunity Commission v. Restaurant Co., 448 F.Supp.2d 1085 (D. Minn. 2006).


13. On an individual basis, employers may prefer to hire a U.S. citizen or national over an alien applicant, provided the two individuals are equally qualified. See 8 U.S.C. §1324b(a)(1). Employers who cannot simply have a general policy of hiring U.S. citizens over non-citizens.


15. The two Ninth Circuit cases which have addressed this issue suggest that employers are entitled to more than six days to investigate whether an employee’s documents are valid, but also indicate that a two week delay in terminating an unauthorized alien violates IRCA. See New El Rey Sausage Co., Inc. v. U.S. I.N.S., 925 F.2d 1153 (9th Cir. 1990) and Mester Mfg. Co. v. I.N.S., 879 F.2d 561 (9th Cir. 1989).

16. See Minn. Stat. §266.085, subd. 12; Rasidescu v. Commissioner of Economic Sec., 644 N.W.2d 504 (Minn. 2002). But see Flores v. Department of Jobs and Training, 411 N.W.2d 499 (Minn. 1987) (explaining that an alien who becomes unauthorized may still recover unemployment benefits if she was authorized to work in the U.S. at the time her wage credits were earned).

17. 166 N.W.3d 324, 329-31 (Minn. 2003).


21. The Minnesota Workers’ Compensation Court of Appeals (“WCCA”) construed the WCA to provide benefits to unauthorized aliens, finding them to be “employees” within the language of the Act in Gonzalez v. Midwest Staffing Group, Inc., slip op. at 2-3 (W.C.C.A. Apr. 6, 1999).


23. See Minn. Stat. §176.101, subd. 1(g)(temporary total disability benefits shall cease if the total disability ends and the employee fails to diligently search for appropriate work within the employee’s physical restrictions).

24. Id. at 331-32 (Gilbert, J., dissenting).


26. Minn. Stat. §176.82, subd. 1 provides civil liability against “any person . . . in any manner intentionally obstructing an employee seeking workers’ compensation benefits.” This statute provides a cause of action for an employee against an employer or insurance carrier who used threats or coercion to discourage or prevent an employee from pursuing a workers’ compensation claim. See Minn. Stat. §176.82, subd. 1. Damages available under Minn. Stat. §176.82 may not be offset by any workers’ compensation benefits to which the employee is entitled, and are in addition to penalties under Minn. Stat. §176.225. Id.; Kaluza v. Home Ins. Co., 403 N.W.2d 230, 235 (Minn. 1987).


28. Previously, under the old Code of Professional Responsibility, an attorney was prohibited from threatening criminal charges to gain an advantage in a civil proceeding. Accordingly, DR 7-105(A) stated as follows: A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.
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Recent Developments in Employment Law for the Defense Attorney

As defense attorneys, all of us have clients with employees. A client with at least one employee has employment problems, and will likely be affected by and need advice regarding recent developments in employment law during the past year. The courts have made significant changes to the way employers pay separated employees' earned but unused vacation, what terms an employer should and must not include in separation agreements, what actions may be deemed as retaliatory when an employee makes a protected report, and many more. As these areas impact most defense attorneys' clients, this summary provides an overview of what defense attorneys should look out for when counseling clients. It is not meant to be an in-depth analysis of each development, but rather a general guide to assist defense attorneys in spotting important issues for their clients.

What is Retaliation, and Will I Know it When I See It?

The United States Supreme Court recently changed the face of retaliation law in the Eighth Circuit, making it more important than ever for defense attorneys to advise their clients to be aware of potential retaliation claims. A retaliation, or reprisal, claim arises when an employee engages in some “protected conduct,” suffering an “adverse employment action” and there is a causal connection between the two. The Burlington Northern case did not affect the “protected conduct” and causal connection prongs, but had a dramatic impact on what may be considered an “adverse employment action,” particularly in the Eighth Circuit.

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The Burlington Northern Claims

In Burlington Northern, the employee, White, was employed as a track laborer, and her duties included cutting brush, clearing litter, transporting track material, and forklift operation. As White had prior forklift experience, she was assigned to mainly forklift operation soon after her hire, although her title and job description did not change. Forklift operation was considered by many employees to be more desirable work, as it was cleaner and less strenuous. After a short period, White complained that her supervisor made sexually discriminatory comments and insulting and inappropriate remarks in front of her male coworkers; the supervisor was disciplined. Burlington subsequently reassigned White to her original track laborer duties, as some employees had complained that the “less arduous and cleaner” forklift job should be given to a “more senior man.” White filed a retaliation complaint. She filed an additional complaint a few weeks later claiming she was subjected to increased monitoring and surveillance after her first complaint. A few days after the second complaint, White and her supervisor had a disagreement, which resulted in White being suspended without pay pending an investigation into possible insubordination. Thirty-seven days later she was reinstated to her former track laborer duties, with full back pay. White filed an additional complaint with the EEOC based on her suspension.

When White sued, her lawsuit included a charge that Burlington’s actions in changing her job duties and suspending her without pay were retaliation for her complaints. The district court found retaliation and awarded White $43,500 in compensatory damages. A Sixth Circuit panel reversed. The Sixth Circuit decision was vacated and heard en banc, wherein the full Sixth Circuit affirmed the lower court’s ruling on the retaliation claim. Burlington appealed the decision to the Supreme Court.

The Change in Retaliation Standards

The Court, in Burlington Northern, resolved a split between the stricter Fifth and Eighth Circuits, and the more lenient Seventh, Ninth and District of Columbia Circuits, regarding the standard to be applied in retaliation cases. Prior to the


2 Protected conduct includes such actions as refusing to perform duties that the employee thinks are illegal, Phipps v. Clark Oil Refining Corp., 408 N.W.2d 569 (Minn. 1987), taking part in an investigation, as either a complainant or witness, or making a “report” with a governmental agency or the employer.

Burlington Northern decision, the standard was relatively high for a plaintiff to make out a retaliation claim in the Eighth Circuit. The previous standard required the employee to suffer “a material employment disadvantage” reflecting “a tangible change in duties or working conditions.” While the standard prevented retaliatory termination, it did not clearly prohibit changes in job duties or schedules. If there were a change in duties or schedule, the employee would need to prove this change led to an “ultimate employment decision,” which was limited to such acts as hiring, granting leave, discharge, promotion and compensation.

The Supreme Court held that conduct not necessarily related to ultimate employment actions, or even actions confined to the workplace, could constitute retaliation under Title VII. The rationale is based on the broader objectives and language of the anti-retaliation provisions in Title VII as compared to the anti-discrimination provisions. Since the anti-retaliation provisions seek to protect employees’ conduct, the protection was not limited to actions an employer could take related to employment conditions. Therefore, the anti-retaliation provisions extend beyond the workplace and outside of the context of employment.

The new standard for retaliation is whether a particular action is “harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination.” Therefore, a plaintiff must show that a reasonable employee would have found the challenged action “materially adverse.” The Court provided that courts and employers would have to wrestle with the difference between “trivial harms,” such as petty slights, minor annoyances, personality conflicts, ostracism, and poor manners, and “materially adverse” actions. As applied to White, the Court held her reassignment to the more arduous, and less prestigious, track laborer duties was retaliation, even though those duties were part of White’s job description. The Court explained that the particular circumstances of the case must be considered, and that reassignment of duties would not always be considered retaliation.

APPLICATION BY THE LOWER COURTS

Although the Eighth Circuit has yet to interpret the Burlington Northern decision, many other circuits, as well as the district courts, have issued opinions that define the terms “trivial” and “material” in a variety of ways. At least one Minnesota District Court has interpreted Burlington Northern to mean that a harm “clearly falls within the category of ‘trivial’ harms [where] there is no indication that [the plaintiff] suffered any disadvantage” from the challenged action.

The courts are also applying Burlington Northern to a variety of other statutory anti-retaliation provisions.

APPLICATION FOR DEFENSE ATTORNEY CLIENTS

Retaliation, or revenge, is a commonplace reaction when a co-worker or subordinate’s claims wreak havoc in the work place or with an employer’s reputation. As such, employers must be particularly vigilant when an employee makes a report or takes part in an investigation to prevent retaliation from occurring. Defense attorneys should advise their clients to train all employees on an annual basis on discrimination and anti-retaliation policies. Employers must have anti-retaliation policies in force, and inform employees of those policies at annual training events and whenever an investigation or report is active in the workplace. Employers must also remind supervisors to be on the lookout for any potential retaliatory conduct after a complaint has been raised, as this is the crucial time to prevent behavior that may result in liability. Employers are not prohibited from reassigning employees who bring claims or who file reports, or from taking other legitimate employment actions, but the prudent employer will engage in an interactive process, such as asking the employee if he or she would like to be reassigned. And, of course, employers should follow up on all claims and complaints, and document the resulting investigation, anti-retaliation notices, and employee responses.

As defense attorneys, we can learn about and understand the culture of our clients’ workplaces and temper our advice accordingly. We can learn about our clients’ job descriptions, reporting hierarchies and training methods and thus be better able to point out areas for potential improvement and liability protection. In so doing, we can become an invaluable resource for our clients.

DOES MY CLIENT HAVE TO PAY FOR UNUSED VACATION TIME, EVEN WHEN THEY HAVE A POLICY AGAINST PAYMENT?

Payment of earned but unused vacation time upon employee termination has long been a matter of contract, or agreement, with the employee. Employers wishing to limit

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4 Baucom v. Holiday Cos., 428 F.3d 764, 767 (8th Cir. 2005).
5 See, e.g., Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997).
8 See e.g., Zelnik v. Fashion Inst. of Tech., 464 F.3d 217 (2nd Cir. 2006) (Section 1983 case); Freeman v. Potter, 2006 WL 2929952 (7th Cir. 2006) (Americans with Disabilities Act case).
employee vacation payout at termination have been able to do so, provided they uniformly applied the provisions as set forth in the employee handbook or other similar policy. For example, employers have limited payment of vacation when an employee fails to give 2 weeks notice before quitting, or when an employee is terminated for misconduct. These policies are no longer viable under a new Minnesota Court of Appeals decision that came down on August 8, 2006, Lee v. Fresenius Medical Care, Inc., 719 N.W.2d 222 (Minn. App. 2006).

In Lee, the employer had a policy that did not allow payment for earned but unused vacation if the separated employee failed to give “proper notice” or was terminated for misconduct. The employer terminated Lee, and did not pay her for her earned but unused vacation. The district court granted the employer’s motion for summary judgment, and Lee appealed. The appellate court explained that earned wages, which by statute must be paid out upon termination, include earned but unused vacation. The court then stated, “a party cannot provide by contract what is prohibited by statute.” The court ultimately concluded that because the statute required payment of earned vacation time, employers could not contract around the requirement, regardless of legal precedent to the contrary.

For the time being, defense attorneys should be sure to inform their clients that they are required to pay all earned but unused vacation time upon termination, regardless of any provisions in their employment handbooks providing for nonpayment. The Lee case is currently on appeal to the Minnesota Supreme Court, so defense attorneys and their clients may hope for a return to the previous, employer-friendly standard.

IS ANYTHING NEW AT THE ADMINISTRATIVE LEVEL THAT MY CLIENTS MIGHT LIKE TO KNOW ABOUT?

EO SURVEY RESCINDED

Defense attorneys have some good news to give their government contracting clients this year. Most human resources professionals working for employers contracting with the government dread the semi-annual Equal Opportunity Survey (“EO Survey”). The EO Survey was enacted by the Clinton Administration to improve deployment of scarce federal resources to those companies most likely to be out of compliance with affirmative action requirements, and to increase self-awareness and encourage self-reporting by government contractors. The EO Survey required government contractors to submit extensive personnel data, including applicant flow, new hire, promotion, termination, workforce incumbency, compensation and tenure data, broken down by race, ethnicity, and gender. Since the relevant EEO-1 race categories were recently expanded, the reporting process became even more burdensome. Companies were particularly unhappy with the time and efforts required of the EO Survey given that the Office of Federal Contract Compliance Programs (“OFCCP”) admitted, years before its elimination, that the EO Survey provided little to no benefit.

Finally, in September 2006, the OFCCP rescinded the EO Survey requirement. The OFCCP’s decision was based on a report from a private consulting firm hired to evaluate the Survey. That evaluation concluded that the Survey’s predictive value was “only slightly better than chance” and that the Survey “fails to provide value to either OFCCP enforcement or contractor compliance.” In the final rule rescinding the Survey, the OFCCP concluded “the lack of utility of the EO Survey, the contractors’ burden of completing the EO Survey, and the burden to the OFCCP to collect and process EO Survey data that will yield such a poor targeting system are too significant to justify its continued use.”

EEOC TO FOCUS ON INVESTIGATION AND LITIGATION OF SYSTEMIC DISCRIMINATION

The Equal Employment Opportunity Commission (“EEOC”) enforces federal laws prohibiting employment discrimination, including investigating discrimination in the workplace. On certain occasions, the EEOC will also litigate discrimination cases against employers on employees’ behalf. Traditionally, the EEOC has focused its enforcement efforts on individual allegations raised in discrimination charges. However, in April 2006 the EEOC indicated its intent to alter its focus to systemic cases of discrimination. “Systemic” cases are “pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on and industry, profession, company or geographic location.”

An independent task force was formed to make specific recommendations regarding systemic discrimination. This task force suggested that the EEOC increase effectiveness in addressing systemic discrimination claims by changing the
way it staffs and investigates cases. In addition, the task force recommended creating incentives for field representatives to successfully identify, investigate and litigate systemic cases; using the proper technology to ensure that staff in different offices who work together on systemic cases can communicate and share information effectively; enhancing systemic expertise among staff; creating an internal Advisory Committee to help ensure that the systemic investigation program is effective nationwide; and educating employers and employees about their rights and responsibilities under the federal anti-discrimination laws.

Defense attorneys should make sure their clients are aware of the change in focus to systemic litigation, encourage their clients to be particularly aware of the potential for systemic discrimination, and counsel their clients to monitor their systems accordingly. For example, employers should audit their payroll practices and policies to make sure there are no unexplained wage disparities between employees in protected classes, and to monitor whether there is a concentration of employees in a protected class in any area of the business. Employers should maintain best practices of applying neutral and consistent discipline and salary programs among all employees. Employers should also have effective discrimination policies and conduct anti-discrimination and anti-harassment training. Employers should be aware that documentation regarding these steps may be discoverable, and may wish to work with counsel to protect any sensitive documents.

Although there does not appear to be a significant increase in class action cases to date, defense attorneys should be aware that the plaintiffs’ bar may attempt to capitalize on these changes to find and bring charges of systemic discrimination to the EEOC. They may draft charges to the EEOC in such a fashion as to raise the specter of systemic discrimination to encourage broader investigations. In litigation, plaintiffs’ attorneys are likely to include additional discovery requests to fish for systemic claims, increasing both the initial burden and the overall risk to employers.

HOW DO I PROTECT MY CLIENT’S RIGHTS IN DRAFTING AN EMPLOYMENT RELEASE, AND WHAT WILL COME BACK TO HAUNT ME IF I INCLUDE IT IN THE RELEASE?

As discussed above, the EEOC has announced a new initiative to step up its fight against systemic discrimination. The interesting part is that the EEOC’s focus appears to be more about filing lawsuits against well-known, larger employers, challenging the use of certain language in the employers’ separation agreements—language that the EEOC argues is invalid and per se retaliatory because it requires the employee to waive his/her right to file a charge of discrimination and “chills” an employee’s right to file and/or participate in an EEOC investigation.

In support of its position, the EEOC has pointed to its guidelines on non-waivable employee rights, as well as the First Circuit’s holding in EEOC v. Astra USA, Inc. The EEOC has taken the position that not only is a separation agreement that requires an employee to release and/or waive his/her right to file a charge and/or participate in an EEOC investigation invalid, the mere fact an employer presents such an agreement constitutes per se retaliation due to the chilling effect that the release/waiver creates.

Locally, the EEOC took an aggressive approach in 2006, filing several lawsuits against companies, including Land O’Lakes and Ventura Foods. Other suits filed outside of Minnesota by the EEOC included Sara Lee and Eastman Kodak. In each case, the EEOC asserted that language used by the employer in its separation agreement, requiring employees to release/waive their right to file a charge with the EEOC in exchange for severance benefits, was a violation of Title VII.

17 94 F.3d 738, 744 (1st Cir. 1996) (stating that “any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest”).
19 06-Cv-3828, (D. Minn., Sept. 25, 2006) (the agreement “required terminated employees to agree, as a material term of the agreement, that they had not filed a claim of discrimination with the EEOC and had no current intent to file such a claim” which the EEOC alleged was prohibited and chilled the employees from filing or prosecuting a charge of discrimination with the EEOC).
20 05-663 (D. Minn., Sept. 1, 2006) (EEOC asserted that conditioning the receipt of severance upon the waiver of filing a charge of discrimination was illegal and per se retaliatory under Title VII, ADEA and EPA).
21 1:06-cv-645 (S.D. Ohio, Sept 29, 2006) (EEOC alleged that Sara Lee required employees to waive their right to file any EEOC charge as a condition to receive severance or other pay, which was a violation of Title VII, ADEA and EPA because it deprived employees of equal employment opportunities and otherwise adversely affected their status as employees because of retaliation).
Prior rulings in favor of the EEOC helped bolster its activity in this area. In August 2006, the U.S. District Court for the District of Maryland held that Lockheed Martin unlawfully retaliated against an employee by offering her a severance package on the condition that she withdraw a pending EEOC charge and refrain from pursuing future charges against the company. The EEOC had also relied heavily on the holding in SunDance, where the court held that the Agreement was, on its face, retaliatory since it conditioned severance pay on the promise to not file a charge with the EEOC. The EEOC argued that the language was a “pre-emptive strike against future protected activity” because the Agreement allowed the employer to sue the employee for the return of the severance payments if the employee subsequently filed a charge against the employer. In October 2006, however, the Sixth Circuit reversed the lower court holding, stating it, as well as other courts, have upheld waivers of claims under ADEA, EPA and Title VII where the agreement was executed voluntarily and intelligently. The court further stated, “the language of the Separation Agreement probably does not prevent mere participation in the EEOC proceedings, and is unenforceable if it does. And, as we have noted, the charge-filing ban may be unenforceable; but its inclusion in the Separation Agreement does not make SunDance’s offering that Agreement in and of itself retaliatory.”

So, what does all this mean for defense attorneys? If you haven’t already, review your standard general release agreements in order to remove and/or amend problematic language. Employers can still condition severance/separation benefits on the execution of a general release agreement but they should take care to ensure the language in their agreements, as well as in discussions with employees, do not run afoul of recent case holdings. Some suggestions to consider, to best avoid the attention of the EEOC, are:

- Add a provision in the agreement that makes it clear that the employee is not waiving his/her right to file a charge.
- Include language that makes it clear that the employee is waiving the right to recover any monetary damages and any other type of relief if the employee, or someone on his/her behalf, pursues an individual charge.
- Use “plain English” to ensure the agreement is understandable to the person receiving it.

And, of course, the best advice is to make sure your clients have counsel review the agreement prior to discussing and/or delivering it to the employee.

**How Have Changes in Minnesota Whistleblower Rights Impacted My Clients?**

Twenty years ago, the Minnesota Supreme Court and the Minnesota Legislature each independently recognized “whistleblowing” as a cause of action in Minnesota. Until the Minnesota Supreme Court’s decision in *Nelson v. Productive Alternatives*, 715 N.W.2d 452 (Minn. 2006) practitioners and courts treated the two independently recognized causes of action as one. No more. Minnesota now recognizes both as independent causes of action. Does it matter? What are the differences between the two?

**Background**

On November 17, 1984, Mark Phipps, a cashier, refused to pump leaded gasoline into a vehicle equipped only to receive unleaded gasoline because it was against the law. He was fired. Phipps sued for wrongful termination and defamation. The trial court dismissed the action on the pleadings, reasoning Minnesota was an at-will employment state (employees could generally be terminated for any reason or no reason at all) and did not recognize a cause of action for wrongful termination. Phipps appealed.

On appeal, the Minnesota Court of Appeals found that an exception should be made to the at-will doctrine in a case such as this and, for the first time, recognized a “public policy exception” to the at-will employment doctrine, holding “[a]n employer . . . is liable if an employee is discharged for reasons that contravene a clear mandate of public policy.” To prevent frivolous or fraudulent suits by disgruntled employees discharged for valid reasons, the court placed the burden on the employee of proving “the dismissal violates a clear mandate of public policy, either legislatively or judicially recognized.” Once the employee carries his/her burden of proof, to avoid liability the employer must demonstrate the employee was dismissed “for reasons other than those alleged by the employee.” The court further held a successful plaintiff was entitled to tort damages. Clark Oil appealed the decision to the Minnesota Supreme Court.

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26 The Clean Air Act prohibited filling an unleaded car’s tank with leaded gasoline.
27 396 N.W.2d 588, 592.
28 Id.
29 Id.
While Clark Oil’s appeal was pending, the Minnesota Legislature passed Minnesota Statute §181.932, which made it illegal to take an adverse employment action against an employee who, “in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official” or who “refuses to participate in any activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law.”

The Minnesota Supreme Court then affirmed Phipps, holding that if an “employee is discharged for refusing to participate in an activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law” s/he may bring a cause of action for the tort of wrongful discharge in violation of public policy (in short, a whistleblower claim). In addition, the court held the burden shifting paradigm that applies to Title VII cases also applies to whistleblower claims and punitive damages are available for a prevailing plaintiff.

TWO CLAIMS OR ONE?

After the Minnesota Supreme Court decided Phipps and the legislature passed the statute, the courts intertwined the two, applying requirements enunciated in the Minnesota Court of Appeals’ and Minnesota Supreme Court decisions to whistleblower causes of action brought under the statute.

Beginning with Vonch v. Carlson Companies, the Minnesota Court of Appeals held that the in order to maintain a cause of action under the whistleblower statute, the law about which the employee complained must be one that protected the “general public” from injury: it was not enough if the law only affected the employer’s internal management about which the public did not have an interest. This “public policy exception” principle was followed by the Minnesota Court of Appeals for the next nine years.

The Minnesota Supreme Court in Hedglin v. City of Willmar brought into question whether the public policy exception would continue to be applied to cases brought under the statute. The Court held that the statute “clearly and unambiguously protects reports made of any violation of any federal or state law or rule adopted pursuant to law.” (emphasis original). The court further explained that it is irrelevant whether the law cited was actually violated, the “only requirement is that the reports of state law violations were made in good faith.” It then went on to state that, finding the laws cited by the plaintiffs did implicate public policy, the court need not decide whether the public policy requirement applied to the whistleblower statute. Finally, in 2002 the Minnesota Supreme Court decided the question in Anderson-Johanningmeier v. Mid-Minnesota Women’s Center, Inc. The plaintiffs in Anderson-Johanningmeier complained to the Minnesota Department of Labor and their boss about the company’s decision not to pay vacation upon termination. Their positions were eliminated and they sued alleging, in part, their termination violated Minnesota’s whistleblower statute. Granting judgment notwithstanding the verdict, the district court found no violation because the pay practices affected only the employees and entities involved in this case, not the public. The Minnesota Supreme Court reversed holding no such requirement exists: the statute does not require a public policy violation and the court was not going to import it.

What the Court did not address, however, was whether or not the public policy exception still existed at common law, or indeed, if there is any common law cause of action for whistleblowing. That question was answered in 2006 when the Minnesota Supreme Court decided Nelson v. Productive Alternatives, Inc. Nelson, the plaintiff, an employee and member of the nonprofit corporation Productive Alternatives, claimed he was wrongfully discharged under common law in retaliation for exercising his voting rights as a member. The sole question before the court was whether the common law cause of action existed or was precluded by the whistleblower statute. The Court held the public-policy exception to at-will employment still existed as a common law tort and required

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20 Phipps Clark Oil & Refining Corp., 408 N.W.2d 569, 571 (Minn. 1987).
21 Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 260 (1981). Under this paradigm, the plaintiff must “demonstrate that his discharge may have been motivated by his good faith refusal to violate the law” and “the burden of production” then “shifts to the defendant to articulate another reason for the discharge.” Phipps, 408 N.W.2d at 572. “To prevail . . . the plaintiff must prove by a preponderance of the evidence that the discharge was for an impermissible reason.” Id.
22 Phipps, 408 N.W.2d at 572-73.
23 439 N.W.2d 406, 408 (Minn. App. 1989).
24 Vonch was fired after complaining that his supervisor was committing “theft and fraud through alleged travel and expense improprieties.” Id. at 406.
25 582 N.W.2d 897, 901 (Minn. 1998).
26 Id. at 902.
27 637 N.W.2d 270 (Minn. 2002).
28 Id. at 277.
29 715 N.W.2d 452 (Minn. 2006).
that public policy at issue be clear. A complaint that does not point to a clear public policy supporting this type of wrongful discharge claim must be dismissed.

**CURRENT LAW: TWO CAUSES OF ACTION – THE SAME WRONG TARGETED, YET DIFFERENT REQUIREMENTS AND AVAILABLE REMEDIES.**

Nelson made clear both the statutory whistleblower and tort of wrongful discharge for public policy causes of action co-exist in Minnesota. To prevail on a statutory cause of action, an employee must show s/he “in good faith, reported a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official.”

To prevail in a common law tort claim for wrongful discharge, an employee must prove he was “discharged for refusing to participate in an activity that [he], in good faith, believes violate any state or federal law or regulation adopted pursuant to law” and the law violated must implicate a clear public policy.

Under both the statute and common law, the claim must be brought in good faith. Defining good faith while interpreting the statute, the Minnesota Supreme Court, held that at the time the employee makes the report, s/he must make it for the purpose of exposing an illegality and not for a self-serving purpose. Moreover, if the report was made to an employer, it cannot be one about which the employer already knows. Whether or not this same definition applies to the common law action has yet to be decided. Similarly, in bringing an action under the statute, the plaintiff is required to specifically identify the federal or state law or rule that was violated. Again, whether this applies to a common law claim has yet to be determined.

**DAMAGES**

While most damages for the statutory and common law whistleblower claims are identical, one important distinction exists. Causes of action brought under the whistleblower statute allow the plaintiff an opportunity to receive attorney fees if s/he prevails. The common law claim, as a tort, does not award attorney fees to any prevailing party. For that reason alone, practitioners are much less apt to see any common law whistleblower claims.

**WHAT IS NEW WITH MINNESOTA LEAVE LAW, AND HOW SHOULD I ADVISE MY CLIENTS?**

The Minnesota Legislature was busy in 2006, passing laws requiring public and private employers to provide more time off, with pay, for Minnesota residents.

**NEW OBLIGATIONS FOR PUBLIC EMPLOYERS**

Practitioners advising public employers must be aware of new laws regarding pay and time off for employees. Below is a brief synopsis of these new benefits.

1. **Salary Differential for Reserve Forces Reporting for Active Duty.**

   Beginning July 1, 2006, public employers must pay a salary differential to reserve forces reporting for active duty. The salary differential is the difference between the employee’s three-month average gross earnings as a state employee (excluding overtime but including any wage increase which would have occurred but for the active service) and the employee’s monthly base pay in active service. The statute also requires some continued health and dental coverage.

2. **Additional Paid Leave for Organ Donors.**

   For each donation an employee makes, the state, counties, cities, towns, school districts and other governmental subdivisions employing twenty or more employees must now provide 40 hours of paid time off for employees seeking to undergo a medical procedure to donate an organ or partial organ. Employers cannot force employees to use vacation or other time for this paid leave, i.e., it is in addition to any other leave benefit available to the employee. Moreover, employers cannot retaliate against an employee for taking this leave. When advising public employers, it is important they know this is an additional paid leave which must be granted upon request.

**BENEFITS AVAILABLE TO ALL EMPLOYEES**

Public and private employers (of any size) must provide certain time off for an immediate family member (parent, child, grandparent, sibling or spouse) whose relative is in...
active service. First, employers must give employees up to ten working days without pay to an employee whose immediate family member, as a member of the United States Armed Forces, has been injured or killed while in active service. Employers may require the employee to use any vacation or other available and leave benefits for this period.

Additionally, the legislature gave immediate family members time off to attend send-off or homecoming ceremonies. In this statute, the legislature expanded the definition of immediate family members to include legal guardians, fiancés or fiancées. This unpaid time off is limited to the actual amount of time necessary, not to exceed 1 day in any calendar year.

**WHAT EMPLOYMENT LAW DEVELOPMENTS AT THE SUPREME COURT WILL AFFECT MY CLIENTS?**

Most defense attorneys, and their clients, would likely agree that an employer would not be liable under Title VII discrimination laws if the individual making the employment decision was completely unaware that the affected employee was a member of a protected class. This might change, depending on the decision rendered by the Supreme Court later this year. The case raising the issue is a Tenth Circuit decision wherein the employer was found potentially liable in a race discrimination case for an employment decision made by a human resources manager who was located in a different state from the employee, and who had no knowledge of the employee’s race. The employer argued there could be no liability because the undisputed facts showed the individual making the employment decision was completely unaware of the terminated employee’s race. However, the Tenth Circuit held that the EEOC could show the employer’s proffered reason for termination was pretextual by using evidence that the manager’s decision was influenced by a biased subordinate. Specifically, the Tenth Circuit stated:

> It should go without saying that a company’s organizational charts do not always accurately reflect its decision making process. A biased low-level supervisor with no disciplinary authority might effectuate the termination of an employee from a protected class by recommending discharge or by selectively reporting or even fabricating information in communications with the formal decision maker. Recognition of subordinate bias claims forecloses a strategic option for employers who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness as to the source of reports and recommendations.

Thankfully, the employer is not held accountable for every statement made by subordinate employees in the employment context. According to the Tenth Circuit decision, the affected employee must show more than mere input or influence in the decision making process. “Rather, the issue is whether the biased subordinate’s discriminatory reports, recommendation or other actions caused the adverse employment action.” In the case at bar, the EEOC was able to meet its burden based on evidence that “the human resources official relied exclusively on information provided by [the employee’s] immediate supervisor, who not only knew [the employee’s] race but allegedly had a history of treating black employees unfavorably and making disparaging racial remarks in the workplace.”

Defense attorneys may think this all sounds familiar, because this is the general state of the law in the Eighth Circuit. The Third, Sixth, Seventh, Ninth, Eleventh and DC Circuits have all reached similar decisions, although there is a split as to the level of control the biased subordinate must exert over the employment decision.

Defense attorneys should be aware that their clients cannot escape liability by merely funneling all employment decisions made by company managers through a human resources employee. Best practices dictate that all employment decisions, particularly those that may rise to the level of an adverse employment action, be reviewed for possible bias by a senior level human resources employee.

**CONCLUSION**

The changes in employment law in the past year illustrate the aphorism “everything old is new again.” For years, employment defense attorneys believed they had safety in advising clients on retaliation claims, releases, whistleblower law and vacation time. Last year proved the law is anything but static. The courts in the past year have raised more questions than given answers, and the legislature has mandated new employer obligations. Hopefully, the court will provide some answers to the remaining questions in 2007. Stay tuned.

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49 Employers cannot terminate employees for taking time off either for the death or injury of the immediate family member or for attending the send off or homecoming ceremonies.
51 EEOC v. BCI Coca-Cola Bottling Co, 450 F.3d 476 (10th Cir. 2006).
Debra Oberlander
EXECUTIVE DIRECTOR, MDLA

It’s cloudy and raining – and the forecast is for possible snow – as we Minnesotans move into another spring. Even though it’s dreary out, it is great to see grass greening up and buds appearing on trees and bushes and birds singing away – new life. It makes me energized. MDLA continues to prosper thanks to our members. We appreciate you renewing your dues and working with the Board and me to provide benefits/services to all of you that we hope will assist you in your respective practices. We are grateful for your continued support of MDLA.

For those of you who have not yet renewed your dues, I hope you will rejoin and work with us to make MDLA one of the greatest state associations for lawyers involved in the defense of civil actions in the country. We can work together and make a difference. An example of this is the outstanding support from members who have been testifying on legislation during this year’s session. The new majority in the Legislature has brought about some interesting legislative proposals this year. MDLA’s focus has always been to ensure a fair and just playing field, and we continue to work towards that goal.

I also want to take this opportunity to remind you of several upcoming seminars. As we have for several years now, MDLA has partnered with the HCBA and MTLA to put on an annual Medical Malpractice Conference. This year’s Conference is scheduled for April 19 and promises to be an invigorating, stimulating seminar with a roster of outstanding speakers on topics in the med mal practice area(s).

In June, MDLA will host its annual golf tournament at StoneRidge Golf Course just east of downtown St. Paul. We are very excited to have Teresa Kimker, Mark Girouard and Susan MacMenamin from Halleland Lewis Nilan & Johnson speak on recent state and federal sanctions decisions and provide practical insights to help identify potential problems in litigation and avoid sanctions altogether. I will be requesting two hours of ethics credit for this presentation entitled “Sanctioned! Traps and Hazards in the Litigation Course, and How to Avoid Them.” After the CLE, we will have lunch with a shotgun start for golf at noon. Please watch for information on this seminar/golf outing. It’ll be a great time.

In July, MDLA and the law firm of Murnane Brandt will co-host the annual women lawyers’ breakfast – July 19 at Windows on Minnesota. MDLA women lawyers really look forward to this yearly breakfast to not only acquire an hour of CLE credit, but to also connect with each other and learn what their colleagues have been doing in the past year. We are working on another interesting, provoking program for MDLA’s women lawyers. We sure hope to see you at the breakfast in July.

MDLA’s 32nd Annual Trial Techniques Seminar is scheduled for Thursday, August 16, to Saturday, August 18, in Duluth. Based on our attendance last year, the decision was made to move the seminar to the Duluth Entertainment and Convention Center (DECC). We hope to increase our attendance by offering the seminar at this exciting venue. Paul Rajkowski, MDLA Vice President, Rajkowski Hansmeier, is coordinating this seminar and he has some great speakers/presentations lined up. It will definitely continue the MDLA tradition of offering outstanding speakers in an area of trial practice.

We are grateful for support from our sponsors/exhibitors. I believe MEI is going to sponsor their golf outing on Thursday afternoon again which should be a lot of fun for you golfers. Integrity is also hosting a reception for MDLA’s newer lawyers on Thursday evening. Please watch for information on this opportunity to get together in the lovely city of Duluth to not only learn about substantive areas of the law, but to also enjoy each other’s company and time with your families.

Thanks again to all of our MDLA members for making MDLA the grand association it is. We truly value your participation and input. If you should have any questions, please contact me at director@mdla.org and/or 612-338-2717.

ASSOCIATION NEWS
January 17, 2007, MDLA sponsored a “Brown Bag” seminar at 4:00 p.m. entitled “INSURERS IN DIRE STRAITS: Money for Nothing and Checks for Free” at the law firm of Rider Bennett, LLP in Minneapolis. This seminar was approved for 1.5 CLE credits by Minnesota, Event Code 105272, and Wisconsin.

Stacy Kabele, Taylor & Lance, gave an outstanding presentation on the Kwong and Malmin decisions and how insurers can avoid being in dire straits. Although the insurer did not participate in either of these cases, they were ordered by the court to pay in Kwong a default judgment and in Malmin an excess verdict in the underlying tort action. The courts did hold, however, that the insurer must be given the right to participate in the lawsuit in order to safeguard its legitimate interests. Ms. Kabele gave attendees background on these cases and how to protect a client’s interests in these types of actions.
MDLA met for its 42nd Annual Mid-Winter Conference (MWC) on February 9-11 at Arrowwood on the shores of Lake Darling just outside of Alexandria, MN. We had a great time. MDLA Secretary Thomas L. Marshall, Jackson Lewis, coordinated the seminar and brought together a great group of talented speakers on a variety of topics. The presentations and speakers were as follows:

On Friday afternoon, we once again had our new lawyers speak. They did a fantastic job and we are lucky to have such an energetic group of newer lawyers involved in the association and willing to speak. Jessica R. Wymore, Rider Bennett, LLP, and Kelly Sofio, Oskie, Hamilton & Sofio, P.A., started this programming with a presentation entitled Strategies for Winning No Fault Arbitrations. They encourage all MDLA members who meet the AAA arbitrator requirements to apply to become an AAA arbitrator. If you need an application, please contact Deb Oberlander at the MDLA office – director@mdla.org.

Next, Chris Angell and Anthony T. Smith, Murnane Brandt, P.A., spoke on Motion Granted! – Putting Yourself in a Position to Win Summary Judgment Motions; followed by Kathryn Downey, Murnane Brandt, P.A., and Chad J. Hintz, Burke & Thomas, PLLP; on How to Handle Difficult Deposition Situations; Amy K. Amundson, Rider Bennett, LLP, spoke on Effective Marketing Ideas for Associates from “Wise” Partners; and last but certainly not least was Lacee Bjork Anderson, The Esquire Group, gave a very interesting presentation entitled Lessons from “The Office”: Discerning Your Vocation as an Attorney.

On Saturday morning, Tom Marshall welcomed everyone to the MWC and introduced our first speaker – Stephen P. Laitinen, Larson • King, LLP, on Qualifying and Attacking Expert Witnesses; followed by Nathan H. Bjerce, Bowman and Brooke LLP, and Cortney G. Sylvester, Halleland Lewis Nilan & Johnson, on Offensive and Defensive Use of Federal Regulations in Products Liability. Dr. John Lundstrom, who appeared courtesy of MEI, gave a very interesting presentation on Independent Chiropractic Evaluations. Patricia Y. Beety, League of Minnesota Cities, and Janet C. Ampe, Henningson & Snoxell, Ltd., concluded the morning’s presentation with a discussion on Issues in Defending Retaliation Claims.

We had free time for the water park in the afternoon and then got together again for a wonderful buffet dinner on Saturday evening.

Everyone was up bright and early on Sunday for that day’s programming. We started out with an update on E-Discovery Amendments to the Federal rules of Civil Procedure: Best Practices for Counsel and Clients by Michele Lange, Kroll Ontrack, Inc. Mark A. Kleinschmidt, Cousineau McGuire, Chtd., and Nicole B. Surges, Erstad & Riemer, P.A., next talked about Occupational Diseases – Benzene Exposure, and Thomas E. Marshall, Jackson Lewis, concluded the morning’s program with an update on potential legislative issues given the new leadership in Minnesota’s Legislature.

Several attendees at the MWC were fortunate enough to receive a copy of Gray’s Anatomy, The Unabridged Running Press Edition with illustrations from Medical Evaluations, Inc.

David Classen, Larson King, won an I-pod Shuffle from Integrity.

Thanks again to our exhibitors for their support of MDLA seminars.

This seminar was approved for the following CLE credits:

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<tr>
<th>State</th>
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<td>MSBA Civil Trial</td>
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The 43rd Annual MWC is scheduled for next February 8-10, 2008, at the Edgewater Resort in Duluth, MN. Please mark your calendars and join us for another great MDLA seminar. We believe this will be a particularly fun event as the Edgewater has their new water park and there is skiing available at Spirit Mountain (and other locations in the North Shore area) and some night life in Duluth for those who seek that form of entertainment. Contact information for the Edgewater is 800-777-7925 or www.duluthwaterpark.com.
MDLA COMMITTEE UPDATES

MDLA’s committees remain active and provide great opportunities to learn and discuss issues/topics of concern with others in similar practices. Meeting notices can be found on MDLA’s web site at www.mdla.org, on the list of upcoming MDLA events at the end of e-mails sent to members and via the list serve for the respective committee. If you are interested in being on a list serve for a particular committee, please let me know, and I’ll add your e-mail address to the appropriate list serve.

Set forth below is information on scheduled meetings of various substantive committees. Committee members are reminded of upcoming meetings via the list serve for each committee. If you are not a member of a committee, again committee meeting notices can be found on MDLA’s web site and on information queries sent weekly. Any MDLA member is welcome to attend any committee meeting. We also welcome guests to “check us out.” A guest is allowed to attend one committee meeting. The guest is then encouraged to join MDLA to participate in the activities of the committee.

AMICUS COMMITTEE: This committee meets via list serve to consider requests for appearances by MDLA as an amicus.

COMMERCIAL LITIGATION COMMITTEE: This committee does not currently schedule regular meetings but does attempt to meet at least quarterly.

CONSTRUCTION LAW COMMITTEE: MDLA’s Construction Law Committee meets at 4:00 p.m. on the third Monday of every other month (January, March, May, July, September, and November) at The Local, 931 Nicollet Mall, Minneapolis. Occasionally, the meeting date is changed, but efforts are made to adhere to this meeting schedule.

EDITORIAL COMMITTEE: The Editorial Committee meets to proof Minnesota Defense, MDLA’s quarterly magazine. Since the magazine is published on or about February 1, May 1, August 1, and November 1, the proofing meetings are scheduled about two weeks before those publication deadlines.

EMPLOYMENT LAW COMMITTEE: This committee meets at noon on the first Wednesday of every other month, commencing with February, April, June, August, October, and December. Again, meeting dates may be changed as conflicts arise, etc. Janet Ampe, Henningson & Snoxell, and Mary Senkbeil, Regis Corporation, made the determination that new co-chairs of the Employment Law Committee should be appointed. Jim Andreen, Erstad & Riemer, and Amy Taber, Rider Bennett, volunteered to serve as new co-chairs of this committee. Thanks to Janet and Mary for getting this committee organized and functioning. We look forward to continuing their work with our new co-chairs - Jim and Amy. MDLA’s Employment Law Committee sponsored a CLE on February 6 entitled “Effectively Using Mental Health Experts in Emotional Distress Claims.” Dr. Michael G. Farnsworth and Dr. Kristine Kienlen gave a very interesting talk on the use of psychiatry and psychology in the evaluation of plaintiff complaints of emotional distress in the workplace. This seminar was approved for 1.5 credits in Minnesota, event code 105944.

GOVERNMENTAL LIABILITY COMMITTEE: This committee attempts to meet at various locations, dates and times, but every other month. The committee does a case law update CLE in February (the first meeting of the year) at the League of Minnesota Cities in St. Paul.

INSURANCE LAW COMMITTEE: MDLA’s Insurance Law Committee meets at noon on the second Tuesday of every other month at the law firm of Bassford Remele, 33 South Sixth Street, Suite 3800, Minneapolis. The first meeting this year was on Tuesday, March 13. Subsequent meetings will be May 8, July 10, September 11, and November 13, barring any unforeseen conflicts. The next meeting of this committee is currently scheduled for Tuesday, May 8, at noon at Bassford Remele.

LAW IMPROVEMENT COMMITTEE: This committee monitors legislation during Minnesota’s legislative sessions. In that regard, a meeting is typically scheduled prior to or early in the legislative session and then during the session as bills are introduced and decisions need to be made on MDLA’s action on such proposed legislation.

NO-FAULT COMMITTEE: This committee generally meets on the second Friday of every other month – starting with January -- although this schedule is currently under review to allow more committee members the opportunity to attend meetings in person.

PRODUCTS LIABILITY GROUP: MDLA’s Products Liability Group meets on a more informal basis, depending on the schedules of the Chair and Vice Chair.

WORKERS’ COMPENSATION COMMITTEE: This committee meets every other month, depending on the schedules of the co-chairs, rotating between the law firms of Erstad & Riemer, 8009 34th Avenue South, Suite 200, Minneapolis, and Brown & Carlson, 5411 Circle Down Avenue, Suite 100, Minneapolis.

Several MDLA members have worked to create an “Ad Hoc Committee on Nursing Home and Assisted Living Claims.” This ad hoc committee is still in an early organizational stage and does not have set meeting dates yet. We are also considering whether or not this committee should become a “full-fledged” MDLA committee rather than an “ad hoc” committee.

Watch for more information on MDLA committees – meetings, activities, etc. – on MDLA’s web site at www.mdla.org. We also have list serves established for each of our substantive committees which allow members of those particular committees to communicate with each other on a more informal basis. These list serves also allow our members in out-state Minnesota more opportunities to participate in the association even though they are often unable to attend meetings in person.
NEW AND RETURNING MEMBERS

The following attorneys have joined the MDLA. We welcome them into our membership.

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tmaguire@brownandcarlson.com
Please contact me.
I am interested in serving on an MDLA committee.

- **Amicus Curiae Committee**
  William M. Hart, *Chair*

- **Commercial Litigation Committee**
  Stephen P. Laitinen, *Chair*

- **Construction Law Committee**
  Steven M. Sitek, *Chair*

- **Continuing Legal Education Committee**
  Susan R. Zwaschka, *Chair*

- **Defense Law Practice Management**
  Michael J. Ford, *Chair*

- **Editorial Committee**
  Victor E. Lund, *Chair*

- **Employment Law Committee**
  Jim Andreen and Amy Taber, *Co-Chairs*

- **Governmental Liability Committee**
  Paul Reuvers, *Chair*

- **Information Sharing Committee**
  Steven R. Schwegman, *Chair*

- **Insurance Law Committee**
  John Anderson and Dale Thornsjo, *Co-Chairs*

- **Law Improvement Committee**
  Rich Thomas and Tom Marshall, *Co-Chairs*

- **Membership Development Committee**
  Mark Fredrickson and Mary Mahler, *Co-Chairs*

- **New Defense Attorneys Section**
  Amy K. Amundson and Lacee B. Anderson, *Co-Chairs*

- **No-Fault Committee**
  Jessica R. Wymore, *Chair*

- **Products Liability Group**
  Cortney G. Sylvester, *Chair*

- **Workers’ Compensation Committee**
  Douglas Brown and Nicole Surges, *Co-Chairs*

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**ANNOUNCEMENT**

The election of the Officers and Members of the Board of Directors of the Minnesota Defense Lawyers Association will take place as part of the Association’s Annual Meeting in Duluth on **Friday, August 17, 2007**.

The Nominating Committee is accepting nominations for the positions of the Officers of the Association and Members of the Board of Directors. The Chair of the Nominating Committee is President Emeritus Gregory P. Bulinski, Bassford Remele, A Professional Association.

If any member of the Association has an interest in serving as an Officer or Member of the Board of Directors, or would like to nominate any other member of the MDLA, please contact Gregory P. Bulinski at gregb@bassford.com or by telephone at 612-333-3000.
APPLICATION FOR MEMBERSHIP

Please print:

Date __________________

I, ____________________________________________________________ , do hereby apply for membership in the Minnesota Defense Lawyers Association and do hereby certify that I am an attorney involved in the defense of civil actions in the State of Minnesota.

I am a partner in or associated with the law firm of ______________________________________________ 

____________________________________________________________________________________________

Year I was admitted to practice ________________ I am currently a member of DRI: Yes _____ No _____

Office address________________________________________________________________________________

____________________________________________________________________________________________

Areas of practice and specialization:

___ ADR ___ Employment ___ Products Liability
___ Appellate ___ Environmental ___ Professional Liability
___ Auto: No-Fault ___ General Litigation ___ Subrogation
___ Commercial ___ Governmental Liability ___ Workers’ Compensation
___ Construction Law ___ Insurance Coverage ___ Other ________________
___ Dram Shop ___ Medical Malpractice ___

Office address

Office telephone _____________________________ Office fax number* ______________________________

Home address_________________________________ Home phone __________________

E-mail address* ______________________________________________________________________________

*By providing a fax number and e-mail address, you are agreeing to receive fax and e-mails from the association that may contain a message of a commercial nature. Please sign here to express your understanding and acceptance of these communications. Signature ________________________________________________

Legislative district where I live __________________ Attorney ID __________________

(Call House Information, Minnesota Legislature, 651-296-2146 to learn which legislative district you live in.)

I attach my check for $ _____________* (to be returned to me if this application is not accepted).

I agree to abide by the bylaws of the Minnesota Defense Lawyers Association.

Signed ____________________________________________________

*Annual MDLA Membership Fees:
Member of the Bar less than 2 years $95
Member of the Bar 2 to 5 years $140
Member of the Bar 5 years or more $210
Retired Membership $40

(Fees established January 1, 2003)

Copy, fill out and mail to:
Minnesota Defense Lawyers Association
600 Nicollet Mall, Suite 380A
Minneapolis, MN 55402

MDLA is exempt from Federal taxation under IRC 501 (c)(6). As a result, membership dues are not tax deductible as a charitable contribution; they may be deductible as a business expense.
ARTICLES FROM PAST ISSUES

Members wishing to receive a copy of an article from a past issue of *Minnesota Defense* should forward a check made payable to the Minnesota Defense Lawyers Association in the amount of $5.00 for postage and handling. In addition to the articles listed below, articles dating back to Fall ’82 are available. Direct orders and inquiries to the MDLA office, Suite 380A, 600 Nicollet Mall, Minneapolis, MN 55402.

<table>
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<tr>
<th>Fall 2005</th>
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<tr>
<td>Police Dogs, the Dog Bite Statute and Governmental Immunity</td>
<td>Paul D. Reuvers</td>
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<td>Bassford Remele: A Longstanding Affiliation with the MDLA</td>
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<td>Proximate Cause: The Forgotten Tool in the Defense Lawyers Bag</td>
<td>Marcus Sanborn</td>
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<tr>
<td>The Medicare Super Lien: more powerful than an ordinary health care lien, faster than a typical governmental bureaucracy and able to impose penalties and increased exposure in a single bound</td>
<td>Sean J. Mickelson</td>
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<td>No-Fault or Our Fault? Ideas on How We Can Solve Many of Our Own No-Fault Problems</td>
<td>Kelly Sofio</td>
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<tr>
<td>Statutes of Limitations, Statutes of Repose and Notice Requirements at a Glance</td>
<td>Michael D. Carr</td>
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<tr>
<td>The Evolution and Extinction of The Business Risk Doctrine and Other Issues Affecting Insurance Coverage in Construction Defect Litigation</td>
<td>Carrie Hund</td>
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<tr>
<td>Barbarians at the Gate: Is Public Entity Lead-Based Paint Litigation Coming to Minnesota?</td>
<td>Matthew S. Frantzen</td>
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<td>Who’s on the Risk? Allocating Damages Among Insurers in Construction</td>
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<td>Defect Claims</td>
<td>Brian H. Sande and Mark R. Bradford</td>
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<td>2006 Legislative Report</td>
<td>Sandy Neren</td>
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<tr>
<td>The Corporate Death Defense: Alive And Well in Minnesota</td>
<td>Richard J. Leighton</td>
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<td>Understanding Minnesota’s Contractual Indemnity Quagmire at a Glance</td>
<td>Michael D. Carr</td>
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<tr>
<td>What Civil Defense Attorneys Should Know About ERISA</td>
<td>Tiffany M. Quick</td>
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<td>Wooddale Builders, Inc. v. Maryland Casualty Co. Supreme Court Addresses Certain Insurance Coverage Issues Pertaining to Moisture Intrusion Claims</td>
<td>John M. Bjorkman and Paula Duggan Vraa</td>
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CONTINUING LEGAL EDUCATION

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<td><strong>MDLA Mid-Winter Meetings</strong></td>
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<td><strong>MDLA Duluth Trial Techniques Seminar</strong></td>
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We've certainly had some interesting experiences since we arrived here last fall. One memorable one was a birthday party for one of Leon's co-workers. It turned out the birthday girl, Assel (pronounced a-SELL) had spent the entire morning at the office assembling food she prepared the day before. A table was loaded with layered salads, meats, breads, nuts, juices, wine, and vodka. We ate and drank till the close of the work day. When it's your birthday here, you do all the work.

We've had a big national holiday, Republic Day, which was celebrated on October 25th with lots of traditional dancing shows at the main square in the city. Most days it's a six lane street, but on holidays it turns into the public square.

Winter didn't start for us until a couple of days before Thanksgiving. Before that, it had never gotten below freezing. Then we got snow, and it has been much cooler since. The snow has stayed. Not that it is really cold, though. Most days it is around the freezing mark, a little above mid-day and a bit below the rest of the time. The coldest it has gotten is into the low teens or single digits for a couple of days. They do a pretty good job of cleaning the streets. During the last snowfall, the trucks were out plowing. To clean two lanes of a four-lane regular street, there were 6 snowplows, each with rotating brushes mounted under the truck, led by a police car, following each other, pushing all the snow to the curb. Following them was a crew of about a dozen men with shovels moving the snow into the open storm sewers which line the street. The sidewalks are cleaned primarily by old fashioned brooms; sometimes steps are cleaned with steaming hot water. Icy sidewalks are a reality, and we are pleasantly surprised when we see cleared walkways. We are very glad we brought our grippers to attach to our boots.

The heat came on in our apartment in late October. We have no control over it, as it is supplied by the city. The weather was still relatively warm, so most days the heat was on and the windows were open. Now that winter has come, the apartment is cool but comfortable. We needed to try to seal up the windows (not necessarily successfully) because when it got really cold outside for a couple of days it was too cold in our apartment. We think we have eliminated enough of the leaks so that the next time it gets really cold, we should be ok.

We have enjoyed the arts here. We live a couple blocks from the Opera and Ballet, and we have taken advantage of both the location and the Soviet legacy of having arts accessible to everyone. Our favorite opera so far is Tosca, and our favorite ballet is Swan Lake. Hundreds of school kids also attended Sleeping Beauty, so that was its own interesting experience. The sets seem to be mainly canvas, so they can be rolled up and stored easily we assume. Some productions we have seen are more forgettable. The ballet company here is considered to be quite good, and benefited when the Bolshoi Ballet came from Russia for safety during World War II (known in this part of the world as the Great Patriotic War). They say the premier dancers are off in more premier locations, but it is quite respectable, and here all year.

We have totally enjoyed the experience of the traditional Kazakh orchestra. At first we could identify very few instruments in the 50-piece orchestra beyond, “I think that one is the dombro, and isn’t that an ocarina?” Each orchestra dresses in traditional Kazakh attire and provides a visual feast for the senses as well. It was obvious that we heard extraordinary musicians.

The Central Museum currently has an exhibit of Faberge eggs. This is not the same one we saw in the Kremlin, but one which was donated to the country by one of the oligarchs. We hear this exhibit will go to Italy next.

We do much of our shopping for produce at a couple of places. One is the central market, known as the Green Bazaar. It has lots of fresh produce, some local, some brought up from Turkey and some from the other “Stans.” We were able to get excellent heirloom tomatoes there up until December 1. As winter sets in the variety steadily diminishes, and the prices go up. However, we still get good apples, pears, carrots, pomegranates, mushrooms, and peppers, at very reasonable prices. We also regularly visit what we nicknamed “our vegetable lady.” She has been out all day, nearly every day, at an open tent with a good supply of fruits and vegetables. We’ve gotten to know her a bit, and it’s been a fun place to pick up produce.

The meat market at the Green Bazaar is a bit too much for us to trust buying meat there. We can’t send pictures, because it’s illegal to take them there, but it is an experience watching a butcher cut up carcasses with a large, heavy ax.
We do enjoy having Moldovan wine available in the grocery stores. (There are no liquor stores here.) Moldova really does have some good wine, but a lot of it here is “semi sweet” (and not very good) so we need to read the labels carefully. We know we won’t find much Moldova wine back home – still a well-kept secret. The grocery stores (even the small neighborhood type stores) here have one long wall of vodka and cognac, occasionally right next to the baby food.

**Leon’s Work**

The first semester of teaching here is nearly over. It has kept him very busy, much more so than expected. He has been teaching nearly every day, and the preparation time is extensive. This is probably because he keeps revising what he is teaching to fit better. For example, he is teaching a couple of undergraduate courses in tort law (negligence law) and, as usual, started with personal injury cases and concepts. Then there was a major news story here about a coal mine explosion killing 14, when someone failed to either turn on or keep operating an exhaust fan. He decided to use it in class to analyze how negligence law would work, using Kazakhstan’s own statutes. The near universal response of the students was, “Why would you ever think negligence law would apply to a situation like that? The government will investigate and tell everyone what to do. Our statutes may apply in theory, but it would never actually happen, and it shouldn’t.” They were right, as within a month the news reported that the accident had been investigated, the government had decided how much to pay the families, and it shouldn’t. Still, it is a good lesson in how much to charge the companies, and it was all over.

Students are not interested in personal injury tort law as anything other than an abstract theory. They have been, however, very interested in business tort law (after all, nearly all the students are majoring in international business law). He revamped the rest of the semester, and has had some very good sessions dealing with various business cases. The students are not used to using specific laws to solve specific problems. Rather, they jump to the conclusion they like and try to find some reason to justify it. Teaching the mental discipline to read what laws say and then apply them has taken a lot of time.

Leon’s other main course this semester has been a graduate level course in trial skills. He is sure this is the first time anything like this has been tried here. Law school is pure theory, and no one teaches any of the skills lawyers use in every day practice. He has had a couple of major challenges. The first is that Leon has had to slow down the pace of the course dramatically. For example, the students said they had all studied evidence so Leon thought he would review it briefly. When they had no idea how to offer evidence, or what the concept of relevancy even meant, Leon needed to slow down – a lot. That part is fine, fun actually. What isn’t is the poor attendance. It is standard practice here for graduate students to have full-time jobs. This is encouraged by the administration. Someone who is working is excused from all classes. They only need to pass the final exam. So out of a class of 25, Leon will regularly have between 5 and 10. This presents lots of problems for a skills class. The final project for the entire class will be a court trial, a pretty simple one with few witnesses and a couple of factual disputes. When the schedule was set out for the opening statements, direct examination, cross examination, and final arguments, a couple of students (who rarely attend class) asked if it would be possible to change the order of things. They wanted final argument first. They clearly do not have any idea what a trial is. Since the main goal is not to pass or flunk students, but to teach as many as possible a few skills, sporadic attendance has been a challenge.

We are getting around pretty well. We will never know enough Russian, but every bit helps. We have an excellent Russian teacher. Life is getting smoother. Two experiences we are glad to have behind us: food poisoning and the police coming to ask us to prove we were not illegal Turkish immigrants.

**Happy New Year**

No, this letter isn’t that late, it’s just that we are at the traditional Kazakh New Year’s celebration, Nauryz (Nah roos), which is celebrated starting with the equinox, our American first day of spring. It is an old holiday, predating Islam, which originated in Persia about 2500 years ago. It was pretty well suppressed during Soviet times, but it is now being made one of the main holidays of the year.

It started with an official three-day holiday, although events will go on for a full month. In a logic we don’t fully understand, people were given time off on Thursday, Friday and Saturday for the holiday and then required to return to work on Sunday, which is normally a day off.

The university had its own separate celebration, which ended up taking nearly all day. We began by visiting the yurts that several departments had rented especially for the day. In the parking lot area where they were standing were tables and tables of food. Each department in the university
had their own “pot luck” style table of ethnic foods, and a number of faculty and students wore their ethnic costumes. There were Kazakh, Tatar, Korean, Uigur, Turkmen and Kyrgyz clothes.

Everyone was to sample everything from each of the tables. There were lots of dishes made of horse meat, horse fat, and noodles. We ate dried horse neck, horse sausage, and who knows what else. (We recognized tongue and stomach; we don’t want to know what we didn’t recognize.) Their favorite drink was fermented mare’s milk. Bread is a big deal in this culture, and the favorite for this traditional holiday is a deep fried variety. Many other kinds were there also, including nan, a disc with an outer ridge baked in a tandoor oven. At the same time as everyone was eating at the pot luck tables outside, students put on a program on the steps of the university, including demonstrations of ethnic dancing, in full costume. Other performances included students singing or playing instruments, usually with karaoke style recorded backup music.

There were also demonstrations of various Kazakh traditions. One interesting one we saw takes place at the time a child learns to walk. The parents select one of the oldest relatives, usually a grandmother or aunt, to preside. The baby, dressed to its finest, then has a string loosely wrapped around its legs. Grandmother gives her wishes for the child’s future, as well as her blessing, and then she cuts the string. As the baby walks a few steps, handfuls of candy are thrown to the entire crowd. In this demonstration the rector (a woman) was the honored person selected to do this. We attached a photo of a little girl just after the ceremony.

After the program was completed, we were invited into the yurt with the university president and heads of departments for another meal and celebration. There were about 20 of us in the yurt, and the table was covered in traditional foods. The meal started, though, with beshbarmak, the traditional national dish of Kazakhstan. It is boiled horse meat served on noodles and some onions, with a little broth. The name literally means “five fingers,” and it originally was eaten that way. After eating, drinking, and toasting our way through way much too much food and drink, we were finished with the first round. Then appeared the boiled sheep’s head on a platter of boiled potatoes. Fortunately there were lots of important guests at this meal, so we didn’t have to cut into it first. (Not so two nights later when Leon was presented with the sheep’s head, and while being asked to cut it was told the story of the time they had given it to another American guest who promptly fainted.) The most honored guest cuts off pieces of meat for those around him, then passes the platter down the table for others to do the same. At about the same time out came the fermented camel’s milk. It’s frothy, sour, and Leon’s was also lumpy with curds. Not our favorite. It is an acquired taste and this was our first sample.

Most of the conversation centered around the toasts. They are not monologues, but are frequently interrupted with jokes, banter, and even occasionally a song. People were drinking vodka, cognac, mare’s milk, camel’s milk, or juice for the toasts. If you didn’t want to drink too much, it was no problem, but if you wanted to “bottom’s up” for each toast, you could consume large quantities of alcohol.

The party finished late afternoon when the university president decided it was time to wrap it up and gave a toast that said the party’s over. We then went to “Old Square” where the general party for the city was being held. There were lots of ethnic dance and music groups, but most of them had finished before we arrived. We were in time for the pop singers, who all sound alike and all seem to sing to the same Russian disco music track.

It’s definitely spring here, and the weather has been warm for nearly a month. Of course, the heat is still on full blast in our apartment. Which means we have windows open 24/7 just to stay comfortable. Both of us keep quite busy with teaching. We are looking forward to getting out of the city more as the weather gets better. We know we are getting near the end of the time we will be here.

This is one very interesting slice of Kazakhstan life we wanted to share with you.

–Nancy and Leon Erstad
THE COMMERCIAL LITIGATION CORNER

By Patrick D. Robben
RIDER BENNETT, LLP

Admit it—you are drawn like a moth to the flame to the daily stream of details coming out of the ongoing Anna Nicole Smith media coverage. (Of course, as learned barristers, your interest is purely professional in the legal issues involved.) The real life soap opera going on in courtrooms in California, Florida, and the Bahamas has undoubtedly inspired many law school final exam scenarios. The case has made also celebrities of everyone involved, including the Broward County, Florida medical examiner Dr. Joshua Perper and probate judge Larry Seidlin. We commercial litigators can only watch with envy as criminal and family practitioners get all the face time as cable television panelists!

Actually, there is a “business litigation” element to the story, although it receives far less attention. There has been much attention paid to the fight for custody of Smith’s sole remaining child, infant Dannielynn Hope Marshall Stern. That child stands to come into her mother’s stake in the $88.5 million bankruptcy judgment Smith obtained against E. Pierce Marshall, the son of her pre-deceased second husband, Texas billionaire J. Howard Marshall II. J. Howard Marshall II died in 1995. How it came to pass that Smith stood to possibly obtain the multi-million dollar sum is not often explained in the flurry of media stories about the paternity battle.

Vickie Lynn Marshall, a/k/a Anna Nicole Smith, married J. Howard Marshall II in 1994. Her husband died a year later, and Smith then filed for Chapter 11 bankruptcy in the United States District Court for the Central District of California. E. Pierce Marshall filed a proof of claim in the bankruptcy proceeding alleging that Smith had defamed him and seeking a declaration that this claim was not dischargeable in the bankruptcy. In return, Smith brought a counterclaim alleging that he had tortiously interfered with a gift she expected to receive from her husband, who died without providing for his wife in his will in spite of her understanding that she would be provided for in the form of a “catch all” trust. A separate legal battle in Texas Probate Court resulted in a declaration following trial that a living trust and “pourover” will created as part of J. Howard Marshall II’s estate plan, which did not provide for Smith, was valid.

The California federal court nonetheless awarded Ms. Smith $44.3 million in compensatory damages and an equal amount of punitive damages. The court found that E. Pierce Marshall had conspired to suppress or destroy an inter vivos trust instrument that his father intended to create for Smith’s benefit and to strip him of his assets by backdating, altering, and otherwise falsifying documents, arranging for surveillance of his father and Smith, and presenting documents to him under false pretenses. The punitive damages were awarded based on the court’s finding that there was “overwhelming” evidence of E. Pierce Marshall’s “willfulness, maliciousness, and fraud.” Final judgment was entered on that award in 2002.

The Ninth Circuit Court of Appeals later reversed on the grounds that the California bankruptcy court lacked jurisdiction, based on the probate exception to federal jurisdiction. The probate exception recognizes the states’ exclusive jurisdiction over probate matters. The United States
Supreme Court granted certiorari and heard oral arguments on Smith’s appeal from that decision on February 28, 2006, with Ms. Smith observing the proceedings in person from the gallery. Howard K. Stern, who is listed on the Bahamian birth certificate as the father of Smith’s surviving daughter, was one of the attorneys of record for Smith in that appeal.

The Supreme Court reversed the Ninth Circuit’s decision, concluding that the probate exception to federal jurisdiction was not applicable. Marshall v. Marshall, 547 U.S. 293 (2006). The high court remanded the case back to the Ninth Circuit for consideration of whether Smith’s claims qualified as a bankruptcy “core proceeding” and to address E. Pierce Marshall’s arguments of issue and claim preclusion. (E. Pierce Marshall himself died in June 2006. His family was apparently awaiting a resolution of Smith’s affairs before discussing the status of the litigation.)

Now you know everything you need, or ever wanted, to know about the bankruptcy judgment that serves as the backdrop to the ongoing legal maneuvering as to who should be awarded custody of Smith’s child. Underlying the whole tragic saga is a legal ruling on the extent to which the probate exception denies or permits a federal bankruptcy court to make final determinations on contested claims in an adversary proceeding.

Speaking of celebrities, the MDLA Commercial Litigation Committee’s own celebrity, Committee Chair Steve Laitinen from Larson•King, LLP, presented on expert depositions at MDLA’s great Mid-Winter Conference held in February at Arrowwood Resort in Alexandria. The Mid-Winter Conference is a great example of the types of opportunities available through active participation in MDLA and its Committees. If you are interested in being a part of the Commercial Litigation Committee, feel free to contact Steve or myself, or pass on your interest to our Executive Director par excellence, Deb Oberlander.

Everything… you need to know about releases and settlements… is covered in the new and improved RELEASE DESKBOOK, (5th Ed.) published Summer 2006, David M. Bateson and Richard C. Scattergood, editors.

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Updated sections of the RELEASE DESKBOOK discuss Ethical Considerations in Settlements, as well as partial releases and employment cases. The chapters include a detailed review of the law and practical aspects of structured settlements and more. Each chapter contains forms and suggestions to help the practitioner in the drafting and analysis of settlement and release agreements.

The DESKBOOK includes an extensive appendix of forms and a topical index. Call MDLA (612) 338-2717 to order: $90 each, including postage and handling.

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MN △ WINTER 2004 31
This column affords me the opportunity to talk about DRI - The Voice of the Defense Bar. DRI is an international organization of lawyers involved in the defense of civil justice. Although we are comprised of more than 22,000 members, we are an organization of individual relationships. The camaraderie, friendships and professional interaction among our membership are the elements that keep us relevant, vital, and strong.

I had the opportunity to join defense organization representatives from Illinois, Indiana, Minnesota, North Dakota, South Dakota, and Wisconsin for the North Central Regional Meeting on Friday, January 12, and Saturday, January 13 at the Charleston Place Hotel in Charleston, S.C. The 2007 meeting was hosted by MDLA. The 2008 Regional meeting will be hosted by Indiana in Savannah, Georgia, on January 18 and 19.

First, a little background. DRI is divided into 12 geographic regions. We are a part of the North Central Region which includes Illinois, Indiana, Minnesota, North Dakota, South Dakota and Wisconsin. This is the third largest region. Regions meet twice a year; once at the DRI Annual Meeting (this particular meeting is typically a planning session) and again as a group at a local venue. One of the purposes of the Regional meetings is to bring together various state and local defense organizations to share ideas and exchange information to improve each of our organizations. If you have any ideas to enhance the relationship between DRI and MDLA or ideas for facilitating interaction between the groups, please feel free to contact me.

DRI Regional Director Chuck Cole, a defense attorney from Chicago, started the 2007 Regional meeting by giving a short history of the North Central Region. Marc Williams, DRI First Vice President, provided an update on DRI activities and stated DRI membership is at 22,500 which is an all-time high for DRI.

John Trimble, the immediate past Regional Director then gave a presentation on judicial independence and the task force created by DRI to study issues facing the judiciary, including salary/pay, court funding and security, judicial selection, and unjust criticism. “Without Fear or Favor: A Report by DRI’s Judicial Task Force” will be submitted to the DRI Board of Directors for approval this Spring. Although the Report is still in draft form, I have had an opportunity to review the report and one observation is very clear: Although many defense lawyers are well aware of issues important in their respective jurisdictions, many of us to not understand issues involving the “judiciary’s institutional legitimacy, judicial independence, and judicial accountability…”

We also heard a report on JAIL –Judicial Accountability Initiative Law – an effort in SD to amend the Constitution to create Special Grand Juries who could strip judges of their judicial immunity from suit. The South Dakota Bar Association organized as well as many private citizens and public figures to speak out against putting this initiative on the ballot. The initiative was overwhelmingly defeated.

We also heard a very good presentation on e-discovery which was a shorter version of a presentation at DRI’s Annual Meeting in San Francisco. It was very interesting and informative. The speaker discussed discovery problems associated with electronically stored information, including scope, proportionality, costs, sanctions, and privilege. One of the myths about electronic discovery is that it’s just like paper only you push a button and the truth is on the hard drive.

Paul Rajkowski and I then gave an interactive presentation on getting new lawyers involved in the MDLA and keeping current members active. We also solicited information from the other state organizations as to what they have done along the same lines. Paul and I highlighted
our new lawyers program at the Mid-Winter Conference (MWC) and how this has increased attendance.

John Wilkerson, South Carolina DRI State Rep, provided information on activities of the S.C. association which hosts three or four judicial receptions throughout the year - typically quarterly. They also host a yearly legislative reception. States from the North Central Region then provided updates on their activities, etc., over the past year. We were fortunate to have the executive director and a Board member from the Canadian Defense Lawyers Association join us at our meeting this year. They provided us with some very interesting information on their association and how it works because it encompasses such a large area.

I would strongly encourage you to make plans to attend the 2007 DRI annual meeting in Washington, D.C. (Wednesday, Oct. 10, 2007 – Sunday, Oct. 14, 2007). You can register online at www.DRI.org. There is a block of rooms at the Marriott Wardman Park hotel which is a classic favorite choice among downtown Washington, DC hotels. You save money if you are a DRI member and more money if you register early. Remember, we are all stressed with our responsibilities to our clients, firms and families. However, I became a member of DRI because of what DRI has to offer and because it is good for business. The annual meeting will be an excellent opportunity to meet clients and good lawyers around the country who are willing to refer business.

As a State Representative I will facilitate the flow of communication between DRI and MDLA. I will also be attending MDLA Board meetings and submitting quarterly reports to DRI. If you have any questions, needs or concerns, please feel free to give me a call or contact me by email, sschwegman@quinlivan.com.

DRI MEMBERSHIP APPLICATION
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I belong to a Local or State Defense Association: Yes (   ) No (   )

To the extent that I engage in personal injury litigation, I do not, for the most part, represent plaintiffs.

I have read the provision above and hereby make application for Individual Membership.

(   ) My check for the annual dues ($195 U.S.) is enclosed. Please forward information on DRI publications, seminars and services.

(   ) I have been admitted to the bar for fewer than five years. My check for the annual dues for this category ($125 U.S.) is enclosed. Please forward the appropriate publications.

(   ) I wish to serve on a committee. Please send Committee Preference List.

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Signature_______________________________________________

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