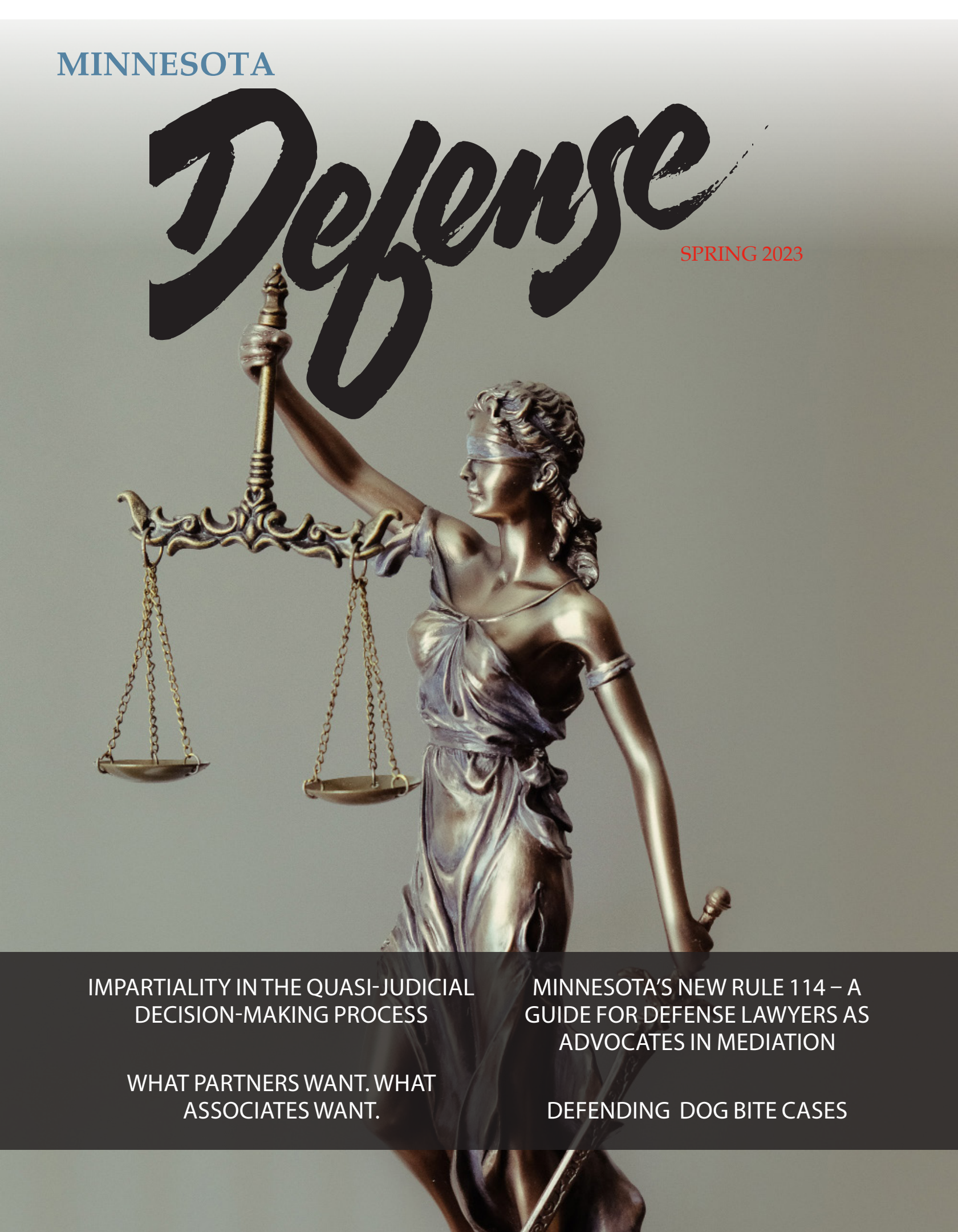
MINNESOTA

Defense

SPRING 2023



IMPARTIALITY IN THE QUASI-JUDICIAL DECISION-MAKING PROCESS

WHAT PARTNERS WANT. WHAT ASSOCIATES WANT.

MINNESOTA'S NEW RULE 114 – A GUIDE FOR DEFENSE LAWYERS AS ADVOCATES IN MEDIATION

DEFENDING DOG BITE CASES

Articles from Past Issues 3

Join a Committee 3

The President's Column
By Tammy Reno 4-5

Impartiality in the Quasi-Judicial Decision Making
By Paul Reuvers 6-9

What Partners Want What Associates Want
By Stephanie Angolkar, Elle Lannon, Sean Kelly 11-15

Defending Dog Bite Cases
By Ron Berman 17-20

Minnesota's New Rule 114
By Kristi Paulson 22-24

DRI Corner
By Jessica Schwie 25

MDLA Congratulates 26

The Editorial Committee welcomes articles for publication in *Minnesota Defense*. If you are interested in writing an article, please contact the Chief Editor or call the MDLA office at 612-750-8606-6293.

VOLUME 44, ISSUE 2 • SPRING 2023

Minnesota Defense is a regular publication of the Minnesota Defense Lawyers Association for the purpose of informing lawyers about current issues relating to the defense of civil actions.

All views, opinions and conclusions expressed in this magazine are those of the authors, and do not necessarily reflect the opinion and/or policy of the editors, the Minnesota Defense Lawyers Association or its leadership.

The publication of any advertisement is not to be construed as an endorsement by *Minnesota Defense*, the Minnesota Defense Lawyers Association, or its leadership, of the product or service offered.

All inquiries should be directed to MDLA, 9505 Copley Drive, Indianapolis, IN 46260

ARTICLES FROM PAST ISSUES

Members wishing to receive copies of articles from past issues of *Minnesota Defense* should forward a check made payable to the Minnesota Defense Lawyers Association in the amount of $5 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, 9505 Copley Drive, Indianapolis, IN 46260.

Winter 2023
MDLA's New Affinity Bar Fee Structure
Stephanie Anolkar and Cally Kjellberg-Nelson
Telling Your Story: Using the Doctor Deposition Offensively
Kevin McCarthy
Under (Peer) Pressure: A Breakdown of Minnesota's Peer Review Statute
Ryan Paukert
Supreme Court Will Hear Case on Nursing Homes & Federal Funding
Mollie Buelow and Pat Skogland
Evaluating Exculpatory Clauses After Justice & Rugged Races
Patrick H. O'Neill III and Samual H.J. Schultz

Fall 2022
Finding the Balance between Trial Life and Home Life
Sheina Long
The Widening Path to Criminal Liability for Medical Negligence
Anu Chudasama
Supply Chain Disruptions & Breach of Contract Claims
Elizabeth Roff

Spring/Summer 2022
Preventing a Nuclear Attack: Recommended Strategies in Responding to Nuclear Verdict Tactics
Rylee Retzer and Shannon Nelson
Untangling the Web of an Employer's Obligation to Provide Employees Leave: The Minnesota Parental Leave Act
Michelle Christy
Navigating the Changes to the Rules Governing Miller-Shugart Settlement Agreements in Minnesota
Beth A. Prouty and Lance D. Meyer

Fall 2021
A Tale of Two Pandemics: COVID-19 and Multi-Million-Dollar Verdicts
Elena D. Harvey
"Construction" Re-Defined: Demolition Work Now Potentially Subject to the Improvement To Real Property Statute of Limitations
Elizabeth Roff
Why Women Lawyers Lead
Stacy Lundeen and Elle Lannon

JOIN A COMMITTEE

MDLA committees provide great opportunities for learning and discussion of issues and topics of concern with other members in similar practices. Activity in committees can vary from planning CLE programs, to working on legislation, to informal gatherings that discuss updated practice information or changes in the law. Serving on a committee is one of the best ways to become actively involved in the organization and increase the value of your membership.

If you would like to join a committee's distribution list, please update your member profile on mdla.org specifying the appropriate committee under the "Practice Type" section. You will be automatically added to the distribution list.

To learn more about an MDLA committee, please visit www.mdla.org. Meeting times and dates for each committee are listed online.

Committees available include:

- Amicus Curiae
- Construction Law
- Diversity
- Editorial
- Employment Law
- Events Committee
- Governmental Liability
- Insurance Law
- Law Improvement
- Law Practice Management
- Long-Term Care
- Membership Committee
- Medical Liability and Health Care
- New Lawyers Committee
- Motor Vehicle Accident
- Products Liability
- Retail and Hospitality
- Technology
- Workers' Compensation
- Women in the Law

THE PRESIDENT'S COLUMN

Tammy Reno

Nilan Johnson Lewis

Spring has sprung! Or has it? Mother Nature is sure keeping us on our toes, isn't she? I hope you all survived the winter and are enjoying the sunshine and warmer temps. We certainly earned it.

We are excited to see the Associates Series kick off. This series is designed to help new (and newish) lawyers understand the steps and timing of a civil litigation case, from the start of a lawsuit through trial. Sessions will occur monthly. All lawyers, regardless of membership in the MDLA, are welcome to attend. Our first session was held on March 22nd and was taught by Rachel Beauchamp of Cousineau Malone. She discussed "Understanding the Life of a Civil Case." She walked through the steps and timing of a civil litigation case. Other upcoming seminars include "Taking Fact Witness Depositions," "Winning with Expert Witnesses," "Litigation Reporting not Law School Writing," "Monitoring and Momentum," "Wellness as a Newer Attorney," and "How to Second Chair Your First Trial." All sessions are taught by some of our revered members and are not just for brand new lawyers. Please encourage attorneys in your firms to attend these valuable sessions. You can go to the website and see what is upcoming and watch for sessions to be announced in the weekly Request for Information and Upcoming Events email. This will culminate in the Trial Academy in January 2024.

This year marks MDLA's 60th year! We will be having a 60th Anniversary Gala to kick off the Trial Techniques Seminar that will be held from August 17th to August 19th. The Gala will be Thursday, August 17th at 6:00 p.m. It will be held at the DECC and we will honor our past presidents, our accomplishments, and our future. If you have any fun photos of any of our past presidents, send them my way (treno@nilanjohnson.com). Brendan Tupa has been busy putting the seminar together and he has a great lineup of speakers/topics. This year's seminar is entitled "Learn from the Legends of the Defense Bar." It is exactly what it sounds like. Come learn from some of our past presidents and other seasoned members! Watch for the finalized agenda and registration information. Save the date now and get your room in Duluth booked! Don't forget to shop for the perfect Gala outfit!

Our Diversity Event will take place on May 24, 2023, at 12:00 p.m. at the Como Park Zoo & Conservatory (Berglund Wright Room). It is always well attended, and we certainly hope this year is no exception. This year's topic is "Diversity in Practice: Advocacy in the Immigration System." Presentations will include "Immigration 101 and who are The Advocates for Human Rights"; "Immigration Court, Court Monitoring, Call to Action: Treatment in the Legal System"; and "Ethics of Pro Bono Immigration Humanitarian Practice." The programming will go until 3:45 p.m. and we encourage you stay for the reception from 4:00 p.m. to 6:00 p.m.

Another event to watch out for is the Women's Breakfast. It is scheduled for July 20, 2023, at 8:00 a.m. at Windows at the Marquette Hotel. Stay tuned for the topic and speaker line-up. The Women's Breakfast is not just for women. We encourage everyone to attend. Also, if you were not aware, we now have a Wellness Committee. As lawyers, the stress of the job and other commitments can be difficult. This committee will come up with ways to educate us and give us the outlets we need to live and practice in a healthy way. Be on the lookout for information about this committee and upcoming meetings and events.

The transition of our director from Ewald to Lisa Mortier has gone well! While there were a few hiccups along the way, as we would expect, Lisa is up and running and taking care of us. She is bringing great ideas to the organization and is giving us the refresh that we need to help our organization run smoothly and grow. We are lucky to have her and look forward to what the future holds with her at the helm. If you need to reach her, her email address is: lmortier@mdla.org.

If you are interested in writing an article for this publication, let us know! It is a great way to educate your colleagues and is a good marketing tool. We encourage attorneys of all levels to bring important issues to our attention.

The President's Column **continued on page 5**

The President's Column **continued from page 4**

If you are interested in becoming a member, adding new members from your firm, or becoming a committee chair, please contact me at treno@nilanjohnson.com or our director at director@mdla.org, and we will help you get involved to contribute to the success of our thriving civil defense community.

Best of luck to you all as you tackle the final months of winter. Hopefully there are warm weather vacations in your future. I look forward to a successful 2023 and am excited to see what the year has in store for MDLA!

Founded 1963

MINNESOTA DEFENSE LAWYERS ASSOCIATION

Celebrating 60 Years

60TH ANNIVERSARY GALA

Please join your colleagues and friends in honoring our past & building our future.

Thursday, August 17th - Duluth Entertainment Convention Center

6:00pm - 7:00pm Reception

7:00pm - 8:00pm Dinner

8:00pm -11:00pm Live Band - Laura Velvet

Sponsor Opportunites available on the MDLA website

IMPARTIALITY IN THE QUASI-JUDICIAL DECISION MAKING

By Paul Reuvers

"Government is a trust, and the officers of the government are trustees. And both the trust and the trustees are created for the benefit of the people."

Across the United States, local government officials are regularly called upon to investigate disputes, apply the applicable law to the facts found, and make binding decisions about disputed rights. These "quasi-judicial" decisions include everything from the ordinary to the obscure. Few would be surprised that permitting and licensing decisions are quasi-judicial, but many are surprised to learn that run-of-the-mill employment decisions, when made by a political subdivision, constitute quasi-judicial decisions. These decisions are not only labeled differently when they are made by a political subdivision, they are also subject to certain safeguards. In Minnesota for instance, quasi-judicial decisions are generally subject to certiorari review only, unless a statute authorizes district court jurisdiction. This safeguard ensures an expedient and deferential review to prevent the judiciary from encroaching on the constitutional power spheres of the other government branches. The separation of powers, however, is not the only constitutional principle at play.

As government agents, public officials must comply with Fourteenth Amendment Constitutional due process. In particular, the Constitution protects parties' rights to an impartial decision maker. A decision maker's impartiality can be significantly affected by bias and prejudice, conflict of interest, ex parte communications, and of course, bribery. Municipal officers are arguably more prone to these external influences than judges or other quasi-judicial decision makers because they typically live and work in the communities they serve.

This article will review how courts have handled each of these forms of bias and prejudgment. It will offer suggestions for how to address these issues. And, it will outline the types of remedies available to aggrieved parties.

I. BIAS AND PREJUDICE

Bias is a prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair. *Bias, Oxford Languages.* There are three common forms of bias. The first is procedural bias, which deals with unfair procedures that benefit one party over another. The second is implied bias, which is bias based on relationships. And the third is actual bias, which is genuine prejudice for or against a party. The existence of any form of bias can be grounds for a reversal.

Procedural bias occurs when the decisionmaker does not meet all the requirements for a fair hearing. This typically arises from pre-hearing decisions. For example, in *Barbara Realty Co. v. Zoning Bd. of Review*, a zoning board was set to hear an application that would allow the petitioner to build a motor lodge. 85 R.I. 152, 128 A.2d 342 (1957). Before the hearing, a member of the zoning board told the petitioner that the board would object to the application. When asked why, the board member said, "What difference does it make, we are going to shove it down your throats anyways." *Id*. at 155, 343. The court held that the board member should be disqualified in the interest of justice and to preserve public confidence in his impartiality. *Id*. at 157, 344. Because a quasi-judicial decision requires an investigation into a disputed claim, application of a prescribed standard to the facts found, and a decision binding on the parties, a decision maker renders its decision arbitrarily when it has already decided ahead of time, before the hearing, without

Impartiality **continued on page 6**

Paul Donald Reuvers is a graduate of the University of Notre Dame and William Mitchell College of Law. Following law school, he clerked for Minnesota Supreme Court Justice Esther Tomljanovich. Paul is an AV Preeminent® rated attorney by Martindale-Hubbell, and a founding member of Iverson Reuvers who has defended municipalities in litigation for over 30 years. He has litigated and tried cases in state and federal court and is a frequent speaker on a range of municipal issues.

.

Impartiality **continued from page 6**

consideration of the evidence at the hearing, and without considering the full record.

Implied bias is presumed or inferred bias, which results from a familial or other close relationship between the decisionmaker and the interested party. Relationships can undoubtedly cause bias in quasi-judicial decisions, but they are not certain to sway the decision. Instead, when bias is implied, the greater harm is likely to the public confidence, which is undermined not only by actual bias, but also the appearance of impropriety. As such, implied bias can be grounds to invalidate a decision.

Actual bias is a genuine prejudice that a judge, juror, witness, or other person has against some person or relevant subject. Actual bias by one decision maker can invalidate the votes of others, especially when that decision maker is in a unique position of influence. In *Cont'l Prop. Grp., Inc. v. City of Minneapolis*, a city council member took a closed mind approach to a high rise proposed in her ward of the city. No. A10-1072, 2011 WL 1642510, at *19 (Minn. Ct. App. May 3, 2011). She also organized neighborhood opposition to the project and took an advocacy role to sway the opinions of other voting council members. *Id*. The council denied the applications at issue in a unanimous thirteen-zero vote, but the court invalidated the decision because of the impact of the biased council member. *Id*. at *4, 20. Biased opinions by a decision maker regarding projects in their ward/district are often given substantial weight by other officials. Bias by one decision maker can be imputed onto other decision makers and invalidate decisions made with a large majority.

Quasi-judicial decision makers can also create bias by going beyond their roles and interfering with conclusions of independent experts. Municipal officials are often not experts in the fields in which they make decisions. As a result, municipalities frequently hire independent experts to conduct studies to help them understand the impact of their decisions. Public officials cannot interfere with independent experts to favor their own personal beliefs. In *Living Word Bible Camp v. Cty. of Itasca*, an environmental scientist was hired by the county to draft an Environmental Assessment Worksheet (EAW). No. A12-0281, 2012 WL 4052868 (Minn. Ct. App. Sept. 17, 2012). A county commissioner who opposed the proposed development requested that the scientist delete a number of "no-impact" and "mitigation" statements that favored development. *Id*. at *8. Ultimately, the commissioner succeeded in having the scientist remove some conclusory language in the EAW that favored the development. *Id*. The county board voted three-one to require an Environmental Impact Statement. *Id*. at *9. The court held that the commissioner's actions that altered the independent EAW were biased and rendered the decision-making process arbitrary and capricious. *Id*. at *22–23. Quasi-judicial decision makers cannot interfere with independent experts to alter or sway their conclusions to favor one side.

Bias can be an especially difficult procedural deficiency to eliminate in the quasi-judicial context, because it can be formed prior to decision makers becoming public officials. In *McVay v. Zoning Hearing Bd.*, a developer sought a special exception permit to build multi-family dwellings. 91 Pa. Commw. 287, 496 A.2d 1328 (1985). The city had never staffed its zoning board, so they appointed five new members for the sole purpose of deciding the special exception permit. *Id*. at 289, 1329. But before being appointed to the zoning board, a majority of the zoning board members had signed petitions opposing the multi-family development. *Id*. After a hearing and deliberations, the zoning board unanimously rejected the permit. *Id*. at 290, 1330. The court held that the decision was void because of bias. *Id*. And the court gave little merit to the zoning board members' claims that the previous opposition was personal, not official.

II. CONFLICTS OF INTEREST

Conflicts of interest are easier to spot than bias, but just as difficult to manage. A conflicting interest generally arises when a public official has an interest not shared in common with the other members of the public. Public officials are disqualified from participating in proceedings in a decision-making capacity when they have a direct interest in the proceedings' outcome. Financial considerations and relationships are two usual suspects creating conflicts in the quasi-judicial process. There is, however, no settled rule as to whether an interest will disqualify an official, because conflicts of interest are especially difficult to manage in quasi-judicial decisions involving local government. Local governments function best when they are led by individuals involved and interested in their communities. As a result, local government officials live and own property in the communities they serve, and this is often a requirement for the job.

Thus, courts take a case-by-case approach based on the unique facts, even where financial conflicts are involved, which is the purest form of conflicts. In Minnesota, the courts consider multiple factors, including the nature of the decision being made; the nature of the pecuniary interest; the number of officials making the decision who are interested; the need, if any, to have interested persons make the decision; and the other means available, if any, such as the opportunity for review, that serve to insure that the officials will not act arbitrarily to further their selfish interests. While direct financial interests may seem rare, local governments often must make decisions affecting property values. There is a conflict of interest any time a public official's property value changes based on their decision. In *E.T.O., Inc. v.*

Impartiality **continued on page 8**

Impartiality **continued from page 7**

Marion, a town board denied a bar's application to renew its liquor license in a two-one vote. 375 N.W.2d 815 (Minn. 1985). One of the board members that voted "no" owned fifty-three acres across from the bar, and his property had been devalued by $100,000.00 after the bar opened. *Id*. at 816. The Minnesota Supreme Court held it would be hard to imagine a "more direct, admitted financial interest" and to permit the board member to vote in such a situation would make "our statutes and decisions prohibiting conflict of interest … a mere mockery." *Id*. at 820. The town board's decision was reversed because of the conflict. *Id*.

Conflicts created by property interests are particularly common for municipal officials because their property values might easily be affected by zoning changes, variances, conditional use permits, or grants of liquor licenses. Property ownership can result in a financial conflict, and it can also create a relationship conflict.

Grabowsky v. Twp. of Montclair, involved such a property conflict formed through affiliation. 221 N.J. 536, 115 A.3d 815 (2015). Two members of a township board were in leadership roles in a church. *Id*. at 541, 818. A developer sought to build a large, assisted living facility in a lot beside the church. *Id*. at 540, 817. The plan required a zoning application, which was approved by the township board. The court noted that an organization "may have an interest in the [zoning] application by virtue of its proximity to the property in dispute" whether or not the organization participated in the application. *Id*. at 558, 828. Here, a state statute required notice to all properties within two hundred feet of a proposed zoning change. *Id*. at 559, 828. Because the church was within two hundred feet, the court held that it had an interest. *Id*. at 559, 829. The court declined to impute automatic conflicts for all members of a church or organization with a conflict. *Id*. at 561, 829. Instead, it held that public officials with "substantive leadership" positions in an organization will share the conflict themselves. *Id*. at 561, 829–830. Therefore, a conflict existed for the two public officials.

Relationships can potentially create conflicts of interest, although mere membership, as opposed to a leadership role in an organization, is usually insufficient. The relationship conflict can also be based on legal obligations. In *Appeal of City of Keene,* the city requested the county board chair make a public necessary determination for properties surrounding an airport. 141 N.H. 797, 693 A.2d 412 (1997). The chair of the board was an attorney whose law partner previously represented two property owners near the airport and subject to the determination. *Id*. at 798, 413. The county board denied the request for a public necessity determination. *Id*. The Supreme Court of New Hampshire invalidated the decision because of the chair's conflict of interest. *Id*. at 802, 416. The court reasoned that under the ABA model code, the board chair previously shared his partner's ethical obligations to two former clients—and that they maintained a duty to them as former clients. *Id*.

III. EX PARTE COMMUNICATIONS

Ex parte communications in quasi-judicial proceedings are similar to such communications in a judicial proceeding. They include any communication outside of the record of the pending proceeding. Due process requires a quasi-judicial officer to refrain from ex parte communications. The main difference in the quasi-judicial context is ex parte communications include conversations between public officials outside the hearing.

Courts have used varying approaches to analyzing ex parte communications. Under the first, and seemingly minority approach, an ex parte communication does not deny due process where the substance of the communication was capable of discovery by the complaining party in time to rebut it on the record. The second approach focuses on the nature of the ex parte communication and whether it was material to the point that it prejudiced the complaining party and thus resulted in a denial of procedural due process.

In *Jennings v. Dade Coty*, the court applied the second approach. 589 So. 2d 1337 (Fla. Dist. Ct. App. 1991). The court reasonably recognized that public officials will unavoidably be the recipients of unsolicited ex parte communications regarding quasi-judicial matters they are to decide, and the occurrence of such a communication does not mandate automatic reversal. *Id*. at 1341. Instead, the court adopted criteria to analyze the prejudicial effect of ex parte communications and created a cause of action where the aggrieved party proves that an ex parte communication occurred. *Id*. at 1342. Such a showing creates a presumption the communication was prejudicial unless the defendant proves contrary. *Id*. The burden of persuasion stays with the public official. *Id*. The key to the second approach is determining the prejudicial effect of an ex parte communication. Other jurisdictions have adopted similar criteria, which include the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and, whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

IV. BRIBERY

Bribery is partiality in its most unadulterated form, and when it occurs in the quasi-judicial process it is plainly a due process violation subjecting the decision to reversal. Moreover, evidence of a decision maker's past bribery can render future decisions reversible as well. This theory is

Impartiality **continued on page 9**

Impartiality **continued from page 8**

called compensatory bias, and it occurs when a decision maker, who is taking bribes in some cases, is biased against those who do not bribe the decision maker, so he or she avoids being perceived as uniformly and suspiciously soft on the party opposing the government. Therefore, a decision maker's acceptance of bribes in the past creates a presumption that they may unfairly decide cases where no bribe is being offered.

Besides being a serious due process violation, it is illegal—typically a felony offense—for public officials to accept bribes in every American jurisdiction. Even in states with immunity for quasi-judicial decision makers, such immunity rarely extends to crimes of corruption such as bribery, extortion, public office crimes, conspiracy, etc.

V. REMEDIES

When an individual experiences partiality in a quasi-judicial proceeding, they can choose between multiple remedies, which may differ depending on the type of quasi-judicial proceeding they involved. In Minnesota, for example, allegations involving a wrongful termination must be advanced by writ of certiorari, unless the allegations fall under a statutory grant of jurisdiction to Minnesota's district courts, such as the Minnesota Human Rights Act. See *Dietz v. Dodge Cty.*, 487 N.W.2d 237 (Minn. 1992). In the land use/zoning context, with some exceptions, district courts have jurisdiction to hear appeals from quasi-judicial decisions. The aggrieved party may request the court approve/deny the pertinent application without further proceedings, on the basis the decisionmaker rendered an arbitrary and capricious quasi-judicial decision. Indeed, when a zoning authority's decision is arbitrary and capricious, the standard remedy is that the court orders the permit to be issued. Nevertheless, courts have held the existence of a biased public official is more akin to a decision based on the incorrect legal standard. In practice, this means remand to the decision-making body to reconsider the decision (excluding the biased member) is the typical remedy when faced with bias or prejudicial conduct in quasi-judicial decision making.

Outside of quasi-judicial review procedures afforded by state law, an aggrieved individual may instead choose to pursue a claim under 42 U.S.C. § 1983. The attendant caveat with such claims, however, is the aggrieved individual must have been deprived of a protected life, liberty, or property interest. The right to procedural due process does not guarantee process for processes' sake; the right to due process guarantees process for the sake of protecting an established interest. As such, the existence of a protected interest is a prerequisite for a constitutional claim.

As with judicial review procedures under state law, the viability of a § 1983 claim will turn on the specifics of the interest at issue. For instance, land use applications generally do not result in protected property interests. Likewise, there is no constitutional right to continued at-will employment; and, unless other facts are present which would change the analysis, the claim will be subject to dismissal. In an effort to bolster a claim by presenting additional facts, a party may also simply prove their claim is not viable. For instance, a court may be unwilling to hear a constitutional claim where a grievance process was available to a terminated employee, but the employee failed to exhaust their state law remedies. The same requirement applies in the land use/zoning context where, for example, a plat application is rejected, and the party pursues a constitutional claim without first applying for a variance.

Identifying partiality can be difficult. Bias is typically not as obvious as a council member openly organizing opposition in the community. But if bias is actually identified, it is important to remove the biased decision maker from all further proceedings regarding the matter because bias is grounds for a reversal. This is true even if a vote was unanimous or had a large majority because courts focus on the impact the biased decision maker might have had on the others. As a result, best practice is to simply proceed without the decision maker. If the proceedings have already started, this might require building a record regarding the remaining members' impartiality. But if the impact was potentially substantive or substantial, the whole process may need to be started anew without the biased decision maker.

Courts will reverse decisions tainted by a conflicted decision maker, and the same approach regarding biased decision makers should be used with conflicts. This is true even if they do not vote because a board member may not cure a conflict of interest by abstaining from the vote after already participating in the board's discussion.

In the context of municipal quasi-judicial decisions, ex parte communications are bound to happen. This is why all ex parte communications are not per se grounds for reversal. But when they do happen, it is important to identify them and disclose them. For example, a stray comment in response to a random question on the street will surely have less prejudicial effect than speaking in depth to an interested party before the hearing. It is, like all aspects of impartiality, a balancing act that turns on the facts.

Thank You *for your service*

Practice Areas

ADR
Appellate
Automobile Law
Business Litigation
Commercial Real Estate
Commercial Transportation
Construction
Employment Law
General Liability
Insurance Coverage
Professional Liability
Medical Malpractice
Product Liability
Subrogation
Workers' Compensation

Shayne Hamann

Steve Erffmeyer

Arthur Chapman is proud to have two shareholders on the MDLA Board of Directors. Shayne's practice is focused in automobile and No-Fault litigation and Steve's practice focuses in the areas of commercial transportation and general liability.

The attorneys of Arthur, Chapman, Kettering, Smetak & Pikala, P.A. deliver top-tier legal expertise with down-to-earth character and values, without ego and pretense. Clients call on Arthur Chapman attorneys for litigation counsel in the areas of civil and business litigation.

Minneapolis, MN
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402

Hudson, WI
811 1st Street
Suite 201
Hudson, WI 54016

ArthurChapman.com
1-800-916-9262

Good Litigators | Good People | Good Counsel

WHAT PARTNERS WANT. WHAT ASSOCIATES WANT.

By Stephanie Angolkar, Sean Kelly, and Elle Lannon

This article is the culmination of surveying MDLA members, at both partnership and associate levels, with the goal of providing anonymous feedback so that partners may know what associates truly want; and, associates can know what partners truly want, through feedback that individuals may not otherwise feel comfortable providing. Our sources remain confidential, and we strive to prevent from providing any information that would reveal the identity of our participants.

First, we asked partners a series of questions. Here are summaries of their responses.

Partners

1) How did you develop a client base?

- Doing good work for clients, including staying on top of timely reporting and being responsive, it led to referrals. Trust is built up over time like a bank account. One can only take so many "withdrawals" from that bank account before losing the client's trust and their work.
- Getting your name out by being involved in organizations and doing presentations helps an attorney develop their reputation.
- Speak with adjusters on the files you are working on to develop relationships, answer their calls, and ask if you can help with anything else.
- Willingness to explore new areas of law.

2) What can associates do to develop a client base?

- Listen carefully and get to know your client's wants and needs. Deliver on those wants and needs with your assigning partner. Follow up on those wants and needs.
- Do quality work, be timely, and meet all deadlines. This helps you gain the trust of the attorneys you are working with, which leads to opportunities with clients.
- Do more than asked. If reviewing medical records, be sure to suggest the next steps to move the case along. If you prepare a motion, ask to argue it, but do not push if the

What Partners Want **continued on page 12**

Stephanie Angolkar is partner at Iverson Reuvers. Stephanie's practice focuses on the defense of government liability, products liability, and complex litigation. She was named a Super Lawyers Rising Star in 2019 and 2020. Before joining Iverson Reuvers in 2008, she clerked for the Honorable Harriet Lansing and Kevin G. Ross of the Minnesota Court of Appeals.

Elle Lannon joined Quinlivan & Hughes, P.A. as an Attorney in February of 2021. She practices in the areas of civil litigation, with a focus on employment and governmental liability. Elle is active with the Minnesota Defense Lawyers Association where she serves as a Co-Chair on the New Defense Lawyers Committee. Elle also received the Deb Oberlander New Lawyer Award from MDLA in 2022 for her leadership, professionalism, skills, and advocacy in the practice of law.

Sean Kelly is an attorney with Lind, Jensen, Sullivan & Peterson, P.A. and Co-Chair of the MDLA New Defense Lawyers Committee. Sean defends businesses and insureds in a wide range of matters including vehicular accidents, premises liability, personal injury, property damage and construction defect litigation. He practices in the state and federal courts of Minnesota, Wisconsin, and North Dakota.

What Partners Want **continued from page 11**

partner has to decline.

- Be yourself. Make yourself visible. Get to know clients and pieces of their personal lives to ask about the next time you talk to them.

- Develop relationships with your peers in client organizations.

- Develop a network of attorneys who trust you to do a good job if you are referred a case. Look for opportunities to refer cases to other attorneys.

3. What qualities make an associate a good candidate for partnership track?

- Anticipate the needs of a partner on a file and work "ahead" without being asked.

- One partner noted, "there is nothing I love more than getting a file back before a conference or motion hearing and having the exhibits already pulled, tabbed, and an argument outlined."

- Instilling confidence that file tasks can be completed in a timely manner, with little or no oversight.

- Sees the big picture and makes recommendations that move the case toward resolution.

- Get along with clients and show leadership.

- Someone who bills a lot. The firm is a business, so hours and revenue generated matters in the final analysis.

- Someone partners can envision being an equal in 5-10 years.

- Make themselves part of the fabric of the firm and recognize the business side of law.

- Puts in nonbillable time to get to know the practice area better.

4. What can make an associate not a good candidate for partnership track?

- Not visible or engaged and does not work hard.

- Not seeking out work when they are not busy and not communicating.

- Does not recognize the business side of the firm and only having an employee-based mindset.

- Misses deadlines.

- Submits incomplete work.

- Does not respond to partners or clients.

- Fails to learn or absorb new information.

- Has bad attitude.

- Does not work with others.

- Has a task-based mindset.

- Fails to see the big picture and provide recommendations.

- Fails to meet billable goals, turns down work, and declines to pursue opportunities. Partners may be too busy to invite associates to attend a deposition, draft a brief, or observe an argument. An associate should seek out these opportunities, even if they are non-billable.

- Refuses to participate in nonbillable activities.

- Inserts themselves without knowing the lay of the land and acting like they know more than you do.

5. For a new lawyer coming straight out of law school, what should their priorities be in order to set themselves up for success?

- Communicate – ask questions but try to find the answer first by looking at the rule. It is ok to not know the answer, but it looks lazy if you do not try first.

- Meet all deadlines.

- Enter time contemporaneously. You will short yourself and the firm of time if you do not.

- Learn about write-offs and how to word billing. Ask why time was cut off and look at revisions so you learn the art of billing.

- Organization and responsiveness.

- Completeness and accuracy in work.

- Learn to work with people with different styles and practices to learn as much as you can in your first several years.

- Treat partners or senior associates as your clients.

What Partners Want **continued on page 13**

What Partners Want **continued from page 12**

- Find a good mentor who will take you under their wing and give you work.

- Join organizations to network.

- Make sure you are actually going into the office every day.

- Get face time in by walking around and talking to people and eating in the lunch room.

6. For the more experienced associate (about 4-6 years) joining your firm, what should their priorities be in order to set themselves up for success?

- Evaluate what is needed on a file, bring the work plan to the assigning attorney, and offer to do the work.

- Take the initiative to handle a case from beginning to end.

- Know your files inside and out and be cognizant of all deadlines, including insurance companies' necessary reports and deadlines.

- Write-offs should be less. Everyone spins their wheels from time to time, but now an associate should demonstrate efficiency and experience.

- Organization and responsiveness.

- Go above and beyond by adding value to work and not just doing what was assigned but adding thoughts and information that helps show readiness to step into the next level.

- Start looking for ways to raise your profile by speaking at events and writing for publications.

- Try to develop an expertise in a practice area or areas and focus on developing a client base.

- Exceed billing goals every year.

7. What information do you need that would help you support an associate being involved in MDLA?

- Associates being involved in MDLA is a no-brainer for me, personally, but if this were a situation where the associate's firm was not familiar with MDLA, the firm would need to see information that shows how the associate's involvement with the organization is valuable.

- CLEs on topics to develop the associate's litigation and management skills.

- Opportunities for publication and presentation, exposure to potential clients, and practical skill development.

- MDLA and other similar organizations are "you get what you give" types of groups. If you are a member but not attending committee meetings, conference, or other events; and, are not volunteering to write, speak and lead, you are not getting the value MDLA can provide, which is connections and opportunity.

- Training sessions or "academies" where we can send associates.

8. How can associates improve their practical knowledge and experience?

- Volunteering for assignments outside their comfort zone within their firm.

- Pro bono work with Volunteer Legal Network, SMRLS, ILCM, or the Pro Se Project.

- Be involved on a file from beginning to end to learn how the pieces fit together.

- Worry more about the experience and less about whether it is something you will immediately be compensated for.

- Offer to use nonbillable time to watch a partner take a deposition or make an argument on a file you worked on. You learn a lot.

- Ask questions if you are unsure why the partner does what they do.

- Gain trial experience, even if it is from simply sitting at counsel table using nonbillable time is extremely valuable down the road when a partner or client inquires about trial experience.

- Get involved with organizations like MDLA and other bar associations. Present at these organizations, even if it is introducing a speaker.

- Join a substantive practice committee with MDLA and develop a network of lawyers in your field for ideas and questions.

We also asked associates a series of questions. Here are summaries of their responses.

Associates

1. Are you working at a firm you see yourself at in 5 years? Without identifying the firm, why or why not?

- Yes: Good work-life balance, good salary, and the

What Partners Want **continued on page 14**

What Partners Want **continued from page 13**

path for growth is clear

- Yes: More structure, good support from partners and staff, interesting work, friendly staff, and the ability to work from home.

- Unknown: Lack of structure, unclear path for promotion, unsure if the partners I like to work with are going to stay or go.

2. Do you prefer in-person work, remote work, or hybrid? Why? On a scale of 1 to 10, how important is flexibility when it comes to working in-person vs. remotely?

- In-person: I find it less distracting. I have also found some of the best opportunities for learning "how to be a lawyer" come from stopping by a partner's office to chat in person.

- Remote (hybrid): I find I am often more productive working at home and enjoy the ability to be there more often. However, I like having the option to come in if I need a change of scenery or if the work I am doing would just go better/be easier to accomplish in the office. Flexibility is a 10 for me.

- Hybrid: I like to be in the office for a change of scenery, but I also value the opportunity to work from home. I would rate it a 10 for how important flexibility is when it comes to working in person vs. remotely.

3. Do you get regular feedback from the partners on your job performance? What could partners do better to provide feedback?

- Yes: However, partners are busy so often it can be hard to get meaningful feedback in a timely fashion.

- Yes: But partners have emphasized letting them know when we have questions, but it still feels like I might be bothering them when I know they have a loaded schedule.

- No: I assume that if I am not getting feedback then my job performance is generally good, but it would be nice to know every once in a while if I am on the right track.

4. What mentoring experiences are most helpful for you?

- As a woman in the legal field, women mentors have been particularly helpful.

- Being able to shadow them as they do lawyering activities that I have either not had to do yet or haven't done in a while.

- Shadow a couple different partners to see what they do differently and why it works best for them. The actual experience of watching them do certain activities and having feedback on why or how they choose their strategies has been the most impactful.

- Getting to discuss the business of having a legal practice, acquiring and retaining clients, what organizations to join, how to get referrals, and keep your practice growing.

5. What are the 2 or 3 personality traits of the best partners to work for? What are the 2 or 3 personality traits of partners you prefer to avoid working for?

Best Traits:

- Patient
- Helpful Mindset
- Ability to Create Deadlines to Keep Everyone on Track.
- Kindness
- Honesty
- Responsive
- Clear Expectations
- Good Sense of Humor

Traits to Avoid:

- Indirect Communication Style
- Domineering
- Solely Focuses on the Negatives
- Rude
- Dismissive
- Unhelpful
- Cluttered
- Forgetful

6. What do you think your firm or employer could do to improve culture in your workplace, or what do they do well, if you think culture is good?

What Partners Want **continued on page 15**

What Partners Want **continued from page 14**

Improvements:

- Increasing our diversity in the workplace.

- Starting events and activities back up that occurred before the COVID-19 pandemic.

- A better physical presence in the office.

Good Culture Examples:

- Everyone seems to genuinely get along and they are actively trying to find ways to encourage people to come in and socialize with each other.

- Ensures that the firm is a space where everyone has a voice, and everyone has the right to voice their opinion.

- Everyone feels valued.

7. Do you feel encouraged to get involved in organizations like MDLA? Why or why not?

- Yes: The partners here encourage us to join and be active in organizations.

- Yes: Networking is strongly encouraged, but not specifically MDLA or any specific organizations.

- Yes: I feel like my firm encourages new attorneys to get involved to meet fellow attorneys in their field. Associates do need clarity, however, on what the firm is willing to pay for when it comes to attending these organizations' events.

8. Knowing what you know now, what questions would you ask if you had to re-interview for your current job?

- What is the firm doing to recruit attorneys of color?

- What kinds of things does it take to be successful at this firm?

- Of the people who have left this firm in the last 2-3 years, what were the reasons for leaving?

9. What do you wish your firm would provide more training on?

- Practical matters, like taking depositions, etc. Whatever would be the kind of practical lawyering that will come up first as we advance our careers.

- Software programs.

- More technical training on the systems we utilize.

- More chances to stop in and observe jury selection, the cross-examination of an expert, or some other portion of a live jury trial that we almost never get a chance to see. It is very difficult to get any opportunities to simply observe trials because many clients do not want to pay for a second chair.

MDLA's Associate Series

MDLA is presenting its first-ever Associate series, with a practical skills course each month, hosted at member firms. Sessions include:

March – "Understanding the Life-Cycle of a Civil Litigation Case"

April – "Taking Fact Witness Depositions"

May – "Taking Expert Witness Depositions"

June – "Litigation Reporting not Law School Writing"

July – "Monitoring and Momentum"

September – "Wellness as a Newer Attorney"

October – "How to Second Chair Your First Trial"

See www.mdla.org for more information and registration! Stay tuned for Trial Techniques Seminar in August and Trial Academy in January 2024!

LEXITAS™

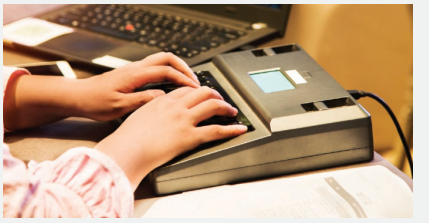
Reliability Proven. Trust Earned.

Legal & Corporate Support Services You Can Trust

For legal, insurance, and corporate leaders responsible for vital outcomes, Lexitas delivers highly responsive professional services paired with powerful technology to help move your practice, and your business, forward.

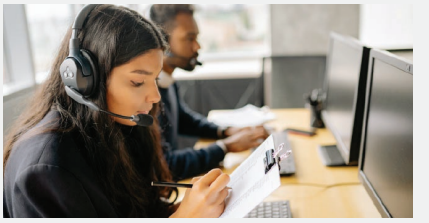
COURT REPORTING

Lexitas offers expert court reporting services nationally and internationally, catering to a wide range of litigation practice areas. Our technology makes scheduling fast and easy; gives you online access to all your deposition materials; and provides a seamless remote experience.



DEFENSE RECORDS

Our innovative technology reduces the time spent retrieving records, decreasing total time spent working on a case. Lexitas has extensive provider relationships, dedicated hands-on professionals, and a secure client portal to ensure you get the records you need fast.



REMOTE DEPOSITION

Lexitas offers full support to attorneys and their teams to keep their discovery schedules moving forward. Lexitas offers a well-executed exhibit management experience for remote depositions.

SERVICES

Court Reporting | Record Retrieval | Legal Talent Outsourcing | Registered Agent | Process Services
Investigations | eLaw® Case Tracking | Alternative Dispute Resolution

Anthony Earley
Account Executive | Minneapolis, Minnesota
Mobile 517.331.2024
Anthony.earley@lexitaslegal.com

lexitaslegal.com
800-676-2401

DEFENDING DOG BITE CASES: AN EXPERT'S VIEW

By Ron Berman

INTRODUCTION

Dog bites continue to be a growing problem in the U.S. both in the number of incidents and the seriousness of the victim's injuries. The U.S. Post Office stated that there are approximately 4.5 million reported dog bites a year in the United States. Unreported bites have been estimated at three times that amount.

Dog bites happen everywhere dogs and people co-habitate with canines, leading to a rising number of injuries, insurance claims, and litigation. The American Veterinary Medical Association stated that there are approximately 85 million dogs in the United States. They live in approximately 69 million homes (American Pet Products Association - Pet Owners Survey.) In 2019 more than 1/3 of homeowner liability payouts were due to dog bites. (Insurance Information Institute.) Dog bite claims and related medical costs, settlements, and jury awards, to plaintiff's have risen 39% from 2012-2020. (Insurance Information Institute) Between 2019-2020, the amount of insurance payouts increased nearly 30 million dollars. (Insurance Information Institute.)

Dog bites happen for many different reasons. Dog aggression, while always understandable from the dog's point of view, is not always acceptable from a human point of view. A girl, who is a stranger to the dog, is bitten in the face. Bad dog! But - she was on her knees, directly in front of him, with her arms around his neck. She then moved her face to within a few inches of his face while attempting to kiss the dog on the top of his head. This is a horrible scenario that plays out too frequently. To the child, she was being friendly; but, to the dog, the actions constituted a direct threat.

Let us consider another common situation. The owner of a Labrador Retriever/German Shepherd mix invites a friend over for lunch. The friend reaches his hand out to be smelled by the dog and is bitten in the hand. What the friend didn't know is that the dog, a former street dog, had a tough time in the streets until it was picked up by a rescue organization and adopted. The dog had a difficult history with humans and, whenever a strange man lifted his arm or reached out to the dog, it reacted as though it was about to be hit. The friend's offering was seen as a threat due to the dog's prior experiences. Did he "provoke" the dog? Was the dog demonstrating fear aggression, protective aggression or territorial aggression? Answers to these questions require a detailed accounting of the facts of each case.

No two dog bite incidents are the same. Each has it's own mix of facts that carry their own weight in forming opinions about what actually happened and who is responsible. Lawyers litigating dog bite cases stand to benefit from a deeper view beyond the surface knowledge to be successful in dog bite and pet related injury cases.

BASICS

Experienced attorneys know the important early steps when litigating a dog bite case include getting the animal control records (if the bite was reported); and, the dog's veterinary records. The animal control records should cover both the incident at hand as well as any former bites, complaints, or activity such as barking issues or dog at large citations. Knowing to get the dog's veterinary records can provide

Dog Bites **continued on page 18**

Ron Berman is a dog trainer, canine behavioral consultant and forensic expert.

He has been retained on nearly 1000 dog bite cases and has been qualified as an expert in courts nationwide on over 90 occasions. Ron has also consulted on cases in Japan, Canada, England, Australia, Sweden and New South Wales.

Dog Bites **continued from page 17**

important information showing whether the dog has a history of bites or aggressive behavior.

The dog's veterinary records are a treasure trove of information. The dog's veterinary records will likely contain the dog's breed (often guessed at by the owner and/or veterinarian's staff) the dog's age, the dog's weight relative to the time of the incident, and most importantly, the dog's behavioral history while at the vet. Often included in the dogs' records are notes regarding any incidents of dog on human or dog on dog aggression that the owner reported to the veterinarian or the veterinary staff.

I have found that although many attorneys know to subpoena the vet records, they do not specifically ask for the doctors handwritten notes, so they only get the computer records. Veterinarians usually handwrite notes like "be careful," "watch out," "will bite," often in red as a pre-caution to staff who may need to interact with the dog. This info can be left off the computer records because it is for internal use only. Knowing to subpoena the vet's handwritten notes provides litigators with an important source of information they would otherwise miss if they only subpoenaed the dog's vet records; and, as defense counsel you do not want to be surprised by this history if the plaintiff's attorney has found this information already.

Lawyers also tend to overlook requesting the vet records for dogs that are present at the time of the bite or injury that are not the subject of the lawsuit. It is important to get the veterinary records for all the dogs present at the time of injury because if a dog that appears to be the victim has a history of aggression to other dogs, this could be beneficial for the defense case that the biting dog was "unprovoked." If the plaintiff was bitten during an altercation with their dog by the defendant's dog, a portion of liability could rest with the plaintiff if his dog provoked the defendant's dog. Knowing what to ask for and from where can be a powerful tool in determining liability in dog bite and dog injury cases.

BITE WOUNDS

Bite wounds are one of the two most important pieces of evidence in a dog bite case. They are a physical representation of exactly what happened. To a trained eye they can often show which dog bit the plaintiff (in multi-dog incidents), whether the dog was provoked or, if the dog bit without provocation, whether it was a bite versus a serious attack, etc. Was the bite inhibited or was it a full bite? Was it a full thickness wound? Which teeth were involved? Was the plaintiff's injury a bite at all or was it a scratch? Bite wounds may tell an objective story of what happened when interpreted by an expert.

First, the wound can tell you whether the injury is from a bite or a scratch. Scratches usually follow certain patterns as described in the scientific literature but there are cases where determining whether the injury was made by teeth or claws is not so easy. There are spatial relationships between the claws that do not exist between canine teeth, incisors, or molars. It is important to determine whether the wound was caused by a bite or scratch to get a clear picture of the events that led to the injury.

Second, analysis of the wound can often indicate the dog's intentions. The number of bites, depth, and placement of the bites can be determinative of whether the dog was acting aggressively or defensively; and, if aggressively whether it was demonstrating fear aggression, protective aggression, or territorial aggression. This can be achieved by obtaining measurements of the wounds if they have yet not healed. Hopefully, the treating physician measured the length and thickness of the plaintiff's wounds as well as diagramed the locations of the bite marks. Often, a mention of "bite marks" on a medical record relates to one bite with several teeth involved; but, may mistakenly be interpreted as multiple bites. The number, depth and placement of the bites says a lot about the dog's state and intention. Again, relating to provocation (defensive bite) or vicious attack (unprovoked). Bites to the stomach or chest or anywhere to the center of mass are more concerning than bites to an arm or leg from an expert's point of view. These areas of the body have little protection and house vital organs filled with blood. Dog bites are essentially "crush injuries." Wounds to these areas of the body can lead to fatalities and, domesticated dogs do not commonly bite humans in these parts of the body. These wounds fit more with predatory aggression. A useful tool for helping a jury interpret and understand the intent behind a bite wound is the bite wound scale created by Dr. Ian Dunbar. Dr. Dunbar's scale rates the plaintiff's wounds and assigns a level of intentionality and whether the dog should be considered safe to be around others. Dr. Dunbar's scale can help a jury to get a deeper understanding of the level of aggression which can be inferred from the wound. This can lead to a better picture of what actually happened during the incident. If the bite marks don't support the plaintiff's account, it likely didn't happen the way they tell it.

A perfect example of this is with bites to the face. I have investigated nearly two hundred of these bites and, on two occasions were the plaintiffs men; I interpret these as poorly informed "dog lover" bites. In most cases of bites to the face the plaintiff will state that the dog jumped up and bit them; but in fact that is almost never the case. These incidents are almost always provoked by a plaintiff when the victim puts their face to close to a strange dog's face either to hug it, kiss it, or just get closer and more intimate than the dog is comfortable with. When a dog bites the face of someone who is a stranger trying to kiss the dog, this is a defensive bite. Typically, in this situation the dog will bite once and release immediately. The dog just wants to create distance between the perceived threat and itself. In casting the blame on the dog by saying that it "jumped up," the plaintiff is

Dog Bites **continued on page 19**

Dog Bites **continued from page 18**

experiencing "dog lover denial." They think that because they love dogs, dogs love them back and welcomed close contact. The wounds on their face are evidence that they were wrong. In my experience, the plaintiffs are always on one knee, two knee's or crouching right in front of the dog when they are bitten. The bite marks will show the plaintiff's physical relationship to the dog at the time of the bite providing evidence of whether the plaintiff provoked the bite or not.

While dog bites to the face are often defensive, conversely, if the plaintiff is bitten in the leg, the upper arm, the hand, and/or the buttocks by one or more dogs, it is a serious attack and is likely offensive. Such dog bite wounds are comprised of one or more of the following: multiple wounds, often to multiple parts of the body, shaking the victim, and the dog not breaking off the attack on its own. Such attacks are often unprovoked and occur against an unsuspecting passersby. Such attacks are vicious attacks because the dog(s) are attacking without provocation. Plaintiffs who have survived these attacks are usually left with very serious mental and physical injuries, requiring longer and costlier hospitalization and other medical care. Unfortunately, on occasion the attack is fatal. Like provoked cases, wound evidence will tell the story of aggressive attacks.

It is important that evidence of wounds be gathered as quickly as possible after a bite. Photos of the bite wounds after the plaintiff has been treated by emergency medical personnel often have only limited value because the actual wounds have typically been altered, in essence destroying valuable evidence. The details in dog bite incidents often follow patterns and each detail carries its own weight adding to the total weight of the evidence. Understanding the patterns involved in your case will help tell a cohesive story to the jury. A detailed forensic analysis is very hard to attack.

WITNESSES

Witnesses, whether to the incident itself or to the dog's or plaintiff's behavior prior to the incident, can be invaluable. Many witnesses do not offer their testimony, but have to be found and questioned. When approaching a witness, it can be beneficial to have an expert be the first point of contact as opposed to a professional investigator.

First, the use of an investigator may be ineffective. An investigator doesn't have the background and experience to ask the correct questions, in the correct order, at the correct time. Furthermore, anything that the witness tells the investigator would be hearsay, while an expert would be entitled to rely on a witness account in forming an opinion. Therefore, it may be more efficient and effective from a trial standpoint for your expert to be the first point of contact.

Second, using an expert as first point of contact is more likely to lead to willing cooperation by a witness. Although professional investigators can be excellent at their job they also carry with them a formality and affect that can cause potential witnesses to want to back away from participation. They have important information, but don't want to be dragged into the case, often against their neighbors. However, if your expert is first contact, it is much more likely that the witness will feel more comfortable talking to them and often take the opportunity to get free information by asking a few questions about their own dog.

Utilizing an expert to interview witnesses also has the added benefit of being able to interpret conflicting accounts of the incident by differently situated witnesses based on the forensic evidence. Witnesses to the same incident will often describe completely different scenarios based on their physical position and their interpretation of events. Conflicting accounts cause confusion about what actually happened. Your expert, once contact is made, can often connect the dots in seemingly different stories that are not actually different at all but different parts of the same incident.

THE DOG

It can be important to have the dog evaluated and inspected by your expert if the dog is still alive because an evaluation video can win your case for you – if it is winnable.

Aggressive, dangerous, and/or vicious dogs almost always act aggressively in evaluations. Even unprovoked, they are either temperamentally and or habituated to act aggressively in certain situations, one of which was likely what occurred at the time of the incident. There is never a guarantee, but in 30 years only two dogs, out of many hundreds, that were clearly overly aggressive, did not show it during the evaluation. Having an expert do a behavioral evaluation lets you know exactly what you are dealing with. Your client may tell you how wonderful their dog is, but their opinion and experience is not objective.

Any dog behavior evaluation must be planned carefully so as not to give the opposing counsel opportunities to attack the results. Time of day, place, people present, distractions and many other things need to be controlled, so the environment is not too far removed from the actual incident. An evaluation is not to recreate the incident, but to create a similar situation and observe the dog's reaction.

BREEDS

All dogs are individuals within a breed and breed alone is not a clear predictor of aggression. The American dog-loving public has changed since the early 1980's when Pit bulls were found mostly in the inner city. Pit bulls and their mixes are everywhere today, running off leash in an alley,

Dog Bites **continued on page 20**

Dog Bites **continued from page 19**

or walking with a jeweled leash in Beverly Hills.

A dog bite case that went to trial in Oklahoma saw the whole Pit Bull question turned upside down. The defendant's dog was a Pit Bull mix, and the dog was aggressive based on the evaluation and video footage. The plaintiff attorneys were jubilant because every aspect of the trial had gone as they had hoped.

They were all shocked, as was the judge and the other attendees, when the jury found for the defendant. The plaintiff attorney somehow missed that each and every jury member owned a Pit Bull or Pit Bull mix.

Pit Bulls, when not aggressive to other dogs or to people, can be fantastic pets. However, they have been shown in peer reviewed scientific studies to bite more often and to inflict more serious wounds leading to more expensive medical treatment and longer hospital stays. They have also been shown to be involved in more incidents requiring amputations and more fatal incidents. American Pit Bull Terriers are listed as "dog aggressive" in their standard by the United Kennel Association, the only U.S. kennel association that registers them.

While breed may be important, it is essential to focus on the individual dog with evidence based on previous behavior. Breed, size, age, sex, exercise, and socialization, to name a few, are each factors, each carrying minimal weight on its own but telling a convincing story as part of a whole.

OWNERS

"Owner denial," is an emotional state where the owner is either unable or unwilling to see their dog as it really is; and, is common among the owners of aggressive, dangerous, and/or vicious dogs. Dog owners experiencing "owner denial" create reasons or excuses for the dog's aggressive behavior, usually explaining it away as a normal response or asserting the claimant provoked the response.

"Owner denial" can blind an owner to the danger posed by their dog even after multiple instances of biting and aggressive behavior. I have had two dog training clients who experienced "owner denial." One was a successful real estate attorney and the other a legendary rock star. Each of their dogs had bitten or attacked 16 people before they contacted a canine professional. They each had very detailed reasons why each bite their dog delivered was reasonable under the circumstances, but after 16 bites they had had enough.

The attorney hit the wall when her dog bit her husband in the face as he bent down to pick up some food that had fallen on the floor. The rock star reached his limit when his German shepherd bit the drummer of his band in the backside just as they were starting rehearsals for their world tour. The drummer could not drum standing up and the dog situation finally had to be addressed. Surprisingly, neither were ever sued.

The above are obviously extreme, but demonstrate how many dog owners experience "owner denial." The signs are clearly there but they cannot receive the message. Recently I heard from a man who wanted my help with his dog, a recently rescued Saint Bernard who had bitten his daughter twice and was not good with toddlers. He said he did not want to give up on his dog; and, that until things could be sorted out, his daughter and the dog were separated in the house.

The fact that his very large dog had bitten his 18 year old daughter on two occasions, unprovoked, and was aggressive to young children did not dawn on him as being an extremely dangerous situation. I doubt that anyone reading this, even those without an 18 year old daughter or young children isn't terrified thinking of this dog near their children or anyone's children, but this gentleman was "in denial" and hell bent on keeping his daughter in a very dangerous situation while he took care of his dog.

People's relationships with their dogs can be deeply emotional and they often project their innocent, vulnerable "inner child" onto them. It can be extremely hard to believe - or even consider - that their beloved pet is dangerous, let alone vicious. They want to protect their "babies" and so they make excuses and go into denial so that they can avoid the whole subject…until the next incident.

MEDICAL RECORDS

It is imperative that attorneys go through the medical records carefully. Plaintiffs have been known to give different narratives about the incident based on where they were and when they said it. On more than a few cases, while going through a tedious number of medical records I found doctor's notes stating that the patient himself had told the doctor a completely different story regarding how the incident happened, one that clearly showed that the plaintiff had provoked the dog.

SUMMARY

Like any complex case, dog bites, dog knockdowns and all the many other ways dogs are involved in human injuries require knowledge and expertise to litigate well. Most attorneys have told me they do one to two dog bite cases every 5 years. Certainly not enough to become an expert in handling them. This article will hopefully give you a deeper view of some of the knowledge that can help an attorney be successful in litigating dog bites and pet related injury cases.

2022 ROSTER

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

MINNESOTA CHAPTER

www.MINNESOTAMEDIATORS.ORG

The following attorneys are recognized for

Excellence in the field of Alternative Dispute Resolution


Hon. John Borg
(612) 840-1619


Hon. Arthur Boylan
(612) 387-5655


Philip L. Bruner
(612) 332-8225


Patrick R. Burns
(612) 877-6400

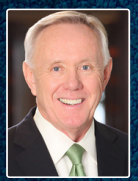

Joseph Daly
(612) 724-3259


Hon. Mel Dickstein
(612) 888-4681

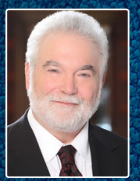

James Dunn
(651) 365-5118


Sheila Engelmeier
(612) 455-7723


Just. James Gilbert
(952) 767-0167


Hon. Sam Hanson
(612) 790-1244


Martin Ho
(612) 332-1622


Steve Kirsch
(612) 312-6519


Roger Kramer
(651) 789-2923


B. Jon Lilleberg
(612) 255-1134


Paul F. McEllistrem
(952) 544-5501


Donald McNeil
(952) 841-0206

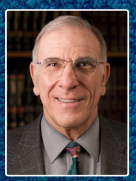

Linda Mealey-Lohmann
(612) 791-2218


Antone Melton-Meaux
(612) 790-0386


Kristi Paulson
(612) 895-2210


Philip Pfaffly
(612) 349-5224


Mark Pilney
(651) 702-1414

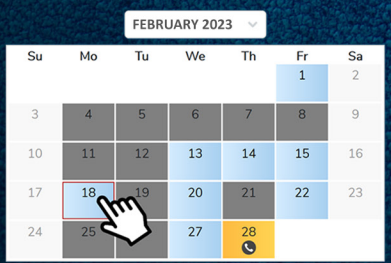

Peter Pustorino
(952) 925-3001


Paul J. Rocheford
(612) 375-5937


James G. Ryan
(612) 338-3872


Doug Shrewsbury
(952) 428-9840


John Vukelich
(218) 786-0565



Check your preferred available dates or schedule appointments online, directly with Academy Members - for free.

Visit our national roster of 900+ top neutrals at www.NADN.org

NADN is administrator for the DRI Neutrals Database

www.DRI.org/neutrals

dri™

The Voice of the Defense Bar

MINNESOTA'S NEW RULE 114 – A GUIDE FOR DEFENSE LAWYERS AS ADVOCATES IN MEDIATION

By: Kristi Paulson

Trial lawyers love to try cases and jury trials are the bedrock of the justice system. However, time and resources require that not every case can, nor should, be tried. Alternative dispute resolution is a system that ranges from adjudicative to facilitative to evaluative tools and processes designed to assist courts, parties, and lawyers in resolving conflicts and managing caseloads. A common facilitative process in civil cases is mediation, a process that uses a third-party neutral as an intermediary, to facilitate settlement in conflict resolution and contested legal cases.

Alternative Dispute Resolution in Minnesota began initially as an intended means to avoid litigation. Rule 114 was introduced in 1994 as a practice rule for lawyers governing civil mediations and arbitrations. The process of mediation has continued to evolve over the years and is a valuable tool in the settlement of cases. It has become more than just an effective pretrial process. Mediation in today's world is now also used during the trial phase to resolve issues or matters, during post-trial discussions to settle lingering issues or negate appeals, and even targeted mediation is employed to address specific issues, such as damages or liability.

The Minnesota Supreme Court, recognizing the evolution of the alternative dispute resolution process, began the long task of amending Rule 114 of the General Rules of Practice back in 1997. That process has since included years of input from entities such as the ADR Ethics Board, the ADR Workgroup, and a Supreme Court Advisory Board. In July 2022, the Minnesota Supreme Court issued an order amending Rule 114 and Rule 310, making sweeping changes to the dispute resolution process in Minnesota. As amended, this new rule changes the ADR process through language that clarifies dispute resolution procedures, identifies responsibilities in the process, and creates new rosters and requirements for professional neutrals. The new rule also codifies an ethical code for neutrals, clarifying the enforcement process and placing the ADR Ethics Board at the heart of the enforcement and oversight of these new rules.

The new Rule 114 went into effect on January 1, 2023.

The New Rule 114 – The Defense Lawyer's To-do List as a Mediation Advocate:

At first glance, Rule 114 appears to be a handbook for mediators and arbitrators. A closer look at the language of the rule reveals that Rule 114 applies to everyone who does any kind of court-annexed ADR. This new rule imposes specific obligations on attorneys with respect to ADR processes. As defense lawyers, what does one need to focus on or be aware of under this new Rule 114? Let's look at ten requirements of Rule 114 that defense lawyers and trial lawyers should incorporate into their mediation advocacy practices.

(1) Defense Lawyers Should Confer with Opposing Counsel and Select an ADR Neutral.

This requirement is not new. What changes is that the new Rule 114 moves this requirement much earlier in the case process. Parties are to confer about ADR processes and select an ADR neutral once they have "commenced a case through service, petition, or motion." Minn. R. 114.04(b) (1994). This rule, coupled with Rules 111.02 and 304.02, requires parties to include ADR information in initial court

***Rule 114* continued on page 23**

KRISTI PAULSON is a professional mediator and arbitrator as well as an accomplished trial lawyer. Kristi is a Rule 114 Qualified Neutral in Minnesota and a Rule 8.9 Qualified Neutral in North Dakota. She serves on both the Lawyers Board of Professional Responsibility and the ADR Ethics Board. In addition to serving as a mediator and arbitrator, Kristi owns and operates PowerHouse Mediation, offering national training and education in the areas of mediation, ADR and advocacy.

Rule 114 **continued from page 22**

submissions. Parties are also to provide the name of a neutral if selected by agreement of the parties to the court. Courts are now required to order that process and that neutral. Courts are not allowed to impose preferences or requirements as to particular processes or neutrals the attorneys may select. Minn. R. 114.04 (b).

(2) Defense Lawyers Should Inform Clients about ADR Processes.

Attorneys are now required in all civil disputes to inform their clients about available ADR processes. Now, at the time of filing, court administrators are required to provide information as to qualified neutrals listed on relevant rosters. Minn. R. 114.03(a). Parties, by mutual agreement, are not required to use rostered, rule-qualified neutrals; however, all neutrals are now subject to the requirements in Rule 114 and the jurisdiction of the ADR Ethics Board whether or not they are listed on a roster. Inclusion on the roster does ensure that the individual neutral has met the training and practice requirements set forth and required by the Minnesota Supreme Court.

(3) Defense Lawyers Should Exercise Rights to Remove Court appointed ADR Neutrals.

If parties cannot agree on an ADR process, Rule 114 requires the court to select and order a non-binding process. Minn. R. 114.04 (b). If the parties are unable to agree to the selection of an ADR neutral, the court will select from the list of Qualified Neutrals. Minn. R. 114.04 (b). If an attorney is not satisfied with the court appointed neutral, the new Rule 114 sets forth a removal process. A party, within seven days, may file a notice to remove a Qualified Neutral in which case the court shall select another. After the one presumptive removal, an affirmative showing of prejudice brought by motion is required. See Minn. R. 114.04(c).

(4) Defense Lawyers Should Notify the Court of a Settlement.

Attorneys are responsible for notifying the court if a case has settled through ADR. They are also required to now promptly complete settlement documents and finalize closure of the case. Minn. R. 114.05. The Advisory Committee comments clarify that there is no requirement under the new rule that settlement documents be filed if the case itself is not filed with the Court.

(5) Defense Lawyers (trying the case) Should Attend the ADR Proceedings.

Rule 114 now requires that attorneys who will try the case may be required by the court to attend. Minn. R. 114.06(e). Attorneys should carefully read the court's order and/or address this with the court if there is a reason the attorney trying the case cannot attend. Why? Sanctions. Sanctions are the new teeth in this rule. A court can now award sanctions for violations of the attendance rule.

(6) Defense Lawyers Should Ensure Clients Understand ADR Processes.

(1) ADR is not Discovery. The ADR process is certainly one in which parties learn a lot about claims, both their own and the other side's. The long-standing rule continues that neutrals cannot be called to testify in the proceedings of the parties. The new rules codify that the "notes, records, impressions, opinions and recollections" of the ADR neutral are confidential and shall not be disclosed. Rule 114 offers a caveat saying that court orders or agreement of all parties, including the neutral, may now allow for disclosure. While there is much discussion over what might be a basis for such a court order, there is agreement that a party's desire to obtain discovery is not likely an adequate basis. And, generally, neutrals are reluctant to consent to a voluntary disclosure in civil cases.

(2) ADR Proceedings Cannot Be Recorded. The pandemic introduced the concept of online mediation as a necessity and it is now a recognized medium in the mediation world. Technology makes it easy to record proceedings and that threatens the confidential sanctity of the process. The new Rule 114 clarifies and states that no recording of any ADR proceeding is permitted, absent agreement of all parties and the neutral. The rule acknowledges that many courtrooms are subject to continual recording and clarifies that even if there is constant recording, it is not admissible without full agreement of the parties and the neutral.

(7) Defense Lawyers Should Maximize Communication with the Neutral.

The new rule defines the instances and the process for communicating with the neutral in advance of an ADR proceeding. There is to be no advance communication with a neutral, absent agreement by all, in any adjudicative process. In mediations and other evaluative, hybrid, or facilitative processes, the new rule recognizes that communication that encourages or facilitates settlement may be valuable.

(8) Defense Lawyers Should Pay the Neutral (as should Plaintiff's Lawyers).

Rule 114 **continued on page 24**

Rule 114 **continued from page 23**

This sounds obvious. Neutrals are to be paid for their services based on terms provided to the parties in the written agreement governing the process, or in some cases as ordered by the court. Yet, this doesn't always happen. The new Rule 114 provides that neutrals may file an affidavit with the court and seek an order for just and proper relief. Courts can order the payment of ADR fees whether they are court-ordered fees (Minn. R. 114.10) or fees agreed to by private agreement of the parties. The court shall provide notice to the parties and then may issue an order "granting relief as the court deems just and proper." Minn. R. 114.11.

(9) Defense Lawyers Should Be Familiar with the ADR Code of Ethics and the ADR Ethics Board.

The Rule 114 Code of Ethics defines standards of ethical conduct intended to guide the neutrals conducting ADR under this rule. Rule 114.13 (Code of Ethics & Enforcement Procedures) defines and sets forth eight ethical requirements an ADR neutral must comply with at all times during the ADR process: (1) impartiality, (2) conflicts of interest, (3) competence, (4) confidentiality, (5) quality of process, (6) advertising and solicitation, (7) fees, and (8) self-determination. These canons are felt to create a high level of integrity and fairness in the process. Attorney advocates are not bound by these particular rules or subject to the jurisdiction of the ADR Ethics Board. Yet many of these ethical rules are similar to the ones found in the Rules of Professional Responsibility. Attorneys are bound by those rules.

(10) Defense Lawyers Should Embrace the Concept of Self-Determination in Mediation.

The new Rule 114 embraces the concept of self-determination and integrates it as the focus of the mediation process. ADR Professionals are required under the new rules to "act in a manner that recognizes that mediation is based on the principle of self-determination by the parties." Mediation is a process that requires the parties' participation: it is their dispute, their case and their outcome. Both neutrals and mediation advocates should be mindful of this focus.

Concluding Remarks

The modern-day ADR arena is growing and moving forward. The new ADR ethics rules contained in Rule 114 are intended to define and clarify the field of ADR, an area that has increased in popularity over the years. These ADR rules are meant to offer guidance and order to an increasingly popular process for all involved. For ADR providers and also for defense attorneys as ADR advocates, the new Rule 114 is now part of one's life as a defense lawyer and needs to be incorporated into one's practice.

DRI CORNER

The Voice of the Defense Bar

By Jessica Schwie
Kennedy & Graven, Chtd
MDLA DRI State Representative

Hello from DRI! I really enjoyed attending MDLA's MidWinter in February, sharing time with friends, colleagues, and clients while learning how to be a better legal professional in Minnesota. After the close of MidWinter, in my role as DRI State Representative, I received notice that DRI is hoping to better support our local events by sharing communications and calendaring of events. For those of who have found the benefit of being members of both MDLA and DRI, you might start seeing increased event planning coordination.

Registration is now open for DRI's annual meeting taking place in San Antonio, Texas. Entertaining speakers such as storyteller NPR National Political Correspondence Mara Liasson, whose reports can be heard regularly on NPR's award-winning newsmagazine programs, Morning Edition and All Things Considered, will lead seminar discussions. And, federal appellate judge Jeffrey Sutton will give us insight on handling federal appeals effectively. Please mark your calendar for October 25–27, 2023 and visit dri.org for more information on the seminar content in the coming weeks and months as the program is developed. In the meantime, a number of substantive law seminars are scheduled—from trucking law to employment to medical claims and a variety of other areas of practice. More information on the seminars and how to develop your practice and your network in certain substantive areas can be found on DRI's website. For those that do not have the time and resources to travel, webinars in the various practice areas are available and sections such as the Government Liability Committee will be hosting Town Hall meetings, zoom happy hours, and remote coffee chats where practitioners come out of isolation to gather for comradery and to engage in vicarious legal research and strategy.

In closing, the last time I connected with you here, it was on the heels of another snowstorm. This time, I still have a snow pile in my yard, but the thermometer hit 82 degrees today. I am looking forward to venturing out of my home, enjoying nature, and even seeing some of you at the New Associate Training series being put on by MDLA. I often hear people say how they would like more training on this or that, including young attorneys who wish they knew how to do x, y, and z. It is not the job of, nor is it even possible for, your Partners or Shareholders to provide you with all of your training. Here's the secret, even after practicing for more than 25 years, I still get nervous about my next deposition, trial, or conversation with an expert. I want to know how to take a deposition, try a case, or even talk to my client using the latest technology, terms, conventions, and legal principles. I do not want to sound like an idiot or put in the lousy lawyer category. So, I chose to invest in myself to train myself, and I do that training by (in part) attending events like the New Associate Training series. I may not be a New Associate anymore, but this old dog has a passion for strategic and competitive games, loves to learn new tricks, and seeks to have a life filled with the type of joy that is brought about by feeding a curious mind in good company with others gathered with a common purpose. I look forward to seeing you at the upcoming MDLA and DRI events that band us together and bring us personal and professional growth.

If you are looking for more information on membership, upcoming local DRI activities, or just want to chat about DRI, please reach out: jschwie@kennedy-graven.com or 612-251-8504 for call or text.

MINNESOTA LAWYERS MUTUAL'S

Defense Program

INSURANCE SPECIFICALLY DESIGNED AND RATED FOR DEFENSE FIRMS

Members of MDLA have access to MLM's Defense Program offering a lawyers' professional liability policy with preferred pricing and enhanced coverage.

MINNESOTA DEFENSE LAWYERS ASSOCIATION

Two Ways to Save

- **Preferred pricing** for firms with substantial insurance defense practice
- **A 5% membership credit -** Credit applied to premium on a per attorney basis

Enhanced Coverage*

- **Additional Claim Expense -** Benefit equal to one-half of the policy single limit, up to a maximum of $250k per policy period
- **Increased Supplementary Payment Limit -** From $10k to $25k - this includes loss of earnings if you attend a trial at our request and coverage for costs and fees incurred defending disciplinary claims
- **Aggregate Deductible -** Caps the total amount the insured will have to pay in total deductibles regardless of the number of claims in a single policy period

*Visit www.mlmins.com for qualification details

"We are proud that the MDLA has selected MLM as a partner to offer coverage to its membership. MLM has long been recognized as a financially stable and consistent carrier for Minnesota lawyers, and we're thrilled to work in partnership with MDLA to benefit members of the association."

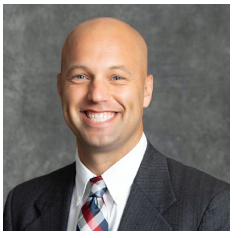
Paul Ablan, President and CEO
Minnesota Lawyers Mutual

Protect your firm with the ***premium savings*** and ***enhanced coverage*** offered to you as a member of the MDLA.

Apply for a quote online!

www.mlmins.com

MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY



Chris Siebenaler
612-373-9641
chris@mlmins.com

013122022

MDLA CONGRATULATES—SEND US YOUR VICTORIES!

The "MDLA Congratulates" column recognizes significant defense victories at summary judgment, trial, or appeal by MDLA members. To be included in the next edition, send a short, one-paragraph summary of the case including the MDLA member attorneys involved, the type of victory, and the issues presented to director@mdla.org by July 15, 2023. Inclusion in the MDLA Congratulates column is subject to space limitations, and the MDLA Editorial Committee reserves the discretion to determine which cases will be included in the column and/or to shorten submissions as appropriate.

April 4, 2023 - Meagher + Geer trial lawyers, Rodger Hagen and Joseph Simmer, successfully defended a northern Minnesota clinic and provider against allegations that a patient's death was the result of negligent prescribing practices. After a five-day trial, the jury returned a unanimous verdict finding the provider was not negligent in their care and treatment of the patient.

February 20, 2023 - Meagher + Geer trial lawyers, Rodger Hagen and Joseph Simmer, successfully defended a neurosurgeon and neurosurgery group in a Hennepin County District Court jury trial which concluded last week. In their lawsuit, the plaintiffs alleged that the defendant neurosurgeon failed to timely recognize and treat spinal instability, resulting in the patient becoming disabled. An 8-person jury unanimously concluded, after deliberating for less than 30 minutes, that our neurosurgeon client was not negligent.

Stephanie Angolkar and Jason Hiveley of Iverson Reuvers obtained a reversal of the denial of qualified immunity in the published opinion *Brabbit, v. Capra,* 59 F. 4th 349(8th Cir. 2023. The Eighth Circuit held the suicide prevention measures taken by jailers were not so inadequate to constitute deliberate indifference to risk of suicide and the jailers were entitled to qualified immunity. Additionally, nurses at the jail were not deliberately indifferent to the risk of suicide and were entitled to qualified immunity.

MINNESOTA Defense

Minnesota Defense Lawyers Association
9505 Copley Drive
Indianapolis, IN 46260
(612) 750-8606
www.mdla.org