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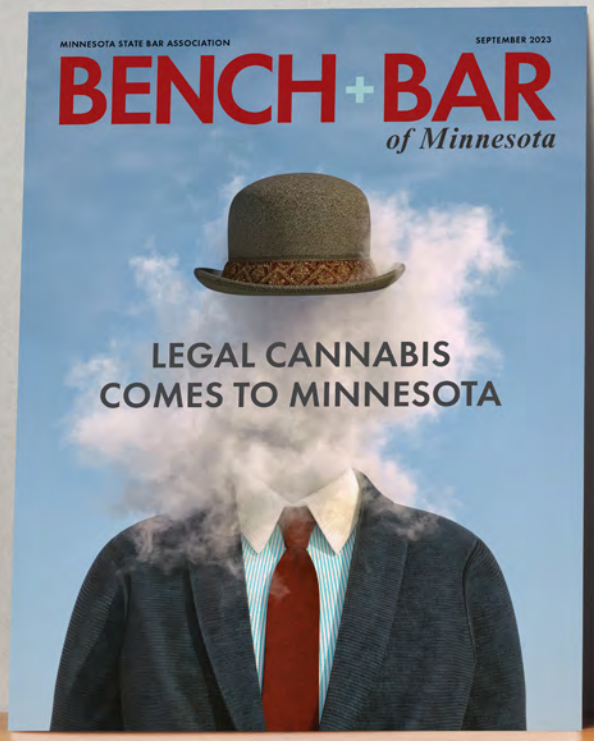

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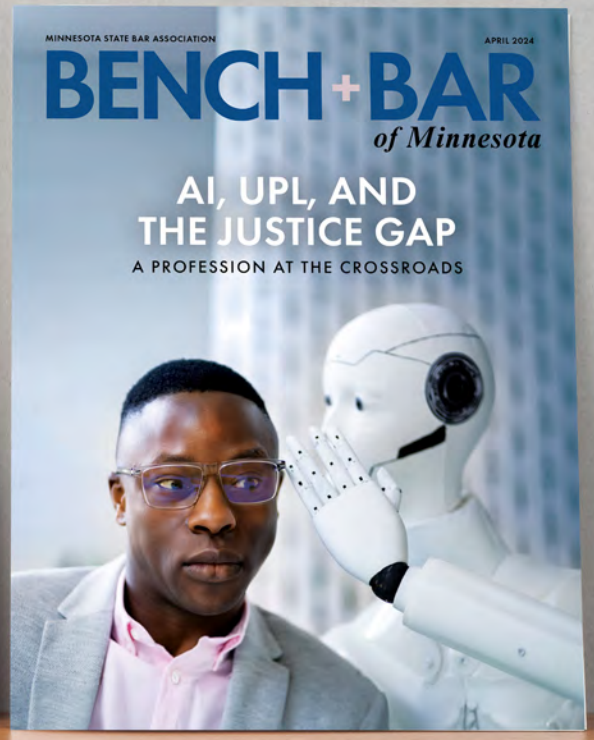

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I HAD A SECRET

BY PAUL FLOYD

PAUL FLOYD is one of the founding partners of Wallen-Friedman & Floyd, PA, a business and litigation boutique law firm located in Minneapolis. Paul has been the president of the HCBA, HCBF, and the Minnesota Chapter of the Federal Bar Association. He lives with his wife, Donna, in Roseville, along with their two cats.

When I was in fourth grade I was shy and reserved. If you know me now, you might wonder how this was possible. But at the time, I was that kid in class who was always staring out into space, daydreaming. Probably not surprising, given that I also could not see the blackboard, but I kept that a secret. When the teacher wrote words or math problems on the board, I was lost. Eventually, it dawned on my teacher that I needed glasses. I did not want to wear glasses in elementary school for fear of being called Four Eyes. But, being extremely nearsighted, I needed what we call today an accommodation. With that accommodation, I could see.

We soon moved across Ohio. And while my eyesight improved with new glasses, I continued to struggle with reading. But I kept it a secret until the 6th grade, when my teacher asked each student to stand and read from our English textbook. When it was my turn, I read my part. My teacher said, "Paul, read it again." So I read it again. This time she said, "Paul, slow down and read what is written on the page." To which I replied, "I don't care what is written, what I read is what it should say." My teacher did not take my insolence lightly. It was what we in my family called "sass," and you did not sass your teacher.

Instead, she sent me home with a note to my mother suggesting that I read out loud every night as a part of my homework. For the next few months, I would do my best to read to my mother. I was unaware at the time that I was struggling with undiagnosed dyslexia—which means that my brain periodically inverts letters and numbers. So I learned to read phonetically to make sense of it all. But after a few months, I was back to keeping my reading problems a secret (or so I thought). It worked pretty well until high school, when my math and reading deficiencies caught up with my grades (Cs and Ds).

In college, one of my first classes was creative writing. Being dyslexic, I liked the creative part. I was very creative in hiding my dyslexia and in coming up with ways to learn the material without reading a lot. My professor recognized that I had a problem and took the time to teach me grammar, spelling, and writing. By then I had learned to type my written submissions, which helped me succeed in college, seminary, and law school.

You may have guessed that not all my problems were solved. During one of my first months as a young associate at a new law firm, a partner called me into his office and asked me: "Did you send this letter out?" I said yes and he said read it. I read it. He asked: "Do you see anything wrong with it?" I said no, sensing that I must have missed something crucial. It was then he said, "You missed a 'not' in one conclusion. From now on all of your correspondence will need to be proofread by Becky." I was so relieved! I thought he was going to fire me. Instead, he provided me with an accommodation.

Finally, I learned an important lesson. I had to admit to myself that I had a reading impairment and stop being afraid to seek help. It was actually quite liberating. With my secret out in the open, I could now ask for help so that my work product would be the best it could be.

Recently, I have noticed that my hearing is not as sharp as it once was. I find myself straining to hear my law students' answers in class. While it is hard to admit that I need help with my hearing, I realize that I need another accommodation to help me continue to be the best lawyer I can be.

All around me, I find other lawyers and law students who face similar challenges in seeing, reading, learning, hearing, and mental health issues that demand accommodations and accessibility. This is a great example of the legal profession changing for the better. So, whether you need glasses, a hearing aid, or an accommodation for depression, bipolar disorder, autism spectrum disorder (ASD), ADHA, dyslexia, or any other disability, know that you are not alone. In fact, your particular neurodiversity is a plus instead of a deficit.*

If you are neurodivergent, know you have a neurodiverse MSBA president. Let's all partner to be a more diverse, equitable, and innovative bar association and legal profession. And remember to be kind, because the person next to you may have a secret. ▲

* Teams that include both neurodivergent and neurotypical colleagues have the ability to look at problems from different angles, leverage the unique and more widely varied strengths of team members, and envision new possibilities. See Neurodiversity in the Workplace at *https://nitw.org.* Cognitively diverse teams have been shown to solve problems faster *(https://hbr.org/2017/03/teams-solve-problems-faster-when-theyre-more-cognitively-diverse).*

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MEET THE 2023 NLS OUTSTANDING NEW LAWYER OF THE YEAR

The MSBA New Lawyers Section has named Roxanne N. Thorelli its 2023 Outstanding New Lawyer of the Year. The award recognizes the exceptional achievements of one new lawyer each year, with a focus on involvement with local bar organizations, pro bono and community service work, contributions to advancing diversity, and professional accomplishments.

Thorelli is a senior associate at Fredrikson & Byron, where her practice is focused on mergers and acquisitions, debt and equity financing, corporate restructuring, and general corporate matters. She has been an engaged member of the Minnesota State Bar Association and the Hennepin County Bar Association since law school and is the current chair of the HCBA New Lawyers Section. She has also been recognized as a 2023 Minnesota Rising Star in mergers and acquisitions by Super Lawyers.

Thorelli is likewise engaged with the legal community at a national level, serving as a delegate to the American Bar Association's Young Lawyers Division. She dedicates a significant amount of time to pro bono representation through the Volunteer Lawyers Network Employment Advice Clinic and the LegalCORPS Business Law Advice Clinic. She is also a member of the pro bono committee at Fredrikson & Byron and the pro bono coordinator for her department.

Thorelli further serves her community by mentoring law students, acting as an advisor to the Golden Key International Honour Society at University of Minnesota, sitting on the Board of the Calumet Lofts Homeowners Association, and volunteering with Feed My Starving Children and the Salvation Army. ▲

A new wrinkle in mock trial

2023 First Place National Courtroom Artist
Taelyn Baiza, Boise High School

The MSBA's high school mock trial program is expanding its program to include a courtroom artist competition. High school students will be able to compete even if their school does not have a mock trial team. Participants will create a drawing depicting a moment in the trial they attend and submit it for judging. A limited number of participants will advance to participate in the state tournament, where they will be assigned to one of the trials to create a drawing that will be evaluated by a panel. All entries will be displayed at the awards banquet and participants will be introduced. The artist selected as having created the best drawing will be eligible to accompany the state champion team to the National High School Mock Trial Championship in the spring of 2024. Please visit ***www.mnbar.org/mocktrial*** for additional information or contact Kim Basting (***kbasting@mnbars.org***). ▲

GOT A CLE IDEA?

Save the dates

PUBLIC LAW CLE SERIES ON LEGAL CANNABIS

On September 26-28, the Public Law Section will offer a CLE series, "It's a Joint Effort: Navigating Minnesota's New Cannabis Laws," focusing on the impacts that this spring's cannabis legalization will have on various areas of the public law sector.

■ On Tuesday 9/26, Kyle Hartnett, assistant research manager/staff attorney at League of Minnesota Cities, will present an overview of the changes to Minnesota law. He'll provide some insights about regulation and what public entities are doing now to prepare.

■ On Wednesday 9/27, attorney Kate Bischoff of k8bisch LLC will focus on the impact on public employers. She'll address policies that may need updating and workplace scenarios you should be ready to tackle.

■ On Thursday 9/28, Kacy Wothe of the Hennepin County Attorney's Office will talk about the new law from a criminal justice perspective. She'll discuss what's changed, how expungements will work, what the federal law implications are, and whether the law will bring relief to caseloads in the criminal justice system.

You can get more details and register for one or more of the programs by visiting our CLE page at ***www.mnbar.org/cle-events.*** ▲

WE WANT TO HEAR FROM YOU

The Tri-Bar Signature CLE Committee plans and executes Signature CLE programs that are timely, relevant, interesting, and broadly applicable to the members of the MSBA, HCBA, and RCBA—and we're looking for new members to contribute ideas and work with us on getting speakers and presenters involved.

The committee seeks to provide value to legal professionals through featured presentations of current legal issues and hot topics, while supporting fair and equitable law practice and attorney well-being. Individuals should be willing to lead or assist on program planning and be resourceful in connecting with legal professionals. Committee meetings are informal and monthly. Interested members should contact Geen Mui at ***gmui@mnbars.org.*** ▲

DO YOU HAVE A FILE RETENTION POLICY? IF NOT, YOU SHOULD PUT ONE IN PLACE.

FILE RETENTION AND RETURN

BY SUSAN HUMISTON ✉ susan.humiston@courts.state.mn.us

SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

File retention and return is a frequent topic on our attorney ethics help line.[1] The Office of Lawyers Professional Responsibility has addressed the topic in this column on previous occasions,[2] but refreshers are helpful, and new readers likely have questions.

The starting point

You should start from the perspective that the client's file belongs to the client. While the ethics rules do not use the term "file," the Minnesota Supreme Court did in the course of a discipline case almost 30 years ago (*In re XY*, 529 N.W.2d 688 (Minn. 1995)), stating: "[t]he file belonged to the client and was appropriately returned to her upon her request." The Court further stated that copies of the file were for the *lawyer's* benefit. Starting from the proper perspective about whose property it is usually helps resolve a lot of client-lawyer issues relating to the return and retention of the client file.

The rules

The issue of document retention often comes up when addressing an attorney's obligation to return the client file after termination of representation, covered by Rule 1.16(d), Minnesota Rules of Professional Conduct (MRPC).[3] In 2005, Minnesota adopted ABA model rule 1.16(d) for the most part but went on to adopt additional provisions, not contained in the model rule, to provide further ethical guidance to lawyers on the topic of file return obligations. This guidance was framed with the phrase "papers and property to which the client is entitled," which is defined in Rule 1.16(e), MRPC. You should review that rule, as well as my 2018 article and Martin Cole's 2015 article (see note 2) on the topic, if you have questions about what to return.

One thing we get a lot of questions about is whether providing copies of documents to the client as the representation progresses as necessary under Rule 1.4 (your communication obligation), relieves you from providing a copy of the entire client file upon their request at the conclusion of the representation or at a time thereafter when the client seeks a copy of their file. This Office has consistently taken the position that it does not. Even if you have provided copies as you go, if the client requests a copy of their file, you should provide it, most notably because the papers and property to which the client is entitled under the rule are broadly defined, and may not be co-extensive with what has already been provided.

Because of your Rule 1.16 obligation, you should have good systems in place to be able to convey the client's file to them easily and accurately at the conclusion of the representation. We see so many complaints that start with the allegation that the lawyer did not timely provide a copy of the file upon request. Such a complaint will prompt an investigation, and can be a basis for discipline, but it can also lead us to uncover additional issues. Thus, good file return practices allow you to comply with the ethics rules and can serve as an effective risk management technique.

Retention obligations

The ethics rules do not, however, expressly tell you how long you must keep the client's file. You should be careful not to read into this absence of a specific timeline the prerogative to destroy client files at will because, as noted above, the file is presumptively the client's and they have a right to obtain it upon request. What should a lawyer do?

The best advice I can give you on this topic is to establish reasonable file retention procedures in your retainer agreement so that the client knows what your practices are and can plan accordingly. You can reiterate those retention policies in your file-closing letter, if you send one. With more and more files being maintained electronically, storage capacity is usually not an issue, but it's also important to have in place safeguards for backing up electronically stored files and procedures for ensuring that files are not inadvertently deleted. Your malpractice carrier may have retention guidelines that you can take into consideration, usually dictated by the time period under which a malpractice claim can be stated against the lawyer. In setting retention time policies, however, do not forget to consider the client's potential need for the documents.

If you do not have retention policies that have been clearly communicated to your client, you may be left to wonder whether you are able to ethically destroy client files, and if so, when you may do so. Kenneth Jorgenson's article from 2004 (see note 2) provides some good guidance for your consideration.

You should also take care with original items provided to you by the client or items that you prepare that have intrinsic value or legal effect. Rule 1.15(c), MRPC, requires you to safekeep client property provided to you; this rule is not limited in time. You should always return client originals or other property you received from the client or a third party to the client or third party at the time the representation ends, so that you are not ethically obligated to safekeep them indefinitely. The same goes for items created by you where the original has independent value or legal effect. This is the client's property. Wills and trusts are the main items that come to mind for me in this category. I recommend you do not keep them for the client because, if so, you are undertaking a commitment that will be difficult if not impossible to modify as time goes by.

Do you have a file retention policy? If not, you should put one in place.

Other related questions

A couple of other questions that we get frequently: Do the ethics rules require you to provide multiple copies of the client's file to the client? The answer is no. If you have provided to the client a complete copy at the conclusion of the representation, we have taken the position that you are not ethically obligated to keep providing file copies to the client. That said, having good records of prior file productions is a good idea to avoid a dispute regarding what was produced and when.

Am I required to provide a paper copy of the client file since it is maintained electronically? The ethics rules do not expressly address this question, but we have generally taken the position that providing a copy of the file as maintained by the lawyer, provided it is usable and accessible to the client, satisfies the ethics rules. Thus, if you only have an electronic copy of the file, you can provide the file electronically provided it is produced in a form that is accessible and usable by the client. Similarly, if you only have a paper copy of the file, the rules do not require you to scan it and provide an electronic copy just because the client asks for an electronic copy.

Can I charge the client for providing copies of their file, whether in paper form or electronically? The answer is maybe. Pursuant to Rule 1.16(g), MRPC, you may charge for copies only if the client, prior to termination of the lawyer's services, has agreed in writing to pay such a charge. Having this provision in your fee agreement may also moot a lot of disputes regarding production of the file. Most lawyers are happy to accommodate multiple and varied requests relating to return of the client file if they can charge for duplicating and retrieving the file.

Finally, always remember that you cannot condition payment of fees or copying costs on the return of the client file. In 2005, Minnesota adopted Rule 1.16(g), MRPC, which makes such conduct unethical. Notwithstanding this express prohibition, lawyers continue to receive discipline for requiring payment on production. I know it is frustrating to be required to provide the client with their file when they owe you money, but it is short-sighted to pick this battle with your client.

Conclusion

Lawyering creates a lot of paper, mostly electronic nowadays. Having good policies and procedures regarding the handling of that paper for your law practice—particularly relating to file return and retention—really pays dividends. It is not only a crucial element of customer service, but part of your ethical obligation. If you have questions regarding this topic, please call our Office. ▲

NOTES

[1] Attorneys who have questions about their ethical obligations under the Minnesota Rules of Professional Conduct may call us at 651-296-3952 for confidential ethics advice free of charge.

[2] Prior Director columns on this topic can be found on the *lprb.mncourts.gov* website under Articles. For example, Susan Humiston, *File Contents and Retention*, Bench & Bar (August 2018); Martin Cole, *Client Files: The ABA Weighs In*, Bench & Bar (September 2015); Kenneth Jorgensen, *File Retention Policies and Requirements*, Bench & Bar (December 2004).

[3] Rule 1.16(d), MRPC, provides "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, *surrendering papers and property to which the client is entitled*, and refunding any advance payment of fees or expenses that has not been earned or incurred." (emphasis supplied)

PROTECTING OUR JUDGES

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

MARK LANTERMAN is CTO of Computer Forensic Services. A former member of the U.S. Secret Service Electronic Crimes Taskforce, Mark has 28 years of security/forensic experience and has testified in over 2,000 matters. He is a member of the MN Lawyers Professional Responsibility Board.

In July I had the honor of co-presenting with the Hon. Esther Salas, a federal judge from New Jersey, at the 8th Circuit Judicial Conference in Minneapolis.[1] During her remarks Judge Salas gave the audience an update on the Daniel Anderl Judicial Security and Privacy Act.[2] This past December, Congress passed the legislation, also known as Daniel's Law—a pivotal moment in improving protections for the federal judicial community and their families. The law protects judges' information from being sold on data broker websites, enables them to request that personally identifiable information be removed from federal government websites, and prevents businesses or individuals from publishing their personal information with "no legitimate news media or other public interest."[3]

The law was named after Judge Salas's own son. Tragically, in July 2020, an attorney posing as a FedEx driver killed Daniel in the family's home while seeking to target Judge Salas. Judge Salas's husband, attorney Mark Anderl, was also critically wounded. Leading up to the attack, the gunman had argued a case before Judge Salas and had repeatedly made hateful and misogynistic statements on his personal website.[4] The murderer obtained her home address online and had planned other attacks.

The events suffered by Judge Salas and her family have also been experienced by other members of the judicial community. In 2005, federal judge Joan Lefkow returned home to discover that her husband and mother had been murdered in her home by a troubled litigant.[5] In 2021, former Wisconsin judge John Roemer was killed by an individual who had had a case involving armed burglary and firearms charges before the judge over 15 years prior.[6] With threats against judges and their families now commonplace, implementing protective measures is increasingly pressing. New York City Bar Association President Susan J. Kohlmann described the reality of the situation: "Over the past several years, threats and attacks against judges in the United States have increased in both number and intensity. Regrettably, we seem to be living in a culture where judges—and, in fact, all manner of public officials... are confronted with threats, intimidating behavior, and menacing rhetoric simply for doing their jobs. Indeed, death threats against public officials have become shockingly ordinary."[7] The internet enables individuals to locate the personal information necessary to carry out attacks and provides a public forum to voice threats. The Daniel Anderl Judicial Security and Privacy Act aims to give judges greater authority over their personal information online.

While most tend to agree with the common-sense approach put forward in this bill, others argue that the bill offers a false sense of security for those it protects. As a security expert, I often discuss the dangers of doxxing ("Doxxing redux: The trouble with opting out," Dec. 2019 B&B) and the tough task of managing your online presence. Unfortunately, there are inherent limitations to how well an individual can erase themselves from the internet. But there is nonetheless value in security measures that seek to mitigate the risk of doxxing-related attacks. Just like seat belts or life vests, no one security measure is perfect in guaranteeing your safety. But I think most of us would agree that the possible benefits of simple security measures make them not only sensible but necessary.

Similarly, while the Daniel Anderl Judicial Security and Privacy Act cannot guarantee that a judge's personal information will be unavailable everywhere, it is an important tool in limiting what information can be easily gathered about members of the judicial community and their families. As with other protections, such as those offered by the U.S. Marshals Service, the legislation is one very important piece of how threats against the judicial community can be anticipated and proactively managed. In addition to doxxing-related crime, judges are at risk of cybercrime more generally, including social engineering attacks.

While legislation like Daniel's Law is effective in directly limiting the personal information about judges in the public domain, judicial officers remain especially vulnerable to social engineering. A criminal may go directly to the source, tricking a victim into providing personal information. These attacks are often made possible by some piece of information found online. For example, sharing details about upcoming travel to a legal conference on social media can open the door to a phishing (or smishing, or vishing) attack. Based on even one detail willingly provided in a post, cybercriminals can piggyback to even greater amounts of information. When posting, consider

whether you would want to tell what you're sharing directly to a threat actor. And importantly, this advice should extend to everyone within a family or household. Staying apprised of current threats (for example, those posed by criminal uses of ChatGPT) should also be prioritized as both a personal and professional security step. Social media monitoring services can be helpful in identifying and reporting potential threat actors.

As Judge Salas stated following the passing of Daniel's Law this past year, "Judges, and their families, should not live in fear for doing the job they are sworn to do. As a nation and as a people, we cannot accept this. This legislation will make it harder for violent individuals to find judges' addresses and other personal information online. By better protecting judges, the bill also helps safeguard the judicial independence guaranteed by the Constitution."[8] Protecting judges by appropriately accounting for the risks of our cyber landscape is critical to upholding the democratic right to a fair trial. Increased threats and intimidation toward the judiciary impede the judicial process for all. In Minnesota and throughout the United States, the safety of both federal and state judges ought to be everyone's concern. While the Daniel Anderl Judicial Security and Privacy Act is undeniably a milestone in judicial security, this act is not the end of these efforts. Judge Salas, as well as every member of the judicial community, needs the support of our nation and its lawmakers. ▲

NOTES

[1] Judge Salas and I co-presented on judicial security at the invitation of the Hon. Patrick J. Schiltz and the Hon. Lavenski R. Smith.

[2] *https://www.uscourts.gov/news/2022/12/16/congress-passes-daniel-anderl-judicial-security-and-privacy-act*

[3] *Id.*

[4] *https://www.cnn.com/2020/07/20/us/suspect-shooting-at-judge-salas-home/index.html*

[5] *https://www.chicagotribune.com/opinion/commentary/ct-opinion-federal-judges-threats-lefkow-20201209-4vypwpafvfb35jy7x5tjkhlutm-story.html*

[6] *https://www.cnn.com/2022/06/04/us/wisconsin-judge-killed-targeted-attack/index.html*

[7] *https://www.nycbar.org/media-listing/media/detail/the-disturbing-trend-of-threats-and-violence-against-judges-and-the-vital-importance-of-judicial-security*

[8] Supra note 2.

Lessons from a meditation retreat

TURNING TOWARD THE QUIET

BY PATTY BECK ✉ *patty@abalancedpracticellc.com*

PATTY BECK is the president and owner of A Balanced Practice, LLC, where she teaches attorneys, judges, and other legal professionals practical strategies for incorporating well-being into their personal and professional lives.

"It's too quiet." This was the thought that plagued me during the first two days of the five-day silent meditation retreat I completed last year. Despite my best efforts to prepare myself to unplug leading up to what had unexpectedly become my busiest time of year, I was not prepared for how difficult it would be learning to embrace silence and regain a sense of calm in what had otherwise been an overwhelming time in my life.

I initially signed up for the silent retreat as a prerequisite to a certification I was considering. Conveniently conducted via Zoom and scheduled during the holidays when my calendar was otherwise open, it seemed like a great way to challenge myself while developing my meditation skills. What I did not anticipate was how busy life and work would become in the months leading up to the retreat, or that I would begin a series of speaking engagements and family obligations two days after the retreat.

A few days before it began, the idea of being unplugged from clients, family, and friends for five days seemed impossible. It felt like I should be available: "What if someone needs me?" was a thought I could not shake. At the same time, I knew I was exhausted and needed time away to reset.

To prepare for the retreat, I set a detailed autoreply and contacted my clients to share about my retreat and how to reach me in an emergency. Since I don't have an assistant, my husband agreed to monitor my phone daily for new voicemails. My clients were wonderful, sending several messages of support, curiosity, and enthusiasm that allowed us to deepen our relationships in a way that I hadn't anticipated.

As the retreat began, I struggled to be away from technology apart from our Zoom sessions. I didn't like how quiet the house was or how anxious I felt being unable to check in with anyone. I agonized about whether my plan was working, but my husband assured me each evening that I had no new voicemails (which, of course, made me feel like a cell tower must be down). It was also hard being in the quiet of my thoughts and emotions with nothing to drown out the sound of my inner critic, which was constantly saying that I should be working.

Then something changed.

One morning, my husband put on Christmas music in the kitchen so that I wouldn't miss out on the festive feeling of my favorite season. While I appreciated the sweet gesture, I found myself going upstairs to be in the quiet of our bedroom. As I wrapped myself in a blanket and sipped my coffee, I suddenly felt a new appreciation for the quiet.

I found that the quiet allowed me the space to slow down and pay attention to what I was thinking and feeling, and to navigate challenging thoughts about work and life in a supportive rather than judgmental way. I spent time considering changes I could make to manage how overwhelmed I had been feeling. I also noticed that my body relaxed in places I didn't realize were tense.

More than anything, the quiet had become a space where I could turn and simply breathe—without the relentless pressure to always be doing something. I embraced the silence the last few days, and after the retreat ended, my mind felt clearer. I was able to deliver my speaking engagements with ease.

Over six months later, I have found myself better able to recognize when I'm feeling overwhelmed, and I have learned to turn toward the quiet moments to re-center myself during busy days. I often take a few minutes to meditate (the Insight Timer app is my favorite) and notice how my body feels. I pay more attention to my thoughts and approach them with curiosity rather than criticism or avoidance. When I need time away, I share what I'm doing in my autoreply, which often sparks authentic discussions about well-being with clients and friends.

If you are feeling overwhelmed by life or struggling to take time for yourself, please know that you are not alone. We are all fighting our own battles, and sometimes life and work catch up with us in unexpected ways. Taking a few deep breaths, doing a quick meditation, or simply taking a break from checking email can often help to regain focus during a busy day. While I recognize that not everyone has the ability to unplug completely for five days, I encourage you to look for the quiet moments where you can simply be with yourself and take a moment to breathe one day at a time. ▲

NEED SOMEONE TO TALK TO?

One great option is Lawyers Concerned for Lawyers (LCL), which provides free, confidential support and services to Minnesota lawyers, judges, law students, and their immediate family members on any issue that causes stress or distress.

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TIPS FOR MEDITATION

- Start small. Short meditation sessions a few days a week are more valuable than one long session on the weekend.
- Find a consistent time of day to practice meditation and use an app for guidance (such as Insight Timer, Calm, Headspace).
- Try different postures to find what resonates with you (sitting in a chair, lying on the floor, resting on a cushion, etc.).
- Explore different meditation anchors (breath, body movement, sounds of your environment, etc.).
- Be patient with yourself. What you experience today may be vastly different from tomorrow, and that's okay.

TIPS FOR TAKING TIME OFF

- Think about what you hope to achieve with your time away.
- Decide how "unplugged" to be (completely? available by voicemail only? checking email intermittently?).
- Arrange for back-up coverage on active files to avoid client interruptions.
- Communicate! Tell colleagues and clients what to expect and consider sharing what you're doing. It adds a personal connection that can enhance relationships.
- Be patient with yourself; taking time off can be challenging, so be kind to yourself with whatever you're able to do.

Q WHAT'S THE MOST IMPORTANT THING YOU HAVE ON OR NEAR YOUR DESK RIGHT NOW?

JOE DAMMEL

Joe Dammel is the managing director of the Buildings department at the St. Paul-based nonpartisan energy policy organization Fresh Energy. He advocates for policy change at the Legislature and before governmental agencies.

I have a Polaroid of the lake in Canada that I used to visit every summer growing up. My grandparents had a cabin on the lake and I have many fond memories of spending time with them and my dad. Much of that time was spent on the water. Because the water was so clear, the fish only bit at sunset. We would head out to the fishing spot after dinner and wait for the walleye to begin biting, which they usually did just as the sun dipped below the horizon (which was also when the mosquitoes decided to come out, too).

The last time I was up there, which is going on 15 years ago now, I remember my dad was driving the boat back to shore and I turned around to watch the wake of the boat cut through the glassy water and expand outwards, toward the sunset behind us. I raised my camera and pressed the shutter.

I started law school at the University of Minnesota a few weeks later.

I credit the trips we took to that lake in Canada with igniting a passion for working to protect our natural world. The photograph on my desk serves as a reminder of why I pursued a career in energy and environmental law and policy. I hope that future generations can also experience nature by enjoying its wildness and beauty.

MADELINE GUSTAFSON

Madeline Gustafson is a litigation attorney at Bassford Remele, PA, where her primary practice areas include commercial litigation, professional liability litigation, general liability, and employment litigation. She was recently appointed secretary of the New Lawyers Section for the MSBA.

Uff da. (I'm practicing my Minnesota mannerisms because as a native Iowan, I'm working on fitting in here.) Asking me about the "most important thing" on my desk right now gives me slight anxiety, as the logical answer would be my cell phone and laptop—which keep me way too plugged in to my job—but I'd like to reframe the question slightly to what I'm "most proud of" on my desk (not counting the photos of my family and husband, that is).

The thing I am most proud of on my desk is a traveling trophy awarded amongst the Bassford associate attorneys called "the Willems Whale." The Willems Whale is an award you can only get from your peers at Bassford. When an associate does something "profound"—such as winning a dispositive motion, taking their first deposition, or rockin' it at a CLE, the former trophy winner of the Willems Whale nominates another associate for the award. The first time I received the award, it was for speaking for the first time at a CLE. More recently, my friend and colleague Michael Pfau gave it to me as inspiration for this article, so I'll have to give it back to him—he's the real rock star and current holder of the Willems Whale.

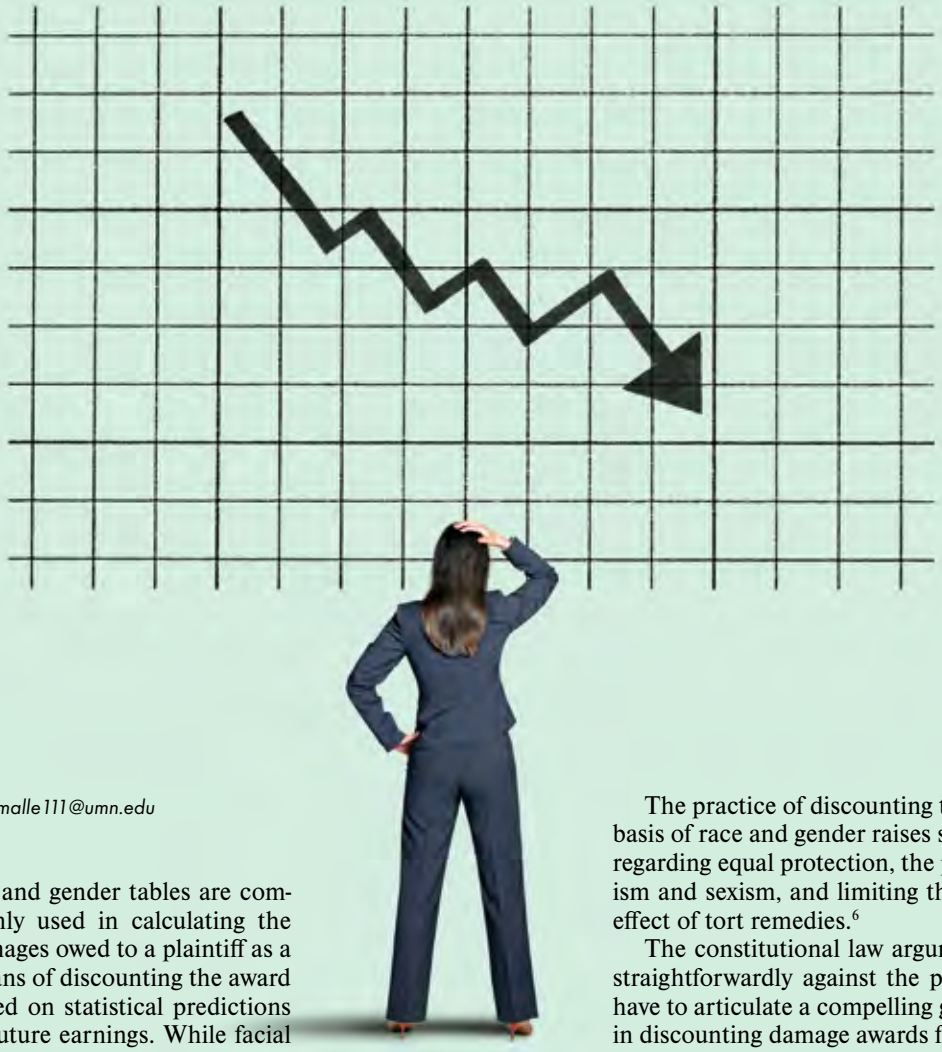
The traveling award is a bit of a tradition around Bassford—the shareholders have their surfboard for winning trials (don't ask me how that started) and the associates have the Willems Whale. Named after an iconic new[er] shareholder of the group, Kyle Willems, it features a picture of Kyle happily riding an Orca whale with one hand waving frantically in the air, the other clinging on to the Orca. The image is a bit reminiscent of what it's like practicing litigation—a little crazy, a little fear-inspiring, and a little fun. It keeps things light when the job can be stressful. The traveling award also plays its part in building camaraderie amongst the associate class. As a result, it's the trinket I'm most proud of on my desk.

FARIS RASHID

Faris Rashid is a partner at the law firm of Greene Espel, where he practices business litigation with a focus on technology, trade secrets, and product liability disputes.

I actually have two answers. First, I clutter both my home and office desks with family photos. When I'm busy at work, or waiting for an oral argument to start by Zoom, for example, they remind me to lighten up and focus on what matters. I keep a rotating collection of my children's artwork on my desks for the same reason—and because it makes them so proud to see it there. My second answer is a scented candle that my friend Katrina, also an attorney, sent at the very start of the pandemic, when we all suddenly started working from home. The candle's scent is labeled "Cancelled Plans." I generally don't use scented candles and I've never burned it, but it's stayed on my home office desk since March 2020, as a reminder of how much life—and the practice of law—has changed. And to take nothing for granted.

WHY ARE WE USING RACE AND GENDER TABLES TO SET TORT DAMAGES IN 2023?



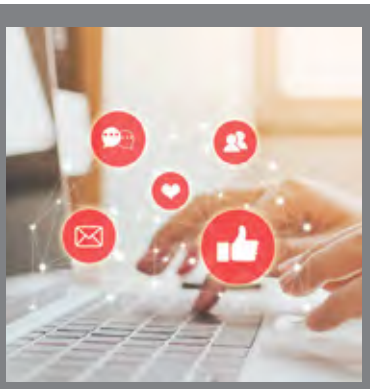
BY IAN MALLERY ✉ malle111@umn.edu

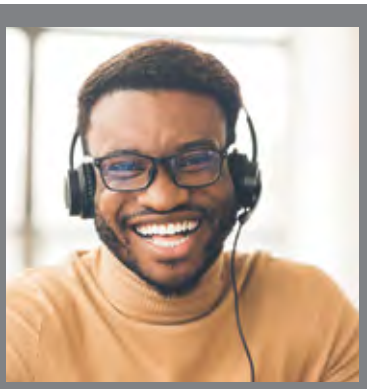
Race and gender tables are commonly used in calculating the damages owed to a plaintiff as a means of discounting the award based on statistical predictions of future earnings. While facial race classifications receive strict scrutiny in almost every other area of the law,[1] they are almost universally accepted in American courts when calculating tort damage awards.[2] Once liability is found, both parties call expert witnesses who utilize actuarial tables to calculate past damages and future income loss.[3] In most cases, these experts will use race and gender as a variable in this calculation.[4] In practice, this discounts awards to minorities and women simply due to expected life outcomes of their groups as a whole.[5]

IN PRACTICE, THE TABLES DISCOUNT AWARDS TO MINORITIES AND WOMEN SIMPLY DUE TO EXPECTED LIFE OUTCOMES OF THEIR GROUPS AS A WHOLE.

The practice of discounting tort damages on the basis of race and gender raises significant concerns regarding equal protection, the perpetuation of racism and sexism, and limiting the desired deterrent effect of tort remedies.[6]

The constitutional law argument is, on its face, straightforwardly against the practice. One would have to articulate a compelling government interest in discounting damage awards for different races of people, which would require a court to accept that determining the most "statistically accurate" compensation owed by a defendant is more valuable than awarding equal damage for equal harm.[7] An added wrinkle, however, is that we are unlikely ever to see this argument raised past the trial court level. It is highly unlikely that the type of defendant with the means to pursue an appeal would be willing to accept the negative publicity that would result from advancing an argument in favor of facial race or gender discrimination.





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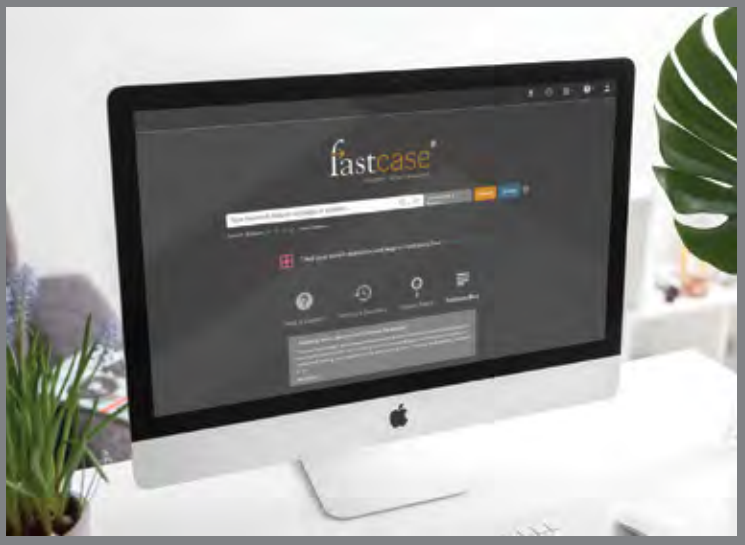

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Race and gender discounting acts to perpetuate racial disparities. The disparities that appear in actuary tables are the result of decades of socioeconomic discrimination faced by women and minorities.[8] For example, in lead paint litigation, victims tend to live in low-income neighborhoods and are disproportionately Black and Hispanic children, and defendants pay far less than they would if their victims were white, middle-class children.[9] Rather than reflecting the capacity of a race or gender group member to achieve a certain outcome, they reflect the past injustices that have limited the outcomes of those members up to the present.[10] This injustice is even more apparent in cases involving children. If two otherwise identical children, one White and one Black, are irreparably harmed from lead poisoning, the Black child would be likely to receive a significantly lower damage award because he is statistically less likely to obtain a bachelor's degree or live as long as the white child.[11] Allowing these calculations to proceed on a regular basis fails to account for both the variety of life outcomes that are independent of race or gender and social progress that could possibly diminish the disparities these statistics reflect during a plaintiff's lifetime.

Tort law targets three primary objectives: compensatory justice, corrective justice, and deterrence.[12] Discounting damages based on race and gender minimizes the deterrent effect of tort liability upon the government and companies that operate in low-income and minority communities. Especially when considered in conjunction with insurance policies, race-based actuarial tables increase moral hazard because they increase the likelihood that corporations will engage in riskier behavior in communities of color because the costs are lower and therefore more appealing to insurance providers.[13] By allowing these race-based classifications to proceed, the courts are effectively encouraging harm to proceed and creating a feedback loop between harm done to minority communities and lower damage awards based on lower life expectancy and educational outcomes.

A final issue that arises from the use of race tables in tort litigation is actually determining someone's race. In *McMillan v. City of New York*, Judge Jack Weinstein found that question damning enough to bar the use of race in the first place.[14] The claimant was made quadriplegic by the negligent crash of the Staten Island Ferry. The expert for the city used a race actuary table to discount McMillan's damages.

On cross-examination, McMillan's attorney asked a simple question: "How do you know McMillan is Black?" The expert was unable to provide an acceptable answer, and Judge Weinstein threw out consideration of McMillan's race. The opinion provided a terse but simple explanation: "The question posed is whether such 'racially' based statistics and other compilations may be relied upon to find a shorter life expectancy for a person characterized as an 'African-American,' than for one in the general American population of mixed 'ethnic' and 'racial' backgrounds. The answer is 'no.'"[15]

Other litigators have found success in raising this question to juries and some jurisdictions have acted to ban the use of race and gender tables.[16] Notably, in 2019 California enacted a law that banned the calculation of damages based on race, ethnicity, and gender.[17] Because this issue is largely confined to the district courts and unlikely to be appealed to the Supreme Court, it will be up to the Legislature to enact a ban statutorily. Ridding the courts of this practice will better serve the purposes of tort law by decreasing moral hazard and creating a more just compensation scheme that does not utilize past injustices to justify discounted awards today. ▲

IAN MALLERY is a third-year law student at the University of Minnesota focusing on labor and civil rights law. He is a student director for the Clemency Project Clinic and a member of the executive board of the University of Minnesota National Lawyers Guild.

NOTES

[1] "All racial classification imposed by government must be analyzed by a reviewing court under strict scrutiny... such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

[2] While some states have banned the practice legislatively, it remains in widespread use. Goran Dominioni, *ARTICLE: Biased Damages Awards: Gender and Race Discrimination in Tort Trials*, 1 Cardozo Int'l & Comp. L. Rev. 269, 271 (2018).

[3] Forensic economists utilize life expectancy, work-life expectancy, and average wage tables compiled by the U.S. Department of Labor. *Id.*

[4] A 2009 survey by the National Association of Forensic Economists showed that 44% considered race while 92% considered gender. Kim Soffen, *In One Corner of the Law, Minorities and Women are Often Less Valued*, The Washington Post (2016).

[5] Jesse Schwab, *ARTICLE: The Problem with Defining Tort Damages in Terms of Race and Gender*, 2019 Harv. C.R.-C.L. L. Rev. Amicus 1, 2 (2019).

[6] Martha Chamallas, *SYMPOSIUM: Access to Justice: Can Business Co-Exist with the Civil Justice System?*, Loy. L.A. L. Rev. 1435, 1439.

[7] *Bollinger*, 539 U.S. 306, 326 (2003).

[8] Schwab, *supra* at 3.

[9] Chamallas, *supra* at 1440.

[10] *Id.*

[11] *See e.g. G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 140 (E.D.N.Y. 2015) (finding the use of race-based statistics to calculate a reduced life expectancy for tort damages unconstitutional).

[12] Benjamin Shmueli, *ARTICLE: Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice*, 48 U. Mich. J.L. Reform 745, 747 (2015).

[13] Dhruti J. Patel, *NOTE: Policing Corporate Conduct Toward Minority Communities: An Insurance Law Perspective on the Use of Race in Calculating Tort Damages*, 53 U. Mich. J.L. Reform 227, 233 (2019).

[14] 253 F.R.D. 247, 248 (E.D.N.Y. 2008).

[15] *Id.*

[16] Chamallas, *supra* at 1443.

[17] Schwab, *supra* at 1.

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FROM 0 TO HF100

LEGAL CANNABIS COMES TO MINNESOTA

BY JARED M. REAMS AND RACHEL S. KURTH
jreams@ecklandblando.com rkurth@ecklandblando.com

Gov. Tim Walz signed HF100 on May 30, 2023, after a nearly six-month journey through numerous committees and revised engrossments in the Minnesota House and Senate, making Minnesota the 23rd state to legalize recreational-use cannabis. To get the bill to his desk, the Legislature had to balance a surprising number of competing interests and stakeholders, including consumers, medical patients, social equity advocates, state and local government entities, law enforcement, hemp businesses, medical cannabis businesses, prospective in-state cannabis businesses, and out-of-state players in the cannabis industry.

Fitting a state-sanctioned cannabis market neatly within a federal system in which cannabis remains an illegal controlled substance was also no small hurdle. Overall, the Legislature was thoughtful in its undertaking and left Minnesotans with one of the most comprehensive and, in certain respects, progressive cannabis laws in the nation. Nevertheless, certain gaps and potential conflicts remain in the bill and may require action by the Legislature, newly created Office of Cannabis Management, or both to remedy.

Recreational possession and use

While conflicting information has been widely publicized—and generally accepted as correct—Article 1, section 75 of the bill makes clear that its adult possession and use provisions became effective July 1, 2023. Accordingly, starting in July, individuals over the age of 21 had the legal ability to possess, use, transport, gift (for no remuneration), and cultivate cannabis at home under Minnesota law. The limits are also quite permissive: In public, an adult can possess, transport, or gift up to two ounces of cannabis flower, eight grams of cannabis concentrate, or edibles containing up to 800 milligrams of THC. While a person is at their own residence, the possession limit for cannabis flower increases to two pounds.

Adults can also grow cannabis at home—but unlike limits on possession, plant limits are tied to the residence itself and not to the number of persons 21 and over who live there. Up to eight plants can be cultivated at a single residence by one or more adults, but only four of those can be mature (flowering) at any one time. The plants must also be grown in an "enclosed, locked space that is not open to public view," so raised beds in the front yard will not be a viable option. Even so, cannabis pollen floating naturally in the air can affect final yield, and most people interested in cultivation will likely be growing indoors for better control.

It appears that in setting the at-home possession limit at two pounds, the Legislature was operating under the belief that each of the four allotted mature plants will produce roughly half a pound of cannabis flower when harvested. This is certainly debatable. Not only is the yield of a single plant highly variable, but the definition of "cannabis flower" under HF100 exacerbates the problem, as it includes "the harvested flower, bud, leaves, and stems of a cannabis plant." Consequently, a person may violate the two-pound possession limit the instant they pull their four mature plants out of the ground. With this said, the cultivation limits may be intended to account for multiple adults living at the same residence, each of whom would have their own two-pound cannabis flower allowance under the statute and also want to grow their own plants.

The areas in which cannabis products can be legally used are significantly more restricted than where they can be possessed—especially with respect to smoked or vaped products. The law expressly allows adult cannabis use at a private residence (including the yard and curtilage), on private property that is not generally accessible by the public (unless the property owner prohibits it), and at a venue or event that is licensed for on-site consumption. An added restriction on smoking and vaping in these areas is almost hidden within a portion of the bill mostly concerned with medical cannabis:

"Except for the use of medical cannabis flower or medical cannabinoid products, the vaporizing or smoking of cannabis flower, cannabis products, artificially derived cannabinoids, or hemp-derived consumer products is prohibited in a multifamily housing building, including balconies and patios appurtenant thereto." Additionally, as with tobacco, smoking or vaping cannabis products is prohibited in locations covered by the Minnesota Indoor Clean Air Act (MICAA), which, importantly, the Minnesota Department of Health interprets to include private social clubs. And unlike tobacco shops, smokable cannabis retailers were not given a "product sampling" exception for on-site use akin to Minn. Stat. §144.41467(4).

Interestingly, while those areas listed above may be called "protected" locations for use, revisions to the state criminal laws effective August 1, 2023 leave no legal penalty for using cannabis outside of them (namely public spaces not subject to the MICAA). Nevertheless, municipalities can ban that practice by ordinance, and it remains an open question how many Minnesota cities will do just that.

By completely eliminating the ability of multifamily housing tenants to smoke or vape recreational cannabis products at their homes, allowing landlords to forbid *all* cannabis products (including edibles) on their rental properties, and allowing municipalities to ban use in all public spaces, there is a legitimate criticism that the Legislature has legalized cannabis only for the wealthy (or at least those wealthy enough to be homeowners). The concern is even greater for medical cannabis patients, because while the bill does not outlaw smoking or vaping medical cannabis in multifamily residences as it does for recreational users, it does not protect medicinal use either, and it appears that HF100 would still allow landlords to prohibit the practice. It remains to be seen whether a property owner must allow medical patient tenants to use edible products, at a minimum, as a reasonable accommodation under Minnesota Human Rights Act. Unfortunately, patients should expect no additional protections under the Federal Fair Housing Act, since cannabis remains a controlled substance federally.

MEDICAL CANNABIS WILL CONTINUE TO BE REGULATED BY THE OFFICE OF MEDICAL CANNABIS UNDER THE DEPARTMENT OF HEALTH UNTIL MARCH 1, 2025. THEREAFTER, THE MEDICAL PROGRAM WILL BE CONTROLLED BY THE DIVISION OF MEDICAL CANNABIS UNDER THE OFFICE OF CANNABIS MANAGEMENT.

Medical cannabis

Medical cannabis has been legal in Minnesota since 2014, although the program was exceedingly restrictive as to the conditions that cannabis could be used to treat and the forms of cannabis that could be used for the treatment itself, namely pills and derivatives that were not plant material. HF100 greatly expands the forms medical cannabis can legally take, including flower, concentrates, and edibles. While it does not expand Minnesota's list of qualifying medical conditions for cannabis treatment, it does allow the Office of Cannabis Management to add conditions to the list. The law also prohibits sales tax on medical cannabis products.

Medical cannabis will continue to be regulated by the Office of Medical Cannabis under the Department of Health until March 1, 2025, to avoid interruption for medical cannabis patients while the Office of Cannabis Management is being implemented. Thereafter, the medical program will be controlled by the Division of Medical Cannabis under the Office of Cannabis Management.

Changes to criminal laws

While the legal adult use provisions of HF100 became effective July 1, changes to criminal laws surrounding cannabis in Minnesota were awkwardly delayed until August 1, 2023. In most circumstances, however, the provisions of the statute that permit adult use and possession may nullify vestigial laws that would criminalize the same conduct during the month of potential conflict.

For example, under prior law it was a controlled substance crime in the fifth degree under Minn. Stat. §152.025, subd. 2(1) to "unlawfully possess[] one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV, except a small amount of marijuana." Come August 1, HF100 amended that offense to exclude all cannabis products, regardless of amount. But for any cases brought between July 1 and August 1, the use of the word "unlawfully" by the statute will be important. "Unlawfully" is defined to mean "selling or possessing a controlled substance in a manner not authorized by law." Because HF100 legally authorized adult possession of cannabis on July 1, 2023, that possession cannot violate the statute.

The revisions to Minnesota's cannabis-related crimes reduce previous penalties for sales crimes across the board, with a maximum penalty of imprisonment of up to five years and fines of up to

$10,000 for unlawfully selling more than two ounces of flower, eight grams of concentrate, or edibles containing more than 800 milligrams of THC. Changes to possession crimes are less easily summarized. Penalties will be reduced for the unlawful possession of less than 10 kilograms of cannabis flower, two kilograms of concentrate, or 100 grams of THC within edibles, with corresponding penalties ranging from petty misdemeanors for possession of lower amounts to felonies allowing up to five years imprisonment and fines of up to $10,000 for higher-level violations within those thresholds.

The penalties for possessing amounts greater those discussed above remain unchanged for possession of cannabis flower, while they are harsher for concentrates and may be more lenient for edibles. This is because the previous regime treated all "mixtures" "containing marijuana or [THC]" the same. As an example, under the previous Minn. Stat. §152.021, one would need to possess 25 kilograms of concentrates to be charged for the same first-degree controlled substance offense as a person with 25 kilograms of cannabis flower. Under the revised law, only 10 kilograms of concentrate is sufficient. While edibles containing just one kilogram or more of THC will also qualify for the same offense, the revised law may actually be more permissive because it only takes into account the weight of the THC itself, as opposed to the weight of the entire "mixture" or edible.

As for motor vehicle crimes, the Legislature wisely declined to tie DUI offenses to the mere presence of a THC metabolite in a driver's system, given that these metabolites may persist in the body for up to 30 days, long after intoxicating effects have subsided. Instead, it will simply be a crime to operate a vehicle under the influence of cannabis, regardless of how that may be proved. Having open cannabis packaging or "hot boxing" in a motor vehicle that is on a street or highway will also remain illegal, just as a similar possession or use of alcohol is proscribed. Keep it in its original packaging or the trunk.

Expungement

In recognition of the past severity and disparity of cannabis crime enforcement in Minnesota, HF100 establishes a temporary Cannabis Expungement Board (under the Office of Cannabis Management); provides for the automatic expungement of certain cannabis offenses, including misdemeanor sale and possession crimes; and allows the possibility of expungement or resentencing for felony offenses on a case-by-case basis. The "automatic" expungement track does not require any action by affected persons to take effect, but it is unclear whether those with felony convictions will need to petition the board or follow some other procedure for board review. Future rulemaking should resolve that question. To be eligible for felony expungement or resentencing to a lesser offense, the cannabis crime at issue (1) must not have involved a dangerous weapons, battery, or assault; (2) must be a non-felony offense or no longer a crime after August 1, 2023; and (3) must have no appeal pending and no further opportunity for appeal.

Cannabis business licensing

Given that Minnesota took 23rd place in the race to legalization, the Legislature faced a real concern that out-of-state entities in established markets would have a competitive advantage over in-state newcomers to the cannabis industry. The dormant commerce clause would likely prevent any residency restriction on licensing, regardless of whether such a policy would be wise in the first place. The Legislature thus confronted the issue with a double-edged sword: It struck down opportunities to monopolize, but with the same blow may have cut the ability for small cannabis businesses to become anything but.

Features of HF100 include a limited pool of licenses, caps on size and production, and vertical integration limits. Size caps limit the square footage of canopy size for cultivators, production numbers for manufacturers, and storefronts for retailers. Vertical integration limits force businesses into one of 16 discrete license types and disallow businesses from holding more than one type of license, with limited exceptions. For example, a cannabis manufacturer could not obtain a cannabis retailer license (which would allow sales directly to consumers) but could obtain a cannabis cultivator license to grow its own supply, as well as an "edible cannabinoid product handler endorsement" to produce edibles. Restrictions on license holders that are businesses will also apply to each of the businesses' cooperative members, managers, directors, and general partners.

Licenses that allow for vertical integration, such as micro- or mezzo-business licenses, trade the additional permissions for lower size caps. Additionally, while lower-potency hemp edible businesses will not have any vertical integration limits or size caps, they cannot hold any cannabis (read: non-hemp) license, while cannabis businesses can deal in hemp or cannabis products.

The number of licenses to be issued, as well as size caps and the application process itself, has yet to be decided by the Office of Cannabis Management.

Social equity

In addition to expungement, the state has also provided social equity redress within the licensing process. While the Office has yet to decide how many points to attribute to each cannabis business license application criteria, HF100 does require that at least 20 percent of the total awardable points be reserved for social equity applicants. These are individuals who (1) were convicted of a cannabis possession or sale offense prior to May

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RACHEL KURTH is an associate attorney at Eckland & Blando, where she assists clients, including hemp and cannabis businesses, in all matters related to contracts and regulatory compliance, from initial negotiations to contractual disputes. She graduated from Mitchell Hamline School of Law in 2022.

1, 2023; (2) have a parent, guardian, child, spouse, or dependent who was convicted of a cannabis possession or sale offense prior to May 1, 2023; (3) were the dependent of someone who was convicted of a cannabis possession or sale offense prior to May 1, 2023; (4) are service-disabled veterans or veterans who lost honorable status due to an offense involving the possession or sale of marijuana; (5) for at least the past five years, have been a resident of a census tract or neighborhood disproportionately targeted by cannabis enforcement; (6) are emerging farmers; or (7) for at least the past five years, have lived in a census tract where the poverty rate is 20 percent or more, or in which the median family income did not exceed 80 percent of the statewide median family income (if in a metropolitan area, then 80 percent of the metropolitan median family income).

In determining how many points to award to a business based upon social equity factors, the Office will consider the number or ownership percentage of its cooperative members, officers, directors, managers, and general partners who qualify as social equity applicants. Additionally, while a conviction for a cannabis offense remains a social equity category, the Office has authority to decide whether any *felony* conviction would be entirely disqualifying for an applicant.

IN DETERMINING HOW MANY POINTS TO AWARD TO A BUSINESS BASED ON SOCIAL EQUITY FACTORS, THE OFFICE OF CANNABIS MANAGEMENT WILL CONSIDER THE NUMBER OR OWNERSHIP PERCENTAGE OF ITS COOPERATIVE MEMBERS, OFFICERS, DIRECTORS, MANAGERS, AND GENERAL PARTNERS WHO QUALIFY AS SOCIAL EQUITY APPLICANTS.

Quasi-social equity factors will also play into the application process, with an undetermined amount of points awardable to retired military personnel who do not otherwise qualify as social equity applicants, as well as those who would expand cannabis-related services to an underrepresented market, including the medical cannabis market.

Sunset period for hemp businesses

To avoid interruption for businesses selling hemp products, such as the THC seltzers and gummies presently found on shelves in Minnesota, the Legislature decided to keep the "edible cannabinoid product" law passed last summer on the books until March 1, 2025. After that date, the Office of Cannabis Management will issue licenses to make and sell the revised version of these products, called "lower-potency hemp edibles." Importantly, all retailers that wish to continue selling edible cannabinoid products to consumers during the interim period must register with the Minnesota Commissioner of Health by October 1, 2023 (through a process that has not been established at the time of this writing).

Because the product and registration requirements are different for edible cannabinoid products than for lower-potency hemp edibles, there may be a heightened risk of confusion by law enforcement authorities investigating compliance. As an example, lower-potency hemp edibles cannot contain delta-8 THC, while edible cannabinoid products can, and while sellers of edible cannabinoid products must register with the Office of Cannabis Management, as discussed above, lower-potency hemp edible retailers must register with local units of government.

Despite their differences, the competing regimes are intended to regulate the same kinds of products (hemp-derived edibles), and there is nothing about those products or their packaging that indicates which set of laws they are being sold under. Additionally, because HF100 is less than forthcoming in its text regarding the sunset period for edible cannabinoid products and continuation of Minn. Stat. §151.72, it is possible that some law enforcement entities acting in good faith will have no idea that the edible cannabinoid product statute is still effective. Attorneys representing hemp businesses should apprise their clients of this unfortunate situation.

Tribal compacts

Despite personal use provisions having become effective in July, it is not expected that retail cannabis locations will be licensed and able to offer products for sale until early 2025. To those looking for cannabis products before then, keep an eye out for tribal governments exercising their sovereignty to regulate cannabis within their tribal jurisdiction, or for compacts between tribal governments and the state of Minnesota, which can allow for an accelerated path to retail sales across jurisdictional lines. Certain tribal governments have already begun the negotiation process. A tribal government (with more agility than the state) could begin regulating a cannabis market within its borders without waiting for the Office of Cannabis Management's bureaucratic formation and provide options to consumers that do not exist elsewhere in Minnesota. (Shortly after this article was completed, Red Lake Nation announced that it would begin selling recreational cannabis in August. Without a compact, products are legal for sale and use only within tribal boundaries.)

The waiting game

While HF100 accomplished much in its 300-or-so pages, the newly created Office of Cannabis Management has its work cut out in the coming months. Rulemakings related to personal use, business licensing, expungement, and several other key provisions of the bill can be expected in the near future, and the decisions will be impactful. In the meantime, Minnesota has fallen into limbo, with legal possession and use but no legal sales, and an excited (or perhaps anxious) prospective industry that is unsure how to direct its energy. But when the law is at its most obscure, one thing becomes clear: Lawyers are important. ▲

UNDERSTANDING EXPUNGEMENT

under the new cannabis law

BY DEA CORTNEY AND SAMUEL EDMUNDS

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With the recent passage of HF 100,[1] Minnesota became the 23rd state to decriminalize or legalize some recreational uses of cannabis.[2] In so doing, the state also recognized the need for justice reform by implementing significant changes related to expungement and resentencing. Expungement allows individuals with past convictions for certain cannabis offenses to have their records sealed, offering them a clean start and a chance to rebuild their lives. In this article, we will discuss the recent marijuana law changes in Minnesota, with a focus on expungement and its impact on individuals and communities.

Minnesota's journey toward marijuana legalization has been gradual. As far back as 1976, Minnesota decriminalized the possession or sale of a small amount of marijuana, defined as less than 42.5 grams.[3] In 2014, the state passed a law allowing the use of medical marijuana for certain qualifying conditions.[4] This initial step toward recognizing the medicinal value of cannabis laid the foundation for future reforms. Last year, the Legislature legalized certain low-dose, hemp-derived edible THC products.[5]

This year's final legislation-turned-law is a 300-plus-page bill that made its way through 30 committees in the House and Senate and a trip to the conference committee before passage in both bodies. Upon signing the bill, Gov. Tim Walz stated: "We've known for too long that prohibiting the use of cannabis hasn't worked. By legalizing adult-use cannabis, we're expanding our economy, creating jobs, and regulating the industry to keep Minnesotans safe.... Legalizing adult-use cannabis and expunging or resentencing cannabis convictions will strengthen communities. This is the right move for Minnesota."[6]

The new cannabis statute repeals, amends, and adds over 100 provisions to our law books.[7] The new law contains nine articles, many of which focus on business and regulatory matters associated with the cannabis industry. This analysis will focus on Article 5, which deals with expungement and resentencing.

Understanding expungement

Article 5 of the new law focuses on the expungement of criminal records associated with Minnesotans' prior cannabis convictions and the resentencing of certain prior marijuana criminal convictions.

Expungement is a legal process that allows individuals to clear their criminal records of certain offenses,[8] giving them a fresh start and removing the barriers associated with past convictions. In the context of marijuana law changes in Minnesota, expungement is an essential aspect of promoting fairness and equity. Expunging marijuana-related convictions means that individuals can end or avoid long-term consequences that hindered employment prospects, housing opportunities, and access to educational and financial resources caused by prior convictions.

One of the primary motives for revising expungement laws related to marijuana was to rectify the disproportionate impact of cannabis-related convictions on marginalized communities, especially communities of color.[9] Nationwide, it has been well-documented that individuals from such communities are more likely to be arrested and convicted for marijuana offenses despite similar usage rates compared to other racial groups.[10] For instance, the ACLU found that Black Minnesotans are more than five times more likely to be arrested for a marijuana-related offense than white Minnesotans.[11] These convictions often result in lifelong consequences, hindering employment prospects, housing opportunities, and access to education.[12]

Minnesota's legislative reforms were aimed at addressing these systemic inequities by providing a pathway for individuals to clear their records and escape the cycle of discrimination perpetuated by past marijuana convictions.[13] Another significant motivation for expungement reform is to align Minnesota's laws with the changing legal landscape of cannabis. As more states across the nation embrace recreational marijuana use, it becomes increasingly evident that individuals with prior convictions face unfair consequences in a system that no longer considers their actions criminal.

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Recognizing this discrepancy, Minnesota sought to remove the barriers associated with past convictions and allow individuals to fully participate in the emerging legal cannabis market. Expungement reforms can serve as a bridge between the past and present, acknowledging the evolving acceptance of cannabis in society.

Expungement criteria and process

Article 5 of HF 100 (now 2023 Session Law Chapter 63) sets forth a process for the automatic expungement of certain lower-level cannabis offenses (essentially those convictions that will no longer be crimes) and creates a Cannabis Expungement Board to review felony offenses for potential expungement.

Automatic expungement

Beginning August 1, 2023, prior offenses that will receive automatic expungement include:

1. Cases resolved with a §152.18 dismissal and discharge of proceeding (stay of adjudication) for a violation of fourth-degree sale or possession, fifth-degree sale or possession, or marijuana in a motor vehicle/possession of a small amount (Minn. Stat. §§152.024, 152.025, and 152.027, respectively).
2. Convictions or stayed sentences for marijuana in a motor vehicle/possession of small amount (Minn. Stat. §152.027, subd. 3 or 4).
3. Charges that resulted in dismissal prior to a finding of probable cause or resolutions in favor of the petitioner.[14] Note also that a verdict of not guilty by reason of mental illness is not a resolution in favor of the petitioner.[15]

Although the process is "automatic," meaning individuals do not need to submit an application, petition, or motion, it won't be instantaneous. The BCA first has to run background checks and then notify the judicial branch of the expungement, which then has 60 days to seal the records.[16] Upon receiving notice, the judicial branch shall also order all related records to be sealed, with the exception of Department of Health and Department of Human Services records.[17] The BCA has estimated that it could take up to a year for the agency to process the automatic expungements.[18]

The new law specifically states that the BCA must provide information on its website regarding noncitizens' potential need to obtain copies of records affected by expungement in advance, details on how to obtain these copies, and advising that a noncitizen should consult with an immigration attorney regarding expungement of records.[19]

Review by Cannabis Expungement Board

The new law established the Cannabis Expungement Board, comprising the chief justice of the Minnesota Supreme Court, the Attorney General, the Commissioner of Corrections (or their designees), a public defender, and a member of the public.[20] The board will obtain and review all available records to determine whether a person committed an act involving the sale or possession of cannabis that would either be a lesser offense or no longer a crime after August 1, 2023.[21]

The new statute specifically delineates eight felony marijuana sale and possession offenses[22] that may be eligible for expungement or resentencing to a lesser offense if:

1. the offense did not involve a dangerous weapon, the intentional or attempted infliction of bodily harm, or an act committed with intent to cause fear of immediate bodily harm or death;
2. the charge would either be a lesser offense (i.e. non-felony) or not a crime after August 1, 2023; and
3. the conviction was not appealed, any appeal was denied, or the deadline to file appeal has expired.[23]

For both automatic expungements and those that go through the review board process, expungement is "presumed to be in the public interest unless there is clear and convincing evidence that an expungement or resentencing to a lesser offense would create a risk to public safety."[24] This represents a lowered burden for petitioners compared to the standard under Minnesota's general expungement statute, 609A, which provides that "expungement of a criminal record is an extraordinary remedy to be granted only upon clear and convincing evidence that it would yield benefit to the petitioner commensurate with the disadvantages to the public and public safety..."[25]

The new procedures for automatic expungement and review by the Cannabis Expungement Board do not preclude the use of preexisting pathways to expungement. Under prior expungement law in chapter 609A, petitioners may file a petition for expungement directly with the district court. Depending on the outcome of the individual case, applicant may have a presumptive-expungement-type case, or a burden-on-the-petitioner-type case. In either case, the applicant may be able to obtain expungement relief from a prior marijuana conviction faster than the automatic or review board processes might achieve. Members of our bar who are experienced in expungement litigation should be able to offer this legal service.

THE NEW PROCEDURES FOR AUTOMATIC EXPUNGEMENT AND REVIEW BY THE CANNABIS EXPUNGEMENT BOARD DO NOT PRECLUDE THE USE OF PREEXISTING PATHWAYS TO EXPUNGEMENT. UNDER PRIOR EXPUNGEMENT LAW IN CHAPTER 609A, PETITIONERS MAY FILE A PETITION FOR EXPUNGEMENT DIRECTLY WITH THE DISTRICT COURT.

Expungement's impact on individuals and communities

Expungement has far-reaching implications for individuals and communities affected by past marijuana convictions. For individuals, expungement offers a new lease on life, removing the stigma and barriers associated with a criminal record. It opens doors to employment, housing, education, and other opportunities that were previously out of reach.

Moreover, the expungement of marijuana-related convictions benefits communities. By allowing individuals with past convictions to reintegrate into society more successfully, it reduces the burden on social services and decreases the likelihood of recidivism.[26] Expungement also helps address the racial and social disparities that have disproportionately affected marginalized communities due to the war on drugs.[27]

The Minnesota Bureau of Criminal Apprehension (BCA) estimates that 60,000 misdemeanor marijuana cases will be eligible for automatic expungement under the new law.[28] It is unclear how many felony cases will qualify for review by the Cannabis Expungement Board once it is created. A manual review of cases will be required because the state's criminal history system is unable to sort felony drug possession and sale cases by the type of drug involved.[29]

Challenges and future considerations

While Minnesota's expungement reforms are a significant step forward, challenges and considerations remain. One challenge is ensuring access to information and resources for individuals who may not be aware of their eligibility for expungement. Education campaigns and outreach efforts are crucial to reach those who could benefit from the law changes.

It will also be vital to monitor the implementation of expungement laws to ensure fairness and equal access. Evaluating the effectiveness of the expungement process, addressing any potential biases, and making necessary adjustments are key to ensuring that the benefits of expungement reach all affected individuals.

Minnesota's recent marijuana law changes, particularly those related to expungement, reflect a commitment to justice reform and addressing the long-term consequences of outdated drug policies. By legalizing recreational marijuana and allowing for expungement of certain cannabis-related offenses, the state is providing individuals with a second chance and dismantling barriers to opportunity. Moving forward, continued efforts to educate, support, and evaluate the expungement process will be essential to maximizing the positive impact of these reforms on individuals, communities, and the overall criminal justice system. ▲

NOTES

[1] Minnesota House of Representatives 2023 House File 100, now known as Minnesota Session Laws 2023, Regular Session, Chapter 63, H.F. No. 100. *See https://www.revisor.mn.gov/laws/2023/0/Session+Law/Chapter/63/*

[2] Matt DeLong, Ryan Faircloth, and Brooks Johnson, *What You Need to Know about Minnesota's Marijuana Legalization Bill*, StarTribune, 5/20/2023 *https://www.startribune.com/minnesota-marijuana-legalization-bill-law-cannabis-cultivation-dispensaries-business-pot-weed-legal/600275325/#:~:text=It%20legalizes%20the%20possession%20and,cannabis%20and%20hemp%2Dderived%20markets.*

[3] Laws of Minnesota 1976 Chapter 42.

[4] Minnesota Department of Health, *Medical Cannabis Program Key Dates*, 3/22/2023, *https://www.health.state.mn.us/people/cannabis/about/timeline.html* . *See also* Minn. Stat. §§152.21 – 152.37.

[5] J. Patrick Coolican, *The Legislature Stumbles into Legalizing THC, for Better or Worse*, Minnesota Reformer, 7/1/2022 *https://minnesotareformer.com/2022/07/01/the-legislature-stumbles-into-legalizing-thc-for-better-or-worse-column/*. *See also* Minn. Stat. §151.72.

[6] WCCO Staff, *Gov. Tim Walz Signs Recreational Marijuana Bill into Law*, CBS NEWS MINNESOTA, 5/30/2023, *https://www.cbsnews.com/minnesota/news/gov-tim-walz-signs-recreational-cannabis-bill-into-law/*.

[7] Minnesota Session Laws – 2023, Regular Session, Chapter 63, H.F. No. 100, *infra*, note 1.

[8] *See* Minn. Stat. ch. 609A.

[9] *See* Grace Birnstengel, *If Minnesota legalizes weed, will marijuana-related criminal records be cleared?* MPR NEWS, 5/1/2023, *https://www.mprnews.org/story/2023/05/01/if-minnesota-legalizes-weed-will-marijuana-related-criminal-records-be-cleared*.

[10] *See e.g. Racial Disparities in Marijuana Arrests*, NORML, 2023, *https://norml.org/marijuana/fact-sheets/racial-disparity-in-marijuana-arrests/*.

[11] Lynette Kalsnes, *Black People Five Times More Likely to Get Arrested for Marijuana in Minnesota,* ACLU Minnesota, 4/20/2020, *https://www.aclu-mn.org/en/press-releases/black-people-five-times-more-likely-get-arrested-marijuana-minnesota*.

[12] R. Allyce Bailey, *Serving Time and It's No Longer a Crime: An Analysis of the Proposed Cannabis Administration and Opportunity Act, Its Potential Effects at the Federal and State Level, and a Guide for Practical Application by Local Government,* 25 UDC/DCSL L. REV. 5 (2022).

[13] *See* Briana Bierschbach, *Minnesota Legal Marijuana Advocates Focus on Racial Equity*, Star Tribune, 5/11/2021, *https://www.startribune.com/minnesota-legal-marijuana-advocates-focus-on-racial-equity/600056064/*.

[14] Minnesota Session Laws – 2023, Regular Session, Chapter 63, H.F. No. 100, *infra*, note 1.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] DeLong, Faircloth, and Johnson, *infra*, note 2.

[19] Minnesota Session Laws – 2023, Regular Session, Chapter 63, H.F. No. 100, *infra*, note 1.

[20] *Id.*

[21] *Id.*

[22] Minn. Stat. §§152.021, subd. 1(6); 152.021, subd. 2(6); 152.022, subd. 1(5) or 152.022, subd. 1(7)(iii); 152.022, subd. 2(6); 152.023, subd. 1(5); 152.023, subd. 2(5); 152.024, subd. 1(4); and 152.025, subd. 2(1).

[23] Minnesota Session Laws – 2023, Regular Session, Chapter 63, H.F. No. 100, *infra*, note 1.

[24] *Id.*

[25] Minn. Stat. §609A.03, subd. 5.

[26] Bailey, *infra*, note 12.

[27] *Id.*

[28] DeLong, Faircloth, and Johnson, *infra*, note 2.

[29] *Id.*

IN THE WEEDS

FIREARM OWNERSHIP, CANNABIS, AND THE HEMP EXCEPTION

BY AARON EDWARD BROWN

In 2022, much to the surprise of many Minnesotans—and even certain lawmakers—the Legislature passed a law that provided guidance on the now-permissive use of certain forms of psychoactive hemp.[1] Specifically, the law provided greater clarity concerning the use of hemp products that became legal under federal law through the Agricultural Improvement Act of 2018—aka the farm bill.[2] The farm bill allowed these psychoactive products through an exception that defines hemp as c*annabis containing less than .3% tetrahydrocannabinol (THC) by dry volume*, and removed hemp from the Controlled Substances Act of 1970.[3] To be clear, hemp and "marijuana"[4] are both cannabis sativa plants and visually indistinguishable from one another.[5] They do, however, have one critical difference, which becomes abundantly clear if your main goal in using the plant is to experience its mind-altering effects: Hemp contains very low amounts of the psychoactive ingredient THC, whereas cannabis contains relatively high levels of THC.[6] To put it more simply, in its pure form the latter will get you high and the former will not.

Because federal and Minnesota state law exclude hemp from the applicable statutes that implicate cannabis generally, enterprising individuals have been able to grow hemp and extract or otherwise isolate the minimal amounts of THC inside, which can then be used to create any number of consumable items (such as gummies, beverages, and tinctures). These various products technically still fall under the 2018 farm bill's definition of hemp even though the actual THC content can be at a level similar to that of many cannabis products.[7] And like that, in July 2022 people in Minnesota interested in the mind-altering effects of THC no longer needed to visit their former high school classmate or aspiring local musician to score technically illegal cannabis. Instead, Minnesotans can now go to their local smoke shop, gas station, or even microbrewery to participate in the age-old experience of consuming THC, overeating some snacks, and passing out to Netflix a little too early in the evening. But with this newfound ability to get high in Minnesota without breaking the law,[8] many may be wondering what the implications are for firearm owners who are also interested in the THC experience.

Firearms & THC use

Under federal law, individuals who "habitually use"[9] cannabis are legally prohibited from buying or possessing[10] firearms. The penalty is up to 15 years in prison.[11] Minnesota had a parallel restriction under state law until this summer.[12] The federal prohibition continues to exist even in light of the fact that nearly one half of the population of the United States lives in a state that has expressly legalized the recreational use of cannabis (and two-thirds live in a state that has legalized medicinal cannabis).[13] To add injury to inconvenience, the federal firearm prohibition (922(g)(3)) does not distinguish between a medicinal user and a recreational user because the Controlled Substances Act (CSA) classifies cannabis as a Schedule I drug with no redeeming medicinal value, a lack of accepted safety for use under medical supervision, and a high (no pun intended) potential for abuse.[14] In comparison, cocaine, fentanyl, and oxycodone are all considered to have at least some medicinal value—and are on a lower schedule than cannabis, which exempts medicinal users of these substances from the prohibitions in 922(g)(3).[15]

This scheduling determination regarding cannabis, which can only be described as completely untethered from reality, has created many obstacles for individuals with serious medical ailments who could benefit by medicinal cannabis use. For some, chief among these obstacles is the patient's loss of their Second Amendment rights, which has dissuaded patients from engaging in otherwise beneficial cannabis-related therapies.[16] To combat this quagmire, several different strategies have emerged, including lawsuits[17] and Minnesotans lobbying the Department of Health to petition the federal government to exempt cannabis from Schedule I of the CSA.[18] To date, these strategies have been unsuccessful, notwithstanding the fact that the scientific consensus is that cannabis has medicinal benefits.[19]

Medicinal and recreational users alike can face many collateral consequences related to their cannabis use. Although the industry is by and large heavily regulated in the states that allow cannabis some legal status, the consequences include housing discrimination in certain instances, as well as potential employment discrimination in certain states.[20] Interestingly, far less regulated[21] and researched[22]

UNDER FEDERAL LAW, INDIVIDUALS WHO "HABITUALLY USE" CANNABIS ARE LEGALLY PROHIBITED FROM BUYING OR POSSESSING FIREARMS. THE PENALTY IS UP TO 15 YEARS IN PRISON.

SIMPLE MARIJUANA POSSESSION IS NO LONGER CRIMINALIZED IN MOST STATES AND IT IS APPARENTLY NO LONGER BEING TREATED AS A CRIMINAL OFFENSE IN THE VIEW OF THE FEDERAL GOVERNMENT.

hemp products that provide a similar ability to become intoxicated also provide less risk[23] in terms of collateral consequences—including for firearm owners—than more regulated cannabis products in states that allow both. Even more absurd, however, is that the risk profile for a recreational hemp user who owns a firearm in Minnesota is lower than for a firearm-owning medicinal cannabis patient. Of course, there are still rules, including around carrying or actively possessing a firearm while intoxicated, which (for good reason) Minnesota law prohibits.[24] This is true regardless of whether the individual carrying a firearm is intoxicated because of hemp, cannabis, alcohol, or some other mind-altering substance.[25]

Future outlook in light of *Bruen*

Perhaps one of the most impactful Second Amendment cases in the history of our country was decided this past summer. The case, *New York State Rifle & Pistol Assn., Inc. v. Bruen*,[26] rejected the consensus two-step legal analysis that developed after the Supreme Court's prior significant Second Amendment case, *Heller*.[27] Under *Bruen*, a regulation that the Second Amendment's "plain text covers" can only be found constitutional if the regulation is "consistent with the nation's historical tradition of firearm regulation."[28] The *Bruen* test—in its relatively short existence—has led federal courts around the country to declare many decades-old laws unconstitutional, including certain federal firearm prohibitions for individuals subject to civil domestic violence prevention orders,[29] felony indictments,[30] or who knowingly possessing a firearm that has had the serial number removed.[31] But other federal courts have come to the exact opposite conclusion on many of these same issues,[32] teeing up what seems to be an inevitable SCOTUS fight to further interpret the limitations articulated in *Bruen*.[33]

With respect to cannabis use and firearm possession, there has been a budding disagreement among federal courts in the preceding months concerning whether 922(g)(3) can ever be constitutionally applied to a habitual cannabis user. As of now, a number of federal courts who have heard a post-*Bruen* challenge to 922(g)(3) (as it relates to cannabis) have upheld the prohibition,[34] but others have found it incompatible with *Bruen's* demands.[35] The decisions upholding 922(g)(3) as applied to cannabis users have largely arrived at their conclusions under two separate theories.

The first is that violators of 922(g)(3) are not covered by the plain text of the Second Amendment because the plain text only covers "ordinary, law-abiding citizens."[36] There are several reasons why the author views this reasoning as problematic in this context. First, the plain text of the Second Amendment doesn't qualify who can own a firearm and instead uses the term "the people."[37] In other places in the bill of rights where the term "the people" is used, such a qualification wouldn't make sense.[38] Second, simple marijuana possession is no longer criminalized in most states and it is apparently no longer being treated as a criminal offense in the view of the federal government.[39] Thus, even if the Second Amendment protection only applies to "ordinary, law-abiding citizens," cannabis users would still be covered by the plain text of the Second Amendment.

The second is that 922(g)(3) is consistent with the historical tradition of firearm regulation in the United States. Courts upholding 922(g)(3) under this reasoning do so by comparing several sets of "analogous" laws—the first being state restrictions on carrying a firearm while intoxicated and the second being laws aimed at preventing people considered to be dangerous from possessing firearms.[40] In the author's view, these comparisons are flawed because both sets of past laws don't resemble historical analogues that are "relevantly similar" when applied to recreational cannabis users—and especially when applied to medicinal cannabis users.[41]

With respect to 17th and 18th century laws governing intoxication and firearm possession, 922(g)(3) is simply way too broad, as it criminalizes all active and *constructive* possession of firearms regardless of whether the individual is presently intoxicated. This criminalization of even constructive possession of a firearm is not analogous to prohibiting carrying a firearm while intoxicated. It is, however, perfectly analogous to Minn. Stat. §624.7142, subd. 2 (or any number of other states' variations), which does prohibit active firearm possession *while intoxicated*.[42] Importantly the historical justifications for these laws similarly show that the concern was related to the danger created by people who were actively intoxicated, and not people who sometimes drank alcohol and also constructively possessed or sometimes used a firearm legally while sober. In other words, these laws (much like our current ones) acknowledge people who drink alcohol on a regular or habitual basis generally don't need to have their firearm access restricted at all times and in all places, but rather just when they are intoxicated.[43]

With respect to historical laws disarming people with a proclivity for violence, the idea that tens of millions of recreational and medicinal cannabis users are all inherently dangerous solely because they sometimes use cannabis for medicinal or recreational purposes is borderline offensive and factually inaccurate in any reality other than the 1936 propaganda classic *Reefer Madness*. These laws are not the "relevantly similar" historical analogues that *Bruen* demands[44] because there is nothing inherently dangerous about someone who uses cannabis recreationally or medicinally one day and then constructively owns, or uses in a lawful manner, a firearm the next day. But even if there was, the government would need to show that an individual's dangerousness exists *through violent, forceful, or threatening conduct*, to get the correct "relevantly similar" fit under *Bruen*.[45] And to state the obvious, consuming a cannabis gummy is not in and of itself real or attempted violent, forceful, or threatening conduct. Although many rounds of briefing will undoubtedly be held on this specific issue, it would not surprise the author if many circuits (including the 8th Circuit) eventually struck down 922(g)(3) when applied to cannabis users.

Conclusion

The questionable constitutionality of 922(g)(3) and its state-law equivalents is not the only reason to suspect potential change. Recently, the Biden administration issued a statement noting that the Secretary of Health and Human Services and the U.S. Attorney General were both being asked to initiate a review of how cannabis is scheduled under federal law.[46]

On the state level, Minnesota's new Democratic trifecta recently passed a legal framework for the recreational use of cannabis.[47] Included in this framework is an amendment to Minnesota's ineligible-persons statute, which provides that recreational or medicinal users above the age of 21 are not prohibited from firearm possession solely because of their cannabis use. This is an important step. But further state-level measures could go a long way in reducing the associated risks, in particular for Black Minnesotans who have been nearly five times more likely to face a cannabis-related charge than white Minnesotans.[48] These measures could include prohibiting state law enforcement from aiding federal authorities in investigating or prosecuting potential actions under 922(g)(3) (related to cannabis use), or requiring the Minnesota commissioner of health to apply for a federal exemption to the CSA's scheduling of cannabis on behalf of Minnesota's medicinal patients.

We have learned a lot in the intervening 50 years since the federal government officially criminalized cannabis use. One thing we have learned is that the health, safety, and financial costs associated with alcohol use far exceed the costs associated with cannabis use.[49] Another is that many people find a tremendous amount of relief in their cannabis treatment,[50] with some reporting that the impact is literally life-changing.[51]

To recap, although the law has recently changed in Minnesota, the federal firearm prohibition exists for all cannabis users (medicinal or otherwise) even though the same cannot be said about recreational users of similarly intoxicating hemp products.[52] It is important to recognize the Minnesota Legislature's bold action in setting up a thoughtful and well-regulated legal marketplace for cannabis and ending the catastrophic damage brought about by prohibition. But it is also important to recognize that the work is not finished, as the federal firearm prohibition as applied to cannabis users creates an unreasonable risk for Minnesotans who own firearms. This risk remains particularly intolerable for the nearly 40,000 (and growing) medicinal users[53] in Minnesota. Simply put, our society should be removing obstacles—not maintaining them—for people to access the medicinal help they need. Hopefully with some continued bold action on the state and federal level, we won't be in the weeds on this issue for much longer. ▲

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NOTES

[1] Shaueneen Miranda, *Minnesota lawmakers voted to legalize THC edibles. Some did it accidentally*, NPR (7/2/2022), *https://www.npr.org/2022/07/02/1109576113/minnesota-thc-edibles-accident-delta-8*.

[2] *See* H.R. 2 – 115th (2017 – 2018): Agricultural Improvement Act of 2018, H.R. 2, 116th Cong. (2018), *https://www.congress.gov/115/plaws/publ334/PLAW-115publ334.pdf.*

[3] *Id.*

[4] Although the state of Minnesota and the U.S. federal government continue to use the term "marijuana" to define cannabis sativa plants that contain high levels of THC, the author will instead refer to cannabis sativa plants with high levels of THC as "cannabis." This preferred naming convention is due to the history of the term marijuana and its connection to propaganda designed to criminalize cannabis use and disparage certain groups of people. For a further discussion please see, Alex Halperin, *Marijuana: is it time to stop using a word with racists roots?*, The Guardian (1/29/2018), *https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism*.

[5] Matt Shipman, *Is Hemp The Same Thing As Marijuana?*, NC State University News (2/14/2019), *https://news.ncsu.edu/2019/02/is-hemp-the-same-thing-as-marijuana/#:~:text=Hemp%20and%20marijuana%20are%2C%20taxonomically,genus%20(Cannabis)%20and%20species*.

[6] *Id.*

[7] For more information on the two common ways manufacturers produce hemp-derived THC, *see* Elena Schmidt, *Legal Delta-9: How is It Made, and How is That Possible?,* ACS Laboratory (6/2/2022), *https://www.acslabcannabis.com/blog/retail-legal-delta-9-how-is-it-made-and-how-is-that-possible* (discussing isomerization and extraction as the two main ways manufacturers produce hemp-derived THC).

[8] Technically vendors could already sell psychoactive hemp-derived products, but the legal status was brought into question by a Minnesota Court of Appeals opinion. *See* Rep. Tina Liebling, *Regulating the sale of edibles containing hemp-derived THC* (7/20/2022), *https://www.house.mn.gov/members/Profile/News/12268/35938*.

[9] "Habitually use" has most commonly been defined as the individual (i) using drugs regularly or habitual; and (2) close in time to the prohibited action; however, some courts have found that even a onetime use of an illicit substance like cannabis can make someone a "habitual user" for purposes of 922(g)(3) under certain circumstances. *See United States v. Carnes*, 22 F.4th 743, 748 (8th Cir.), *reh'g denied*, No. 20-3170, 2022 WL 540599 (8th Cir. 2/23/2022), and *cert. denied*, 214 L. Ed. 2d 180, 143 S. Ct. 370 (2022).

[10] For purposes of 18 USC §922(g) "possession" means both active and constructive possession and prohibits ownership generally unless the owner doesn't actively or constructively possess the firearm. *See Henderson v. United States*, 575 U.S. 622 (2015). For ease, I will use the terms "ownership" and "possession" interchangeably in this article.

[11] 18 USC §922 (g)(3); 18 USC §924(a)(8).

[12] Minn. Stat. 624.713, Subd. 1(10)(iii), amended by HF 100 (2023).

[13] Natalie Fertig, Mona Zhang and Paul Demko, *Nearly half of Americans to reside in states where Marijuana is legal*, Politico (11/9/2022), *https://www.politico.com/news/2022/11/09/half-americans-state-marijuana-legal-00065987*.

[14] 21 USC §812.

[15] *Id.*

[16] *See, e.g.*, Briana Bierschbach, *Medical Marijuana advocates pushing for Second Amendment rights,* Star Tribune (6/17/2021), *https://www.startribune.com/medical-marijuana-advocates-pushing-for-second-amendment-rights/600068875/* (noting that individuals are prioritizing their Second Amendment right over cannabis treatment).

[17] *See, e.g.*, *Wilson v. Holder*, 7 F. Supp 3d 1104 (Nev. 2014); *Fried v. Garland*, 2022 WL 16731233 (N.D. Fla. 11/4/2022).

[18] *See supra* Note 16.

[19] See *UN Commission on Narcotic Drugs reclassifies cannabis to recognize its therapeutic uses*, World Health Organization Press Release (December 4, 2020), *https://www.who.int/news/item/04-12-2020-un-commission-on-narcotic-drugs-reclassifies-cannabis-to-recognize-its-therapeutic-uses; see also*, Jonathan N. Adler, M.D. & James A. Colbert, M.D., *Medicinal Use of Marijuana—Polling Results*, N Engl J Med, 368:e30 (2013), *https://www.nejm.org/doi/10.1056/NEJMclde1305159* (noting that around 8 in 10 doctors approved the use of medicinal cannabis).

[20] *See* Sophie Quinton, *Workers Who Legally Use Cannabis Can Still Lose Their Jobs*, Pew (3/2/2022), *https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/02/28/workers-who-legally-use-cannabis-can-still-lose-their-jobs* (noting only MN, DC, and 13 other states ban employer discrimination against workers who use cannabis for medical reasons).

[21] *See* Gary S. Kaminsky & Neil M. Willner, *The Tip of the Spear Piercing the Regulated Cannabis Industry: How Intoxicating Hemp Cannabinoids and the Illicit Market Pose Significant Challenges to the Emerging Industry,* JDSupra *(4/21/2022). https://www.jdsupra.com/legalnews/the-tip-of-the-spear-piercing-the-4104795/* (noting that hemp-derived cannabinoids are free from oversight and the stringent testing mandates governing similar intoxicating products in the regulated cannabis marketplace).

[22] For example, certain states have blocked the sale of hemp derived Delta 8 in part because the lack of research into its psychoactive effects. *See* Kaitlin Sullivan, *Delta 8 THC is legal in many states, but some want to ban it*, NBC News (6/28/2021), *https://www.nbcnews.com/health/health-news/delta-8-thc-legal-many-states-some-want-ban-it-n1272270.*

[23] This remains true under federal law for naturally derived hemp products; however, the DEA recently provided guidance that synthetically created compounds (e.g., Delta 9 THCO) do not fall under the hemp exception. Dario Sabaghi, *Delta-8 and Delta-9 THC-O are Controlled Substances, DEA Says*, Forbes.com, *https://www.forbes.com/sites/dariosabaghi/2023/02/16/delta-8-and9-thc-o-are-controlled-substances-dea-says/.*

[24] Minn. Stat. §624.7142, subd. 1(3).

[25] *Id.*

[26] *New York State Rifle & Pistol Assn., Inc. v Bruen*, 142 S. Ct. 2111 (2022).

[27] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[28] *Bruen*, 142 S. C.T. at 2129-30.

[29] *See United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023).

[30] S*ee United States v. Stambaugh*, 2022 WL 16936043 (W.D. Okla. 11/14/2022)

[31] *See United States v. Price*, 2022 WL 6968457 (S.D.W. Va. 10/12/2022).

[32] *See, e.g., United States v. Rowson*, 2023 WL 431037 (S.D.N.Y.) (finding statute prohibiting persons under felony indictment from receiving firearms is constitutional under *Bruen*); *United States v. Holton*, 2022 WL 16701935 (N.D. Tex. 11/3/2022) (finding statute prohibiting possession of firearm with serial number removed is constitutional under *Bruen*).

[33] The main tension is that two separate courts can come to two separate conclusions on the same exact issue based solely on how tightly each court draws the analogous historical law to the challenged law. This issue should be resolved (or at least explored) in *United States v. Rahim*i, Docket No. 22-915, which the Supreme Court agreed to hear next term.

[34] *See, e.g.*, *United States v. Black*, 2023 WL 122920 (W.D. La. 1/6/2023);
United States v. Sanchez, 2022 WL 17815116 (W.D. Tex. 12/19/2022); *Fried,* WL 16731233.

[35] *See, e.g., United States v. Harrison, 2023 WL 1771138 at *8 (W.D. Oklahoma 2/3/2023); United States v. Connelly, 2023 WL 2806324 (W.D. Tex. 4/6/2023).*

[36] *Sanchez*, 2022 WL 17815116 at *2-3 (holding that the language of § 922(g)(3) is not covered by the plain text of the Second Amendment because the Second Amendment only covers ordinary, law-abiding citizens).

[37] *See* U.S. Const. amend. II.

[38] Compare U.S. Const. amend. II. with U.S. Const. amend. I ("Congress shall make no law...[prohibiting]... the right of *the people* peaceably to assemble..."); U.S. Const. amend. IV ("The right of *the people* to be secure in their persons..."); U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by *the people*") (emphasis added). *See also*, Justice Stevens dissent in Heller pointing out that this type of limitation would negate the Fourth Amendment entirely. *Heller*, 554 U.S. at 644 (Stevens, J., dissenting).

[39] *See* Joseph R. Biden, *A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana*, The White House (10/6/2022), *https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana/* (granting a full unconditional pardon under both DC and federal law for every United States citizen who committed the offense of simple possession of cannabis in violation of the CSA).

[40] *See, e.g., United States v. Posey*, 2023 WL 1869095 (N.D. Indiana 2/29/2023); *Fried,* WL 16731233 at *7.

[41] *Bruen*, 142 S. C.T. at 2123.

[42] Minn. Stat. §624.7142.

[43] *United States v. Harrison, 2023 WL 1771138 at *8 (W.D. Oklahoma 2/3/2023).*

[44] *Bruen*, 142 S. C.T. at 2132.

[45] *See Harrison,* 2023 WL 1771138 at *17 (citing *Binderup v. Att'y Gen. United States of Am.*, 836 F.3d 336, 375 (3d Cir. 2016) (noting that "because longstanding prohibitions focused on dangerousness exhibited by past violent, forceful, or threatening conduct, '[d]ispossession on the basis of a conviction for these sorts of crimes comports with the original public understanding of the scope of the right to keep and bear arms.'").

[46] *Supra* note 39.

[47] HF 100 (2023).

[48] Christopher Ingraham, *Minnesota's Black Marijuana Users Far More Likely to Face Arrest than White Ones*, Minnesota Reformer (9/7/2022), *https://minnesotareformer.com/2022/09/07/minnesotas-black-marijuana-users-far-more-likely-to-face-arrest-than-white-ones/.*

[49] Adie Rae, PhD and Mandy Armitage, MD, *Are Marijuana and Alcohol Equally Dangerous, or Is One Safer Than the Other?*, GoodRx Health (October 2021), *https://www.goodrx.com/well-being/substance-use/is-cannabis-safer-or-healthier-than-alcohol.*

[50] Christopher Ingraham, *92% of patients say medical marijuana works*, The Washington Post (10/1/2014), *https://www.washingtonpost.com/news/wonk/wp/2014/10/01/92-of-patients-say-medical-marijuana-works/.*

[51] Joanna Ing and Cheryl Varley, *Medical cannabis 'saved my life'*, BBC News (5/18/2021), *https://www.bbc.com/news/health-57098858.*

[52] *Supra* note 3.

[53] Jay Kohls, *Advocates say legalized marijuana could help Minnesota medical cannabis program*, KSTP-TV (11/27/2022).

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LANDMARKS IN THE LAW

Current developments in judicial law, legislation, and administrative action together with a foretaste of emergent trends in law and the legal profession for the complete Minnesota lawyer.

Administrative Law
JUDICIAL LAW

Supreme Court overturns MPCA grant of water pollution permit. A unanimous Minnesota Supreme Court found the MPCA's decision to issue a water pollution permit for PolyMet's proposed NorthMet mine to be arbitrary and capricious based on "danger signals" in the agency's handling of EPA comments on the project. In reaching this result, the Court provided guidance on the Minnesota Administrative Procedure Act's section 14.68 process for investigating "alleged irregularities in [agency] procedure" and on the "arbitrary and capricious" standard for challenging agency action in section 14.69(f).

The dispute concerned a series of conversations between MPCA and EPA officials about PolyMet's draft permit. In a special fact-finding process requested under section 14.68 by environmental groups and the Fond du Lac Band of Chippewa, a district court determined that MPCA officials had asked EPA officials to withhold their written comments on the draft permit until after the close of the public comment period. The district court found that "the MPCA's primary motivation was its belief that there would be less negative press about the NorthMet Project if EPA comments were delayed until after public comments and verbally expressed EPA concerns were incorporated into the draft permit." Additionally, the district court found that MPCA failed to preserve notes and emails relating to its arrangements with EPA. And although EPA officials verbally raised concerns with MPCA about the draft permit, EPA ultimately never submitted any written comments, either before or after the public comment period.

Based on these findings, the environmental groups and Band challenged the permit decision as "made upon unlawful procedure" under section 14.69(c) and as "arbitrary and capricious" under section 14.69(f). But the district court largely rejected these challenges on the grounds that that although MPCA's actions may have been "irregular," they did not rise to the level of "unlawful." The district court stated that there "is no statute, rule, regulation, or other formally adopted policy or procedure that prohibited MPCA from asking EPA to delay its comments." The court of appeals affirmed, holding that even if there had been unlawful process, the challengers had not shown that MPCA's actions had caused them "actual prejudice" under section 14.69, which empowers courts to "reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced" because of unlawful, unsupported, or arbitrary and capricious agency action.

The Supreme Court reversed, describing the approach of the lower courts as "too constrained." The Court explained that the phrase "arbitrary and capricious" functions as a "catchall, picking up administrative misconduct not covered by the other more specific paragraphs" for judicial review under the Minnesota Administrative Procedure Act. Thus, even if a procedural irregularity uncovered under section 14.68 doesn't rise to the level of being unlawful under section 14.69(c), it may nevertheless constitute what the court described as a "danger signal" that the agency has acted arbitrarily and capriciously under section 14.69(f). The Court emphasized that "agency's procedures are at the heart of the Minnesota Administrative Procedure Act," which "focuses on 'procedural rights with the expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained.' Minn. Stat. §14.001."

Applying this reasoning, the Supreme Court stated that the "motivation of the MPCA—to avoid public awareness and scrutiny of the EPA's concerns because of the intense public interest in the NorthMet project—is contrary to the express 'purposes of the Administrative Procedure Act' to increase transparency and 'public access to governmental information.' Minn. Stat. §14.001(4)." The Court concluded that "the MPCA's request that the EPA refrain from providing written comments on the draft permit during the public comment period is an irregularity in procedure that constitutes a

danger signal of arbitrary and capricious decision-making."

The Court also rejected the court of appeals' conclusion that persons challenging agency action must demonstrate actual prejudice to their substantial rights. The Court emphasized that the statute authorizes courts to reverse agency action where the challenger's substantial rights "*may* have been prejudiced" and concluded that challengers "need not show *actual* prejudice." (Emphasis in Court's opinion.) The Supreme Court observed that the "court of appeals recitation of the prejudice requirement of section 14.69 placed a higher, and therefore improper, burden on appellants." The Court concluded that based on the circumstances, there was ample basis to conclude that the challengers' interests may have been prejudiced by MPCA's conduct because EPA's concerns were not adequately reflected in the administrative record. The Court remanded the matter to MPCA to receive EPA's comments into the record. ***In re Denial of Contested Case Hearing Requests and Issuance of NPDES Permit for the Proposed NorthMet Project***, No. A19-0112 (Minn. 8/2/2023).

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Criminal Law

JUDICIAL LAW

Probation revocation: The need for confinement outweighs policies favoring probation when a defendant repeatedly violates probation by having contact with a minor after a criminal sexual conduct conviction. Appellant pleaded guilty to first-degree criminal sexual conduct in 2018. He was sentenced to a stayed sentence of 144 months in prison, with a 30-year probationary term. Conditions of his probation included completing sex offender treatment, no unsupervised contact with minor females, and no use of sexually explicit materials. He violated all these conditions, including multiple violations of the no-unsupervised-contact condition, so the district court revoked his probation and executed his sentence.

Appellant argues the district court did not make sufficient factual findings to support the revocation, but the court of appeals disagrees. The district court designated the specific conditions that were violated, found the violations intentional and inexcusable, and found the need for confinement outweighed the policies favoring probation ("*Austin* factors"). *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). As to the third *Austin* factor, the court specifically found that confinement was necessary to protect the public from further criminal activity by appellant (*State v. Motland*, 695 N.W.2d 602, 607 (Minn. 2005)), pointing to specific evidence presented regarding appellant's behavior and the risks of such behavior. ***State v. Smith***, A22-1715, 2023 WL 441161040 (Minn. Ct. App. 7/10/2023).

Postconviction: Statute of limitations for petition does not restart when a stayed sentence is executed. After his conviction in June 2019 for felony domestic assault, appellant's 15-month sentence was stayed for five years. In August 2021, appellant's probation was revoked, and his sentence was executed. In July 2022, appellant filed a postconviction petition, arguing prosecutorial misconduct deprived him of a fair trial. The district court denied appellant's petition, finding it time-barred.

Postconviction petitions must be filed within two years of the entry of judgment of conviction or sentence, if no direct appeal is filed, or an appellate court's disposition of the petitioner's direct appeal. Minn. Stat. §590.01, subd. 4(a). Appellant argues the two-year period began in his case when the district court executed his sentence in August 2021, because the execution of his sentence was a modification of his sentence.

The court of appeals disagrees. The district court executed the sentence it had previously imposed per the requirements of Minn. Stat. §609.14, subd. 3(2), which governs revocation of a stay of execution. Appellant's sentence remains unchanged from when it was imposed in 2019. As appellant did not file a direct appeal, the postconviction statute of limitations expired two years after he was sentenced in June 2019, and his July 2022 petition was untimely. ***Brouillette v. State***, A23-0020, 2023 WL 4411614 (Minn. Ct. App. 7/10/2023).

4th Amendment: A vehicle impounded following a lawful search that revealed controlled substances may be searched again while in law enforcement's custody and control. Police had stopped appellant's vehicle for brake light and license plate violations when they noticed a firearm in the vehicle. As neither appellant nor his passenger had permits to carry, the vehicle was searched for weapons, turning up heroin and methamphetamine. Appellant and his passenger were arrested, and the vehicle was impounded. After the passenger posted bail, she asked to retrieve items from the vehicle. When brought to the vehicle, she acted suspiciously and tried to conceal something from the vehicle in her jacket. Police found a black plastic lockbox in the jacket, which contained a variety of controlled substances. Appellant was thereafter charged with first-degree and fifth-degree controlled substance offenses. His motion to suppress evidence in the lockbox was denied. After a stipulated facts trial, appellant was convicted of the first-degree offenses.

Appellant does not argue the initial search of the vehicle was unlawful, and the court of appeals notes that the automobile exception to the warrant requirement authorized police to conduct the search for concealed firearms or controlled substances. Appellant argues, however, that the lockbox was removed from the vehicle before any probable cause arose to believe it contained contraband.

The court explains that probable cause to search a vehicle does not expire when it is impounded. As police had probable cause to search the vehicle for weapons and controlled substances when it was first impounded, the vehicle remained in the custody and control of police, and no other circumstances dispelled probable cause to believe additional contraband could be found in the vehicle, police were authorized by the automobile exception to search appellant's vehicle at the time the passenger arrived at the impound lot to remove property from the vehicle.

The court also rejects appellant's argument that the passenger's removal of the lockbox from the vehicle rendered it unsearchable. Under the automobile exception, police are permitted to search any container that was inside a vehicle at the time there was probable cause to search it. Police were authorized to search the lockbox even after it was removed from the vehicle because they had probable cause to search the vehicle when the lockbox

was removed. ***State v. Schell***, A22-1115, 2023 WL 4692914 (Minn. Ct. App. 7/24/2023).

Public trial: Excluding public from a courtroom due to covid-19 implicates the right to a public trial. Appellant was charged with first-degree aggravated robbery and all spectators were excluded from the courtroom during his trial, pursuant to a covid-19 trial plan. The trial was broadcast via a one-way video feed in a nearby courtroom. Appellant was convicted and argued for a new trial, claiming his right to a public trial was violated. The court of appeals found the trial was partially closed, but ultimately concluded appellant's public trial right was not violated.

The Supreme Court first determines that the district court's complete exclusion of the public from the trial courtroom was a "true closure subject to constitutional scrutiny." Not a single member of the public was allowed into the trial courtroom. Although a video feed was provided, "[t]he constitutional values of having trial participants understand they are being observed and providing the support of family to the defendant... are undermined when the public is only allowed to view the proceedings from a secondary location via a one-way video feed."

The Court goes on to recognize that protecting trial participants and the public during the covid-19 pandemic was an overriding interest that justified some restrictions on attendance at the trial. However, even if an overriding interest is present, the district court must make specific detailed findings showing how the restrictions are no broader than necessary to protect the overriding interest and that the district court considered reasonable alternatives to closure.

Here, the district court's decision to exclude all spectators was supported by adequate findings regarding the size of the courtroom and social distancing guidelines. However, the district court did not make adequate findings for the Supreme Court to assess whether the district court considered reasonable alternatives to closure or made any findings explaining why a one-way video feed to another courtroom made the closure no broader than necessary. The case is remanded to the district court to make a record on the reasonable alternatives to closure it considered and on whether the trial closure was broader than necessary. ***State v. Bell***, A20-1638, 2023 WL 4750955 (Minn. 7/26/2023).

Evidence: Victim's statements did not fall within excited utterance exception to hearsay rule. Respondent was charged with misdemeanor domestic assault. The state moved to introduce a body-worn camera recording showing the victim's statement regarding respondent's physical abuse after the victim refused to respond to the state's subpoena. The district court granted respondent's motion to suppress the recording, concluding the victim's statements did not fall within the excited utterance hearsay exception and that her statements were testimonial under the confrontation clause. The court of appeals affirmed, finding that admission of the recording would violate respondent's right to confrontation.

The Supreme Court first concludes that the district court properly found the excited utterance hearsay exception inapplicable. Courts are to consider a number of factors, including the length of time between the utterance and the event at issue, the nature of the event, the declarant's physical condition, and any possible motive to falsify. The Court notes that, while not required, a physical manifestation of stress is often a key indicator of "an aura of excitement." The district court found here that the victim had an unexcited demeanor, enough time had passed for the victim to suggest that respondent may have fallen asleep, and nearly all the victim's recorded statement was made in response to questions by the police. Under these findings, the Court decides the district court properly excluded the body-worn camera recording of the victim's statement as inadmissible hearsay. The Court does not address respondent's claim of a confrontation clause violation. ***State v. Tapper***, A22-0161, 2023 WL 4751211 (Minn. 7/26/2023).


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Employment & Labor Law

JUDICIAL LAW

Fair Labor Standards Act; nominal attorney's fees. An award of nominal attorney's fees to a prevailing party in a claim under the Fair Labor Standards Act for nonpayment of wages was upheld by the 8th Circuit, based upon the "egregious" conduct by the attorney for the class action claimants. Affirm-

ing a lower court ruling, the 8th Circuit held that the attorney's fees should be substantially reduced from the lodestar amount because of the wrongful behavior of the attorney for the class. ***Vines v. Welspun Pipes, Inc.***, WL 2023 4685888 (8th Cir. 7/21/2023) (unpublished) (*per curiam).*

Misconduct in wage case; dismissal upheld. Litigation misconduct also was central to dismissal of a claim for unpaid wages, based upon the counsel for claimant repeatedly filing premature, meritless motions; making *ex parte* calls to the district court in a discovery dispute; asserting improper objections during depositions; and instructing a witness not to attend a deposition. That behavior warranted the trial court to dismiss the lawsuit as a sanction for "bad faith" litigation conduct, which the 8th Circuit affirmed. ***Bachman v. Bachman***, WL 2023 4286722 (8th Cir. 6/30/2023) (unpublished) (*per curiam).*

Race discrimination claim, termination upheld. A delivery driver who was fired after striking a homeowner's mailbox with his truck, which he denied, lost his claim of race discrimination after he was terminated due to the incident. The 8th Circuit upheld summary judgment on grounds that the termination was due to the driver's failure to report the accident and being dishonest about it and the claimant did not show that there was any pretext in the decision-making process. ***Cross v. United Parcel Service, Inc.,*** WL 2023 3858611(8th Cir. 6/7/2023) (unpublished) (*per curiam).*

ERISA benefits; claim denied. An employee who was denied health insurance benefits under his employer's ERISA plan after he had surgical treatment in connection with weight reduction lost his claim on summary judgment. The 8th Circuit upheld the dismissal on grounds that the ERISA plan expressly excluded medical services in connection with weight reduction, and no federal or state law ordered coverage for that type of treatment. ***Schafer v. Zimmerman Transfer, Inc.***, 70 F.4th 471 (8th Cir. 6/7/2023).

Social Security denied; claimant able to work. A claim by an employee who sought Social Security disability (SSI) benefits due to chronic fatigue was denied by an ALJ with the Social Security Administration. Upholding the ALJ's ruling, the 8th Circuit held that the claimant's medical report did not establish any disability to work and she could still perform work that included mostly computer-related tasks. ***Bentley v. Kijakazi,*** 2023 3862562 (8th Cir. 6/7/2023) (unpublished).

Federal vaccination requirement; dismissed for mootness. Revocation of an executive order signed by President Biden to require federal contractors to have their employees vaccinated for covid made a lawsuit over that policy moot. The 8th Circuit dismissed an appeal by the government of an adverse lower court decision on grounds that, due to revocation, the executive order could no longer be enforced, which made the case moot and warranted dismissal of the appeal. ***State of Missouri v. Biden***, 2023 WL 3862561(8th Cir. 6/7/2023) (unpublished) (*per curiam).*

Paid time off (PTO); no right to accrued amount. An executive director of a nonprofit organization who resigned and then sought his accumulated paid time off (PTO) lost his case. Affirming a decision of the Ramsey County District Court, the Minnesota Court of Appeals held that the claims consisting of breach of contract and violation of Minn. Stat. §181.14, the Payment of Wages Act (PWA), were not actionable because the claimant did not have a contractual right to a payout of accrued PTO and the statute does not provide any "independent" right to such a payment. ***Hightower v. Community Action Partnership of Ramsey & Washington Counties***, WL 2023 4199084 (Minn. Ct. App. 6/26/2023) (unpublished).

Unemployment compensation; translation claim fails. An employee who worked at stocking shelves for Walmart lost his claim for unemployment compensation benefits after he was discharged. The court of appeals affirmed a decision of an unemployment compensation judge with the Department of Employment & Economic Development (DEED) on grounds that the employee committee disqualifying "misconduct." It further rejected the contention that the claimant was not provided with adequate translation services during the hearing, an issue that was raised for the first time on appeal. ***Guffe v. Wal-Mart Associates, Inc.***, WL 2023 4167863 (Minn. Ct. App. 6/26/2023) (unpublished).

Former police officer prevails. A former police officer successfully challenged the decision of an administrative law judge (ALJ) who had denied his request that the claimant city must provide continuing health insurance coverage to him because he suffered a duty-related disability, as required under Minn. Stat. §352B.10. Reversing a denial by an ALJ, the appellate court held that the ALJ improperly imposed a burden of proof on the employee to establish eligibility, which was arbitrary and capricious. ***City of Waite Park v. Weeks***, WL 2023 393565 (Minn. Ct. App. 6/12/2023) (unpublished).

Unemployment compensation; covid vaccination denials. The Minnesota Court of Appeals recently addressed a quartet of covid-related unemployment claims.

An employee who refused to comply with the employer's covid vaccine requirement was denied unemployment compensation benefits because her refusal was based on "purely secular reasons" regarding the efficacy and safety of the vaccine, rather than a "sincerely held religious belief." Reiterating the standard for the determination of these type of cases, the appellate court, in a published decision, ruled that vaccination-refusing employees cannot successfully assert a claim of violation of their exercise of religious freedom rights under the First Amendment unless they show that their resistance is based upon "sincerely held" religious beliefs, rather than questioning the validity of the testing or the vaccination process. ***Goede v. Astra Zeneca Pharms., LP***, 992 N.W.2d 700 (Minn. Ct. App. 6/7/2023).

But the appellate court reversed a pair of denials of benefits by an unemployment law judge (ULJ) with the Department of Employment & Economic Development (DEED). Benefits were proper because the employees had "sincerely held religious beliefs" that supported their position, and there was insufficient evidence in the record to support the ULJ's contrary determinations. ***Benish v. Berkley Risk Administrators Co., LLC, 2023***, WL 3938996 (Minn. Ct. App. 6/12/2023) (unpublished) and ***Millington v. Fed. Reserve Bank of Minneapolis***, 2023 WL 3939525 (Minn. Ct. App. 6/12/2023) (unpublished).

An employee who claimed that it was too burdensome

for him to submit to covid testing and was not able to establish that his refusal to participate in testing was based on his sincere religious belief lost his claim. ***Daniel v. Honeywell International, Inc.***, 2023 WL 3941697 (Minn. Ct. App. 6/12/2023) (unpublished).

Unemployment compensation; availability for employment. An employee who suffered a significant job-related injury during a relatively short time working won her claim for unemployment benefits. Reversing a decision of an ALJ, the appellate court held that the record did not support the ALJ's determination that the employee had not made herself "available" for suitable employment, as statutorily required under Minn. Stat. §268.085, subd. 1(4) to obtain benefits. ***In re Merrell,*** WL 2023 3943608 (Minn. Ct. App. 6/2/2023) (unpublished).

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Environmental Law

JUDICIAL LAW

Minnesota Supreme Court rejects PolyMet's NPDES permit on procedural and groundwater issues. On 8/2/2023, the Minnesota Supreme Court affirmed in part, reversed in part, and remanded the National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) permit issued by the Minnesota Pollution Control Agency (MPCA) for a new copper mining project in St Louis County, MN, proposed by New Range Copper Nickel (formerly PolyMet Mining).

In January 2019, several environmental groups and the Fond du Lac Band of Lake Superior Chippewa challenged the permit to the Minnesota Court of Appeals. Among other things, appellants alleged that MPCA had followed irregular and unlawful procedures by pursuing and entering into an agreement by which the U.S. Environmental Protection Agency (EPA) would not submit written comments on the permit during the public-comment period but would read the proposed comments to MPCA staff in a conference call. In May 2019, the court of appeals transferred the case to the district court to examine the alleged unlawful procedures. The district court determined that while MPCA had followed several procedural irregularities, the agency's conduct, including MPCA's efforts to persuade the EPA not to submit written comments during the public comment period, was not procedurally improper or otherwise unlawful.

In reviewing the district court's decision, the court of appeals determined it did not need to determine whether the challenged procedures were unlawful because appellants had not demonstrated that the procedures prejudiced their substantial rights. For example, the court noted that MPCA's actions did not prevent appellants from submitting comments on the permit, and even if EPA had submitted comments during the public comment period, they likely would have come toward the end of the

comment period such that appellants could not have considered EPA's comments in drafting their own comments. Plus, EPA did communicate its comments to MPCA. The court of appeals also evaluated appellants' other arguments challenging the permit, including whether the permit should have included water-quality-based effluent limits (WQBELs) in addition to technology-based effluent limits, and whether the permit properly regulated seepage discharges to groundwater from the proposed project's stockpile and tailings basin.

The Minnesota Supreme Court granted appellants' petition for review to address three primary issues: (1) whether the permit must be reversed or remanded because of the procedural irregularities described above; (2) whether the permit should have included water quality-based effluent limitations (WQBELs); and (3) whether the permit complies with a Minnesota rule addressing wastewater discharges to groundwater, Minn. R. 7060.0600 (2021).

On the issue of procedural irregularities, the Court held that even if an irregular procedure of an agency does not rise to the level of an unlawful procedure under the Minnesota Administrative Procedure Act (MAPA, Minn. Stat. ch. 14), an irregularity in procedure nonetheless may constitute a "danger signal" that may be considered in determining whether an agency decision is "arbitrary or capricious." Here, the Court found several "danger signals" in MPCA's interaction with EPA during the permitting process, including: (1) arranging to delay EPA comments on the draft permit; (2) failing to document in the administrative record either its request or EPA's concerns about the draft permit; (3) not explaining if or how the MPCA resolved EPA's concerns; and (4) general deficiencies in the administrative record regarding communications between the MPCA and the EPA. These danger signals, the Court held, rendered the MPCA's decision on the permit arbitrary and capricious.

In determining whether MPCA's arbitrary and capricious permit decision required reversing or modifying the decision, the Court emphasized that the relevant inquiry is whether appellants' substantial rights "*may* have been prejudiced." Minn. Stat. §14.69 (emphasis added). Here, the Court held that appellants had met the standard. For example, the Court concluded that the lack of documentation in the administrative record regarding EPA's concerns with the permit—particularly on issues of greatest concern to appellants, such as the need for WQBELs—"may" have limited appellants' right to engage in meaningful review of the proposed permit. Accordingly, the Court remanded to MPCA for the limited purpose of giving EPA an opportunity to provide written comments on the final permit and for MPCA to respond to any comments submitted by EPA. The Court also directed MPCA to amend the permit, if warranted by EPA's comments, to add WQBELs and ensure compliance with state and tribal water quality standards.

Regarding compliance with Minnesota groundwater requirements, at issue was an MPCA rule prohibiting, in relevant part, the discharge of industrial waste to the "unsaturated zone" in a manner that may "pollute the underground waters." The rules define "unsaturated zone" as "the zone between the land surface and the water table." Minn. R. 7060.0300, subp. 7. The Court evaluated the application of this prohibition to the proposed category 1 stockpile and tailings basin at New Range's proposed mining operation. Both the stockpile and the tailings basin would allow pollutants from the mining waste materials to infiltrate to the underlying groundwater; however, in both cases, New Range proposed to construct cut-off walls from surface to the bedrock that would contain the polluted groundwater and minimize the groundwater escaping outside of the containment system. The polluted groundwater in the containment system would then be collected and sent to a wastewater treatment system. No party disputed that the groundwater in the containment systems underlying the stockpile and tailings basin would be polluted; rather, the core issue was whether the groundwater in the containment systems was part of "the underground waters" that may not be polluted under Rule 7060.0600, subpart 2.

The Supreme Court held that it was. Looking to the broad definition of "underground water," Minn. R. 7060.0300, subp. 6, the Court held that the term's unambiguous language contemplates no exclusions. The Court thus held that the prohibition on discharges to the unsaturated zone in a manner that may pollute the underground waters "applies with equal force to groundwater within the planned containment systems" at the proposed mining project, "as it does to groundwater outside the planned containment system." And because the language was unambiguous, the Court determined it did not need to defer to MPCA's contrary interpretation. The Court noted that its holding does not necessarily preclude MPCA from issuing a permit for the project, as the MPCA could consider granting a variance, which the rules allow in "exceptional circumstances." Minn. R. 7060.0900. The Court reversed the court of appeals on the groundwater issue and remanded the permit to MPCA for consideration of whether a variance is appropriate for the project. The Court's holding raises the possibility that other infiltration-based wastewater management facilities could likewise require a variance. ***In re Contested Case Hearing Requests & Issuance of Nat'l Pollutant Discharge Elimination Sys.***, ___ N.W.2d ___ (2023).

U.S. Court of Appeals upholds EPA's aircraft GHG emissions rules. In a recent ruling, the United States Court of Appeals for the D.C. Circuit upheld the 2021 EPA standards regulating greenhouse gas (GHG) emissions from domestic aircraft. The EPA's standards aligned with those adopted by the International Civil Aviation Organization (ICAO). Petitioners—made up of 12 states, the District of Columbia, and three environmental groups—challenged the EPA's regulations, claiming they should have been more stringent than those promulgated by ICAO in an effort to combat climate change.

Petitioners first asserted that the EPA failed to apply factors required by Section 231 of the Clean Air Act. The court rejected this argument, citing to the language of Section 231, which provides that "[t]he Administrator shall, from time to time, issue proposed emission standards applicable to the emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare." The court, examining the plain language of Section 231, explained that the statute

is "relatively simple," and does not mandate consideration of certain factors (such as a "latest-technology" approach), nor contemplation of substantive content of aircraft emissions standards. The EPA relied upon an earlier 2016 endangerment finding related to emissions of GHG from aircraft over a certain size. The EPA concluded that "elevated concentrations of these substances were reasonably anticipated to endanger the public health and welfare by contributing to climate change." Having made the endangerment finding, the EPA was within its authority under Section 231 to "issue proposed emissions standards" related to GHG emissions from aircraft.

Petitioners next contended that the EPA acted arbitrarily and capriciously in passing the aircraft emissions standards. They asserted three prongs to this argument: (1) by aligning domestic aircraft standards with ICAO, the EPA did not account for harms of climate change; (2) the EPA failed to consider alternatives that would reduce GHG emissions; and (3) the EPA did not consider effects of the emissions standards on minority and low-income populations as required by executive orders. The court rejected all three prongs. First, the court found it beneficial to align domestic emissions standards with global ICAO standards, citing to a history of consistent harmonization between the EPA and ICAO. Next, the court held that the EPA reasonably concluded that implementing alternative standards like those proposed by petitioners would result in delay and undue hardship to American aircraft manufacturers, which the court recognized already "navigate lengthy timelines for the certification and sale of new aircraft." Finally, the court rejected the third claim, explaining that petitioners' claim was foreclosed by the executive orders, and not subject to judicial review.

The court concluded that the EPA has substantial discretion to regulate GHG emissions from aircraft under Section 231 and acted properly in aligning domestic standards with those of ICAO. ***California v. Environmental Protection Agency***, 72 F.4th 308 (D.D.C. 2023).

ADMINISTRATIVE ACTION

EPA rescinds Trump-era rule on evaluation of benefits and costs in Clean Air Act rulemaking. On 7/13/2023, the EPA published a final rule rescinding the agency's 2020 Trump-era rule titled "Increasing Consistency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process" (the benefit-cost rule).

In many instances, the EPA is required to prepare an economic impact assessment (EIA) prior to promulgating or revising a standard or regulation under the Clean Air Act (CAA) (42 U.S.C. §7401 *et seq.*). *See* 42 U.S.C. §7617(a) (requiring consideration of, e.g., the costs of compliance, the potential inflationary or recessionary effects of the standard or regulation, the effects on competition with respect to small businesses, and the effects on consumer costs and energy use). In addition, EPA is subject to various executive orders that require the estimation of costs and benefits any time an agency develops "economically significant" regulations. For example, in 1993, President Clinton issued Executive Order 12866, which mandates that agencies "assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are

difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs," and "base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation."

Executive Order 12866 defines an "economically significant" regulation as any rule that may "have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." In addition the Office of Management and Budget's (OMB's) Circular A–4 provides guidance to federal agencies on the development of regulatory analysis as required under Executive Order 12866 and a variety of related authorities, and the EPA's Guidelines for Preparing Economic Analyses complements Circular A-4 by providing guidance on analyzing the benefits, costs, and economic impacts of regulations and policies, including assessing the distribution of costs and benefits among various segments of the population.

On 12/23/2020, the EPA attempted to revise, update, and codify these practices in the final benefit-cost rule, which established procedural requirements governing the preparation, development, presentation, and consideration of BCAs, including risk assessments used in the BCA, for significant rulemakings conducted under the CAA. The rule defined BCA as "an evaluation of both the benefits and costs to society as a result of a policy and the difference between the two." 85 Fed. Reg. 84130 (2020).

The benefit-cost rule consisted of four elements. First, it required EPA to prepare a BCA for all significant proposed and final regulations under the CAA. Second, the rule required EPA to develop the BCA using the best available scientific information and in accordance with best practices from the economic, engineering, physical, and biological sciences. The rule codified best practices for the preparation, development, presentation, and consideration of BCAs, and required that risk assessments used to support BCAs follow best methodological practices for risk characterization and risk assessment. Third, the rule imposed additional procedural requirements to increase transparency in the presentation and consideration of the BCA results. Specifically, the rule required the preamble of significant proposed and final CAA regulations to include a summary presentation of the overall BCA results for the rule, including total benefits, costs, and net benefits. Fourth, the rule required the EPA to consider the BCA in promulgating regulations, except where prohibited.

After publication, several parties filed petitions for review of the benefit-cost rule in the U.S. Court of Appeals for the District of Columbia. These consolidated cases are currently in abeyance.

On 1/20/2021, President Biden signed Executive Order 13990, directing the EPA to review all regulations and policies undertaken by the previous administration and rescind or revise any that do not protect public health and the environment. The EPA conducted a comprehensive review of the benefit-cost rule and concluded that regulations promulgated in the rule were inadvisable, not needed, and untethered to the CAA. The EPA stated that, in some cases, the rule could have hindered the EPA's compliance with the CAA and may not have even furthered the rule's stated purposes of consistency and transparency.

On 5/13/2021, the EPA issued an interim final rule to rescind the benefit-cost rule as well as a press release stating that the rule "imposed procedural restrictions and requirements that would have limited EPA's ability to use the best available science in developing Clean Air Act regulations, and would be inconsistent with economic best practices."

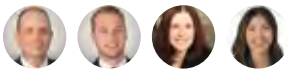
In its final rule rescinding the benefit-cost rule, the EPA explained that it would rescind the rule for several reasons:

(1) First, it failed to articulate a rational basis justifying its promulgation. EPA explained the rule did not provide any recorded evidence that the guidance and administrative processes already in place presented problems that justified the mandate imposed by the rule, and there was no discussion of how the rule would have improved the agency's ability to accomplish the CAA's goals to protect and enhance air quality.
(2) Second, the rule's expansion of BCA to all "significant" CAA rulemaking would require EPA to conduct resource-intensive BCAs without justifying why such expansion was necessary or appropriate.
(3) Third, best practices for conducting a high-quality BCA evolve over time and cannot be established using a set formula. The EPA explained that the codification of specific practices would have prevented situation-specific tailoring of the regulatory analysis to proposed policies. In addition, the rule contained a number of provisions that promoted particular types of data that could have conflicted with the use of best scientific practices or arbitrarily caused the agency to disregard important or high-quality data.
(4) Fourth, the rule required the EPA to present net-benefit calculations in regulatory preambles in a manner that would have been misleading and inconsistent with economic best practices. Specifically, the rule required a presentation of only the benefits "that pertain to the specific objective (or objectives, as the case may be) of the CAA provision or provisions under which the significant regulation is promulgated" (85 Fed. Reg. 84130 (2020)). The rule also required that if any benefits and costs accrue to non-U.S. populations, they must be reported separately to the extent possible. EPA also explained that the "purpose of a BCA is to assess the economic efficiency of policies, and in order to do so accurately, net benefits are calculated by subtracting total costs from total benefits, regardless of whether the benefits and costs arise from intended or unintended consequences and regardless of the particular recipients of the benefits or costs" (88 Fed. Reg. 44710 (2023)).
(5) Fifth, the rule did not reconcile its requirement that the agency consider the BCA in promulgating regulations with the substantive mandates of the CAA. The EPA explained that statute, not agency procedural rules, dictate what the agency may or may not consider in the context of exercising authority, and that the rule failed to align with the varied ways in which Congress either granted authority to or directed the EPA to consider benefits, costs, and

other factors.

(6) Sixth, the rule failed to provide any support for its contention that the pre-existing process was deficient. The EPA explained that the agency's pre-existing administrative process and procedures provide ample consistency and transparency, and that the rule's new procedures were unwarranted.

In its final rule, the EPA asserted that the administrative processes already in place before the benefit-cost rule was promulgated provided ample consistency and transparency in the rulemaking process. **"Increasing Consistency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process,"** 88 Fed. Reg. 44710 (2023). This final rule took effect on 8/14/2023.



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JUDICIAL LAW

Final judgment rule; attempt to manufacture appellate jurisdiction rejected. An 8th Circuit panel appears to have retreated from previous decisions by the court that allowed litigants to manufacture appellate jurisdiction by dismissing certain claims without prejudice.

After Judge Ericksen dismissed all claims against one group of defendants, dismissed most (but not all) of the claims against another group of defendants, and denied a motion for the entry of a final judgment on the claims against the first group of defendants under Fed. R. Civ. P. 54(b), the remaining parties entered into an agreement for the conditional dismissal of the remaining claims, under which the plaintiffs' claims against the second group would be "reinstated" if the 8th Circuit reversed the dismissal of the claims against the first group.

Noting that the 8th Circuit "repeatedly has expressed concerns about attempts to circumvent the final judgment rule," the majority of the panel found that "the form of conditional dismissal presented here does not create a final decision." Accordingly, the appeal was dismissed for lack of jurisdiction.

Judge Kelly dissented, asserting that previous 8th Circuit decisions allowed litigants to dismiss claims without prejudice in order to create appellate jurisdiction. ***In Re: Municipal Stormwater Pond Coor. Litig.***, ___ F.4th ___ (8th Cir. 2023).

No personal jurisdiction; single sale of product. Affirming a district court's dismissal of an action for lack of personal jurisdiction, the 8th Circuit held that a single sale of the subject product to the plaintiff was insufficient to establish personal jurisdiction over the corporate defendant, even where the defendant maintained a nationally available website. ***Kendall Hunt Publ'g Co. v. Learning Tree Publ'g Corp.***, ___ F.4th ___ (8th Cir. 2023).

Waiver; failure to raise argument before district court or in previous appeal. Where the appellants cited a case only in passing in the district court and on appeal, the 8th Circuit found that the appellants had waived an argument that was not "meaningfully" raised, noting that citing a case "without developing an argument is not enough to preserve an issue for appeal." ***Karsjens v. Harpstead***, ___ F.4th ___ (8th Cir. 2024).

Motion to disqualify judge and magistrate judge, and motion to reassign motion to disqualify denied. Judge Ericksen denied a motion to disqualify both her and Magistrate Judge Schultz, and also denied a motion to reassign the motion to disqualify in a long-running product liability MDL, finding that the motion was "meritless," and also finding that the motion was untimely when it was not filed until "at least 16 months" after plaintiffs first indicated that they intended to move for recusal. ***In re: Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.***, 15-md-2666 (JNE/DTS) (D. Minn. 7/10/2023).

Fed. R. Civ. P. 62(b); defendant ordered to post bond in excess of $1 billion. Where the defendant sought a stay of a judgment pending appeal and asked that the court "exercise its discretion" to waive the required bond, Judge Wright denied the stay request and approved the defendant's alternative request that it be allowed to post a bond in the amount of $1,158,806,436.37. ***Kelley v. BMO Harris Bank N.A.***, 2023 WL 4740927 (D. Minn. 7/25/2023).

Fed. R. Evid. 702; summary judgment granted; expert witness excluded. Granting the defendant's motion for summary judgment in a Title IX/ADA action, Judge Tostrud excluded the testimony of one of the plaintiff's experts in its entirety, finding, among other things, that her opinions regarding the defendant's interviewers' failure to use "best practices" were "not reasonably tethered" to relevant legal standards, and that her opinions regarding interviewers' alleged bias were not "based on expertise." ***Olson v. Macalester College***, ___ F. Supp. 3d ___ (D. Minn. 2023).

Motions to quash subpoenas; burden. Granting in part and denying in part a series of motions to quash subpoenas for personal cell phones in the *In Re Cattle and Beef Antitrust Litig.* brought by former employees of a Cargill affiliate, Magistrate Judge Docherty found that the subpoena recipients' privacy interests would be "adequately protected by the existing protective order," and that their "only real burden" would be that they would be without their cell phones for no more than two days. ***In Re Rule 45 Subpoena to Lucas***, 2023 WL 4561320 (D. Minn. 7/17/2023).

Fed. R. Civ. P. 26(a)(2)(B) and 37(b)(1); untimely disclosures; sanctions. Where plaintiff's experts failed to make the timely disclosures required by Fed. R. Civ. P. 26(a)(2)(B) and defendants moved to exclude the experts, Judge Davis declined defendants' request to exclude the experts, and instead held that both experts could be deposed by the defendants, with the plaintiffs required to pay the "reasonable costs and attorney's fees" associated with both depositions, but denied the defendants' request for the costs and fees associated with their motion to exclude the experts. ***Evans ex rel. Evans v. Krook***, ___ F. Supp. 3d ___ (D. Minn. 2023), *appeal filed* (No. 23-2753, 8th Cir. 8/1/2023).

Request for leave to amend denied; failure to comply with Local Rule 15.1(b). Granting the defendants' motion to dismiss claims with prejudice in a securities fraud action, Chief Judge Schiltz denied plaintiffs' request for leave to amend their complaint where they had "not identified any additional facts that they could allege," and where they failed to submit the proposed amended complaint required under Local Rule 15.1(b). ***Steamfitters Local 449 Pension & Retirement Sec. Funds v. Sleep Number Corp.***, 2023 WL 4421688 (D. Minn. 7/10/2023).

Forum selection clause; courts "in" or "of" a particular state. Dismissing an action on the basis of *forum non conveniens*, Judge Tostrud determined that a forum selection clause designating the "Courts of the State of New York" required litigation in the New York state courts, meaning that the action could not be transferred to a New York federal court. ***Persaud-Bramante Apts., L.L.C. v. Underwriters at Lloyd's of London***, 2023 WL 4473424 (D. Minn. 7/11/2023).

Local Rule 5.6(d)(3); motion for further consideration of continued sealing; presumptive right of access. Judge Tunheim rejected a challenge to a decision by Magistrate Judge Docherty that had denied a motion for further consideration of continued sealing of a contract, where the magistrate judge found that most of the contract was not "sensitive," that the confidentiality provision in the contract did not weigh in favor of sealing, and that the presumption of public access was strong. ***Cambria Co. v. Disney Worldwide Servs., Inc.***, 2003 WL 4545066 (D. Minn. 5/8/2003), *aff'd*, 2023 WL 4559436 (D. Minn. 7/17/2023).

Doe pleadings; privacy interests. Magistrate Judge Foster granted the plaintiffs' motion to proceed under pseudonyms on their claims arising out of the sex trafficking of a minor, finding that "all" of the relevant factors weighed in favor of allowing plaintiffs to proceed pseudonymously. ***Doe v. Lazzaro***, 2023 WL 4545066 (D. Minn. 7/14/2023).

Local rules amended. Amendments to Local Rules 83.5 and 83.7, relating to the requirement for local counsel and *pro hac vice* admissions, took effect on 8/1/2023. In a somewhat unusual move, Chief Judge Schiltz issued a letter the same day addressing and explaining the amendments.

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Intellectual Property

JUDICIAL LAW

Trade secret: Denial of preliminary injunction to enforce noncompete agreement. Judge Blackwell recently denied a motion for preliminary injunction that sought the enforcement of a noncompetition provision. Plaintiff Cookie Dough Bliss Franchising, LLC owns and licenses businesses that sell edible cookie dough products under the Cookie Dough Bliss trademark. In 2021, Cookie Dough entered into an agreement with defendants Feed Your Soul, granting them a non-exclusive license to operate a franchise using Cookie Dough's products, recipe, resources, and trademark in Minnesota. The agreement also included a noncompetition provision that prohibited defendants from being involved in any competitive business within a 30-mile radius of

the franchise location for two years after the franchise agreement terminated. Both parties allege that the opposing party materially breached the franchise agreement, leading to its termination.

Once the agreement was terminated, defendants began operating their own newly named cookie dough treat business in the same location using the same Facebook website. Cookie Dough filed suit alleging trade secret theft and simultaneously filed a motion for a temporary restraining order and preliminary injunction seeking to enforce the noncompetition provision of the franchise agreement. The four-factor test weighed against the issuance of a preliminary injunction. The first factor, threat of irreparable harm, was not present, as most of the harm Cookie Dough cited was speculative. For non-speculative harm, Cookie Dough's own actions created culpability by creating customer confusion, and Cookie Dough was not licensed to sell franchises in Minnesota. The court found against Cookie Dough on the next factor, finding that Minnesota law disfavors noncompete agreements, and Cookie Dough has not provided enough facts to prove the provision serves a legitimate purpose. In evaluating the balance of harms, the court found against Cookie Dough, citing that the injunction would put defendants out of business and would end their family's primary income. The final factor, the public interest, did not benefit either party as the public interest supports upholding contracts and unrestrained competition. The court, in finding three of four factors weighing against Cookie Dough, denied the motion for preliminary injunction. ***Cookie Dough Bliss Franchising, LLC v. Feed Your Soul Minn.***, LLC, No. 23-1552 (JWB/TNL), 2023 U.S. Dist. LEXIS 132808 (D. Minn. 8/1/2023).

Copyright: Lack of personal jurisdiction in view of single sale into district. The 8th Circuit recently affirmed a dismissal for lack of personal jurisdiction. Plaintiff Kendall Hunt Publishing is a textbook publisher located in Iowa. Hunt employed the defendants remotely from their homes in California, and the parties had regular contact by email and phone. From 2014-2016 the defendants successfully negotiated a publishing deal with a California teacher for an online ethics textbook—negotiating and editing solely in California. In 2019, the defendants incorporated their own business, Learning Tree Publishing Corporation, which sells online textbooks, including an ethics textbook by the aforementioned California teacher. Hunt filed suit against Learning Tree alleging claims of copyright infringement, tortious interference with contract, and unfair competition. Learning Tree countered by moving to dismiss the case due to lack of personal jurisdiction. The Iowa district court granted the motion for lack of personal jurisdiction and Hunt appealed. The 8th Circuit in response held that the district court lacked personal jurisdiction over Learning Tree. The court in its reasoning opined that Learning Tree did not have the requisite contacts with Iowa. Learning Tree did not advertise in Iowa and only had one online sale in Iowa, conducted by Hunt's employee in anticipation of litigation. The court also rejected the argument that the defendants' personal contacts with Iowa should be imputed to the corporation. The court reasoned the copyrighted material was not derived from prior contacts in Iowa and that the alleged wrongful conduct—working with the teacher and publishing and selling the book—took place in California. The 8th Circuit affirmed the district court's dismissal for lack of personal jurisdiction. ***Kendall Hunt Publ'g Co. v. Learning Tree Publ'g Corp.***, No. 22-188, 2023 U.S. App. LEXIS 18688 (8th Circ. 7/24/2023).

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Probate & Trust Law

JUDICIAL LAW

No presumption of undue influence in Minnesota. The trustee of a trust agreed to lease a farm to her grandson and his business. The beneficiaries of the trust later filed an action to invalidate the lease. The district court, after a trial, concluded that the lease was invalid as it was the product of undue influence and as it was unconscionable. While the district court appeared to analyze the relevant factors to prove undue influence in relation to the sale of real property, it relied on a New Jersey case for the proposition that "courts presume undue influence in certain cases and shift the burden of proof onto the party opposing a determination of undue influence to rebut that presumption." The court of appeals found that the New Jersey case was not binding authority, that it was not aware of any precedential case in Minnesota applying a presumption of undue influence, and that such a presumption of undue influence conflicts with at least one Minnesota Supreme Court case. For that reason, the court of appeals held that a confidential relationship does not create a presumption of undue influence or shift the burden of proof. Rather, the burden of proving undue influence remains on the party asserting undue influence. ***In re Ursula E. Nelson Tr. under Agreement dated 3/21/2014, as Amended***, No. A22-1781, 2023 WL 4418643 (Minn. Ct. App. 7/10/2023).

Common law supports striking unenforceable trust provisions. A grantor executed a trust containing a specific provision relating

to amendments that did not include a requirement that amendments be witnessed or notarized. Fourteen years later, the grantor amended the trust. The grantor signed and delivered the amendment, but it was not notarized or witnessed. Two years later, the grantor similarly amended the trust. In the final amendment, the grantor included a penalty provision that provided that "percentages will only be paid out if [the beneficiaries] start acting [like] family again to my son..." After the grantor died, one of the beneficiaries petitioned to invalidate the two amendments on the basis that the amendments were not witnessed or notarized, among other reasons.

Initially, the district court found that the first amendment was validly executed but found that the second amendment was too ambiguous to enforce. The trustee moved the court for amended findings, arguing that the penalty provision should be struck and that the remainder of the second amendment should be enforced. The district court agreed and "reformed" the trust by striking the penalty provision. On appeal, the court of appeals agreed that the amendments were validly executed and concluded that the district court properly struck the penalty provision and reformed the trust under Minn. Stat. §501C.0415 because the grantor made a mistake of law in believing that the penalty provision was enforceable.

The Supreme Court also found that the trust amendments had been validly executed. However, Minn. Stat. §501C.0415 "was not the correct provision to use in construing the second trust amendment." Specifically, "[e]quating an ambiguous trust provision to a mistake of law is not supported by pertinent precedent or statute." However, the analysis did not end there. The Supreme Court went further and noted that "Minnesota common law supports the equitable remedy of striking a provision that is unenforceable but upholding otherwise clear language in an instrument..." Because the penalty provision was not so intertwined with the rest of the trust provisions that it could not be severed, the Supreme Court determined that the district court acted within its equitable powers in construing, interpreting, and enforcing the second amendment to the trust. ***Matter of Tr. of Robert W. Moreland***, 993 N.W.2d 80 (Minn. 7/12/2023).

Presumption of revocation appropriately overcome. The decedent executed a will that left his assets to his descendants or to charity (if his descendants did not survive him). The decedent's descendants predeceased him. It was undisputed that the decedent's individual will was in his possession prior to his death, but it was not located after his death. The nominated personal representative, therefore, filed a petition for formal adjudication of intestacy. A copy of the decedent's will was thereafter provided to the district court by the decedent's attorney. Learning that it was a beneficiary, the charity objected to the nominated personal representative's petition. At trial, the nominated personal representative claimed that the decedent told her that he was going to change his will on one occasion and that the decedent told her he had destroyed his will on another. The decedent's attorney, however, testified that he had spoken with the decedent periodically about his estate plan and the decedent never indicated that he wanted to change it—despite changing other parts of his estate plan. The charitable beneficiary further introduced two letters that indicated that the decedent was comfortable with his will. Ultimately, the district court admitted the will to probate. The court of appeals affirmed, finding that the record contained extensive circumstantial evidence that the decedent did not revoke his will and that the charitable beneficiary made a *prima facie* showing of non-revocation. ***In re Estate of Andersen***, No. A23-0042, 2023 WL 4553437 (Minn. Ct. App. 7/17/2023).

Decision to appoint manager to govern land owned by a trust and individual affirmed. Married tenants in common who owned farmland executed identical wills. The wills contained a provision that prohibited the surviving spouse from revoking his or her will after the other died. The wills also contained a provision bestowing their interest in the land to a trust and granting one of their children the option to lease the land at a specified rate. After the husband died, the wife attempted to lease the land to her son at a rate lower than that designated in the husband's will. The trustee of the trust petitioned the district court to appoint a manager to make all decisions concerning the land. The district court granted the petition and the wife appealed. The wife argued that the district court lacked subject matter jurisdiction to issue an order relating to the farmland, as the scope of the court's authority was limited to the portion of the land that the trust owned.

The court of appeals disagreed and indicated that the district court was authorized to order the trustee to act consistently with the trust. However, the court of appeals noted that the district court's order could be read to exceed the trustee's authority and was potentially too expansive, as the district court only had authority to appoint a person to manage the land on the trust's behalf (not the wife's behalf). Therefore, the court of appeals modified the district court's order to specify that the manager's authority could extend no further than the trustee's power under the terms of the trust. The wife also argued, among other things, that her agreement with her husband that prohibited her from changing her will after his death did not result in the terms of her will becoming effective during her lifetime. The court of appeals agreed but also found that the terms of the husband's will fixed the trust's position as to any land lease terms with the couple's son. The court of appeals found that the couple's arrangement displayed an intention that the husband's will would govern the lease option and the lease terms that the trust was required to extend to their son on the husband's death. ***Matter of Will of Hemish***, No. A22-1569, 2023 WL 4554653 (Minn. Ct. App. 7/17/2023).

Attorneys' fees awarded to personal representative, not to beneficiary. A decedent's son filed a petition for formal probate of will and appointment of personal representative. The son served notice to all interested parties. After a hearing, the son was appointed as personal representative. Months later, the personal representative filed an *ex parte* petition to release funds from a nonprobate account. The petition noted that four of the account's beneficiaries were prepared to submit documentation required to release the funds, but the appellant could not be reached. Because there was not unanimity, Merrill Lynch had refused to release the funds. Shortly thereafter, the appellant filed an objection to the probate petition and the petition for the release of funds.

Ultimately, the district court dismissed the appellant's objections on summary judgment. In doing so, the district court directed the parties to file motions relating to any request for reimbursement of attorneys' fees. After motions were filed by both the personal representative and the appellant, the district court found that the personal representative's actions benefitted the estate and that his attorneys' fees were fair and reasonable, and awarded the personal representative almost $25,000 in attorneys' fees. The court denied the appellant's request for attorneys' fees, finding that she did not benefit the estate and that her litigious behavior caused substantial delays. The court of appeals found that the district court did not abuse its discretion in awarding the personal representative attorneys' fees, that the district court did not err in finding that the attorneys' fees were fair and reasonable, and that the record supported the district court's finding that the appellant's actions did not benefit the estate. ***Estate of Donald J. Kellett, a/k/a Donald Jean Kellett, Decedent***, No. A23-0289, 2023 WL 5013537 (Minn. Ct. App. 8/7/2023).

Agreement to proceed with a civil action amounts to waiver of *in personam* jurisdiction defense. The testators executed trusts in which their assets were to be distributed equally to their three children. One testator died in 2012 and the other died in 2017. At the time of the last testator's death, the value of the trust's assets was approximately $3 million. But because of actions taken between 2012 and 2016, one of the children (the trustee of the trust) received almost $1.7 million in assets, while the others received only about $350,000. The two beneficiaries who received less sought court intervention. The district court found that the trustee influenced his parents to take out personal loans on his behalf that were collateralized by assets in the trust. However, instead of later repaying the loans personally, the trustee used the trust's assets to repay the loans.

The district court determined that the trustee had breached his fiduciary duties, appointed an independent accountant to determine damages, and awarded prejudgment interest. After the forensic accountant's review, prejudgment interest was awarded from the date of each identified transaction. On appeal, the trustee argued, among other things, that the beneficiaries could not pursue claims that were personal to the testators because they had not been appointed as personal representatives of their estates. The court of appeals disagreed, finding that because the district court concluded that the breach of fiduciary duty only occurred when the trustee failed to repay the loans (in 2017), the beneficiaries had standing to pursue claims against the trustee. The trustee also argued that the district court lacked *in personam* jurisdiction over him, pursuant to *Swanson v. Wolf*. The court of appeals similarly rejected this argument, finding that the trustee waived any jurisdictional challenge he may have had when he affirmatively invoked the district court's jurisdiction (by agreeing to allow the case to proceed as a civil action versus a trust action, asking the court to order mediation, and filing a motion for a new trial). Additionally, the trustee argued that the district court miscalculated its award of prejudgment interest. The court of appeals agreed and found the district court's calculation to be erroneous, as it calculated interest from the date of the transaction rather than from the commencement of the action. ***Jorgensen v. Jorgensen***, No. A22-1652, 2023 WL 5012216 (Minn. Ct. App. 8/7/2023).

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Tax Law

JUDICIAL LAW

Tax court ordered to explain narrow aspect of hotel valuation. In an extensive opinion concerning the valuation of a hotel property, the Minnesota Supreme Court vacated and remanded to the tax court a single issue: "the tax court is directed to revisit and explain its adoption of the percentage reduction to the sales price of one of the comparator hotels that it used in its sales comparison analysis to account for non-taxable assets included in the sales price." The Court otherwise affirmed the tax court's opinion. ***Bloomington Hotel Invs., LLC, v. Cnty. of Hennepin***, No. A22-1201, 2023 WL 5065419 (Minn. 8/9/2023).

Following "*Erie* shuffle," tax court deems Minnesota's frivolous return penalty not unconstitutional. The Minnesota Tax Court has "sole, exclusive, and final authority for the hearing and determination of all questions of law and fact arising under tax laws of [Minnesota]," but the court does not have original jurisdiction to decide constitutional issues. For nearly 40 years, however, the tax court has been able to acquire such authority through what has become known as the *Erie* shuffle, so named after *Erie Mining Company v. Commissioner of Revenue*, 343 N.W.2d 261, 264 (Minn. 1984).

In a case involving taxation of Minnesota apportionable income for a nonresident taxpaying couple, the tax court engaged in an *Erie* shuffle to address the taxpayer's constitutional challenge to Minnesota's frivolous return penalty. The court construed the self-represented taxpayer's constitutional challenge as raising three arguments concerning (1) due process; (2) excessive fines; and (3) equal protection. None was successful.

First, the court rejected the taxpayers' argument that

the frivolous penalty clause violated due process for lack of notice. Well-established law put the taxpayers on notice that calling wages another name for the purpose of not including them on a return has "no basis in fact or law" and is frivolous. E.g., *Brintnall v. Comm'r of Revenue*, No. 7495-R, WL 1877239 (Minn. Tax 4/8/2003). Since the court in a prior opinion found that the taxpayers attempted to avoid taxation by calling wages another name, they were on notice and their due process claim failed.

The court then turned to the excessive fines argument. Both the United States and the Minnesota Constitution protect individuals against excessive fines, and that protection extends to civil as well as criminal proceedings. Justice Gorsuch, concurring in the recent Supreme Court case involving Hennepin County's forfeiture system, reminded litigants that "[e]conomic penalties imposed to deter willful noncompliance with the law... cannot be excessive." *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1382 (2023) (Gorsuch, J., concurring). The Minnesota Tax Court applied the established three-part test set out in Minnesota case law (*State v. Rewitzer*, 617 N.W.2d 407 (Minn. 2000)) to conclude that the challenged penalty met the constitutional requirements. The three-part test includes inquiries into (1) the gravity of the offense and the harshness of the penalty, (2) a comparison of the contested fine with fines imposed for the commission of other crimes in the same jurisdiction, and (3) a comparison of the contested fine with fines imposed for commission of the same crime in other jurisdictions.

Finally, the court summarily rejected the taxpayers' equal protection claim as "nonsensical." The court concluded that the frivolous return penalty is not unconstitutional, and that summary judgment was appropriate to the commissioner. ***Wendell v. Comm'r of Revenue***, No. 9488-R, 2023 WL 4441638 (Minn. Tax 7/10/2023).

Request for attorneys' fees denied. Warning that "a taxpayer's subjective belief that its gross receipts are nontaxable does not alter the consequences of its refusal to provide records in response to an audit," the Minnesota Tax Court denied a taxpayer's request for over $20,000 in attorney's fees. The court articulated the "gist" of the taxpayer's claim to fees as follows: The disputed sales tax assessment order was not "substantially justified," the taxpayer asserted, because the court granted summary judgment in the taxpayer's favor on an unopposed basis. The unopposed nature of the summary judgment, the taxpayer continued, proved that "[t]here never was the slightest factual basis" for the tax order. The court explained that "the question is not whether [the taxpayer] ultimately provided adequate... support for its sales tax reporting," but whether the commissioner's position had a reasonable basis in fact or law. Since the commissioner's position had a reasonable basis, the requested attorney fee award was not appropriate. The court did, however, award several hundred dollars in requested costs. ***Bugg Prod. LLC v. Comm'r***, No. 9516-R, 2023 WL 4983130 (Minn. Tax 8/2/2023).

Summary judgment not appropriate to resolve tax-exempt nature of medical clinics. Minnesota exempts public hospitals from property taxation. "Public" hospital includes hospitals owned by the public (like county hospitals) but also any hospital that is not "operated for the benefit of a private individual, corporation, or group of individuals." *State v. Browning*, 255 N.W. 254, 256 (Minn. 1934). In addition to excluding public hospitals themselves, the property tax exemption extends to certain auxiliary properties. Auxiliary properties are exempt if they are "owned by a public hospital *and* [are] used for the accomplishment of the purposes for which the hospital was organized." *Abbott-Northwestern Hosp., Inc. v. Cnty. of Hennepin*, 389 N.W.2d 916, 919 (Minn. 1986).

At issue in these cross motions for summary judgment was whether two clinics in Pine County (one in Pine City and one in Hinckley) are exempt as "auxiliary property" of a public hospital. The taxpayer argued that the two clinics qualified as exempt because both clinics were "essentially a hospital" and both were reasonably necessary to the hospital. The county countered that the clinics do not rise to the level of "functional interdependence" required for exemption. *See Chisago Health Servs. v. Comm'r of Revenue*, 462 N.W.2d 386, 390 (Minn. 1990) (discussing functional interdependence and explaining that "Auxiliary facilities to qualify for tax exemption must, first, be devoted to what it is that a public hospital does and, secondly, be reasonably necessary to accomplish that purpose. The test, in a sense, measures the degree to which the auxiliary facilities and the public hospital are functionally interdependent.")

The court determined that the factual record was not sufficiently developed to establish either that the Pine County clinics operate as auxiliary properties to a public hospital or that they do not. The parties' cross motions for summary judgment were denied. ***Welia Health v. Cnty. of Pine***, No. 58-CV-22-196, 2023 WL 4917278 (Minn. Tax 8/1/2023).

Expert exclusion too extreme for counsel's calendaring error. A calendaring error by counsel resulted in untimely disclosure of an expert. In some circumstances, untimely disclosure can result in exclusion of the expert's testimony. However, "the most compelling circumstances" are necessary to warrant the exclusion of expert testimony. In this instance, the untimely disclosure was not the result

of an inexcusable dereliction or tactical maneuvering. Because the county suffered no prejudice (trial was months away and the county had additional discovery opportunities), the county's motion to exclude was denied. ***MinnStar Bank, N.A. v. Cnty. of Blue Earth***, No. 07-CV-22-1402, 2023 WL 4751797 (Minn. Tax 7/25/2023).

Continued crackdown on tax protester "gibberish." The federal tax courts continue to warn taxpayers to refrain from making frivolous arguments. Petitioners who continue to embrace arguments deemed frivolous are subject to penalties per Section 6673(a)(1), which authorizes those penalties "[w]henever it appears to the Tax Court that—(A) proceedings before it have been instituted or maintained... primarily for delay, [or] (B) the taxpayers positions in such proceedings is frivolous or groundless." *Saccato v. Comm'r of Internal Revenue*, T.C.M. (RIA) 2023-096 (T.C. 2023).

Before the court for a second time, the petitioner in the first case this month "excluded all wages paid... on their joint 2018 federal income tax return and contend that wages of U.S. citizens do not constitute taxable income." *Hatfield v. Comm'r of Internal Revenue*, T.C.M. (RIA) 2023-093 (T.C. 2023). Within an IRS notice and before the court many times already, the "Petitioners' assertion that wages are not taxable income has been identified as a 'frivolous position.' *Frivolous Positions*, 2010-17 I.R.B. 609 (2010), *see, e.g., Walker v. Comm'r of Internal Revenue,* 123 T.C.M (CCH) 1336 (T.C. 2022); *Briggs v. Comm'r of Internal Revenue*, 111 T.C.M (CCH) 1389 (T.C. 2016); *Lovely v. Comm'r of Internal Revenue*, 110 T.C.M. (CCH) 98 (T.C. 2015), *aff'd sub nom. Lovely v. Comm'r of Internal Revenue*, 642 F. App'x 268 (4th Cir. 2016).

The tax court concluded by taking the "opportunity to warn petitioners again that assertions of such frivolous arguments in any future appearance before this Court may result in an additional penalty." *Hatfield*, T.C.M. (RIA) 2023-093, *3 (T.C. 2023).

In the second case, the court rejected petitioner's entreaty that he was not a tax protester. *Saccato*, T.C.M. (RIA) 2023-096 at *11. From the outset, the petitioner asserted what can only be described as tax protester arguments, starting with a claimed exemption from federal income tax. His reasoning: "[H]e is 'a citizen of the State of Oregon' and 'not a federal citizen.'" *Id*. at *10. Further, the court cited additional "gibberish commonly embraced by tax protesters—e.g., that he 'never knowingly elected to be treated as a 'taxpayer',' that he 'was protected through the doctrine of estoppel,' and that 'the notice of deficiency lacked the required jurat signed under the penalties of perjury.'" *Id.*

Since "[f]rivolous arguments and groundless claims divert the Court's time, energy, and resources away from more serious claims and increases the needless cost imposed on other litigants," the purpose of imposed penalties is quite clear. *Kernan v. Comm'r of Internal Revenue*, 108 T.C.M. (CCH) 503 (T.C. 2014), *aff'd sub nom. Kernan v. Comm'r of Internal Revenue*, 670 F.App'x 944 (9th Cir. 2016). Penalties "compel taxpayers to conform their conduct to settled tax principles and to deter the waste of judicial and IRS resources." *Coleman v. Comm'r of Internal Revenue*, 791 F.2d 68, 71–72 (7th Cir. 1986); *Salzer v. Comm'r of Internal Revenue* T.C. Memo. 2014-228, 108 T.C.M. 503, 512 (T.C. 2014), *aff'd sub nom. Kernan v. Comm'r of Internal Revenue*, 670 F.App'x 944 (9th Cir. 2016).

In *Saccato*, the court's warning to future petitioner's was quite clear as the court chastised the "[petitioner's] persistent filing of frivolous papers" which "has wasted the Government's time and ours." The court imposed a $10,000 penalty. *Id*. at *11.

Unclean hands not tenable as an affirmative defense. In this case, the petitioner claimed that the government's action in response to the COVID pandemic caused him direct harm and further that such government-induced harm should estop collection efforts under the unclean hands doctrine.

Upon review of the petitioner's federal income tax for 2013 and 2017, the IRS determined deficiencies were attributable to the petitioner's capital gains in cryptocurrency transactions during those years. In 2020, during the early days of the pandemic, however, the petitioner suffered large losses after having to liquidate assets at a substantial loss. The petitioner claims these losses were exacerbated—if not caused—by the government's response to the covid pandemic.

The petitioner's defense of unclean hands, however, had no legal basis. Fundamental to a defense of unclean hands is that "'the alleged misconduct by the [party] relate directly to the transaction concerning which the complaint is made.'" (*Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.,* 890 F.2d 165, 173 (9th Cir. 1989) (internal quotation omitted)). Further, "unclean hands does not constitute 'misconduct in the abstract, unrelated to the claim to which it is asserted as a defense.'" *Jarrow Formulas, Inc. v. Nutrition Now, Inc.,* 304 F.3d 829 (9th Cir. 2002) citing *Republic Molding Corp. v. B.W. Photo Utils.,* 319 F.2d 347, 349 (9th Cir. 1963). The petitioner's defense thus had no basis, as petition failed to substantiate any relationship between the government's 2020 alleged misconduct and a determination of federal income tax deficiencies in 2013 and 2017. ***Kim v. Comm'r of Internal Revenue***, T.C.M. (RIA) 2023-091 (T.C. 2023).

Morgan Holcomb
Adam Trebesch
Mitchell Hamline School of Law

PEOPLE + PRACTICE

We gladly accept announcements regarding current members of the MSBA. BB@MNBARS.ORG


Peter J. Kaiser and **Taylor D. Sztainer** were appointed adjunct directors of Moss & Barnett's board of directors. Adjunct directors are shareholders who serve as non-voting members of our board of directors for one year. The adjunct director program is intended to train future leaders of the firm. Kaiser is a corporate lawyer and Sztainer leads the firm's professional liability team.


Liz Dillon and **Ryan C. Gerads** were elected to the executive committee of Lathrop GPM LLP. Dillon is a partner in the firm's Minneapolis office and leads the franchise & distribution practice group. Gerads is a partner in the firm's St. Cloud office. He practices corporate, business, and tax law.

Michael J. Pfau joined Bassford Remele. Pfau is a litigator, focusing his practice in the areas of commercial litigation, consumer law defense, construction, and employment litigation/advice.

David R. Schaps was named shareholder at Barna, Guzy & Steffen, Ltd. Schaps is part of the government, labor & employment law department. He works closely with cities, the state, and municipalities in many areas of law.


Edward "Teddy" Fleming and **Zachary Wall** joined Winthrop & Weinstine. Fleming joined the corporate & transactions practice, and Wall joined the commercial lending practice.

Brian Clausen joined Dougherty, Molenda, Solfest, Hills & Bauer PA as a shareholder. He has over 24 years of practice and works exclusively in the area of family law.

Elizabeth "Ellie" Orrick joined Brandt Kettwick Defense after clerking for the Minnesota Court of Appeals. Orrick's time will be dedicated to helping those facing criminal charges.

Tyler J. Martin joined Arthur, Chapman, Kettering, Smetak & Pikala, PA. His practice is focused in automobile law and general liability.

Joseph Graen joined DeWitt LLP as a member of the litigation and intellectual property litigation practice groups, practicing in the firm's Minneapolis office.

Michael Bondi joined Spencer Fane LLP in the intellectual property practice group as a partner. Bondi focuses his practice on the preparation and prosecution of U.S. and foreign patent and trademark applications.


V. John Ella and **Anna Swiecichowski** joined Fafinski Mark & Johnson, PA. Ella joins as a shareholder, practicing in all aspects of commercial litigation, employment law, business law, and appeals, with an emphasis on unfair competition and defending employment claims. Swiecichowski joins as an associate, practicing in all aspects of commercial litigation, appeals, employment law, and business law.


Gov. Walz appointed **Justice Natalie Hudson** to serve as chief justice of the Minnesota Supreme Court. Justice Hudson will fill the vacancy that will occur upon the retirement of Chief Justice Lorie Gildea. **Karl Procaccini** was appointed to serve as associate justice. Procaccini will fill the vacancy that will occur upon Justice Hudson's elevation to chief justice. Procaccini teaches law at the University of St. Thomas School of Law.

Robert P. Abdo was elected to a two-year term on Lommen Abdo's board. Abdo is executive vice president of the firm and chair of the business, mergers and acquisitions, estate planning, and real estate group.

Leanne Litfin joined Maslon LLP as an attorney in the labor & employment group. Litfin counsels clients in labor law, including labor standards, wage and hour law, data practices, discrimination claims, employment contract disputes, compliance issues, and employee discipline.

Gov. Walz appointed **Kathryn Hipp Carlson** as a judge on the Minnesota Workers' Compensation Court of Appeals. Carlson will replace the Hon. David A. Stofferahn, who retired in July, and will serve the remainder of his term, which expires in January 2027. Carlson is an attorney at Hipp Carlson, PLLC, where she has practiced exclusively in workers' compensation since 1993.

Former Hamline Law Dean Donald Lewis retires from firm he co-founded

BY MARLA KHAN-SCHWARTZ

Donald Lewis, an accomplished attorney who served as dean of Hamline University School of Law from 2008 to 2013, recently retired from the Minneapolis firm he co-founded, Nilan Johnson Lewis. The 70-year-old has shifted to part time arbitration and mediation work with JAMS, a private company that provides alternative dispute resolution services

Lewis's tenure at Hamline Law was a career midpoint, sandwiched between stints in private practice. He also worked for the U.S. Justice Department after law school and as a federal prosecutor in Minnesota.

While he was serving on the William Mitchell board of trustees in 2007, he became interested in leading an academic environment. A year later, as he prepared to become dean at Hamline Law, the economy collapsed.

Lewis would serve as dean for five years. His tenure was marked by improving national rankings and being placed in the top five for "best value" by National Jurist magazine. Providing access and helping ensure students were equipped with tools and skills that would help them following law school provoked changes to the curriculum. Some classwork included helping students develop skills to build their own profitable law practices following law school.

"I made it a major focus of my administration of law school to do everything I could to enhance the career opportunities that students would have," said Lewis.

Strategic planning and creative thinking also led to the first discussions of what would become the combination of Hamline Law and William Mitchell College of Law. The merger didn't happen during his tenure, "but it became pretty apparent that was something in our future.

"I wasn't sure that St. Paul could sustain two law schools or that Minnesota could necessarily sustain four law schools, and I felt that we should explore a path to a combination that ultimately occurred."

Professor emerita Marie Failinger said Lewis' tenure was "probably the most challenging time for admissions in legal education in memory."

Lewis, Failinger recalled, was "realistic about the need for the law school to 'right-size,' and he set about making it happen in a careful way that respected our faculty and staff. But he also brought a new emphasis on courses and opportunities that would prepare students for the practice of law, and improved Hamline's job placement ranking in the Twin Cities especially."

Most importantly, Failinger added, Lewis "always acted with integrity and with concern for our faculty, staff, and students."

In memoriam

KENNETH DAVID BUTLER of Duluth died on August 8, 2023. In 1973, Ken graduated from the Saint Louis University School of Law. He subsequently established a law career in Duluth and started his own solo practice in 2000.

NICOLE ROCHELLE HITTNER of Inver Grove Heights passed away on July 8, 2023 at the age of 45. She attended William Mitchell College of Law 2005-2008. She was brought on as a summer associate during law school at Lindquist and Vennum and ultimately became a partner. In 2021 she moved to Taft Stettinius & Hollister LLP.

BARNETT IAN "BUD" ROSENFIELD passed away suddenly on July 10, 2023. Rosenfield was the state's ombudsman for mental health and developmental disabilities as well as a former supervising attorney at the Minnesota Disability Law Center.

CHRISTOPHER "CHRIS"RYAN BRADEN died June 29, 2023 at age 39. Braden's dream was to become a lawyer and he eventually became his dad's law partner in 2017. He loved practicing law and concentrated on family, juvenile, and guardianship/ conservatorship cases. Braden, who enjoyed judging MSBA mock trial competitions, was a SMRLS (legal aid) volunteer attorney and a past president of the Rice County Bar Association.

JAMES HINCHON MANAHAN, 86, died on April 18, 2023. Manahan was active in many legal organizations, including service as president of the American Academy of Matrimonial Lawyers (Minnesota Chapter), dean of the Academy of Certified Trial Lawyers of Minnesota, president of the Sixth District Bar Association, and president of the Harvard Law School Association of Minnesota. For 25 years he was board-certified by the National Board of Trial Advocacy as both a civil and a criminal trial specialist. He was a part-time public defender for 20 years in Mankato. After moving to the North Shore, he was the victim witness coordinator for the Lake County Attorney's Office in Two Harbors.

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Hvistendahl Moersch Dorsey & Hahn, P.A., in historic Northfield, Minnesota is expanding! We are seeking applications for an experienced associate attorney to practice primarily in family law. Approximately two years of experience or more is preferred. Send resumes and cover letters to lawinfo@hvmd.com.

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I HATED BEING A LAWYER!

BY PAUL M. FLOYD

PAUL FLOYD is one of the founding partners of Wallen-Friedman & Floyd, PA, a business and litigation boutique law firm located in Minneapolis. Paul has been the president of the HCBA, HCBF, and the Minnesota Chapter of the Federal Bar Association. He lives with his wife, Donna, in Roseville, along with their two cats.

One day, 15 years into being a litigator, I was driving down 35W with my wife, Donna, when I blurted out, "I hate being a lawyer!" To which my wife responded, "You don't have to be one." To which I replied, "Oh, yes I do. You don't understand." Donna said, "Well, you don't have to be *that* kind of lawyer." After a long pause, she asked, "What would you rather be doing?" I immediately said: "Teaching and counseling professionals instead of litigating." She said: "Let's talk about how we could make that happen."

In talking over the years with mentors, peers, and younger colleagues, I have heard this refrain numerous times from lawyers who are stressed, frustrated, and on the verge of throwing in the towel. It grows louder after receiving a terrible decision from a judge, being stiffed by a client, or getting an ethics complaint.

For me, "I hate being a lawyer!" was an epiphany and a turning point in my career. Tired of the games some litigators play, all I could see ahead of me was dreary years of arguing with opposing counsel and bringing motions in response to delay tactics. It was not for me. I was depressed and seriously considering leaving the profession. I dreaded going to work. My acute but low-grade stress showed up as high blood pressure at my annual physical. It also was coming out sideways in my closest relationships—where I was grumpy, tired, sad, and in general not pleasant to be around.

My wife's words of encouragement, followed by some helpful therapy, prompted me to move in a new direction. I left my litigation job and started a new firm with a law school classmate. My practice evolved over time from litigation to transactional work, especially serving lawyers and other professionals and their firms. More importantly, I began to teach college and law school. It made all the difference to my mental health, personal relationships, and outlook. It's wise to pause every so often and take account of the pros and cons of our practices and then act.

For many of us (assuming good health), our law practices will span four decades. Each of those decades is characterized by different life and practice stressors, with ebbs and flows in work-life balance. In the first decade, you find your own style of practice and focus on becoming competent. Some lawyers, perhaps in a search for work/life balance, move from firm to firm and even in and out of law practice, trying to find the setting that best aligns with their values or personal goals. This is a time for building relationships with peers and mentors, which can be enhanced through bar association socials, CLEs, and section, committee, or task force involvement. Writing an article for Bench & Bar or a district bar publication can help to establish your competence in your practice area.

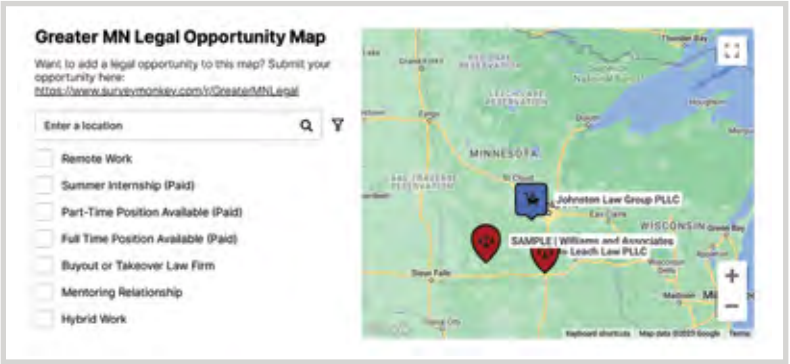
The second decade is generally focused on doing what you do well and developing a good reputation among peers and referral sources. For those in private practice, the focus moves from becoming a law firm shareholder or partner to marketing and building a book of clients. Client relationships and referrals are pivotal here. Again, bar associations' resources and member benefits can support your growing practice. Becoming certified as a civil trial, criminal law, real estate, or labor & employment specialist can further burnish your reputation and solidify your legal competence in the marketplace.

The third decade can be one of major change: going in-house, becoming a judge, starting your own firm, or joining a new firm and establishing a professional brand for yourself. Here, volunteering in bar associations' sections, committees, boards, DEI and pro bono initiatives, and leadership tracks can help a lawyer to stand out to another law firm when considering a move, to their corporate client when looking to go in-house, or to the governor's office when seeking a judgeship.

The fourth decade is different for each attorney. Figuring out how you want to spend the last years of your practice before retirement is essential for mental well-being. For many, the last decade of practice is the most enjoyable. You don't have to prove your "value-add" to your firm or clients. You can say yes or no to client matters and volunteer projects. Being active in your bar association before you retire can be rewarding. Consider joining the Senior Attorneys Section and enjoying the support of your fellow senior attorneys before and after you retire.

Be intentional and seize control of each decade of your career. The practice of law is not about getting a job and putting your life and career on autopilot until you're miserable or you finally retire. And don't wait until you're yelling into the wind about hating being a lawyer before you figure out what kind of lawyer you want to be. Thankfully, it's a career, not a sentence. ▲

IN THE NEWS



Connecting Greater Minnesota lawyers with job seekers

This past bar year, the Greater Minnesota Section Council has been focused on identifying and overcoming barriers that law students and metro attorneys face in choosing to practice in rural areas. One challenge section members felt they could face head-on was making connections for the individuals struggling to find opportunities.

We are happy to introduce an easy-to-access, easy-to-use mapping tool for legal opportunities in rural Minnesota. At present, this tool will reside on the Greater MN Legal Opportunity Network Community at ***www.mnbar.org/greater-minnesota-practice***, where it is available for all MSBA members. The map can show a variety of available opportunities, including full-time work, part-time work, paid summer internships, mentoring, and firm buyout opportunities. It will also indicate whether those opportunities are hybrid, remote, or in-person, and whether benefits and housing options are available. The map will serve as a stand-alone web-based tool but also will be used at law school and other bar association events to highlight opportunities. The first event at which the tool was made available was a November 6 Meet the Market event at the U of M Law School.

Do you have a legal opportunity to submit? You can share it via the survey link at ***www.surveymonkey.com/r/GreaterMNLegal.***

Special thanks to Greater Minnesota Section Council member Janna Borgheiinck of Wornson Goggins PC (New Prague) for her work on developing this tool. ▲

ATJ committee's report examines debt litigation in MN

On October 10, the MSBA Access to Justice Committee issued a comprehensive report on debt collection lawsuits in Minnesota, Minnesota Consumer Debt Litigation: A Statewide Access to Justice Report. Based on a thorough analysis of nearly 700,000 court cases from 2011-2021, it highlights the dominance of debt collection cases in the state's civil courts, where they make up over half of all civil cases. It also points out that the complexity of the legal system can be particularly burdensome for unrepresented Minnesotans.

Over 97 percent of individuals facing debt litigation represent themselves, as they often fall into a financial gap where they earn too much to qualify for legal aid yet can't afford private attorneys. This situation underscores the need for accessible and effective means for all Minnesotans to participate in the legal process. Currently, 82 percent of debt lawsuits filed in district court result in automatic wins for the plaintiffs, potentially leading to court-authorized garnishments of wages and bank accounts.

The report also uncovers disparities, both racial and income-related, in debt lawsuit filings. Black and Latino Minnesotans face debt claims at a rate more than twice that of non-Hispanic white Minnesotans, even at higher income levels. While the court cannot control who gets sued, the disparities highlight the urgent need to improve the justice system to ensure that all Minnesotans have a path to participate effectively in the legal process.

The report's recommendations are aimed at addressing these issues:

- Develop specialized procedural rules for debt cases to better manage consumer debt cases.
- Create and enhance resources to empower self-represented litigants.
- Preserve economic stability for debt-burdened individuals to meet their basic needs while repaying debts.
- Expand services for lower- and moderate-income individuals struggling with debt.

The report was a joint effort between the MSBA Access to Justice Committee, Legal Services State Support, the Pew Charitable Trusts, and the data analytics firm January Advisors. You can read the full report at ***www.mnbar.org/atj***. ▲

Drawing the line on ethical witness preparation

BY SUSAN M. HUMISTON ✉ *susan.humiston@courts.state.mn.us*

SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

Earlier this year, a former Fox News employee filed an employment lawsuit against Fox.[1] I was interested in this lawsuit due to its allegations regarding improper witness coaching before a deposition. In fact, the alleged actions of counsel had their own section of the complaint with this heading: To Thrust Exposure for Its Wrongdoing Away from Fox Corp and onto Others, Fox News's Legal Team Coerces Ms. Grossberg to Distort the Truth and Shade Her Deposition Testimony Against Her Personal and Professional Best Interest in the *Dominion* Litigation.[2] What was alleged against both in-house and outside counsel?

The complaint alleged, among other things, that Ms. Grossberg (1) was discouraged from mentioning understaffing or workplace stress and how it interfered with her ability to stay current on tasks; (2) understood she was to respond with "I do not recall" whenever she had the opportunity; and (3) counsel "scowled" or shook their head "no" when she answered hypothetical questions in ways that were truthful but implicated others or put information in context.

My first thought was, who hasn't made a face on occasion when prepping a witness? Sometimes you cannot help cringing when you listen to a witness, not because you want the witness to testify untruthfully but because you know how the witness's words would be misconstrued. My second thought was, telling a witness to truthfully answer "I don't know" is not problematic, but I also found it fascinating what the complainant heard the lawyers to be communicating based upon the allegations. Effectively preparing witnesses to provide testimony is an essential litigation skill. To do so competently and ethically requires a lot of work and forethought, because you must not only understand where the ethical lines lie but also keep in mind how the nonlawyer witness is hearing what you are saying.

With this backdrop, I was pleased to see a recent ethics opinion by the ABA.[3]

Permissible witness preparation

The opinion provides a helpful list of preparatory conduct that is ethical. That list includes:

- reminding the witness that they are under oath;
- emphasizing the importance of telling the truth;
- explaining that telling the truth can include a truthful answer of "I do not recall;"
- explaining case strategy and procedures, including the nature of the testimonial process or the purpose of the deposition;
- suggesting proper attire and appropriate demeanor and decorum;
- providing context for the witness's testimony;
- inquiring into the witness's probable testimony and recollection;
- identifying other testimony that is expected to be presented and exploring the witness's version of events in light of that testimony;
- reviewing documents or physical evidence with the witness, including the use of documents to refresh a witness's recollection of the facts;
- identifying lines of questioning and potential cross-examination;
- suggesting choice of words that might be employed to make the witness's meaning clear;
- telling the witness not to answer a question until it has been completely asked;
- emphasizing the importance of remaining calm and not arguing with the questioning lawyer;
- telling the witness to testify only about what they know and remember and not to guess or speculate; and
- familiarizing the witness with the idea of focusing on answering the question, i.e., not volunteering information.

This list not only delineates ethical witness preparation but also provides a good roadmap for how to competently prepare a witness to be deposed or to testify. Diligence and competent representation of your client generally requires that you approach witness preparation by covering the above topics and doing so in the manner described.

Impermissible witness preparation

The opinion also outlines unethical efforts to improperly influence witness testimony (described in the opinion by various phrases such as coaching, horseshedding, woodshedding, or sandpapering). This list includes:

- counseling a witness to give false testimony;
- assisting a witness in offering false testimony;
- advising a client or witness to disobey a court order regulating discovery or trial process;
- offering an unlawful inducement to a witness; or
- procuring a witness's absence from a proceeding.

Obvious, right? But what about gray areas?

The opinion provides the following guidance regarding "I don't recall." It is appropriate to tell a witness that "I don't recall," when true, is an acceptable answer. The opinion contrasts this with impermissibly telling a witness, "The less you recall, the better." The former is permissible, while the latter encourages a witness to lie under oath about what is remembered.[4] Turning to the allegation in the Fox lawsuit, encouraging a witness to respond "I don't recall" when true is permissible; it may cross the line if the guidance is to respond that way even if it's not true or to respond that way categorically to certain types of questions, regardless of the truth. A nuance to keep in mind here is thinking about your guidance from the perspective of the witness. Are you being clear in your guidance by reiterating that "I don't recall" is acceptable only if true, without suggesting that is a preferable answer notwithstanding its accuracy? Judicial proceedings (which include deposition testimony) are truth-seeking exercises, and it is generally true that the facts are the facts, as they say. Similarly, take care in suggesting word choice. Is your focus on making the witness's testimony clear, or are you assisting a witness in providing false or misleading testimony? The former is permissible, the latter is not. Are you clear with your witness on the distinction?

The ABA opinion discusses examples in which lawyers are implicitly and impermissibly encouraging false testimony, such as telling a witness to "downplay" the number of times prep sessions occurred, encouraging a client to misrepresent the location of a slip-and-fall accident to have a viable claim, or "programming a witness's testimony."

The opinion is somewhat equivocal on scripting testimony.[5] The opinion calls "programming" witness testimony unacceptable but suggests question-and-answer scripts may be permissible, and provides an analogy to drafting witness affidavits. The Restatement has long taken the position that witness preparation can include rehearsal of testimony.[6] The key is that the testimony must be truthful. I've never known anyone to script questions and answers (and it seems like a bad idea and extremely difficult to do), but I have seen witnesses perform poorly because they try to testify the way they think the lawyer wants them to answer questions instead of speaking clearly about how they recall and understand the facts. Again, the bullet-point list of permissible witness preparation actions not only provides good guidance for staying on the right side of the ethical line but also shows the best way to assist the witness in authentically and accurately sharing the information they possess.

Remote proceedings

An important focus of the recent opinion is impermissible coaching during testimony, particularly given the prevalence of remote proceedings, where it is possible to attempt to influence testimony mid-deposition or trial. The opinion starts with the obvious prohibitions—winking at a witness during trial testimony, kicking a deponent under the table, passing notes or whispering to the witness mid-testimony—and then progresses to other forms of signaling that are often impermissible, such as spoken objections that suggest the answer. Basically the opinion provides that what doesn't fly in person does not fly remotely, just because it is easier to do and harder to prevent. And there is very little tolerance for such coaching even if the "coached" testimony is true, given how often it runs afoul of procedural rules and the myriad ways it undermines the credibility of the witness and the proceedings.

The opinion does note one caveat relating to deposition testimony, namely, "openly asking a witness to correct an inadvertent misstatement when the witness obviously misunderstood a question or simply misspoke." The opinion notes this is not impermissible coaching, and in some instances, may be an appropriate remedial measure to correct false testimony.[7] The best way to handle this is in real time, or through limited re-direct at the end of the deposition.

Conclusion

Effectively preparing a witness to offer testimony is a required litigation skill and I hope that newer lawyers are getting the training they need to do so competently and ethically. Becoming proficient is more challenging than it may appear. Actions that interfere with the opposing party's ability to gather information relating to the matter are generally not consistent with the ethics rules and add to the stress of an already stressful situation and practice. I hear from so many that lawyers are losing the ability to be adversarial in a professional manner, and I see that in the complaints that we receive. Further, more courts are sanctioning such conduct, which is often in violation of the court's procedural rules but can also run afoul of several ethics rules. No matter your level of experience, a review of the recent ABA opinion is a helpful reminder of the ethics of witness preparation. ▲

NOTES

[1] Complaint, *Grossberg v. Fox Corp, et. al.*, No. 1:23-cv-02368 (SDNY 3/20/2023), ECF No. 1.

[2] Para. 132-171, at 31-39.

[3] ABA Formal Opinion 508, "The Ethics of Witness Preparation" dated 8/5/2023.

[4] *Id.*, fn. 10.

[5] *Id.*, fn. 19.

[6] The Restatement (Third) of the Law Governing Lawyers, §116 (2000).

[7] Opinion 508, fn. 29.

The CSRB weighs the lessons of Lapsus$

BY MARK LANTERMAN ✉ mlanterman@compforensics.com

MARK LANTERMAN is CTO of Computer Forensic Services. A former member of the U.S. Secret Service Electronic Crimes Taskforce, Mark has 28 years of security/forensic experience and has testified in over 2,000 matters. He is a member of the MN Lawyers Professional Responsibility Board.

In August the Cyber Safety Review Board (CSRB)[1] put forth its second report, "Review of the Attacks Associated with Lapsus$ and Related Threat Groups."[2] Lapsus$ was an organized hacking group, unique for its members and motivations. Beginning in 2019, the group targeted multiple organizations and entities using tactics that ranged from simple social engineering to advanced technological tools.[3] The group seemed to have a number of reasons for their attacks, from political ideologies to simply showing off. Recently, a court found that an 18-year-old from Oxford was a member of Lapsus$, even having leaked clips of an unreleased game online while violating his bail conditions.[4]

According to a BBC report, "The gang—thought to mostly be teenagers—used con-man like tricks as well as computer hacking to gain access to multinational corporations such as Microsoft, the technology giant, and digital banking group Revolut. During their spree the hackers regularly celebrated their crimes publicly and taunted victims on the social network app Telegram."[5] The string of attacks offered insight into the security vulnerabilities existing within even the best-defended organizations; the CSRB report provides an in-depth analysis of the attacks and strategies for dealing with the most successful methods of intrusion.

The CSRB found that typical multi-factor authentication (MFA) methods were largely insufficient for protecting most organizations and consumers. "In particular," the report noted, "the Board saw a collective failure to sufficiently account for and mitigate the risks associated with using Short Message Service (SMS) and voice calls for MFA."[6] SIM swapping attacks were frequently used by Lapsus$ to bypass MFA protections, and information obtained via "underground markets" was used to get access to victims, sometimes through their own third-party vendors.

Having reviewed what made this group's attacks so successful (and why some organizations were able to effectively defend themselves), the CSRB made several recommendations on how to improve cybersecurity postures and stay resilient against similar attacks. Its summary of the types of organizations best able to defend themselves or mitigate damages is worth bearing in mind:

1. organizations with mature, defense-in-depth controls;
2. organizations that used application or token-based MFA methods and network intrusion detection systems;
3. organizations that effectively followed their incident response plans; and
4. organizations that were able to communicate safely with incident response professionals without being monitored by threat actors.

While Lapsus$ may have disbanded—or rebranded—similar cybercrime groups can easily materialize. Security methods should always be assessed for optimal protection, such as standard MFA practices. The episode is also a reminder that third-party vendor relationships are critical pieces of an overall security posture and that clear contract language is important in managing data. As the CSRB report demonstrates, attackers will often attack a target through its vendors. Resiliency, smooth incident response procedures, and clear communication with necessary external parties can help organizations recover as quickly as possible when cyberattacks do occur.

While Lapsus$ as it once existed may or may not be finished, organized cybercrime groups will continue to pose significant risks. The report describes a need for additional law enforcement involvement as well as intervention programs for young offenders. Though recommendations are given for individual organizations to improve internally, overarching changes to what we consider "basic" cybersecurity are proposed as well:

"We need better technologies that move us towards a passwordless world, negating the effects of credential theft. We need telecommunications providers to design and implement processes and systems that keep attackers from hijacking mobile service. We need to double down on zero trust architectures that assume breach. We need organizations to design their security programs to cover not only their own information technology environments, but also those of their vendors that host critical data or maintain direct network access."[7]

The Cyber Safety Review Board's most recent review is important for organizations looking to gain a fresh perspective on their current practices, especially in light of cybercrime groups capable of bypassing even the strongest security measures. The group's next report will delve into cloud computing and keeping data secure regardless of where it is stored. ▲

NOTES

[1] *https://www.cisa.gov/resources-tools/groups/cyber-safety-review-board-csrb*

[2] *https://www.cisa.gov/sites/default/files/2023-08/CSRB_Lapsus%24_508c.pdf*

[3] *https://www.forbes.com/sites/emilsayegh/2023/03/15/teenagers-leveraging-insider-threats-lapsus-hacker-group/?sh=5b859ba64e43*

[4] *https://www.bbc.com/news/technology-66549159*

[5] *Id.*

[6] Supra note 2.

[7] *Id.*

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Understanding Seasonal Affective Disorder

and how it can affect your practice

BY SHEINA LONG ✉ *sheina.long.vaar73@statefarm.com*

SHEINA LONG is a licensed attorney practicing in Minnesota and Wisconsin who also holds active licenses in Missouri and Illinois. She is currently based in St. Paul, Minnesota, working within the Claim Litigation Counsel Section of the Law Department of State Farm Mutual Automobile Insurance Company.

Have you ever suffered from the seasonal blues? You likely were dealing with seasonal affective disorder. The Mayo Clinic defines seasonal affective disorder (SAD) as "a type of depression that's related to changes in seasons—seasonal affective disorder [] begins and ends at about the same times every year."[1]

Symptoms

We all know how dreary and cold the Minnesota winters can be. They start early in the fall and seem to end late in the spring. The sun tends to hide behind the dark clouds, and we find darkness creeping in during the early evening.

Could the symptoms of the winter blues be something more? The Mayo Clinic lists symptoms of fall and winter SAD, which include "feeling listless, sad or down most of the day, nearly every day; losing interest in activities you once enjoyed; having low energy and feeling sluggish; having problems with sleeping too much; experiencing carbohydrate cravings, overeating and weight gain; having difficulty concentrating; feeling hopeless, worthless or guilty; having thoughts of not wanting to live."[2]

The Mayo Clinic further lists symptoms of spring and summer SAD, which include "trouble sleeping; poor appetite; weight loss; agitation or anxiety; increased irritability."[3]

How can SAD affect our practice?

SAD affects our moods and can leave us feeling hopeless, listless, and unmotivated to work or to complete the daily tasks on our to-do lists. Despite the change in seasons, our lists of reports, motions, briefs, and other work keep growing.

If our mindset prevents us from being able to fully focus on our work, that can affect our work product and the ability to fully and properly represent our clients. Minnesota Rules of Professional Conduct Rule 1.1 states "a lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

SAD can affect an attorney's ability to be thorough in representation, or to prepare reasonably for the representation, in ways we may not even realize.

What improves SAD?

In a word, sunshine.

Sunshine is underrated in the numerous benefits that it can bring to the mind and body. According to a Forbes article on the benefits of sunlight, "it elevates mood; it improves sleep; it promotes bone growth; it helps strengthen the immune system; it lowers blood pressure; it may reduce the risk of melanoma; it promotes weight loss."[4] Try to get as much sunlight as possible by going outside or sitting in the sunlight in front of a window.

Despite sunshine's being a mood elevator, there are many days during the winter months when it's hard to get adequate sunshine—the weather is often coldest on sunny days in winter, and the sun frequently vanishes for many days at a time.

Light therapy is another way to improve SAD-related mood problems. In the words of the UK National Health Service, light therapy "involves sitting by a special lamp called a light box, usually for around 30 minutes to an hour each morning."[5] Light therapy lamps can be found on Amazon or various stores online. It is said that the "light produced by the light box simulates the sunlight that's missing during the darker winter months."[6]

The Mayo Clinic also identifies some self-care methods we can use to help fight effects of SAD: "[M]ake your environment sunnier and brighter, get outside, exercise regularly, and normalize sleep patterns."[7]

Many individuals may suffer from the winter blues yet fail to recognize the symptoms of seasonal affective disorder. If you think you may be one, try taking advantage of some of these methods for combating the effects of seasonal affective disorder and to abide by the ethical rules of our practice.

My views expressed herein do not necessarily reflect the view and position of State Farm and they are given in my individual capacity. ▲

NOTES

[1] *https://www.mayoclinic.org/diseases-conditions/seasonal-affective-disorder/symptoms-causes/syc-20364651*
[2] *Id.*
[3] *Id.*
[4] *https://www.forbes.com/sites/nomanazish/2018/02/28/why-sunlight-is-actually-good-for-you/?sh=1a5e466e5cd9*
[5] *https://www.nhs.uk/mental-health/conditions/seasonal-affective-disorder-sad/treatment/#:~:text=more%20about%20antidepressants-,Light%20therapy,lamps%20and%20wall%2Dmounted%20fixtures.*
[6] *Id.*
[7] *https://www.mayoclinic.org/diseases-conditions/seasonal-affective-disorder/diagnosis-treatment/drc-20364722*

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Mitchell Hamline Alumni Association names three newest winners

BY TOM WEBER

A recently retired judge who served on the bench for more than a quarter century, the director of the Safe Harbor program at Minnesota's health department, and the director of the Prison to Law Pipeline at the Legal Revolution were recipients of this year's alumni awards from the Mitchell Hamline Alumni Association.

Outstanding Alumni Award

Senior Judge Denise Reilly '83

Denise Reilly is a 1983 graduate of William Mitchell College of Law and served nine years on Mitchell Hamline's board of trustees, from 2012-2022. She was a district court judge for nearly 17 years before being named to the Court of Appeals in 2014 and recently retired as she approached the mandatory retirement age. She will soon take senior judge status.

In 2009, Reilly was one of three judges to serve on a panel that heard the trial in the recount of the U.S. Senate election between Norm Coleman and Al Franken. The panel eventually unanimously ruled that Franken won. Before becoming a judge, she was an assistant U.S. attorney for eight years and an attorney at Lindquist & Vennum before that. She started her career as a law clerk to the late U.S. District Judge Robert Renner.

Distinguished Alumni Award

Caroline Palmer '98

Caroline Palmer is the Safe Harbor director at the Minnesota Department of Health, where she focuses on building collaboration across government and private sectors on behalf of survivors of human trafficking. She is responsible for policy development, grantee oversight, project management, and data/evaluation management.

Before joining the state, Palmer was the policy and legal affairs manager at the Minnesota Coalition Against Sexual Assault for more than a decade. She has also served as the pro bono development director at the Minnesota State Bar Association; was a staff attorney at the Minnesota AIDS Project; and has a long history in arts journalism.

Recent Alumni Award

Maya Johnson '20

Maya Johnson joined the organization All Square and its subsidiary, the Legal Revolution, in 2022 to direct its Prison to Law Pipeline. The program works with currently incarcerated people in Minnesota who are seeking legal education opportunities. The work includes a partnership that resulted in Mitchell Hamline becoming in 2022 the first ABA-approved law school in the country to educate currently incarcerated individuals.

Johnson previously worked as a staff attorney for Southern Minnesota Regional Legal Services and clerked during law school for the Minnesota state appellate public defender's office, the ACLU of Minnesota, and the Hennepin County Public Defender's Office. She also was a certified student attorney with the Mitchell Hamline LAMP and Reentry clinics.

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Advocate Award – Catherine Ahlin-Halverson, Maslon LLP
Direct Legal Service Award – Muria Kruger, Volunteer Lawyers Network
Private Practice Lawyer Award – Erica Holzer, Maslon LLP

Q: WINTER'S COMING. TELL US ABOUT YOUR DREAM VACATION GETAWAY.

Grace Bowman

Grace Bowman is an assistant public defender in Minnesota's Ninth Judicial District. She obtained her JD from Mitchell Hamline School of Law in 2022. ✉ *grace.bowman@pubdef.state.mn.us*

I know that in the dead of winter, most Minnesotans want to escape to somewhere warm. Florida, or Aruba, or Fiji, could sound good to a lot of people, and I get it. But I really, really want to get colder.

I live in northern Minnesota, but Bemidji's average January low of -5F isn't enough. I dream about North Ice, Greenland; or Oymyakon, Russia; or the Vostok Research Station in Antarctica. If the weather is warm enough to allow my car to start, I'm not interested.

I'd rather read in front of a fire on a miserably cold day than overheat on a beach somewhere. I want to knit an incredibly thick sweater while sitting under an insane number of blankets. I want to see a penguin while snowshoeing, and then go inside and drink my weight in hot chocolate. If I have to lose a couple of fingers to frostbite, then so be it.

Essentially, I think Herman Melville was right when he wrote that, "To enjoy bodily warmth, some small part of you must be cold, for there is no quality in this world that is not what it is merely by contrast." The best way to be warm is to be cold.

William Murray

William Murray is an attorney at Schatz Law Firm in Rochester, MN. william@schatzlawmn.com

My dream vacation is a sun-soaked stay on the island of Bali. I've always found joy in the ocean and everything it has to offer. Probably because I grew up in a land-locked state.

My time in Bali would start in some of the world's best diving locations, such as the Tulamben Coral Gardens, which is home to abundant species of marine life. There, I could see ribbon eels, reef sharks, manta rays, humphead parrotfish, and blue-ringed octopus. I could also explore the USAT Liberty shipwreck. It was a United States Army cargo ship torpedoed by a Japanese submarine in 1942. Now it's full of coral formations from top to bottom, with its highest point at a depth of about 5 metres (16 ft) and its lowest point at about 30 metres (100 ft).

After a fair share of diving, I'd explore the island. I'd start by hiking Mount Batur at sunrise, a popular hike that leads to the top of an active volcano. I'd also check out the Ubud Monkey Forest. The forest has three 14th century Hindu temples designed to create harmonization between humans and the environment. I'd wrap up my vacation with a bike tour through the rice fields and a day at the beach.

Cassandra (Cassie) Jacobsen

Cassandra Jacobsen is an associate at Cozen O'Connor, focusing on complex commercial litigation and advising employers on a variety of employment issues. ✉ *cjacobsen@cozen.com*

While I'm always open to a beach getaway, I much prefer vacations that balance cultural immersion, natural beauty, and moments of relaxation. With unlimited time and resources, my ultimate dream vacation would entail a multi-week journey through the enchanting landscapes of Italy and Greece. The adventure would commence at Lake Como in Italy, where we would hike Mount Magnodeno and Monte Generoso while enjoying accommodations in the charming towns of Nesso or Bellagio. Following our Italian escapade, we would hop on a southbound train to explore the picturesque coastal villages of Cinque Terre, concluding our Italian leg of the trip with another train ride to the romantic city of Venice (note: since I am a theater enthusiast, this journey is serenaded by the tune "We Open in Venice" from *Kiss Me Kate*).

After savoring the natural wonders, delectable cuisine, and fine wines of Italy, we would catch a flight to the mesmerizing island of Santorini in Greece. Here, we would delve into the rich history and captivating vistas of Pyrgos, indulge in the rejuvenating hot springs, and embark on adventures to the volcanic islands that dot the Aegean Sea.

Now excuse me while I go book those tickets...

Going to Trial

THREE TIPS FOR JUNIOR LAWYERS

BY CIANNA GUERRA HALLORAN

Most cases never make it to trial. This axiom is repeated incessantly throughout the legal community, yet my own experience would say differently. In just over a year since I became licensed to practice, I have gone to trial in two complex civil litigation cases. This may be a rare experience overall, but as a new civil litigator I can attest that one should be prepared for the potential of a trial anyway. The problem is, how can you be prepared for trial when you are entirely new to the practice of law?

One of my two cases was a bench trial that lasted over two weeks in state court and involved the sale of a business as well as fiduciary duties claims. The second was a jury trial involving a distributor-manufacturer contract and trademark issues; it lasted a week in federal court. The two cases were vastly different in subject matter, strategy, and style, but the lessons gained were largely the same.

In my experience, the role of a junior lawyer on a trial team is as distinctive as the roles of lead counsel and second chair. Senior lawyers frequently assume it will be an added stressor to bring an inexperienced lawyer to trial. But as the saying goes, "You can't get a job without experience and you can't get experience without a job." So how do you add value and prove yourself worthy of being on a trial team even if you don't have much experience? I have three tips.

1 Triple-check everything.

Triple-check your work. This is obvious advice, I know, but critical. As a newer lawyer you are already prone to making more mistakes than others. Many of them may not even be properly categorized as mistakes, but rather nuances you missed simply because you have never performed a particular task before. This is especially true if you are preparing for trial for the first or second time. Consequently, it's imperative that you do everything in your power to check your work—which means fixing the mistakes that you can catch and raising questions about the things you do not know. This way, when your work is being reviewed, the only things that should need to be corrected, added, or deleted are the things that it makes sense for you not to understand at this point in your career. I believe that this thoroughness builds trust between you and the other lawyers on the case, which is essential for my next two tips.

2 Listen with intention.

Litigation is a strategic process and it becomes increasingly complex as you close in on trial. It is easy for junior lawyers to feel that they should not be involved in strategy because they are too inexperienced to have any strategic insights. But this state of affairs gives junior lawyers the unique opportunity to listen with intention. And junior lawyers should definitely spend more time listening than speaking. If you add your two cents on every call, meeting, or email chain, you may just find that it adds up to less than you'd hoped. I'm someone who generally hates to be told not to share what's on my mind. But if you can accept this as a temporary role, it can help to secure your place on a trial team.

My suggestion to you is that you do not tune out the portions of team meetings that do not immediately involve you; take note of what the concerns are, what the options are, and the strategies that are ultimately adopted. Stay tuned into the case and try to grasp the issues. By listening intentionally and absorbing details you are not even expected to master, you will prove that you are attentive, tracking all issues, and capable of jumping in if you are needed.

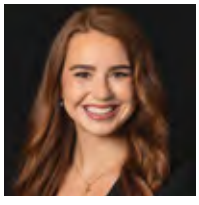
3 Contribute meaningfully.

In a perfect world, you are asked your opinion every time it might prove useful. Unfortunately, that is not the case. I have noticed that some senior attorneys do not want to ask for opinions and put junior lawyers on the spot. I think most junior lawyers appreciate that gesture, but at the same time junior lawyers are still tracking the case in detail—reviewing documents, researching case law, and analyzing the evidence against the elements of the claims. Your knowledge is more of a gold mine than you may realize. You have knowledge of details that will come up in trial preparation, witness preparation, and the trial itself.

It's hard to know when to speak up and when not to, so my two micro-tips in this area are as follows. First, speak up more often than not with the person who is next in seniority to you—most likely a senior associate or junior partner, at least in complex civil litigation cases. This person knows the details of the case as well, but has more capacity to engage in specific case-management discussion. This is the best way I have found to contribute all my ideas, thoughts, worries, comments, and questions, without taking up the time of the entire team. This person should then act as a filter to explain to you why you may be wrong or to elevate your idea to the rest of the team.

Second, read the room and try to speak up last. When a question comes up, listen to what the rest of the team thinks—and if you have a thought that has not been addressed already, then speak up and contribute that idea. What I have found is that you can often avoid sharing something that is unhelpful by waiting to hear what others think. And you get the added bonus of expressing a potentially good idea after everyone else already shared theirs.

Lack of experience can feel like a crippling condition that we all have to work past before getting a seat at the table. But I believe that you can be extremely valuable without that experience if you focus on the quality of your work, listening intentionally, and contributing meaningfully. At the end of the day, your trial team and the clients that you work with benefit when you add the most value possible, no matter your experience level. △



CIANNA GUERRA HALLORAN is a litigation attorney at Winthrop & Weinstine, PA, practicing in all aspects of commercial litigation with an emphasis in shareholder and contractual disputes, insurance, and employment defense.

BETTER TOGETHER

Toward a mutual-care approach to practicing law

BY NATALIE NETZEL

I entered law school with a clean bill of mental health. By my second year of practice, I clearly had the symptoms of what I would learn—much later —was an anxiety disorder. I obsessively checked my email. I woke up in the middle of the night worried about my clients' well-being. Fear of missing a deadline or a hearing prompted me to check my schedule so frequently I had it memorized weeks out. Every morning was filled with dread that today was the inevitable day when those around me would finally realize I was too dumb to be in my job. I magnified every criticism. But praise or confirmation that I was doing well? No way would I let that seep in. I didn't want to become complacent. I couldn't afford to lose my edge.

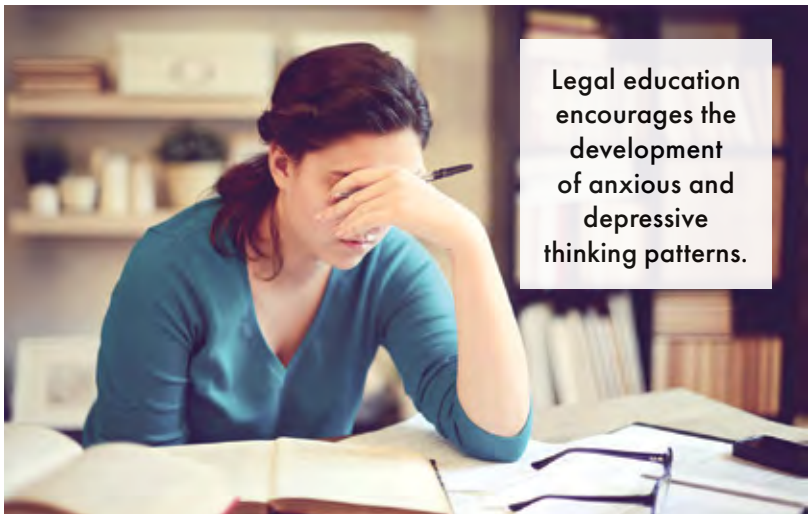
Through this time, I withdrew from other attorneys. They appeared to have it all figured out. They could handle it. They seemed busy, and I didn't want to be a burden. Plus, if I admitted how hard things were for me, it would confirm what I believed others thought of me—I wasn't good enough. My anxious thought patterns didn't seem so much a problem as a trusted friend. I had anxiety about losing my anxiety. Living in a perpetual state of worry kept me on my A-game, or so I thought.

I'm a statistic—part of the 19 percent of attorneys who struggle with anxiety and the 71 percent for whom anxiety is a concern at some point in their career.[1] Lawyers suffer disproportionately compared to other similarly situated professions.[2] Moreover, as an ABA Journal article averred, "law practice may be the loneliest profession."[3] Positive relationships have a protective effect on mental health, yet as a profession we struggle to connect with each other in meaningful ways, which only adds to the problem.

The seeds for my own anxiety disorder were sown in law school, which scholars have called the "catalyst" for the crisis of well-being in law.[4] As a law professor, I have a front-row view of the impact legal education has on students. And while exploring my own anxiety, I have spent a lot of time grappling with my role as a legal educator and the norms I reinforce that may exacerbate mental health issues in students who become lawyers. It is undeniable that the legal profession is in an ongoing crisis of well-being.

As a profession we have become better at acknowledging that self-care practices are part of the solution to the crisis of well-being in law. As a movement, we recognize that individual law students and lawyers are fighting individual mental health and substance use battles. We tend to focus on individual struggles through an individualistic lens. The diagnostic terms we use to describe them have become dispiritingly familiar: adjustment disorder, generalized anxiety disorder, depressive disorder, substance use disorder, and post-traumatic stress disorder, to name a few. The focus on the individual is not all bad. It creates paths for individual interventions proven to help alleviate symptoms. Therapy helps lawyers examine maladaptive thought patterns and maladaptive behaviors. Medication helps regulate and reel in our overactive brains. Meditation helps increase lawyers' compassion for self and others and avoid needless suffering in the wake of systems that cause tremendous pain.

But it's not enough. Systemic change is necessary and long overdue, yet systems don't change overnight and our current focus on fixing individual problems through self-care can cause additional harm to those who suffer. We need a different solution. In this article, I explore how mental health issues are exacerbated, even created, by the norms of our profession starting in law school, and then explore how individual lawyers can work together to promote mutual care as a new norm to counteract our damaging status quo.



Legal education encourages the development of anxious and depressive thinking patterns.

How the sausage gets made

Legal education encourages the development of anxious and depressive thinking patterns. Throughout law school, "thinking like a lawyer" is conveyed to students as the "new and superior way of thinking."[5] Students are rewarded for issue spotting, critical analysis, and being able to defend any position. This new way of thinking is often "fundamentally negative... critical, pessimistic, and depersonalizing."[6] As a result, those who excel at thinking like a lawyer strengthen thought patterns that also underlie mental health issues. Law students are taught to see the world through a lens of risk, which lends itself to hypervigilance—focusing on the worst-case scenarios and anticipating negative outcomes to better prepare oneself. Critical analysis skills necessary to succeed as a lawyer lend themselves to overthinking—ruminating on past events or worrying excessively about future possibilities. Law students are taught to consider liability, which lends itself to catastrophizing—magnifying the potential negative consequences of a situation, imagining the worst possible outcomes, and struggling to see more optimistic or realistic perspectives. Law students are taught to scrutinize every detail, which lends itself to hyper-focusing on the negative.

To be clear, thinking like a lawyer is a necessary part of the profession and there are many personal and professional benefits to the development of the skill. But the skills need to be taught as "an important but strictly limited legal tool," with attention paid to helping students understand how thinking like a lawyer can spiral into more problematic thought patterns if not contained.[7]

Even as law school builds up potentially dangerous thought patterns in students, we add fuel to the fire in other well-intentioned yet harmful ways. Most attorneys carry a heavy workload and strictly adhere to many competing deadlines. The demands on lawyers are unrealistic if we want to achieve any semblance of balance in our lives. Yet as lawyers we meet the demands because the cost of failing to do so is high; clients' livelihoods, liberty, families, and even lives may be on the line. Falling short in ways big and small can result in personal and professional consequences.

Because we know what our students will face when they become lawyers, we recreate demanding circumstances, thinking we are doing them the favor of preparing them for what is to come. We glorify *busy*. We inundate them with work and impose severe consequences for missing deadlines. We point out that if they think missing points on an assignment is bad, imagine how they will feel when the consequences impact a real client. And we make sure to let them know that if they really want to have a great career, excelling academically is not enough. They must also network, find experiential opportunities, build their resumes, demonstrate their leadership potential—all while serving their communities—*and don't forget* to further prove their excellence by gaining legal journal experience. We care about our students. We want them to succeed. So we give them this well-meaning advice.

Perfectionism is celebrated. Never mind the fact that it is structurally impossible in law school. Students arrive at our doorstep on the heels of academic success—enough, anyway, to get them admitted. They enthusiastically greet the challenges of law school and expect their hard work and effort to be rewarded with the same good grades they received in under-

graduate and other graduate programs. Of course, the reality of the grading curve makes this an impossibility for most students—by its nature, the curve overvalues individual work and undervalues collaborative group work. As a result, students feel they must stand on their own. Students who come to understand the curve recognize that they have to constantly outperform their peers to secure better grades and enhance their future career prospects. Students who do not understand the nature of the curve are often left demoralized by feelings of inadequacy, even when they are performing adequately. And for some of these students, the general issues with thinking like a lawyer—hypervigilance, overthinking, and catastrophizing—turn inward. They engage in excessive self-criticism, constantly worry about meeting high standards, and experience a fear of failure. All of this is exacerbated by peers who work at projecting success outwardly while handling problems privately, leaving all students to feel more alone.

How to grow an anxiety disorder

As a legal educator who wants the world for my law students, and at the bare minimum wants to do no harm, I have spent countless hours ruminating, catastrophizing, and overthinking about how much harm I may be causing in my role upholding norms of the profession. When I open the door to conversations about well-being in law school with students, they pull no punches in sharing how various pedagogical practices and messaging styles hurt them. I wish I could tell them their struggles will improve when law school is over. I can't.

I have friends who are lawyers who genuinely love their jobs and are thriving. Yet as a lawyer who speaks openly about my own challenges with mental health in law, I am privy to countless stories of others who are struggling in the shadow of harmful norms. I hold all these stories in confidence, yet their common threads have led me to question the validity of my own "anxiety disorder." I wonder whether my diagnosis is less an individual failing of my own mental health and more a learned response to a problematic system.

The thinking patterns that give rise to my diagnosis are, perhaps, better described as maladaptive coping mechanisms to adjust to the culture of the legal profession. When a disproportionate number of us struggle with so-called "mental illness" as a profession, we must be willing to consider that it could be the system and not merely troubled individuals that are the root of the problem. We must examine the ecosystem in which we exist, participate, and co-create. For the 71 percent of us who struggle with some form of anxiety at some point in our careers, it is fair to wonder how the seeds planted in law school could grow into thorny, unmanageable thickets.

Hallmarks of generalized anxiety disorder include "excessive anxiety or worry" that is "out of proportion to the actual likelihood of or impact of the anticipated event."[8] It does not take much of a stretch to say that these criteria mirror "thinking like a lawyer" as it is taught in law school.

Additional diagnostic criteria necessary to meet a diagnosis for generalized anxiety disorder include that the worry is "difficult to control." It is accompanied by symptoms like restlessness, muscle tension, and sleep disturbance, and causes clinically significant distress in important areas of functioning.[9] In short, when the thought patterns we learned in law school begin to take their toll on us, it's a diagnosable condition. Overwhelming workloads and unduly harsh consequences for messing up lead to more things to worry about. It follows that the more things we have to worry about as lawyers, the more difficult it will be to control our worrying and, in turn, the more difficult it will be to function in our careers and lives.

As I have dealt with my own mental health issues, I have spent time trying to understand the issues on a systemic level. Invaluable research has helped me understand that my experience with mental health issues in law is closer to the rule than to the exception. Thankfully, in recent years, there has been increased attention to the mental health and well-being of lawyers.[10] The problems are both systemic and endemic. What's more, mental health issues like anxiety and depression can cause those who suffer to withdraw from relationships with others. The tragedy in all of this, of course, is that supportive relationships with others help to protect mental health. It's a shame, though not a surprise, that lawyers outrank other professions on the loneliness scale.[11] As a baseline, we are busy. Add struggle to the mix and we are even more likely to deprive ourselves of the human connections we need to heal and thrive.

IF WE WANT TO IMPROVE MENTAL HEALTH OUTCOMES IN OUR PROFESSION, LAWYERS MUST START BEHAVING AS IF OUR COLLEAGUES' WELL-BEING IS OUR BUSINESS. WE MUST GRAPPLE WITH THE FACT THAT LAWYERS' MENTAL HEALTH PROBLEMS ARE NOT INDIVIDUAL BUT COLLECTIVE.

Our colleagues' well-being is our business

Despite the awareness that lawyers are at increased risk to experience adverse mental health outcomes by virtue of membership in the profession, "Many in the legal profession have behaved, at best, as if their colleagues' well-being is none of their business. At worst, some appear to believe that supporting well-being will harm professional success. Many also appear to believe that lawyers' health problems are solely attributable to their own personal failings for which they are solely responsible."[12]

If we want to improve mental health outcomes in our profession, lawyers must start behaving as if our colleagues' well-being is our business. We must grapple with the fact that lawyers' mental health problems are not individual but collective; the failings are not personal but systemic. We all have a choice about whether to uphold the norms that contribute to systemic harms or to actively work to reshape them.

The current approach to solving this well-being crisis in law is skewed heavily toward promoting the micro-level intervention of self-care. This is, perhaps, because it is easier to blame the individual than it is to face the deeply entrenched systemic nature of the norms upheld by the legal profession that all but ensure the crisis of well-being will continue. I can treat my "anxiety disorder" through therapy, medication, and other individual practices that promote well-being. But, if I am correct in my belief that the norms of our profession sometimes mimic anxiety disorders, self-care measures will only get me so far.

In short, by participating in the legal profession and upholding the status quo, we are harming each other. This can be a hard pill to swallow (certainly harder than a Lexapro), so perhaps we avoid acknowledging this because it's too hard to face the harm we inadvertently cause each other. We must be morally courageous enough to acknowledge our individual roles in reinforcing problematic norms.

COMMUNITIES OF MUTUAL CARE CAN BE INFORMAL IN NATURE. THEY DO NOT REQUIRE THE PERMISSION OF ANY PERSON ATOP A HIERARCHY TO BE SUCCESSFUL. THEY CAN BE FORMED BY ANY GROUP OF TWO OR MORE LEGAL PROFESSIONALS WHO WANT TO BE PART OF ONE.

Insights from systems theory

As the profession considers ways to improve well-being, systems theory—a framework borrowed from social work—is a helpful tool. It recognizes there is a reciprocal relationship between people and their environments. This framework is useful in reimagining how legal professionals can intervene to create a culture of well-being in law.

Systems theory helps us recognize that "[t]hough our profession prioritizes individualism and self-sufficiency, we all contribute to, and are affected by, the collective legal culture. Whether that culture is toxic or sustaining is up to us. Our interdependence creates a joint responsibility for solutions."[13] If interventions focus solely on one level, to the exclusion of the others, then the interventions will be ineffective. All of the self-care practices in the world cannot—on their own—fix a crushing caseload or a toxic law firm.

Yet broad systemic change is often slow. Fighting against systems can be overwhelming and demoralizing. And many lawyers are simply too busy with the demands of work and life to also fight for systemic change within the legal profession. So I offer an intermediate level intervention—building communities of mutual care—to further the lawyer well-being movement.

Mutual care as the new norm

When I have struggled, I have survived my own most hopeless moments not through sheer grit or resilience, but through the compassion and care of others. Meaningful, authentic, and supportive relationships are fundamental to well-being and healing. Our lonely profession needs more of this. We must recognize that self-care alone is not enough. With urgency, we must shift our mindset to one of mutual care. Self-care only works when the need for it is respected and valued such that circumstances allow for self-care to occur. When we collectively work together to make space for self-care, we practice mutual care.

As a professor, I am on a mission to help law students embrace the concept of mutual care. I want the experience of becoming a lawyer to be better for them than it was for me. When I have opened the door to conversations about well-being in law and the harmful norms that interfere with it, law students are grateful and eager to share their experiences. I view it as part of my role as an educator to engage in these conversations. In turn, I have seen students feel empowered to work together to provide each other with the support they need.

One benefit of these conversations is that I get to learn from students in the process. One group of law students took the initiative to present to other students about mutual care. Their work deepened my own understanding of the idea I hold so dear. They explained, "Mutual care embraces reciprocal and supportive relationships, values authentic connection with others, and understands that giving what you can and receiving what you need in support/ resources/ time/ energy is central to be able to counter power structures that are larger than any one individual."[14]

Building off the wisdom of my students, lawyers can band together in informal groups with a commitment to support each other's well-being. In these communities of mutual care, attorneys can actively work together to create the circumstances that allow their members to make space for self-care. Those of us who have internalized harmful norms of the profession and attributed our successes to them—in other words, nearly all of us—may need to do some unlearning. The success of mutual care efforts depends on a willingness to prioritize embracing the concept. It takes intentionality, vulnerability, and a commitment to acting as if our colleagues' well-being is our business.

Communities of mutual care can be informal in nature. They do not require the permission of any person atop a hierarchy to be successful. They can be formed by any group of two or more legal professionals who want to be part of one. A community of mutual care could be formed based on a common practice area (e.g., criminal defense or prosecution, medical malpractice, immigration, probate), shared employment, similarity of status or position (e.g., associates or partners in big firms, solo practitioners, legal aid lawyers, law students or professors), or shared identity (e.g., racial or ethnic group, gender, sexuality, disability status, familial role, point in lifespan of career). Once the community forms, they intentionally focus on how members can give what they can to each other and receive what they need from each other.

For many lawyers, giving comes easier than receiving. Giving is often a driving force in pursuing a career in law. Many attorneys are motivated by a sense of justice, a passion for advocating for those who are marginalized or disadvantaged, and a commitment to upholding the values of fairness and equality. Indeed, a recent study revealed many law students are drawn to the legal profession because they have experienced some form of trauma or injustice in their own lives, and they want to use their skills and knowledge to make a difference in the world.[15] This innate desire to give back and contribute to positive change is a commendable aspect of the legal profession. Communities of mutual care build on this inherent desire to help others.

For some lawyers, the second part of the equation, receiving what they need, is harder. Receiving involves acknowledging the validity of one's own needs, sharing them, and accepting help. Lawyers who have internalized the kind of rugged individualism encouraged in the traditional law school experience may view needing help as either a sign of weakness or a burden to others. Communities of mutual care validate and normalize lawyers' need for help. A hallmark of communities of mutual care is reciprocity and the symbiotic relationship between giving and receiving. As Paul Wellstone famously said, "We all do better when we all do better."[16]

Building community

Building a community

There is no single way to build a community of mutual care. The idea is meant to be flexible—and to coalesce around our collective need for support and connection. My community has morphed over time. It grows in the moments I fall apart a little and a colleague steps into help—or when I see another lawyer struggling and they give me the opportunity to lean in and care for them. It also grows in the moments where we celebrate each other's humanity and worth outside of accomplishment and production.

For anyone interested in trying to build on the concept: First and foremost, trust your gut about your own mutual care needs and get curious about the mutual care needs of those around you. Without being overly prescriptive, I humbly offer the following advice.

■ **Normalize struggles in the practice of law.** Competitive norms of our profession encourage us not to let our guard down. Or to show weakness. Yet we do ourselves and each other a disservice when we pretend that we have it all together. We miss out on the opportunity to connect with others and feel less alone. Talking about mental health struggles in law is not easy. My own vulnerability in this regard has made other lawyers feel uncomfortable, yet I keep sharing because we must move through the discomfort to make meaningful change. And yes, I have experienced stigma, judgment, criticism, and misconceptions due to my openness, especially when my approach is unpolished. The pain I have felt in those moments has been real and scary. Yet on balance, the connection, compassion, understanding, and grace that have been returned to me when I share my struggles privately and publicly have far outweighed the pain.
Communities of mutual care can serve as a safe space for open dialogue about struggles with self-care and mental health and about experiences and challenges in the profession. Moving past mere commiserating, lawyers deserve spaces to provide each other emotional support and to help each other develop healthier strategies to cope with our profession's harmful norms.

■ **Encourage leading by example.** It takes courage to prioritize self-care as a lawyer, even more to acknowledge it openly. Lawyers are often valued most for their accomplishments. While many lawyers' achievements are laudable, it can also be dehumanizing when lawyers are only celebrated for what they are able to produce and not for who they are outside of their accomplishments. Communities of mutual care can celebrate lawyers' value in other aspects of their lives and serve as cheerleaders when someone makes a valid choice *not* to, say, join a board, seek a promotion, or take on a new big client because they are prioritizing other aspects of their humanity. My own biggest accomplishment this year is figuring out how to achieve a bit less— without losing my sense of self-worth. I hope the same can be true for other lawyers.

IF THIS ARTICLE RESONATES WITH YOU, I ENCOURAGE YOU TO SHARE IT WITH SOMEONE YOU TRUST AND ASK WHICH PARTS, IF ANY, RESONATE WITH THEM.

NATALIE NETZEL is an associate professor of law and the director of clinics at Mitchell Hamline School of Law, where she is deeply committed to the well-being of her clients, her students, and her colleagues.

■ **Shared workload management.** Many kinds of legal cases run on timelines. Judges must manage busy dockets, clients have immediate needs, bosses have expectations, and modern technology rarely lets us be *truly* out of reach. As such, the reality of the current state of lawyering is that rest is often only possible when workloads are manageable, when attorneys know someone else has their back and can handle issues that arise when they are away, or when people and systems honor boundaries—not all of which is within the control of individual attorneys. Communities of mutual care can champion the power and necessity of rest and provide each other with support to make periods of rest possible.[17] And, because breaks from work only work when there is an opportunity to actually take a break, communities of mutual care create pathways to allow each other to have breaks truly be breaks, by providing support where they can in managing each other's workloads.

■ **Foster compassion.** Compassion and self-compassion are undervalued traits in our profession, which rewards imperviousness and perfectionist tendencies. Thinking like a lawyer can spiral into anxious and depressive thinking patterns and increase our tendency to be critical and judgmental toward ourselves and others. But I have faith in the ability of attorneys to work together to foster compassion as an antidote—which includes strengthening our own self-compassion. That "entails being warm and understanding toward ourselves when we suffer, fail, or feel inadequate, rather than ignoring our pain or flagellating ourselves with self-criticism."[18]

Indeed, mutual care is both self-centered and selfless in that it honors the individual need for self-compassion and self-care while trusting that lawyers who have their self-compassion and self-care needs met will have the capacity and ability to show compassion and care to others. The reciprocal nature of care and compassion, without forced expectation, is what causes communities of mutual care to flourish.

Building your own community

If this article resonates with you, I encourage you to share it with someone you trust and ask which parts, if any, resonate with them. I hope it serves as a catalyst for conversation among lawyers who desire to engage in collective work to improve our individual and collective well-being. We heal in community. Together we have the power to reshape our norms. May we find each other and create a healthier profession. ▲

NOTES

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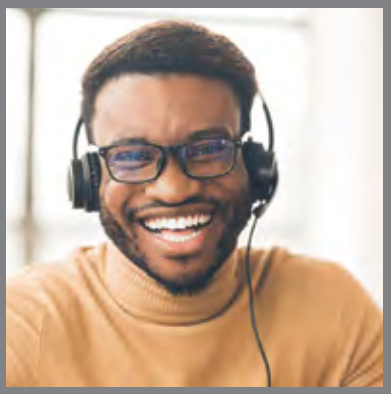

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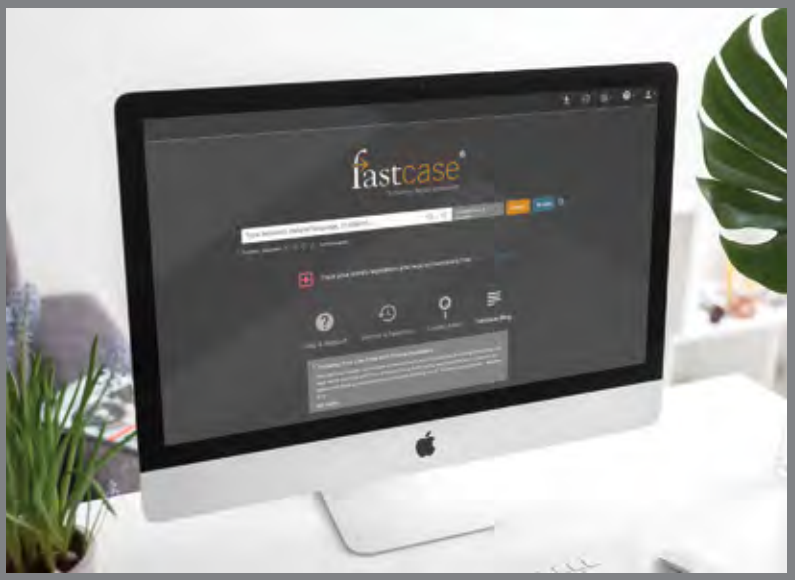

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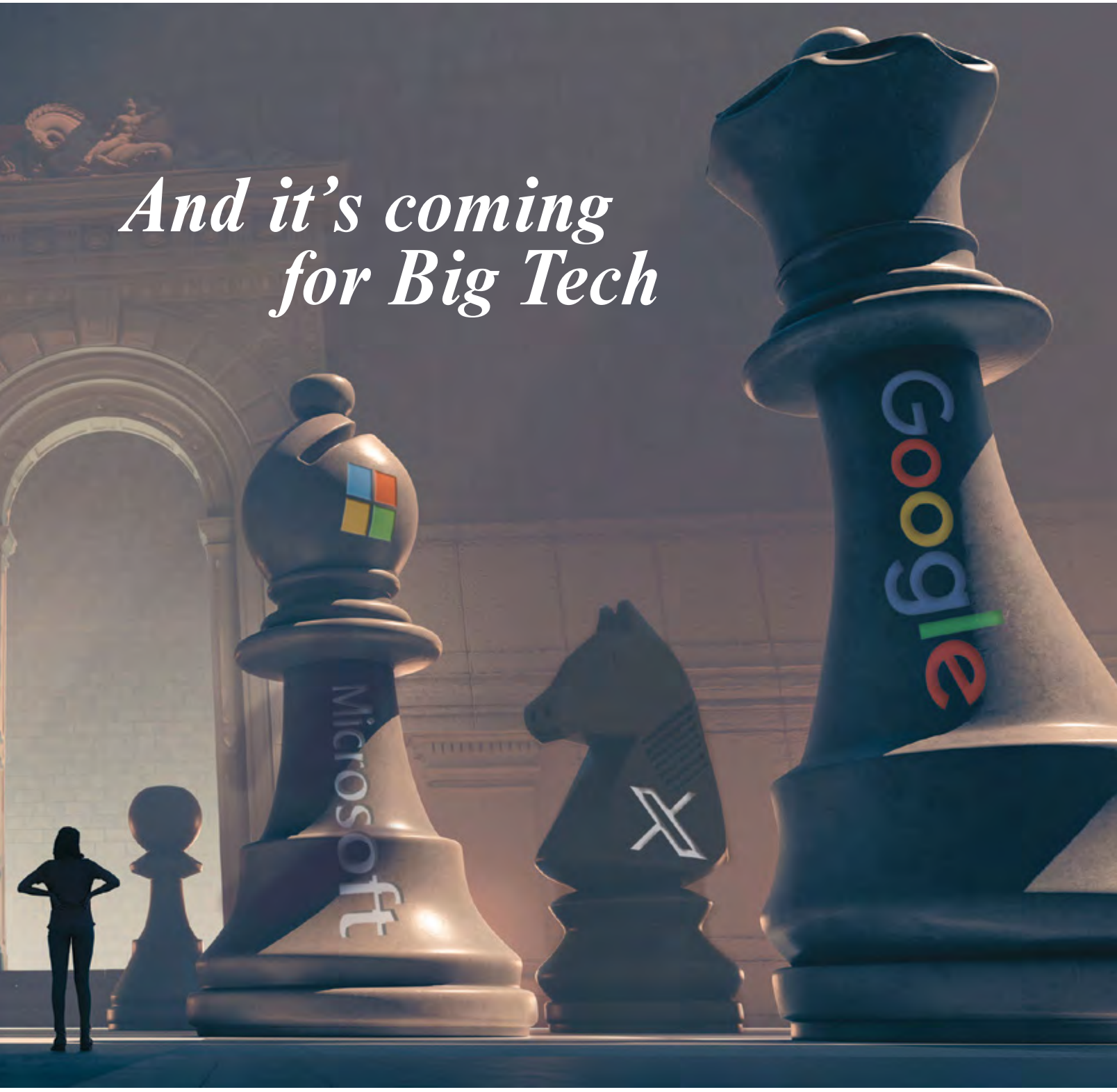
Trust us
Antitrust is back

BY DAN GUSTAFSON AND ABOU AMARA dgustafson@gustafsongluek.com aamara@gustafsongluek.com

And it's coming for Big Tech



TRUST US: ANTITRUST IS BACK

And it's coming for Big Tech

More than a century ago, the critical industries of the day in the United States—railroads, electricity, oil, and gas—rested in the hands of a few powerful corporations. Rather than competing with one another as expected under our innovative, capitalistic system, these powerful entities realized that they could extract above-market profits from American consumers with their market power or concerted action. As a result, collusion and consolidation became the mantra of the day as these companies sought to increase their unchecked economic power. This anticompetitive behavior resulted in "exorbitantly high prices on essential goods"[1] for millions of American consumers, reduced output of products and services, lessened the quality of those products and services, and raised unfair barriers for those wanting to compete in the marketplace. Despite significant public outcry against these abuses, there was very little the American people could do about it.

But in 1890, Senator John Sherman of Ohio proposed, and Congress enacted, the Sherman Antitrust Act.[2] The goal of the Sherman Act was to ensure that markets worked for consumers and companies fairly competing for business, rather than for dominant companies and monopolies. Specifically, the law prohibits trusts, monopolies, and cartels from dominating a market and likewise bans the use of contracts, the formation of business conspiracies, and other business practices that amount to a "restraint of trade."[3] Some common restraints of trade include "price-fixing," dividing markets (commonly referred to as "market allocation"), and "bid-rigging."

In 1914, Congress strengthened the Sherman Act by adopting the Clayton Act. That legislation added several important tools to the law for antitrust enforcers and specifically addressed anti-competitive mergers, monopolies, and price discrimination.[4] Particularly important, the Clayton Act created a private right of action for violations of the Sherman Act and the Clayton Act that granted aggrieved parties a federal cause of action to protect themselves from harmful, anticompetitive practices across the country. By creating this private right of action, and providing for the imposition of treble damages and attorneys' fees, the Clayton Act added a powerful *private* incentive to complement government enforcement actions.

ECONOMY NUMBERS

75%
of U.S. industries have experienced significant market concentration since the 1970s, leading to a series of consumer, business, and labor problems

7%
increase in consumer prices (relative to European Union residents) for the same goods

17%
decrease to wages from industry-specific consolidation

Following 1914, enforcement of the Sherman Act, the Clayton Act, and their progeny has generally taken two forms: (1) public enforcement through the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC), and (2) private party enforcement through (predominantly) class-action antitrust litigation. Like a bicycle, antitrust enforcement works best when *both* wheels of enforcement—public and private—are adequately and properly used. From about 1900 to 1940, both wheels were working fairly well. During that time, the DOJ routinely brought actions to preserve competition, and private parties brought money-damages actions against companies for their anticompetitive conduct.

For example, in *Northern Securities Co. v. United States*,[5] the United States Supreme Court held that a railroad holding company's ownership of several other subsidiary competitor railroad companies violated the Sherman Act, and ordered the break-up of the holding company, requiring that each respective railroad company operate separately and independently of each other. Similarly, in *Standard Oil Co. of New Jersey v. United States*,[6] the Court, affirming the lower court, held that the oil company's holding companies—which, in turn, owned nearly all petroleum companies and oil refining companies in the United States—violated the Sherman Act, and the Court broke up the company. As those cases illustrate, the DOJ and the federal courts had a strong appetite for ridding our economic system of anticompetitive behavior or anticompetitive market circumstances.

But following that initial era of robust public and private enforcement, the appetite for *public* enforcement waned. Since the 1970s, public enforcement of the antitrust laws has entered a period of relatively "rare"[7] enforcement—owing in part to the rise of the laissez-faire Chicago school of economics in antitrust law. And what has been the result? Excessive market concentration and dominant firms, which has resurrected many of the same concerns that faced Americans prior to Congress's enactment of the Sherman Act.

According to NYU economist Thomas Philippon, a world-renowned scholar on competition, 75 percent of U.S. industries have experienced significant market concentration since the 1970s,[8] leading to a series of consumer, business, and labor problems. From a consumer standpoint, Americans have experienced a 7 percent increase in prices (relative to European Union residents) for the same goods, a difference estimated to cost the median American household $5,000 per year.[9] From a business growth standpoint, new business formations have declined as a share of the economy since the 1970s.[10] And from a labor standpoint, industry-specific consolidation is estimated to decrease wages by as much as 17 percent.[11]

Excessive market cowncentration hurts consumers in our economy. These statistics, and so many more, paint a clear picture: Consistent antitrust enforcement is essential to maintain a vibrant American economy for competing businesses and consumers. And after decades of relative inertia, it appears that the tide may be turning. Two years ago, the Biden Administration issued an executive order, "Promoting Competition," that included 72 antitrust and competition initiatives to be implemented by 14 federal agencies.[12] This enforcement activity looks hardest at the core industries of today—Big Tech.

DOJ's head for antitrust, Assistant Attorney General Jonathan Kanter, recently spoke about the threat of tech monopolization to our free markets. In those remarks, he noted that the "digital economy has enabled monopoly power of a nature and degree not seen in a century"—in other words, since the days of *Northern Securities* and *Standard Oil*.[13] "The digital age is not only characterized by the presence of monopoly power, but by new means of its exploitation more threatening to individual freedom than ever before."[14] These remarks, signaling a resurrection of robust public antitrust enforcement, were not simply hollow words; they were a clear mandate—one that has led to real action.

First, the DOJ has returned to prosecuting *criminal* antitrust violations. Although the Sherman Act has provided for criminal prosecution since its inception, criminal enforcement has generally been non-existent. From the 1970s until 2020 or so, the DOJ had not prosecuted a single criminal antitrust case.[15] But by the end of 2021, the DOJ had "21 indicted cases against 42 individuals, including 9 CEOs and corporate presidents under indictment."[16] Moreover the DOJ ended 2021 with "146 pending grand jury investigations, which is the most in 30 years."[17]

And second, the DOJ and FTC have returned to engaging in robust investigations and *civil* enforcement. Since 2018, the DOJ and FTC—under both Democratic and Republican administrations—have brought *dozens* of investigations and enforcement actions against some of the largest tech companies, including Apple, Amazon, Google, Meta, and Microsoft. In December 2022, for example, the FTC filed an administrative action against Microsoft's proposed acquisition of video game developer Activision Blizzard, Inc., alleging that the acquisition would "result in harm to consumers, including reduced consumer choice, reduced product quality, higher prices, and less innovation."[18] In September 2023, an antitrust monopolization trial against Google began in Washington D.C. federal court.[19] In that trial, the DOJ hopes to prove that Google illegally abused its power over online search functionality to throttle competition.

Although the results of this increased criminal and civil public enforcement have been mixed, the *scope*, *pace,* and *appetite* for robust public enforcement—regardless of which political party controls the Executive branch— is an indication that these recent trends are not an aberration; they are the beginning of a robust new era.

This resurrection is a welcome arrival for private class-action enforcers. For the first time in over three decades, private enforcers are confident that we can again get back on the bicycle and properly ride again, knowing that the public wheel is pumped up and ready to roll.

That's why antitrust is back. ▲

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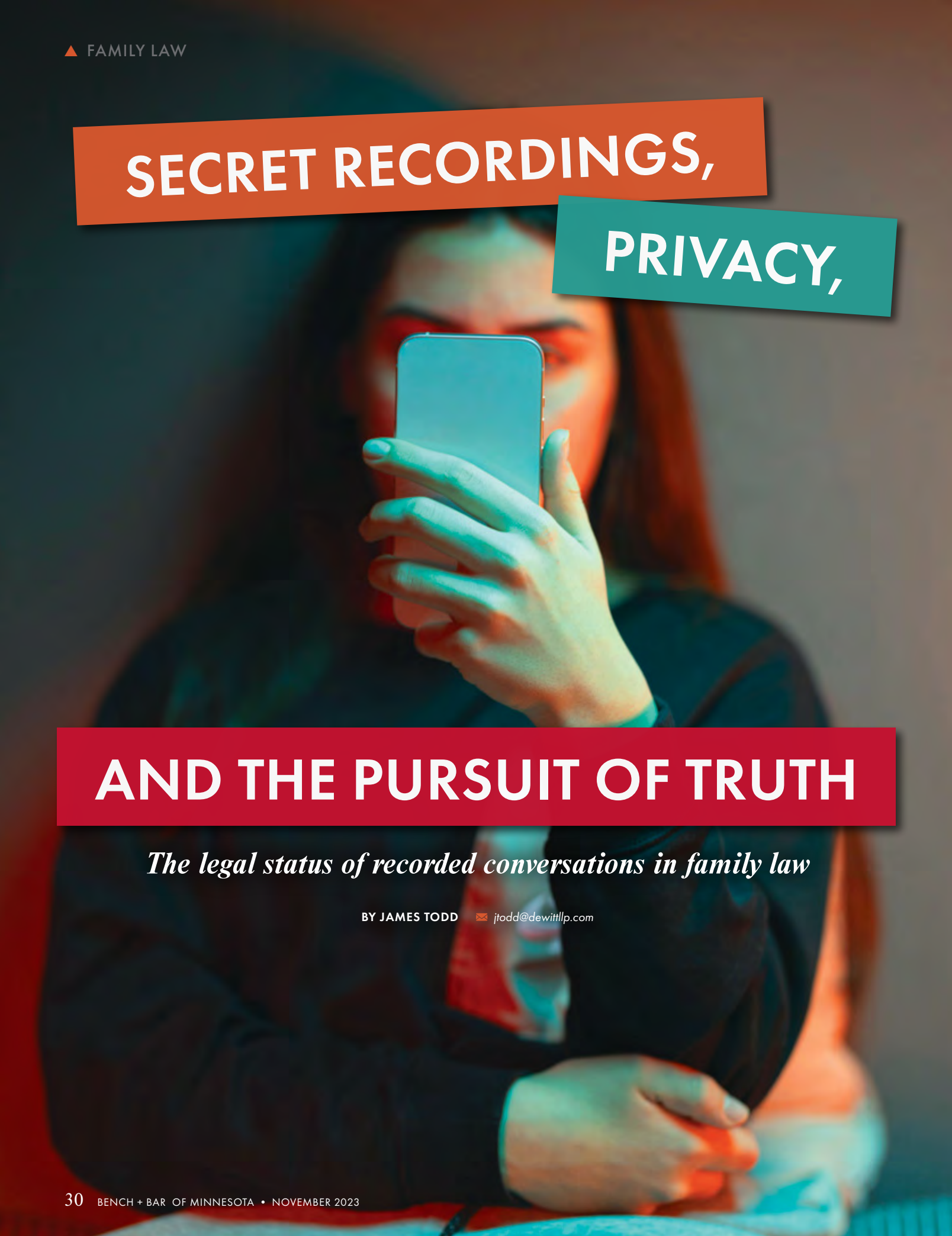
SECRET RECORDINGS, PRIVACY, AND THE PURSUIT OF TRUTH



The legal status of recorded conversations in family law

BY JAMES TODD ✉ *jtodd@dewittllp.com*

Wiretapping has been around since before the telephone. During the Civil War, soldiers on both sides routinely cut into telegraph lines, using copper wires and a receiver to intercept messages and send out disinformation. Wiretapping has since been used for everything from corporate espionage and insider trading to organized crime and, of course, criminal investigations. Even in the domestic sphere, the topic is nothing new.

The question for family-law practitioners is how to advise clients when it comes to secret recordings—whether to gather them and, when presented with secret recordings, whether to use those recordings as evidence in a family court proceeding.

In Minnesota, the problem for a too-eager domestic investigator is Minn. Stat. §626A.02, Minnesota's anti-wiretapping statute. Along with its virtually identical federal counterpart—Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2511—the statute prohibits the intentional interception and use of "any wire, electronic, or oral communication."[1] The good news for amateur sleuths is that there is an exemption from prohibition where one of the parties to the communication has given prior consent to such interception.[2] This is what is known as the "one-party consent" exception to the federal anti-wiretapping statute and the majority of state statutes (including Minnesota's).[3] And it generally means that recordings of conversations to which the person recording is a party do not violate the federal or Minnesota's anti-wiretapping statute.

But what about a custodial parent's recording of their minor child's conversation with an unaware third party, where the recording parent is not also a party to the conversation? Conventional examples might include recordings by custodial parents of telephone or FaceTime conversations between a minor child and the other parent, baby monitors that link to smartphones through an app, smartwatches worn by children with remotely accessible recording functions, or a recording made by a parent, say, from a different part of the house, of the other parent screaming at their child. Can these secret recordings be used as evidence?

Generally, the answer appears to be (probably) yes—but with caution. Every federal district and appellate court, and virtually every state appellate court,[4] interpreting essentially identical versions of the federal and state anti-wiretapping statutes (including Minn. Stat. §626A.02 itself), has adopted the doctrine of "vicarious consent," holding that a guardian can provide vicarious consent on behalf of their minor children and intercept a recording of their minor children's conversations with another person without violating either state one-party consent statutes or the federal anti-wiretapping statute as long as the guardian has a good-faith, objectively reasonable belief that the interception of such a recording is necessary for the best interests of the children in their custody.[5]

Family law practitioners should be aware (and should advise their clients) that Minnesota state courts have never addressed the issue nor explicitly adopted the vicarious consent doctrine. In *Wagner,* 64 F. Supp. 2d at 896 (D. Minn. 1999), though, the U.S. District Court for the District of Minnesota did adopt the vicarious consent doctrine as to both the federal *and* Minnesota anti-wiretapping statutes. The court squarely addressed the issue of whether a custodial parent's secret recording of their minor child and the other parent would violate either the federal or Minnesota anti-wiretapping statute—and found in a 1999 opinion that such a recording would not violate either statute if the custodial parent had an objectively reasonable, good-faith belief that such a recording was necessary for their minor child's best interests.[6]

In *Wagner*, Lesa Wagner sued her former husband, Robert, for Robert's recording of Lesa's telephone conversations with the parties' two minor children, and his use of those recordings in their dissolution proceeding.[7] Robert admitted to intercepting those telephone calls and using them in the dissolution matter but argued that he had vicariously consented to the recording on behalf of the minor children.[8] Lesa moved for summary judgment against Robert based on his admission.[9] The *Wagner* court denied summary judgment, and its decision is worth quoting at length since it provides an excellent analysis of the vicarious consent doctrine and why the Eighth Circuit adopted it:

"The Court is now confronted with an issue upon which the Eighth Circuit has not spoken, specifically, whether the exemption permits a custodial parent to 'vicariously consent' to the recording of the minor child's telephone conversations.

"Although the issue has not been explicitly addressed by the Eighth Circuit, federal courts in other circuits have examined the issue of the vicarious consent doctrine. *See*, *e.g.*, *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998); *Thompson v. Dulaney*, 838 F. Supp. 1535 (D. Utah 1993).

"Most recently, the Sixth Circuit analyzed the vicarious exception doctrine in *Pollock*. *Pollock*, 154 F.3d at 607 – 10. The *Pollock* case, in which a non-custodial parent sued the custodial parent for recording telephone conversations between the non-custodial parent and their 14-year-old child, involved facts substantially similar to those in the present matter. As the Sixth Circuit noted, the basis of the case 'occurred in the context of a bitter and protracted child custody dispute,' and the custodial parent maintained that the non-custodial father was subjecting the child to emotional abuse and manipulation by pressuring the child regarding custodial matters. *Pollock*, 154 F.3d at 603 – 04.

"After an in-depth analysis of the issue, including a thorough examination of the relevant case law from other jurisdictions, the Sixth Circuit adopted the vicarious consent doctrine and held as follows: 'As long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.' *Pollock*, 154 F.3d at 610.

"The court held that the issue of material fact as to the defendant's motivation in taping the telephone conversations precluded summary judgment. *Pollock*, 154 F.3d at 612.

"In addition, another district court in the Eighth Circuit addressed the vicarious consent doctrine in *Campbell v. Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998). In analyzing the issue, the court recognized that the 'Eighth Circuit has not addressed whether parents may vicariously consent to the recording of their minor children's conversations' and noted that the court had 'uncovered no cases rejecting a vicarious consent argument, and, furthermore, finds persuasive the cases allowing vicarious consent.' *Campbell*, 2 F. Supp. 2d at 1189. The court thus adopted the vicarious consent doctrine, holding that the custodial parent's 'intercepting the telephone conversations must have been founded upon a good faith belief that, to advance the child's best interests, it was necessary to consent on behalf of his minor child.'

Campbell, 2 F. Supp. 2d at 1191. In reaching its decision, the court noted that it 'merely applied what it concludes to be the majority law on the subject...' *Campbell*, 2 F. Supp. 2d at 1192.

"Indeed, the only case in which the court explicitly declined to adopt the vicarious consent doctrine in connection with Title III was that of *Williams v. Williams* ("*Williams I*"), 581 N.W.2d 777 (Mich. App. 1998). In rejecting the doctrine, the Michigan court recognized that it was deviating from the majority. *Williams*, 581 N.W.2d at 780-81. The Sixth Circuit, in *Pollock*, observed of the *Williams* court that, 'in declining to adopt the doctrine of vicarious consent, it was departing from the path chosen by all of the other courts that have addressed the issue.' *Pollock*, 154 F.3d at 609.

"In fact, the Michigan Supreme Court later remanded the *Williams* case back to the Michigan Court of Appeals for reconsideration in light of *Pollock*. *Williams v. Williams* ("*Williams II*"), 593 N.W.2d 559 (Mich. 1999). On remand, the Michigan Court of Appeals reversed its earlier ruling regarding the vicarious liability exception to Title III liability. The court recognized that, 'because the Sixth Circuit Court of Appeals has now spoken on the issue and no conflict among the federal courts exists, we are bound to follow the *Pollock* holding on the federal question in the case.' *Williams v. Williams* ("*Williams III*"), 603 N.W.2d 114, 1999 WL 692342 (Mich. App. 9/3/1999). Accordingly, the only case which had explicitly rejected the vicarious consent exception was subsequently reversed, and its decision was brought into conformity with all other federal decisions that have addressed the issue.

"Finally, therefore, as the Court has uncovered no cases explicitly rejecting the vicarious consent doctrine, as there appears to be no conflict among the federal courts, and as the Court finds persuasive the cases adopting the vicarious consent doctrine, the Court determines that the vicarious consent doctrine should apply in the present matter."[10]

While virtually every federal and state court addressing the issue has adopted the vicarious consent doctrine in one-party consent states like Minnesota, family-law practitioners should still exercise caution because it is still the case that Minnesota never explicitly adopted it. Clients should be advised accordingly. It is *technically* still possible that clients who secretly record their children's conversations, to which the clients themselves are not a party, could be found in violation of Minn. Stat. §626A.02 and subjected to criminal and civil penalties.

But it seems unlikely that Minn. Stat. §626A.02 was "intended to subject parents and guardians to criminal and civil penalties when, out of concern for the best interests of their minor children, they record their children's conversations."[11] If clients possess unassailable recordings of their children experiencing abject abuse, for example, one would be hard-pressed *not* to use that evidence to protect the children. ▲

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NOTES

[1] Minn. Stat. §626.02, subd. 1(1); *see also* 18 U.S.C. §2511(1)(a).

[2] Minn. Stat. §626A.02, subd. 2(d); *see also* 18 U.S.C. §2511(2)(d).

[3] Eleven states require the consent of all parties to a telephone conversation before it can be recorded: California, Delaware, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. The remaining states, except for Vermont (which has no statutory prohibition on secret recordings), only require the consent of one party to the conversation.

[4] The only state court to have considered and rejected the doctrine was the Michigan Court of Appeals, which was subsequently reversed and has since brought its decision into conformity with all other decisions to have addressed (and adopted) the vicarious consent doctrine as applied to the federal statute. *See Williams v. Williams*, 581 N.W.2d 777 (Minn. Ct. App. 1998) (rejecting the vicarious consent doctrine); *Williams v. Williams*, 593 N.W.2d 559 (Mich. 1999) (remanding the *Williams* case back to the Michigan Court of Appeals in light of the 6th Circuit's adoption of the vicarious consent doctrine in *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998)); *Williams v. Williams*, 603 N.W.2d 114, 1999 (Mich. Ct. App. 9/3/1999) (adopting the vicarious consent doctrine as to the federal statute, but declining to adopt the doctrine to Michigan's anti-wiretapping statute).

[5] *See*, *e.g.*, *Wagner v. Wagner,* 64 F. Supp. 2d 895, 896, 899 – 901 (D. Minn. 1999); *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998); *State v. Spencer*, 737 N.W.2d 124, 128 – 34 (Iowa 2007); *State v. Whitner*, 732 S.E.2d 861, 863 – 65 (S.C. 2012); *Campbell v. Price*, 2 F. Supp. 2d 1186, 1189, 1191 – 92 (E.D. Ark. 1998); *People v. Badalamenti*, 54 N.E.3d 32, 37 – 40 (N.Y. 2016); *Griffin v. Griffin*, 92 A.3d 1144, 1152 (Me 2014); *Commonwealth v. F.W.*, 986 N.E.2d 868, 873 – 75 (Mass. 2013); *Lawrence v. Lawrence*, 360 S.W.2d 416, 418 – 20 (Tenn. Ct. App. 2010); *Alameda v. State*, 235 S.W.3d 218, 221 – 23; *Smith v. Smith*, 923 So.2d 732, 740 (La. Ct. App. 2005); *State v. Morrison*, 56 P.3d 63, 65 (Ariz. Ct. App. 2002); *In re Marriage of Radae*, 567 N.E.2d 760, 763 – 64 (Ill. Ct. App. 1991); *State v. Diaz*, 706 2d 264, 269 – 70 (N.J. Ct. App. 1998); *Silas v. Silas*, 680 So.2d 368, 370 – 72 (Ala. Ct. App. 1996).

[6] *Id.* at 900.

[7] *Id.* at 895 – 97.

[8] *Id.* at 897.

[9] *Id.* at 895.

[10] *Id*. at 899 – 901.

[11] *Spencer*, 737 N.W.2d at 128 – 34.

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LANDMARKS IN THE LAW

Current developments in judicial law, legislation, and administrative action together with a foretaste of emergent trends in law and the legal profession for the complete Minnesota lawyer.

Criminal Law

JUDICIAL LAW

Restitution: Court is not required to consider collateral sources. Appellant was convicted of murder and ordered to pay $2,362 to the Crime Victims Reparations Board (CVRB) for cremation expenses the CVRB paid as reparations to the victim's daughter. The district court rejected appellant's argument that the court needed to consider the approximately $14,000 the victim's daughter received from a GoFundMe campaign.

Minn. Stat. §611A.54 dictates how the CVRB may award reparations to crime victims and requires that reparations "be reduced to the extent that economic loss is recouped from a collateral source." Minn. Stat. §611A.54(1). Reparations and restitution are distinct forms of relief. Reparations are payments made by the CVRB, while restitution is payment by a defendant to a victim for qualified economic losses. Restitution is governed by sections 611A.04 and 611A.045, which provide that the court may consider only the amount of loss sustained by a victim as a result of the offense and the defendant's ability to pay. Unlike reparation determinations, restitution does not involve consideration of "collateral sources."

Thus, here, the district court did not err in failing to consider collateral sources when calculating restitution. But the district court did err by not including a payment schedule or structure in its final restitution order, as required by section 611A.045, subd. 2a. Remanded for the district court to amend its order to include a payment schedule or structure. ***State v. Cotton***, A23-0213, 2023 WL 5689332 (Minn. Ct. App. 9/5/2023).

4th Amendment: Probable cause for vehicle search exists where a reliable informant personally observed unlawful conduct and police corroborated details of the report. Police received a report from a confidential reliable informant (CRI) of a man with a firearm in a vehicle who was selling marijuana. The CRI described the man, the firearm, the man's vehicle, and the vehicle's location. Police explained that the CRI was observing the man and his illegal activity in real time while speaking with police, that police had previously worked with this CRI multiple times, and that the CRI had always provided accurate information. Police went to the location described by the CRI and located a vehicle matching the CRI's description. When the vehicle began to drive away, police made a traffic stop, searched the vehicle, and found a firearm, a digital scale, and marijuana inside. The driver, respondent, was charged with being a prohibited person in possession of a firearm. The district court granted respondent's motion to suppress the evidence from the vehicle search, finding that, although the CRI was reliable, the CRI's tip "lacked sufficient detail and range to establish the [CRI's] basis of knowledge." That is, the CRI's tip "lacked details to be corroborated" by police. The state appealed and the court of appeals affirmed.

The Supreme Court reverses. A threshold issue is whether respondent's vehicle was sufficiently connected to unlawful activity to support probable cause for the search. The court of appeals found the CRI did not specify that the gun was in the vehicle, as opposed to on respondent's person. However, the Supreme Court notes that the tip described respondent as both selling drugs and possessing a firearm, and the CRI specifically reported personally observing respondent with a firearm inside the vehicle. For probable cause purposes, the possession of a firearm in a vehicle is sufficient to create some probability that unlawful activity is occurring.

The parties also dispute the reliability of the CRI and whether police corroborated the tip sufficiently to establish the CRI's basis of knowledge. Based on the CRI's track record with police, the court finds the CRI was reliable. As for the CRI's basis of knowledge, the CRI personally observed a male in possession of a firearm. A tip based on a CRI's personal knowledge need only be corroborated by minor details—"enough to lend credence to the [CRI's] tip..." The Court finds the record here supports a finding that the source of the CRI's

knowledge was reliable. Reversed and remanded to the district court. ***State v. Mosley***, A22-1073, 944 N.W.2d 883 (Minn. 9/6/2023).

Odor of marijuana is one fact to consider in totality of the circumstances analysis for determining if a vehicle search was lawful. Respondent was pulled over by police for a vehicle equipment violation. His wife and child were also in the vehicle. During the traffic stop, police smelled an odor of marijuana emanating from the vehicle. Police told respondent the odor gave them probable cause to search the vehicle. During the search, police found methamphetamine and drug paraphernalia. Respondent sought to suppress the evidence, and the district court granted his motion and dismissed the complaint. The court of appeals affirmed.

One exception to the warrant requirement is for automobile searches. Police may search a vehicle without a warrant if there is probable cause to believe the search will result in the discovery of evidence or contraband. At the time of the offense, under Minnesota law, there were various methods of lawful possessing of marijuana (such as medical marijuana, a "small amount" of marijuana, and "industrial hemp").

The Supreme Court rejects the state's request to create a bright-line rule that the odor of marijuana emanating from a vehicle, on its own, will always create the requisite probable cause to search the vehicle. The Court reiterates that the totality of the circumstances test for probable cause "is meant to be applied anew in each case based on the unique circumstances present." This analysis requires that the odor of marijuana be considered as just one circumstance among all others.

In this case, the only indication that evidence of a crime or contraband might be found in respondent's vehicle was the odor of marijuana. Police did not articulate any other circumstance contributing to the probable cause analysis. Therefore, there was not probable cause for the search of the respondent's vehicle and the district court properly suppressed evidence obtained during that search. ***State v. Torgerson***, A22-0425, 2023 WL 5944620 (Minn. 9/13/2023).

Indecent exposure: "Any place where others are present" is any place capable of being viewed by others. Appellant was standing nude in the backyard of his home when he was observed by a neighbor from her open back deck door across a public alley. Appellant's property was partially fenced in, but there were no fences obstructing appellant's backyard from his neighbor's deck or from the alley. Appellant was charged with gross misdemeanor indecent exposure, due to a prior indecent exposure violation. He was convicted after a jury trial. He argued in postconviction proceedings that the state had not proved the "public place" element of the offense. The district court denied his petition and the court of appeals affirmed.

Minn. Stat. §617.23, subd. 1, prohibits indecent exposure "in any public place, or in any place where others are present." Given the statute's disjunctive "or," the Supreme Court does not consider whether appellant's partially

enclosed backyard is a "public place." Instead, the court finds the "place" element of the offense is satisfied because appellant was in a place where others were present. The Court notes that "present" is ambiguous. However, given the statute's purpose of remedying the mischief of people lewdly exposing themselves to others, the statute's object of preventing offense or annoyance caused by being exposed to another's lewd conduct, and the consequences of the possible interpretations of the statute, the Court holds that the Legislature intended section 617.23, subd. 1, "to prohibit lewd behavior that is reasonably capable of being viewed by others, in light of the totality of the circumstances."

The Court finds the state presented sufficient evidence to prove appellant exposed himself in a place reasonably capable of being viewed by others. ***Fordyce v. State***, A21-1619, 994 N.W.2d 893 (Minn. Sept 2023).

Falsely reporting crime. Appellant falsely reported to police that the father of her child abused the child. She was in Blue Earth County when she made the report, but the report was made to the Waseca Police Department. Appellant was prosecuted and convicted of falsely reporting a crime in Waseca County, and she argued on appeal that venue in Waseca County was improper. The court of appeals affirmed her conviction.

Minn. Stat. §627.01, subd. 1, requires that criminal cases be tried in the county where the offenses were committed, while subd. 2 explains that this means "any county where any element of the offense was committed." Thus, the state needed to prove that at least one element of the false report of a crime offense was committed in Waseca County.

Minn. Stat. §609.505, subd. 1, makes it a crime when a person "informs a law enforcement officer that a crime has been committed... knowing that [the report] is false and intending that the officer shall act in reliance upon" it. While "inform" has differing dictionary definitions, section 609.505 itself expressly provides that, to commit the crime, the defendant must inform a specific type of person—law enforcement. Thus, the Legislature intended to include a police officer's report of the false information as part of the offense. As such, the state can meet its burden of proving venue by showing an officer was in the county of trial when they received the false report.

Here, the state presented sufficient evidence to prove law enforcement received appellant's false report in Waseca County, so appellant's conviction is affirmed. ***State v. Johnson***, A21-1360, 2023 WL 5944263 (Minn. 9/13/2023).

Maltreatment reporting: Mandated reporter must report maltreatment within preceding three years regardless of child's age at the time of the report. Appellant was charged with third-degree criminal sexual conduct following a report to police from appellant's therapist that appellant told his therapist he had sexual intercourse with his children's 17-year-old babysitter. The babysitter had turned 18 by the time the report was made. Appellant moved to suppress the therapist's report and testimony, arguing they were based on privileged statements. The district court denied the motion, finding the therapist-patient privilege does not apply to information the therapist was required to report as a mandated reporter. Appellant was convicted after a jury trial.

The mandated reporter statute, Minn. Stat. §260E.06, subd. 1(a), partially abrogates the statutorily created therapist-client privilege, as it requires a mandated reporter "who knows or has reason to believe a child is being maltreated... or has been maltreated within the preceding three years shall immediately report the information" to the authorities. Section 260E.04 also allows disclosure of maltreatment information in legal proceedings that follow the reporting. Case law has clarified that the mandated reporter statute "abrogate[s] privilege only to the extent that it would permit evidentiary use of the information required to be contained in the maltreatment report," which includes the identity of the child, the alleged perpetrator, and the nature and extent of the maltreatment. Appellant argues, however, that his therapist's report was not mandatory because the babysitter was an adult at the time of the report.

The court of appeals finds section 260E.06 ambiguous, but the court notes that section 260E.4 anticipates evidentiary use of mandated child maltreatment reports in criminal proceedings and construes the mandated reporter statute with the criminal statute prohibiting appellant's conduct and the relevant statute of limitations. The court holds that the word "child" in the mandated reporter statute "refers to an individual who is a child at the time of the maltreatment." Therefore, the district court properly concluded appellant's therapist's report was mandatory and properly denied appellant's motion to exclude the therapist's report and testimony. ***State v. Martens***, A22-1349, 2023 WL 6052543 (Minn. Ct. App. 9/18/2023).

Firearms: Group of disassembled and incomplete shotgun parts can be a "firearm." Police found in a backpack belonging to appellant a disassembled shotgun, which police were able to assemble and fire using a bolt and washer from a similar firearm. At the time, appellant was ineligible to possess a firearm. The court of appeals affirmed his conviction for possession of a firearm by an ineligible person. The Supreme Court also affirms.

Minn. Stat. §609.165, subd. 1b(a), states that a person commits a felony if they were previously convicted of a crime of violence and ship, transport, possess, or receive a firearm or ammunition. "Firearm" is not defined. The Court previously defined a firearm, in the context of Minn. Stat. §624.713, as "a weapon, that is, an instrument designed for attack or defense, that expels a projectile by the action or force of gunpowder, combustion, or some other explosive force." Both sections 624.713 and 609.165 criminalize *possession* rather than *use* of a firearm, and both prohibit those convicted of a crime of violence from possessing firearms. Thus, the Court applies the same definition of "firearm" to this case.

The question then becomes whether taking away two parts of a shotgun (here, the bolt and washer) changes the design of the firearm. The Court finds that possessing "the integral parts unique to a firearm in an unassembled state in the same container" does not change the fact that the parts were designed to be a weapon, even though a part may be missing. The Court holds "that a disassembled and incomplete shotgun can be a firearm under section 609.165, subdivision 1b(a), so long as it is an instrument designed for attack or defense that expels a projectile by some explosive force." Here, the state presented sufficient evidence to prove beyond a reasonable doubt that the shotgun parts in appellant's backpack were a firearm under this definition. ***State v. Stone***, A21-1648, 2023 WL 6280234 (Minn. 9/27/2023).

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Employment & Labor Law

JUDICIAL LAW

Time rounding-off; dismissal reversed. An employer's practice of rounding off time worked by employees at the beginning and end of their work shifts was actionable under the Federal Fair Labor Standards Act, 29 U.S.C. §301, *et. seq*. Reversing summary judgment dismissal of the lawsuit, the 8th Circuit Court of Appeals held that expert evidence raised a genuine issue of whether the rounding-off had *de minimus* effect because it averaged out over time, as the district court erroneously concluded as a matter of law. ***Houston v. St. Luke's Heath Systems, Inc.***, 76 F.4th 1145 (8th Cir. 8/11/2023).

Union dues; refusal to pay. A challenge by union members to a deduction of union dues from their paycheck failed. The 8th Circuit, affirming a lower court ruling, rejected the 1st Amendment claim against the employer and the union on grounds that the employees voluntarily agreed to the deduction policy when they joined the union. ***Burns v. School Service Employees Union Local 284***, 75 F.4th 857 (8th Cir. 7/28/2023).

Failure to promote; agreement requires arbitration. An employee's claim of race and age discrimination due to failure to promote her to an open position was barred by an arbitration clause in her union's collective bargaining agreement. The 8th Circuit Court of Appeals, in a decision written by Judge David Stras of Minnesota, affirmed the lower court's determination that arbitration was required because the dispute involved "interpretation" of the bargaining agreement. ***Avina v. Union Pacific Railroad Co.***, 72 F.4th 839 (8th Cir. 7/3/2023).

Battery, harassment, and other claims affirmed and remanded. A contract attorney for a legal staffing company is entitled to pursue a battery claim against a co-worker, but her discrimination, harassment, and other claims against another co-worker and their employer were dismissed. The 8th Circuit affirmed the three lower court rulings by Judge Nancy Brasel in Minnesota dismissing all the claims, except remanding the sole battery claim. ***Yang v. Robert Half International, Inc.***, 2023 WL 5356624 (8th Cir. 8/22/2023).

Retaliation, discrimination verdict; reversal because no "protected activity." A school district employee's verdict for discrimination and retaliation when passed over for a superintendent position was vacated and denied. The 8th Circuit ruled that the claimant did not engage in "protected activity" under Title VII of the Federal Civil Rights Act in vacating the award of damages, including punitive damages. ***Warren v. Kemp***, 2023 WL 5356630 (8th Cir. 8/22/2023) (unpublished).

Veterans preference; detention disparities elimination upheld. The elimination of detention deputies by Winona County during a construction project reducing the facility's capacity was upheld. Affirming the trial court, the Minnesota Court of Appeals held that the action was made in "good faith" by the county, which defeated the veterans preference claim under Minn. Stat. §197.46. ***Wemette v. County of Winona***, 2023 WL 5198736 (Minn. Ct. App. 8/14/2023) (unpublished).

Unemployment compensation; disqualifying "misconduct." An employee who committed numerous behavioral improprieties was denied unemployment compensation benefits. Upholding a disqualifying decision by the Department of Employment & Economic Development (DEED), the court of appeals held that the inappropriate comments to female customers, a verbal dispute with a co-worker, threats to another co-worker, and leaving work early, among other deficiencies, warranted a determination of "misconduct" barring benefits. ***Vang v. Mo's Tropical Market***, 2023 WL 5743393 (Minn. Ct. App. 9/5/2023) (unpublished).

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Federal Practice
JUDICIAL LAW

28 U.S.C. §1441(b)(2); so-called "snap" removal rejected. The 8th Circuit rejected a so-called "snap" removal for the second time in recent months, finding that the removal "does not cure a lack of complete diversity among the named parties." ***Cagle v. NHC Healthcare Maryland Heights, LLC***, 78 F.4th 1061 (8th Cir. 2023).

Fed. R. Civ. P. 50(b); failure to preserve issue for appeal; question of law versus sufficiency of the evidence. Where the defendant's motions for judgment as a matter of law at the close of the plaintiff's case and at the close of all evidence were denied, but the motion was not renewed after judgment was entered for the plaintiff, the 8th Circuit agreed with the plaintiff that the defendant was challenging the sufficiency of the evidence rather than raising a question of law, meaning that the defendant failed to preserve the issue for appeal. ***Turner v. Faulkner Cnty.***, 78 F.4th 1025 (8th Cir. 2023).

Fed. R. Civ. P. 11(c); sanctions award affirmed. The 8th Circuit affirmed Judge Wright's award of almost $17,000 in sanctions, finding no error in failing to impose a lesser sanction, and also rejecting the argument that monetary sanctions were not appropriate where the attorney's fees were not "incurred" because they were covered by insurance. ***Kezhaya v. City of Belle Plaine***, 78 F.4th 1045 (8th Cir. 2023).

Fed. R. Civ. P. 26(a)(2)(B); treating physician's causation opinion excluded. Affirming a district court's exclusion of a treating physician's expert testimony on causation due to his failure to provide the written report required by Fed. R. Civ. P. 26(a)(2)(B), the 8th Circuit held that a treating physician who is offered to provide expert testimony as to causation, but who did not make that determination in the course of treatment, is required to submit a report that meets the requirements of Fed. R. Civ. P. 26(a)(2)(B). ***Johnson v. Friesen***, 79 F.4th 939 (8th Cir. 2023).

Fed. R. Civ. P. 6(b) and 59; Fed. R. App. P. 4; untimely notice of appeal. The 8th Circuit held that the time for the plaintiff to file his notice of appeal was not tolled by his filing of an untimely motion for a new trial despite the defendants' failure to object to the untimeliness of the motion in the district court, finding that while Fed. R. Civ. P. 6(b) is a non-jurisdictional claim-processing rule, Fed. R. App. P. 4 barred review of the district court's denial of the new trial motion. ***Gonzalez v. Shahin***, 77 F.4th 1183 (8th Cir. 2023).

IDEA; 28 U.S.C. §1441(a); "defendants;" removal. Affirming a district court's denial of a motion to remand, the 8th Circuit held that the parents of a student were "defendants" entitled to remove a school district's appeal of an IDEA award to federal court. ***Steckelberg ex rel. AMS v. Chamberlain School Dist.***, 77 F.4th 1167 (8th Cir. 2023).

Fed. R. Civ. P. 26(e); denial of motion for new trial affirmed. Affirming a district court's denial of the plaintiff's motion for a new trial, the 8th Circuit held that even if one defendant did not supplement its expert disclosures as required Fed. R. Civ. P. 26(e), the plaintiff was unable to articulate how he was prejudiced by this failure. ***Wallace v. Pharma Medica Research, Inc.***, 78 F.4th 402 (8th Cir. 2023).

Fed. R. Civ. P. 56(d); no abuse of discretion. The 8th Circuit found no abuse of discretion in a district court's refusal to stay summary judgment to allow for additional discovery, finding that the plaintiff's "unspecified assertions" regarding his alleged need for discovery "failed to meet the requirements of Rule 56(d)." ***Marlow v. City of Clarendon***, 78 F.4th 410 (8th Cir. 2023).

28 U.S.C. §636; *res judicata* effect of magistrate judge's denial of motion to amend. Affirming Judge Wright's dismissal of certain claims and award of summary judgment to the defendants on other claims on the basis of *res judicata*, the 8th Circuit rejected the plaintiff's argument that Magistrate Judge Brisbois's denial of its motion to amend could not have preclusive effect, finding that the order denying the motion to amend constituted a "final judgment on the merits" for purposes of *res judicata*. ***Satanic Temple v. City of Belle Plaine***, 80 F.4th 864 (8th Cir. 2023).

Diversity jurisdiction; admission of fact not binding. Where the plaintiff limited liability company filed an action in state court, the defendant removed on the basis of diversity jurisdiction, the plaintiff agreed the parties were diverse, the defendant prevailed on its motion to dismiss, and the plaintiff appealed and then asserted for the first time that the parties were not diverse, the 8th Circuit rejected the defendant's argument that the plaintiff's "admission of a jurisdictional fact" was binding, and remanded the action to the district court for a determination of subject matter jurisdiction. ***Great River Entertainment, LLC v. Zurich Am. Ins. Co.***, ___ F.4th ___ (8th Cir. 2023).

Fed. R. Civ. P. 10(a); John Doe plaintiffs; adults' motion to proceed pseudonymously denied. Judge Blackwell denied adults' motion to proceed as Doe plaintiffs in an action challenging the placement on "Black Lives Matter" posters in Lakeville schools, rejecting their claims that they "fear reprisal from political activists," and finding that "in only a very few cases challenging governmental activity can anonymity be

justified." ***Cajune v. ISD #194***, 2023 WL 5348833 (D. Minn. 8/21/2023), *appeal filed* (8th Cir. 9/19/2023).

■ **Motion for stay of discovery pending resolution of motion to dismiss granted.** While acknowledging the defendant's "heavy burden," Magistrate Judge Wright granted the defendant's motion to stay the Rule 26(f) conference and discovery pending resolution of its pending motion to dismiss, finding that the plaintiff would not be prejudiced by the stay, and that potential hardship to the defendant, the conservation of judicial resources, and the "likelihood" of the defendant's success on the merits all favored a stay. ***Huff v. Canterbury Park Holding Corp.***, 2023 WL 5403472 (D. Minn. 8/22/2023).

■ **Alleged breach of nonsolicitation agreement; no irreparable harm.** Chief Judge Schiltz denied the plaintiff's motion for a preliminary injunction prohibiting violation of a nonsolicitation agreement, again finding that the Minnesota law that presumes irreparable harm does not apply in federal court. ***Piper Sandler & Co. v. Gonzalez***, 2023 WL 5426000 (D. Minn. 8/23/2023).

■ **L.R. 7.1(f)(1)(D); request for leave to exceed word limit denied.** Judge Menendez denied the plaintiff's request to exceed the word count limitation of L.R. 7.1(f)(1)(B) on its motion for summary judgment, finding that the plaintiff had "without justification" delayed making its request until well after it filed two memoranda totaling 11,449 words, and after the defendant had filed its opposition memorandum. ***Little Giant Ladder Sys., LLC v. Tricam Indus., Inc.***, 2023 WL 5447283 (D. Minn. 8/24/2023).

■ **Fed. R. Civ. P. 26(a)(2); plaintiff allowed to amend inadequate expert disclosures.** Denying several defendants' motion for partial summary judgment in a negligence case, Judge Menendez agreed with the defendants that the plaintiff's expert disclosures were inadequate on the issue of causation, but exercised her "broad discretion" and allowed the plaintiff 30 days to submit new expert disclosures. ***Krasne v. Mayo Clinic***, 2023 WL 5487388 (D. Minn. 8/24/2023).

■ **Denial of motion to amend complaint affirmed.** Reviewing *de novo*, Chief Judge Schiltz affirmed Magistrate Judge Foster's denial of the plaintiff's motion to amend her complaint for a fourth time, where the motion was filed 11 months after the deadline to amend set forth in the scheduling order, there was no good cause for the delay, and any error was due to the "inexcusable neglect" of her attorney. ***S.A.A. v. Geisler***, 2023 WL 5533344 (D. Minn. 8/28/2023).

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Intellectual Property
JUDICIAL LAW

■ **Copyright: Copyright to architectural design does not prevent sale of building in bankruptcy.** A panel of the United States Court of Appeals for the 8th Circuit recently held in a *per curiam* decision that the Architectural Works Copyright Protection Act of 1990 (AWCPA) extended copyright protection to "architectural works." McQuillen Place Company, LLC, retained Cornice & Rose International, LLC (C&R), an architectural firm,

to design a building to be built in Charles City, Iowa. C&R obtained copyright protection under the AWCPA for its technical drawings and for the building itself. First Security Bank & Trust Company was the primary construction lender to McQuillen and obtained a first mortgage on the building. With the building approximately 90% complete, McQuillen halted construction and filed for bankruptcy. The bank sought to sell the building to the highest bidder free and clear of all liens.

C&R entered an appearance and objected that such a sale violated C&R's intellectual property rights. The bankruptcy court approved the sale and included language that the purchaser may use and occupy the building so long as not using the plans or drawings owned by C&R. C&R filed a motion to reconsider arguing that the copyright prevented the building from being sold where the architect had not been paid in full. The motion was denied. C&R later filed a lawsuit against the bank, its president, and parties involved in the completion of the building. C&R alleged that all defendants infringed C&R's architectural works copyright by finishing the building because that is an infringing derivative work. The district court dismissed the copyright infringement claim, finding the claim was barred by issue and claim preclusion from the bankruptcy court's order and because the owner's right to finish the building was protected from a claim of copyright infringement by 17 U.S.C. §120(b). On appeal, the 8th Circuit panel held that C&R litigated the scope of its intellectual property rights in the bankruptcy proceeding. The bankruptcy court rejected the same claims and arguments regarding the AWCPA that C&R alleged in its lawsuit. Finding the claims barred, the panel did not further consider the argument under 17 U.S.C. §120(b). ***Cornice & Rose Int'l, LLC v. Four Keys, LLC***, No. 22-1976, 2023 U.S. App. LEXIS 20990 (8th Cir. 8/11/2023).

Trademark: Likelihood of confusion analysis is fact-specific even when mark is famous. Judge Tunheim recently denied Defendant Taco Chon Mexican Grill's motion for summary judgment of trademark infringement. Taco John's is a franchise of quick service Mexican restaurants that sells Mexican food in a causal setting. There are approximately 370 Taco John's establishments across 23 states, including 80 different locations in Minnesota since 1972. Taco Chon Mexican Grill is a set of restaurant-bars in Burnsville and St. Cloud, Minnesota that first opened in 2019. Plaintiffs Taco Johns International, Inc. and Spicy Seasonings, LLC sued Taco Chon Mexican Grill, Taco Chon Mexican Grill II, LLC, and the owner of Taco Chon, Juan Ramos, for trademark infringement, trademark dilution, unfair competition, and related state law claims. Defendants moved for summary judgment on each of plaintiffs' claims, arguing Taco Chon was not similar to Taco John's mark and that Taco John's had failed to show a likelihood of confusion. The court found each of these are highly fact-specific analyses. The court denied Taco Chon's motion for summary judgment on all claims because genuine disputes of material fact existed as to the likelihood of confusion and whether there is evidence of tarnishment or dilution. However, the court found that Taco John's mark is both strong and famous and indicated that the court would instruct the jury accordingly. ***Taco John's Int'l, Inc. v. Taco Chon Mexican Grill LLC***, No. 22-1050 (JRT/LIB), 2023 U.S. Dist. LEXIS 156934 (D. Minn. 9/6/2023).

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Probate & Trust Law

JUDICIAL LAW

Restricting the right to vote of a person subject to guardianship affirmed. In appointing a guardian for appellant, the district court revoked appellant's right to vote. On appeal, the appellant challenged the revocation and argued that revoking his right to vote, pursuant to Minn. Stat. §524.5-120(15) and Minn. Stat. §524.5-313(c)(8), violated equal protection and due process because neither statute provides specific guidelines for denying the right to vote. The Minnesota Court of Appeals highlighted the factual circumstances in the record that supported the district court's decision, such as factual statements in the visitor's report and the fact that appellant presented no contrary evidence. But the court declined to define the mental impairment required to restrict the right to vote and declined to articulate guidelines or criteria to be measured to determine the same as "[a]n appellate court 'may not add to a statute what the legislature deliberately or inadvertently omitted.'" The court of appeals then affirmed the district court's decision to revoke appellant's right to vote. ***In re Guardianship of Nguyen***, No. A23-0344, 2023 WL 6054285 (Minn. Ct. App. 9/18/2023).

District court precluded from enforcing a settlement agreement that touches on issues that are pending appeal. During the pendency of an appeal relating to numerous matters in an intrafamily dispute between two siblings, the parties agreed to participate in mediation in an effort to "reach a global resolution." After a 13-hour mediation, the mediator made a video recording of the terms discussed and directed the parties to work out a written settlement agreement. No written agreement was ever reached, and appellant later filed a motion to enforce the agreement. The district court determined that it did not have authority to enforce the agreement, because it would "necessarily affect [a] prior order which is appealed from," in violation of Minn. R. Civ. App. P. 108.01. The court of appeals agreed, finding that many of the facts relating to the settlement agreement were not different from the pending appeal. Because of this, the court affirmed the district court's order denying enforcement of the settlement agreement. ***In re Estate of Legred***, Nos. A23-0038, A23-0039, A23-0041, A23-0277, 2023 WL 6054279 (Minn. Ct. App. 9/18/2023).

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State Appellate Practice

MN SUPREME COURT

(***Editor's note:*** *Bench & Bar is happy to announce the debut of our State Appellate Practice case notes. The purpose of this section is to provide timely updates on developments at the Minnesota Supreme Court and Minnesota Court of Appeals by tracking notable decisions, cases accepted or rejected for review by the Minnesota Supreme Court, and significant special term orders from the Minnesota Court of Appeals.*)

Notable decisions: Actual malice standard applied to defamation claims arising out of #MeToo social media posts. The Minnesota Supreme Court determined that the actual malice standard applied to defamation claims based on a Facebook post that accused Johnson and two other individuals of sexual assault in the context of the #MeToo movement. The majority opinion, authored by Justice Chutich, clarified that defamation claims must be examined on a "case-by-case basis, apply[ing] the totality of circumstances test and balanc[ing] the content, form, and context of the speech, as well as any other pertinent factors, to determine whether speech involves a purely private matter or is a statement about a matter of public concern intended to influence public discussions about desired political or social change." Chief Justice Gildea dissented, concluding that the "mere fact Freborg made these allegations amid a social movement and included #MeToo in her post does not convert her otherwise private speech into speech on a matter of public concern entitled to heightened First Amendment protection." Justice Anderson and Justice Hudson joined the dissent of Chief Justice Gildea. ***Johnson v. Freborg***, A21-1531 (Minn. 9/20/2023).

Notable petitions granted/denied: Review granted in case involving sufficiency of expert testimony on the issue of causation for medical negligence claims. In a medical negligence action, the district court granted summary judgment on the issue of causation, finding that Rygwall failed to present sufficiently detailed expert opinions on the issue of causation. Rygwall appealed and the court of appeals affirmed. Rygwall successfully petitioned the Supreme Court for review. Issue granted: Whether courts may supplant the jury and hold as a matter of law that the evidence is insufficient to prove causation in a negligence action where medical expert testimony (1) details the precise course of action that the defendant should have followed, (2) explains why these interventions would have made a difference, and (3) opines that the failure to follow the standard of care caused the plaintiff to suffer harm. ***In re Rygwall v. ACR Homes, Inc. d/b/a ACR Homes***, A22-1376, petition for review granted on 9/19/2023.

Notable petitions granted/denied: Court to hear petition to exclude Trump from primary, general elections. In this elections administration proceeding, individual voters seek an order directing the Secretary of State to exclude Donald J. Trump from the ballot for the 3/5/2023 presidential nomination primary and from the ballot for the 11/5/2024 general election as candidate for the office of president of the United States. Numerous parties have intervened in the proceeding or been allowed to participate as *amici*. The Supreme Court has agreed to "address threshold and potentially dispositive legal issues of justiciability and the legal construction of Section 3 of the Fourteenth Amendment to the U.S. Constitution" prior to permitting any discovery. Oral argument is set for 11/2/2023. ***Growe et al. v. Simon***, A23-1354, statutory petition for review granted on 9/20/2023.

MN COURT OF APPEALS

Notable decision: Department of Education's statutory audit and reduction of state aid authority defined. In a *certiorari* challenge to a Department of Education audit that resulted in the reduction in state aid, the court of appeals determined that the Commissioner of Education has the authority, under Minn. Stat. §127A.41, when read in conjunction with Minn. Stat. §124E.16, to audit charter schools to verify pupil counts and state aid entitlements. Minn. Stat. §127A.14, subd. 3 also authorizes the commissioner to increase or decrease the amount of state aid based on the audit results. ***Minnesota Internship Center v. Minnesota Department of Education***, A23-0064 (Minn. App. 9/25/2023).

Notable decision: Personal jurisdiction proper over nonresident investment firm based on actions of employee. In a consumer fraud action, Pretium Partners LLC appealed from the denial of its motion to dismiss the state of Minnesota's complaint for lack of personal jurisdiction. A divided Minnesota Court of Appeals affirmed, determining that the state presented "specific evidence" which, taken as true, established a *prima facie* showing of specific personal jurisdiction, including evidence that (1) Pretium held itself out as the owner of the rental properties; (2) an employee traveled to Minnesota to "assess legal risks;" (3) that same employee communicated with Minnesota residents and government officials "many times via text, email, and phone;" and (4) that employee coordinated 22 rental property inspections while in Minnesota. Judge Connolly dissented, finding that there were insufficient contacts with Minnesota in light of the remedial nature of the Pretium employee's actions on the single visit to the forum. ***State v. HavenBrook Homes LLC et al., Pretium Partners LLC, et al.***, A23-0244 (Minn. App. 9/5/2023).

Notable special term orders: Final Order for Purposes of Appeal – Termination of Parental Rights. In an appeal from a district court order terminating parental rights, the respondents argued that the appeal was untimely because the order terminating appellant's parental rights was a non-appealable order. The court of appeals disagreed, noting that "[a]n order terminating parental rights is final and appealable." The court further observed that "[a] final order" for purposes of appeals from orders of a juvenile court

"ends the proceeding as far as the court is concerned or finally determines some positive legal right of a party relating to the action." An order terminating a party's parental rights fell well within this definition. ***In re Welfare of Children of K.F.***, No. A23-1285 (Order) (Minn. App. 9/25/2023).

Notable special term orders: Final Order for Purposes of Appeal – Denial of Motion to Amend. In an appeal from a district court order denying a motion to amend a marital dissolution property division, the appellant argued that the order denying the motion was an immediately appealable final order on the grounds that it constituted a final division of property resolving property allocation issues between the parties and conclusively determined appellant's positive legal rights related to marital property. However, the court of appeals noted that because the order ostensibly being appealed was the denial of a motion to amend a prior order, it determined that appellant actually sought "review of the district court's rulings on the property-division issues" in that prior order. The court further noted that "[a]n order for the recovery of money" is not appealable. As no final judgment had yet been entered on that prior order, the court dismissed the appeal seeking review of the district court's property division as premature. ***Blessing v. Blessing***, No. A23-1331 (Order) (Minn. App. 9/25/2023).

Notable special term orders: Final Order for Purposes of Appeal – Spousal Maintenance. In an appeal from a district court order regarding spousal maintenance, the appellant argued that the order was final and appealable because it terminated appellant's right to receive spousal maintenance. But the court of appeals observed that the appealed order did not fully resolve the issue of spousal maintenance because it provided for additional submissions to determine the amount of spousal maintenance arrearages that were owed to appellant. As the order did not "fully resolve the issue of spousal-maintenance arrearages, it is not a final, appealable order," and the court dismissed the appeal as premature. ***Locketz v. Locketz***, No. A23-1313 (Order) (Minn. App. 9/25/2023).


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Tax Law
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Property tax: To appeal a commissioner's notice of determination, the party seeking review must both serve and file the appeal within 60 days after the notice date of an order. A taxpayer filed an appeal to contest a 3/3/2023 order assessing taxes and interest for property located in Blue Earth County. The commissioner moved to dismiss the appeal for lack of subject matter jurisdiction because the appeal was filed past the maximum statutory window.

Minnesota Statute §271.06 allows a taxpayer to appeal an order regarding "any tax, fee, or assessment... including the imposition of interest..." Minn. Stat. §271.06, subd. 1. "[W]ithin 60 days after the notice date of an order of the commissioner of revenue, the appellant... shall serve a notice of appeal upon the commissioner and file the original, with proof of such service, with the Tax Court administrator...." Minn. Stat. §271.06, subd. 2. The taxpayer filed and was granted a 30-day extension. Though the parties agree on the facts regarding the date of the order, the taxpayer's filing of an extension, and the date of the appeal, the taxpayer argued that he did not include weekends or holidays in the calculation of the statutory 90-day window. The court applied Rule 6.01(a), finding that the appeal was filed outside the 90-day maximum statutory window, and granted the commissioner's motion to dismiss for lack of subject matter jurisdiction. ***Abdalle v. Commr. of Revenue***, No. COR-9598, 2023 WL 6134625 (Minn. TC 9/19/2023).

Petitions for redetermination and "person[s] outside [of] United States." The court granted respondent's motion to dismiss for lack of jurisdiction under section 6213(a). Section 6213(a), "Time for filing petition and restriction on assessment," lays out a 90-day filing period in which a taxpayer may petition the tax court for redetermination of deficiencies. 26 U.S.C.A. §6213. The statute allows an extended 150-day period "if the notice is addressed to a person outside the United States."

The taxpayers in this case filed their petition for redetermination 148 days after a notice of deficiency was mailed to their California residence. They did not dispute their petition was filed outside the normal 90-day period, but instead "allege[d] their absence from the United States during *part of the day*... the notice was mailed, entitled them to the extended 150-day period." (Emphasis added.) Because its jurisdiction is predicated "on a valid notice of deficiency and a timely filed petition," the court was faced with deciding whether the 150-day period applied under these facts. 26 U.S.C.A §6213, 7442 (West).

The court has previously held that the 150-day period applies "not only to persons outside the United States 'on some settled business and residential basis,' but also to persons temporarily absent from the country." (quoting *Levy v. Comm'r of Internal Revenue*, 76 T.C. 228 (1981)). However, the 150-day period also requires the temporary absence to have "result[ed] in delayed receipt of the deficiency notice." *See Levy* at 231.

While the taxpayers provided evidence they were abroad at the beginning of the day, they returned to their California residence the evening the

notice of deficiency was mailed. The taxpayers were present the day the notice was mailed. Their absence from the country on the morning of the mailing did not delay their receipt of the notice, and therefore the court found it lacked jurisdiction to hear the case as their petition for redetermination was not a "timely filed petition." ***Evenhouse v. Comm'r of Internal Revenue,*** T.C.M. (RIA) 2023-113 (T.C. 2023).

Tax lien priorities, refunds, and "innocent spouse" relief from joint liability. In a complex innocent spouse case, the court held that petitioner was entitled to a refund for overpayments of IRS lien payments.

In 2012, the petitioner and her husband purchased a home, which they held in joint tenancy with right of survivorship. Before the husband's untimely death in 2014, two mortgages were taken out–the WF mortgage in 2012, and the FB mortgage in 2013. Notices of deficiency and demands for tax years 2012 and 2013 were issued. In 2015, a notice of federal tax lien (NFTL) was filed against the home. Finally, in early 2015, petitioner requested innocent spouse relief (ISR). A final determination granting ISR in part for tax year 2012 and in full for tax year 2013 was awarded in 2017. Overall, the petitioner remained liable only for $3,340 (plus interest) of the previously determined $123,200 deficiency.

Facing economic difficulties following her husband's untimely death, the petitioner failed to make payments on the mortgages, resulting in the home's entering foreclosure. Prior to a foreclosure sale, the house was sold in 2015, and the proceeds were used to satisfy four obligations: (1) the closing costs, (2) the WF mortgage, (3) the FB mortgage, and (4) the tax liens.

In 2015, the tax liens on the petitioner's home were paid from the 2015 home sale proceeds. In 2017, it was determined the petitioner was eligible for ISR and within that determination was a denial of the petitioner's refund for overpayment. The petitioner argued that she was entitled to a refund. To be entitled to a refund, however, petitioner had to establish that the funds used to make the initial payment could be traceable to her separate portion of the property. *See Ordlock v. Comm'r of Internal Revenue,* 126 T.C. No. 4 (U.S. Tax Ct., 2006).

At issue here: whether the petitioner's payment of the 2015 tax liens was traceable to their separate property interest in the home sale proceeds, thus qualifying the petitioner for a refund of the 2015 tax liens following the determination for ISR.

Petitioners are entitled to refunds only if there was an overpayment, and only if that overpayment was made with funds that belonged to the taxpayer. Thus, the court had to determine if the portion of the proceeds used to satisfy the tax lien were funds that belonged to the petitioner or her late husband.

Ohio property law applied. The court addressed satisfying the liabilities that encumbered the home and their respective priorities. The first priority determined by the court was the closing costs of the sale. Ohio courts have previously held that priority is given to the costs of sale when property is subject to foreclosure. Although this sale was not a foreclosure sale, the court not only found it analogous for determining payment priority because the house was being foreclosed, but also found that such a determination would not affect its ultimate decision in this case. The closing costs, minimal in relation to the totals of this proceeding, were thus divided equally amongst the petitioner and her late husband's respective one-half interest in the proceeds.

In determining the next priority, the court determined whether the mortgages held priority over the tax liens. Pursuant to Section 6323(h)(1), which specifies conditions for purposes of determining priority, the court found the mortgages held priority over the tax liens. 26 U.S.C.A §6323(h)(1). Since the WF mortgage was first in time, it was given after closing cost, followed by the FB mortgage as the third priority. The tax liens were thus the lowest priority.

Further investigating the WF mortgage, the court determined the petitioner's husband was the primary obligor of the mortgage, and petitioner only had a surety relationship between her husband and the mortgagor. Since the late husband was the primary obligor, payment of the WF mortgage was taken entirely from petitioner's late husband's one-half interest in the proceeds.

Proceeding to the FB mortgage, the court determined the petitioner was either equally encumbered by the mortgage with her late husband or only residually encumbered with her late husband. No strict determination was necessary, however, as the husband's remaining one-half interest was insufficient to fulfill even one half of the FB mortgage. The late husband's one-half interest was thus exhausted, and the remaining FB mortgage was paid by the petitioner.

Since the tax liens were the last remaining encumbrance on the proceeds, the liens could only have been paid from the petitioner's one-half interest in the proceeds. Given that the petitioner requested ISR prior to payment of the tax liens, and the court determined that the tax liens were paid solely from the petitioner's one-half interest in the home sale, the court determined that the payment of the tax liens was an overpayment by the petitioner. As the ISR request reduced the petitioner's liability to $3,340 (plus interest), the court concluded the petitioner was entitled to a refund of the tax liens less the petitioner's ISR liability. ***O'Nan v. Comm'r of Internal Revenue***, T.C.M. (RIA) 2023-117 (T.C. 2023).

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Torts & Insurance
JUDICIAL LAW

Defamation; matters of public concern. Plaintiff, a private figure, filed suit against defendant for defamation after a post on defendant's Facebook page accused plaintiff and two other dance instructors from the Twin Cities dance community of varying degrees of sexual assault. Plaintiff was one of defendant's dance teachers, and the two previously had a casual sexual relationship that lasted for about a year. The district court granted defendant's motion for summary judgment, finding that defendant's speech was true and, alternatively, that her speech involved a matter of public concern and was not made with actual malice. The court of appeals reversed. It held that the truth or falsity of defendant's statement presented a genuine issue of material fact. The court of appeals further held, in a divided opinion, that because the dominant theme of defendant's post involved a matter of private concern, plaintiff was not required to prove actual malice to recover presumed damages. The court of appeals remanded the case to the district court for further proceedings.

The Minnesota Supreme Court reversed in part and remanded. The only issue on appeal was whether or not the post related to a matter of public concern, as defendant did not appeal the court of appeals' ruling that a genuine issue of material fact existed as to the statement's falsity. On this issue, the Court held that to make this determination in a particular case, courts should consider the "totality of the circumstances," including "the content, form, and context of the speech." The Court noted that "as a general proposition," speech relating to sexual assault is a matter of public concern. The Court went on to hold that "[b]ecause the overall thrust and dominant theme of [defendant's] post—based on its content, form, and context—involved a matter of public concern, namely, sexual assault in the context of the #MeToo movement," it was entitled to constitutional protection through the actual malice standard. The Court reasoned: "even though [defendant] named, tagged, and admonished three specific instructors in her post, these personal messages do not outweigh the dominant theme of her speech—to discuss sexual assault in the dance community, a matter of public import." Because the Court determined it could not address the issue of actual malice without a determination of the truth or falsity of the statement, the Court remanded the case to the district court for further proceedings to determine the veracity of defendant's post and, if the post is found to be false, whether the making of the post meets the constitutional actual-malice standard.

Chief Justice Gildea filed a dissenting opinion that was joined by Justices Anderson and Hudson. The dissent embraced a narrower view of what constituted matters of public concern, emphasizing matters related to self-government, government officials, and government performance. ***Johnson v. Freborg***, No. A21-1531 (Minn. 9/20/2023). *https://mn.gov/law-library-stat/archive/supct/2023/OPA211531-092023.pdf*

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PEOPLE + PRACTICE

We gladly accept announcements regarding current members of the MSBA. BB@MNBARS.ORG


Maslon LLP has announced the addition of two attorneys: **Emilio Giuliani III**, who joins the litigation group, and **Laura Trahms-Hagen**, who joins the corporate & securities group.

Jake Holdreith became a fellow of the American College of Trial Lawyers. Holdreith is a partner at Robins Kaplan, where he is head of the health and life sciences industry group and a member of the firm's executive board.

Debra M. Bulluck was the inaugural recipient of the Violence Free Minnesota Alice O. Lynch Inspire Award. This award recognizes individuals who identify as Black, Indigenous, or Person of Color (BIPOC) who have exemplified resilience, passion, and unwavering commitment to creating a more equitable and just society. Bulluck is a member of Moss & Barnett's family law team.

Fredrikson announced a new president and leadership team. **Melodie Rose** was named the firm's first female president. **Kevin Goodno** and **Jamie Snelson** were appointed executive vice presidents. **Loan T. Huynh** was elected to the board of directors, the first lawyer of color elected to the board.

Amber Lee joined Stoel Rives as of counsel in the energy development group. Lee joins Stoel Rives from Alias Energy Consulting, where she served as president and assisted clients with all aspects of energy operations and regulations.

Mack A. Marrin joined Arthur, Chapman, Kettering, Smetak & Pikala, PA. Marrin's practice focuses on representing clients in construction liability.

Greta Bjerkness was named a shareholder at LeVander, Gillen & Miller, PA. She is a member of the real estate, eminent domain, and municipal practice groups.


Gov. Walz appointed **Adam Johnson** and **Lauren Johnson** as district court judges in Minnesota's First Judicial District. Adam Johnson, the deputy county administrator for Rice County, will be replacing Hon. Tim D. Wermager in a seat chambered in Dakota County. Lauren Johnson, an associate attorney with Melchert Hubert Sjodin, PLLP, will be replacing Hon. Mark C. Vandelist in a seat chambered in Scott County.


Matthew R. Burton has joined, and **Charles E. Jones** has rejoined Moss & Barnett as shareholders in its litigation and business law practice areas.

Caleb Nigrin joined Erickson, Zierke, Kuderer & Madsen, PA as an associate attorney practicing in the area of civil litigation.

Stephanie Laws and **Katie Maechler** joined the International Association of Defense Counsel, an invitation-only global legal organization for attorneys who represent corporate and insurance interests. Laws and Maechler are both partners at Maslon LLP.

Kevin Kennedy announced the creation of Kennedy Law Firm PC, a litigation firm specializing in property insurance, liability defense, subrogation, and mediation services. Joining Kennedy at the firm are attorneys **Kerry Trapp** and **Amanda Sperow**. The firm is located in Woodbury.

In memoriam

HON. TERENCE M. DEMPSEY, age 91, died on September 2, 2023. Dempsey joined the Somsen & Dempsey law office, where he practiced until 1992. He worked as a public defender and served as New Ulm city attorney for 10 years. In 1978, Terry was elected to the Minnesota House of Representatives. He was re-elected six times, eventually serving as minority leader. In 1992, he was appointed a district court judge for Watonwan County by Gov. Arne Carlson.

FRANCIS J. RHEINBERGER, age 73, died September 17, 2023. He graduated from Hamline School of Law and practiced in Stillwater for over 40 years and served on multiple Washington County committees.

NICK ROY HAY, age 74, died September 17, 2023. He attended law school at the University of Minnesota. Hay began his distinguished career as an attorney at law specializing in tax law and found a second calling in life working as an CPA for Myslajek, Spencer and Kemp

PATRICK MOORE, age 54, of East Bethel, died on October 9, 2023. After several years of international tax accounting, he returned to law practice by joining Clark A. Joslin Law (eventually Joslin & Moore Law Office, PA). He served on many nonprofit boards and started his own nonprofit organization, Silent Ability.

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Fall Events

REGISTER AT WWW.MNBAR.ORG/ CLE-EVENTS

CELEBRATION
Join us for a reception to celebrate the career of former Chief Justice Gildea.
WEDNESDAY, NOV. 15

HAPPY HOUR AND HEADSHOTS
Socialize with the Public Law Section and get your headshot taken for free!
THURSDAY, NOV. 16

YOGA FLOW
Beginner to advanced yogis are all encouraged to join this welcoming and approachable class. Free to members.
FRIDAY, DEC. 1

and mentor students in research, help create innovative strategies for student recruitment, retention, and completion, and may be expected to develop external grant funding opportunities. All faculty members are expected to engage in scholarly or creative activity or research, in continuing preparation and study, in contributing to student growth and development, and in providing service to the university and community (See Article 22 and Appendix G of the IFO Master Agreement). The successful candidate will be able to develop and teach the undergraduate Legal Environment of Business course as well as upper-level undergraduate and graduate courses in business law or related fields. Current upper-level undergraduate courses include contracts, sales and professional responsibility; employment and labor law; technology and intellectual property law; environmental law; international legal environment of business; negotiation and conflict resolution; and legal aspects of banking and finance. REQUIRED QUALIFICATIONS: Doctorate or terminal degree in Law (J.D.) (Conferred on an official transcript at the time of application). Demonstrated ability to serve a diverse population and apply an equity lens to this position including social justice and/or anti-racism. AA/EOE and a member of the Minnesota State Colleges and Universities System. For complete notice of vacancy and application procedures, please visit: https://minnesotastate.peopleadmin.com/postings/2485

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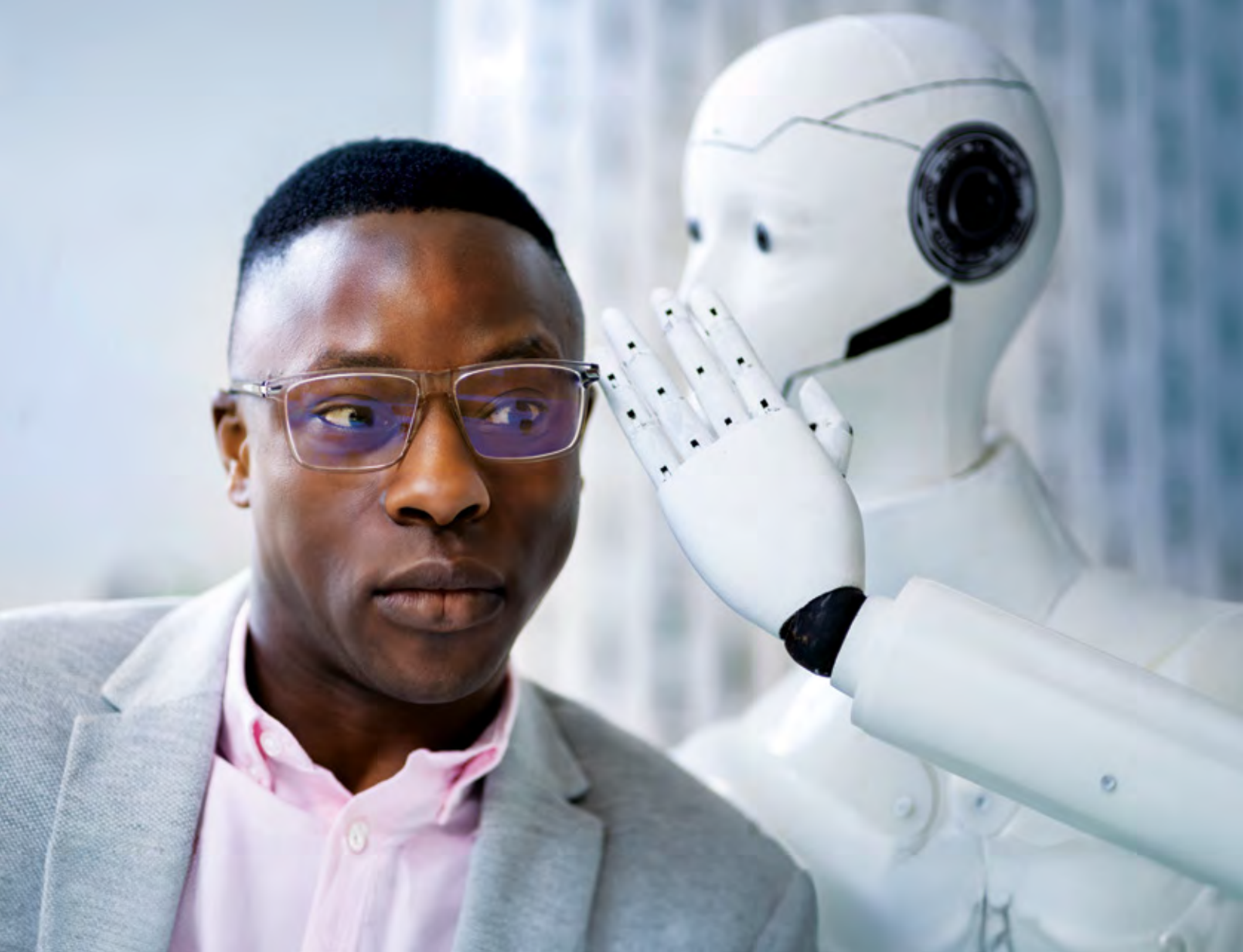
MINNESOTA STATE BAR ASSOCIATION

APRIL 2024

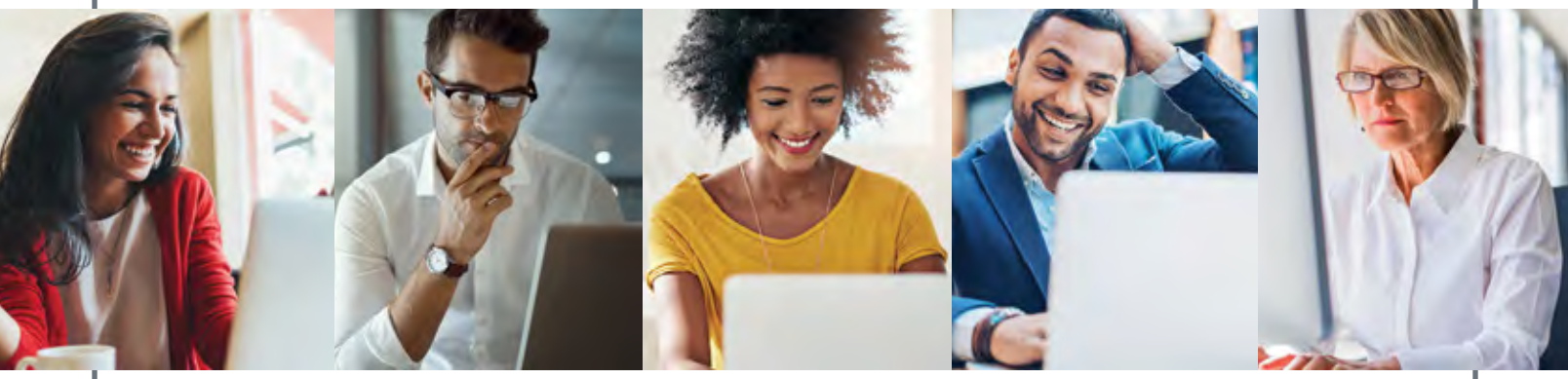
BENCH + BAR of Minnesota

AI, UPL, AND THE JUSTICE GAP

A PROFESSION AT THE CROSSROADS



MSBA Communities

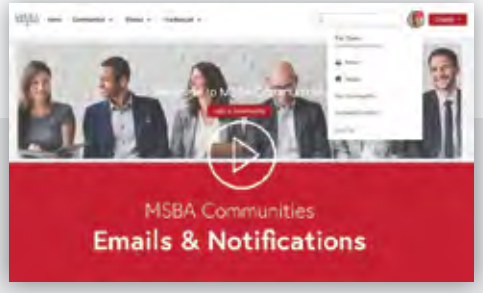


Start reading. Start posting. Start connecting.

Your online Communities are waiting for you. Connect with members of your Section, your district bar, and other groups. **MSBA Communities** are exclusively for members. Ask questions, answer questions, join the conversation.

www.mnbar.org/communities

Have questions? Check out our new tutorial videos.



Need help navigating MSBA's legal tech resources? Schedule a one-on-one virtual walk-through.

Mary Warner, MSBA Legal Technologist
mwarner@mnbars.org

MITCHELL HAMLINE NAMES NEW PRESIDENT AND DEAN

The board of trustees of Mitchell Hamline School of Law has announced the appointment of Camille M. Davidson, dean and professor of law at Southern Illinois University School of Law, as the school's new president and dean. Davidson, who has served as dean at SIU Law since July 2020, will begin her duties at Mitchell Hamline on July 1, 2024.

"I am thrilled to be leading Mitchell Hamline. The school's record of innovation and adaptability—including launching the first-in-the-nation Blended Learning program—speaks to its independence and forward-looking approach."

MH
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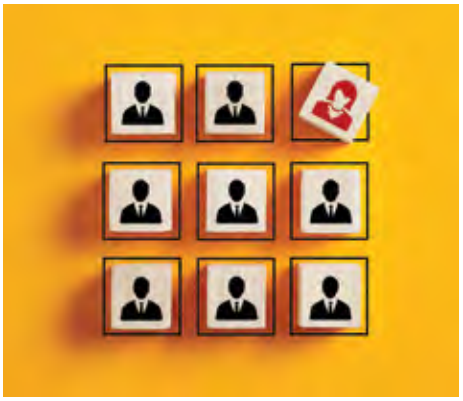
MINNESOTA STATE BAR ASSOCIATION APRIL 2024

BENCH + BAR of Minnesota

VOLUME 81, NO. 3



columns

features

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WE'D LIKE TO HEAR FROM YOU: To query potential articles for *Bench + Bar*, or to pass along your comments on matters related to the profession, the MSBA, or this magazine, write to editor Steve Perry at ***sperry@mnbars.org*** or at the postal address above.

WHAT, ME RETIRE? NEVER!

BY PAUL M. FLOYD

PAUL M. FLOYD is one of the founding partners of Wallen-Friedman & Floyd, PA, a business and litigation boutique law firm located in Minneapolis. Paul has been the president of the HCBA, HCBF, and the Minnesota Chapter of the Federal Bar Association. He lives with his wife, Donna, in Roseville, along with their two cats.

Sooner or later, all practicing lawyers face the inevitable question: "Should I stop practicing law and do something else with my time?" For some, the question arises in our 30s or 40s. For others, it comes in their 60s and 70s. For still others, it comes up repeatedly every 7-10 years. In short, the question of retirement is not just for the older or senior attorney but one for each of us to reflect on throughout our careers.

Following both of my law partners' recent retirements, questions about my own retirement plans have naturally surfaced, making the topic not only timely but deeply relevant to my personal and professional life.

Fortunately, in my law practice I regularly advise and represent numerous attorneys who are at or near the age when many consider retiring. When the topic comes up, their responses fall into three categories:

- I will never retire. I can't see myself doing anything else. Dying in court or at my desk is the way I want to go. Can you make sure the firm's partnership agreement has no set retirement age?
- I must retire now and I mean *now*. This minute, not tomorrow, not in a few weeks. Now. I am done. Can you help me notify my clients and help them find another attorney?
- The firm says I need to retire now, but I would like to transition my practice for another five or so years. Can you help me work through the next season of my law practice?

Each of these responses raises its own set of concerns.

THE "I'LL NEVER RETIRE" ATTORNEY

While this response may sound magnanimous to some and a nightmare to others, not planning for one's transition out of the practice of law is naïve and short-sighted. Be honest: After one turns 60, all bets are off regarding one's good health. An unexpected stroke, cancer, heart attack, long-term illness, Parkinson's disease, dementia, or plain poor health can strike any of us, bringing an end to practicing law. Less expected, but just as real, is that a lawyer may become the primary caregiver for a loved one with a debilitating illness, which can also end a law practice. Not planning for retirement just leaves the burden of closing down your practice to law partners and family members. Avoiding discussion of the hard issues surrounding planning for your retirement may be the path of least resistance in the short term but carries a high risk in the long term. Hope is not a strategy. This is not an ideal way to consider how and why to retire.

THE "I HAVE TO RETIRE RIGHT NOW" ATTORNEY

Pre-covid, a middle-aged attorney who had practiced over 20 years met with me and declared that, given his current mental state (in large part exacerbated by the pressures of his practice), he needed to quit practicing law immediately. When I asked him to clarify his timing, he said that he had just left his therapist's office, and upon the therapist's sound advice, he needed to retire right now. Fortunately, he brought along his senior associate, who was capable and willing

to step in and continue representation of his clients; I advised them about the transition. What I remember most about that occasion was the palpable change in the client's physical posture, words, mood, and emotional state from the time he entered my office to the time he left. He clearly had struggled with the demons of his law practice but for any number of reasons could not until that day let go. This is also not an ideal way to consider how and when to retire, because he had clearly lived unhappily for many years until he broke.

THE "I AM PLANNING FOR RETIREMENT" ATTORNEY

For most of us, thoughts about when and how to retire evolve throughout our practice and help to shape each lawyer's formal (or more likely informal) plan for retirement, as it should. No matter how many years you have been practicing law, planning for retirement will help your eventual move to be less of a chaotic and disruptive surprise to you, your law partners, and your family. Hopefully, this will allow you to retire more on your terms than on the terms of your law partners or your mental or physical health.

The MSBA has a number of succession planning resources. (You were wondering where this was all going, right?) One such tool is the Minnesota Lawyers Mutual (MLM) booklet "Succession Planning," available to members on the Law Practice Management page of the MSBA website *(www.mnbar.org/succession*). There is also an On-Demand MSBA CLE entitled "Successful Succession: Make a Plan for Your Firm." And there are several trained coaches, capable of guiding you through the process, who advertise in the classified section of *Bench & Bar*.

In addition, all lawyers who have been admitted to practice before the Minnesota Supreme Court for at least 37 years or are over 62 years old are automatically enrolled in the MSBA's Senior Lawyers & Judges Section, which regularly meets to discuss navigating the before, during, and after questions of retirement. As more and more of us retire from the practice, being active with other senior attorneys and judges from the profession is a viable and helpful option.

So the next time you hear a lawyer say they will never retire, kindly remind them that they will save everyone a lot of grief if they plan ahead for retirement. ▲

NOT PLANNING FOR RETIREMENT JUST LEAVES THE BURDEN OF CLOSING DOWN YOUR PRACTICE TO LAW PARTNERS AND FAMILY MEMBERS.

Bar exam update: NEW COURT COMMITTEE FORMED

In the summer of 2021, the Minnesota Board of Law Examiners (BLE) began a two-year comprehensive review of the state's bar examination process. The study analyzed not just the bar exam, but also alternative models for evaluating competency to practice, including a curriculum-based pathway and a supervised-practice-based pathway.

The BLE filed its report with the Court on June 1, 2023, containing four recommendations:

- *Minnesota should adopt the NextGen exam.*
- *The Board will file a petition to propose modest changes to the supervised practice rules.*
- *Create an Implementation Committee to further explore and develop a curriculum-based pathway for assessment.*
- *Table the proposal to create a supervised practice-based pathway for assessment, and revisit that proposal following further study and experience with the curriculum-based pathway for assessment.*

On March 12 of this year, the Court issued an order (ADM10-8008) adopting all of the BLE's recommendations with a few minor modifications—and one change: The Court's newly formed Implementation Committee will continue to explore a supervised-practice-based pathway to licensure, albeit secondarily to its study of a curriculum-based means of licensure.

The Implementation Committee includes a broad range of stakeholders and the MSBA has nominated three members for the Court's consideration. The committee's report and recommendations are due on July 1, 2026 for the curriculum-based assessment path, and July 1, 2027 for the supervised-practice method of evaluation. ▲

Congratulations to Watertown-Mayer High!


1ST PLACE COURTROOM ARTIST

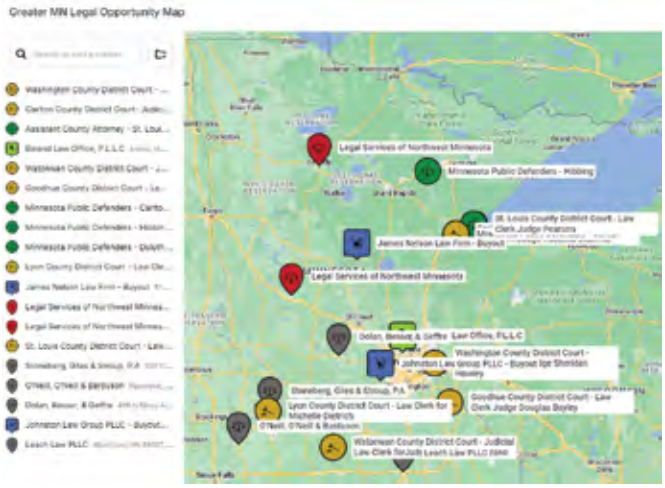
Last month 16 teams from around the state met and competed in the MSBA High School Mock Trial Program's 39th state tournament at the U.S. District Courthouse in St. Paul. Watertown-Mayer High School claimed its second state championship and will represent Minnesota at the national tournament in May. Judges also selected the top eight courtroom artist submissions from the mock trial season to compete for the opportunity to represent Minnesota at nationals; a student from Nova Classical Academy was selected as winner. Please visit *www.mnbar.org/mocktrial* to see the submissions or contact Mock Trial Director Kim Basting (*kbasting@mnbars.org*). ▲

Greater Minnesota Practice Section to receive free dues for 2024-25 bar year and beyond

At its January 25 meeting, the MSBA Board of Governors reviewed and accepted a proposal from the Greater Minnesota Practice Section Council to make the section free for any member that elects it for the 2024-25 bar year and beyond. The proposal was presented by Council member Janna Borgheiinck and came about after the section's membership declined and engagement began to wane in recent years, likely because most CLEs are provided through sections linked to particular practice areas.

In considering ways to combat these issues, the section's purpose was taken into consideration: "to enhance the viability of attorneys practicing in Greater Minnesota and to identify and work toward solutions for the problems shared by those attorneys."

In response the section took two actions.



For more information, visit: www.mnbar.org/greater-minnesota

1. Enhance the viability of their practice by identifying problems and creating solutions. One problem identified was the difficulty of finding jobs and/or finding applicants to fill legal positions in greater Minnesota. To address this problem, the Greater Minnesota Legal Opportunity Map was created. This new tool (see image) will be housed on the section's community page.

2. Membership support to attorneys. How can the association reach more members practicing in smaller cities, towns, and rural areas? By offering section membership for free, the section will seek to expand its reach to more members. ▲

Lessons from private discipline in 2023

BY SUSAN HUMISTON ✉ *susan.humiston@courts.state.mn.us*

SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

Private discipline is nonpublic discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are isolated and nonserious. Several lessons can be learned from reviewing the mistakes and situations that led to private discipline last year.

Contact with a represented party

Every year lawyers are disciplined for contacting represented parties in violation of Rule 4.2, MRPC. Rule 4.2 is generally referred to as the no-contact rule; it states:

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

Last year, Zoom hearings brought a new twist to this age-old rule.

Courts often have large court calendars, and use online breakout rooms for parties to discuss matters before the court or, particularly in calendars involving lots of unrepresented parties with ancillary issues, such as in housing court, financial assistance or other services might be available.

In one matter, a tenant was represented by a legal services provider in a housing matter. It's clear the lawyer for the landlord knew of this representation, because the parties had been attempting to negotiate a resolution of the dispute. At one point, the client chose to attend the financial assistance breakout room, while her attorney assisted another client in a matter before the court. The lawyer for the landlord, however, chose to join the financial assistance breakout room and proceeded to ask the tenant substantive questions to gather information without the tenant's lawyer being present. The tenant's lawyer returned to the breakout room to join her client to find opposing counsel speaking with her client on matters relating to the dispute. This is a straightforward violation of Rule 4.2, MRPC, and the lawyer received an admonition.

The lesson is to be mindful of the different ways in which court hearings are taking place and the different ways in which you might encounter a represented party unaccompanied by their lawyer. Saying hello to a represented party is not prohibited, nor is asking that individual where their lawyer may be or if they will be joining soon, or discussing the weather if you cannot handle silence, but communicating about the subject of the representation—even if you don't think the communication is material—is off-limits.

In another Rule 4.2 admonition, co-defendants in a criminal matter (a burglary) were separately represented by defense counsel. Although the state had made a motion to try the cases together, the court denied the joinder, and the cases proceeded to trial separately. One day, one co-defendant called counsel for his co-defendant to discuss the upcoming trial of the co-defendant. Counsel discussed the facts and circumstances surrounding the alleged crime for which both individuals had been charged, and determined she wanted to call the co-defendant in the upcoming trial of her client. Counsel reached out to counsel for the co-defendant and acknowledged the prior contact. Opposing counsel brought a complaint and a Rule 4.2 admonition was issued.

Counsel appealed the admonition, arguing that the co-defendant reached out to her, and she was not talking about the co-defendant's matter but rather her client's matter. After an evidentiary hearing, a panel of the Lawyers Professional Responsibility Board affirmed the admonition. Because the representations arose out of the same facts and circumstances, the fact that they resulted in two separate court files was not dispositive. Because of the interrelated nature of the facts, you cannot discuss one matter without discussing the other. And whether the opposing party reaches out or you do is not material to the rule violation; the main inquiry is whether there is communication regarding the subject of the representation.

The lesson here is that if someone is represented in the same or related proceedings, just work through counsel and don't take the represented party's calls. Trying to parse "matters" might make sense to you, but it often results in your thinking too narrowly about the subject matter of the opposing party's representation (the key part of the rule), and forgetting that the point of the rule is protecting the opposing lawyer-client relationship and preventing the uncounseled disclosure of information.

Conflicts

Each year a few lawyers receive admonitions for conflicts that were nonconsentable, or in which no informed consent was obtained.

Rule 1.8(c) is not a rule that most lawyers run into frequently, but it is an important rule to remember. It is one of a series of rules that address transactions with clients. Rule 1.8(c) prohibits a lawyer to "prepare an instrument giving the lawyer... any substantial gift from a client, including a testamentary gift, except where the lawyer is related to the donee." Rule 1.8(k) provides that "[w]hile lawyers are associated in a firm," the prohibition of Rule 1.8(c) "that applies to any one of them shall apply to all of them."

At his client's request, a lawyer asked an associate in his firm to draft a will for a long-time firm client that left 25 percent of the remainder of the client's estate after taxes, expenses, and payment of debts to the lawyer. Among other defenses the lawyer raised, one was that although he was familiar with Rule 1.8(c), he thought having another attorney represent the client and staying out of the matter was sufficient to address the conflict concerns raised. Unfortunately, the lawyer had not read the entirety of Rule 1.8 when making this decision, because the associate in his firm was also prohibited. In many instances, lawyers have been publicly disciplined for this rule violation. In this matter, private discipline was imposed because the lawyer repudiated the gift and had attempted to convince his client to do something different over the years on numerous occasions, indicating a lack of self-interest and harm. The lesson here is obvious: If a client wishes to give you a substantial gift, whether testamentary or otherwise, neither you nor anyone in your firm should represent the client in that transaction.

Rule 1.7, MRPC, defines concurrent conflicts of interest. There are two kinds of concurrent conflicts: direct adversity under Rule 1.7(a)(1), and substantial risk conflicts under Rule 1.7(a)(2). Both kinds of conflicts can be consented to under most circumstances unless the requirements of Rule 1.7(b) cannot be met. The key, however, when there is a concurrent conflict that is consentable, is that "each affected client gives informed consent, confirmed in writing." As many lawyers who simultaneously represent corporations and individuals as well as generations of family members know, this is an important part of advising clients, and it can be overlooked when things are going well. Several lawyers received admonitions in 2023 for failing to get informed consent in circumstances where informed consent was required.

In one matter, for example, a lawyer who had represented several family members in various estate planning and real estate transactions over the course of a decade agreed to represent siblings in the sale of property from one to the other. The lawyer represented both parties in the transaction, giving both tax and corporate structure advice. Although it is tempting to think of oneself as a scrivener in these types of largely amicable transactions, that is rarely the case, as lawyers ultimately end up providing advice to both parties regarding transaction details. This conflict was consentable, although the lawyer did not obtain informed consent from each party in writing. Sibling relationships being what they are, adversity did arise between the siblings regarding their parents' trust, and a complaint was filed, resulting in an admonition for lack of informed consent confirmed in writing.

The lesson is to remember that if you are representing multiple parties in a matter, you must analyze for conflicts and whether consent can be obtained, and then obtain that informed consent confirmed in writing. A corollary to this lesson is to make sure you have properly identified who is and who is not your client, and that this is clear to the individuals you are interacting with on the matter. And remember, clients never consent to an actual conflict—that is, where you put the interest of one party before the other; rather, they consent to the risk that a conflict might arise and the lawyer-client relationship might fail.

Other common mistakes

The most common reasons for private admonitions year over year are lack of diligence (Rule 1.3) and lack of communication (Rule 1.4). Every year, several lawyers are also admonished for errors in withdrawing under Rule 1.16(d). The mistakes that lead to discipline when withdrawing include failure to refund unearned fees promptly, failing to provide reasonable notice or to take steps necessary to protect the client's interest, or failing to promptly provide the client's file upon request.

Collecting fees or subsequently suing your client can lead to discipline. In one case, a lawyer sought a harassment restraining order against a former client for conduct that occurred after the representation concluded. The lawyer was perfectly within his rights to do so, and the motion was warranted by the client's harassing post-termination conduct. But when providing evidence in support of the harassment motion, the lawyer disclosed significant confidential information relating to the representation that was not relevant to the motion the lawyer was making. Rule 1.6(b) includes exceptions to the confidentiality rule, including one that allows a lawyer to disclose information the lawyer reasonably believes is necessary to establish the claim in issue, with one of the key words being *necessary*.

Conclusion

Most attorneys care deeply about compliance with the ethics rules. Please take some time each year to reread the Minnesota Rules of Professional Conduct. They can be found on our website and in the Minnesota Rules of Court. You will find the time well spent. And remember, we are available to answer your ethics questions: 651-296-3952. ▲

NETWORK DOWN

Cybercrime or human error?

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

MARK LANTERMAN is CTO of Computer Forensic Services. A former member of the U.S. Secret Service Electronic Crimes Taskforce, Mark has 28 years of security/forensic experience and has testified in over 2,000 matters. He is a member of the MN Lawyers Professional Responsibility Board.

This past month, people across the country were impacted by a severe AT&T network disruption.[1] Though the company encouraged people to make calls using Wi-Fi, the outage still affected many customers' ability to access the internet or even contact emergency services. It made it difficult for some non-AT&T customers to reach out to individuals who had been impacted, and some police departments reported an increase in 911 calls from people looking for answers about what was going on.[2] The outage caused a lot of confusion and created undeniable hurdles for customers.

In the immediate aftermath of the outage, many feared that a cyberattack was to blame. But within a few days, human error was revealed as the more probable culprit, though this may change—the event is still being investigated. According to AT&T's statement, "Based on our initial review, we believe that today's outage was caused by the application and execution of an incorrect process used as we were expanding our network, not a cyberattack."[3] At the time of this writing, it is not entirely clear what process was applied incorrectly, but it seems that this error is the suspected cause of the outage. As with any company or organization, network expansions are often fraught with technological difficulties. In this case, the consequences were severe.

Though a cyberattack is not currently thought to be the source of the AT&T outage, the company's public response was similar to its response if an attack had occurred. Given the severity of the event (full restoration of the network took 12 hours and the outage affected a reported 70,000 customers[4]), the company issued a statement apologizing for the outage. Additionally, AT&T stated that it will provide $5 credits to affected accounts.[5] While reactions to AT&T's response have been mixed, some were generally displeased with AT&T's communications during the event and felt that the credit was unsatisfactory.[6] Some observers have noted that contacting the company directly with their concerns seemed to be beneficial.[7] The company has also tried to assure customers that improvements are being made to its operations to prevent any similar future occurrences.

The ripple effect of technological errors can be disastrous; in this case, "cyber risk" doesn't necessarily relate to cybercrime. Human errors can cause just as much damage, and restoring public faith can be just as difficult. Apart from the immediate financial damages caused by the outage, AT&T may face ongoing losses in the long term that are more difficult to quantify. For example, it was recently announced that New York Attorney Letitia James would be investigating the outage in an effort to protect consumers, acknowledging that a disruption to service can be more than just an inconvenience.[8]

In a digital world that greatly relies on the communication afforded by our devices, even a brief disruption can have devastating consequences. Business continuity plans are as critical as incident plans that seek to minimize the damages incurred through a successful cyberattack; restoring business operations as quickly as possible and providing clear communication throughout an event are imperative to minimize damages and reputational harm. Being aware of potential sources of human error, such as during periods of growth or the implementation of new technologies, can also help in reducing errors. ▲

NOTES

[1] *https://www.cnn.com/2024/02/22/tech/att-cell-service-outage/index.html*

[2] *https://www.cnn.com/2024/02/22/tech/outage-att-cell-phone-service-cause/index.html*

[3] *https://www.cnn.com/2024/02/22/tech/outage-att-cell-phone-service-cause/index.html*

[4] *https://www.nbcnews.com/news/us-news/t-give-5-credits-customers-affected-widespread-service-outage-rcna140443*

[5] *https://www.nbcnews.com/news/us-news/t-give-5-credits-customers-affected-widespread-service-outage-rcna140443*

[6] *https://www.businessinsider.com/att-outage-5-credit-bill-reimbursement-customer-reaction-2024-2*

[7] *https://www.cnbc.com/2024/02/28/in-wake-of-att-outage-consumer-advocate-urge-customers-to-ask-for-money-back-.html*

[8] *https://www.nbcnews.com/news/us-news/t-nationwide-outage-investigation-nys-attorney-general-rcna141201*

Cultivating emotional intelligence in the legal profession

BY KENDRA BRODIN

KENDRA BRODIN is the founder & CEO of EsquireWell, a leading lawyer well-being and performance consulting firm, providing education, strategic guidance, coaching, and online learning tools to help lawyers be happier, healthier, and more successful.

The concept of emotional intelligence (EQ) has its roots in the early 20th century, but it was psychologists Peter Salovey and John D. Mayer who first coined the term in 1990. They defined it as "the ability to monitor one's own and others' feelings and emotions, to discriminate among them, and to use this information to guide one's thinking and actions."

But it was Daniel Goleman's 1995 book *Emotional Intelligence: Why It Can Matter More Than IQ* that brought the concept into the mainstream, highlighting its importance in personal and professional success. Since then, the study of EQ (sometimes referred to as EI) has expanded rapidly; research has shown its impact on various aspects of life, including workplace performance, leadership, and mental health.

For lawyers, the relevance of emotional intelligence and emotional regulation cannot be overstated. The legal profession is inherently emotional—we deal with clients facing stressful and life-changing situations, work in fast-paced and deadline-driven practices, interact with bright and intense colleagues on a daily basis, and feel that we need to be at the top of our game all the time. Lawyers must navigate these emotional landscapes with skill and empathy, all while maintaining their own emotional balance.

High EQ allows lawyers to understand and manage their emotions and those of their clients and colleagues, leading to more effective communication, better decision-making, and stronger relationships. The capacity to regulate one's own emotions, an important component of EQ, is particularly crucial in high-stakes situations such as courtroom battles, intense negotiations, strategic conversations, or emotional interpersonal exchanges where the ability to remain calm and focused can make the difference between a positive and a negative outcome.

Emotional intelligence and emotional regulation are vital skills for lawyers, enabling them to navigate the complexities of their profession with resilience and effectiveness. In such a high-stress environment, understanding and managing emotions is not just advantageous; it's crucial to success and well-being.

EQ: The four quadrants

EQ comprises four primary components, often referred to as the four quadrants:

- **Self-awareness:** This is the ability to recognize and understand one's own emotions, strengths, weaknesses, and values. For lawyers, self-awareness is essential for recognizing internal triggers and biases that can impact decision-making and client/colleague interactions. For example, a lawyer who is aware of their tendency to become angry or defensive in certain situations can work on strategies to remain open and receptive to feedback. Self-awareness also includes accurately identifying the emotion one is feeling as well as gauging the intensity of that emotion.
- **Self-management:** This is also called "emotional regulation," and it involves "right-sizing" one's emotions, thoughts, and behaviors, particularly in stressful situations. Lawyers with strong self-management skills can maintain their composure and think clearly under pressure, enabling them to make rational decisions and avoid impulsive actions and reactions. A lawyer who can manage their frustration during a difficult negotiation, for instance, is more likely to remain focused and find constructive solutions.
- **Social awareness:** This is sometimes called "empathy" for short, and it encompasses understanding the emotions and perspectives of others. In the legal field, social awareness is crucial for empathizing with clients, working effectively with and leading colleagues, understanding the motivations of opposing parties, and effectively navigating courtroom dynamics. A lawyer who can accurately read the emotions of a jury, for example, can tailor their arguments to resonate more effectively.
- **Relationship management:** This component focuses on fostering and maintaining positive relationships, using self-awareness, self-management, and social awareness to build strong, healthy relationships and interact effectively with others. For lawyers, relationship management skills are essential in building trust with clients, collaborating with colleagues, and negotiating successfully with adversaries. A lawyer who can communicate empathetically is more likely to build strong, lasting professional relationships.

NEED SOMEONE TO TALK TO?

One great option is Lawyers Concerned for Lawyers (LCL), which provides free, confidential support and services to Minnesota lawyers, judges, law students, and their immediate family members on any issue that causes stress or distress.

CONTACT LAWYERS CONCERNED FOR LAWYERS

www.mnlcl.org
651-646-5590
866-525-6466 toll-free

Developing emotional regulation skills

Emotional regulation, an integral part of EQ, is the ability to pause between experiencing an emotion and responding to it. This skill enables lawyers to control their thoughts, feelings, and actions in alignment with their long-term objectives and values. Given the demanding nature of legal work, emotional regulation is particularly vital for maintaining composure and making rational decisions under pressure.

Lawyers and legal professionals can develop effective emotional regulation skills through various strategies.

Cultivate self-awareness. Recognize and label your emotions without judgment. Understanding how your emotions influence your thoughts and actions is crucial for effective regulation. Reflecting on past emotional experiences can help identify patterns and triggers, enabling you to anticipate and manage your emotional responses more effectively.

Practice mindfulness. Engage in mindfulness practices such as meditation or deep breathing exercises to calm your mind and stay present. Mindfulness enhances emotional awareness, allowing you to choose how to respond to your emotions consciously and intentionally. It helps in reducing stress and improving focus, both of which are essential for lawyers.

Consider other perspectives. Step back and try to view a situation from different angles. This can provide a broader understanding and help you respond more thoughtfully. Considering how others might interpret the situation can offer valuable insights and improve your ability to empathize and communicate effectively.

Practice adaptable thinking. Challenge your initial reactions and consider alternative interpretations of events. This flexible approach can help you respond more effectively and avoid jumping to conclusions. It encourages open-mindedness and adaptability, both of which are crucial in the ever-changing legal landscape.

Seek support. If you find it challenging to regulate your emotions, consider seeking help from a mental health professional or reaching out to Lawyers Concerned for Lawyers (LCL). Therapy and professional support can provide you with strategies and tools to manage your emotions effectively. Confiding in trusted friends, family, or colleagues can also offer valuable perspectives and emotional relief. Building a support network is essential for emotional well-being.

Emotional intelligence and emotional regulation are truly essential skills for lawyers, enabling them to navigate the complexities of their profession with resilience and effectiveness. By developing these skills, lawyers can enhance their self-awareness, manage stress more effectively, and build stronger relationships. These capabilities are not just tools for sustainable professional success; they are vital components of well-rounded and emotionally healthy lawyers and leaders. ▲

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(LEFT) Attorney Robert Huber received the 2024 Mock Trial Volunteer of the Year Award. **(ABOVE)** 2024 State Champions Watertown-Mayer High School. Coaches: Lori Sieling and Sarah Soley; Attorney Coach: Patrick Neaton. Panel of Judges: Hon. Kate Menendez, Hon. William Fisher, Hon. Jim Dehn, Randy Sparling, Nick Hydukovich, and Lauren Johnson. **(RIGHT)** Nova Classical Academy student artist champion with MSBA President Paul Floyd who served on the courtroom artist judging panel.

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BY IAN LEWENSTEIN

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COMMON BUT NOT FORGOTTEN

My father, mercifully, edited all my college papers. So when I was given the honor by my son to do the same—with a mandated same-day deadline—I was struck by his problems with commas and the irony that I had the same issues in college. But while my son, a first-year college student, can be excused, it's much harder to forgive journalists and professionals for making basic comma mistakes that confuse the reader and can engender ambiguity. When it comes to basic comma mistakes, two are predominantly recurring: (1) missing commas between independent clauses and (2) commas used unnecessarily in compound predicates.

Commas as connectors

Commas can be used in multiple ways and for different purposes, but one important use is to serve as connective tissue between independent clauses. A clause contains a subject and a verb (*I write*); an independent clause can stand by itself as a complete sentence:

I walked to the courthouse. I was late to my hearing.

In the example, both sentences are independent clauses because both clauses (1) have a subject and a verb, and (2) can stand by themselves as complete sentences. But we want to connect the clauses and show a logical relationship between them. To do this, we use coordinating conjunctions: "I walked to the courthouse**, so** I was late to my hearing."

Along with the comma, the conjunction *so* connects the two independent clauses. *So* is part of a rock/sports group called FANBOYS (**F**or, **A**nd, **N**or, **B**ut, **O**r, **Y**et, **S**o). When you have two independent clauses, you connect them using one of the FANBOYS.[1] Neglecting to use this connective tissue can easily stump readers because they expect a break between two sentences, each of which is expressing a distinct idea. This break is also known as the "pause test." While not always reliable, the pause test illustrates how readers naturally expect breaks in writing. When the break isn't there, expect your readers to slow down and stumble, negating your message.

Here are some examples from the *Star Tribune* that show how we need more FANBOYS in our lives:

ORIGINAL	REVISION
Nicks unveiled the doll during a Sunday night concert at New York's Madison Garden and it debuted on Mattel's site Monday morning.	Nicks unveiled the doll during a Sunday night concert at New York's Madison Garden**, and** it debuted on Mattel's site Monday morning.
Several people called 911 to report gunfire and the calls led officers to the 1200 block of Hazelwood where police found the three victims.	Several people called 911 to report gunfire**, and** the calls led officers to the 1200 block of Hazelwood**,** where police found the three victims.
The indignities the girls face range from the terrifying to the absurd but Green knows that ...	The indignities the girls face range from the terrifying to the absurd**, but** Green knows that ...

If the two clauses are short and closely connected, we can politely excuse the commas and FANBOYS: "Ian cooked and Cindy cleaned." (But don't tell Microsoft Word, which is scolding me for omitting the comma after *cooked.*) Or if you are writing fiction, you can be more loosey-goosey. But remember that the goose shouldn't be loose in professional writing.

Beware the compound predicate

Although using commas with FANBOYS is important, you don't want to make the mistake of adding a comma where one is unnecessary. One example is when you have a compound predicate—that is, the same subject in two or more clauses, with the subject omitted after the first clause (stay with me!). A predicate is the verb plus other information.

In a compound predicate, you wouldn't add a comma as such: "The judge waved his hands furiously and spitefully threw his gavel at the witness." The judge is the subject for both independent clauses, so we don't need to repeat them in the second clause.

By dissecting why the judge was so animated (commas, perhaps?), you can understand why you would be mistaken to insert a comma with a compound predicate.

Normally: independent clause + comma + FANBOYS + independent clause

The judge waved his hands furiously, and the judge spitefully threw his gavel at the witness.

But compound predicate: independent clause ~~+ comma~~ + FANBOYS + independent clause (same subject)

The judge waved his hands furiously~~,~~ and ~~the judge~~ spitefully threw his gavel at the witness.

And if you add another verb, you have a series and must punctuate accordingly (serial comma, of course): "The judge waved his hands furiously, spitefully threw his gavel at the witness, and left the bench with a quick sweep of his cloak." For the last two items in the list, you could insert "the judge." But we don't because we want to avoid sounding stilted and interrupting the sentence's natural flow.

When you have a series of three or more items, ensure that you are using a parallel construction with both the subject and verb. For example, if you say, "I sing, dance, and cook," the subject (*I*) is the same for each item in the series, and each item in the series is a verb. Here are some common mistakes (also from the *Star Tribune*) with parallel constructions:

	✗	✓
MULTIPLE SUBJECTS	**Yusuf and his friends** bought a mattress, furniture, and **someone** donated a bed frame.	Yusuf and his friends bought a mattress~~,~~ and furniture, and someone donated a bed frame.
MULTIPLE VERBS	Mack is best known for its semitrucks, though it also **produces** construction equipment, firetrucks, and **has** a defense division that makes military-grade construction vehicles.	Mack is best known for its semitrucks, though it also produces construction equipment~~,~~ and firetrucks~~,~~ and has a defense division that makes military-grade construction vehicles.

Use but don't abuse

Commas are good for organizing information in sentences. As with other punctuation, commas help readers navigate writing, understand it, and, ultimately, use the information. Misplacing a comma may seem trivial, but once you make it a habit, the reader stops reading and instead looks—or winces—for the next misplaced comma. Also, poor mastery of commas makes you vulnerable to being schooled by a judge, who may use a lengthy footnote and multicolor highlighting to explain basic grammatical concepts.[2]

Have other comma questions or topics you want covered? Feel free to email me. ▲

NOTES

[1] You can also exchange the comma and FANBOYS for a semicolon: "I walked to the courthouse; I was late to my hearing." The courts have recognized this semicolon use, too, even citing Strunk and White, authors of *The Elements of Style*. *See In re Welfare of D.J.F-D.*, 986 N.W.2d 17, 25 (Minn. Ct. App. 2023). Oddly, the court misdiagnosed that the clauses were independent and also the reason for the semicolon.

[2] *See, e.g.*, *In re Annexation of Certain Real Property to the City of Waconia from Waconia Township*, OAH 84-0330-32991, 12 n.33 (Minn. Office Admin. Hearings 1/19/2016).

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AI, UPL, AND THE JUSTICE GAP

A PROFESSION AT THE CROSSROADS

BY DAMIEN RIEHL damienriehl@gmail.com

Since November 2022, when ChatGPT raised the world's consciousness of the power of generative AI tools such as large language models (LLMs), the legal profession has debated a particular question: Might LLMs—and the companies that run them—be performing the unauthorized practice of law (UPL)?

In many states, including Minnesota, the UPL statutes prohibit "prepar[ing] legal documents" and giving "legal advice."[1] Central to the UPL debate is the distinction between two concepts: "legal information" and "legal advice." The caveat is familiar—but does the distinction make sense anymore?

Historically, "legal information" has included primary law (statutes, regulations, case law, administrative opinions) as well as secondary materials (treatises, articles, commentaries on the law). Legal information encompasses abstract legal concepts (such as the elements of a breach of contract claim), as well as the particulars of black-letter law—all as provided by legislators, judges, and regulators.

Legal information is the foundation of our legal system; it must be accessible to all. We're all *bound* by the law—so we all must have *access* to it. As the Supreme Court noted in 2020, "Every citizen is presumed to know the law, and... 'all should have free access' to its contents."[2] That access to legal information is provided by various free resources, such as Google Scholar (for cases) and Cornell's Legal Information Institute (for statutes).

In contrast, "legal advice"—that certain something that only lawyers are authorized to provide—has traditionally been viewed as applying legal information to *specific facts*. Throughout human history, the only entities that could apply law to specific facts have been humans. But with the advent of LLMs, machines are increasingly capable of applying the law to specific facts (or, if you prefer, applying specific facts to law). As such, we now must confront novel questions about whether LLMs providing "legal information" might also be supplying "legal advice." Indeed, if you upload a statute into an LLM and ask it to consider how *your* specific facts apply to that statute, the LLM will provide a response. And that response might be shockingly similar to the words that a lawyer would write. Maybe even better.

Those LLMs are also likely to provide the same types of disclaimers that you provide in offering details about your firm and its practice areas on your website: "This is not legal advice." Of course, these disclaimers help keep lawyers from creating attorney-client relationships. Do they *also* keep consumers from believing that any attorney-client relationship exists when those consumers use tools like LLMs?

Beauty is in the eye of the beholder; legal advice is in the eye of the consumer. Would any consumer think that Google or Microsoft, when their tools expressly announce "I am not a lawyer," is acting as their lawyer?

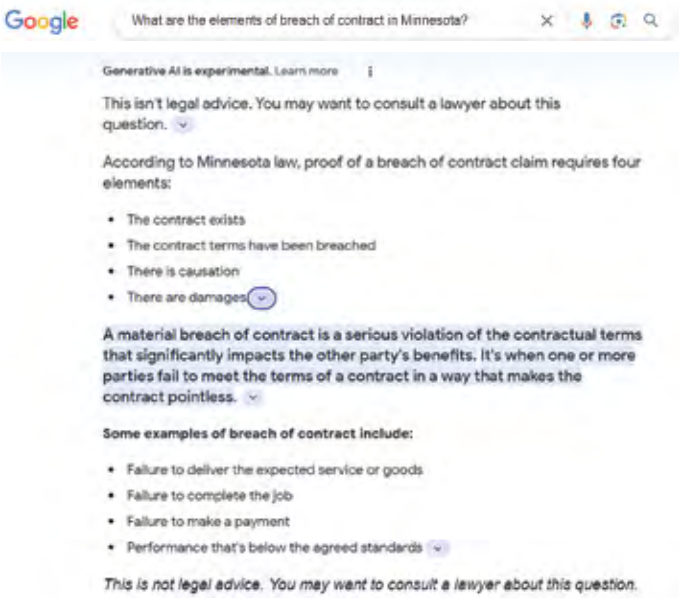
LLMs' role in providing legal information

The newfound ability of LLMs to provide more useful legal information potentially challenges traditional notions of "legal advice." For decades, millions of consumers (and, if we're being honest, most lawyers) have turned to Google and Google Scholar to answer legal questions. "What are the elements of a breach-of-contract claim in Minnesota?" Has anyone believed that all these years, Google has been providing "legal advice"? Of course not.

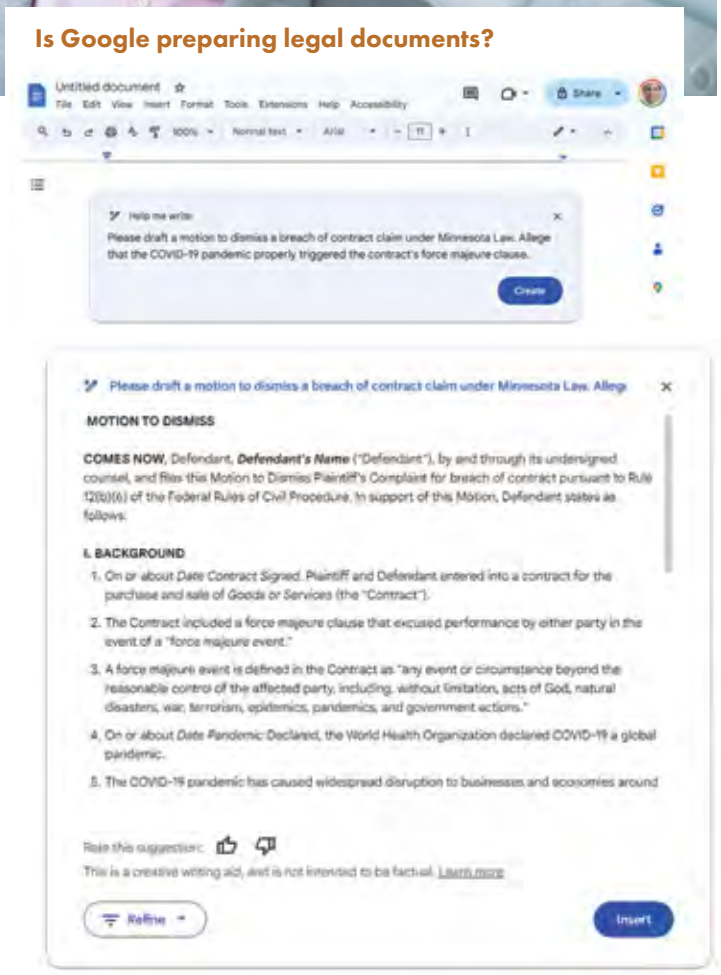
Google is often the tool of first resort for lawyers and consumers alike. Unlike lawyers, low-income and middle-class consumers often rely on Google as their *only* source of legal information. The role of "legal information" is so important—and our help of low-income persons has been so poor—that Google has, for decades, been the primary way that consumers find and interpret legal information.

Today, in addition to pointing users to primary law, Google also provides generative AI answers. For example, if you ask Google the question, "What are the elements of breach of contract in Minnesota?" – Google can now provide a narrative answer:

Note Google's prominent disclaimers: "This isn't legal advice," "You may want to consult a lawyer about this question"—on *both sides* of the answer.



An important question: Given those disclaimers (or even without them), would *consumers* view Google's output as legal advice? Or mere legal information? If you were to poll consumers, what percentage do you think would say that Google is acting as their lawyer—performing the unauthorized practice of law? This is almost certainly "legal information." Especially given Google's clear disclaimers.



Now let's go a step further: Consumers ask the same company (e.g., Google) to draft a motion to dismiss using that legal information, applied to specific facts (covid-19, say). Would any consumer consider this "legal advice"—or would they continue thinking that they were just "Googling it"—that is, obtaining legal information?

Here, is Google giving "legal advice"? Is it "prepar[ing] legal documents"? Minn. Stat. §481.02, subds. 1–2 (2023).

If your answer is, "Yes, Google is either providing 'legal advice,' 'prepar[ing] legal documents,' or both," what then? Prosecute Google? Keep Google's service from low-income consumers?

Chief Justice John Roberts, in his *2023 Year-End Report on the Federal Judiciary*, provided these words regarding the power of AI to help low-income individuals: "For those who cannot afford a lawyer, AI can help. It drives new, highly accessible tools that provide answers to basic questions, including where to find templates and court forms, how to fill them out, and where to bring them for presentation to the judge—all without leaving home. These tools [AI] have the welcome potential to smooth out any mismatch between available resources and urgent needs in our court system."[3]

Those words seem pretty clear: Chief Justice Roberts appears to favor using LLMs to help the low-income population bridge the access-to-justice gap. We should, too.

Imagine the converse: "Sorry, poor people, you don't get the good tools. Despite Justice Roberts's words, your reasonable, Google-created motion is prohibited as the unauthorized practice of law, so you're stuck with 'plain old Googling' to draft your more awful motions (that will be more easily dismissed). It's for your own good!"

Or would it be better to interpret the Google tool's output, as shown above, as "legal information" and not "legal advice"?

Of course, we are weighing this decision even as *lawyers themselves* can use LLMs—in products like Westlaw, LexisNexis, and vLex (Fastcase)—to make the practice of law faster and more effective. When a lawyer uses Westlaw or CoCounsel to draft a legal document, is the legal-research company performing the unauthorized practice of law? Of course not. Legal research tools have always been mere "legal information."

What does this mean for equal justice under the law? Do rich people who can afford lawyers get access to the best LLM-based tools while poor people are stuck with Google search? Access to justice, indeed.

The "legal information" well goes deep. The law consists solely of words. Words are information. And LLMs can now reason with that information, applying facts to law. But that seemingly magical application does not magically convert "legal information" into "legal advice."

UPL or free speech?

Might all the talk about "unauthorized practice of law" implicate another legal concept, "freedom of speech"? Plaintiffs in two cases, *Upsolve* and *Nutt*, have successfully argued that constraints on professional assessments (legal advice and engineering opinions) constitute unconstitutional constraints on free speech.

In *Upsolve v. James*, the Southern District of New York granted Upsolve a preliminary injunction, using an "as applied" standard to hold that Upsolve's argument (that New York's UPL statute unlawfully constrains Upsolve's ability to provide low-income persons information, thereby constraining Upsolve's freedom of speech) is likely to succeed on the merits. The case is currently being appealed to the Second Circuit.[4]

In a similar case from North Carolina, *Nutt v. Ritter*, a federal court recently held that the North Carolina Board of Examiners for Engineers and Surveyors violated a retired engineer's free-speech rights. In December, the federal court held that the regulators' attempt to prohibit the retired engineer from providing an engineering report constituted an unconstitutional violation of free speech. The court reasoned that the engineering guild's "interests must give way to the nation's profound national commitment to free speech."[5]

Looking to the *Nutt* case, is "unauthorized practice of engineering" distinguishable from "unauthorized practice of law"?

From a public policy perspective, which is more dangerous: bad legal advice or a bridge collapse? Yet the *Nutt* court still held that the "unauthorized practice of engineering" constrained free speech unconstitutionally. How might Minnesota's UPL statute, or any state's, fare under this standard?

These two cases raise similar, difficult questions: Can states continue asserting UPL statutes without impinging on free speech rights? Upsolve is before the Second Circuit, and North Carolina federal courts appeal to the Fourth Circuit. Will they both be upheld on appeal? Or are we looking at a circuit split of the sort that the Supreme Court—led by apparent LLM sympathizer John Roberts—will have to resolve? For advocates of crying UPL, these case law developments will likely dampen their optimism.

Big Tech and the unauthorized practice of law

If you are among the legal professionals who believe Google is performing the unauthorized practice of law and that the district courts have wrongly held that UPL restrictions thwart freedom of speech, what should we do next? Should prosecutors or bar associations prosecute Google for UPL?

If your answer is yes, then we should probably also prosecute Microsoft, which is baking LLMs into Microsoft Word and Outlook. And while we're at it, we should probably also prosecute Meta (Facebook), whose open-source LLaMA model answers legal questions similarly. And since nearly 100 percent of the largest technology companies are laser-focused on generative AI, we should also probably do blanket UPL prosecutions of every single Big Tech company—including Amazon, since its AWS hosts LLaMa, Claude, and other LLMs.

On the other hand, if we decline to prosecute Big Tech, then do we similarly decline to prosecute smaller players? Or do we prosecute just the small players and not Big Tech? What does that "punching down" demonstrate? That states are unwilling to assert UPL statutes against the *biggest* players in tech for fear of losing legal battles with Big Tech's Big Law firms, but we're happy to try taking down smaller players?

If we truly seek to use UPL laws to prevent "consumer harm," wouldn't we go after the world's *largest* companies — Google, Microsoft, Meta — whose wildly popular LLMs are the *most likely* to be used by our would-be consumer clients?

In the end, if we decline to prosecute the world's largest companies for UPL, then that decision might well nudge us toward LLMs' most-promising potential benefits, which involve helping bridge the access-to-justice gap.

WHAT IF BAD THINGS HAPPEN?

Of course, the purpose of UPL statutes is to protect the public. So what will happen if unscrupulous people or companies give bad advice, taking advantage of consumers? There's a law for that! Actually, there are many laws to address unscrupulous people taking advantage of others. They include laws pertaining to:

- Negligence. "Providing this bad legal information, you failed to fulfill your duty of care."
- Product liability. "Your legal product lacked sufficient warnings about its limitations."
- Misrepresentation. "Your legal information and claims of being a 'robot lawyer' were false."
- Unfair or deceptive trade practices. "You deceived me, saying that you were a lawyer."
- False advertising. "Your advertisement falsely said that you were a lawyer."
- Breach of contract. "Your terms of service said your coverage included 'all courts,' which was false."
- Consumer protection laws. "This legal product failed to secure client data, resulting in consumer harm."
- Fraud. "Your representation — that you're a lawyer — was false, and you knew that it was false."
- Breach of warranty. "You guaranteed a result, but you failed to deliver."
- Probably many others. (Plaintiffs' lawyers, get your thinking caps on!)

Over 200 years, the case law surrounding each of the common-law and statutory claims above is abundant. UPL prosecution is astonishingly rare. But laws regarding "bad people doing bad things" are bountiful.

Given the paucity of UPL caselaw, and the practical impossibility of distinguishing "legal advice" from "legal information" under the new technological regime, the common-law and statutory claims above can sufficiently protect the public from unscrupulous actors. And because the case law is more developed (millions of cases over centuries), the public is more likely to be protected.

Additionally, under each regime, who can sue? A UPL action arguably can be brought *only* by prosecutors or the attorney general's office. The 10 civil claims listed above can be brought by anyone. Any member of the public who is wronged can sue; there is no need to convince a prosecutor, to wrangle a case based on the weak and minimal UPL case law, or to form a UPL working group. Civil claims democratize suing bad people doing bad things. Anyone can simply sue for negligence, fraud, product liability, or so on—without needing to even utter the term "UPL."

Do UPL laws thwart access to justice?

At the heart of this discussion is access to justice (A2J). For years, 80 percent of consumers' legal needs have been unmet.[6] As Chief Justice Roberts has noted, today's LLM-based tools might offer a solution. LLMs can augment the capabilities of legal aid organizations. And they can help consumers for whom paying a legal bill for even 15 minutes is impossible.

For decades, low-income and middle-income people's *de facto* source of legal information has been Google. Today, their *de facto* source of legal information is an LLM like ChatGPT. Which is better?

If the legal profession stands on the claim that LLM-based tools are performing UPL, then it risks perpetuating the status quo. We're failing badly. And if we do nothing, we'll continue failing the highest goal of our profession: equal justice for all. If we instead embrace the promise of LLMs to serve broad swaths of the public that we have left unserved for decades, then perhaps we can help to bridge the massive justice gap.

Potential solutions to address the A2J gap

AI can improve access to justice. Legal Aid organizations can and should leverage LLM tools, effectively expanding their reach. If legal services transition from traditional methods to more efficient, LLM-driven approaches, they could serve more constituents—and provide even more tailored services to people who need them most. *Pro se* litigants can evolve from "Google-assisted" cannon fodder for lawyers into LLM-enabled parties for whom "equal justice for all" can be referenced with a straight face.

If lawyers increase their productivity with LLMs, they could expand their services by going down-market—and thereby help address that 80 percent of legal needs that are currently unmet. Economists call that an "untapped market." Today, that low-income latent market is willing to pay what it can for reliable legal services, and with LLM-enabled efficiencies, lawyers could serve that market and make more money in the aggregate.

By embracing this potential future, lawyers could make more money, serve more people, and provide wider societal benefits.

COURTS CAN ACHIEVE MORE EFFICIENT WORKFLOWS

When I clerked for the Minnesota Court of Appeals, and subsequently the U.S. District Court for the District of Minnesota, I had a front-seat view of our courts' litigation firehose. Judges and their clerks work tirelessly, but over time judicial caseloads have nonetheless become more voluminous.

What if LLMs were to help courts with that workload, allowing human judges to better serve justice? Some possible applications:

- **Bench memos.** What if an LLM could draft judicial clerks' bench memos, performing in minutes what would normally take clerks all day? For each claim, summarize the parties' positions (which may be spread over many documents): "Plaintiff argues X, defendant argues Y, the law appears to support __." With LLMs, building that tool is trivial (I've already built one), and it can create a bench memo in seconds.
- **Clerks for the clerkless.** For those judges who lack law clerks (such as ALJs and some rural judges), the LLM-backed tools could help in more efficiently processing their caseloads.
- **Substantive analyses.** What if an LLM could programmatically identify weak or missing elements of claims? For example: "For the breach-of-contract claim, plaintiff lacks evidence supporting Element 3 (causation)." This is the work that human clerks do today, but slowly. If LLMs can expedite it (with no sacrifice in quality, likely even an improvement), humans will be able to more quickly identify cases' strengths and weaknesses.

This future should consist not of machines deciding cases, but of tools *aiding* judges and their clerks. Just as e-discovery eased the crushing burden of millions of client documents, LLMs can help judges and their clerks sift through their hundreds of cases. These LLM-backed tools can help separate the litigants' wheat from the chaff more quickly, enabling the human jurists (and their clerks) to more quickly exercise their human judgment.

When I clerked for Chief Judge Michael J. Davis, he would often repeat the maxim: "Justice delayed is justice denied." LLMs can effectively expedite justice.

Conclusion: Where do we go?

The legal profession stands at a crossroads. Embracing generative AI tools such as LLMs can significantly improve legal practice and access to justice. If we're able to assess potential concerns about free speech and guild protectionism, we might move forward with using tools to benefit the public.

The line between "legal information" and "legal advice" has *always* been blurry. And with LLMs, it has become virtually nonexistent. Legal tools can incorporate facts into law, providing legal information that can be indistinguishable from the work of human lawyers. But paradoxically, the technology that can do this near-magical work could also provide lawyers with *additional* work if corporations leverage LLM-enabled lowered costs by giving lawyers more legal work. (One example might be regulatory work that, pre-LLM, was simply too expensive to undertake.) These tools can also enable lawyers and allied professionals to serve a low-income population that has traditionally been unserved.

If lawyers, judges, prosecutors, and bar associations decline to raise the UPL alarm and instead embrace LLMs' benefits to both the public and to the profession as encouraged by Chief Justice Roberts, our profession will continue to have ample work, while also providing improved access to justice. We can do well by doing good. ▲

NOTES

[1] Minn. Stat. §481.02, subds. 1–2 (2023).

[2] *Georgia v. Public.Resource.org, Inc.*, 140 S. Ct. 1498 (2020).

[3] Chief Justice John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary* (12/31/2023), *available at https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf*

[4] *Upsolve, Inc. v. James*, Case No. 1:22-cv-00627-PAC (S.D.N.Y. 5/24/2022), *available at https://www.docketalarm.com/cases/New_York_Southern_District_Court/1–22-cv-00627/Upsolve_Inc._et_al_v._James/68/*, *appealed to* Case No. 22-1345 (2d Cir.), *available at https://www.docketalarm.com/cases/US_Court_of_Appeals_Second_Circuit/22-1345/Upsolve_Inc._v._James/*

[5] *Nutt v. Ritter*, Case No. 7:21-cv-00106 (E.D.N.C. 12/20/2023), *available at https://www.docketalarm.com/cases/North_Carolina_Eastern_District_Court/7–21-cv-00106/Nutt_v._Ritter_et_al/63/*

[6] Legal Services Corporation, *The Unmet Need for Legal Aid*, *available at https://www.lsc.gov/about-lsc/what-legal-aid/unmet-need-legal-aid*

DAMIEN RIEHL is a lawyer, vLex employee, and chair of the Minnesota State Bar Association's working group exploring the access-to-justice potential of generative AI and examining whether AI constitutes the unauthorized practice of law—but any views in this article are his own, not those of his employer, the MSBA, or the working group.

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The Eighth Circuit needs more women on the bench

An advocate's experience

BY STEPHANIE ANGOLKAR

One October morning in 2021, I prepared to return to in-person oral arguments before the Eighth Circuit in St. Paul, Minnesota. After checking in for my argument, I entered the courtroom and quickly saw that I was the only woman in the room. That only changed when the court clerk entered at the start of arguments. The panel clearly had been looking forward to returning to in-person arguments and was very active.

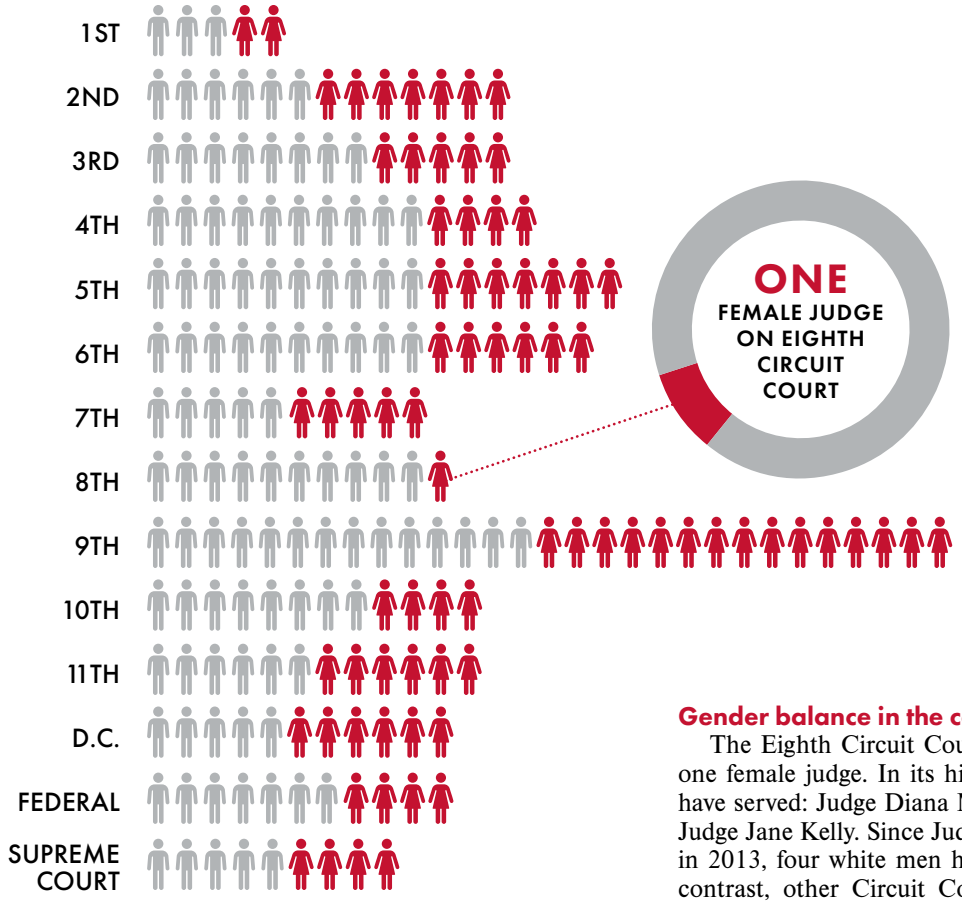
Appellate attorneys often sit in the gallery during the arguments of other cases. One of the cases argued was the appeal of a sex trafficking conviction, *United States v. Taylor*.[1] The engaged panel asked questions about the meaning of a "happy ending."[2] These questions, which can be listened to online, addressed such details as the placement of a hand towel and other hypotheticals. I do not need to tell you the panel was all-male because you know the odds of that in the Eighth Circuit—where we have only one female judge.

So there I sat, trying to identify this feeling I was experiencing. It was a sensitive case, so of course they would need to ask some sensitive questions about the details, right? But I could not help wondering, would the makeup of this audience before the court change the way the questions were asked? The very detailed hypotheticals? Then I started to wonder how these questions might change if there were a woman arguing. Would they be asked the same way? And what if there was a woman among the three judges? Would the questions change? Would they be asked differently? Then my thoughts turned even bolder: What if there were three women on the panel?

The argument ended, and it was time to leave. I pushed the thoughts and questions about more women on the bench aside. But the argument that morning started me on a quest to join a long-standing argument regarding the need for more women on the Eighth Circuit.

FIGURE 1:

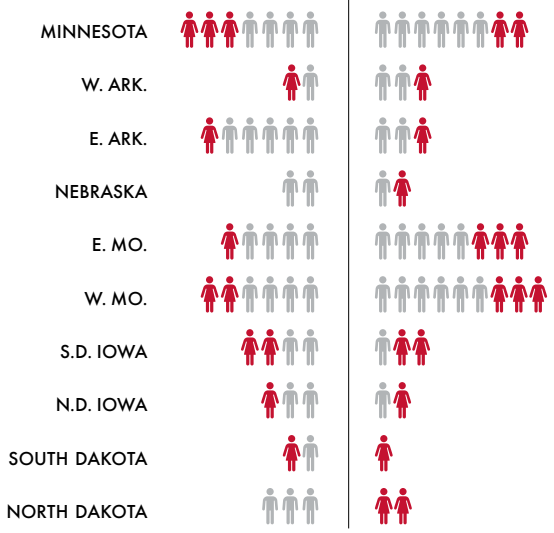
Gender Balance in Circuit Courts and Supreme Court



Eighth Circuit

FIGURE 2: ARTICLE III DISTRICT COURT JUDGES

FIGURE 3: MAGISTRATE JUDGES



(figures excluding Senior status, as of 1/15/24)

Gender balance in the courts

The Eighth Circuit Court of Appeals has only one female judge. In its history, only two women have served: Judge Diana Murphy (deceased) and Judge Jane Kelly. Since Judge Kelly's appointment in 2013, four white men have been appointed. In contrast, other Circuit Courts of Appeal reflect more gender balance (SEE FIGURE 1).

The Eighth Circuit Court of Appeals serves the region including North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, and Arkansas. Within those states' federal district courts, too, there is still work to be done to improve gender balance (SEE FIGURE 2).

At the magistrate judge level, gender balance in the states within the Eighth Circuit is progressing (SEE FIGURE 3).

In some cases, a woman's perspective can influence the result. In *Safford Unified School District v. Redding*,[3] a case involving the strip-search of a 13-year-old-girl, the Supreme Court justices questioned the seriousness of the charge during oral arguments. Only Justice Ruth Bader Ginsburg expressed deep concern. Justice Ginsburg is believed to have influenced the eventual 8-1 vote, and she later explained, "They have never been a 13-year-old girl."[4]

There are many studies and resources analyzing the impact of gender on decisions of the courts.[5] A diverse bench also improves public confidence in the courts. There is something powerfully affirming for the public in seeing judges that look like them or have a relatable background.

THE INFINITY PROJECT BELIEVES IT IS NECESSARY TO HAVE A BENCH REFLECTING SOCIETY AS A WHOLE SO THAT JUDICIAL DECISIONS TAKE INTO ACCOUNT VARIED LIFE EXPERIENCES AND POINTS OF VIEW. IF YOU ARE CURIOUS TO LEARN MORE, VISIT WWW.THEINFINITYPROJECT.ORG/MINNESOTA.

The Infinity Project

The argument for more women in the Eighth Circuit was amplified in 2007. That year, Judge Mary Vasaly, Marie Failinger, Lisa Brabbit, and Sally Kenney founded The Infinity Project in Minnesota. Their mission was to increase gender diversity on the Eighth Circuit bench. The Infinity Project believes it is necessary to have a bench reflecting society as a whole so that judicial decisions take into account varied life experiences and points of view.

The Infinity Project has a busy Applicant Support Committee, recently honored with a Minnesota Lawyer Attorneys of the Year award for diversity, equity, and inclusion efforts. This committee assists women applying for judicial positions, whether it be brainstorming sessions, application and cover letter feedback, or mock interviews.

The committee works with women and diverse candidates applying for judgeships at state and federal levels in multiple states within the Eighth Circuit. The Infinity Project hopes its efforts supporting women at multiple levels will grow the pipeline to the Eighth Circuit–and that these efforts could be more formally replicated in other states. This is particularly important since federal judges often have prior judicial experience. For example, the Hon. Wilhelmina Wright served at all levels of the judiciary in Minnesota before her appointment by President Biden to the United States District Court of Minnesota, and she was a strong contender when he considered an appointment to the United States Supreme Court.

Let's think, too, about the demographics of who is appearing before the court. Are there concerns about the legitimacy of courts and the ethics of judges? How does it feel to appear in a judicial system that more accurately reflects the diversity of our communities? When there is more balance, it feels like a system working for all of us, resulting in more trust from all of us.

I speak from my own perspective as a female attorney. I treasure a moment from a jury trial several years ago in which I, female co-counsel, female opposing counsel, and Judge Ann Montgomery were addressing a trial matter outside the presence of the jury. I do not even remember what it was about. What stands out to me is that we were all women in the courtroom at that time. It is a moment I have yet to replicate in practice. When I appear before a woman judge or am working with other women attorneys in my heavily male-dominated practice area, there is a boost in my self-esteem that affirms and validates my presence in this profession and practice area.

Lived experiences have an impact on judicial philosophies. And the makeup of our bench has an influence on those appearing before it, their trust in the system, and their own feelings of self-worth and possibility.

At a time when diversity, equity, and inclusion efforts are under attack, it is important to reflect on why these efforts are important. It is not about evening out numbers or meeting a ratio, though certainly data points help. Rather, if we view a judicial branch that more closely reflects the diversity of our society, we add legitimacy, buy-in, and ownership by the public in this system.

How you can help

If you are curious to learn more about the Infinity Project, visit *www.theinfinityproject.org/minnesota*. The Infinity Project is a nonpartisan organization that relies on donations from granting agencies, law firms, and individuals to cover expenses for the volunteer-based organization. ▲

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NOTES

[1] 44 F.4th 779 (8th Cir. 2022).

[2] This was one of the issues raised in the appeal. The court affirmed the jury's conviction of sex trafficking offenses.

[3] 557 U.S. 364 (2009).

[4] Hayes, Hannah, *Diversity on the Bench: Why It Matters in a Polarized Supreme Court*, American Bar Association, (8/17/2022), (available at: *https://www.americanbar.org/groups/diversity/women/publications/perspectives/2022/august/diversity-the-bench-why-it-matters-a-polarized-supreme-court/*).

[5] See, e.g. Haire, Susan and Laura Moyer, *Gender, Law, and Judging*, Oxford Research Encylopedias, (4/26/2019) (available at: h*ttps://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-106#:~:text=In%20an%20analysis%20of%20sex,recent%20cohorts%2C%20the%20effect%20disappears*.

LANDMARKS IN THE LAW

Current developments in judicial law, legislation, and administrative action together with a foretaste of emergent trends in law and the legal profession for the complete Minnesota lawyer.

Criminal Law

JUDICIAL LAW

Indecent exposure: A woman's intentional display of breasts is exposure of private parts. Police encountered appellant, a woman, in a convenience store parking lot with her breasts fully exposed. The store was open and others were present. She was arrested and charged with indecent exposure and drug possession, after a search of her purse revealed cocaine. After a stipulated facts trial, appellant was convicted. On appeal, she argues that the evidence was insufficient to convict her of indecent exposure, because female breasts are not "private parts," and that the indecent exposure statute violates equal protection because it penalizes the exposure of only female breasts.

Minn. Stat. §617.24, subd. 1(1) criminalizes willful and lewd exposure of one's body, or the private parts thereof, in a public place. The Minnesota Court of Appeals holds that a woman's fully exposed breasts are "private parts" under this section. While the term is not defined in the statute, the court finds the Legislature must have intended it to include a woman's fully exposed breasts, pointing to the statute's exclusion of breasts exposed for breastfeeding purposes, an exclusion that would be unnecessary if a woman's breasts were not considered "private parts." Because appellant fully exposed her breasts in a public area, one where nude exhibitionism is "shockingly out of the ordinary," the evidence was sufficient to convict her of indecent exposure.

The court also rejects appellant's equal protection argument, given prior case law establishing that exposure of male breasts is distinct from the exposure of female breasts. ***State v. Plancarte***, A23-0158, 2024 WL 413442 (Minn. Ct. App. 2/5/2024).

Escape from custody: At trial for failing to return following a temporary leave from custody, court should instruct jury that the state must prove the failure to return was intentional and voluntary. Appellant was in custody awaiting trial on other charges when he was granted an eight-hour furlough to attend his mother's funeral. He failed to return from the furlough and was arrested almost three weeks later. At the conclusion of his trial for the escape offense, the district court denied appellant's request that the escape instruction include a general intent requirement, as the statute and model instructions do not include such a requirement.

As is relevant to this case, Minn. Stat. §609.485, subd. 2(1), prohibits an "escape [] while [being] held pursuant to a lawful arrest [or] in lawful custody on a charge or conviction of a crime." "Escape" includes failing to return to custody following temporary leave. Minn. Stat. §609.485, subd. 1. While the statute does not include a general intent element, the court of appeals emphasized that "[a]n unbroken line of precedential cases has recognized that the crime of escape includes the element of general, volitional intent." These cases established the requirement that the escape be intentional and voluntary.

Therefore, appellant was entitled to an instruction that the state is required to prove appellant's failure to return from custody was intentional and voluntary. The district court's error was not harmless and appellant is entitled to a new trial on the escape charge. ***State v. Garza***, A23-0128, A23-A0129, 2024 WL 413436 (Minn. Ct. App. 2/5/2024).

Criminal sexual conduct: Infliction of bodily harm alone constitutes "force." Appellant was convicted of first-degree criminal sexual conduct, both for using force and acting against a physically helpless victim. Appellant argues on appeal the evidence is not sufficient to sustain the convictions.

First, the court of appeals finds there was sufficient evidence to support the jury's conclusion that appellant was physically helpless, because the victim testified she was heavily intoxicated and went in and out of consciousness. Next, the court finds the evidence was also sufficient to support the finding that appellant knew or had reason to know the victim was physically helpless.

As to the force charge, the state was required to prove

appellant sexually penetrated the victim, caused injury to the victim, and used force or coercion to accomplish the sexual penetration. Minn. Stat. §609.342, subd. 1(e)(i). Appellant argues the state failed to prove the force element because there was no evidence showing he used the infliction or threat of infliction of bodily harm to cause the victim to submit.

"Force" is defined as "the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit." Minn. Stat. §609.341, subd. 3. The court finds that the structure of the statute indicates it is divided into two parts, separating the bodily harm portion from the remainder. The "causes the complainant to submit" requirement applies only to the second portion, or the "any other crime" portion, of the definition. Thus, the state was not required to prove that appellant's infliction or threatened infliction of bodily harm caused the victim to submit. The evidence here was sufficient to prove appellant inflicted harm upon the victim, given her testimony that she felt pain during the assault.

The district court erred, however, by convicting and sentencing appellant on both first-degree criminal sexual conduct offenses. Case law prohibits convicting and punishing an offender for two counts of the same crime stemming from the same conduct. ***State v. Williams***, A23-0200, 2024 WL 413474 (Minn. Ct. App. 2/5/2024).

■ **Procedure: Requirement that offenses punishable by life imprisonment be prosecuted by indictment does not apply to lifetime conditional release.** Appellant was charged by complaint with third- and fourth-degree criminal sexual conduct offenses relating to an incident in 2019. He was convicted and, due to a 2016 conviction for third-degree criminal sexual conduct, under Minn. Stat. §609.3455, the district court sentenced appellant to 140 months and ordered that he be placed on lifetime conditional release following his release from custody. On appeal, appellant argues Minn. R. Crim. P 17.01, subd. 1 ("An offense punishable by life imprisonment must be prosecuted by indictment") required the state to charge him via indictment, not complaint. The court of appeals affirmed.

Appellant advocates for overturning *State v. Ronquist*, 600 N.W.2d 444 (Minn. 1999), which held that a conviction for an offense which, when coupled with a conviction for a prior offense, required an enhanced sentence of life imprisonment, did not "create an offense punishable by life imprisonment which must be prosecuted by indictment." *Id.* at 449. Decisions of the U.S. Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), "raised the bar for what must be put before a jury when a sentence is enhanced." But these cases do not affect the holding in *Ronquist*. *Apprendi* and *Blakely* affirmed that a sentence other than the fact of a prior conviction must be put before the jury. It is such a prior conviction that triggers the lifetime conditional release.

After concluding *Ronquist* is still good law, the court determines its holding also applies to lifetime conditional release. An indictment was not needed to charge appellant here. ***State v. Snyder***, A22-0318, 2 N.W.3d 302 (Minn. 2/7/2024).

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Employment & Labor Law

JUDICIAL LAW

■ **Race, gender discrimination; legitimate reason to discharge.** A prison employee who was fired for failing to secure an office that an inmate broke into and stole money lost her claim of race and gender discrimination. The 8th Circuit Court of Appeals affirmed a lower court ruling that the employer had a "legitimate, non-discriminatory reason" to fire her for her laxity in not securing the premises. ***Ingram v. Arkansas Department of Corrections***, 2023 WL 5838798 (8th Cir. 2024).

■ **Sick time backpay award upheld.** The award of nearly $33,000 for past sick time owed to an employee under the St. Paul Earned Sick & Safe Time Ordinance was upheld. The Minnesota Court of Appeals affirmed a ruling of the city's Department of Human Rights. ***St. Paul Department of Human Rights v. Caremate Home Health Care***, 2024 WL 323339 (Minn. Ct. App. 1/29/2024) (unpublished).

■ **Unemployment compensation; quarrelsome employee loses.** An employee who swore at his manager and quarreled with a co-worker, exchanging vulgarities overheard by customers while threatening to injure him, was denied unemployment benefits. The appellate court affirmed a decision by an unemployment law judge with the Department of Employment & Economic Development (DEED) that the employee committed disqualifying misconduct that barred him from receiving unemployment benefits. ***Freeman v. Kellberg Catering***, 2024 WL 323451 (Minn. App. 1/29/2024) (unpublished).

■ **Unemployment compensation; cop's use of force bars benefits.** A Duluth police officer was denied unemployment compensation benefits for violating the department's use of force policy. Upholding a decision by an unemployment law judge with DEED, the court of appeals held that firing two shots through an apartment door after pleas from inside to stop shooting constituted disqualifying misconduct. ***Leibfried v. City of Duluth***, 2024 WL 160097 (Minn. App. 1/16/2024) (unpublished).

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Environmental Law

ADMINISTRATIVE ACTION

■ **MPCA issues implementation procedures for wild-rice sulfate standard in wastewater permits.** In January 2024, the Minnesota Pollution Control Agency (MPCA) released its Procedures for Implementing the Class 4A Wild Rice Sulfate Standards in NPDES Wastewater Permits in Minnesota, *available at https://www.pca.state.mn.us/sites/default/files/wq-wwprm2-109.pdf*. The release of the WR implementation procedures followed MPCA's December 2023 release of its Framework for Developing and Evaluating Site-Specific Sulfate Standards for the Protection of Wild Rice. The framework and WR

implementation procedures are the agency's latest steps in its work to fully implement the Minnesota Class 4A 10 mg/L sulfate water quality standard, adopted in 1973, "applicable to waters used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels." Minn. R. 7050.0224, subp. 2.

Minnesota has approximately 2,400 waters that MPCA has determined are "waters used for the production of wild rice." And although sulfate levels across the state have not been measured as thoroughly as other pollutants, sulfate levels in surface waters generally are lower in north-central and northeastern Minnesota, and higher in the western and southwestern portions of the state. In 2021, the U.S. Environmental Protection Agency added 32 wild rice waters to Minnesota's 2020 Impaired Waters List due to measured sulfate levels in excess of 10 mg/L, and in 2022, MPCA updated its Impaired Waters List to include three additional wild rice waters, bringing the total to 35 impaired wild rice waters.

MPCA's WR implementation procedures document reviews MPCA's four-step procedure for evaluating and developing surface water quality-based effluent limits for wastewater treatment facility (WWTF) National Pollution Discharge Elimination System (NPDES) permits. Notably, the Class 4A sulfate standard only applies to "waters used for production of wild rice"—a phrase whose meaning has been and continues to be debated—whereas most Class 4 water quality standards apply to almost all waters of the state. Also, of the approximately 2,400 waters that produce wild rice, only about 10% (244) are impacted by WWTFs with water discharge permits, according to MPCA, and some wild rice waters have multiple WWTFs discharging upstream (e.g. the lower Mississippi receives discharges from about 576 WWTFs). Some WWTF permittees upstream from wild rice waters have sulfate monitoring prescribed in their NPDES permit, but most have not been monitoring sulfate in their discharge.

The WR implementation procedures establish a four-step procedure that will be initiated when a facility's NPDES permit is reissued or the facility undertakes a major modification. The first step, determining whether sulfate monitoring is required, tasks MPCA's effluent limit (EL) staff with determining if there are any wild rice waters downstream of the WWTF's outfall(s). If sulfate is known or suspected to be present in the facility's discharge as a result of its operations or processes, then effluent monitoring will be required. There is no "distance cut-off" between the facility and wild rice water; if the facility is upstream from a wild rice water, the facility will be eligible for sulfate monitoring. A vast majority of the state is covered by watersheds that are upstream from wild rice waters. The sulfate effluent monitoring frequency prescribed by the WR implementation procedures will vary depending on the type of WWTF but generally will range between once per quarter and once per half-year. As more data is gathered, frequency of monitoring may change.

The WR implementation procedures' second step is to examine the sulfate effluent data from the WWTF to determine appropriate sulfate limits. If the facility is upstream from a wild rice water and does not have sulfate effluent data, the next NPDES permit issuance will include sulfate monitoring requirements.

The third step requires EL staff to determine if the facili-

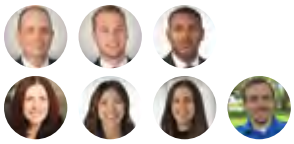
ty has the reasonable potential to cause or contribute to the exceedance of the 10 mg/L sulfate limit in any wild rice water located downstream of the facility. However, EL staff will also determine if there is any "boundary condition" between the facility outfall and wild rice waters that would separate the facility and the downstream wild rice waters. A boundary condition is established when data shows that intervening waters between the facility outfall and downstream wild rice waters are consistently at or below the 10 mg/L sulfate standard. If a boundary condition is established, the upstream WWTF will be determined not to have the reasonable potential to cause or contribute to the exceedance of sulfate standards in the downstream wild rice waters. The facility will follow NPDES wild rice sulfate monitoring guidance and will be reissued its NPDES permit.

If a boundary condition is not found, EL staff will determine if the facility has the reasonable potential to cause or contribute to downstream exceedances of the wild rice sulfate standard. Generally, if a WWTF discharges upstream from a wild rice water that exceeds the sulfate standard, and the discharge has an effluent concentration greater than the standard, the facility will be found to have the reasonable potential to cause or contribute to the downstream impairment. When there is sufficient sulfate monitoring data available, staff will estimate sulfate transport losses from facilities to downstream wild rice waters on a case-by-case basis.

If a WWTF's discharge is determined to have reasonable potential to exceed the wild rice sulfate standard downstream, then the fourth step of the WR implementation procedures will take place, which requires EL staff to calculate a sulfate effluent limit for the facility. This limit is determined by first calculating the wasteload allocation (WLA) of the facility. However, evaluating WLAs is dependent on whether the average baseline sulfate concentration of the downstream wild rice water is greater than or less than the 10 mg/L sulfate standard. If the baseline sulfate concentration is above the standard, EL staff will calculate the WLA individually for the facility. If the baseline sulfate concentration is below the applicable standard, EL staff will evaluate WLAs through a watershed analysis, which would result in a greater sulfate load reduction at larger WWTF sulfate sources, and may allow for less restrictive limits for smaller WWTF sulfate sources, so long as the total permitted mass does not exceed the gross WLA.

The resulting individual WLAs would be converted to individual sulfate effluent limits, calculated based on statistics in EPA guidance documents, factoring in the variability and frequency of sampling in the upcoming permit. Generally, the results will establish a calendar monthly average sulfate effluent limit, to align with standardized monthly data reporting requirements, which will result in attainment of the WLA on an annual basis. These concentration limits will be expressed in units of mg/L and mass limits will be expressed as kg/day. Although MPCA has not yet established any Total Maximum Daily Loads (TMDLs) for impaired wild rice waters, the WR implementation procedures indicate that MPCA is likely to do so in the future and that the agency's goal in the interim is to establish WLAs and sulfate permit effluent limits that will be compatible with future TMDLs.

During the limit-setting process, additional considerations will be reviewed, including mass freeze options (for facilities that only have reasonable potential when operating at full design flow, but typically operate below that, unless the WWTF expects actual increases in its effluent flows); sulfate limits for lakes that are wild rice waters (which will be analyzed on a case-by-case basis); TMDLs that are developed for waters that are on Minnesota's Impaired Waters List; and requests to review new or expanded permit proposals (the WR implementation procedures indicates MPCA receives only 10 to 15 new or expanded permit proposals per year).



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Federal Practice

JUDICIAL LAW

Attorney's fees; district court's failure to calculate the lodestar. Where a district court awarded attorney's fees without first providing a lodestar calculation, the 8th Circuit vacated the award and remanded the case to allow the district court to calculate a lodestar, and also instructed the district court to consider which portion of the more than $1.1 million in costs it had awarded were recoverable under 28 U.S.C. §1920. ***Jet Midwest Int'l Co. v. Jet Midwest Grp., LLC***, ___ F.4th ___ (8th Cir. 2024).

Standing; no "imminent and substantial harm;" no "traceability." In an action brought by parents of students with disabilities, which challenged an Iowa law prohibiting masking in public schools, the 8th Circuit followed decisions by the 1st, 5th, and 6th Circuits in finding that the plaintiffs lacked standing because the risk of harm was not "imminent and substantial," and also agreed with the 4th Circuit that any potential injury was not "fairly traceable" to defendants' conduct. ***ARC of Iowa v. Reynolds***, ___ F.4th ___ (8th Cir. 2024).

Fed. R. Civ. P. 25(c); motions to substitute affiliate of litigation funder as plaintiff denied. Magistrate Judge Docherty denied motions to substitute an affiliate of a litigation funder, finding that the substitution would do "violence to the Federal Rules of Civil Procedure" by "allow[ing] a financier with no interest in the litigation... to override decisions made by the party that actually brought suit." ***In Re: Pork Antitrust Litig. and In Re: Cattle & Beef Antitrust Litig.***, 2024 WL 511890 (D. Minn. 2/9/2024).

Fed. R. Civ. P. 12(b); effect of partial motion to dismiss. Following the prevailing view in the federal district courts nationally, Judge Menendez held that a defendant filing a partial motion to dismiss under Fed. R. Civ. P. 12(b) is not required to file an answer to the remaining claims until after the court rules on the motion. ***Menze v. Astera Health, f/k/a Tr-County Health Care***, 2024 WL 776773 (D. Minn. 2/26/2024).

Removal by third-party defendant rejected; action remanded. Where a third-party defendant purported to remove a Minnesota state court action on the basis of diversity jurisdiction, Judge Magnuson rejected its argument that the Supreme Court's decision in *Home Depot* (*Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019)) was limited to those cases where the original

claims were not removable, and instead held that the "inescapable" conclusion of *Home Depot* is that only the defendant or defendants to the complaint can remove. ***U.S. Bank N.A. v. Copy Center of Topeka, Inc.***, 2024 WL 551292 (D. Minn. 2024).

■ **Fraudulent joinder argument rejected; motion to remand granted.** On a motion to remand a Texas action that had been removed to federal court on the basis of fraudulent joinder and then transferred to an MDL pending in the District of Minnesota, Judge Erickson assumed without deciding that a plaintiff's "lack of real intention" to pursue claims against a nondiverse defendant may provide a basis to establish fraudulent joinder, but found that the defendant had not established the plaintiff's lack of real intention, and remanded the action to the Texas court in which it was originally filed. ***In re: Bair Hugger Forced Air Warming Devices Prod. Liab. Litig.***, 2024 WL 152512 (D. Minn. 1/15/2024).

■ **Motion to compel arbitration granted; no waiver found.** Despite the defendants' previous filing of a Rule 12(b)(6) motion and their participation in the drafting of a Rule 26(f) report, Judge Tostrud, acknowledging that it was a "close call," found that defendants had not waived their right to arbitration. ***Maggie King, Inc. v. ABC Bus Cos.***, 2024 WL 323585 (D. Minn. 1/29/2024).

■ **Forum *non conveniens* motion granted.** In a tort action by a British citizen who resides in Japan against two defendants, one of which was formerly headquartered in Minnesota, Judge Doty granted the defendants' motion to dismiss on the grounds of forum *non conveniens*, finding that most of the facts underlying the case occurred outside of Minnesota, and that the United Kingdom was an adequate and available forum. ***Dibble v. Torax Med., Inc.***, 2024 WL 328965 (D. Minn. 1/29/2024), *appeal filed* (8th Cir. 2/26/2024).

■ **Fed. R. Civ. P. 12(b)(2); action dismissed for lack of personal jurisdiction.** Granting the defendant's motion to dismiss for lack of personal jurisdiction, Judge Tostrud found that the defendant's Minnesota contacts "cannot reasonably be construed to support the exercise of personal jurisdiction" where it was a Virginia corporation with no operations in Minnesota, was not registered to do business in Minnesota, did not regularly ship products to Minnesota, and did not direct marketing efforts toward Minnesota. ***Elliott Auto Supply Co. v. Fisher Auto Parts, Inc.***, 2024 WL 555139 (D. Minn. 2/12/2024).

■ **Requested attorney's fees reduced.** Finding that a request for more than $12,000 in attorney's fees arising out of a default judgment was "somewhat overstated," and that an already reduced hourly rate of $465 was "very high for relatively simply matters," Judge Menendez awarded $10,000 in fees as "rough justice." ***Farnam Street Fin., Inc. v. Nabati Foods, Inc.***, 2024 WL 261290 (D. Minn. 1/24/2024).

■ **Fed. R. Civ. P. 58(a)(3); attorney's fees; request for entry of judgment denied.** Judge Menendez denied plaintiffs' request for entry of judgment on her order granting in part their motion for attorney's fees, finding that Fed. R. Civ. P. 58(a) does not require a separate document, and is appealable even in the absence of a judgment. ***Woodward v. Credit Serv. Int'l Corp.***, 2024 WL 733660 (D. Minn. 2/22/2024).

■ **Fed. R. Civ. P. 54(d); costs awarded for necessary real time and daily trial transcripts.** Rejecting the defendant's challenge to the clerk's award of costs for real time and daily trial transcripts, Judge Tunheim found that the transcripts were "necessarily obtained for use in the case," and denied the defendant's motion to review clerk's action. ***Steady State Imaging, LLC v. Gen. Elec. Co.***, 2024 WL 453806 (D. Minn. 2/6/2024).

■ **Fed. R. Civ. P. 56; *sua sponte* grant of summary judgment to plaintiff.** Denying the defendant-insurers' motion for summary judgment on the plaintiff's equitable estoppel claim in a coverage dispute, Judge Tunheim granted summary judgment *sua sponte* to the plaintiff on that issue. ***Taylor Corp. v. XL Ins. Co.***, 2024 WL 453826 (D. Minn. 2/6/2024).

■ **Request for reduction in judgment; excessive fines clause.** Where judgment had been entered against *qui tam* defendants for more than $487 million, and defendants brought a motion arguing that statutory penalties of more than $352 million, which were roughly eight times actual damages, violated both the excessive fines clause and the due process clause, Judge Wright relied on the excessive fines clause in reducing the statutory penalties to less than $87 million, which was twice the amount of actual damages. ***United States ex rel. Fesenmaier v. Cameron-Ehlen Grp., Inc.***, ___ F. Supp. 3d ___ (D. Minn. 2024).

■ **"Excessive" compensatory damages; *remittitur*.** Where a jury awarded the estate of the decedent $10 million in compensatory damages and $1.5 million in punitive damages in an excessive force/wrongful death action, Judge Doty found that the compensatory damage award "shock[ed] the conscience," was "patently excessive" and "highly speculative," and offered the plaintiff the option of a *remittitur* to $2.5 million or a new trial on compensatory damages. ***Jones ex rel. Handy v. City of St. Paul***, 2024 WL 489705 (D. Minn. 2/8/2024).

■ **Fed. R. Civ. P. 22; interpleader; attorney's fees.** Judge Blackwell significantly reduced an insurer's request for attorney's fees in an interpleader action, finding that it was entitled to fees for its preparation and initiation of the action, but not for fees incurred over the next year while it failed to bring a discharge motion and instead defended a counterclaim, which "unnecessarily increased" its fees. ***Banner Life Ins. Co. v. Bultman***, 2024 WL 689754 (D. Minn. 1/18/2024).

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Intellectual Property
JUDICIAL LAW

■ **Patents: Failure to designate United States in PCT does not trigger §102(e) priority date.** Judge Tunheim recently granted plaintiff Regents of the University of Minnesota's motion for summary judgment that the asserted patent was not invalid because the asserted reference was not prior art under pre-AIA 35 U.S.C. §102(e). Regents sued multiple cellular network companies alleging infringement of several patents related to cellular data transmission technology. Defendants argued that an international application, the Ming PCT (filed under the Patent Cooperation Treaty), invalidated two of the asserted patents. Under §102(e)(2), "an international

application filed under the [Patent Cooperation Treaty] shall have the effects for the purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language." Whether the Ming PCT invalidated the asserted patents turned on whether the Ming PCT "designated the United States" and qualified as prior art under §102(e). Regents argued that the Ming PCT application designated a number of countries but not the United States. Defendants argued that the statutory definition of "designated" is more "capacious." Because the Ming PCT claimed priority to a United States application, defendants argued it necessarily implied that a patent is sought in the United States. The court rejected defendants' argument and found that defendants bear the burden of proving invalidity, and a PCT application is relatively weak evidence of designation when the actual designation section of the application excludes the United States. The court further found that accepting the defendants' argument would undermine the notice function of the designation. Accordingly, the court found defendants could not rely on the Ming PCT as prior art. Separately, the court found defendants could substitute the United States application that the Ming PCT claimed priority to in defendants' invalidity challenges. ***Regents of the Univ. of Minn. v. AT&T Mobility LLC***, Nos. 14-4666, 14-4669, 14-4671, 14-4672 (JRT/TNL), 2024 U.S. Dist. LEXIS 31027 (D. Minn. 2/23/2024).

Patents: Original patent rule satisfied by description incorporated by reference. Judge Tunheim recently granted plaintiff Regents of the University of Minnesota's motion for summary judgment that the asserted patent was not invalid under the original patent rule and denied defendants' inverse motion. Regents sued multiple cellular network companies alleging infringement of several patents related to cellular data transmission technology. Regents asserted U.S. Patent No. RE45230, which is a reissue of U.S. Patent No. 7,292,647. When a patent is defective, the patentee may apply for a reissued patent that cures the error. Under the "original patent rule," the original specification must clearly and unequivocally disclose the newly claimed invention in the reissue. Due to the "fairly significant alterations from the claims in the '647 patent," defendants argued that the reissue was invalid for violation of the original patent rule. First, Regents argued that the original patent rule only applied to broadening reissues. The court rejected this argument, finding that 35 U.S.C. § 251(d), which establishes the rules for reissues, does not distinguish between broadening and narrowing reissues and that no identified cases state that the rule only applies to broadening reissues. Second, defendants argued that the original '647 patent specification did not disclose the claims of the '230 reissue patent in a clear enough fashion to satisfy the original patent rule. Defendants challenged the incorporation of material by reference. The court noted that neither party cited cases directly on point of whether material incorporated by reference satisfies the original patent requirement. The court found that a proper citation on the face of the reissue application satisfies the original patent rule, as the only real difference would be whether the applicant wrote a proper citation to the source material instead of copying and pasting that content into the specification. The court found the '230 reissue patent valid. ***Regents of the Univ. of Minn. v. AT&T Mobility LLC***, Nos. 14-4666, 14-4669, 14-4671, 14-4672 (JRT/TNL), 2024 U.S. Dist. LEXIS 31027 (D. Minn. 2/23/2024).

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Probate & Trust Law

JUDICIAL LAW

Attorney testimony relevant in determining omitted spoused status; spouse entitled to *select* exempt property. A decedent created a will in late 2020. One month later, the decedent married his longtime girlfriend. The will did not contain a provision for the decedent's new wife, and the decedent did not revise his will after his marriage. Instead, the decedent named his new wife as the beneficiary of his retirement account and added her to the title of his Volkswagen Jetta. After the decedent passed away, his wife filed a petition asking the district court to determine that she was an omitted spouse entitled to a share of the estate and ordering the personal representative to turn over possession of a Ford F350 pickup truck as exempt property. Following testimony from the decedent's estate planning attorney, the district court denied both requests.

On appeal, the district court's denial of the wife's request to be treated as an omitted spouse was affirmed. Specifically, the Minnesota Court of Appeals credited the district court's findings that the decedent provided for his wife outside of his will by making her the beneficiary of his retirement account and that the decedent's estate planning attorney credibly testified that the decedent consistently stated throughout the planning process that he intended to make his wife the beneficiary of his retirement account while leaving everything else to his sister. For these reasons, the wife was not to be considered an omitted spouse pursuant to Minn. Stat. §524.2-301(a)(4).

But the court of appeals reversed the district court's finding as it related to exempt property. Specifically, the district court found that the transfer of the Jetta on the decedent's death satisfied the statutory provision allowing for one automobile. The court of appeals, however, found that because the wife was named on the title of the Jetta, she became the sole owner of the Jetta on the decedent's death and the Jetta never became a part of the decedent's estate. Moreover, the court of appeals noted that a surviving spouse is entitled to "select" property from the estate to qualify as estate property. Because the wife was already the owner of the Jetta, she did not select it for the purposes of claiming exempt property. The court went further and found: "[E]ven if the decedent's will provided that a surviving spouse would receive an automobile, the spouse would still be entitled to select an automobile under the exempt-property statute." ***In re the Estate of Joseph Andre Reis****, No. A23-0413, 2024 WL 912625 (Minn. Ct. App. 3/4/2024).*

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State Appellate Practice

MN SUPREME COURT

Notable petitions granted. The Supreme Court has agreed to review an individual taxpayer's lawsuit seeking de-

claratory and injunctive relief to prevent the expenditure of public funds on a collective bargaining agreement that allegedly violates the Minnesota Constitution's equal protection guarantee. The district court dismissed the lawsuit after determining that the individual taxpayer lacked standing to challenge the collective bargaining agreement and on ripeness grounds. The court of appeals reversed, finding that the individual taxpayer had standing based on specific allegations that the plaintiff paid property taxes, which comprised a significant amount of the public funds available to implement the collective bargaining agreement, and that there was a concrete risk of a violation of the equal protection clause. The court of appeals also determined that the district court improperly dismissed the declaratory relief claim on ripeness grounds because the complaint alleged "an actual future controversy" that was justiciable under the Declaratory Judgment Act.

The Minnesota Supreme Court granted review to answer the following questions: (1) Did the court of appeals err by holding that merely alleging that a governmental entity will utilize public funds to implement the terms of a collective bargaining agreement meets the requirements of a specific and unlawful disbursement of public funds for purposes of the taxpayer-standing doctrine, as required under *McKee v. Likins*, 261 N.W.2d 566 (Minn. 1977) and its progeny? (2) Did the court of appeals err in concluding that there is no requirement for ripeness because the respondent sought declaratory judgment related to a contract to which respondent is not even a party? ***Deborah Jane Clapp vs. Rochelle Cox, in her official capacity as Interim Superintendent of Minneapolis Public Schools, et al.***, – A23-0360 (PFR granted 2/28/2024).

MN COURT OF APPEALS

■ **Notable precedential decision: The Minnesota Court of Appeals applied Minn. Stat. §65A.10, subd. 1 to reform a policy to provide coverage for the cost of bringing undamaged portions of a roof into compliance with applicable building codes during repairs occasioned by a covered loss.** A hailstorm damaged the insured's roof in May 2022. The homeowners' insurance policy provided replacement cost coverage for loss or damage to "the outer most layer of roof material," and the insurer accordingly approved removal and replacement of shingles damaged during the hailstorm. During the repair, however, the contractor discovered certain portions of the underlying roof decking—which was not damaged by the storm—to be noncompliant with state building codes. The contractor proceeded to bring the decking into compliance with applicable codes as part of the repair. The insurer later disclaimed coverage for the building-code-related repair costs, and brought an action seeking a declaration that the insured was not entitled to coverage for such costs. The court of appeals affirmed the district court's award of summary judgment to the insured in favor of coverage. The court relied upon Minn. Stat. §65A.10, subd. 1—which, it determined, "requires replacement cost insurance to cover the cost of repairing any loss or damaged property in accordance with the minimum state or local codes." Because the repairs to the roof decking were mandated by the state building code, the damaged shingles could not be repaired without first bringing the roof decking into compliance with the code. As a result, the court of appeals concluded that the "cost of repairing the damaged shingles in accordance with the state building code included the cost of repairs" to the roof decking. ***Great Nw. Ins. Co. v. Campbell***, No. A23-0519 (Minn. Ct. App. 2/5/2024).

■ **Notable precedential decision: The court of appeals rejected the invitation to adopt provisions of the Restatement (Third) of Property, which would have afforded greater discretion to property owners to make "reasonable changes" to easements affecting their property.** Certain property owners in a Plymouth subdivision challenged a real estate developer's proposal to "relocate, widen, and extend" a private roadway easement affecting their parcels. The relevant easement was created through a declaration, recorded in 1981, which expressly stated that "nothing shall be planted, altered, constructed upon, or removed by an owner from the roadway easement." Nevertheless, the developer sought to relocate the roadway easement and prevailed following a trial in the district court. The district court applied Section 4.8 of the Restatement (Third) of Property: Servitudes (2000) to permit a property owner affected by the easement—in this case, the developer—to "make reasonable changes to an easement... including by reasonably relocating it." The court of appeals reversed, holding that the district court's reliance upon the Restatement was in error. In doing so, the court reaffirmed longstanding Minnesota case law stating that where an easement is created by a written instrument, the "specific width, length, and location" of the easement is controlled entirely by the terms of such instrument. Under this precedent, a court may not intervene to "create any reasonable easement" unless the written instrument "is sufficiently vague to permit the inference that any reasonable easement was intended." The court of appeals determined that the 1981 declaration was not "sufficiently vague" to permit the district court to relocate the roadway easement under Minnesota law, relying primarily upon the declaration's language expressly prohibiting any alterations to the easement. Ultimately, the court of appeals concluded

that "given the plain language of the easements declaration, the location and scope of the... roadway easement may not be changed without the unanimous agreement of the property owners who are bound by the easements declaration." ***Willenberg v. Frye***, No. A23-0441 (Minn. Ct. App. 2/5/2024).

■ **Notable special term order: The court of appeals reaffirmed that the 60-day appeal period for an order "relating to registered land" begins to run when the order is filed by the district court.** The court of appeals determined that it lacked jurisdiction to hear an appeal from a district court order determining boundary lines of registered Torrens land because of the appellant's untimely notice of appeal. Minn. Stat. §508.671, which governs appeals from orders affecting registered land, provides that an appeal may be taken from such an order within 60 days from the date the order was filed. The district court filed the underlying order on 11/30/2023, and the court of appeals determined that the 60-day appeal period expired on 1/29/2024. Because the appellant did not file the notice of appeal until 1/30/2024, the court of appeals dismissed the appeal as untimely. In doing so, the court rejected the argument that the December 4 "notice of filing of the order" issued by the court administrator controlled the beginning of the 60-day appeal period under Section 508.671 over the filing of the order itself. ***In re Petition of Larry Sampson & Lisa Sampson***, No. A24-0160 (Minn. Ct. App. 2/20/2024).

■ **Notable special term order: The Minnesota Court of Appeals rejected the Lower Sioux Indian Community's petition for a writ of *certiorari* to prevent a tribal employee from being compelled to testify via subpoena in a state criminal proceeding.** The state of Minnesota subpoenaed a social worker employed by the Lower Sioux Indian Community to testify in their official capacity at a state criminal trial. After the district court rejected a motion to quash the subpoena, the Lower Sioux sought a writ of prohibition. The court of appeals declined to issue the writ, noting that a writ of prohibition may only issue to prevent the exercise of judicial power threatening an injury "for which there is no adequate remedy." Because the order denying the motion to quash the subpoena constitutes a final appealable order from a "special proceeding," the order is appealable pursuant to Minn. R. Civ. App. P. 103.03. In addition, the court of appeals observed that the order was subject to appeal under the collateral-order doctrine adopted by the Minnesota Supreme Court in *Kastner v. Star Trails Ass'n*, 646 N.W.2d 253. Accordingly, the Lower Sioux was not entitled to a writ of prohibition preventing enforcement of the subpoena because the Lower Sioux retained an "adequate remedy" through the regular processes of appeal. ***In re Lower Sioux Indian Community of Minnesota***, No. A24-0211 (Minn. Ct. App. 2/16/2024).

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Tax Law

JUDICIAL LAW

■ **Sales tax, covid, and insurance.** The City of Richmond Heights, in St. Louis County, Missouri, purchased commercial property insurance to protect against losses of sales tax revenue. When St. Louis County closed "all non-essential businesses" in 2020 due to the spread of covid-19, there were sales tax losses and the city submitted a claim. Arguing the language of the policy required "direct physical loss of or damage to property," the insurer sued for declaratory judgment that it was not required to pay. The city counterclaimed. The district court dismissed the counterclaims and granted declaratory judgment to the insurer, and the city appealed.

The 8th Circuit rejected the city's three arguments. First, the city argued that while both parties acknowledged that the losses due to covid-19 were not "physical" losses, the "additional covered property endorsement" catch-all in the policy effectively removed the "physical damage or loss" requirement. The court disagreed, since under that interpretation the catch-all would then directly conflict with other coverage provisions. Second, the city asserted that there was fraud in the inducement and fraudulent misrepresentation, but the court affirmed the district court's dismissal of these claims, pointing out that these claims were not "independent from the City's breach of contract claim." Finally, the city argued that it should have been allowed to amend its complaint to argue that the covid-19 virus was "present on the premises" and that the virus's presence itself was "physical damage." The court, citing other cases that rejected this argument, affirmed the district court's decision to deny leave to amend. ***Mt. Hawley Ins. Co. v. City of Richmond Heights, Missouri***, 92 F.4th 763 (8th Cir. 2024).

■ **Calling it "insurance" doesn't make it so: Taxpayer not entitled to 831(b) election for microcaptive arrangement.** Like other businesses, insurance companies must pay tax on income from premiums and investments. Section 831(b), however, permits some small insurance companies to pay tax only on investment income, and not premiums. This section was enacted in 1986, and one goal was to extend the benefits of self-insurance to small insurance companies. A lot rides on the 831(b) election, because insurance is deductible, but amounts set aside by businesses in a loss reserve as a form of self-insurance are not. The Service explains in a news release that tax law generally allows businesses to create "captive" insurance companies to protect against insurance risks and provides that certain small non-life-insurance companies can choose to pay tax only on their investment income under Internal Revenue Code section 831(b) (microcaptives). The Service considers microcaptive structures that lack many of the attributes of genuine insurance to be abusive.

Despite the importance of defining insurance for 831(b) purposes, the IRS Code does not define the term, and, as the tax court remarked in this dispute between a taxpayer claiming deductions of just shy of $10 million, "[w]hen the insurer and the insured are related (including in the case of captive or microcaptive insurers), the line between insurance and self-insurance blurs." Here, the court agreed with the commissioner and held that the microcaptive arrangement was not insurance because it did not involve risk distribution and did not fall within "commonly accepted notions of insurance."

Captive insurance arrangements such as this one made the IRS's annual "dirty dozen" list of tax scams in 2015, and in Notice 2016-66, the Service advised that mi-

crocaptive insurance transactions have the potential for tax avoidance or evasion. The tax court in this case notes that although it is possible for a captive insurer to establish risk distribution solely by insuring commonly owned brother-sister entities, most "[m]icrocaptive insurers have not fared as well with respect to showing risk distribution" and in fact in "all of our previous cases have found compliance with this requirement lacking." ***Swift v. Comm'r***, T.C.M. (RIA) 2024-013 (T.C. 2024).

Deduction for conservation easement disallowed; gross valuation penalty upheld. In 2015, as part of a syndicated conservation easement, Oconee Landing Property, LLC claimed a $20.67 million charitable deduction for donating a conservation easement over land in Greene County, GA. The IRS disallowed the deduction and this case followed. The IRS made three arguments for disallowing the deduction: that the charitable gift was not made with charitable intent; that the syndicate failed to attach a "qualified appraisal" as required by law; and that the property donated was "ordinary income property" and therefore the deduction was restricted to the property's basis. The court rejected the first argument and upheld the other two.

First, the IRS argued Oconee was not entitled to a charitable deduction because the exchange was not motivated by charitable intent but was, instead, a "quid pro quo exchange." While not disagreeing with the IRS's characterization of the motivations of the syndicate, the court rejected this argument. Case law thus far only disallows deductions when the "quid pro quo" is between the two exchanging entities–the donee and the donor. Because the actual transfer of property was between Oconee and a valid 501(c)(3) organization not involved in the broader syndicate, the exchange had proper charitable intent under the law. The court pointed out that there currently are not any cases where the "tax benefits associated with a charitable contribution deduction have been deemed a 'quid pro quo' that negates the donor's charitable intent."

Second, the court found that Oconee failed to attach a "qualified appraisal" as required by section 170(f)(11)(D). A "qualified appraisal" is an appraisal done within "generally accepted appraisal standards." §170(f)(E)(i)(II). There's an important exception: A person is not considered a qualified appraiser "if the donor had knowledge of facts that would cause a reasonable person to expect the appraiser falsely to overstate the value of the donated property." §1.170A-13(c)(5)(ii). There was significant evidence in this case that there was a "meeting of the minds" between the appraisers and Oconee, and that the property would be valued at $50.4 million despite the owners of Oconee knowing the property was worth less than $10 million.

Third, the court found the property at issue was "ordinary income property," so any charitable deduction was limited to the property's basis. "Ordinary income property" is property "held for sale to customers in the ordinary course of business." §170(e)(1). Oconee was controlled by real estate developers who held the property at issue for sale to customers. And since Oconee provided no evidence to suggest that the basis of that property was higher than zero, the law set the charitable deduction to zero dollars for 2015.

Finally, the court found that the FMV of the easement was "less than $5 million," making the charitable deduction Oconee claimed more than 400% over FMV. As such, Oconee was liable for the 40% "gross valuation misstatement penalty" under section 6662(a). ***Oconee Landing Prop., LLC v. Comm'r***, T.C.M. (RIA) 2024-025 (T.C. 2024).

Trustee removal affirmed. The Minnesota Supreme Court affirmed the district court's removal of Brian Lipschultz from his role of trustee for the Otto Bremer Trust. Lipschultz was removed for actions that the district court found "collectively constitute[d] a serious breach of trust" under Minn. Stat. §501c.0706(b)(1)." After an extensive 20-day bench trial, the district court found a pattern of Lipschultz "placing his personal priorities over the duties he owed to the Trust." The Supreme Court affirmed.

The Court here found the district court did not abuse its discretion in removing Lipschultz. Under Minn. Stat. §501C.0706(b)(1), "The court may remove a trustee if... the trustee has committed a serious breach of trust." A "serious breach of trust" can be one single act of immense harm or a "series of smaller breaches, none of which individually justify removal when considered alone, but which do when considered together." Unif. Tr. Code §706 cmt. The Supreme Court found the actions of Lipschultz fell well within the range of what would qualify under the second clause.

First, the Court held that Lipschultz engaged in self-dealing by using the trust's resources for personal purposes, breaching a duty of loyalty and violating the Charitable Trust Act. His assistant, employed by the trust, spent one to two hours per day "performing non-Trust tasks for him" and he used the trust's address for his own personal business. Second, Lipschultz displayed a pattern of behavior that the district court found "had no place in the charitable world" during a conflict between Bremer Bank board members and the three trust trustees around a potential sale or merger of the bank. The district court found this constituted a breach of loyalty by "putting his own frustration, aggression, and personal interest in revenge ahead of the important interests of the Trust." Third, Lip-

schultz made two phone calls to the CEO of a trust grantee that made the CEO feel "disrespected and bullied." The district court found the content of these calls to be a "serious breach of the duty of loyalty" and "egregious misconduct." Fourth and finally, Lipschultz breached the duty of information by naming his first cousin as his successor but repeatedly telling the Attorney General's Office that he did not have a successor. ***Matter of Otto Bremer Tr.***, No. A22-0906, 2024 WL 462587 (Minn. 2/7/2024).

Retroactive track maintenance deductions permitted. The Minnesota Commissioner of Revenue ordered Soo Line Railroad Company to adjust its corporate franchise tax for tax years 2013 and 2015-2017. At the federal level, Soo Line Railroad claimed the federal Railroad Track Maintenance Credit, a provision that permits credits for "qualified railroad track maintenance expenditures paid or incurred by an eligible taxpayer during the taxable year." 26 U.S.C. §45G(a). In determining state tax liability, Minnesota allows a subtraction from federal taxable income for "the amount of expenses not allowed for federal tax purposes due to claiming the railroad track maintenance credit... effective for taxable years beginning after December 31, 2012." The issue in this case was whether, for the purposes of establishing their Minnesota tax liability, Soo Line Railroad was allowed to subtract from federal taxable income the amount of depreciation expenses on assets purchased *before* 2013. The MN Commissioner of Revenue only allowed the subtraction on assets purchased on or *after* 1/1/2013. Both parties moved for summary judgment.

The court granted Soo Line Railroad's motion for summary judgment, since the statute did not specify when expenses had to have been incurred, and the court observed that if the Legislature wanted to exclude pre-2013 expenses, the statute would have been explicit. ***Soo Line R.R. Co. v. Comm'r***, No. 9557-R, 2024 WL 481289 (Minn. T.C. 2/7/2024).

Property tax; classifications upheld. A taxpayer raised two challenges to an assessment of his land in the city of Carver (just south of Chaska). First, the taxpayer argued that the land was not class 2b rural vacant land but was agricultural land. That challenge failed. The taxpayer also argued that the subject land was eligible for a homestead classification. In this argument, the taxpayer succeeded in overcoming the presumptive validity of the assessor's conclusion that the subject was nonhomestead. He did not, however, present sufficient credible evidence to show the elements to qualify for the homestead designation—whether agricultural or residential—were met. ***Brad Janssen v. Carver County***, No. 10-CV-20-143, 2024 WL 697119 (Minn. T.C. 2/20/2024).

Property tax; appraisal method for unique property. The taxpayer owns a unique, waterfront parcel on the Whitefish Chain of Lakes in Crow Wing County. The parcel is small and triangular, with no improvements. The taxpayers also own a nearby parcel that is improved. Bisecting the parcels is undeveloped public land owned by the Army Corp of Engineers. The taxpayer and the county have disputed the valuation of the parcel in previous litigation. In this round, the court settled the parties' principal dispute: which appraisal method to use when valuing the subject property. In particular, the parties disputed whether to appraise the property as a stand-alone parcel, or whether the parcel should be appraised in conjunction with the adjoining developed parcel (the "house parcel" in the opinion). The court held that appraisal in conjunction with the developed parcel was appropriate under Minnesota law and appraisal theory. ***Lindholm-Nelson v. Crow Wing County***, No. 18-CV-21-1458, 2024 WL 481476 (Minn. T.C. 2/5/2024).



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Torts & Insurance

JUDICIAL LAW

First party insurance; replacement cost. Plaintiff owned a home that was insured by defendant. The insurance policy covered direct physical loss or damage to "the outer most layer of roof material." During a May 2022 storm, hail damaged the shingles on plaintiff's roof. After plaintiff reported the damage to defendant, it confirmed the damage and approved removal and replacement of the shingles. But when plaintiff's contractor removed the shingles, the contractor discovered that the roof decking had gaps exceeding one-fourth of an inch in some places. To comply with the state building code, the contractor was required to repair the gaps before installing the shingles. After the contractor issued an invoice to defendant for the roof repairs, including charges to resolve the decking issues that were not caused by the hail damages as well as the contractor's overhead and profit, defendant disclaimed coverage for the additional repairs and the contractor's overhead and profit. Defendant then brought a declaratory judgment action concerning its coverage obligations. The district court determined that defendant was required to cover the cost of the repairs in addition to the work related to the shingles but not the contractor's overhead or profit.

The Minnesota Court of Appeals affirmed. The court first acknowledged that a roof damage limitation endorsement contained in the policy "plainly excludes coverage" for the additional work required to remedy the decking issue because the decking was not damaged by hail. But the court held that the endorsement to the policy violated Minn. Stat. §65A.10, which provides: "Subject to any applicable policy limits, where an insurer offers replacement cost insurance... the insurance must cover the cost of replacing, rebuilding, or repairing any loss or damaged property in accordance with the minimum code as required by state or local authorities...." The court reasoned that coverage must be provided because "to replace the damaged shingles in accordance with the state building code, the decking had to be repaired."

The court went on to affirm the district court's second holding—that plaintiff could not recover the contractor's overhead and profit—because coverage for such costs was excluded under an "overhead and profit" exclusion in the policy, and that exclusion did not violate Minn. Stat. §65A.10. ***Great Nw. Ins. Co. v. Campbell***, No. A23-0519 (Minn. Ct. App. 2/5/2024). *https://mn.gov/law-library-stat/archive/ctappub/2024/OPa230519-020524.pdf*

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PEOPLE + PRACTICE

We gladly accept announcements regarding current members of the MSBA. BB@MNBARS.ORG

Thomas Oja has become a shareholder at his firm. The new firm name is Webber Arredondo Oja, LLC. Oja continues to practice immigration law with a focus on U.S. visa strategies for skilled professionals.

Bill Pentelovitch was sworn in on February 26 as a member of the Minneapolis Civil Rights Commission. He was appointed to the commission by Mayor Jacob Frey and his appointment was confirmed by the City Council. In his of counsel role at Maslon LLP, Pentelovitch consults with colleagues on litigation and trial strategy.

CB Baga and **Jeffrey Underhill** have joined Maslon LLP. Baga represents clients on pro bono legal matters and supports the firm's DEI efforts. Underhill joined the firm's litigation group and focuses on construction, real estate, and general commercial disputes.

Christine Lindblad has rejoined Fox Rothschild as a partner in the litigation department. She will be based in Minneapolis.

Stephen P. Lucke has joined JAMS in Minneapolis after nearly 40 years as a business litigation associate and partner at Dorsey. Lucke will serve as an arbitrator and mediator, handling business/commercial litigation, health care, class action/mass tort, employment, banking and finance, insurance, and securities cases.

Selma Demirovic joined Arthur, Chapman, Kettering, Smetak & Pikala, PA as an attorney in the workers' compensation practice group.

Christopher (Chris) Larus has become a fellow of the American College of Trial Lawyers. Larus is a partner at Robins Kaplan and chair of the firm's national intellectual property & technology litigation practice.

Spencer Fane LLP announced that **Ian M. Rubenstrunk** has joined the financial services practice group as an of counsel attorney, and **Kathleen (Kaela) Brennan** joined the litigation and dispute resolution practice group as an of counsel in the firm's Minneapolis office.

Adam J. Kaufman and **Kelly M. Eull** have been promoted to shareholder status at Henningson & Snoxell, Ltd. Kaufman focuses on estate planning and the creation of wills, trusts, and incapacity plans. Eull is chair of the family law department and aids in matters concerning dissolution of marriage, paternity, custody, and child support.

Gov. Walz appointed **Viet-Hanh Winchell** as district court judge in Minnesota's 10th Judicial District. Winchell will be replacing Hon. Richard C. Ilkka and will be chambered in Stillwater in Washington County. Winchell is a solo practitioner at United Rivers Law Firm.

In memoriam

Thomas Holloran, a lawyer and former Medtronic executive, died February 15, 2024 at age 94. He left his legacy on the University of St. Thomas as an instrumental part of opening the college's law school in 2001 and founding the Holloran Center for Ethical Leadership in 2006.

Lt. Colonel Edward A. Zimmerman, age 80, passed away on February 3, 2024. Former attorney and army veteran (28 years).

Amelia Rose Hartman, age 37, died February 4, 2024. She attended the University of St. Thomas School of Law. Her passionate, selfless approach to life made her a perfect fit for her chosen profession. She spent as much time at home talking about her paid work as she did her pro bono clients.

Charles "Herman" C. Jensch, of St. Paul, passed away on February 18, 2024, at the age of 94. During Charlie's long career, he was the vice president of Staley Company, president of Sunstar Foods, and a partner at Petersen, Tews, and Squires.

Robert L. Thompson, Jr. of Minneapolis died on February 25, 2024 at the age of 79. He was retired from a 40-year career as a lawyer and business executive, which was preceded by three years of active duty as a U.S. Army officer.

Terry Alan Karkela, age 69, died on March 9, 2024. He successfully managed the Karkela, Hunt & Cheshire Law Firm. He was an active member of the Minnesota State Bar Association's Real Property Section and was elected into the American College of Real Estate Lawyers in 2011.

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