OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVIII NUMBER I
JANUARY 2021
www.mnbar.org

# Bench&Bar OF MINNESOTA

## The case of the accidental landlord

***Why Minnesota's eviction moratorium needs fixing***

# Wishing You Well in

2020 was a year like no other. Many of us connected with our networks in new ways via virtual platforms, and the very concept of a *meeting* was redefined. While the ways we reached family, friends, and colleagues looked different than they had in the past, the interactions were essential. It was a time to support others when they needed a lift. And, just as important, to reach out to them when we needed the same.

At your Minnesota State Bar Association, we've had to adjust as well. Many of the ways we gather, keep you updated, and provide you with programming had to be retooled or reimagined. We hope the services and professional network you have through the MSBA's online communities, committees, and sections have provided support and been a resource to your work.

We don't know what the months ahead will bring. But we do know that we are stronger together. Over 15,000 members strong.

Thank you for your membership and for being part of the MSBA community this year and in the year ahead.

*Best wishes*

from the MSBA staff

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# Bench&Bar OF MINNESOTA

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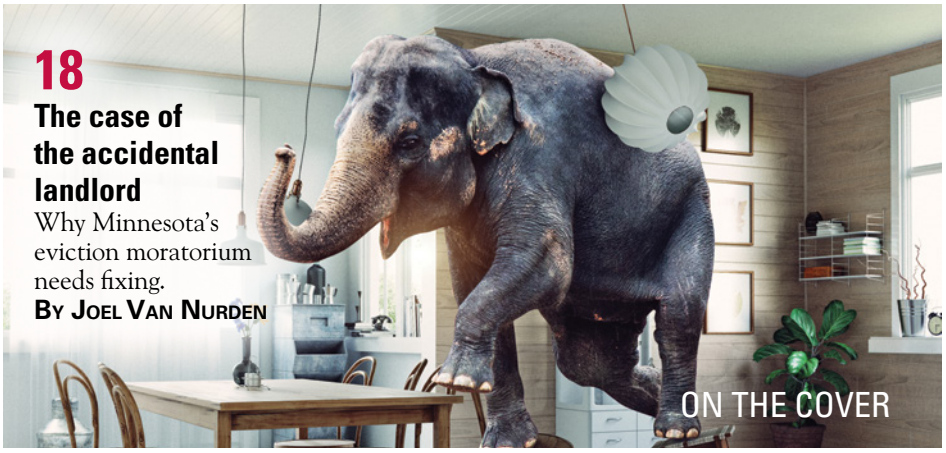

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# Mock trial: The show must go on

Right now 130 mock trial teams from 70 schools across Minnesota are grappling with this fictional factual scenario. The teams span the entire state, from Bemidji to Luverne and from Chisholm to Winona.

The MSBA Mock Trial Program, like all other MSBA programming, was forced to pivot in the wake of covid-19. The easy choice, of course, would have been to shelve mock trial for a year. Instead, MSBA Mock Trial Director Kim Basting, undaunted by the challenge, worked with the Mock Trial Advisory Committee chaired by Wynne Reece to revise the program to allow it to go on despite the restrictions.

This year, the entire mock trial program will be conducted on a virtual platform. The teams and judges will attend the trials from separate locations. The format of the trials will remain essentially the same: Each team will have at least six student members serving in the roles of attorneys, witnesses, and bailiffs/timekeepers. A pretrial conference will be conducted at the start of each trial, followed by opening statements, direct and cross examinations of witnesses, and closing arguments. The attorneys will make objections and abide by the rules of evidence of the mock trial program as they present their cases.

As always, MSBA members will serve as judges in the trials and score the teams' performances. The best teams from each region will have the chance to represent their region and school in the state tournament in March. The team that rises to the top in the state tournament will have the honor of representing Minnesota in the national (and likewise virtual) mock trial tournament in May.

At a time when so many students are unable to participate in extracurricular activities because of covid-19 and social distancing restrictions, the decision to continue the mock trial program is even more important. Doing so helps to create some sense of normalcy in an otherwise tumultuous and unpredictable time.

DYAN EBERT is a partner at the central Minnesota firm of Quinlivan & Hughes, P.A., where she served as CEO from 2003-2010 and 2014-2019. She also served on the board of directors of Minnesota CLE from 2012-2019.

And while a virtual format will certainly be different from a typical courtroom experience, conducting the program virtually may actually be an improvement in some respects. This year, at least, Minnesota's winter will not require trials to be rescheduled or postponed because a team from Fergus Falls is unable to travel to St. Cloud for a competition. It's also great that more MSBA members will have the opportunity to volunteer as judges, since they will have the flexibility to do so from the comfort of their homes or offices.

The change made to this year's mock trial program is a shining example of how to cultivate something good from an otherwise bad situation, a lesson we should all take to heart. The show will go on! ▲

*If you are interested in volunteering to serve as a mock trial judge, please visit the MSBA Mock Trial Program page (www.mnbar.org/mocktrial) or contact Kim Basting, MSBA's mock trial director (612-278-6306; kbasting@mnbars.org).*

**The Case**

### Would you agree to represent Payton and Parker or Nixon Lodge in this case?

Payton Knox, a local hockey hero, and Parker Stevenson became engaged to be married in 2019. Payton's parent, Jordan Knox, formerly a well-known clothier in Hibbing, was as excited as Payton for this wedding, with visions of grandchildren dancing in their head. The happy couple's parents each agreed to foot 35 percent of the wedding costs. The big day was to be July 4, 2020, the five-year anniversary of when Payton and Parker met. The venue was to be Nixon Lodge, a lovely old hotel, reminiscent in some ways (at least for Payton) of the old Hibbing High School. The venue and catering services were booked in June 2019.

Payton, Parker, and their respective parents were fairly well off and they were going to make this the wedding of the decade. The wedding was planned for about 250 people (and two dogs); dozens of friends and relatives were going to be flown in from all over the country (and from France, where Jordan still has family).

Then the covid-19 pandemic began its deadly path across America. By March 2020, Minnesota was in shutdown mode, airlines had all but stopped flying, and people were socially distancing and wearing masks. The hotel and restaurant businesses were required to develop preparedness plans regarding how they would conduct business in the face of covid. Based on the rules promulgated by the Minnesota Department of Health, the recommendations of the Hibbing Health and Safety inspector, and the age and physical layout of the Nixon Lodge, the owner and sales manager, Kris Nixon, informed the Knoxes that the maximum size of the wedding would be 75 and that masks, social distancing, and other health precautions would be required. When the Knoxes balked at these restrictions, Nixon Lodge offered to look for an alternative date, for a fee. The Knoxes were outraged and demanded either the wedding of Payton and Parker's dreams or their money back. Nixon Lodge refused. Payton Knox sued Nixon Lodge for a return of all the money they put down; Nixon Lodge answered with a countersuit, demanding payment of the rest of the monies owed to them.

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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.

# FAQ: What you need to know about the new MSBA health plan

**Q: How does the MSBA health plan work? Who's eligible?**
**A:** The MSBA Association Health Plan (AHP) was developed in collaboration with Mercer, an active partner of the MSBA in offering member benefit solution products, and Medica, a Minnesota-based not-for-profit health plan provider with over 40 years of experience. It offers a portfolio of health benefits options to law firms that have at least one primary owner in good standing with the MSBA and at least one additional individual on staff.

Law firms and their employees will be able to choose from a variety of preferred provider organization (PPO) and health savings account (HSA)-eligible consumer directed health plans (CDHPs). For a law firm to participate, at least 75 percent of its eligible employees must not be enrolled in another health plan, and a minimum of 50 percent (regardless of waivers) must participate in this employer-sponsored plan. The law firm contribution threshold is equal to 50 percent of the lowest-premium employee-only rate.

**Q: When can firms start signing up for coverage?**
**A:** MSBA is quoting these plans for eligible member groups beginning with January 1, 2021 plan-effective dates. To request a quote, interested businesses or their brokers may visit *Health.MSBAinsure.com* or call Mercer customer service at 888-264-9189 for additional details.

**Q: I'm a solo practitioner. Why am I left out of the MSBA plan?**
**A:** The federal Department of Labor rules currently in place do not permit association health plans (AHPs) like the one the MSBA has introduced to include sole proprietorships. This may or may not change in the future.

**Q: What are the plan's coverage options?**
**A:** This table offers a breakdown of the plan limit and deductible options.

| Plan | Deductible | Out-of-pocket Maximum | Copay | Coinsurance |
|---|---|---|---|---|
| Preferred Provider Organization (PPO) | | | | |
| Plan 1 | $500 / $1,500 | $3,000 / $6,000 | $25 | 75% |
| Plan 2 | $1,000 / $3,000 | $3,500 / $7,000 | $30 | 80% |
| Plan 3 | $1,500 / $4,500 | $6,500 / $9,000 | $30 | 70% |
| High Deductible Health Plan (HDHP) with Health Savings Account (HSA) | | | | |
| Plan 4 | $2,000 / $4,000 | $2,000 / $4,000 | N/A | 100% |
| Plan 5 | $4,500 / $9,000 | $6,000 / $13,000 | N/A | 80% |
| Plan 6 | $6,650 / $13,300 | $6,650 / $13,300 | N/A | 100% |

Law firms may also select from Medica's broad access PPO network, Medica Choice Passport, or from a listing of accountable care organizations (ACOs) available in certain geographic areas throughout the state. An ACO is a network of doctors and hospitals that share the financial and medical responsibility for providing coordinated care to patients; the goal is to limit unnecessary spending, raise the level of care, and lower costs. The ACO plans provide members with a lower price point, which in turn means lower premiums. Medica offers seven ACO networks throughout Minnesota and into western Wisconsin and northeastern North Dakota.

| VantagePlus with Medica℠ | Park Nicollet First with Medica℠ | Ridgeview Community Network® powered by Medica | Medica CompleteHealth℠ (featuring care at Mayo Clinic) | Essentia Choice Care with Medica℠ | Altru & You with Medica℠ | Clear Value with Medica℠ |
|---|---|---|---|---|---|---|
|  |  |  |  |  |  |  |
| HEALTH FAIRVIEW NORTH MEMORIAL HEALTH | Park Nicollet | Ridgeview Community Network | Medica CompleteHealth℠ | Essentia Health | Altru | Hennepin Healthcare |
| 12 hospitals<br>650 clinics | 55 medical specialties<br>20 neighborhood clinics | 40 primary care clinics<br>150 specialty care clinics | 20 hospitals<br>60 clinics | 26 hospitals<br>70 clinics | 17 hospitals<br>40 primary care clinics | 2 hospitals<br>9 primary care clinics |
| Savings Compared to Medica Choice Passport: 10% | Savings Compared to Medica Choice Passport: 12% | Savings Compared to Medica Choice Passport: 12% | Savings Compared to Medica Choice Passport: Up to 7% | Savings Compared to Medica Choice Passport: 12% | Savings Compared to Medica Choice Passport: 10% | Savings Compared to Medica Choice Passport: 20% |

To request a quote, interested businesses or their brokers may visit **Health.MSBAinsure.com** or call Mercer customer service at 888-264-9189 for additional details.

**Q: Does the MSBA health plan offer additional benefits?**
**A:** Yes. The AHP provides additional member values-adds that include:

- **My Health Rewards:** Members 18 and older can earn up to a $160 in gift cards funded by Medica;
- **health club reimbursement:** $20 credit toward most clubs' monthly dues;
- **Omada for Prevention:** online health tools that include a dedicated health coach, lifestyle change recommendations that include healthy eating, activity, sleep, and stress management;
- **Ovia Health:** parenting support through mobile apps that span the reproductive health and parenting spectrum.

**Q: Is support available in implementing and administering the plan?**
**A:** Mercer and Medica will work with any licensed and appointed agent who wants to quote MSBA Association Health Plan to their eligible member clients.

The Mercer Affinity 365+™ platform provides members and their brokers access to obtain medical coverage quotes for employees and their families. The plan also offers an online enrollment and HR administration portal that provides an enrollment and administration experience typically only available to larger employers. Along with this ease of plan administration and enrollment, there is a dedicated customer service team to support you and your employees along the way, ultimately reducing your overall administrative costs associated with providing health insurance. ▲

# Lawyers in transition

As one year ends and another begins, some lawyers find themselves in transition between firms or employment opportunities. When this happens, it's natural to focus on employment law—and, if one is a partner, fiduciary obligations. But please don't forget there are also ethical obligations when a lawyer leaves a firm. And they're a frequent source of questions on our ethics hotline at this time of year. The American Bar Association issued a formal opinion on this topic that provides a good framework for lawyers and firms.[1] If you are considering leaving your firm, or are in the management ranks of a firm, it is important that you understand your ethical obligations.

## Restrictions on right to practice

Noncompetes are prevalent in business but prohibited in the legal profession. It is unethical to offer or make an agreement that restricts the right of a lawyer to practice after termination of the relationship.[2] An exception exists for benefits upon retirement, but otherwise the rule is straightforward. This is less about lawyer autonomy than about prioritizing the client's right to a lawyer of their choosing (in keeping with the ethical imperative to place the client's interest first). Even though the point is well-settled, we receive questions every year about terms in employment agreements that clearly aim to restrict practice after termination. Lawyers are naturally competitive and money is money, but keep this clear ethical requirement in mind.

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.

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## Orderly transitions

One of our most important ethical obligations is to keep the client informed of the status of a matter and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation.[3] These communication obligations require notice to the client of material information—such as a planned law firm move or changed staffing on their case. The ethics rules do not dictate who must make this notice or what it must say.

Opinion 489 takes the position that the firm and departing lawyer should attempt to agree on a joint communication to firm clients with whom the departing lawyer has had significant contact—and we always advise as much on the ethics line. This is the best and most professional approach, since it appropriately puts the emphasis on supplying the client with information they need to make informed decisions about their matter. Alternatively, the opinion provides that separate notices may be provided. But in that case care should be taken to make sure clients know they have the option of remaining with the firm, going with the departing attorney, or choosing another attorney. Again, this approach appropriately places the choice in the hands of the client.

There are nuances here that must be taken into consideration. Notice need not be given to everyone who ever came in contact with the lawyer, no matter how casual the contact—the opinion focuses on significant contact on the matter. If the departing lawyer is very junior or not primary counsel, then notice may not make any sense. Remember, too, that notice and options are separate from the departing lawyer's prerogative to solicit former clients—a right that nothing in the ethics rules prevents, and as noted above, one that should not be restricted through agreement.

The opinion also focuses on making the departing lawyer's notices to the firm and to clients as nearly contemporaneous as they can be, but notes that firms can require advance notice to the firm sufficient to allow for an orderly transition. This includes working together to provide a joint client notification, making sure files are in order for transfer, and coordinating coverage for key deadlines in a client's matter. The opinion cautions, however, that advance notice requirements should not be so broad as to pose, in effect, a proscription on practice. If the lawyer is terminated and not departing voluntarily, a whole new layer of complexity is added, but the main obligations from the client's perspective remain the same.

## Clients are not property

This is my favorite line in the opinion, and the one that so many lawyers and law firms struggle to embrace. Clients should not be divided up by the lawyer and firm; the focus, rather, should be on the client's right to decide. Again, there are nuances. Much will depend on the departing lawyer's role in the client representation. Reason should prevail but it can be difficult, particularly if the departure is sudden or acrimonious, to reach that goal. We hear from both sides of the coin on this point, but whether or not you expressly bring up the client's option to move, it certainly exists, and you just look petty (and may be violating the rules) if you deprive the client of information they need to make informed decisions about the representation. This includes providing relevant contact information for the departing lawyer. It goes without saying that a professional, neutral approach is always best. Few if any clients want to be involved in a law firm's internal battles.

The opinion also cautions against restricting the departing lawyer's pre-departure access to the file and resources to allow the lawyer to continue to competently and diligently represent the client as decisions are being made by the client regarding representation. Again, there are nuances. The guiding principle should be placing the client's interest first, and keeping that in mind tends to help things work out for the best. If a lawyer is terminated unexpectedly and immediately, and there are imminent case deadlines, this can be a challenge. Both the terminated lawyer and the firm must take steps to protect the client's interests.

## Other obligations

While Opinion 489 does a good job framing some of the ethics issues implicated when lawyers change firms, the opinion is silent on the often complementary but sometimes conflicting legal obligations that also apply. Most partners and shareholders have fiduciary obligations to their employer or partners that, to the extent they are consistent with the ethics rules, also must be taken into consideration. No one size fits all here, and it is clear that the opinion is focused more on raising the noncompete and related issues than providing detailed guidance on the myriad ways that compliance with ethical obligations can assist in the orderly transition of matters. The opinion correctly notes, however, that firm management has an ethical obligation to have in place measures that offer reasonable assurance of compliance with the ethics rules.[4] Good checklists, procedures, and training on the variety of potential circumstances surrounding lawyer departures should be part of those measures, and will help guard against errors when the unexpected occurs.

## Conclusion

It is hard to mess up transitions if you step back and put the client's interests first. If your guidepost is what is best for the client, as well as how best to work together to serve the client, you will be in a good position to satisfy your ethical obligations. But don't forget there are legal duties, whether contractual or under common law, that should also be given consideration. At this time of year we frequently received calls on this topic and are happy to answer the ethics half of the questions. Best wishes for a significantly better 2021! ▲

## Notes

[1] ABA Opinion 489, *Obligations Related to Notice When Lawyers Change Firms* (12/4/2019).

[2] Rule 5.6(a), Minnesota Rules of Professional Conduct (MRPC). A lawyer may also not make or offer an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy. Rule 5.6(b), MRPC.

[3] Rule 1.4(a)(3), MRPC; Rule 1.4(b), MRPC.

[4] Rule 5.1(a), MRPC.

# Considerations in cloud security

Recently, the CIA awarded a diversified contract for cloud computing, including the housing of top-secret data, to Amazon Web Services, Microsoft, Google, Oracle, and IBM. "Under the C2E contract vehicle," reports an article at Nextgov, "the companies will compete for specific task orders issued by the CIA on behalf of itself and the 16 other agencies that comprise the intelligence community."[1] This is a huge contract for the companies awarded, and it underscores a movement toward cloud computing even in matters involving the utmost in secrecy. For law firms, the question of whether to use the cloud is especially critical given the unparalleled importance of protecting client confidentiality.

In our digital age, organizations, companies, and firms are constantly creating, gathering, and storing mass amounts of data—data that can be compromised by cybercriminals. Due to the costs associated with managing data, cloud computing has become the norm and will continue to be an important resource.

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.

Cloud computing is essentially an infrastructure that allows for on-demand access to organizational assets, especially data, over the internet, typically through commercial providers via a public cloud. Many organizations use multiple clouds and a layered approach, meaning that they use several public cloud options, or a combination of public and private options. This would describe the CIA's approach to cloud computing, opting for several service providers to better allow for customization.

Cloud computing is easily adaptable. As organizations grow in number of employees and physical locations, the cloud allows for easy access to data without the need for physical proximity. With a growing number of devices, and an ever-increasing need for data storage and computing abilities, the cloud is a sensible option for its flexibility, cost, and ease of use.

## Staying secure

From a security perspective, it is important that organizations consider their risk appetites in migrating data to the cloud. Like any technology, cloud computing is neither perfectly secure nor fail-proof. Consider exactly what service, or type of infrastructure, is being used. Understand how your private, public, or hybrid plan is set up to ensure cloud security. How does the vendor protect your data? What are the practices for data encryption? How are data backups conducted? What are the policies and procedures for reporting a data breach, and how will you be notified? What is the vendor's history with data breaches and breach response? There are many questions to consider when assessing and selecting a cloud service provider. Apart from the cybersecurity issues, law firms should also review how the vendor responds to subpoenas or other third-party requests.

Not all cloud providers are going to be the right fit for your organization, and it may be more appropriate to use several different options. Deciding to trust a third party with your data requires ample research and abiding management. Data access control policies should be regularly reviewed and updated, and employees should be trained in their individual roles and responsibilities in securely accessing the cloud.

## Your data, your responsibility

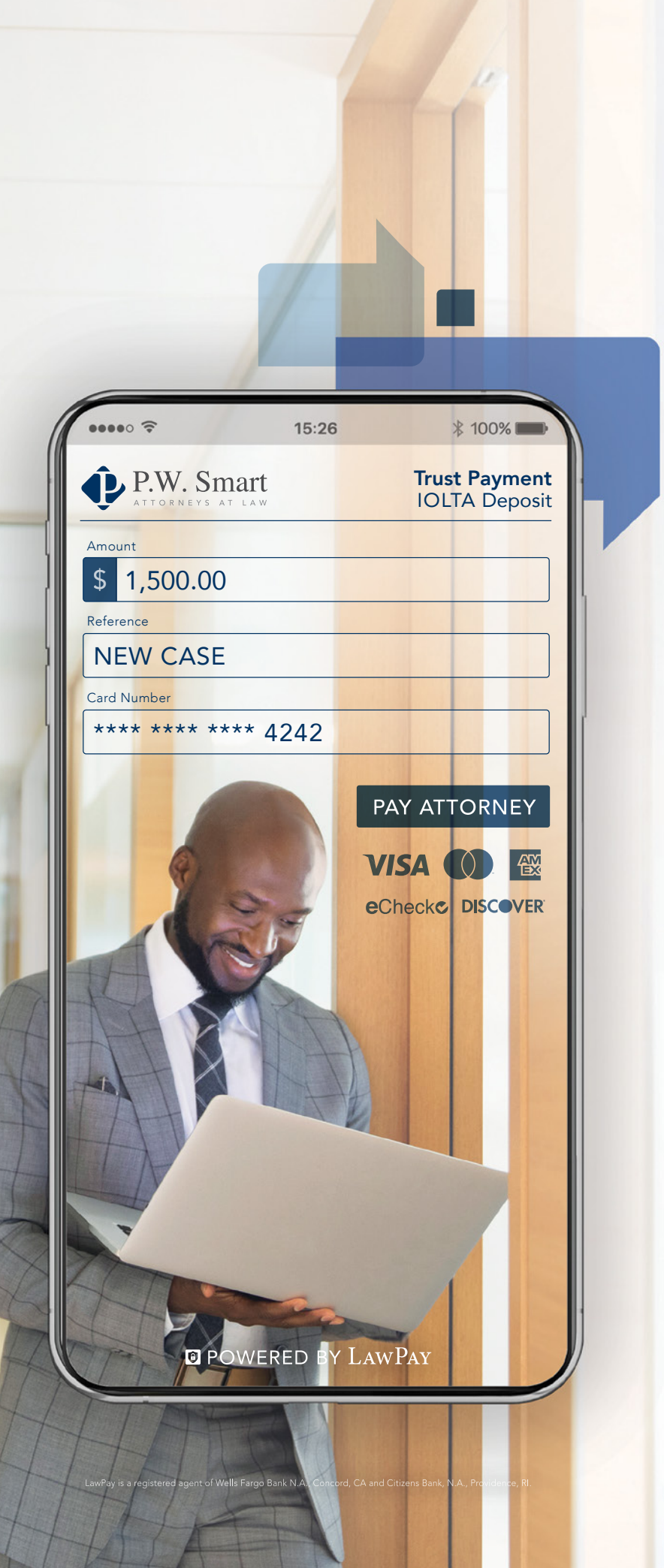
Ultimately, many organizations and firms find that moving to the cloud is necessary and that cloud service providers are often in a better position to protect data than an organization relying completely on its own resources and abilities. But don't forget that no matter where your data is being stored and by whom, you are ultimately responsibly for keeping it secure. When constructing your cloud infrastructure, accept the fact that paying more now for increased security is better than paying much more later in the event of a breach.

The cloud is a convenient and efficient tool. It can help simplify data management and for many organizations it's become a necessity. But balancing the benefits of cloud technology with its risks requires careful research, planning, and management. In the words of the 2019 ABA Tech Report, "If you take only one thing from this… it should be to up your game on cloud security, for your sake and, even more so, for the sake of your clients."[2] Identifying options, researching vendors, and staying apprised of best practices is critical in making the best choice for your organization and your data. ▲

## Notes

[1] *https://www.nextgov.com/it-modernization/2020/11/exclusive-cia-awards-secret-multi-billion-dollar-cloud-contract/170227/*

[2] *https://www.americanbar.org/groups/law_practice/publications/techreport/abatechreport2019/cloudcomputing2019/*

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# 'No one can fix anything working alone'

**Why did you go to law school?**

I have always been an overachiever. I left high school a year early to go post-secondary enrollment full time at Minnesota State University, Mankato. After four years, I graduated with a double major and a minor in business. I had a job waiting for me when I graduated, but I was only 20 years old. I was not certain that I was ready to enter the "real world" just yet. I signed up for the LSAT on campus and put it in the hands of fate, despite having a political science professor tell me I would never get into law school if I did not take his classes. I did well on the LSAT and received a scholarship to Hamline University School of Law.

**If you weren't a lawyer, what do you think you'd be doing with your career?**

I know that I would be helping others in some capacity. My joy in life is to see others smile and to take the stresses of daily life away and bring them happiness. I would most likely be president of a bank by now, but I would still enjoy my philanthropy projects. My eldest son has special needs and I work with several organizations to help with awareness and fundraising. I am certain I would be on the path to help even if I was not a lawyer.

**How did you come to choose a kind of hybrid metro/greater Minnesota practice?**

I would say that it chose me. I swore that when I left my hometown of 3,000 people I would never live in a small town. At almost 7,000 residents, Belle Plaine is the perfect size for my family. It lies between Mankato and the metro area. What makes my hybrid practice special is that I need to be, and am, willing to travel to meet with my clients. I am also willing to meet after hours when the clients are off work or when the kids are in bed. I offer that flexibility to meet the needs of my metro and greater Minnesota clients. If you must utilize PTO time to meet with me, you are paying me twice.

**What are the most important things you get out of your involvement with the bar association?**

The opportunity to meet and collaborate with other attorneys. While I am technically in Scott County, I relate well to the greater Minnesota population since that is where I grew up. There are many issues in greater Minnesota, ranging from succession planning to lack of technology. No one can fix anything alone but working together, through the bar association, we are able to draft legislation and pave the way for future attorneys.

I also enjoy getting the opportunity to meet and mentor future lawyers. All students have an idea of what being a lawyer might look like. I encourage them to find their path and show them how their practice of law can be more fulfilling than just billable hours.

**What do you like to do when you are not working?**

I enjoy spending time with my husband, three kids, dog, cat, guinea pigs, dwarf rabbit, and tropical reef fish. Life is always busy, fun, and happy in our household. I am involved in my city's planning and zoning board and my church's endowment committee. The skills that I gained in law school are a great asset to these organizations.

I am also president-elect of the Minnesota State University-Mankato Alumni Association. I enjoy the opportunity to help engage others with their alma matter. It is not about the money; it is about the people, the connections, and the love of a college. ▲

OMNI KIECKER is the owner of Kiecker Law Office, LLC. Her offices are located in Belle Plaine and Mankato. She prides herself on making the legal process as straightforward as possible. In 2019 she published a book, *Financially Caring for your Disabled Child,* that was rated as a #1 new release in practical guides for law at Amazon. More information can be found on her website www.kieckerlaw.com.

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# Solo-Small BOOTCAMP

## The Small Law Firm Business Plan

## Friday, January 22

**SESSIONS** (8 am – 12:15 pm)
Launching a new practice? Or refreshing your current one? This half-day bootcamp will focus on your business plan and bring you up to speed on the essentials of framing your operations for the modern legal services environment. Event materials will include a business plan spreadsheet and marketing plan outline, made available ahead of the program so you may review and edit as desired.

**TOPICS INCLUDE:**

- **Essential elements of a law-firm business plan**
- **How do you offer services: Subscription? Hourly? Alternative models? Hybrid? Is it time to consider other options?**
- **Marketing Plan: Your business plan within a business plan**
- **Pricing and Forecasting: Planning for the real-world**

**TRADE SHOW** (1:30 – 4:30 pm)
Virtual Trade Show follows the sessions. Schedule brief one-on-one consultations with one of our MSBA Advantage Partners.

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## www.mnbar.org/cle-events

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# The genius of gratitude

Recently, I helped settle an incredibly contentious, emotionally charged family dispute. It took, as predicted, a proverbial "courthouse steps" event to finally convince one psychologically cruel family member to abandon his bullying to avoid seeing his abusive house of cards disassembled under oath.

My clients were understandably shaken up over the trauma this dispute visited on multiple generations of an extended family. Although big dollars were at stake, it was as much about an end to the near-constant drama. When the settlement papers were signed, my client said wistfully, "I'm not going to mind that we're stopping the legal expense, but I'm actually going to miss our therapy sessions."

This remark was telling. To be honest, I probably relied more on my psychology degree than on my law degree to keep the client centered, while also pacifying the sometimes tightly wound rainmaker on the case, and occasionally others on the team who were tempted to stage a mutiny or two against a well-intentioned but difficult client.

Looking back, I realize that I managed the stress and emotions swirling around that case so well because I had integrated three simple daily habits into my life:

- regular exercise: I love my 6:00 a.m. hoops game (when pandemic rules are not in effect). It is physical, competitive, and social, and comes with a fantastic level of good-natured trash talking;
- daily meditation: I get five minutes (and try for at least 15) with my Muse headband within 10 minutes of rising; and
- keeping up with my nightly written "gratitude journal": It takes just five minutes to make three entries.

JOSEPH P. BECKMAN is a co-chair of the MSBA Wellbeing Committee.

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These little habits, which require no more than a 20-minute investment each day, kept me centered. During stressful moments, they helped me keep a healthy perspective and a sense of humor. They reminded me of how much I was grateful for, which in turn helped me keep my cool when my client began to overheat. My inner strength transferred to the client, whose meltdowns dwindled from twice a week to once a month. The change was so powerful that during the last two months of the case, my client began showing up at each meeting with homemade baked goods for the team—no joke!

## Gratitude journal: The five-minute miracle cure?

Studies have shown that, typically within 21 days, a nightly "gratitude journal" can be as effective as commonly prescribed antidepressants. Moreover, these studies suggest that the effects of journaling are not tempered by side effects or plateau. Keep journaling, and soon that attitude of gratitude infuses most everything in your day!

Journaling requires putting the blue screens away about 30 to 60 minutes before getting in bed for the evening and writing down *in detail* three things in your day that went well. Most people who do this keep a small bound journal. Having prior entries in front of you each night extends their positive effect, particularly on the occasional neutral day when you struggle to find three things that went well.

The research suggests a written journal is the key to success. So is the timing—right before bed. Think about it. If the last thing you do at night is reflect on the positive events of the day rather than letting your mind race about proofing that brief, are you more likely to sleep soundly, or less?

## Keep the momentum going

Positive thinking throughout the day is as important as just before bed. "We all need to treat ourselves with some kindness and give ourselves a little space," says Ruth A. Bahe-Jachna, Chicago, a past cochair of the ABA Section of Litigation's Health & Wellness Task Force. Bahe-Jachna takes at least five minutes after she sits down at her desk each morning to clear her mind, closing her eyes and concentrating on her breathing.

"I tell myself to focus. To slow down. To take my time," she says. "When there is a particularly full plate, I think to myself, 'You've got this. You are gonna get through the day!'"

Bahe-Jachna admits that she has not yet mastered the art of daily self-reflection. "What's funny is that it seems that the days when I need it most are the days I am possibly least likely to invest the five minutes in myself!" she bemoans. But, as she recognizes, taking those five minutes is worth it: If we fail to "sharpen our saw" by investing in our own mental health and balance, we risk becoming ineffective and inefficient. Attacking a problem with a dull tool requires more passes and gets a far less clean cut.

Nonetheless, any progress toward the ultimate goal of constant mindfulness and gratitude is important. Why? Because you deserve to treat yourself kindly… and your clients deserve that, too! ▲

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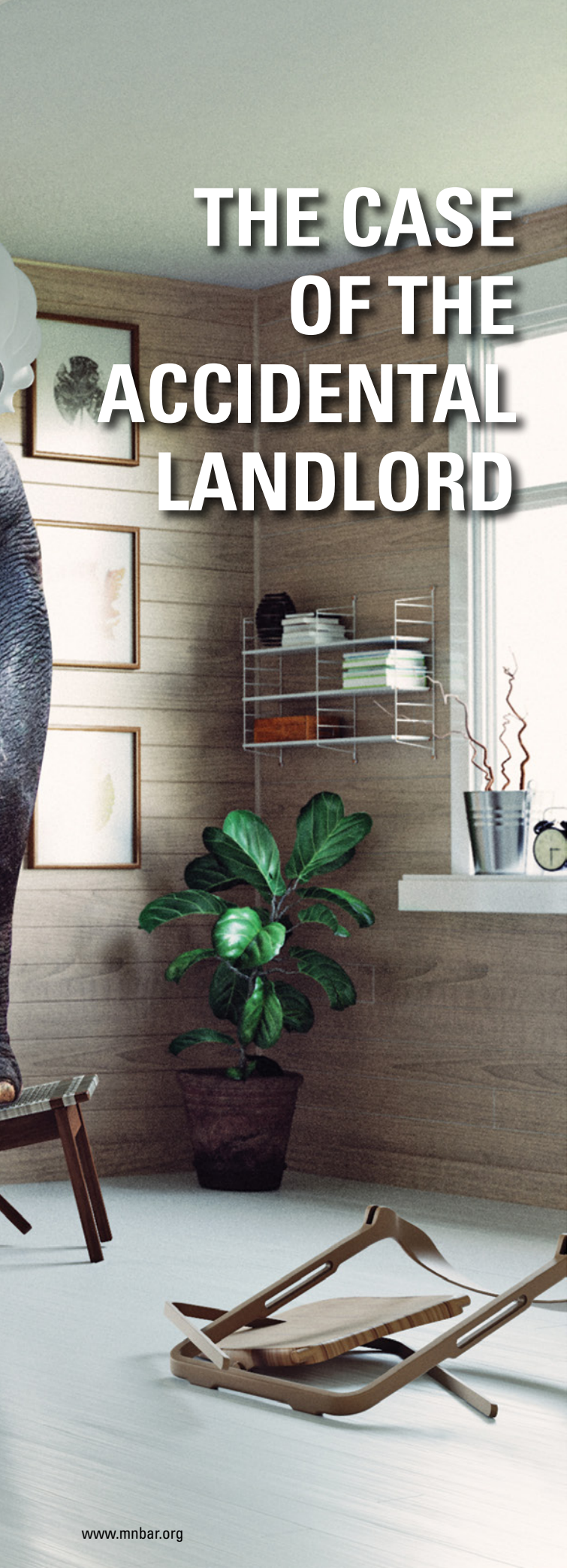

# THE CASE OF THE ACCIDENTAL LANDLORD

## Why Minnesota's eviction moratorium needs fixing

**By Joel Van Nurden**

Mary is a widow in her mid-70s.[1] She has worked hard all her life, paid off her mortgage, and lives frugally on Social Security and her modest savings. She was looking forward to spending her golden years relaxing in her humble, post-World War II ranch-style home in the suburbs. Then the pandemic hit and Mary's daughter lost her job. Mary converted her sewing room back to a bedroom and welcomed her daughter, son-in-law, and their two teenage sons into her home. Mary had expected it would be for a month or so until the pandemic passed and her daughter found work.

Mary almost immediately regretted her act of compassion. Her daughter started drinking and became verbally abusive. Mary suspects, but cannot confirm, that her oldest grandchild is doing drugs. The whole family takes Mary for granted—calling her horrible names, speaking down to her, and at the same time expecting her to cook and clean for them. It has gotten to the point where Mary is afraid in her own home. Moreover, her retirement savings are quickly disappearing as she pays for extra food and higher utility bills. It has been seven months now with no real end in sight.

Mary never considered her daughter's family "tenants" or herself a "landlord." There is no written lease and Mary never asked her daughter's family to pay rent, only to help out around the house. Nevertheless, under Executive Order 20-79[2] (Minnesota's eviction moratorium), Mary is treated no differently than a sophisticated investor leasing large apartment buildings for profit. In other words, she cannot use self-help (change the locks); she cannot bring an eviction in court; and she cannot even give her daughter notice to leave the property.

The current eviction moratorium, with all its good intentions, has caused unjust harm to landlords, particularly nonprofessional or "accidental" landlords. The governor should rescind Executive Order 20-79 and either replace it with something similar to the Centers for Disease Control's (CDC) nationwide eviction moratorium or, better yet, simply let the CDC's moratorium take effect in Minnesota.

### *Minnesota's eviction moratorium*

In response to the covid-19 pandemic, Gov. Tim Walz declared an immediate peacetime emergency on March 13, 2020.[3] This was followed 10 days later by Executive Order 20-14 suspending residential evictions throughout the duration of the emergency.[4] After clarifying the parameters of the eviction moratorium with Executive Order 20-73 on June 5,[5] Walz signed the currently operative moratorium as part of Executive Order 20-79 on July 14.[6]

Executive Order 20-79 prohibits, with very few exceptions, all residential evictions in Minnesota. This prohibition is not limited to evictions based on nonpayment of rent. It also specifically bans evictions based on the termination or expiration of a lease and—even more restrictive—forbids evictions based on material violations of a lease.[7] Not only does the order ban most evictions; it criminalizes even notifying a tenant that their lease is ending or not being renewed.[8]

Exceptions to the eviction moratorium include cases where a tenant seriously endangers the safety of other residents,[9] or violates specific laws involving drugs, guns, stolen property, or prostitution at the property.[10] In addition, a landlord may bring an eviction if the tenant seriously endangers the safety of nonresidents or significantly damages property.[11] But as we shall see, these latter two exceptions must also be material violations of the lease.[12] Finally, a landlord may end a lease and bring a subsequent eviction if the landlord or a family member needs to move into the property.[13]

While the intent of the eviction moratorium is certainly laudable, it has resulted in unintended consequences and has caught unsuspecting and accidental landlords, like our friend Mary, in its dragnet. These are often older individuals who allow down-on-their-luck family members to move in temporarily. Unfortunately, some of these arrangements do not work out as planned. Perhaps the promised help around the house does not materialize; the originally contemplated stay of a few weeks turns into months; or, in some instances, the "tenants" become verbally, emotionally, or financially abusive. Sometimes these relationships become so toxic the owner does not even feel safe in her own home. The eviction moratorium makes no exception for these "landlords."

One could argue the family member exception provides such landlords relief.[14] But that exception, as written, presupposes the landlord is not already living at the property. Furthermore, exactly what constitutes a "need" for the landlord or family member to live at the property is an open and likely contested question. Tenants' attorneys could successfully argue that the landlord does not "need" to move in because he or she is *already* living at the property. The family exception, they could persuasively argue, contemplates a situation where the landlord is essentially homeless.

Even if this exception does apply, a guest living rent free is entitled to over three months' notice to vacate before anything can be done—at least according to some Minnesota court rulings.[15] Unfortunately, and perhaps unavoidably, a lack of clarity plagues Executive Order 20-79. Moreover, the fluidity of the situation and the often expedited need for relief render appellate review impractical. Not surprisingly, there have been no appellate decisions dealing with this, or any other, exception to the eviction moratorium.

Another problem under the eviction moratorium arises when a landlord has no written lease. This, again, often affects accidental and nonprofessional landlords. Such tenancies frequently involve either nontraditional landlord-tenant relationships or are conducted with a handshake. In fact, Minnesota law does not require written leases except for residential buildings with 12 units or more.[16] Even written leases, in the absence of a clause stating otherwise, are of no effect upon their expiration. This becomes a problem because of Executive Order 20-79's seemingly *pro forma* stipulation that "[n]othing in this Executive Order creates grounds for eviction or lease termination beyond what is provided for by Minnesota Statutes."[17] What this means in a practical sense is that even the limited bases for evictions seemingly allowed under the order (i.e. serious endangerment and significant property damage) are unavailable unless a written lease makes such actions "material violations."

In fact, landlords without written leases face two distinct barriers to evicting a tenant who seriously endangers the safety of others or significantly damages property. First, with no written lease there is no right-of-reentry clause. Without such a clause, at least according to some tenants' rights attorneys,[18] there can be no eviction for material breach. Even if a right-of-reentry clause is not required to bring an eviction (as some nonprecedential case law has held),[19] an oral lease will have no specific provisions regarding serious endangerment of others or significant damage to property. Even many written leases do not specifically include such language. And there can be no material violation of nonexistent lease terms. Consequently, tenants occupying any property without a written lease may not be evicted for seriously endangering the safety of others[20] or significantly damaging property.

Prior to the eviction moratorium, if a landlord without a written lease were having trouble with a tenant, the landlord could simply give notice and the tenant would generally have a month to leave or be subject to an eviction. Under the current executive order, these landlords are stuck with dangerous and problematic tenants. Adding insult to injury, such tenants are generally not paying rent. Meanwhile, landlords are still required to pay taxes, rental licensing fees, the mortgage (in many cases), and keep the rental properties maintained to oftentimes unreasonable standards. If they do not, they are liable to be sued by that same tenant for violating the implied covenants of habitability.[21]

### The CDC's eviction moratorium

So what is the solution? How do we, as Gov. Walz has put it, "strike a balance between the crucial importance of maintaining public health and stability for residential tenants, the economic impacts of the covid-19 pandemic on tenants, and the interest of housing providers to maintain and protect their properties"?[22] First and foremost, if the government is going to enforce eviction moratoriums, it must also provide landlords with real financial assistance. What such assistance would look like is beyond the scope of this article.

Second, the governor should rescind Order 20-79 and rely on the federal eviction moratoriums already in place, as well over half the states do currently.[23] In addition to nationwide eviction bans applicable to properties with federally backed mortgages,[24] in early September the Centers for Disease Control and Prevention (CDC) issued its own nationwide eviction moratorium.[25] Much like Executive Order 20-79, the CDC's order seeks to protect residential tenants from being evicted during the covid-19 pandemic. But unlike the governor's order, the CDC's moratorium is narrowly tailored to remedy the evil it claims to address.

Under the CDC's agency order, tenants are protected from eviction if they (1) have used their best efforts to obtain government assistance for housing; (2) are unable to pay their full rent due to a substantial loss of income; (3) are making best efforts to make partial payments of rent; and (4) would likely become homeless or move into close-quarters congregate living if evicted.[26] In addition to these requirements, the CDC's order includes appropriate income restrictions.[27] Tenants must also sign a declaration under penalty of perjury attesting that they meet these criteria and provide this declaration to their landlord.[28]

Finally, the CDC moratorium only bans evictions for nonpayment of rent. This makes sense. After all, this is by far the most common basis for evictions.[29] While we can all understand the financial difficulty currently faced by millions of Americans, there is no reason to let tenants materially breach leases or otherwise violate their obligations in addition to not paying rent.

Some might argue the CDC's requirements place the onus on tenants to affirmatively seek eviction protection, but it actually requires very little when considering the extraordinary relief tenants are being afforded. They are being allowed to indefinitely occupy private property without the requirement they provide any remuneration in return. It is true that both the governor's and the CDC's orders do not abolish the requirement to pay rent. But they have removed a landlord's best and sometimes only means of enforcing their right to receive rent. Yes, landlords could bring lawsuits against tenants for back rent, but in most cases this is an exercise in futility. A judgment against a tenant who has been unable or unwilling to pay rent is often worthless. And because landlords have been unable to bring evictions for such an extended period of time, many will be forced to bring costly district court claims, since their losses will exceed the $15,000 conciliation court jurisdictional limit.[30]

While the CDC's eviction moratorium is not perfect, it is a vast improvement over the moratorium set forth in Executive Order 20-79. It would give accidental landlords a fighting chance to take back control of their homes by letting them terminate "leases" they never knew existed. It would require some proof of good-faith effort on the part of tenants, and it would only ban evictions for nonpayment of rent. No one wants people thrown into the streets because they cannot pay their rent. At the same time, COVID must not be used as an opportunity to take advantage of landlords—particularly if such landlords are simply family members who were just trying to do the right thing. ▲

***JOEL VAN NURDEN** litigates real estate, business, and trust and estate disputes. He frequently represents landlords in evictions and other litigated matters as part of his solo practice at Van Nurden Law, PLLC in Minneapolis.*
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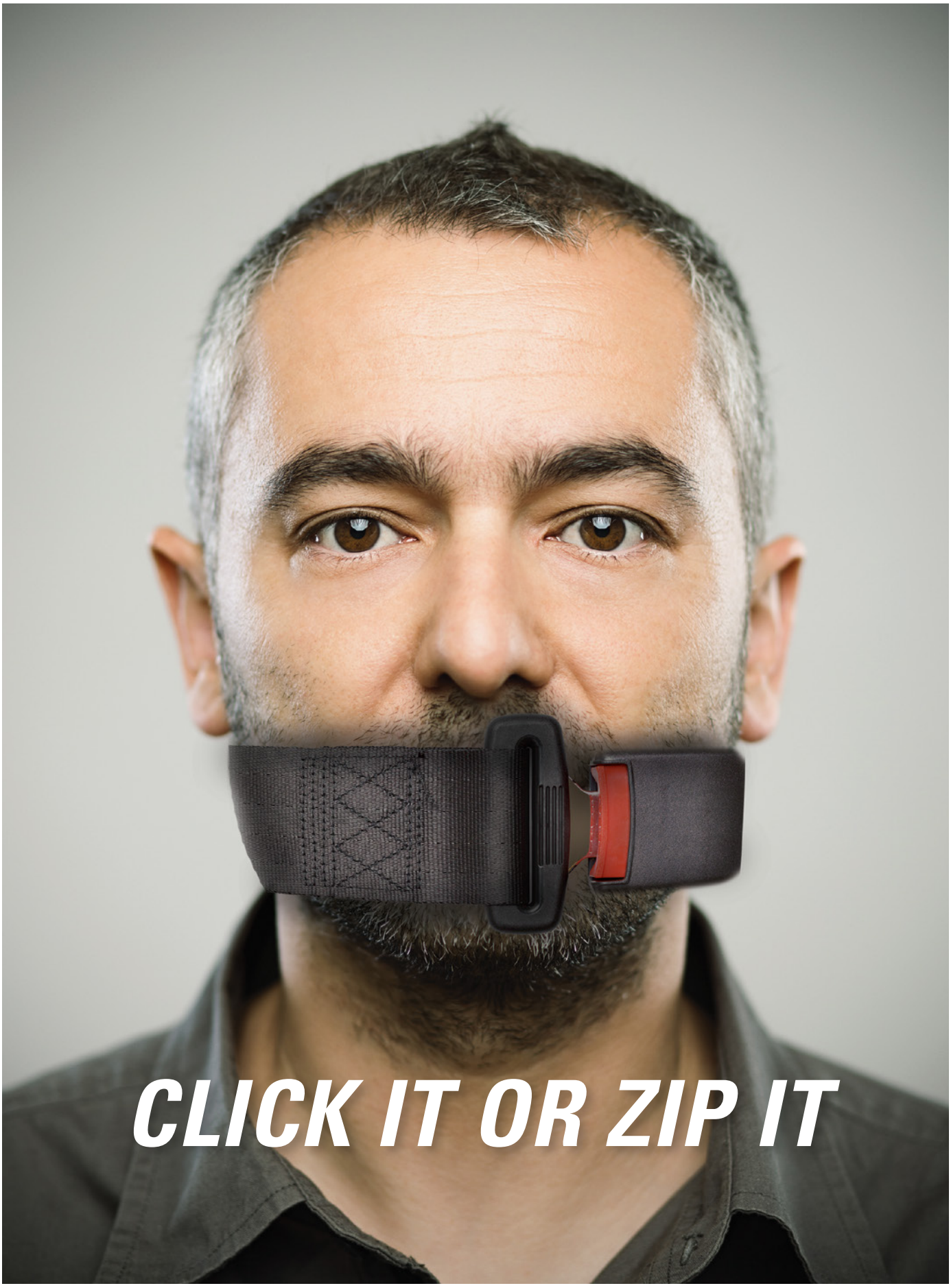
[1] This opening story is based upon an actual client. Names and minor facts have been changed to protect confidentiality.
[2] Emergency Executive Order 20-79 (7/14/2020). At the time this article is going to print, the peacetime emergency along with the attendant eviction moratorium is set to expire on 12/14/2020. It is expected the peacetime emergency will be extended.
[3] Emergency Executive Order 20-01 (3/13/2020).
[4] Emergency Executive Order 20-14 (3/23/2020).
[5] Emergency Executive Order 20-73 (6/5/2020) (clarifying the applicability of Executive Order 20-14 to situations where a tenant seriously endangers the safety of others who are not residents).
[6] Emergency Executive Order 20-79 (7/14/2020).
[7] Unless the material violation also seriously endangers the safety of others or significantly damages property, *see id.* ¶ 2d.
[8] *Id.* ¶¶ 3, 10.
[9] *Id.* ¶ 2a.
[10] *Id.* ¶ 2b (citing to Minn. Stat. §504B.171, subd. 1).
[11] *Id.* ¶ 2d.
[12] *Id.*
[13] *Id.* ¶¶ 2c, 4.
[14] *Id.*
[15] *See* Minn. Stat. §504B.135; *Tich v. Williams*, 27-CV-HC-20-1651 (Hennepin County District Court 11/16/2020) ("under Minn. Stat. §504B.135, a tenancy at will in which no rent is due may be terminated only upon notice of at least three months to the tenant").
[16] Minn. Stat. §504B.111.
[17] Emergency Executive Order 20-79 ¶ 12.
[18] *See* Lawrence R. McDonough, *Wait a Minute! Residential Eviction Defense in 2009 Still is Much More than "Did You Pay the Rent?"*, 35 William Mitchell Law Rev. 762 (2009).
[19] *See C&T Props. v. McCallister*, No. C9-98-940 1999 WL 10262 (Minn. Ct. App. 1/12/1999).
[20] Except for other occupants of the property.
[21] *See* Minn. Stat. §§504B.161, 504B.375-471.
[22] Emergency Executive Order 20-79 p. 1.
[23] Ann O'Connell, *Emergency Bans on Evictions and Other Tenant Protections Related to Coronavirus*, Nolo (11/30/2020) *https://www.nolo.com/legal-encyclopedia/emergency-bans-on-evictions-and-other-tenant-protections-related-to-coronavirus.html*; Emily Benfer, *COVID-19 Housing Policy Scorecard*, Eviction Lab *https://evictionlab.org/covid-policy-scorecard/* (last visited 12/2/2020).
[24] *See* United States Dept. of Housing and Urban Development, *Extension of Foreclosure and Eviction Moratorium in Connection with the Presidentially–Declared COVID–19 Emergency*, Mortgagee Letter (8/27/2020); Federal Housing Finance Agency, *FHFA Extends Foreclosure and REO Eviction Moratoriums*, (8/27/2020). *https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-Foreclosure-and-REO-Eviction-Moratoriums.aspx*
[25] Centers for Disease Control and Prevention; Department of Health and Human Services; Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (9/4/2020). At the time this article went to print the CDC's eviction moratorium was scheduled to end 12/31/2020. As things look now, it is likely this will be extended. Even if the CDC eviction moratorium is allowed to expire, it is this author's opinion that the State of Minnesota would do well to at least modify its own moratorium to align with the CDC's.
[26] Centers for Disease Control and Prevents, *supra.*
[27] *Id.* To qualify for protection a tenant must (1) expect to make less than $99,000 ($198,000 for married couples) in 2020; (2) had low enough income not to have reported in 2019, or; (3) received a stimulus check under the CARES Act.
[28] Centers for Disease Control and Prevents, *supra.*
[29] Andrea Palumbo & Karmen McQuitty, *Tenant Rights in the Era of COVID-19*, Bench & Bar of Minnesota 36 (May/June 2020).
[30] *See* Minn. Stat. §491A.01, subd. 3a


CLICK IT OR ZIP IT

# It's time to rethink the seat-belt gag rule

By Michael T. Burke & Brandon D. Meshbesher

The overwhelming majority of drivers and passengers use a seat belt. A 2019 study found that nationwide seat belt use was over 90 percent for drivers and just under 90 percent for right-front seat passengers.[1] While compliance has been historically lower for backseat passengers, backseat passengers nonetheless use a seat belt about 75 percent of the time.[2] The combination of governmental efforts to mandate seat belt availability and compliance, awareness campaigns such as "click it or ticket," and the introduction of technological features like seat belt reminders and interlocks have helped make wearing a seat belt the rule rather than the exception.[3]

Even though the vast majority of motor-vehicle occupants use seat belts and many states—including Minnesota—impose monetary penalties for noncompliance, the use or failure to use a seat belt is not admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of a motor vehicle.[4] But evolving social norms and legal developments have rendered the original purpose of the seat-belt gag rule obsolete, and it should be modified to better reflect 21st century norms.

## History of seat belt legislation

In late 1963, the federal government passed legislation allowing the Commerce Department to issue mandatory safety standards for seat belts sold in interstate commerce.[5] Minnesota followed suit that same year and passed legislation providing that after January 1, 1964, all new motor vehicles subject to Minnesota license fees needed to be equipped to allow the installation of seat belts in the front seat.[6] Absent from that legislation, however, was any mandate to actually wear a seat belt.[7] At that time, wearing a seat belt was optional and, while it may seem unconscionable now, there was substantial debate over whether seat belts could prevent injuries.[8] As a compromise, the Minnesota Legislature passed the seat-belt gag rule to ensure that a driver who caused a motor vehicle accident could not blame the other driver for failing to wear a seat belt.[9] The new legislation provided that "proof of the use or failure to use seat belts… shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle."[10]

Near the end of the 1960s Congress passed the first federal seat belt law, which mandated that all new cars include seat belts installed at all seating positions.[11] Today, with the exception of New Hampshire, all states and the District of Columbia require adult front-seat occupants to use seat belts, and adult rear-seat passengers are also covered by laws in 31 states and the District of Columbia.[12] In Minnesota, failing to use a seat belt is a primary offense, meaning that drivers and passengers must be buckled up or face a monetary fine.[13]

## The admissibility of seat belt evidence at trial

Minnesota's seat-belt gag rule last saw appreciable attention in the 2018 appellate decision *Jensen v. Arndt*.[14] In *Jensen*, the court of appeals considered the district court's application of the seat-belt gag rule, which precluded the plaintiff from presenting evidence of injuries that were the result of her seat belt use.[15] The court of appeals affirmed the district court with respect to its evidentiary decision, but Judge Kirk, writing separately, expressed the view that it was time for the Legislature to reconsider the seat-belt gag rule because the rule, in effect, "provides no consequence for damages in a civil action for those who fail to wear their seat belts, but it does, as in this case, punish a person who is faithful to the law by buckling up, where the seat belt causes the injuries."[16] He noted that the seat-belt gag rule is rooted in Minnesota's "frontier past, along with the sense that personal freedom extends to the right to endanger one's self," despite the fact that Minnesota law requires drivers and passengers to use seat belts and penalizes them for failing to do so.[17] Judge Kirk concluded that "Minnesota's seat-belt gag rule is outdated, and the legislature should reconsider it."[18]

In 2019, both houses of Minnesota's 91st Legislature drafted bills attempting to repeal the seat-belt gag rule, but neither bill passed.[19] The Legislature's attempt to repeal the seat-belt gag rule follows a trend set in other jurisdictions since the beginning of the 21st century. States such as Oklahoma and Texas, for example, have repealed their seat-belt gag rules.[20] In 2015, the Texas Supreme Court overruled its state's seat-belt gag rule by reasoning that "seat belts are now required by law and have become an unquestioned part of daily life for the vast majority of drivers and passengers," thus rendering the seat-belt gag rule "an anachronism."[21] While acknowledging that "[t]he rule may have been appropriate in its time," the Texas Supreme Court explained that by 2015, it was "a vestige of a bygone legal system and an oddity in light of modern societal norms."[22]

## It's time for Minnesota to modify the seat-belt gag rule

Minnesota's original justifications for the seat-belt gag rule are no longer applicable or relevant. For the last 60 years, new motor vehicles have been manufactured with seat belts already installed and, along with nearly every other state, Minnesota has enacted legislation to mandate the use of seat belts for all motor vehicle passengers.[23] Moreover, data shows that the overwhelming majority of people wear a seat belt when in a motor vehicle.[24] While it might once have been common for a driver or passenger to be unrestrained, that is now a rarity.[25] Due to changes in law and behavior over the past half century, it makes little sense to continue using the seat-belt gag rule in its current form. Excluding seat belt use from consideration at trial, given the state and the country's significant increase in seat belt use and the passage of laws mandating compliance, is antiquated.

Some, particularly attorneys representing injured plaintiffs, have expressed concerns over the effect an outright repeal of the seat-belt gag rule might have.[26] Specifically, it has been argued that the ability to present evidence of seat belt non-use will result in increased cost of litigation because both plaintiffs and defendants will need to present expert testimony concerning what injuries would or would not have been prevented if a seat belt had been used.[27] This argument, however, overlooks potential benefits to plaintiffs. If the seat-belt gag rule were repealed or modified, plaintiffs (as well as defendants) would have the opportunity to present evidence concerning the use or nonuse of seat belts. Judge Kirk highlighted this benefit from the plaintiff's perspective in *Jensen v. Arndt* when reasoning that it was unjust to preclude the plaintiff from introducing evidence of injuries caused by the seat belt itself.[28] Even in cases where a plaintiff is not asserting a claim for injuries caused by a seat belt, plaintiffs would nevertheless benefit from introducing evidence of its use. For example, a plaintiff could argue to the jury that he or she sustained significant injuries despite wearing a seat belt, which would potentially decrease the percentage of contributory negligence assigned to the plaintiff and increase his or her potential recovery.

## How other states address the introduction of seat belt evidence at trial

Recognizing some of the concerns raised by proponents of the seat-belt gag rule, other jurisdictions have taken differing approaches on how seat belt evidence can be presented to a jury. In Florida, for example, the failure to wear a seat belt does not "constitute negligence *per se*, nor shall such violation be used as *prima facie* evidence of negligence or be considered in mitigation of damages." However, such evidence "may be considered as evidence of comparative negligence."[29] New York, on the other hand, does not allow seat belt evidence to be considered with respect to comparative negligence, but allows such evidence to be introduced for purposes of proving the plaintiff's failure to mitigate his or her damages, provided that the defendant pleaded the failure to use a seat belt as an affirmative defense.[30] In order for seat belt non-use to be submitted to the jury in New York, the defendant must "demonstrate, by competent evidence, a causal connection between the plaintiff's nonuse of an available seat belt and the injuries and damages sustained."[31]

Other jurisdictions have balanced the interests of both plaintiffs and defendants by limiting either the percentage of fault attributable to the plaintiff, or the amount of any reduction for the plaintiff's failure to mitigate damages. Missouri, for example, does not allow seat belt non-use to be considered as evidence of comparative fault, but the amount of a plaintiff's recovery may be reduced by 1 percent—after any reduction for comparative negligence—if the party seeking to introduce such evidence presents expert testimony proving that the plaintiff's failure to wear a seat belt contributed to his or her injuries.[32] Iowa's statute is nearly identical to Missouri's statute.[33] In 2018, however, Iowa amended its statute to increase the available reduction of a plaintiff's recovery from 5 percent to 25 percent.[34] Michigan and Oregon both limit reductions in damages to 5 percent, although Michigan allows seat belt non-use to be considered as evidence of negligence while Oregon limits its consideration to the mitigation of damages.[35] Wisconsin also allows evidence of seat belt use to be presented for contributory negligence purposes, but limits any reduction in damages to 15 percent.[36]

In California, failing to use a seat belt when required by law neither establishes negligence as a matter of law nor negligence *per se* for comparative fault purposes.[37] Juries, however, are permitted to consider evidence of a plaintiff's failure to use a seat belt, and there is no statutory limit on any reduction in damages based upon such evidence.[38] California courts have held that "[t]he burden is on the defendants to prove whether in the circumstances of the case, plaintiffs in the exercise of ordinary care should have used the seat belts available to them and what injuries plaintiffs would have sustained, according to expert testimony, if the seat belts had been used."[39] Thus, California allows courts to instruct juries "on the existence of the seat belt statute in appropriate cases, while allowing the jury to decide what weight, if any, to give the statute in determining the standard of reasonable care."[40]

## Three ways to reform Minnesota's seat-belt gag rule

As described above, state legislatures across the country have crafted different ways for seat belt evidence to be presented at trial while keeping in mind the need to balance the interests of both plaintiffs and defendants. Minnesota can and should adapt to these already changed times by using one of three potential methods.

The first is an outright repeal of the seat-belt gag rule, as the Minnesota Legislature tried to do in 2019. Although this is the simplest course for the Legislature, courts would be left with the task of deciding how such evidence can or should be presented to a jury, whether the failure to use a seat belt constitutes negligence *per se* or negligence as a matter of law, the applicable burdens of proof, whether expert testimony is required, and many other important issues. It seems clear that if the Legislature chooses to repeal the seat-belt gag rule, it should replace the rule's provisions with guidance for the courts as to how such evidence may be presented and interpreted.

The second method is the percent-reduction method used in states like Wisconsin and Iowa.[41] Both Wisconsin and Iowa place a limit on the available reduction in damages, but differ as to whether such evidence may be considered for contributory negligence purposes or only with respect to the mitigation of damages. Preventing seat belt non-use from being considered for contributory negligence purposes but allowing non-use to be considered for the failure to mitigate damages makes little sense. Considering state laws that require the use of seat belts, vehicle seat belt alerts, and the significant amount of education on safety benefits of wearing a seat belt, it is difficult to call the failure to use one anything other than negligence. As such, if the Legislature is inclined to adopt a percent-reduction method that limits the available reduction to a specified percentage, it should allow seat belt evidence to be considered for contributory negligence purposes and not limit its application to the failure to mitigate. It should also set the available percentage reduction between 15 and 25 percent. The 1 percent limit in Missouri and 5 percent limit in Michigan and Oregon do not adequately reflect the known safety benefits of seat belt use and the near-ubiquitous compliance with state mandates. The data shows that seat belt non-use is extremely uncommon and a reasonable person either knows or should know that failing to wear a seat belt may result in significant injury. Any percent-reduction method should reflect these considerations.

A third option is the California method, which appears to present the cleanest and fairest approach to balancing the interests of plaintiffs and defendants.[42] The California method provides that failing to use a seat belt is not considered negligence as a matter of law or negligence *per se*. Nevertheless, such evidence may be presented to and considered by a jury. Importantly, California leaves the jury to decide what weight, if any, to give such evidence in determining the standard of

reasonable care. This makes sense given the jury's role in apportioning fault between the parties. California also places the burden on the defendant to prove whether the plaintiff should have used a seat belt in the exercise of ordinary care, and requires the defendant to present expert testimony as to what injuries, if any, the plaintiff would have sustained if a seat belt had been used.

If the Legislature chooses to adopt the California method, it should supplement it with New York's approach by making the failure to use a seat belt an affirmative defense.[43] This proposed method allows the jury to determine the weight of all the evidence and does not artificially restrict the jury from assigning negligence to any party. It also places the burden squarely on the defendant to: (1) establish evidence showing that the plaintiff, in the exercise of ordinary care, should have worn a seat belt under the circumstances; and (2) introduce expert testimony as to what injuries the plaintiff would have sustained if he or she had used a seat belt. It is then left to the jury to interpret all the evidence and decide what weight to give it—as is the standard in nearly every other civil case.

Whether in the form of an outright repeal, a percentage reduction from a verdict, or a system similar to California's, the Minnesota Legislature should bring the seat-belt gag rule into the 21st century. At this time, the policy considerations underlying the rule are extinct. States like California, Wisconsin, New York, Iowa, and Michigan all allow seat belt evidence to be presented to civil juries, and there is no reason that Minnesota cannot or should not do the same. ▲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## Notes

[1] *Seat Belt Use in 2019 – Overall Results*, Nat'l Hwy. Traffic Safety Admin. (Dec. 2019), *available at https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812875* .

[2] R. Li & Timothy M. Pickrell, *Occupant Restraint Use in 2017: Results From the NOPUS Controlled Intersection Study*, Nat'l Hwy. Traffic Safety Admin. (Feb. 2019), *available at https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812594.pdf* .

[3] Increasing Teen Safety Belt Use: a Program & Literature Review, Nat'l Hwy. Traffic Safety Admin. (Nov. 2005), *available at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/809899.pdf* .

[4] Minn. Stat. §169.685, subd. 4; *see also* Minn. Stat. §169.686; *see also Seat Belt Defense in All 50 States*, Matthiesen, Wickert & Lehrer, S.C., *available at https://www.mwl-law.com/wp-content/uploads/2018/02/SEAT-BELT-DEFENSE-CHART.pdf* .

[5] UNITED STATES STATUTES AT LARGE, PL 88-201, (12/13/1963), 77 Stat. 361.

[6] Minn. Stat. §169.685, subd. 1 (1963).

[7] *Id.*

[8] Elizabeth Stawicki, *Seat Belt Law Challenged*, Minn. Public Radio *http://news.minnesota.publicradio.org/features/199903/23_stawickie_seat/* (3/23/1999).

[9] *Id.*

[10] Minn. Stat. §169.685, subd. 4.

[11] *See* 49 U.S.C.A. §30127(d) ("Congress finds that it is in the public interest for each State to adopt and enforce mandatory seat belt use laws and for the United States Government to adopt and enforce mandatory seat belt use regulations.").

[12] Insurance Inst. for Hwy. Safety & Hwy. Loss Data Inst., *Seat belts*, *https://www.iihs.org/topics/seat-belts#:~:text=With%20the%20exception%20of%20New,of%20Columbia%20have%20primary%20enforcement* .

[13] Minn. Stat. §69.686, subd. 1.

[14] *Jensen v. Arndt*, 2018 WL 1702408 (Minn. Ct. App. 4/9/2018).

[15] *Id.* at *2–3.

[16] *Id.* at *9.

[17] *Id.*; *see also* Minn. Stat. § 169.686, subd. 1(a), (b) (2016).

[18] *Jensen*, 2018 WL 1702408 at *9.

[19] HF 2454, 91st Leg., (Minn. 2019), *available at https://www.revisor.mn.gov/bills/text.php?number=HF2454&type=bill&version=0&session=ls91&session_year=2019&session_number=0* ; *see also* SF 1350, 91st Leg., (Minn. 2019), *available at https://www.revisor.mn.gov/bills/text.php?number=SF1350&version=latest&session=ls91&session_year=2019&session_number=0* .

[20] Okla. Stat. Ann. tit. 47, § 12-420 ("the use or nonuse of seat belts shall be submitted into evidence in any civil suit in Oklahoma unless the plaintiff in such suit is a child under sixteen (16) years of age."); *see also* Tex. Transp. Code §§545.412(d) *and* 545.413(g) (repealed in 2003 by REFORM OF CERTAIN PROCEDURES AND REMEDIES IN CIVIL ACTIONS, 2003 Tex. Sess. Law Serv. Ch. 204 (H.B. 4)).

[21] *Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 555 (Tex. 2015).

[22] *Id.*

[23] *Supra* note 14.

[24] *Supra* note 2.

[25] *Id.*

[26] James H. Manahan, *Legal Learning: Bill Could Repeal Seat Belt Gag Rule*, Duluth News Trib. (2/24/2017), *available at https://www.duluthnewstribune.com/opinion/1884608-Legal-Learning-Bill-could-repeal-seat-belt-gag-rule* .

[27] *Id.*

[28] *Jensen*, 2018 WL 1702408 at *9.

[29] Fla. Stat. §316.614(10).

[30] N.Y. Vehicle & Traffic Law §1229-C(8).

[31] *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164 (1974) (internal citation omitted).

[32] Mo. Rev. Stat. §307.178(4).

[33] Iowa Code §321.445(4).

[34] Iowa Code §321.445(4)(b)(2). Iowa's statute was amended shortly after Judge Kirk's concurrence in *Jensen* to increase the available reduction from five percent to twenty-five percent.

[35] Mich. Comp. Laws §257.710e(8); *see also* Or. Rev. Stat §31.760(1).

[36] Wis. Stat. §347.48(2m)(g).

[37] Cal. Vehicle Code §27315(i).

[38] *Id.*

[39] *Housley v. Godinez*, 4 Cal. App. 4th 737, 743, 6 Cal. Rptr. 2d 111, 115 (1992).

[40] *Id.*

[41] *Supra* at note 38; *see also supra* at note 40.

[42] *Supra* at note 41.

[43] *Supra* at note 34.

# Minnesota's best interest factors should address breastfeeding

## *The facts are in. The law should reflect them.*

By Jacquelyn S. Lutz & Linda R. Allen

A review of Minnesota Statutes leaves one with the firm conviction that Minnesota places breastfeeding, and increasing the rates of breastfeeding mothers, as a priority.

- Minn. Stat. §145.894 directs the commissioner of health to develop public education programs promoting the Maternal and Child Nutrition Act and dictates that the programs must include a campaign to promote breastfeeding.
- Minn. Stat. §145.905 protects the right to breastfeed in any location, public or private.
- Minn. Stat. §181.939 requires employers to provide breaks for a mother to express breast milk for her infant child and to provide reasonable accommodations for doing so.
- Minn. Stat. §617.23 specifies that breastfeeding does not constitute indecent exposure.
- Minn. Stat. §256B.79 requires that a nursing facility provide patient education about breastfeeding in order to be eligible for grants under the Chapter.
- Minn. Stat. §241.89 requires correctional facilities to provide education on breastfeeding to pregnant incarcerated women.

The breadth of statutes concerning breastfeeding makes the absence of any reference to breastfeeding in the family law statutes puzzling. But Minnesota is not alone on this front. While the medical community globally agrees that breastfeeding and breast milk are best for children,[1] very few states address the act in their family law codes. Despite every state in the union having protections for the act of breastfeeding,[2] only four list breastfeeding as a factor to be considered in custody matters: Maine, Michigan, South Dakota, and Utah.[3] Hawaii's statute suggests consideration of breastfeeding in parenting plans, but does not require it.[4]

What do courts do in the absence of such language? There are very few published cases that address the issue of custody and breastfeeding. This does not indicate a lack of controversy around the issue; rather, the delay of the judicial process often makes the subject moot by the time appellate courts can consider the matter. Indeed, a New York court noted that by the time the matter came before the court, "[the child] would now be four years old [and] it appears that the issue is academic."[5]

Does Minnesota need a statute specifically addressing breastfeeding and custody / parenting time? In short: yes. When the ancestors of our current best interest factors were put into law in 1969, only 22 percent of American women breastfed.[6] According to the CDC, 79 percent of babies born in Minnesota in the year 2017 were being breastfed at 6 months of age.[7] Science and society have changed, and the statutes need to change with them. The process of fitting breastfeeding into our current statutory framework is hardly a simple matter. The lack of statutory guidelines and dearth of case law leave judges in a lurch and puts parties at the mercy of wide-ranging judicial discretion. It makes coming to family court on this issue unpredictable—and family court with a young child should be anything but unpredictable. Minnesota law as a whole recognizes the importance of breastfeeding; it's time for the custody and parenting time statutes to reflect it.

## Our current framework

The nutritional, physical, and emotional benefits of breastfeeding implicate a number of factors already cited as elements of a child's best interest under the current law.

### *Sec. 518.17 subd. 1(a)(1) — Physical needs and development*

The American Academy of Pediatrics (AAP) recommends that a child be exclusively breastfed for six months, followed by continued breastfeeding with the introduction of others foods until at least one year.[8] Breast milk has every nutrient necessary to meet a child's needs, including living cells that inhibit the growth of harmful bacteria and viruses in the child's system.[9] Breastfeeding lowers the risk of respiratory tract infections,[10] gastrointestinal infections,[11] and Sudden Infant Death Syndrome,[12] as well as the incidence of clinical asthma, skin reactions, and eczema,[13] celiac disease, and inflammatory bowel disease.[14] It also lowers the risk of childhood obesity, type 1 diabetes, and childhood leukemia/lymphoma.[15] While there is debate about long-term intellectual outcomes, the AAP's review of the science concludes that breastfeeding is highly correlated with high intelligence scores and sound long-term neurodevelopment.[16]

The physical act of breastfeeding is beneficial as well. Nursing exercises the muscles of the jaw and face in a way that causes the bones of the face to develop more fully.[17] Babies who are fed from bottles have narrower jaws and a higher palate that is more likely to restrict nose breathing.[18] Babies who breastfeed less than one year are more likely to need orthodontia and have snoring and breathing-related problems in their future.[19] It is important that the courts understand that at-the-breast feeding and not simply breast-milk-feeding is important to the benefits available to a child.

For the child nursed beyond the age of 12 months, there is weighty research supporting the nutritional benefits of "extended breastfeeding." Breast milk continues to provide substantial nutrients beyond 12 months, particularly protein, fat, and most vitamins.[20] The amount of antibodies and immune factors in milk increases as a child ages (likely an evolutionary response to growing children's habit of putting things in their mouths).[21] Toddlers that are breastfed are sick less often than their formula-fed counterparts.[22] The World Health Organization recommends breastfeeding to age two, at a minimum.[23]

### *Sec. 518.17 subd.1(a)(2) — Special medical needs*

Breastfeeding children who were born prematurely lowers the rates of sepsis and infection, and improves neurodevelopmental outcomes as well as mental, motor skill, and behavior ratings as they age.[24] Babies with genetic conditions that affect their immune systems (Down syndrome, cystic fibrosis, celiac disease, or other malabsorption issues) are recommended to breastfeed due to the superior antibodies and immunoagents present in breast milk as well as the easier digestion.[25]

### *Sec. 518.17 subd 1(a)(1) — Emotional needs and development*

Beyond basic nutrition, breastfeeding also provides emotional and psychological benefits to a child. Breastfeeding promotes a secure attachment of the child to the breastfeeding parent, which has a significant impact on mental development. Dr. Eleanor Willemsen, Ph.D. and Kristen Marcel wrote an academic article aimed at the family bar entitled "Attachment 101 for Attorney: Implications for Infant Placement Decisions."[26] Willemsen and Marcel write:


> Attachment in infancy gives the individual a base of operations from which to venture forth to learn about the world, connect to other people in it, and acquire a firm sense of one's self and one's place in that world.[27]

According to Willemsen and Marcel, in infancy, attachment needs are met by actual proximity, physical contact, and communication through eye contact or gesture with the caregiver.[28] Breastfeeding naturally fills each of those needs and, therefore, creates a strong attachment to the breastfeeding parent. Having a secure attachment, and not disrupting it, provides numerous benefits for a child in the first 24 months, such as increased independence, self-awareness, and superior sensorimotor skills[29] as well as longer-term benefits that include earlier language development and better social skills.[30]

### *Sec. 518.17 subd. 1(a)(10) — The benefit of maximizing parenting time with parents*

Attorneys and courts may be eager to support breast-milk-feeding (that is, bottle-feeding expressed breast milk) as distinguished from at-the-breast-feeding: It makes balancing parenting time allocations easier. While there needs to be a balance for both parents, it is important to stress that the physical act of breastfeeding provides significant benefits beyond nutrition. This includes the muscular skeletal benefits discussed above as well as the psychological benefits. Importantly, maintaining a secure attachment to the breastfeeding parent can actually promote successful parenting time with the other parent. According to Willemsen and Marcel, "[a secure attachment] enables the child to tolerate being separated from the caregiver, both physically and mentally, without anxiety increasing enough to disrupt play."[31] By encouraging breastfeeding and a secure attachment to the breastfeeding parent, the best interests of the child in having a healthy relationship with the other parent are promoted because the child will be better able to tolerate separation.

### *What a breastfeeding best interest could do*

Currently, five states address breastfeeding in their family law statutes as it relates to custody and parenting time schedule. In Hawaii the statute states that "A detailed parenting plan may include, but is not limited to, provisions relating to… breastfeeding, if applicable."[32] Although it is valuable that the statute sets forth breastfeeding as a consideration, it gives no guidance whatsoever as to how it should affect parenting time.

The state of Maine, like Minnesota, uses best interest factors—and, in listing them, notes that the court must consider "[i]f the child is under one year of age, whether the child is being breastfed."[33] One can infer from this language that parenting time should be set in a way that maximizes a child's ability to continue to breastfeed until one year old. But research has demonstrated that there is nothing magical about turning one; many children breastfeed beyond this age and receive proven benefits from it. Each child is unique and should be allowed to have a parenting time schedule that supports the child's ability to continue to breastfeed until its natural conclusion for that child.

In Michigan, the statute creates parenting time factors, one of which is "Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing."[34] The Michigan statute takes the age limit in the wrong direction from Maine's statute and then sets a standard for consideration of breastfeeding after six months that is too subjective and difficult to prove.

Utah has detailed guidelines that establish a parenting time schedule for the noncustodial parent based upon a child's age and breaks this down by stages according to age. For example, a child that is five months old or younger is to be with the noncustodial parent for six hours per week in three blocks of time.[35] There is then an expansion at five months, nine months, 12 months, 18 months, and three years. Utah also sets forth considerations for deviating from these guidelines such as "the lack of reasonable alternatives to the needs of a nursing child."[36] But the guidelines do not define "reasonable alternatives." Is asking the breastfeeding parent to pump a reasonable alternative? What about supplementing with formula? In the end, the statute is vague.

South Dakota sets forth the most detailed prescription for addressing the needs of breastfeeding children when setting a parenting time schedule. It is worth quoting at length:

> "Parents must be sensitive to the special needs of breastfeeding children. A child's basic sleep, feeding, and waking cycles should be maintained to limit disruption of the child's routine. Forcibly changing these routines due to the upheaval of parental disagreement is detrimental to the physical health and emotional well-being of the child. On the other hand, it is important that the child be able to bond with both parents.
>
> "For children being exclusively breastfed, the nursing child can still have frequent parenting time with the father. The amount of time will be dictated by the infant's feeding schedule, progressing to more time as the child grows older. Yet where both parents have been engaged in an ongoing caregiving routine with a nursing child, the same caregiving arrangement should be continued as much as possible to maintain stability for the child. If the father has been caring for the child overnight or for twenty-four hour periods while the nursing mother sleeps or works, then these guidelines encourage that arrangement to continue.
>
> "A mother may not use breastfeeding as a means to deprive the father of time with the child. If, for example, a nursing mother uses day care or a babysitter for the child, the same accommodations (i.e. bottle feeding with breast milk or formula or increased time between breast feeding sessions) used with the day-care provider or babysitter will be used with the father, if the father is capable of personally providing the same caregiving."[37]

This statute gives a lot of guidance on how to look at each child's individual needs and schedule indicating the parent that is not breastfeeding should have parenting time that is subject to the child's routine. The final paragraph, however, turns a critical eye toward the breastfeeding parent, suggesting breastfeeding can be used as a weapon to deprive another parent of parental rights. This language potentially puts the breastfeeding parent on the defensive. It further sets forth a way to incorporate the other parent in the schedule of the child that is already dealt with earlier in the statute and thus seems duplicative and unnecessary.

## It's time for Minnesota to factor in breastfeeding

Given the proven health benefits, both physical and psychological, to a breastfed child, continuing the physical breastfeeding relationship should be a priority in family law cases. Breastfeeding should be supported—as should the need of children for both parents. Nothing in this article should be construed as advocating for a breastfeeding parent controlling a child's schedule or engaging in "gatekeeping." Willemsen and Marcel conclude that babies can, and often do, form multiple attachments including with mother, father, and a regular caregiver.[38]

The realities of biology often result in a breastfed child being primarily attached to the breastfeeding parent at first, but the relationships of both parents with a child are important. It is time for the state to provide guidelines for the courts and the parties on how to protect the breastfeeding relationship and ensure a healthy relationship with both parents by adding it to the best interest factors. ▲


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## Notes

[1] American Academy of Pediatrics, *Breastfeeding and the Use of Human Milk*, 129 Pediatrics, Number 3, e827 (March 2012) (Policy Statement); World Health Organization, Nutrition: Exclusive Breastfeeding (2017) retrieved at *http://www.who.int/nutrition/topics/exclusive_breastfeeding/en/* .

[2] Breastfeeding State Laws, National Conference of State Legislatures, accessed at *https://www.ncsl.org/research/health/breastfeeding-state-laws.aspx* .

[3] Me. Rev. Stat. tit. 19-A, §1653 3P (2019); Mich. Comp. Laws §722.27a Sec.7a(7)(b) (2020); S.D. Codified Laws §25-04A-Appendix A 1.16 F (2019); Utah Code §30-3-34 2(o).

[4] Haw. Rev. Stat. §571-46.59(c)(4) (2019).

[5] *McClure v. Zimmer*, 605 N.Y.S.2d, 107, 199 A.D. 395 (N.Y. App. Div. 1993).

[6] Anne L. Wright & Richard J. Schanler, *The Resurgency of Breastfeeding at the End of the Second Millennium*, 131, The Journal of Nutrition, 421S (200).

[7] Breastfeeding Report Card – United States 2020, Centers for Disease Control and Prevention, accessed here: *https://www.cdc.gov/breastfeeding/data/reportcard.htm* .

[8] American Academy of Pediatrics, *Breastfeeding and the Use of Human Milk*, 129 Pediatrics, Number 3, e827 (March 2012) (Policy Statement).

[9] Diane Wiessinger, Diana West, & Teresa Pitman, La Leche League International, The Womanly Art of Breastfeeding, 6, 8th ed. 2010.

[10] *See supra*, note ii, at e828.

[11] *Id.* at e829.

[12] *Id.* at e829.

[13] *Id.* at e829-e830.

[14] *Id.* at e830.

[15] *Id.* at e830.

[16] *Id.* e830-e831.

[17] *See supra*, note iii, at 7.

[18] *Id.*

[19] *Id.*

[20] Dewy KG, *Nutrition, Growth, and Complementary Feeding of the Breastfed Infant*, 48 Pediatric Clinical North America, Issue 1, 87-104 (Feb. 2001).

[21] *See supra,* note iii, at 203

[22] Gulick EE, *The Effects of Breastfeeding on Toddler Heath*, 12, Pediatric Nursing, Issue 1, 51-4 (Jan-Feb 1986).

[23] World Health Organization, Nutrition: Exclusive Breastfeeding (2017) retrieved at *http://www.who.int/nutrition/topics/exclusive_breastfeeding/en/* .

[24] *See supra,* note ii, at e831.

[25] *See supra*, note iii, at 370-71.

[26] Eleanor Willemsen & Kristen Marcel, Symposium, *Attachment 101 for Attorneys: Implications for Infant Placement Decisions,* 36, Santa Clara L. Rev., 439-75 (1996); available online at *http://www.psychology.sunysb.edu/attachment/online/attachment101.pdf* [page numbers cite to online version].

[27] *Id.* at 15.

[28] *Id.* at 4.

[29] *Id.* at 9.

[30] *Id.* at 9.

[31] *Id.* at 7.

[32] Haw. Rev. Stat. § 571-46.59(c)(4) (2019).

[33] Me. Rev. Stat. tit. 19-A, § 1653 3P (2019).

[34] Mich. Comp. Laws § 722.27a Sec.7a(7)(b) (2020).

[35] Utah Code § 30-3-35.5 (3)(a).

[36] Utah Code § 30-3-34 2(o).

[37] S.D. Codified Laws § 25-04A-Appendix A 1.16 F (2019).

[38] *Id.* at 15.

# 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.


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## CRIMINAL LAW

### JUDICIAL LAW

**Check forgery: Forged signature on front of check is not a "false endorsement."** Appellant was found guilty of check forgery by false endorsement for writing 18 checks from S.H.'s account to a grocery store, forging S.H.'s signature on the signature line on the front of the check. Appellant argues he did not "endorse" the checks, because he did not sign the backs of the checks.

Appellant was convicted under Minn. Stat. §609.631, subd. 2(2), which makes it a crime for a person, with the intent to defraud, to "falsely endorse[] or alter[] a check so that it purports to have been endorsed by another." "Endorse" is not defined, but the court determines that, with respect to checks, the term has an established, accepted special or technical meaning, which is reflected in dictionary and legal definitions of the word, as well as in Minnesota statutes and case law. This special or technical understanding is that an endorsement on a check is a signature other than that of the check's maker.

The court further concludes that this special, technical meaning of "endorse" applies to the check forgery statute. Because section 609.631, subd. 2(2), clearly uses "endorse" only as it relates to checks, it is reasonable to conclude that the Legislature intended "endorse" to have its special, technical meaning. Moreover, section 609.631 criminalizes the act of the false making of a check in subd. 2(1) and the false endorsing of a check in subd. 2(2). Only the special, technical meaning of "endorse" recognizes that the act of making a check is separate from the act of endorsing a check.

Finally, the court finds the evidence is insufficient to support appellant's conviction, because there is no evidence he falsely endorsed or altered a check, only evidence that he falsely made checks. Appellant's conviction is reversed. ***State v. Jonsgaard***, 949 N.W.2d 161 (Minn. Ct. App. 8/10/2020).

**Criminal sexual conduct: Phrase "force or coercion" in first-degree criminal sexual conduct statute establishes alternative means of committing element of offense.** A jury found appellant guilty of first-degree criminal sexual conduct, noting in response to special verdict questions that they found he used force, coercion, and both force and coercion in the commission of the offense. The state told the jury in its closing argument that the offense required that appellant used force or coercion and stated that the jurors did not "need to agree that there was either force or coercion." Appellant argues that the state's comments violated his right to a unanimous verdict, as the jury was required to unanimously agree whether the intentional act of sexual penetration was committed by force, committed by coercion, or committed by both force and coercion.

While a jury must unanimously agree that the state has proved each element of a charged offense, it need not always decide unanimously which of several possible means a defendant used to commit an offense. The court concludes that force and coercion are alternative means of completing one element of the first-degree criminal sexual conduct offense. One element required for a first-degree criminal sexual conduct conviction is "the use of force *or* coercion." Minn. Stat. §609.342, subd. 1(e)(1). The court notes that the inclusion of "or" in this section indicates an alternative. This interpretation is consistent with similarly structured statues that the court has found to present alternative means of committing an offense, as well as United States Supreme Court precedent finding it constitutionally permissible for jurors to reach a guilty verdict without unanimously specifying which overt act was

the means by which a crime was committed. Thus, the state did not misstate the law in its closing argument. ***State v. Epps***, 949 N.W.2d 474 (Minn. Ct. App. 8/24/2020), *review granted* (11/25/2020).

■ **Evidence: Confessions to multiple offenses require evidence corroborating either the commission of each offense or their attendant facts.** Appellant was convicted of five criminal sexual conduct offenses. Among other arguments on appeal, he claims the evidence was insufficient to corroborate his confession to one of those offenses. Specifically, appellant told an investigator that he allowed C.D., a 10-year-old, to hold his penis while he peed when they were scouting for deer.

A defendant's confession is direct evidence of guilt, but it must be "sufficiently substantiated by independent evidence of attending facts or circumstances from which the jury may infer the trustworthiness of the confession." *In re Welfare of M.D.S.*, 345 N.W.2d 723, 735 (Minn. 1984).

Here, the state relied on the following evidence to corroborate appellant's deer scouting incident confession: C.D. testimony corroborated appellant's confessions to two other incidents—C.D.'s testimony about an incident of abuse while duck hunting with appellant, and a Facebook message appellant sent to C.D. apologizing for his abuse. The court finds this evidence insufficient, as none of it specifically relates to the deer scouting incident. Therefore, the evidence was insufficient to allow the jury to infer the trustworthiness of appellant's confession to the deer scouting incident and reach a guilty verdict, so his conviction for that offense is reversed. ***State v. Holl***, 949 N.W.2d 461 (Minn. Ct. App. 8/24/2020), *review granted in part, denied in part* (11/17/2020).

■ **MIERA: Defendant is not exonerated when a conviction is vacated based on a clarification of the law, if conduct violated existing law at the time of the offense.** Police were called after witnesses saw appellant pushing A.R.H. into a vehicle and possessing a pistol. When police arrived, appellant ignored their commands and he was placed under arrest, after which police located a BB gun nearby. Appellant was charged with being a felon in possession of a firearm, domestic assault, and obstruction of legal process. In 2010, he pleaded guilty to the felon in possession charge, and execution of a 60-month sentence was stayed for 10 years. In 2011, appellant violated his probationary conditions and his sentence was executed. In 2016, the Minnesota Supreme Court ruled that an air-powered BB gun is not a "firearm" under the felon in possession of a firearm statute. In 2017, the district court granted the state's motion to vacate appellant's conviction and dismiss the charge against him. Appellant filed a petition for an order declaring him eligible for compensation under the Minnesota Imprisonment and Exoneration Remedies Act (MIERA). The district court denied his petition.

For compensation under the MIERA, a petitioner must have been exonerated. "Exonerated" is specifically defined in Minn. Stat. §590.11, subd. 1(b), and requires that the petitioner's judgment of conviction was vacated, reversed, or set aside, or a new trial ordered, "on grounds consistent with innocence." "On grounds consistent with innocence" requires a showing of factual innocence.

Appellant's conviction in 2010 was based on established law at that time, which held that a BB gun was a firearm under multiple statutes. The Supreme Court later determined that a BB gun is not a firearm specifically under the felon in possession statute. However, the court of appeals focuses on the fact that appellant's conduct was a crime under existing law at that time. The Supreme Court's later clarification of the law does not change that fact. Appellant has provided no other evidence of his factual innocence. Thus, he does not qualify as "exonerated" under the MIERA. ***Kingbird v. State***, 949 N.W.2d 744 (Minn. Ct. App. 8/31/2020), *review granted* (11/17/2020).

■ **Vehicle forfeiture: Driver participating in ignition interlock program must be enrolled with the vehicle subject to forfeiture proceedings in order to stay forfeiture.** Appellant's 1985 Ferrari was forfeited after he was convicted of DWI. He argues on appeal that the forfeiture should have been stayed due to his participation in the ignition interlock program. Two months after this DWI, appellant was arrested for another DWI offense, after which he enrolled again in the ignition interlock program with his Range Rover. Ignition interlock was not installed in his other vehicles, including his Ferrari.

Under a 2019 addition to the DWI forfeiture scheme, an exception to forfeiture was enacted. Minn. Stat. §169A.63, subd. 13(a), specifically provides that "[i]f the driver who committed a designated offense or whose conduct resulted in a designated license revocation becomes a program participant in the ignition interlock program under section 171.306 at any time

before the motor vehicle is forfeited, the forfeiture proceeding is stayed and the vehicle must be returned." The question is whether this section requires appellant to participate in the program with the to-be-forfeited car, here, his Ferrari, as opposed to any car—that is, whether his participation in the program with his Range Rover qualified him for stay of the forfeiture of his Ferrari.

The court points to section 169A.13, subd. 13(a)'s use of "the vehicle," not just "vehicle," which the court finds to mean that the section refers to not just any vehicle, but to a particular vehicle. Given the statute as a whole, which addresses vehicles subject to forfeiture, the court finds that the particular vehicle referred to is the vehicle that is to be forfeited. Thus, the driver must be participating in the program with the vehicle that is to be forfeited to qualify for a stay of the forfeiture under section 169A.63, subd. 13(a).

Here, appellant did not enroll in the ignition interlock program with his Ferrari, the vehicle subject to forfeiture. Thus, he was not eligible for a stay of the forfeiture proceedings under section 169A.63, subd. 13. ***Jensen v. 1985 Ferrari***, 949 N.W.2d 729 (Minn. Ct. App. 8/31/2020).

■ **DWI: Postconviction challenge of a test refusal conviction is timely if filed within two years of *Johnson v. State*.** Appellant was arrested for DWI after police suspected he drove while under the influence of cannabis. He was offered blood and urine tests, but he refused both. He ultimately pleaded guilty to third-degree test refusal. He was discharged from probation in 2014. In 2019, he petitioned for postconviction relief asking that his conviction be vacated based on the rule declared in *Birchfield v. North Dakota*, 136 S.Ct. 1260 (2016), a rule the Minnesota Supreme Court declared retroactive in *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018). The state argued appellant's petition was time-barred, because it was not filed within two years of the 2016 *Birchfield* decision. The postconviction court found appellant's petition timely, but denied the petition.

First, the court of appeals agrees that appellant's petition was timely. Section 590.01, subd. 4(a), requires that a postconviction petition be filed within two years of a conviction, sentence, or appeal disposition, but the court can consider petitions filed outside of that time if any of five exceptions applies. Petitions invoking an exception must be filed within two years of the date the claim arises—that is, within two years of when the petitioner knew or should have known that the claim existed. Minn. Stat. §590.01, subd. 4(c). Appellant invokes the exception to the general two-year requirement contained in section 590.01, subd. 4(b)(3), which applies when "the petitioner asserts a new interpretation of federal or state constitutional or statutory law... and the petitioner establishes that this interpretation is retroactively applicable to the petitioner's case." The event that supports appellant's right to postconviction relief is the new and retroactive interpretation of law, which occurred in two steps: (1) a new rule of law was announced in *Birchfield*, and (2) *Johnson* determined that the *Birchfield* rule applies retroactively. This second step did not occur until 2018. Thus, appellant's 2019 petition was timely.

Next, the court holds that the postconviction court erred in denying appellant's petition based on the postconviction court's conclusion that the *McNeely* rule does not apply retroactively to appellant's case. The retroactive application of *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), was decided by the court in *Hagerman v. State*, 945 N.W.2d 872 (Minn. Ct. App. 2020), *review granted* (Minn. 8/25/2020), in which the court held that "*McNeely*, as applied through the *Birchfield* rule, is substantive and retroactive." Thus, the postconviction court's decision is reversed.

Finally, the court concludes the postconviction court erred in failing to follow the heightened pleading requirement and burden-shifting procedure set out in *Fagin v State*, 933 N.W.2d 774 (Minn. 2019), for postconviction challenges raising a *Birchfield* claim. The case is remanded for further proceedings. ***Edwards v. State***, 950 N.W.2d 309 (Minn. Ct. App. 9/21/2020).

■ **4th Amendment: Scope of traffic stop may be expanded to investigate suspected pretrial release violation if expansion is reasonable under *Terry v. Ohio* and supported by reasonable suspicion.** Appellant was on pretrial release with conditions in a DWI and controlled substance case when police pulled over a speeding vehicle in which he was a passenger. The officer recognized appellant and was aware he had a record. The officer had also investigated appellant's involvement in an assault 10 days earlier, during which he learned that appellant was on pretrial release. The officer smelled alcohol coming from the vehicle and asked the driver and passengers if they had been drinking. Appellant responded affirmatively and admitted a condition of his release was abstaining from alcohol. Appellant then blew 0.03 on a PBT. He was arrested for violating his release conditions. During a search of his person, the officer found shotgun shells in his clothing. The district court denied appellant's motion to suppress the shotgun shells, concluding the evidence was found during a valid search incident to arrest. Appellant was convicted for unlawful possession of ammunition after a stipulated facts bench trial.

When a lawful investigatory traffic stop is expanded beyond the initial purpose of the stop, each incremental intrusion must be tied to the original legitimate purpose of the stop, be supported by independent probable cause, or be reasonable, as defined in *Terry v. Ohio*, 88 S.Ct. 1868 (1968). Here, the traffic stop was initially justified because the driver of the vehicle failed to signal a turn.

The expansion of the stop to investigate whether appellant's alcohol consumption violated any pretrial release conditions was also justified, because the court finds it was reasonable under *Terry*. *Terry* calls for a balancing of the government's need to search and seize and the individual's right to personal security free from arbitrary interference by the government. The court finds that expanding the investigation to include appellant's pretrial release status did intrude upon his individual rights, but that the intrusion was minimal. This minimal intrusion was outweighed by the public safety interest underlying the imposition of pretrial release conditions.

The officer also articulated an adequate basis to expand the stop to investigate appellant's pretrial status. When the officer asked appellant if he was subject to a "no drinking" condition, he had smelled alcohol in the vehicle, appellant had admitted to consuming alcohol, and the officer was aware of appellant's history with law enforcement and that appellant was on pretrial release 10 days earlier. Under these circumstances, the officer reasonably suspected a pretrial release violation and was justified in questioning appellant about his release conditions. Appellant's subsequent admission that he had a "no drinking" condition provided a reasonable basis for the PBT. The PBT's confirmation of appellant's alcohol consumption provided a

reasonable basis for the officer's investigation into the status and conditions of appellant's pretrial release. That investigation led to appellant's lawful arrest for violating his pretrial release conditions and the discovery of shotgun shells during search incident to appellant's arrest. Under these circumstances, the expansion of the traffic stop was justified, and the district court did not err in denying appellant's motion to suppress evidence seized as a result of that expansion. ***State v. Sargent***, A19-1554, 2020 WL 5755482 (Minn. Ct. App. 9/28/2020).

■ **Obstruction: Partial name given with intent to obstruct is a "fictitious name."** When appellant Dakota James-Burcham Thompson was pulled over for speeding, he told the officer his name was Dakota James Burcham, gave his correct date of birth, and denied going by any other names. A records search of that name returned no results. The officer broadened his search and determined appellant's real name was Dakota James-Burcham Thompson, who had an active arrest warrant. Appellant testified that his name prior to being adopted more than 10 years ago was Dakota James Burcham, and that he gave that name to the officer because he was "hesita[nt] with law enforcement due to [his] past." Appellant was convicted of giving a fictitious name to a peace officer. The court of appeals affirmed.

Minn. Stat. §609.506, subd. 1, makes it a crime to, "with intent to obstruct justice," "give[] a fictitious name other than a nickname... to a peace officer... when that officer makes inquiries incident to a lawful investigatory stop or lawful arrest." "Fictitious" is not defined in the statute, so the court looks to the dictionary definitions of the word, finding it to mean, as applied to names, "a false name and a name that is not a person's true name, which would include a partial, or rearranged legal name." Under this definition, the name appellant gave to the officer was fictitious, and the evidence was sufficient to support his conviction. ***State v. Thompson***, 950 N.W.2d 65 (Minn. 10/21/2020).

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## EMPLOYMENT & LABOR LAW

### JUDICIAL LAW

■ **Race bias, retaliation claims rejected; employee not reappointed.** An employee who was terminated from her position with the Federal Emergency Management Agency (FEMA) lost her claim for race discrimination and retaliation after she was not appointed when her term of employment ended. The 8th Circuit upheld a ruling of U.S. District Court Judge David Doty that dismissed the case on grounds that the claimant failed to establish a *prima facie* case of either race discrimination or retaliation. ***Moreland v. Wolf***, 2020 WL 6498678 (8th Cir. 11/5/2020) (*per curiam*).

■ **Retaliation rejected; race, ADA claims denied.** An employee in Minnesota who claimed racial discrimination and retaliation lost his claim. Dismissal of the *pro se* claimant's discrimination action (including claims of race discrimination and violation of the Americans with Disabilities Act) by Judge Doty was affirmed by the 8th Circuit, although a partially concurring and dissenting opinion by Judge Jane Kelley would have allowed the retaliation claim to survive a motion to dismiss. ***Robinson v. VSI Construction, Inc.***, 2020 WL 6777998 (8th Cir.11/18/2020) (unpublished).

■ **Sales representatives act; remanded for "good cause" determination.** An employee in Minnesota who claimed that he was terminated in violation of the Minnesota Termination of Sales Representatives Act (MTSRA) achieved remand of the dismissal of his lawsuit by U.S. District Court Judge Doty in Minnesota. The 8th Circuit reversed the lower court's finding that the act did not apply and remanded for determination whether the employer had "good cause" to terminate the employee. ***Engineered Sales Co. v. Endres + Hauser, Inc.,*** 980 F.3d 597 (8th Cir. 11/17/2020).

■ **Unemployment compensation; mistaken closure of account.** An employee was ineligible to establish a new unemployment benefits account after he elected to reactivate and receive payments on a pre-existing account. The Minnesota Court of Appeals held that the unemployment statute made the applicant ineligible for benefits, despite his claim that he made a mistake in asking for his closure of his account. ***Vang v. Medtronic, Inc.***, 2020 WL 6391289 (Minn. Ct. App. 11/02/2020) (unpublished).

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## ENVIRONMENTAL LAW

### JUDICIAL LAW

**8th Circuit defers to state agency interpretation of federal air regulations.** The United States Court of Appeals for the 8th Circuit issued an opinion upholding a state agency decision not to require a Clean Air Act (CAA) major source air permit for a North Dakota coal mine processing plant based in part on deference to the state agency's interpretation of federal law. The case, *Voigt v. Coyote Creek Mining Co., LLC*, involved an action brought by owners of ranches adjacent to the processing plant, who alleged that the mining company failed to obtain the proper construction permit under the CAA and failed to implement a dust control plan required by a federal new source performance standard (NSPS)—and that as a result, excessive coal dust, or "fugitive emissions," from the company's open storage coal pile located near the plant blew onto their ranches.

The CAA prevention of significant deterioration (PSD) air permitting program requires that a "major emitting facility" may not be constructed until a major source permit is obtained. 42 U.S.C. §7475(a). Relevant here, a facility is deemed "major" if it has the potential to emit (PTE) at least 250 tons per year (tpy) of any air pollutant, including "fugitive emissions." *Id.* §7479(1). In this case, if the mining company's open storage coal pile was deemed to be part of the mine processing plant, i.e., the "emitting facility," it would exceed the 250 tpy threshold and require a major federal PSD permit. Conversely, if the coal pile was not deemed part of the plant, the fugitive coal emissions would be below the threshold and only a "minor" air permit under state law would be required. In addition, if the coal pile was deemed part of the processing plant, the company would be subject to the NSPS in subpart Y of 40 CFR pt. 60, which requires that open storage coal piles in a coal processing plant must implement a fugitive dust control plan. The North Dakota Department of Health (NDDOH) concluded that under the federal regulations at issue, the coal pile was not part of the processing plant; accordingly, NDDOH determined that the site was not a "major emitting facility," was thus not required to obtain a major federal permit or subject to Subpart Y, and could be regulated under a minor state air permit. The district court agreed.

In affirming the district court, the 8th Circuit first held that the relevant regulatory language was ambiguous on the question of whether the mining company's open storage coal pile should be considered part of the "emitting facility" for determining applicability of the CAA's major permit requirement and Subpart Y NSPS. The court then consulted EPA guidance to aid it in determining whether the coal plant is part of the processing facility; however, the court also found no conclusive answer in EPA's guidance. Finally, the court agreed with the lower court that under these circumstances, "the best interpretative aid… is the NDDOH permitting decision, which concluded that the coal pile is not part of the coal processing plant." This decision, the court held, "is entitled to deference."

The court rebuffed arguments by the ranch owners that the NDDOH decision should not be entitled to deference because it was "no more than a state agency's interpretation of federal law." This argument ignored the CAA's system of cooperative federalism, the court held, through which states directly implement the federal CAA permitting program through EPA-approved state implementation plans. Any concern that deferring to state agencies could lead to national inconsistency of CAA permitting programs was misplaced, the court asserted, because unreasonable or arbitrary state permitting decisions that could result in national inconsistency may be challenged in federal court.

In a lengthy dissent, Judge Stras argued that "it defies basic constitutional principles to defer to a state agency's interpretation of federal law," noting that "[m]ost Americans would be surprised to learn that state bureaucrats can play an even larger role than federal judges do in interpreting federal law." ***Voigt v. Coyote Creek Mining Co.**, LLC*, No. 18-2705, __ F.3d __ (8th Cir. 11/20/2020).

### ADMINISTRATIVE ACTION

**EPA issues draft "functional equivalent" guidance concerning groundwater discharges under the CWA.** The U.S. Environmental Protection Agency (EPA) issued draft guidance designed to implement the U.S. Supreme Court's 4/23/2020 Clean Water Act (CWA) decision in *County of Maui v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462 (2020). In *County of Maui*, the Court evaluated the circumstances when discharges of wastewater to groundwater may require a National Pollutant Discharge Elimination System (NPDES) permit under the CWA. The Court held that a permit is required when the groundwater discharge is the "functional equivalent" of a direct discharge and provided seven nonexclusive factors that "may prove relevant" depending upon the circumstances of a particular case:

1. transit time;
2. distance traveled;
3. the nature of the material through which the pollutant travels;
4. the extent to which the pollutant is diluted or chemically changed as it travels;
5. the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source;
6. the manner by or area in which the pollutant enters the navigable waters;
7. the degree to which the pollution (at that point) has maintained its specific identity.

The Court emphasized, however, that the standard would have to be developed through court decisions in individual cases and through potential EPA guidance.

EPA's draft guidance "places the functional equivalent analysis into context within the existing NDPES permitting framework." The guidance first highlights certain "threshold conditions" that must exist in order to trigger the NPDES requirement, including: (1) there must be an "actual discharge of a pollutant to a water of the United States," not just a discharge to hydrologically connected groundwater; and (2) the discharge must be from a "point source." Next, EPA emphasizes in the draft guidance that "[o]nly a subset of discharges of pollutants to groundwater that ultimately reach a water of the United States should be deemed the 'functional equivalent' of a direct discharge," in accordance with the court's factors. (This is consistent with the Supreme Court's rejection of the 9th Circuit's broader "fairly traceable" test.") For example, EPA indicates that "[i]f the pollutant composition or concentration that ultimately reaches the water of the United States is different from the composition or concentration of the pollutant as initially discharged, whether through chemical or biological interaction with soils, microbes, plants and their root zone, groundwater, or other

pollutants, or simply through physical attenuation or dilution, it might not be the 'functional equivalent' of a direct discharge to a water of the United States."

Finally, the draft guidance proposes an additional factor to be considered in the "functional equivalent' analysis—the design and performance of the system or facility from which the pollutant is released. This information is "routinely considered by permitting agencies" in administering the NPDES program, EPA noted, and can inform the scope of the "functional equivalent" analysis. The draft guidance will be available for public comment for 30 days following publication in the Federal Register. ***Draft Guidance Memorandum: Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program*** (David P. Ross, EPA assistant administrator, Office of Water) (12/8/2020).

**MPCA issues new MS4 general permit.** The Minnesota Pollution Control Agency issued a new final general NPDES/SDS permit authorizing permittees to operate small municipal separate storm sewer systems (MS4s) and to discharge from the small MS4s to receiving waters. The terms of the five-year permit include certain differences from MPCA's prior MS4 general. For example, the permit includes (a) new application requirements for total maximum daily loads (TMDLs) to better substantiate that applicable waste load allocations (WLAs) are being met; (b) new requirements to address chloride from de-icing material; (c) new requirements to address bacteria from pet waste; (c) more protective post-construction stormwater management requirements for redevelopment projects; and (d) a more performance-based approach to addressing TMDLs for chloride, bacteria, and temperature. **MPCA, Small Municipal Separate Storm Sewer Systems General Permit**, No. MNR040000 (11/16/2020).

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## FAMILY LAW

### JUDICIAL LAW

**Post-decree motion to establish parenting time.** Father moved for parenting time assistance, seeking to modify the parties' prior stipulation regarding parenting time, and father asked the court to order mother to return the parties' child to Minnesota, as she had recently moved out of state. Mother objected with a variety of concerns, mainly regarding father's mental health. Father did not address or rebut the concerns.

Father claimed that the district court erred by treating his motion as one to modify parenting time. Father believes that the court incorrectly assigned him a burden of proof, and that a modification of parenting time is in the child's best interest. The court looks to Minn. Stat. §518.175, subd, 1(a) which "indicates that if a district court reserves a determination regarding the future establishment of parenting time and there is a subsequent motion to establish parenting time" then "the best interest standard set forth in subdivision 5, paragraph (a), shall be applied. Minn. Stat. §518.175, subd. 1(a). However, Minn. Stat. §518.175, subd. 5(a) does not refer to the child's best interests. The court concluded that "when the legislature amended subdivision 5(a) in 2016, it neglected to change subdivision 1(a)'s reference to the best-interest standard in subdivision 5 from subdivision 5(a) to subdivision 5(b)." Therefore, subdivision 1(a)'s reference to the best-interest standard within 5(b) governs father's motion and the district court properly assigned father a burden of proof.

Father claimed the court erred by denying him parenting time based on evidence of conduct unrelated to the child regarding allegations of domestic abuse and father's sexual activity that occurred prior to the child's birth. While the "court shall not consider conduct of a party that does not affect the party's relationship with the child" pursuant to Minn. Stat. §518.17, subd. 1(b)(4), the court found that the district court properly considered "any physical, mental, or chemical health issue of a parent that affects the child's safety or developmental needs." Therefore, even though the district court considered conduct that occurred prior to the child's birth, the consideration was proper as the conduct suggested a concern for the child's safety.

Finally, father claimed the court erred by refusing to order mother to return the child to Minnesota. The court agreed

with the district court that there is no legal basis to order mother to return the child to Minnesota. Under Minn. Stat. §518.175, subd. 3(a) "the parent with whom the child resides shall not move the residence of the child to another state except upon order of the court or with the consent of the other parent, if the other parent has been given parenting time by the decree." It was undisputed that father had no parenting time with the child and therefore, no reason to require mother to return the child to Minnesota. ***In re the Custody of: N.Y.B.: James Edward Bono vs. Megan Yvonne Hedberg***, A20-0283 (Minn. Ct. App. 11/2/2020).

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## FEDERAL PRACTICE

### JUDICIAL LAW

■ **Article III standing; "generalized grievance."** Delaware law requires political balance for appointments to certain courts, and limits appointments to member of major political parties. Attorney Adams, a political independent, commenced an action challenging Delaware's "bare majority" and "major party" requirements. The district court found that Adams had standing to challenge both of these requirements and found for Adams on the merits. The 3rd Circuit affirmed in part and reversed in part, finding that Adams had standing to challenge the major party requirement, but that he lacked standing to challenge the bare majority requirement. Delaware sought *certiorari* on the merits. The Supreme Court granted *certiorari*, but ordered that the parties first address the issue of Article III standing.

The Supreme Court never reached the merits of the dispute, determining that the case "begins and ends" with standing. While acknowledging that the case was "fact-specific," the Court unanimously found that Adams lacked standing to contest the major party requirement, because he failed to show that he was "able and ready" to apply for a judicial position and that his statements of a "general intent" to seek a judgeship were insufficient to establish "injury in fact." ***Carney v. Adams***, ___ S. Ct. ___ (2020).

■ **Exclusion of expert report.** The 8th Circuit found no abuse of discretion in the district court's exclusion of the plaintiffs' expert's report in a product liability action that failed to account for "obvious" alternatives regarding the source of an allegedly defective sling, finding that the expert's opinion was based on "insufficient facts." ***Hirchak v. W.W. Grainger, Inc.***, 980 F.3d 605 (8th Cir. 2020).

■ **Fed. R. Civ. P. 26(a)(2)(B)(i); hypothetical questions to expert; no abuse of discretion.** In an appeal by the plaintiff from an adverse jury verdict in a legal malpractice action, the 8th Circuit found no abuse of discretion in the district court's overruling of objections to six hypothetical questions posed by defense counsel to defendants' expert, finding that the answers to those questions did not "add factual bases… beyond what [the expert's] supplemental expert opinion disclosed," and that it also concurred with the district court's "lengthy, point-by-point explanation" as to why any error in admitting the testimony was harmless. ***Estate of West v. Domina Law Group, PC LLO***, ___ F.3d ___ (8th Cir. 2020).

■ ***Knowlton;* general jurisdiction; 28 U.S.C. §1292(b).** While finding that the defendant, which was registered to do business in Minnesota, was subject to general jurisdiction pursuant to the 8th Circuit's decision in *Knowlton v. Allied Van Lines, Inc.* (900 F.2d 1196 (8th Cir. 1990)), Judge Doty acknowledged that "serious questions" had been raised regarding *Knowlton*'s continued viability and invited either party to seek an interlocutory appeal pursuant to 28 U.S.C. §1292(b). ***Greenstate Credit Union v. Hy-Vee, Inc.***, 2020 WL 6586230 (D. Minn. 11/10/2020).

■ **Renewed motion for leave to conduct expedited third-party Doe discovery granted.** In August 2020, this column noted Magistrate Judge Wright's denial of a motion for expedited third-party Doe discovery without prejudice after finding that plaintiff had not produced the required *prima facie* evidence to support each of its claims, and that the requested discovery was overbroad.

Recently, Magistrate Judge Wright granted the plaintiff's renewed motion for expedited third-party Doe discovery, finding that the plaintiff had established a *prima facie* case, and that its revised document requests were "sufficiently tailored." However, Magistrate Judge Wright denied the plaintiff's request for leave to take "limited follow-up discovery" without prejudice. ***NCS Pearson, Inc. v. John Does (1-21)***, 2020 WL 6581122 (D. Minn. 11/10/2020).

■ **Fed. R. Civ. P. 23(f); request for stay denied.** Where Judge Davis certified a plaintiff class in a securities class action and the defendants filed a Fed. R. Civ. P. 23(f) petition with the 8th Circuit, Judge Davis denied defendants' Motion for Stay Pending Rule 23(f) Petition and Appeal, finding that the defendants had not established a likelihood of success on the merits or the threat of irreparable harm.

Judge Davis also denied defendants' alternative request that the court stay dissemination of the class notice as premature, because plaintiffs had not yet submitted a proposed class notice, finding that he could consider the impact of the status of the case in the 8th Circuit if and when plaintiffs moved for approval of their class notice. ***Plymouth Cty. Retirement Sys. v. Patterson Cos.***, 2020 WL 6566467 (D. Minn. 11/9/2020).

■ ***Forum non conveniens;* forum selection clause.** In an action arising out of injuries sustained by a Minnesota plaintiff while on a transatlantic cruise, Judge Wright granted defendants' motion to dismiss under the doctrine of *forum non conveniens*, finding that the forum selection clause in the underlying contract (which designated a Swiss court as the only proper forum for the litigation) was enforceable, rejecting plaintiffs' arguments that being forced to litigate in Switzerland would be so "difficult" as to effectively deprive them of their day in court, and also rejecting plaintiffs' argument that the forum selection clause was included in an adhesion contract. ***Sheehan v. Viking River Cruises, Inc.***, 2020 WL 6586231 (D. Minn. 11/10/2020).

■ **Grant of motion to strike deposition errata sheet affirmed.** In October 2020, this column noted Magistrate Judge Menendez's grant of defendants' motion to strike plaintiff's deposition errata sheet, in which the plaintiff attempted to—among other things—change "yes" answers to "no."

That order was recently affirmed by Judge Frank, who also rejected the plaintiff's new-found argument that the court reporter's instructions regarding submission of an errata sheet somehow permitted the widespread modifications to his deposition testimony. ***Elsherif v. Mayo Clinic***, 2020 WL 5015825 (D. Minn. 8/25/2020), *aff'd*, 2020 WL 6743482 (D. Minn. 11/17/2020).

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## IMMIGRATION LAW

### JUDICIAL LAW

■ **No CAT relief; Somali government did not "willfully" turn a blind eye.** The 8th Circuit Court of Appeals held that the record failed to show the Somali government had "willfully" turned a blind eye to Al-Shabaab's activities, notwithstanding the petitioner's argument, in relation to his Convention Against Torture (CAT) claim, that it would acquiesce in his torture. The court found, to the contrary, that the government actively combats the organization and seeks to maintain order in the country. ***Moallin v. Barr***, 19-2743, *slip op.* (8th Cir. 11/23/2020). *https://ecf.ca8.uscourts.gov/opndir/20/11/192743P.pdf*

■ **TPS designation denotes "inspected and admitted" for adjustment of status purposes.** Joining the 6th and 9th Circuits, the 8th Circuit Court of Appeals held that a noncitizen who entered the United States without inspection or admission but later received temporary protected status (TPS) is deemed "inspected and admitted" under 8 U.S.C. §1255(a) (INA § 245A) and thus may adjust to lawful permanent resident (LPR) status. "USCIS's contrary interpretation conflicts with the plain meaning of the INA and is therefore unlawful. *See* 5 U.S.C. § 706(a)(A). We affirm the district court's judgments." ***Velasquez, et al. v. Barr, et al.***, 19-1148, *slip op.* (8th Cir. 10/27/2020). *https://ecf.ca8.uscourts.gov/opndir/20/10/191148P.pdf*

■ **Dream on: DACA update.** As noted in the September edition of *Bench & Bar*, the U.S. Supreme Court rejected, on 6/18/2020, the government's effort to end the Deferred Action for Childhood Arrivals Program (DACA) and remanded the case for further consideration, not because the Department of Homeland Security (DHS) lacked the authority to do so, but because it failed to provide a reasoned explanation for this. In a 5 to 4 majority opinion authored by Chief Justice John G. Roberts, Jr., the Court ruled that it held jurisdiction to review DHS's rescission of DACA under the Administrative Procedure Act (APA). ***DHS v. Regents of the University of California***, 591 U.S. _____, No. 18-587, *slip op.* (2020). *https://www.supremecourt.gov/opinions/19pdf/18-587_5ifl.pdf*

On 7/28/2020, DHS Acting Secretary Chad Wolf issued a memorandum ("Reconsideration of the June 15, 2012 Memorandum Entitled 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children'") suspending DACA (i.e., DHS would reject all first-time DACA requests; adjudicate all pending and future properly submitted DACA renewal requests [and associated applications for employment authorization] from current beneficiaries; limit the period of any deferred action granted to one year; and reject all pending and future applications for advance parole from beneficiaries of the DACA policy). *https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf*

On 11/14/2020, the U.S. District Court for the Eastern District of New York granted the plaintiffs' motion for summary judgment, finding Chad Wolf was not lawfully serving as acting secretary of the Department of Homeland Security when he issued his memorandum. ***Battalla Vidal, et al. v. Wolf, et al.*** and ***State of New York, et al. v. Trump, et al.***, Nos. 16-CV-4756 (NGG) (VMS) and 17-CV-5228 (NGG) (VMS) (E.D.N.Y. 11/14/2020). *https://www.dhs.gov/sites/default/files/publications/20_1114_ogc_batalla-vidal-partial-msj-class-cert-order_508.pdf*

On 12/04/2020, the U.S. District Court for the Eastern District of New York ordered the Department of Homeland Security (DHS) to post a public notice, within three calendar days, that it would accept applications for DACA, both first-time and renewal, as well as advance parole requests while, at the same time ordering DHS to extend deferred action grants of DACA and employment authorization to two-year periods. ***Battalla Vidal, et al. v. Wolf, et al.*** and ***State of New York, et al. v. Trump, et al.***, Nos. 16-CV-4756 (NGG) (VMS) and 17-CV-5228 (NGG)

(VMS) (E.D.N.Y. 12/04/2020). *http://cdn.cnn.com/cnn/2020/images/12/04/batalla_vidal_et_al_v_nielsen_et_al__nyedce-16-04756__0354.0.pdf*

On 12/07/2020, the Department of Homeland Security (DHS) updated its website to comply with the court's 12/04/2020 order. *https://www.uscis.gov/news/alerts/deferred-action-for-childhood-arrivals-response-to-december-4-2020-order-in-batalla-vidal-et-al-v*

*https://www.uscis.gov/i-821d*

■ **"Public charge" and inadmissibility.** On 12/2/2020, the 9th Circuit Court of Appeals upheld the preliminary injunctions enjoining the implementation of the Department of Homeland Security's redefinition of the term "public charge," which describes a ground of inadmissibility under immigration law. That redefinition encompasses a change from one who "is or is likely to become primarily dependent on the government for subsistence" to one who is "likely to participate, even for a limited period of time, in non-cash federal government assistance programs." As the court eloquently noted, "Up until the promulgation of this Rule, the concept has never encompassed persons likely to make short-term use of in-kind benefits that are neither intended nor sufficient to provide basic sustenance." The two injunctions were issued by the U.S. District Courts for the Northern District of California and Eastern District of Washington and applied to the city and county of San Francisco, county of Santa Clara, and states of California, Maine, Pennsylvania, Oregon, District of Columbia, Washington, Virginia, Colorado, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Rhode Island, and Hawaii. The court did, however, vacate that portion of the injunction issued by the U.S. District Court for the Eastern District of Washington making it nationwide in nature. ***City and County of San Francisco, et al. v. U.S. Citizenship and Immigration Services, et al.*** and ***State of California v. U.S. Department of Homeland Security, et al.*** and ***State of Washington, et al. v. U.S. Department of Homeland Security, et al.,*** Nos. 19-17213, 19-17214, 19-35914, *slip op.* (9th Cir. 12/02/2020). *https://cdn.ca9.uscourts.gov/datastore/opinions/2020/12/02/19-17213.pdf*

■ **H-1B rule changes in the face of APA notice and comment requirements.** Faced with the task of determining whether the Departments of Homeland Security (DHS) and Labor's (DOL) efforts ("Strengthening the H-1B Nonimmigrant Visa Classification Program" and "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens [sic] in the United States") to significantly change the H-1B visa program while dispensing with "due deliberation" were justified in the face of the covid-19 pandemic and its impact on domestic unemployment, the U.S. District Court for the Northern District of California ruled that they were not. It first found the Department of Homeland Security's Rule was issued "'without observance of procedure required by law' and thus must be set aside." At the same time, the court found the Department of Labor had failed to meet its burden "that providing advance notice would have had consequences so dire that notice and comment would not have served the public interest." Given the government's failure to show good cause for dispensing "with the rational and thoughtful discourse that is provided by the APA's notice and comment requirements," the court found the plaintiffs were entitled to judgment in their favor**. *Chamber of Commerce, et al. v. U.S. Department of Homeland Security, et al.***, No. 20-cv-07331-JSW (N.D. Cal. 12/01/2020). *https://www.chamberlitigation.com/sites/default/files/cases/files/20202020/Order%20Granting%20Summary%20Judgment%20-%20U.S.%20Chamber%20v.%20DHS%20%28N.D.%20Cal.%29.pdf*

## ADMINISTRATIVE ACTION

■ **Automatic extension of TPS-related documentation for TPS beneficiaries.** The U.S. Department of Homeland Security (DHS) announced its continued compliance with the preliminary injunction orders of the U.S. District Court for the Northern District of California in *Ramos, et al.* v. *Nielsen, et. al.*, No. 18–cv–01554 (N.D. Cal. 10/03/2018); the U.S. District Court for the Eastern District of New York in *Saget, et. al.*, v. *Trump, et. al.*, No. 18–cv–1599 (E.D.N.Y. 04/11/2019); and the U.S. District Court for the Northern District of California to stay proceedings in *Bhattarai* v. *Nielsen*, No. 19–cv–00731 (N.D. Cal. 03/122019). While the 9th Circuit Court of Appeals vacated the injunction on 9/14/2020, it has not yet issued its order to the district court making its ruling effective. As a result, TPS beneficiaries from El Salvador, Honduras, Nepal, Nicaragua, and Sudan will retain their status while the preliminary injunctions in *Ramos* and *Bhattarai* remain in effect. TPS beneficiaries from Haiti will retain their status while the preliminary injunctions in either *Ramos* or *Saget* remain in effect. As such, DHS further announced the automatic extension of the validity of TPS-related employment authorization documents (EADs); notices of action (Forms I–797); and arrival/departure records (Forms I–94), (collectively known as "TPS-related documentation") for those TPS beneficiaries from the aforementioned countries. The extension of those documents will run through 10/04/2021. **85 Fed. Register, 79208-15** (12/9/2020). *https://www.govinfo.gov/content/pkg/FR-2020-12-09/pdf/2020-27154.pdf*

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## INTELLECTUAL PROPERTY

### JUDICIAL LAW

**Trademark: Temporarily freezing assets and ordering expedited discovery.** Judge Nelson recently granted 3M Company's motion for a temporary restraining order and for limited discovery. 3M sued as-yet-unknown individuals or entities for trademark infringement for allegedly using e-commerce platforms to sell counterfeit N95 respirators using 3M's registered trademarks without authorization. 3M moved (1) for a temporary restraining order to enjoin defendants' infringing conduct, (2) to temporarily freeze defendants' assets, and (3) for expedited discovery to determine defendants' identities.

The court first found a temporary restraining order was proper. 3M established that it would suffer irreparable harm to its reputation and goodwill; the balance of harms favored 3M; 3M was likely to succeed on its Lanham Act claims; and the public interest supported granting the injunction. The court then granted the motion to freeze defendants' assets held by eBay, PayPal, and other payment processers connected to the sale of counterfeit products. Though temporarily freezing defendants' accounts may impose some hardship, the temporary restraint was necessary to prevent defendants from receiving the proceeds of their allegedly infringing sales and thereafter dissipating such funds. Finally, the court granted the motion for expedited discovery. Federal Rule of Civil Procedure 26(d)(1) prevents a party from seeking discovery from any source before the parties have conferred in the Rule 26(f) conference, except where authorized by court order. The court found good cause existed to order the discovery because without the expedited discovery, 3M likely would not be able to identify the defendants, which would stifle the litigation. ***3M Co. v. Individuals, P'ships, & Unincorporated Ass'ns identified in Schedule "A"***, No. 20-cv-2348 (SRN/TNL), 2020 U.S. Dist. LEXIS 217813 (D. Minn. 11/20/2020).

**Patent: Exclusive license runs with patent.** Judge Nelson recently granted defendant Cardio Flow, Inc.'s motion for summary judgment. In 2012, Cardiovascular Systems, Inc. (CSI) and the widow of the company's founder settled patent litigation by granting CSI an exclusive license to the Nadirashvili Patent Portfolio. The widow later assigned her rights to the portfolio to Cardio Flow. CSI sued Cardio Flow for breach of contract to enforce its exclusive rights under the settlement agreement. CSI argued that by virtue of the assignment of patent rights to Cardio Flow, Cardio Flow was bound by the terms of the settlement agreement. Cardio Flow moved for summary judgment arguing that as a non-signatory of the settlement agreement, it was not bound by the agreement.

The court found that because Cardio Flow was not a signatory of the settlement agreement, there was no legal basis on which to enforce the terms of the settlement agreement against Cardio Flow. Dismissal of CSI's breach of contract claim was proper. Enforcement of CSI's exclusive rights, however, could be accomplished through a patent infringement action. The court found that the settlement agreement made CSI the exclusive licensee of the Nadirashvili Patent Portfolio and that the license runs with the patents. If CSI finds that Cardio Flow infringes any of the patents of the Nadirashvili Patent Portfolio, CSI is free to seek a remedy for patent infringement in a separate lawsuit. ***Cardiovascular Sys. v. Cardio Flow, Inc.***, No. 18-cv-1253 (SRN/KMM), 2020 U.S. Dist. LEXIS 204120 (D. Minn. 11/2/2020).

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## REAL PROPERTY

### JUDICIAL LAW

**Zoning ordinance enactment.** A plaintiff alleging that a city enacted a zoning ordinance in unlawful retaliation for engaging in a protected activity need not plead that the city lacked probable cause to enact the ordinance to survive a motion to dismiss for failure to state a claim upon which relief may be granted. In *Sanimax*, the plaintiff operated an animal rendering and used cooking oil processing facility in the City of South St. Paul. The city passed nuisance ordinances directed at it beginning in 2014. The plaintiff sued to prevent enforcement of the nuisance ordinance and the city amended it. Then, in 2017 and 2019, the city considered and then enacted zoning ordinances with an allegedly discriminatory animus against the plaintiff. Sanimax sued, asserting amongst other claims that the city enacted the zoning ordinance in retaliation for the earlier lawsuit to prevent enforcement of the nuisance ordinance in violation of the 1st and 14th Amendments. The city moved to dismiss, asserting amongst other arguments that the plaintiff had failed to plead that the city lacked probable cause to prove 1st Amendment retaliation. The district court held that although the 8th Circuit requires that a plaintiff alleging a retaliatory law enforcement action plead a lack of probable cause, such a heightened pleading standard does not exist for a retaliatory law-making claim. It, therefore, held that plaintiff's retaliatory enactment claim was sufficiently pled and denied the city's motion to dismiss it. ***Sanimax USA, LLC v. City of S. St. Paul***, No. 20CV01210SRNECW, 2020 WL 6275972, at *5 (D. Minn. 10/26/2020).

**Partition.** When a party's conduct with respect to jointly owned property is found to have constituted a bad faith effort to prevent and delay a sale and reduced the property's value, the district court properly exercises its discretion to reduce the amount of proceeds to be paid to that party and increase the distributions to the other co-owners.

In *Humphreys*, four siblings jointly owned lake property and only the respondent used it. In 2012, three siblings instituted a partition action that lasted six years. During the litigation, the respondent undertook a number of actions, including suing her brothers, the referee, and the brothers' attorney, and also left the property in disarray. The district court in 2013 approved an initial asking price of $235,000. In 2018, the court approved a sale for $125,000. In 2019, the district court issued a decision allocating the sale proceeds and, in that order, deducted $9,000 from the respondent's share of the proceeds and allocated that amount to be divided among the other three siblings because the respondent harmed the value of the property before the sale. The court of appeals held that the district court did not abuse its discretion by considering the bad faith conduct in deciding the amounts of distributions and therefore affirmed the district court. ***Humphreys v. Humphreys Krasner***, No. A19-1775, 2020 WL 7018337, at *3 (Minn. App. 11/30/2020).

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## TAX LAW

### JUDICIAL LAW

■ **SEP-IRA withdrawal income: "Conduit agency" argument rejected; penalties upheld.** The petitioner in this dispute, Mr. Ball, participated in a Simplified Employee Pension Individual Retirement Arrangement (SEP-IRA). A SEP-IRA is a form of retirement account that permits business owners to provide retirement benefits for themselves and their employees. SEP-IRAs share many commonalities with traditional IRAs: contributions to SEP-IRAs are tax deductible (up to certain limits); and tax is deferred on any income until withdrawal. Like a traditional IRA, distributions before age 59.5 are taxed as income and subject to a 10% penalty. Taxpayers can avoid the 10% penalty if the distribution satisfies certain early withdrawal exceptions, and taxpayers are permitted to "roll over" (e.g., move to a different account) the funds in SEP-IRAs. A taxpayer might desire to roll over funds if, for example, the taxpayer changes jobs. There are different methods of rolling over funds; one method is referred to as a "60-day rollover." In this method, SEP-IRA funds are distributed to the owner directly. The owner then has 60 days to deposit the funds into a new IRA account so that the taxpayer can avoid taxes and penalties.

In the tax year at issue, Mr. Ball, who was not 59.5, requested and received distributions from the SEP-IRA account of $170,000 and $39,600, respectively. The distributions took place after Mr. Ball executed a Traditional IRA Withdrawal Request form that requested that the custodian JP Morgan Chase Bank, NA, pay to Mr. Ball the designated amount. Mr. Ball checked a box on each withdrawal request form indicating that the withdrawal was an early distribution with no known exceptions to being taxable. He further instructed Chase to make the distribution into a Chase business checking account that he had opened in the name of a Nevada limited liability company, The Ball Investment Account, LLC. The Ball LLC account was not a retirement account. Immediately after the first distribution, in June 2012, Mr. Ball wired $170,000 from the account to a Nevada title company to fund a real estate loan to Petersen Development, LLC. The title company recorded the receipt as: "New Loan from the Ball Sep Account." The loan was secured by a deed of trust that shows "The Ball SEP Account" as the beneficiary. The loan was repaid over a year later in April 2013 with a check payable to "The Ball SEP Account." Mr. Ball immediately deposited the payoff check into the SEP-IRA account. His account statement shows the deposit as "rollover contribution." The $39,600 withdrawal was treated similarly.

Mr. Ball argued that despite the distribution to an unqualified account, the withdrawal should not be taxable (and not subject to the early withdrawal penalty) because "the movement of funds from the SEP-IRA through the Ball LLC account to, and then back from, [lender accounts] described a 'conduit agency arrangement.' Under that theory, Ball LLC acted as a mere facilitator, transferring funds between the SEPIRA and the two other LLCs." The court rejected the "conduit agency arrangement" because the court was not persuaded that Ball LLC was acting as an agent or conduit on behalf of Chase (as custodian of the SEP-IRA) when Ball LLC received and made use of the distributions. The court pointed to Chase's ignorance of the disposition of the $209,600 that it deposited into the Ball LLC account and the taxpayer's unfettered control over Ball LLC. "[N]othing in the record," the court reasoned, "convinces us that [Mr. Ball] did not have unfettered control over the $209,600 Ball LLC received from Chase." The court upheld the 10% early withdrawal penalty as well as the understatement penalty. ***Ball v. Comm'r***, T.C.M. (RIA) 2020-152 (T.C. 2020).

■ **That's a lot of zeros: IRS adjusts Coca-Cola's income by more than $9 billion in transfer pricing dispute.** Transfer pricing is not for the faint of heart; neither is this 90-page opinion in which the tax court upholds the Service's reallocation of income to Coca-Cola from foreign manufacturing affiliates. The reallocation blow is softened somewhat by the court's additional holding that Coca-Cola's timely election to employ dividend offset treatment for certain dividends must offset some of the reallocated income.

The Coca-Cola Co. is the ultimate parent of a group of entities that do business in more than 200 countries throughout the world. Coca-Cola owns valuable

and extensive intellectual property necessary to manufacture, distribute, and sell Coca-Cola's beverages. Coca-Cola licenses foreign manufacturing affiliates, referred to as "supply points" in this opinion, to use the IP to produce concentrate which the supply points then sell to unrelated bottlers in the supply point's region. The supply points have a right to use the IP, but no ownership interest in Coke. The supply points must compensate Coca-Cola for the IP. The gist of the Service's position is that the supply points paid insufficient compensation to Coca-Cola for the rights to use this intangible property. ***The Coca-Cola Co. & Subsidiaries v. Comm'r***, No. 31183-15, 2020 WL 6784134 (T.C. 11/18/2020).

**Pilot with U.S. tax home not entitled to exclude foreign earned income.** United States citizens are subject to federal income tax on their worldwide income. Section 911(a), however, allows qualified individuals to exclude "foreign earned income" from their income. To be a "qualified individual" the taxpayer must have a "tax home" in a foreign country; the taxpayer must be either "a bona fide resident of… [that country] for an uninterrupted period which includes… [the] entire taxable year," or physically "present in a foreign country or countries" for a certain period. *Id.* subsec. (d)(1). The concept of "tax home" is challenging when applied to taxpayers whose jobs require frequent travel, and a developed body of case law addresses flight crews.

In this dispute, United States citizen Douglas Cutting claimed the benefit of Section 911. Cutting claimed his tax home was in Thailand, where he lived with his wife and stepchild when he was not working. Section 911 refers to Section 162 to determine tax home. Typically, an individual's tax home is that person's regular or principal (if more than one regular) place of business or, if the individual has no regular or principal place of business because of the nature of the business, then at their regular place of abode. A body of developed case law instructs that the "tax home" for an airline pilot is the pilot's duty base. In this case, Mr. Cutting selected San Jose, California as his duty base. Because his duty base was in California, Mr. Cutting's tax home was California, despite his family's residence in Thailand.

Because Mr. Cutting did not have a tax home abroad, the court did not need to address whether Mr. Cutting was a bona fide resident of Thailand. Sec 911(d)(1) (providing that a qualified individual is an "individual whose tax home is in a foreign country and who is" either "a bona fide resident of… [that country]," or physically "present in a foreign country or countries" for a certain period). Nonetheless, the court held that Mr. Cutting could not establish this second prong of the "qualified individual" test. ***Cutting v. Comm'r***, T.C.M. (RIA) 2020-158 (T.C. 2020).

**Buffalo, New York's boom & bust cycle sets the stage for easement dispute.** The taxpayers in this dispute contributed facade easements on three commercial buildings to the National Architectural Trust. Because the buildings were in a historic preservation district that under local law already restricted what building owners could do with their property, the commissioner claimed that the easements did not reduce the fair market value of the property at all, and therefore no deduction was proper. As framed by Judge Holmes, "[t]his case thus poses a question of interest to donors of the subset of conservation easements that protect facades on old buildings: How does one gauge the marginal effect of the easement in light of local law?"

Readers interested in historic architecture might enjoy reading the descriptive opinion. Judge Holmes' recitation of the history of Buffalo is worth quoting: "Buffalo was America's eighth largest city in 1900… during the last great immigration boom. Its population kept growing for the first half of the twentieth century and peaked at nearly 600,000 in the 1950 census. Then, with the opening of the St. Lawrence Seaway, the collapse of grain milling and steelmaking, and the cratering of much of its blue-collar industry, it shrank to only 260,000 people today. When Buffalo was growing into a great city, it attracted the attention of great architects and great designers—its largest park was designed by Frederick Olmsted, its first skyscraper by Louis Sullivan, and what was for a time the largest office building in the world by D.H. Burnham & Co. Such achievements are the happy legacy of a prosperous economy."

The taxpayer in this dispute claimed a deduction for the donation of conservation easements on three buildings built during Buffalo's boom. Taxpayers are permitted deductions for "qualified conservation contribution[s]," which are "contribution[s] (A) of a qualified real property interest, (B) to a qualified organization, (C) exclusively for conservation purposes." The contribution must be in perpetuity, but unlike the numerous conservation easement cases we have recently reported, this dispute does not involve the perpetuity requirement. Instead, this case presented what the court described as "one of the apparently rare instances in which the only dispute is about the proper value of an easement." Like most valuation disputes, competing experts presented widely divergent valuations. The court carefully reviewed each expert's findings, and the court concluded that while the taxpayer overstated the value of the contribution, the overstatement was modest and no penalties were in order. ***Kissling v. Comm'r***, T.C.M. (RIA) 2020-153 (T.C. 2020).

**Court grants petitioners' motions or protective orders to limit county's use of proprietary information.** These cases involved the market value of two downtown Minneapolis properties and one North Loop Minneapolis property for Pay-2019 taxes. Hennepin County served each petitioner (LPF North Loop Investors LLP; BAEV —

LaSalle Minneapolis Hennepin Avenue LLC; and CWI Minneapolis Hotel LLC) separately with written discovery, including interrogatories and requests for production of documents. In response to the county's request for document production and interrogatories, each petitioner answered stating that, "Petitioner will produce all non-privileged documents responsive to this Interrogatory after a mutually acceptable protective order addressing confidentiality is entered by the Court." The county sent meet-and-confer letters to petitioners in an effort to agree on a protective order. Petitioners subsequently emailed a draft to the county stating, in relevant part, that certain sensitive information produced during discovery could only be used in the matter in which it was produced. The county proposed instead that the information would receive the same protection as "assessor's data" under the Minnesota Government Data Practices Act (MGDPA), meaning that the information could be used in other matters.

The parties were not able to come to an agreement, and the county filed motions to compel discovery with the tax court. That same day, each petitioner filed a motion for a protective order, stating that certain information was confidential commercial or trade secret information. For purposes of resolving common legal issues, these matters were consolidated before the tax court.

Minn. R. Civ. P. 33.01(a) provides that any party may serve written interrogatories upon any other party, and the responding party must serve separate written answers or objections to each interrogatory within 30 days after service. Minn. R. Civ. P. 33.01(b). Rule 34 allows any party to serve on any other party a request to produce documents and to permit the party making the request an opportunity to inspect and copy any designated documents. Minn. R. Civ. P. 34.01(a)(1)(A). Additionally, any party seeking discovery may move for an order compelling an answer or production. Minn. R. Civ. P. 37.01(b)(2).

To prevent public disclosure of matters produced in discovery, the party from whom discovery is sought may move for a protective order. *See* Minn. R. Civ. P. 26.03. Protective orders "permit discovery of relevant information while protecting a privilege by limiting access to the information."

Trial courts have broad discretion to regulate discovery and issue suitable protective orders. *See In re Paul W. Abbott Co.*, 767 N.W.2d 14, 17-18 (Minn. 2009). Minnesota law provides, in relevant part, that a party from whom discovery is sought, and for good cause shown, may request that the court issue an order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way. The tax court has "previously found good cause when the party seeking the protective order 1) considers information to be confidential commercial information; (2) pursues adequate measures to protect that information from public disclosure; and (3) might be harmed if the information were disseminated to its competitors." *See IRC Champlin Marketplace, L.L.C. v. Cty. of Hennepin*, Nos. 27-CV-19-6858 & 27-CV-19-6585, 2020 WL 5097109, at *3 (Minn. T.C. 8/25/2020).

In a detailed opinion, the court granted the petitioners' motions for protective orders, concluding that the proprietary information will be limited to each individual case. Furthermore, the court stated that although "assessors may have access to proprietary information in their capacity as *expert appraisers* for the City of Minneapolis or the County, they may not use that same information in their capacity as *assessors*."

Because the court granted protective orders for each case, the petitioners' objections to the county's motion to compel were resolved. The court granted the county's motions to compel as to the requests for sale documents, leases, and financial documents. ***LPF North Loop Investors LLP v. Hennepin Co.***, 2020 WL 6604877 (Minn. T.C. 11/12/20).

**Court denies motion for leave for additional direct testimony; expert reports should be complete.** Petitioner Lowe's Home Centers, LLC, filed property tax petitions with respect to property located at 11201 Fountains Drive North, in Maple Grove, for the 2016 and 2017 tax-payable years. Scheduling orders issued in both cases provide that the written report of any expert retained in these matters who is expected to testify at trial shall serve as the authoring expert's direct testimony. The parties moved to consolidate the cases, and, the consolidation order required the parties to serve review appraisals no later than 3/4/2019.

The parties exchanged expert reports and subsequently filed pretrial submissions with the court in accordance with the consolidation order. "The submissions included: 1) two primary appraisals of the subject property by Lowes (one for each tax year), each by Michael MaRous; 2) two primary appraisals of the subject property by the County (one for each tax year), each by Timothy Mitchell; 3) two review appraisals by Lowes' review appraiser of the County's primary appraisals (for the respective tax years), each by Gary Battuello; and 4) a review appraisal by the County's review appraiser of Lowe's primary Pay-2017 appraisal, by Mark Kenney."

On 3/4/2019, Lowes moved for leave to conduct additional direct oral testimony of its review appraiser at trial. Lowes contends that "Mr. Battuello's written review appraisal will not and cannot review and respond to all of' the appraisal testimony of Mr. Mitchell." Lowes argues that Mr. Battuello should be able to address Mr. Mitchell's written appraisal in an expanded fashion, and expresses concern that, if the county does not cross-examine or if the county performs only a limited cross-examination of Mr. Battuello, he will never have the opportunity to fully respond to Mr. Mitchell's written appraisal. The county

states that Lowes may seek to offer Mr. Battuello's rebuttal testimony in response to Mr. Mitchell's *oral* testimony at trial but not to explain matters already addressed in his written testimony.

Minn. R. Civ. P. 26.05 provides that a party has a duty to amend a prior response to an interrogatory or request for production, if the party learns that the response is in some material respect incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. This rule extends to any report of an expert witness. *See* Minn. R. Civ. P. 26.01(b)(5).

Furthermore, the court is authorized to reasonably control the mode and order of interrogating witnesses and presenting evidence so as to "1) make the interrogation and presentation effective for the ascertainment of the truth, 2) avoid needless consumption of time, and 3) protect witnesses from harassment or undue embarrassment." Minn. R. Evid. 611(a). Consistent with Rule 611(a), the tax court regularly issues scheduling orders that require the direct testimony of expert witnesses to be reduced to writing, absent leave of court (citations omitted).

The court denied Lowes' motion for leave for additional oral direct testimony of its review appraiser. The court stated that the scheduling order required that expert reports include complete statements and opinions of all witnesses and the basis and reasons for them. Accordingly, the court stated that Mr. Battuello's written reports should have contained all the bases and reasons for his opinion and petitioners may not supplement Mr. Battuello's written reports with additional direct testimony to overcome deficiencies. ***Lowe's Home Ctrs., LLC v. Hennepin Co.***, 2020 WL 6688900 (Minn. T.C. 11/13/20).

■ **Property tax: Petitioner failed to comply with mandatory disclosure rule.** On 6/28/2019, petitioner DTD Properties, LLC filed property tax petitions stating that the estimated market value of two subject properties for taxes payable in 2020 exceeded their actual market value. Both petitions describe the respective subject properties as income-producing. On 7/6/2020, the Olmsted County Attorney sent petitioner's counsel a letter stating, in relevant part, "if your Tax Court petition contests the valuation of income producing property, you are required as the petitioner to provide certain financial information about the property by no later than August 1 of the taxes payable year." Citing Minn. Stat. §278.05, subd. 6. On 9/28/2020, the county filed motions to dismiss both petitions. The county asserts that it did not receive the necessary information with respect to either property by 8/1/2020. Petitioner argues that the required information was unavailable at the time it was due but provides no additional substantive details.

The mandatory disclosure rule states that in cases where the petitioner contests the valuation of income-producing property, certain information must be provided to the county assessor no later than August 1 of the taxes-payable year. Minn. Stat. §278.05, subd. 6(b) (2018). Failure to submit the required documentation by the August 1 deadline results in automatic dismissal of the petition unless an exception applies. *See Wal-Mart Real Estate Bus. Tr. v. Cty. of Anoka*, 931 N.W.2d 382, 386 (Minn. 2019). The statute provides two exceptions to the August 1 deadline: "1) if the failure to provide the required information was due to its unavailability at the time the information was due; or 2) the petitioner 'was not aware of or informed of the requirement to provide the information.'" Minn. Stat. §278.05, subd. 6(b)(1).

With respect to exception 2, petitioner did not contend or provide any facts supporting a contention that it lacked knowledge of the obligation to provide mandatory disclosures by the 8/1/2020 deadline. With respect to exception 1, petitioner did not provide any facts explaining why the required information was unavailable; nor did petitioner provide any specific circumstances that interfered with its access to information. The court stated that the mere assertion that the information was unavailable did not satisfy the requirements of the mandatory disclosure rule, and thus, granted the county's motion to dismiss. ***DTD Properties, LLC v. Olmsted Co.***, 2020 WL 7086154 (Minn. T.C. 12/1/2020).


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Kammi J. Hoeffler joined Fitch, Johnson, Larson & Held, PA and will be practicing in the areas of workers' compensation and insurance defense. Hoeffler graduated from Mitchell Hamline School of Law in May 2020.


CORTNEY

Dea Cortney joined Sieben Edmunds Miller PLLC as an attorney and will be assisting criminal defense and personal injury clients. She has been with the firm since October 2018 as a law clerk. This October, she was officially sworn in and licensed to practice law in Minnesota.


DELAPENA

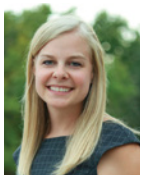
Gov. Tim Walz announced the reappointment of Hon. Bradford Delapena as judge of the Minnesota Tax Court for a six-year term set to expire on January 4, 2027.

Christina Petsoulis joined Flaherty & Hood, PA as an associate attorney. Petsoulis will focus her practice on representing and consulting public employers on labor and employment matters.


MORGAN

Jacob Morgan has joined Johnson, Killen & Seiler in Duluth, MN. Morgan graduated from Mitchell Hamline School of Law.

Kassius O. Benson was selected to lead the Hennepin County Public Defender's Office. He was also elected to serve a three-year term on the NAMI (National Alliance on Mental Illness) Minnesota board of directors, starting January 1, 2021. Benson is an MSBA Certified Criminal Law Specialist and owner of a criminal defense firm.


KRUSCHKE


ZUGAY

Kaylee Kruschke and Dawn Zugay joined Mendoza Law, LLC. Kruschke joins as an associate attorney and will be focusing her practice in the areas of data privacy, internet and telecommunications, and arts and entertainment law. Zugay joins as senior counsel and practices in the area of nonprofit organizations and is a Rule 114 Neutral providing mediation services in business, employment, and housing disputes.


SCHMOLL

Zach Schmoll has been promoted to principal and selected as the president of Fields Law Firm. Schmoll's practice includes representing clients in workers' compensation, disability, and personal injury matters. In addition to his litigation practice, he will oversee management of the firm and also serve as a director of strategic planning.


CONNELL


O'CONNELL

Alexandra Michelson Connell and Lindsey O'Connell have become shareholders at the family law firm of Tuft, Lach, Jerabek & O'Connell.

## In Memoriam

**Vance B. Grannis, Jr.,** age 83, of Inver Grove Heights, passed away on November 17, 2020. Grannis was a practicing attorney for over 60 years and was still practicing law at the time of his passing. He was the first mayor of Inver Grove Heights and helped found the city. He worked part time as a municipal law judge and volunteered for over 25 years as a police reserve officer.

**John Wendell Hendrickson, Jr.**, age 80, of Plymouth, passed away on November 17, 2020. After graduating from University of North Dakota-Grand Forks, he began his law practice in Fargo with his father and grandfather. He moved to the Twin Cities in 1971, worked for IDS as an attorney, and later started his own practice.

**Thomas J. 'Tom' Germscheid**, age 66, of Stillwater and formerly North St. Paul, died on November 18, 2020. Germscheid was a dedicated attorney and practiced 38 years, first at Collins, Buckley, Sauntry, and Haugh Law Firm, then for his own practice, Germscheid Law Firm, and most recently for the state of Minnesota as a mediator.

**Llewellyn "Lew" Herbert Linde**, of Hastings, passed away at the age of 92 on November 27, 2020. Lew was a co-founder of Hastings Family Service, in 1970, serving on its board for 32 years. The agency provides direct services to local citizens living in poverty. Upon his retirement, he volunteered as a pro bono attorney specializing in family law for Legal Assistance of Dakota County for more than 20 years.

**Lawrence M. Rocheford**, age 62, of Inver Grove Heights, passed away on November 27, 2020 of covid-19. A civil litigator and partner at Jardine, Logan & O'Brien and Lommen Abdo law firms for over 30 years, Rocheford was a board-certified civil trial advocate by the National Board of Trial Advocacy for 25 years, was certified as a civil trial specialist by the Minnesota State Bar Association and was an associate in the American Board of Trial Advocates. He was also an adjunct professor at William Mitchell College of Law.

**John William "Bill" Schindler**, age 90, of Plymouth, died on December 1, 2020. He earned his JD from William Mitchell and was a Faribault County district court judge.

**Dan Kammeyer**, of Anoka, passed away at age 82 on December 3, 2020. He received his law degree from the University of Minnesota. He began work as an attorney and was appointed to the bench as a judge in 1979. He served in this role until his retirement in 2008.

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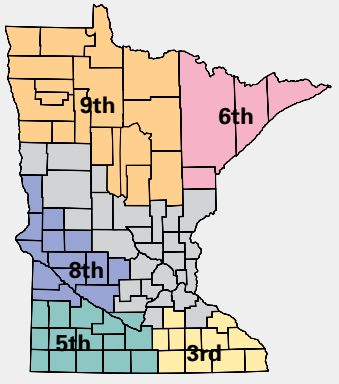

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*[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.*

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