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VOLUME LXXVI NUMBER IV
APRIL2019
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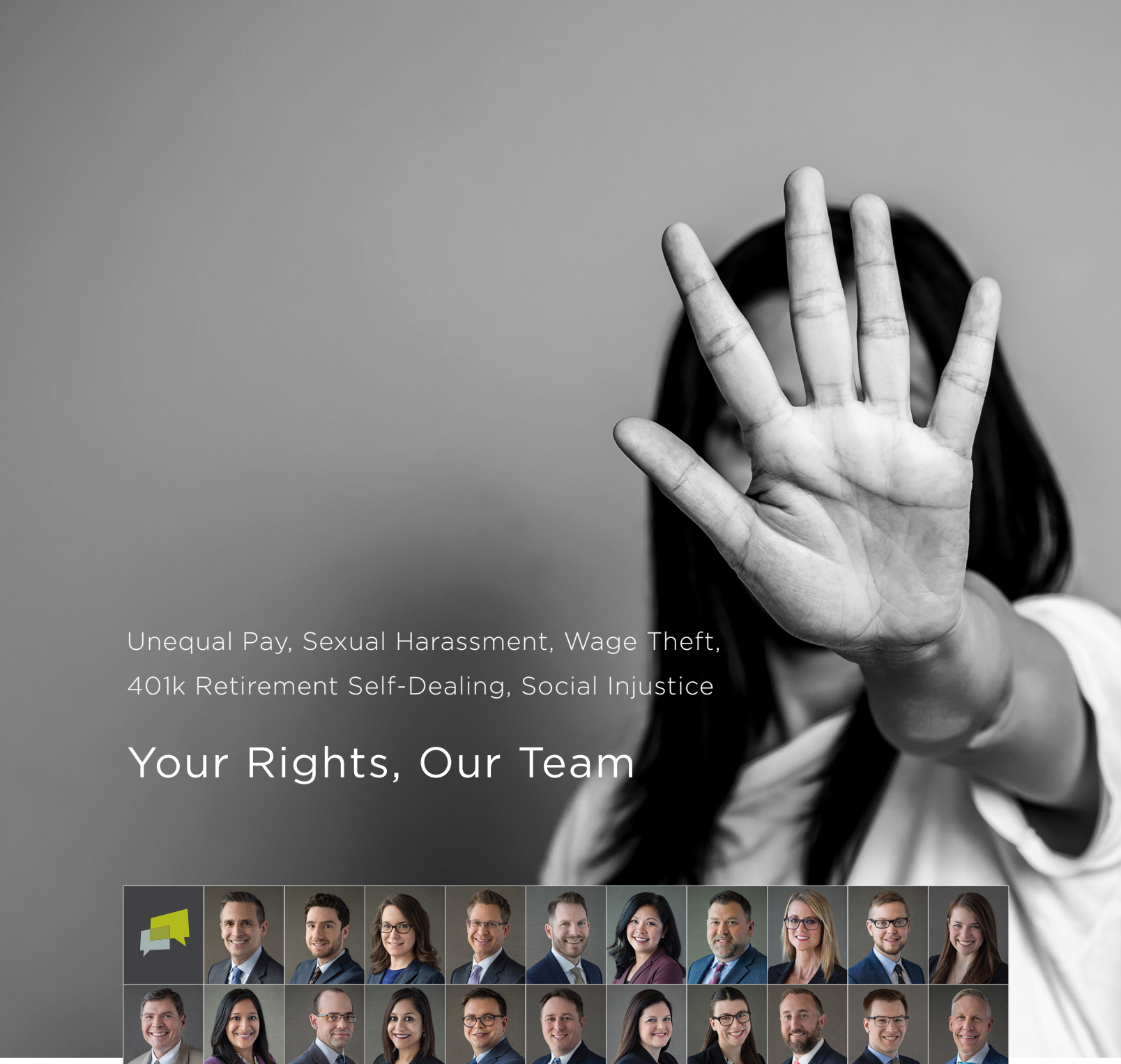

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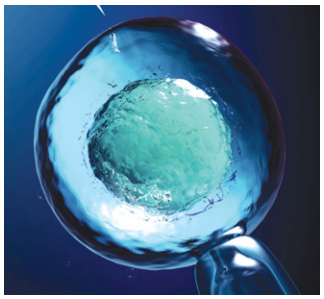

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One Profession a hit in Bemidji

Nearly 100 lawyers, judges, and state and local bar leaders gathered in Bemidji (9th Judicial District) on March 22 for the MSBA's One Profession event. The day-long conference, hosted by the MSBA and the 14th and 15th District Bar Associations, was part of a series of similar events being held throughout greater Minnesota to discuss the issues and opportunities affecting legal communities across the state.

The Bemidji event, introduced by MSBA President Paul Godfrey, featured a keynote talk by Dr. Michele Statz, an anthropologist of law and assistant professor at UMN Medical School/Duluth. Statz led a spirited conversation about access to legal services in the Northland. She was joined by Tamara L. Yon, assistant chief judge for the 9th Judicial District, who talked about the challenges of recruiting judges in her district; Karin Ciano, executive director of the Collaborative Community Law Initiative, who discussed draft legislation that she co-authored seeking to forgive student debt for attorneys who agree to live and work in greater Minnesota; Kelly Asche, a researcher for the Center for Rural Policy and Development, who talked about the reasons why families move to rural communities; and Leann Fuith, dean of career and professional development at Mitchell Hamline School of Law, who discussed how blended legal education—part online and part on-campus—is helping communities keep their local talent.

Justice G. Barry Anderson presented recent Minnesota Supreme Court cases, and Judges Heidi Schellhas and Renee Worke gave updates from the court of appeals. CLE breakout sessions covered employment law, legal technology, criminal law, and more.

Upcoming One Profession events will be held in the 3rd Judicial District (Rochester, April 26), the 7th (Long Prairie, May 17), and the 10th (Coon Rapids, July 11). The 1st Judicial District event will be held on October 25 at a location to be determined. Visit *www.mnbar.org/one-profession* for details.

MSBA legislative update

The MSBA is pursuing legislative initiatives to tackle two scenarios in which it can be hard to get needed legal help. The initiatives seek (1) state funding for student loan repayment assistance for lawyers who commit to private practice in rural areas, and (2) a civil right to appointed counsel in public housing eviction actions alleging breach of lease.

The proposed legislation to assist new rural lawyers was brought forward by the Solo & Small Firm Section, which tellingly noted, "There are many counties in rural Minnesota where the entire bar could sit together around a dinner table." Sen. Nick Frentz (DFL-North Mankato), a lawyer, has introduced a bill, SF2587, that would provide student loan repayment assistance to lawyers who make a five-year commitment to practice in designated rural areas. The lawyers must devote at least 50 percent of their time to representing individual residents who have an income below 400 percent of the federal poverty guidelines.

The MSBA's second legislative initiative is targeted to assist people of lower income who live in public housing. Research by the MSBA's Access to Justice Committee demonstrates that in Minnesota public housing breach of lease evictions in 2016, unrepresented tenants were evicted 83% of the time while represented tenants settled all of their cases.

Bills seeking to guarantee a civil right to counsel in public housing breach of lease evictions have been filed in both the Minnesota House and Senate. They were authored by Rep. Ruth Richardson (DFL-Mendota Heights), a lawyer, and Sen. Kari Dziedzic (DFL-Minneapolis).

MSBA to file amicus brief in family law case

On February 27, the Minnesota Supreme Court granted review in *Thornton v. Bosquez* (No. A18-0223) and invited the MSBA to participate as an *amicus*. The case presents significant issues regarding the impact of domestic violence on child custody determinations. Notably, Minnesota was one of the earliest states to consider the factor of domestic abuse in child custody decisions, and ongoing revisions to Minnesota's child custody statutes have continued to incorporate domestic abuse as an important consideration in child custody matters. In *Thornton*, the Minnesota Supreme Court will address—for the first time—the circumstances in which a parent who has committed domestic abuse may be awarded custody in light of Minnesota's current statutory presumption against granting joint custody to parents where domestic violence has occurred.

In consultation with the MSBA's Family Law Section, the MSBA accepted the Court's invitation to participate as *amicus*, and will argue for affirming the decisions of the district court and court of appeals. Special thanks to Christopher Bowman and Michael Boulette, who were appointed by the Appellate Practice and Family Law Sections, respectively, to author a brief on behalf of the MSBA. Briefing is ongoing, with oral argument likely to occur sometime this summer.

***MEET THE STAFF:** Senior Director of Policy Nancy Mischel joined the MSBA in the fall of 2004 after working as an attorney for various legal aid programs in the Twin Cities for 11 years. Seven of those years included work at the state Capitol, working to pass legislation beneficial to low-income Minnesotans. She's a graduate of the University of Minnesota Law School, and keeps a toe in the water by taking the occasional pro bono case. Her current work at the MSBA includes working with committees and bar leadership to shepherd policy through the MSBA, resulting in amicus briefs to the court, petitions for rule amendments, and other policy positions. Nancy loves to travel, hear live music, try new recipes, spend time outdoors in warm weather, and read.*

Ethical "of counsel" associations

Based on several recent calls to our ethics hotline, it appears that many Minnesota attorneys are interested in understanding the ethics rules involved when "associating" with another lawyer or law firm as a means to grow a practice or expand the legal services available to clients. Some use the term "of counsel" to describe this association; others consider the term old-fashioned and prefer variants like special counsel, associated counsel, or affiliated counsel. The term can refer either to an individual with whom you associate or to a law firm. While the term can refer to an employee relationship, I will focus on the use of the term to describe non-employee relationships.

The starting point

Minnesota's ethics rules do not define, or specifically mention, the term "of counsel" or its variants. The American Bar Association addressed the term "of counsel" and the types of relationships it's meant to cover in ABA Opinion 90-357. Pursuant to this opinion, the term is a professional designation denoting a "close, regular, and personal" relationship that is more than just a referral relationship, more than an occasional consulting relationship, and more than an association for one case. If you have such a close, regular, and personal relationship with another firm or attorney, you may ethically use the designation "of counsel" or similar variants.

SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

Conversely, though, if your association is less than close, regular and personal, your use of the designation "of counsel" or its variants may be false or misleading. As everyone knows, the cardinal rule of lawyer advertising is to ensure that all communications about yourself and your legal services are not false or misleading.[1] The ABA opinion provides that this type of relationship may be between individuals or law firms, and you can have associations with more than one lawyer or law firm simultaneously.

Fee-sharing

Rule 1.5(e) regulates the division of fees between lawyers who are not in the same firm. When you have the close, regular, and personal association described above, are you in the same firm for purposes of this rule? I think so, and so do many ethics opinions that have addressed this subject.[2] This position is consistent with the definition of law firm or firm in the rules: "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or *other association* authorized to practice law," and "if [lawyers] present themselves to the public in a way that suggests they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules."[3]

While you may choose to disclose to clients the division of fees with the "of counsel" firm or lawyer, you are not required to do so under Rule 1.5(e), but you would be if you do not have a close, regular, or personal relationship with the entity or individual with whom you are sharing fees. Remember, "of counsel" relationships should not be used to disguise a referral relationship to avoid—or because you cannot meet—the division of fee requirements of Rule 1.5(e). Finally, if you are sharing fees with an associated non-Minnesota lawyer or law firm, you should check the rules of the jurisdiction where that lawyer is located, as those ethics rules may differ.

Conflicts

Perhaps the most significant ethical consequence of this type of association is the imputation of conflicts for purposes of disqualification. Because you are being treated for purpose of the ethics rules as a "firm," Rule 1.10(a) provides that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."[4]

Please keep this in mind when you are forming an association with another lawyer or law firm—your conflicts are imputed to them, and their conflicts are imputed to you. As part of forming this relationship, you must think through how you are going to detect and address potential conflicts. Note also that blanket screens and broad advance waivers generally do not solve this problem, because some conflicts cannot be consented to, and you usually cannot provide sufficient generic information in advance to obtain the informed consent needed to consent to specific conflicts.

Other considerations

If you are associating with law firms or lawyers not licensed in Minnesota, you should be sure to include jurisdictional limitations when communicating about the association or services being provided.[5] Similarly, some states, like Iowa, do not allow you to form "of counsel" relationships with attorneys not admitted in Iowa.[6] Obviously, you should also not suggest an "of counsel" or closer association if that is not in fact true ("Lawyers may state or imply that they practice in a partnership or other organization only when that is in fact true"[7]).

If you only associate occasionally, using terms that suggest a closer relationship is false and potentially misleading, and, as noted, should not be used to avoid fee-sharing disclosure requirements. Beyond the scope of this article, you should also think about how to minimize your potential vicarious liability for those with whom you are associated, as well as the implications of the association for your malpractice insurance; both are good questions for your malpractice carrier. Finally, if you are associating with a non-Minnesota law firm, you should look at the Professional Firms Act regarding the requirements for that foreign entity to register in Minnesota.[8]

Conclusion

I've enjoyed discussing with several lawyers the various ways in which they are looking to associate with others to grow their practice or expand the services they provide to clients. I also applaud the fact that calling for ethics advice was one of the first things they did! ▲

Notes

[1] Rule 7.1, Minnesota Rules of Professional Conduct (MRPC).

[2] *See, e.g.,* Illinois State Bar Association Opinion No. 16-04 (October 2016); State Bar of Arizona Ethics Opinion 16-01 (April 2016); *But see* Professional Ethics of the Florida Bar Opinion 00-1 (April 20, 2000) (concluding that only if the "of counsel" attorney practices exclusively through the firm is the relationship exempt from the division of fees rules).

[3] Rule 1.0(d), MRPC; Rule 1.0, Cmt. [2].

[4] Rule 1.10(a), MRPC.

[5] Rule 7.5(b), MRPC.

[6] Iowa Ethics Opinion 13-01 (July 2013).

[7] Rule 7.5(d), MRPC.

[8] Minn. Stat. §319B.04 (2018).

Security considerations for law firm data governance

The legal community deals with a huge amount of data. Legal strategies, client communications, research, e-discovery, documentation, billing, personal information about clients—the list of data types with which law firms are entrusted every day is continuously growing. Effective data management is critical, as immediate access to data is just as important as keeping it protected. Data governance frameworks assist in keeping in compliance with current regulations and standards.

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 trials. He is a member of the MN Lawyers Professional Responsibility Board.

Data governance refers to a framework establishing how the data that an organization collects and stores should be managed, accessed, and kept private. How this framework is structured largely depends on the types of data being collected, and it also assigns responsibilities for invested stakeholders who are held accountable for certain elements of the management process. Because law firms need to manage an array of complicated data, delegation is critical. Data management should not be solely the concern of the IT department. Upper management support and involvement helps set expectations for data governance, especially with regard to budgeting and the allocation of necessary resources.

Laying out this degree of communication within a firm about its data governance strategy requires data stewardship. Data stewards are assigned to specific data assets or business processes and take particular responsibility for how it is accessed and protected.

More is not better

Data governance strategies should specify how long certain types of data are to be retained and how and when it is destroyed. Storing large amounts of inactive data (especially confidential or personally identifying information) makes law firms a prime target for breaches. Data architecture frameworks are used to document what data assets are being stored and where, as well as their movement within the network. Data inventories should be consistently updated to make data minimization easier to organize and execute.

Data frameworks are critical in clearly communicating within the firm what types of data are being amassed, where it is being stored, and what technologies should be used to manage it, such as cloud infrastructures. Cloud computing allows for immediate access to data from internet-enabled devices without the physical storing of data within an organization's immediate proximity or location. Remote servers enable employees to access data from anywhere. The cloud is a cost-effective and simpler technology for many organizations, and replaces centralized data storing with a distributed and expanded framework. That said, this decentralized system requires a strong relationship with your provider, an understanding of what data is being stored, who your client is, and what amount of risk you are willing to take. Implementing cloud security solutions is important for dealing with data that is not completely in your control. Encryption policies and user education also balance data protection with immediate accessibility.

Strongest possible controls

Law firms are being pushed to implement the strongest possible information governance controls and procedures. Clients have high expectations for data security, and recent international laws draw attention to an increase in future cybersecurity pressures within the United States. The General Data Protection Regulation (GDPR) has a significant impact on U.S.-based law firms that have clients with protected EU status. Breach notification, consent for how data is collected and used, data minimization, and breach assessments are all elements of what is required by the GDPR. "All customer-facing documentation will require revision to comply with the GDPR," notes a recent article in the magazine

American Gaming Lawyer, "which requires providing detailed information to data subjects regarding the processing of personal data in a concise, transparent, intelligible, and easily accessible form." Strong data governance frameworks make compliance with security regulations feasible.

The reputational, financial, and legal risks associated with a data breach impacting a law firm are severe. Huge stores of data, increased utilization of the Internet of Things, and varied mobile devices, cyber regulations, and client expectations for data privacy all make for a very complicated set of requirements by which law firms have to abide. Data governance frameworks assign accountability and promote interdepartmental communication, upper level support of secure data policies, and the use of tech tools and resources to protect and access data. Preparing for data breaches with strong incident response plans that take into account compliance (and the costs associated with non-compliance), having qualified security personnel, and perhaps investing in cyber insurance all help to demonstrate to clients a firm's focus on keeping their data secure. ▲

'My bar group friends are always the most supportive'

SUMBAL MAHMUD is a Human Services Judge in the Appeals Division. Prior to that she obtained top secret security clearance with the federal government, and was trained at a Federal Law Enforcement Training Center (FLETC) for 6 weeks for certification to become an asylum officer for the Department of Homeland Security. She has been the executive director of a large non-profit organization in Chicago and in-house counsel for Best Buy.
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Why did you go to law school?

When I was young, I thought lawyers went around and saved the world or something. I had a passion for and happened to excel in speech, debate, and mock trial. One of my most treasured mementoes from high school is an award I received from the MSBA Mock Trial program. I owe immense gratitude to the MSBA and to each and every lawyer who volunteered as a mock trial judge. If you are one of my former coaches, or ever gave up a Saturday to help me perfect my courtroom skills, I would love to reconnect with you and thank you in person. I cannot repay you, but know that I am trying to pay your investment forward. It took 20 years, but I am now fortunate enough to sit on the MSBA Council—the board of directors of the organization that played a part in setting me on my way to a legal career.

Tell us a little about the humanitarian work you do.

I was born in Lahore, Pakistan. My family immigrated to Minnesota when I was 18 months old. I have lived a life trying to navigate two cultures, two countries, two identities (an American in Pakistan, a Pakistani-American in America). It has taken some time, and I have made some awkward mistakes, but I think I have finally settled on being comfortable in my own in-between.

Even while developing my legal career, my heart has, all the while, kept being drawn back to the street children in Pakistan. When I see my friends' social media postings of their kids on the first day of school, I immediately think of what many school-age children in Pakistan would do for the chance to go to school. My business plan is micro-lending for education. My hope is that instead of buying your family member yet another trinket for a holiday, people might be moved to lend a family enough money to educate their child. Micro-lending has an incredible return on investment and loans are repaid or paid forward at a high rate.

I am a frequent public speaker. I have given thousands of speeches, participated on panels, and been the keynote speaker for many events, but to leave a true legacy, my desire is to write a children's book here in the U.S. and use the proceeds to fund children to attend school elsewhere in the world. I have not made this happen yet, but I believe in the power of affirmations, so if the universe is reading this—please help me!

You've volunteered extensively with bar groups—serving on ABA committees, serving for five years on the national board of directors of NAPABA, rising to president of the Minnesota chapter of NAPABA—and you recently joined the MSBA Council. What do you get from your work with the MSBA and other bar groups?

Friends? Only kidding a little bit. Whether it be on LinkedIn or Facebook, my bar group friends are always the most supportive and encouraging of all my endeavors. For example, I posted that I would like to purchase water filters for the poor in Pakistan. Each filter cost $60 and would last about a year. It would save a family (usually the women/girls of the home) four hours of their day in pursuit of clean water. In a matter of hours, friends donated generously toward this cause.

As a lawyer, you've worked in many settings: as a private practitioner, corporate counsel, asylum officer for the Department of Homeland Security, and as a Human Services judge. Which has been most memorable, or most meaningful, to you?

All of the above. Each experience has prepared me for the next. Whether conducting interviews of asylum seekers near the U.S./Mexico border, adjudicating affirmative asylum applications, or conducting hearings at DHS, my job at the end of the day is to listen (and to write). I used to think that being a lawyer was all about speaking, but I have come around to believe that it is more about listening. Lawyers are listeners who capture and tell someone else's story. ▲

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Lawyer addiction and wellness consultant Patrick Krill addressed the February 28 gathering (top left). Chief Justice Lorie M. Gildea provided opening remarks (lower right); Associate Justice David Lillehaug organized the conference (top right).

Lawyer well-being in Minnesota gets a boost from the Supreme Court

By Joan Bibelhausen

National efforts to advance well-being in the legal profession were placed under a statewide spotlight at the Minnesota Supreme Court's Call to Action for Lawyer Well-Being conference on February 28. Nearly 250 representatives from a range of legal employers were invited to discuss the data and recommendations from *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change,*[1] a groundbreaking 2017 report issued by The National Task Force on Lawyer Well-Being.[2] These efforts followed the 2016 release of updated data showing high levels of problematic substance use, mental health issues, and stigma in our profession.[3]

In introducing the conference, Minnesota Supreme Court Chief Justice Lorie S. Gildea said, "The report makes it clear that the legal profession is in serious need of self-reflection, healing, and meaningful change. If we fail to respond to these devastating levels of mental and chemical health issues, we risk our profession's reputation, the public's trust in the legal profession, and the ability to attract bright young minds to the profession."

Chief Justice Gildea then introduced Patrick Krill, a co-author of the study detailing substance use and mental health issues in the legal profession and a national consultant on lawyer well-being. In his keynote address, Krill identified reasons that the entire profession should be paying close attention to and acting on this research. They included the costs to legal organizations and those who are personally affected by these issues; the importance of reducing stigma and acting quickly; and the positive path that can result from engaging on these issues.

Breakout sessions

The attendees then joined four breakout groups focused, respectively, on large firms, solo and small firms, judges and public lawyers, and in-house counsel. Each group discussed specific opportunities and challenges in creating greater awareness and implementing well-being options within their spheres. Attendees were encouraged to analyze their work environments for opportunities and to review and adopt a well-being pledge.

Following the breakouts, Associate Justice David Lillehaug introduced the second keynote speaker, Anne Brafford. Brafford, a member of the national task force and the author of the *Path to Lawyer Well-Being Toolkit*,[4] addressed the nexus between well-being and personal peak performance. She stressed that legal organizations and their leaders play an enormous role in whether lawyers

feel engaged or depleted and burned out, and offered science-based organizational strategies to fix problems that harm lawyer well-being.

Justice Lillehaug closed the conference with a challenge. "The Court hopes that all participants heard our call," he said, "and left inspired to take concrete steps to encourage wellness. We'll be following up with them over the next year." As its first next step, the Supreme Court has created a webpage featuring conference materials and videos of the keynotes at *www.mncourts.gov/lawyer-well-being.aspx*.

LCL can help

Lawyers Concerned for Lawyers (LCL) was delighted to be involved in planning this conference and is grateful to the Supreme Court for raising the profile of these issues. For 42 years, LCL has assisted individuals and organizations in the legal profession to recognize issues of impairment and to support our colleagues as they seek the help they need. Since the publication of the well-being report in August 2017, LCL has provided dozens of CLE and other programs and has participated in many discussions with employers about implementing these recommendations in their organizations.

LCL can be a resource for beginning or for continuing discussions on how to support our colleagues so we can do our best thinking. Well-being efforts are not optional; they are critical to retention, business success, effective diversity and inclusion initiatives, reduced risk of ethics and malpractice issues, client and lawyer satisfaction, personal resilience, organizational health, and the reputation of our profession. ▲

Notes

[1] *http://ambar.org/lawyerwellbeingreport*

[2] The National Task Force on Lawyer Well-Being is a coalition of entities, including the American Bar Association and representatives of lawyer assistance programs.

[3] P. R. Krill, R. Johnson, & L. Albert, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," 10 J. ADDICTION MED. 46 (2016); J. M. Organ, "What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being," 8 U. ST. THOMAS L. J. 225 (2011).

[4] *http://ambar.org/wellbeingtoolkit*.

JOAN BIBELHAUSEN is the executive director of Lawyers Concerned for Lawyers (LCL). You can find more information on Lawyers Concerned for Lawyers at www.mnlcl.org. LCL may be reached, confidentially, at 651-646-5590 or help@mnlcl.org.

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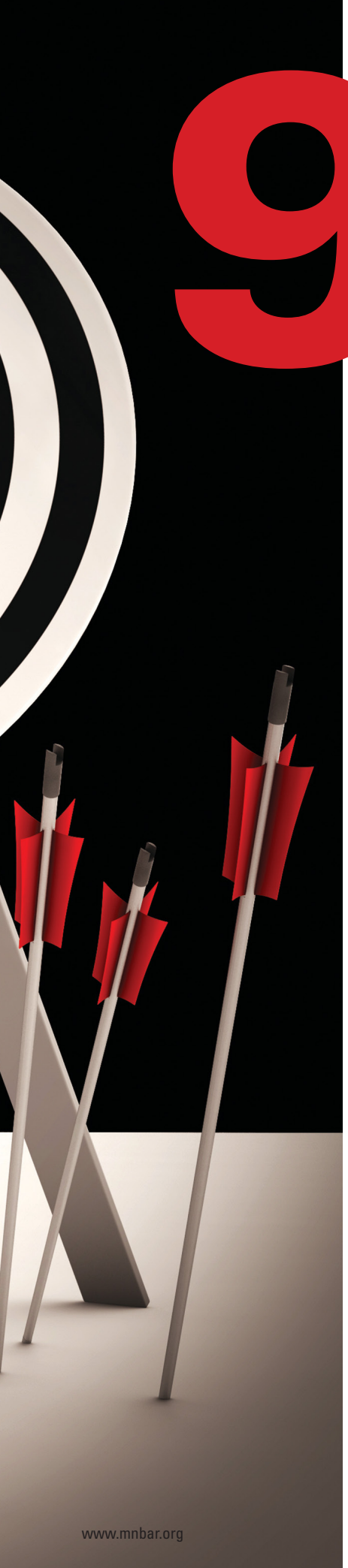
Partner disputes, competitor animosity, disgruntled employees, and government compliance woes are among the common triggers for litigation that can kill a young enterprise—litigation that, in many cases, is entirely avoidable through attention to detail.



9 WAYS TO FAIL AS AN ENTREPRENEUR

AND HOW TO COUNSEL CLIENTS TO AVOID THEM

By Inti Martínez-Alemán

Conventional wisdom says that 80 percent of businesses fail within two years. The Small Business Administration (SBA) disagrees.[1] According to SBA statistics, from 2005 to 2017 nearly 80 percent of new establishments survived one year. "About half of all establishments survive five years or longer…. About one-third of establishments survive 10 years or longer."[2]

So the prospects for business startups are not as grim as presumed. What *is* grim is having to shut down a business because of poorly managed disagreements. Partner disputes, competitor animosity, disgruntled employees, and government compliance woes are among the common triggers for litigation that can kill a young enterprise—litigation that, in many cases, is entirely avoidable through attention to detail.

I started practicing law over 10 years ago in Honduras and spent the first five years of my career there. Yet despite the many differences between the two countries and their distinct legal systems, business owners in Honduras and the U.S. make very similar mistakes. Barring a few local nuances, I have seen at least nine recurring mistakes that entrepreneurs make in both nations.[3]

1 ICs = EMPLOYEES

We all know those people who think that issuing a 1099 tax form to their workers automatically makes these workers independent contractors. And we all know those people who treat their employees as if they were independent contractors. When I advise clients on the subject, I tend to hear stories about a cousin or business associate who has been misclassifying their workers for 20 years and has never had a problem. Perhaps those stories are true and perhaps they aren't, but the downside is just too great to take the risk. The penalties for misclassifying workers can be severe.

There are several tests to determine whether a worker is an independent contractor or an employee. The IRS, federal labor law, and state labor law use different multi-factor tests for different purposes.[4] A common thread between these variegated tests is control. How workers get their orders, instructions, and supervision goes a long way toward determining whether a worker is an independent contractor or an employee. Simply issuing a 1099 does not settle the matter.

2 WHAT INSURANCE?

Not all insurance is created equal. Even within a particular class of coverage—workers' compensation, general business liability, professional liability, product liability, business interruption, or personal property insurance—not all carriers and policies are created equal. I hate to see it when my clients come to me wanting to sue their insurance carrier over a denied claim, only to find out that their insurance policy explicitly excludes the type of risk or damage a business owner suffered.

However much education there may be out there about insurance coverage, policies are very complex. And even when entrepreneurs clearly know the scope and contents of their insurance, they often accept whatever is offered to them as they are rushing to open or expand their business. Some insurance agents are not eager to tell potential customers about all the risks of cheap insurance policies, either.

For example, if your company plans to flip homes, make sure there is not a townhome & condo exclusion in your commercial general liability insurance policy. If you plan to innovate in your hiring and compensation structure for your workers, make sure to obtain an employment-related practices endorsement, if you are able.

Owning a business is risky business. Not having a tailored insurance policy for your specific type of enterprise can be dangerous. Investing the time and money to know what is covered, and what is *not* covered, could save your business from failure.

3 JUST PUT IT ALL ON MY AMEX

If I am the sole owner of a coffee shop, then it's okay to use the business to support my lifestyle, right? Not quite. If you are running your shop under an entity offering limited liability, then you had better steer clear from commingling funds. Otherwise, a court could find in favor of a business creditor after piercing the limited liability veil. That means your creditor could likely snatch up your family boat or cabin.

Using your personal credit card to pay for business expenses is allowed if the business in turn reimburses you for that use. If there is no reimbursement or equivalent, then you are setting yourself up for misfortune.

4 WHO EVEN READS THE FINE PRINT?

The haste to open your doors and start making money can trip you up if you do not know what you are signing and getting yourself into. More than legal advice, this is life advice. It applies to almost everything we do.

If you do not know what your rental lease or your loan agreement says, how will you know your rights? Most laypersons will not understand the terms of their lease or loan without actually reading the agreement—and even then, the dense legalese will be impenetrable to anyone unfamiliar with the terminology.[5] Without proper legal counsel, you might be out of luck when your relations with your landlord or lender go south.

The best contracts I have read contain quick and precise executive summaries or a table of contents of the entire contract written in plain English. These summaries or tables help entrepreneurs understand what they are getting into—really—when signing that contract. Do not settle for less.

5 "I CALL THE SHOTS." BUT DO YOU, REALLY?

Being a company owner should involve *de jure* and *de facto* ownership. Let's discuss what this means in the context of limited liability companies (LLC), because that's the most commonly chosen entity these days. (Nearly 87 percent of Minnesota business entities filed in 2018 were LLCs.)[6]

Minnesota's new LLC Act allows for an LLC to be governed by an operating agreement that may be oral, recorded, or implied—or even a combination of these approaches.[7] This means that the way members of an LLC run the company and treat each other may determine the *actual* terms of a valid operating agreement.[8] This agreement may bind the company, too.[9] Conversely, a written operating agreement may be deemed ineffective if the conduct of the company members implicitly disregards the written record. How you carry out your company affairs is indicative of the company members' agreement, whether or not it is memorialized.

What's the lesson here? Written governing documents matter a lot. But *enforcing* these documents is even more important. If operating agreements are not updated to reflect the current understanding and conduct of the partners, then why even have written governing documents anyway?

Because written operating agreements are private documents, I advise my business clients to file a statement of authority before the Secretary of State.[10] This statement will tell the public the essential information about company leadership, without the details of the operating agreement. This filing enables third parties to find out who is authorized to sign contracts and bind the company, including their limitations and restrictions.

Note that the doctrine of apparent authority is still applicable to, and intersects well with, the LLC Act. If an assistant manager does not have the power to bind the company but nonetheless makes purchases from a third party on behalf of the company, and the company readily pays for such purchases, then the assistant manager's apparent authority before the third party is valid despite not having the actual authority to make the purchases.[11] Conduct and course of dealing matter!

Any real estate lawyers in the house? Note the statute's provisions regarding real property belonging to the LLC. The statement of authority may reflect who in the company has the authority, or limitations to this authority, to "execute an instrument transferring real property held in the name of the company." If a limitation on the authority to transfer real estate is recorded in the real property records, then "all persons are deemed to know of the limitation."[12]

6 NO PAPER TRAIL, WILL SURELY FAIL

Similarly, if you are not documenting your business operations, chances are you will not be able to corroborate what really happened if a dispute arises a couple of years down the road. Keeping a daily log or journal of business operations, filtering your emails by categories, keeping digital copies of all physical mail, and backing up your electronic devices on the cloud are all examples of organizing your documents in ways that make it easy to retrieve them if a lawsuit commences.

Google Vault is a formidable and low-maintenance product that "lets you retain, hold, search, and export data to support your organization's archiving and eDiscovery needs."[13] With Vault you can seamlessly retrieve emails, chats, Google Drive files, etc. in anticipation of litigation. Legal holds and audit reports are a breeze!

A series of emails and text messages can become binding contracts under the right conditions. If you are keeping notes or journal entries for your business operations, chances are these would dissuade a potential plaintiff from litigating against you when your documentation is up to snuff. And if you do end up in court, a reasonable judge will give weight to your documented evidence.

We have all met people who do not like to put anything in writing. They only want to talk on the phone or in person about business matters. I tell my clients to take extra precautions with this type. What a savvy business person should do in these situations is to send the interlocutor a written summary of the conversation immediately afterward, giving them an opportunity to object to the summary within reasonable

WRITTEN GOVERNING DOCUMENTS MATTER A LOT.
BUT *ENFORCING* THESE DOCUMENTS IS EVEN MORE IMPORTANT.

time, lest it be deemed accurate. For example: "Hey Jim, my takeaways from our talk were ABC. I will assume these are true for you as well, unless you tell me otherwise by 123."

The point of documenting your business operations is primarily to prevent litigation from ever starting. If you are well documented, chances are a third party will not want to mess with you. But if they do, you can show the court what you've got.

7 Mi IP es su IP

The saying *Mi casa es su casa* is a gesture of utmost hospitality—it invites others to enjoy what belongs to you. But a business that produces intellectual property of any kind should protect it. If a company has employment agreements with its workers, the agreements should have clauses stating that all intellectual property and its derivatives that were produced or improved by an employee belong to the employer and not to the employee. The last thing you want is an unhappy employee claiming the intellectual property they produced belongs to them.

It is also risky to use a business logo or slogan that is not protected with a registered trademark or copyright. Protecting your company's intellectual property could prevent headaches down the road. Registering your intellectual property can also increase your company's value and potential monetary claims against a third party if they infringe.

Smart business owners grow their business by protecting their intellectual property. Anything short of that is asking for trouble.

8 YOU'RE FIRED! (EXCUSE TO FOLLOW)

When I represent employees in wrongful termination cases, it always irks me when employers come up with phony explanations for firing. It is even worse when managers contradict themselves or there is documented evidence of seeking a pretext for firing. If a manager fires an employee because of her continuous poor performance, but every performance review in her personnel record is stellar, there is less wiggle room for an employer to come out clean.

I advise my business clients to hire and fire for the right reasons. Pursuing unfairly discriminatory or retaliatory practices can be costly for an employer.

9 IT'S SAFE. BUT IS IT CYBERSAFE?

Although it varies according to industry, on average, human error is at the heart of nearly one in five data breaches.[14] Last year alone, according to the 2018 Verizon Data Breach Investigations Report, there were 53,308 reported security incidents in 65 reporting countries, of which 2,216 were confirmed data breaches.[15] It means that even if your staff makes no mistakes in how they handle sensitive data, there is a high chance that an external source could target your business to obtain confidential data.

There is no guaranteed solution to prevent data breaches, but you can significantly improve your odds by getting periodic cybersecurity assessments from a trusted vendor, implementing rigorous data policies, encrypting your data and storage, using a virtual private network when you are out of the office, and training staff to be more tech-savvy. And just in case, make you sure you get cybersecurity insurance to mitigate your losses.

You will find many free apps or services out there promising to protect your data or make your life easier. A rule of thumb in the tech world is that you are either a customer or a product. If you are paying, you are a customer and hopefully your data is protected. If the app is free, chances are that app is using you and your data as a product offered to third parties. Do not compromise your company's data: Stay away from the free version and pay the extra dollars.

CONCLUSION

While there is no perfect way to avoid litigation, it is in a business owner's best interest to keep a tight rein on their company. Putting into practice what I recommend here requires work and money, but it will pay off. Shuttering a business over legal disputes or costs is painful—and even more so if you could have avoided a protracted lawsuit. ▲

***INTI MARTÍNEZ-ALEMÁN** founded Ceiba Fôrte Law Firm® in 2016. The firm helps Latinos protect their assets, businesses, and jobs by litigating civil, business, and employment cases. Inti is licensed to practice law in Minnesota, New York, and the Republic of Honduras. He is married to his high school sweetheart, Ofelia Ponce, and they love living in Little Canada, Minnesota.*

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Notes

[1] *https://perma.cc/ESS7-RHLZ*

[2] *Id.*

[3] Actual data on the incidence of particular kinds of litigation is hard to come by. The Minnesota Judicial Branch, for example, does not compile a practical breakdown of the types of civil cases filed. The current case typology is not very useful: If you want to know how many cases involve business disputes, generic descriptions like "Civil Other" or "Contract" are not helpful. *https://perma.cc/AV6W-KWP9*

[4] My colleague Aaron Hall has a very good primer here: *https://perma.cc/Q8ZY-HZ4T*

[5] Boilerplate contracts are everywhere and it's rare that anybody reads them or objects to them. Two scholars tackle the enforceability of pseudo-contracts and how shared-meaning analysis could help further consumer rights: *https://perma.cc/5A2G-QLE8*

[6] *https://perma.cc/436R-K2P5*

[7] Minn. Stat. §322C.0102 subd. 17. Nevertheless, I would never recommend an oral or implied operating agreement.

[8] Joan MacLeod Heminway, *The Ties That Bind: LLC Operating Agreements as Binding Commitments*, 68 SMU L. Rev. 811 (2015) *https://perma.cc/R39L-F3FM*

[9] Minn. Stat. §322C.0110 subd. 1; *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999) is persuasive.

[10] *Id.* at §322C.0302

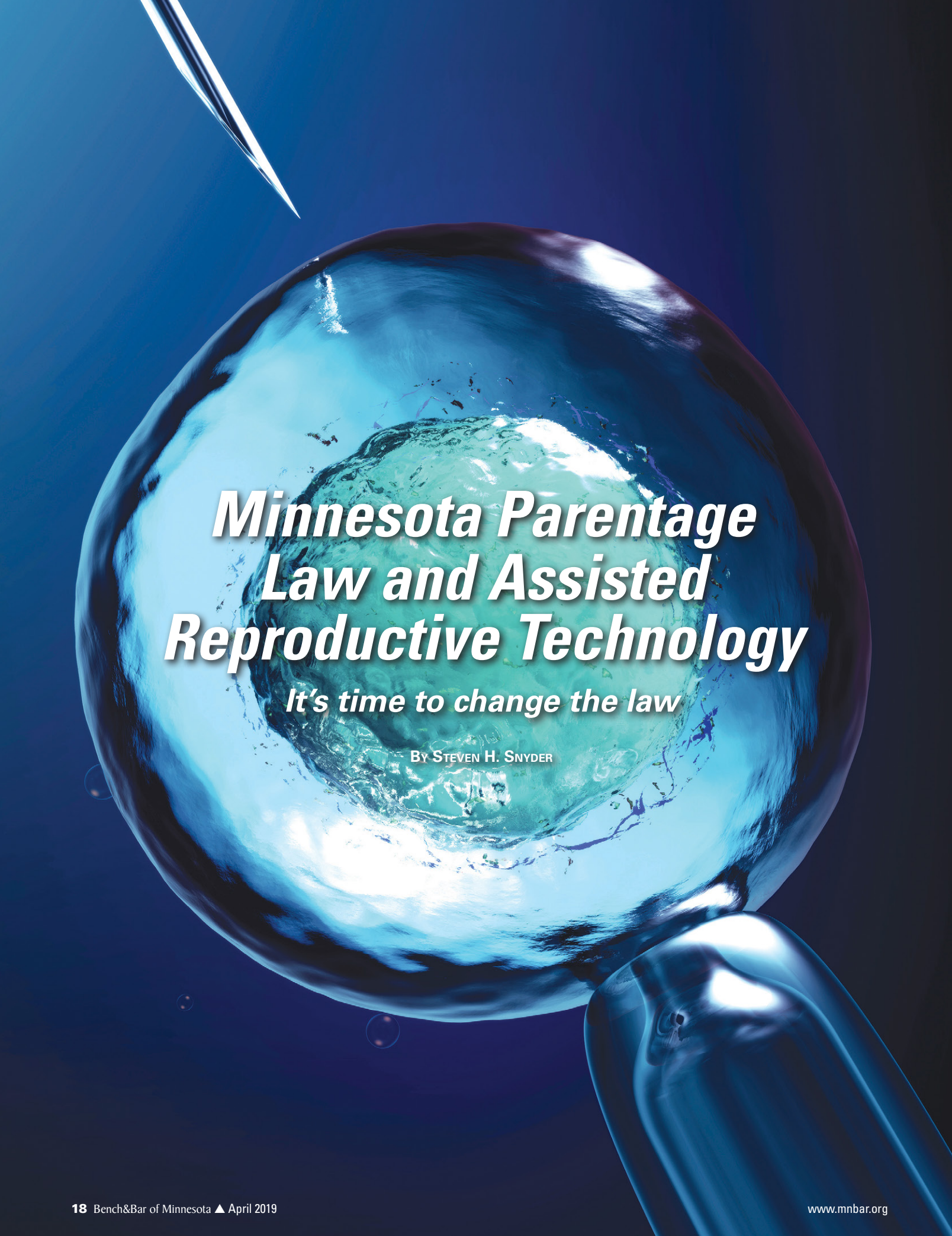
[11] See Comment for Section 301: *https://perma.cc/NT5W-UX76*

[12] *Id.* at subd. 7.

[13] *https://perma.cc/875N-KC2F*

[14] *https://perma.cc/WL8X-AGEL*

[15] *Id.*



Minnesota Parentage Law and Assisted Reproductive Technology

It's time to change the law

By Steven H. Snyder

Human beings have been naturally reproducing for their entire history, but only in relatively recent history have they been able to do so without sexual intercourse. The first artificial insemination of a woman with donor sperm occurred in 1884,[1] and the practice was common enough by the 20th Century that specific provisions for parentage in such cases were incorporated into the Uniform Parentage Act (UPA) of 1973, adopted in Minnesota in 1980 as the Minnesota Parentage Act (MPA).[2]

Since 1980, however, numerous other methods of assisted reproduction[3] have developed, specifically including egg retrieval and *in vitro* fertilization.[4] The advent of intrauterine insemination and reliable *in vitro* fertilization paved the way for use of surrogacy[5] as a means for aspiring parents to have children when they were unable to gestate their own child. The first documented surrogacy by intrauterine insemination was initiated in 1976.[6] Since then, surrogacy using *in vitro* fertilization and another woman's egg has become the norm. Unfortunately, Minnesota parentage law has failed to keep pace with developing medical technology and the creation of families through these alternative means. As just one example of this, I will discuss the disconnect between the MPA and the establishment of the intended parentage in various surrogacy arrangements.

Surrogacy can be either traditional[7] or gestational.[8] In both cases, existing Minnesota parentage law presumes the surrogate to be the legal mother at birth by virtue of giving birth and/or bearing a genetic relationship to the child. Depending on the specific circumstances of the surrogacy arrangement, the intended parents may or may not be genetically related to the child, and they will not have any marital relationship to the birth mother. This creates a critical disconnect between the intended parentage of the child and Minnesota law.

How and whether the intended parents who seek to procreate by means of assisted reproduction are presumed to be, or can be made, the legal parents of the child is now governed by laws enacted well before this means of reproduction became viable and common. That law currently requires the asserted legal parent to be related to the child either by having given birth, having some marital relationship to the birth mother and/or a residential relationship to the child, or having a genetic relationship to the child.

In cases in which both heterosexual intended legal parents use their own sperm and egg to create the embryos the surrogate gestates for them, the parents may both be able to establish the necessary genetic presumption of parentage under existing law to have standing to establish their parentage over the resulting child.[9] But in various other surrogacy arrangements in which insemination or other donor sperm or eggs are used, it is possible that none of the statutory presumptions will be met by either of the intended parents. Nevertheless, it is solely the procreative intent of the parent(s) that initiates and results in the child who is born.

This article discusses the current disconnect between the intent of the parties in surrogacy arrangements and Minnesota parentage law. It then examines the possible future evolution of surrogacy law in Minnesota based on current trends in case law as well as legislative enactments and proposals that are evolving nationally.

Current Minnesota parentage law

Minnesota establishes parentage of children under the auspices of the 1973 Uniform Parentage Act as adopted, supplemented, and amended in Chapter 257 of the Minnesota Statutes, the Minnesota Parentage Act (MPA). Under those provisions, certain individuals with a recognized orientation to a child based on marriage or other circumstances are granted the right to assert their alleged parental relationship to a child based on limited statutory presumptions.

> A child, the child's biological mother, or a man presumed to be the child's father under section 257.55, subdivision 1, paragraph (a), (b), or (c) may bring an action:
>
> (a) at any time for the purpose of declaring the existence of the father and child relationship presumed under section 257.55, subdivision 1, paragraph (a), (b), or (c).[10]

Those presumptions are seen by the court as the complete universe of relationships that grant standing in a parentage proceeding. Without standing, an individual who wishes to assert a legal parental relationship to a child cannot initiate an action to do so. The courts have interpreted this authorization narrowly:

> The MPA provides the *exclusive* bases for standing to bring an action to determine paternity. Whether and when a person may bring an action depends on which presumptions of paternity, if any, apply. Nine presumptions of paternity are set forth in section 257.55, generally divided between those based on marriage... and those based on circumstances other than marriage.... Standing to bring a paternity action with respect to these presumptions is also based on statute.[11]

A presumption based on proven genetic relationship is also set forth in Minn. Stat. 257.62, subject to an exclusion for donors of genetic material for use in assisted reproduction for the sole benefit of the recipient parent.[12]

Application of the MPA to surrogacy

The Minnesota Court of Appeals has had one opportunity to apply the MPA to a surrogacy arrangement.[13] In *A.L.S. v. E.A.G.*,[14] a gay couple in a committed relationship entered into a traditional surrogacy arrangement with a woman who had expressed the desire to carry their child as a surrogate only. The agreement among the parties was that the woman would be inseminated with the sperm of one of the intended legal fathers, gestate the child, and terminate her presumptive maternal rights as the child's birth/genetic parent so that the genetically unrelated partner could then establish his parental rights in her place. The surrogate changed her mind after the child's birth and asserted her presumptive maternal rights. The trial court ruled that the surrogate was not the child's legal mother and that the non-genetic partner was the child's second legal father. On appeal, the court of appeals reversed this determination by strictly applying the provisions of the MPA.

In reaching this conclusion, the court evaluated the various presumptions of paternity and maternity. First, it determined that the surrogate was the child's legal parent by virtue of her two coexisting presumptions of maternity: giving birth and being genetically related to the child. Second, the court determined that none of the statutory presumptions or provisions of the MPA applied to give the non-genetic father a basis for asserting legal parentage over the child. The court reasoned that the non-genetic partner must either be the biological or adoptive parent of the child in order to receive parental rights.[15] The court determined that neither of those relationships existed and reversed the district court order making him the child's father. Essentially, because the non-genetic father could not meet any of the presumptions or requirements of the express provisions of the MPA, he had no standing to assert any legal parental rights even though it was his and his partner's specific procreative intent to become parents under an express agreement into which the surrogate voluntarily entered.

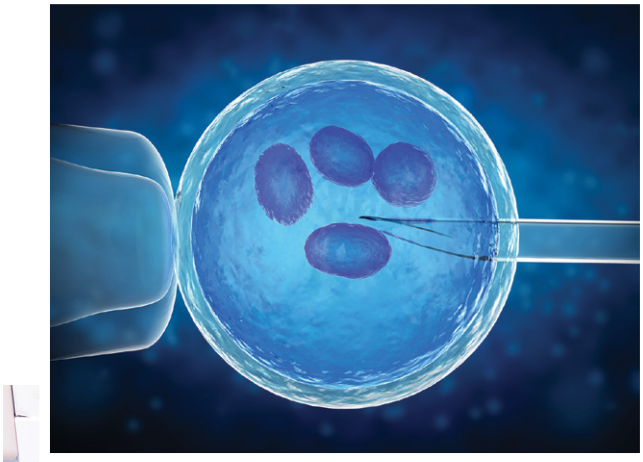
This same disconnect between the MPA and the intended parentage in some surrogacy arrangements is further underscored in a New Jersey Supreme Court case, *In re T.J.S.*[16] Under essentially the same provisions of the 1973 UPA as adopted in Minnesota, the New Jersey Supreme Court affirmed a court of appeals decision holding that adoption was the only means available for establishing the legal parentage of a person who had no legal presumption of parentage under that statute. Although the facts and arguments are slightly different from those in *A.L.S. v. E.A.G.*, supra, the statutory interpretation of the required parental presumptions—and the outcome—were the same.

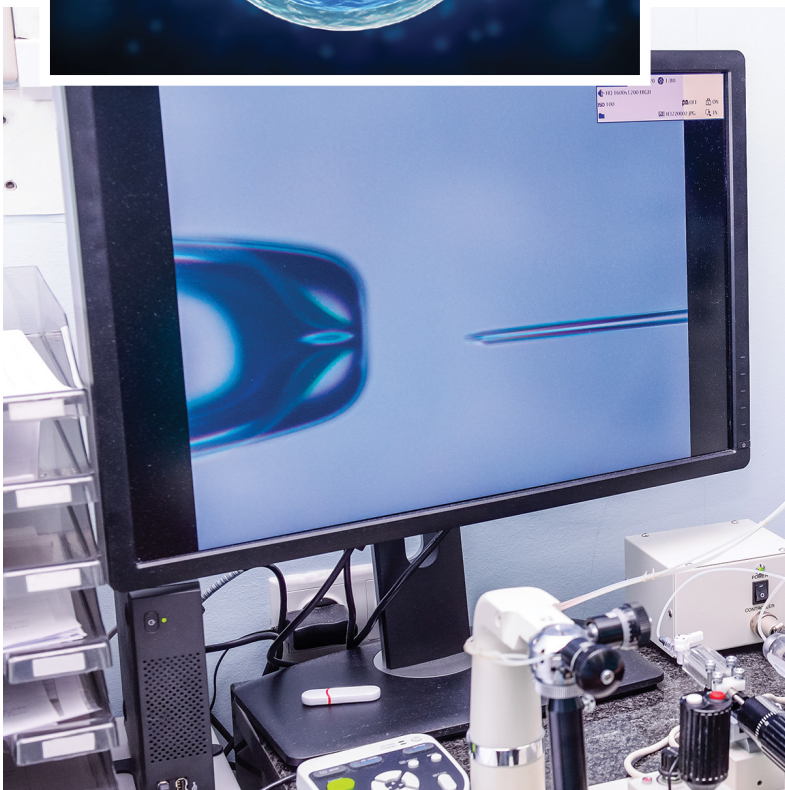
In *T.J.S.*, a husband and wife entered into a gestational surrogacy arrangement with a consenting woman. An embryo created by *in vitro* fertilization using the husband's sperm and the egg of an anonymous donor was transferred into the surrogate's uterus for gestation; therefore, the husband had a parental presumption as the child's genetic father, but the wife had no parental presumption based on either giving birth or having a genetic relationship. The husband and wife applied for a pre-birth order of the trial court to list the husband and wife as the resulting child's parents on the child's initial birth record. The trial court issued the requested order on the condition that the surrogate relinquish her presumptive parental rights three days after the birth in keeping with the three-day post-birth waiting period required in adoptions, which the surrogate did. The surrogate cooperated in the proceedings and made no objection.

Upon learning of the pre-birth order, the New Jersey Department of Health moved to vacate that portion of the trial court order listing the intended, non-genetic mother on the birth record. The trial court granted the motion to vacate, holding that the statutory requirements requiring her to have a parental presumption to assert parentage did not violate the intended mother's equal protection rights under the New Jersey Constitution, and that her sole remedy was to adopt the child. In its detailed analysis of the New Jersey Parentage Act, which is essentially equivalent to the MPA, the court reasoned:

> The [New Jersey Parentage] Act defines the "parent and child relationship" as "the legal relationship existing between a child and the child's natural or adoptive parents, incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship." There are several means by which to establish a parental relationship under the Act: (1) genetic contribution, (2) gestational primacy, i.e., giving birth, or (3) adoption. In addition, a rebuttable presumption of paternity derives from the parties' legal relationship, i.e., marriage or its equivalent, when a child is born during the course of a marriage or within 300 days of its termination. This presumption, that a man is the father of a child born to his wife, extends to a husband who consents to his wife being inseminated with donor sperm under the supervision of a licensed physician.
>
> Nowhere in the Act does the presumption of parentage under Section 43(a) extend to a wife whose husband, while married, fathers a child with another woman, or to a wife who simply acknowledges in writing her maternity of the child. On the contrary, where a husband has a child, born to another woman, while married to his wife, the wife may only establish a parental relationship with the child by adoption. Similarly, the Act contains no comparable analogue to Section 44 that renders an infertile wife, by operation of law, the natural mother of a child born to another woman artificially inseminated with the husband's sperm and with the wife's consent. Indeed, as noted in the adoption context, any such provision would conflict with the express legislative enactment affording a birth mother 72 hours to decide whether to relinquish the child before a surrender of her parental rights is deemed valid.
>
> Thus, contrary to the gender-neutral interpretation plaintiffs ask us to adopt, the plain language of the Act provides for a declaration of maternity only to a biologically- or gestationally-related female and requires adoption to render [the intended mother] the mother of [the child]. No alternative construction is plausible and nowhere in the statutory scheme may it be implied that maternity is established simply by the contractual or shared intent of the parties. Indeed, plaintiffs themselves acknowledge that the Act, as written, cannot be extended to confer maternity on [the intended mother] at the moment of the child's birth, but would have to be rewritten to allow, at the very least, a 72-hour waiting period for [the surrogate] to waive her parental rights to the child born to her. Simply put, the Legislature has determined when a woman is the legal mother of a child, and it does not include the present circumstance.[17]

This reasoning and the holding based thereon were affirmed by a split decision in the subsequent New Jersey Supreme Court opinion cited above.





Decided in two different jurisdictions under the same statutory scheme, these cases clearly demonstrate that establishing parentage in a surrogacy process is not adequately supported by the current MPA. Surrogacy presents a variety of presumptive relationships to the resulting child, but surrogacy is procreation by intent, not necessarily biology or family relationship as required by the MPA. Under the MPA, the surrogate who gives birth has a presumption by virtue of giving birth. She may also have a presumption based on her genetic relationship to the child in a traditional surrogacy arrangement. If the surrogate is married, her husband will carry the marital presumption of paternity.

The intended parents may or may not hold any of the statutory presumptions. If the intended parents are a heterosexual couple using their own sperm and egg, they will each have a genetic presumption to support their claim for establishing legal parentage. Even in this case, however, their parentage will be established by application of the best interests standard,[18] not necessarily the clearly expressed intent of the parties to the arrangement. If one or both of the intended parents uses donor sperm or egg, the non-genetically related intended parent will have no presumption of parentage to grant them standing to assert their parental rights under the MPA. In such cases, the intended parents will only be able to establish their legal relationship to the child through an adoption proceeding with the cooperation and consent of the surrogate. This will always be the case for same-sex male couples, as one of the intended parents will always lack a marital relationship to the birth mother or genetic link to the resulting child.

Hypothetical case[19]

The deficiencies of existing Minnesota parentage law become clear when one applies the MPA to a surrogacy arrangement in a common situation with an uncommon twist. As noted above, there are many surrogacies initiated by heterosexual couples in which the intended mother can neither gestate the child nor provide the egg to create the embryo (as was the case in *T.J.S.*, supra). In such cases, the husband typically provides the sperm and is thereby genetically linked to the child. The husband has a presumption of paternity to assert under the MPA based on his genetic link, but the wife does not. In order to establish parentage upon the birth, the typical procedure would be to establish the husband's paternity based on his genetic presumption and then have him initiate (and the surrogate consent to) a stepparent adoption by his wife, as required by the New Jersey court in *T.J.S.*, supra.

Assume the surrogate gets pregnant with twins and calls the intended parents with the good news immediately upon her positive pregnancy test. After celebrating that night, the wife wakes up the very next morning to find her husband—her genetic link to the child and her necessary path to establishing her own parentage—dead of a heart attack. If the surrogate then reconsiders her original intent because she is concerned about the wife's ability to raise twins as a single mother/recent widow, she may assert her parental presumption to the twins based on having given birth to them.

The wife, on the other hand, has no parental presumption under the MPA to provide standing to initiate a proceeding for parental rights. Despite the intent of all the parties at the outset, the surviving wife could not even get in the courthouse door.[20] Without intent as at least a factor in the establishment of parentage in cases of assisted reproduction, these kinds of unexpected and inequitable outcomes remain all too possible.

The role of intent in surrogacy

The proper role of intent in assisted reproduction, particularly surrogacy, is reflected in two California parentage determinations, *Johnson v. Calvert*[21] and *In re Marriage of Buzzanca.*[22]

Johnson was a case in which a heterosexual married couple entered into a surrogacy arrangement with a willing surrogate. Because of conflicts between the couple and the surrogate during the pregnancy, the surrogate petitioned for parental rights to the child. Referring to the same presumptions set forth in the MPA, the court noted that the surrogate and the intended mother each held a statutory presumption—the surrogate by virtue of giving birth, and the intended mother by virtue of being the child's genetic mother. Confronted with the equipoise of presumptions, the court determined that parentage under the California Parentage Act should be determined by a tie-breaker: the expressed intent of the parties.

> We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.[23]

This reliance upon the intent of the parties to a surrogacy arrangement to determine parentage was further expanded in *Buzzanca*. In *Buzzanca*, a married couple used donor sperm and egg to create an embryo that was transferred into the genetically unrelated surrogate for gestation. The couple initiated divorce proceedings, and the intended father attempted to avoid both parentage and any child support obligation by asserting he could not be established as the child's father because he had no genetic or marital presumption of paternity upon which such a determination could be based. As originally agreed, the surrogate did not assert any parental rights and did not want to be the child's legal mother. The trial court initially determined that, under those circumstances, the child had no lawful parents. In reversing the trial court and finding that the intended mother and father were, indeed, the legal parents of the resulting child, the California Court of Appeals wrote:

> Even though neither Luanne nor John are biologically related to Jaycee, they are still her lawful parents given their initiating role as the intended parents in her conception and birth. And, while the absence of a biological connection is what makes this case extraordinary, this court is hardly without statutory basis and legal precedent in so deciding. Indeed, in... our Supreme Court's *Johnson v. Calvert* decision, the court looked to intent to parent as the ultimate basis of its decision. Fortunately, as the *Johnson* court also noted, intent to parent "'correlate[s] significantly'" with a child's best interests... That is far more than can be said for a model of the law that renders a child a legal orphan.[24]

Together, these two cases establish an analysis for determining legal parentage of children born pursuant to surrogacy arrangements according to the original intent of the parties—and, as implicitly encompassed therein, the best interests of the child. Most attorneys practicing in the area of assisted reproduction and surrogacy concur that intent should be the cornerstone of establishing parentage in surrogacy and other forms of assisted reproduction.

In such a regime, a woman who provides an egg (whether hers or a donor's) to create an embryo that is transferred to another woman as her surrogate would be established as the legal mother. Conversely, if a woman provides an egg as an egg donor only to create an embryo that is transferred to another woman for gestation with the intent that the woman gestating the child will become the legal parent, the woman gestating would be established as the legal mother. These similar, but disparate, cases involve the same medical procedure but produce opposite parentage results based on the respective parties' intent. Unfortunately, intent has not been adopted as a factor under the MPA either by statute or case law. So the parties to a surrogacy agreement in Minnesota continue to face uncertainty regarding the ultimate parentage of a child born via surrogacy if a conflict arises among the parties.

Most attorneys practicing in the area of assisted reproduction and surrogacy concur that intent should be the cornerstone of establishing parentage in surrogacy and other forms of assisted reproduction.

Efforts to update Minnesota parentage law in cases of assisted reproduction

The Uniform Parentage Act of 2000 was proposed in the Minnesota Legislature in 2001. An extensive task force was convened to evaluate the updated version of the Act, which included provisions to reliably and predictably govern all assisted reproduction matters. After due consideration, the task force recommended against adopting the updated version. It was not re-introduced or passed.

Thereafter, every session of the Minnesota Legislature has included some effort to regulate assisted reproduction and create predictable outcomes. Amendments to the artificial insemination statute[25] were proposed to include cases of egg donation, for the protection of recipient parents and egg donors. The amendments failed. Thus, egg donors retain an existing presumption that gives them standing to assert legal parentage based upon their genetic link to the child under the MPA should they choose do so. An amendment to Minn. Stat. Sec. 257.55 was proposed to include intent as one of the presumptions to create standing for an intended parent to assert a claim to parentage in cases of assisted reproduction in which they had not given birth and had no marital relationship to the birth mother or genetic link to the child (as in the hypothetical set forth above). It failed.

In 2008, a comprehensive statute to regulate and govern surrogacy was passed in bipartisan votes by both the Minnesota House and the Minnesota Senate. Then-Gov. Tim Pawlenty vetoed the bill. Thus, it remains the case that intended parents with no statutory presumption of maternity or paternity may lack standing to assert their claims to parentage. Some form of legislation to improve the application of Minnesota parentage law to cases involving assisted reproduction has been introduced in every session of the Legislature since 2002; not one has become law.

Various bills have been introduced during the 2019 session that would affect establishment of parentage with respect to certain forms of assisted reproduction. One bill affirms and regulates compensated surrogacy according to well-accepted national legislative trends;[26] another attempts to prohibit compensated surrogacy and place other prohibitive restrictions on the process;[27] a third attempts once again to amend and expand the artificial insemination statute.[28] In addition, a study group has been established to evaluate the newest version of the UPA as amended in 2017 for possible introduction and passage during the next legislative session (or two). This version of the UPA would also establish predictable and equitable parentage outcomes in all cases of assisted reproduction. The fate of all these legislative efforts is unclear, at best.

National trends for legislating parentage in surrogacy

There are three clear indicators of the direction the Minnesota Legislature should take. The first is a striking trend in recent legislation in a mounting number of other states to govern establishment of parentage in surrogacy. The second is the UPA as amended in 2017.[29] The third is the recently amended American Bar Association Model Act to Govern Assisted Reproductive Technology.[30]

In 1988, the New Jersey Supreme Court decided the case of *In re Baby* M.[31] *Baby* M was the first contested traditional surrogacy case in the U.S., and it was a matter of national attention. Based on the co-existing presumptions of maternity arising from both giving birth and having a genetic relationship to the child, the traditional surrogate was awarded legal maternity.

Immediately following that landmark traditional surrogacy case, eight states moved to legislatively limit or criminalize surrogacy in some manner. This reactionary wave was followed by

the affirmative California decisions in *Johnson* and *Buzzanca*, supra. In the 25 years following those decisions, 16 states have, by case law and/or legislation, expressly permitted and regulated compensated surrogacy, including three of the states that originally limited or prohibited surrogacy after *Baby M*. In addition, several other states have implicitly approved surrogacy by exempting surrogacy from the application of their respective adoption statutes prohibiting compensation in an adoption. No prohibitive legislation was passed in any state in that same 25-year period. New York has recently issued an extensive task force report that recommends legislation to permit and regulate compensated surrogacy, and there is a bill currently pending in that state that would overturn its criminalization of that process. Virtually all of these legislative enactments establish parentage in surrogacy and other assisted reproductive methods based upon the original intent of the parties. Clearly the national trend is in favor of expressly addressing and permitting surrogacy and other forms of assisted reproduction and creating reliable parentage outcomes for all the parties in those situations.

Both the 2017 UPA and the ABA Model Act have comprehensive provisions to regulate assisted reproductive technology. Both were formulated by esteemed and diverse bodies of attorneys representing all U.S. states. Each reflects a reasonable national consensus for governing and establishing parentage in assisted reproduction. They address the parentage of both sperm and egg donors, as well as the intended parents in surrogacy. Both the UPA and ABA Model Act permit and regulate parentage in surrogacy. They each affirm the propriety of reasonable compensation paid to women who act as surrogates.

The main difference between the two lies in their treatment of traditional surrogacy. The ABA Model Act provides for enforcement of traditional surrogacy arrangements in the same fashion as gestational surrogacy arrangements, allowing the original intent of the parties to determine the ultimate parentage of the child. The surrogate has no right to challenge or usurp the surrogacy process and keep the child in either scenario. Under the UPA, however, a traditional surrogate is given a period of days following the birth in which she can unilaterally undo the intended surrogacy arrangement and keep the child. The UPA only applies the intent test imported from *Johnson* and *Buzzanca* to gestational surrogacy. Nevertheless, there are still clear and consistent rules for the establishment of parentage in compensated surrogacy arrangements in both, and that would be a desirable step forward for Minnesota parentage law.

Conclusion

Medical advancements have separated the process of having children and forming families from the natural procreative process. Minnesota's outdated parentage laws were passed before many of the current assisted reproductive technologies existed, and the laws should now be updated to contemplate these new ways to form families. Minnesota should be next on the extensive and growing list of states to permit and reliably establish parentage in all surrogacy arrangements and all other forms of assisted reproduction. ▲

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Notes

[1] A.T. Gregoire Ph.D., Robert C. Mayer M.D., *"The Impregnators"*, 16 Fertility and Sterility, 130–4 (1965). *https://www.sciencedirect.com/science/article/pii/S0015028216354760?via%3Dihub*

[2] Minnesota Statutes Chapter 257 (Minnesota Parentage Act) (1980).

[3] Reproduction without sexual intercourse.

[4] The formation of a human embryo outside the human body.

[5] The process by which another woman attempts to carry and give birth to a child created through intrauterine insemination or *in vitro* fertilization using sperm and/or eggs provided by the intended legal parents of the resulting child.

[6] Sue A. Meinke, *Surrogate Motherhood: Ethical and Legal Issues*, The Joseph and Rose Kennedy Institute of Ethics, Bioethics Research Library, Georgetown University, Revised Jan. 1988, at 2. *https://repository.library.georgetown.edu/bitstream/handle/10822/556906/sn6.pdf*

[7] The surrogate is inseminated with the sperm of the intended legal father and is both the gestational and genetic contributor.

[8] The surrogate receives and gestates an embryo created using either the intended legal mother's egg or a separate egg donor's egg so she is the gestational, but not the genetic, contributor.

[9] Even in this "simplest" case, the surrogate will still have a competing presumption of maternity upon which to contest parentage based on her having given birth to the child.

[10] Minn. Stat. Sec 257.57, Subd. 1. (1980).

[11] *Witso v. Overby*, 627 N.W. 2d 63, 65-66 (2001). (Emphasis added.)

[12] Minn. Stat. Sec. 257.63, Subd. 5(c).

[13] In one other unpublished decision, the court of appeals determined that a gestational surrogacy arrangement was enforceable under Illinois law based on the parties' express choice of law provision in their surrogacy agreement. This case did not apply the MPA to the surrogacy arrangement for its determination of parentage. *In re Baby Boy A.*, 2007 Minn. App. Unpub. LEXIS 1189, 2007 WL 4304448, at 3-8 (Minn. App. 12/11/2007).

[14] *A.L.S. v. E.A.G.*, 2010 Minn. App. Unpub. LEXIS 1091, 2010 WL 4181449 (Minn. App. 10/26/2010).

[15] *Id.*, at 10, citing Minn. Stat. Sec. 257.52 (1980).

[16] *In re T.J.S.*, 54 A.3d. 263 (N.J. 2012).

[17] *In re T.J.S.*, 16 A3d 386, 388-389 (N.J. App. Div. 2011). (Citations omitted.)

[18] Minn. Stat. Sec. 518.17 (2008); *Durkin v. Hinich*, 442 N.W.2d 148, 152 (Minn. 1989); *A.L.S. v. E.A.G.*, 2010 Minn. App. Unpub. LEXIS 1091, 2010 WL 4181449, at 16 (Minn. App. 10/26/2010).

[19] (Well, maybe it actually happened.)

[20] Of course, the wife could present arguments based on equal protection and other grounds outside the MPA, but the New Jersey court in *T.J.S.*, supra, rejected those arguments based on New Jersey's similar parentage statutes. It is only speculative that the wife would succeed with such arguments against the express terms of the MPA.

[21] *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

[22] *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410 (Cal. App. 4th Dist. 1998).

[23] *Johnson v. Calvert*, 851 P2d. 776, at 785 (Cal. 1993).

[24] *Buzzanca*, supra, at 1428 (Cal. App. 4th Dist. 1998).

[25] Minn. Stat. Sec. 257.56 (1980).

[26] H.F. 1140, 90th Leg., S.F. 1533, 90th Leg. (Minn. 2017).

[27] H.F. 1000, 91st Leg., S.F. 1152, 91st Leg. (Minn. 2019).

[28] H.F. 724, 91st Leg., S.F. 755, 91st Leg. (Minn. 2019).

[29] Uniform Parentage Act (2017).

[30] American Bar Association Model Act Governing Assisted Reproductive Technology (Feb. 2017).

[31] *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

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◀ Members of the Apple Valley High School Mock Trial team were presented with a scholarship check for $2,000 by JD Feriancek with ACTLM after winning their first state title. They will represent Minnesota at the National Mock Trial Championship (NHSMTC) in Athens, GA in May. The team is coached by Eric Strauss, Jeanie Zurales, and Becca Strauss.

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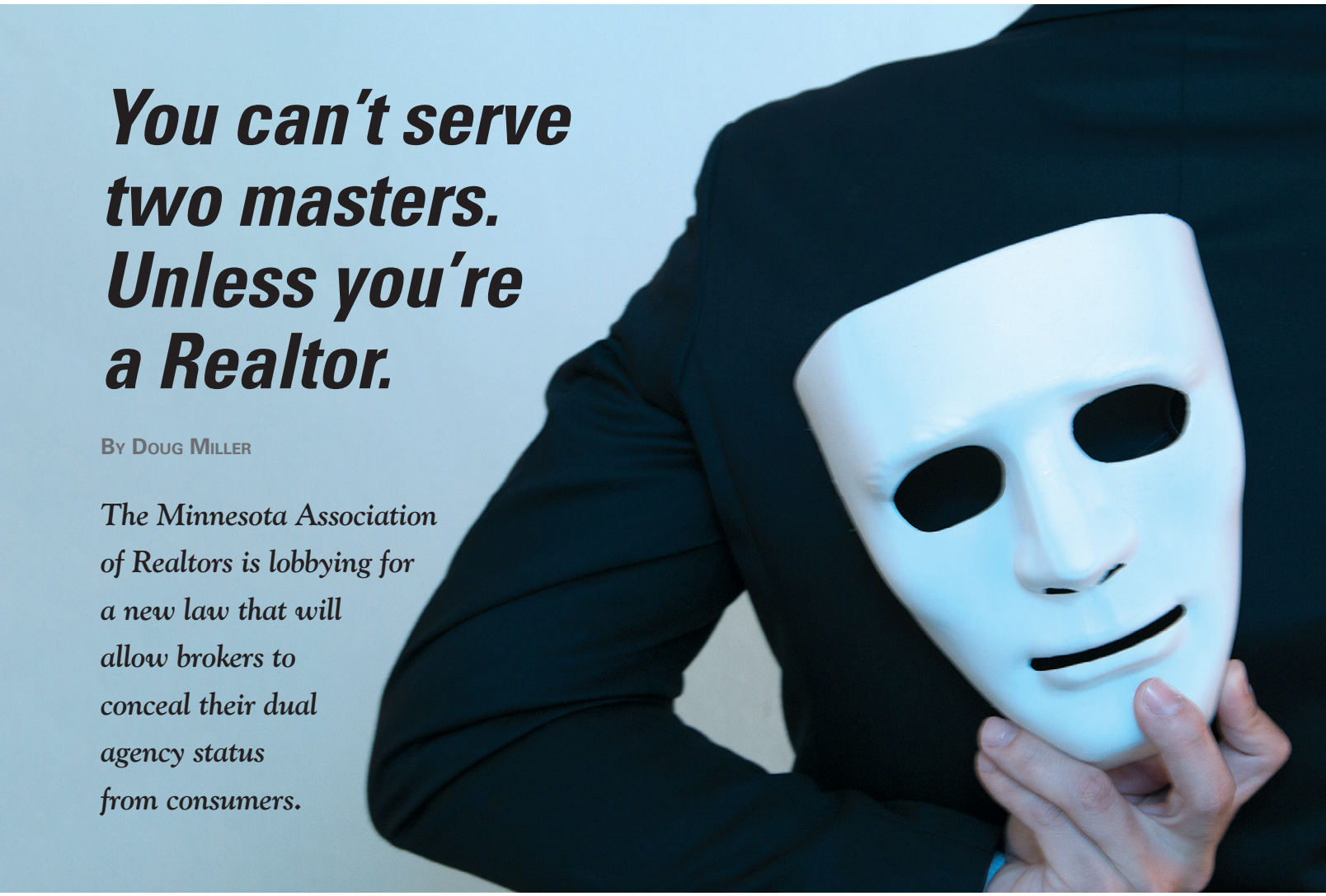

You can't serve two masters. Unless you're a Realtor.

By Doug Miller

The Minnesota Association of Realtors is lobbying for a new law that will allow brokers to conceal their dual agency status from consumers.

"Hogger" is the celebratory term used by Realtors[1] to describe a transaction in which one agent or one broker "represents" both the buyer and seller—an arrangement known as dual agency. When this happens, agents and their brokers[2] reap a double fee as a sort of perverse reward for abandoning fiduciary duty. Their clients experience a fundamental degradation in service. It is the worst form of bait-and-switch, using pledges of undivided loyalty as the bait and, when dual agency arises, providing no such thing. Dual agency is illegal in every fiduciary profession where competing interests are involved—except for Realtors.

Real estate licensees already enjoy special legislative protections written into consumer protection licensing laws. The current licensing statute misrepresents dual agency conflicts and their ramifications and obliterates the informed consent requirements found in common law. Worse, the licensing law serves to exonerate Realtors from civil liability if they comply with those minimal and incomplete disclosures.[3]

A new piece of dual agency legislation introduced this year in Minnesota (H.F. 1112, S.F. 1020) would rename the practice *designated agency* and allow dual agent brokers to represent themselves as exclusive agents while concealing their dual agency status and financial interest in the transaction. For brokers, dual agency transactions mean that they don't have to share the commission with outside brokerage firms. In other words, brokers are incentivized to engineer dual agency transactions in which they abandon their clients. If designated agency is passed, as it has been in 34 other states, we will have legalized fraud in a fiduciary relationship.

Dual agency is bad. Now throw in a double fee.

Brokers love dual agency. And they should, since they get paid double. As a result, dual agency encourages really bad practices like reverse marketing. *Reverse marketing* is when brokers intentionally limit the marketing of their clients' homes. Instead of charging consumers 6 percent and trying to sell their clients' homes for the highest price and in the shortest time possible, brokers act on the almost irresistible temptation to severely limit the marketing of their clients' homes to try to engineer a double fee by finding a buyer who is represented by the same brokerage. Reverse marketing already is rampant in our market, despite the fact that it flies in the face of why consumers hire brokers in the first place.

Pocket listings are a particular kind of reverse marketing in which brokers tell clients that they want to "test market"

their homes to get feedback from agents within a brokerage firm. They are also called "pre-MLS listings." Brokers typically keep the home off the MLS for a couple of weeks (the highest interest in homes just listed typically occurs in the first two weeks) and intensely market the potential hogger to agents within the brokerage. These homes often hit the MLS with an accepted offer without ever experiencing the full market exposure the properties deserved.

Brokerages also offer financial incentives to agents and managers who betray their clients into dual agency transactions. There is a class action going on in New York right now alleging:

> "Since at least January 1, 2011, Houlihan Lawrence has operated a bait-and-switch scheme to lure thousands of homebuyers and sellers into dual-agent transactions…. To induce its 1,300 agents to participate in the scheme, Houlihan Lawrence pays secret kickbacks to the sales agents who secure double commissions through dual-agent transactions. These kickbacks encourage Houlihan Lawrence agents to put their personal interest in a bigger commission check ahead of the interests of their clients by incentivizing them to steer clients into dual-agent transactions."[4]

Some years ago, Edina Realty made national real estate industry news by removing their clients' listings from two of the most buyer-frequented websites in the country at the time: Trulia and Realtor.com. As reported at the time by the industry publication Inman News,[5] a representative from Edina said that one of the reasons that they did this was to increase the search engine optimization of their firm's website. In other words, they wanted consumers to find properties on their firm's website, which would likely increase the chances of collecting a double fee and imposing dual agency on their clients. If there were no such thing as a "hogger," would this ever have happened? (In 2014, Edina Realty did an about-face and began sharing its listings with those sites and with Zillow, with which they had not previously listed.[6])

Agents derive their agency relationship from their brokers

Even though most consumers believe that they are hiring an individual Realtor when they engage one to buy or sell a house, they are really hiring the brokerage firm. Consumers can *only* hire the broker and never the salesperson (also known as an "agent"). Realtors are authorized to represent clients only on behalf of their brokers. If the agent leaves the firm, the broker gets to keep the client. It's not the agent's client. All contracts are with the broker, and only the broker can handle the money. It is the broker who must supervise the agents. It is the broker who is responsible for the acts of the agents.

Realtors love dual agency but hate explaining it to clients, because when clients truly understand what it means, they won't agree to it. It is impossible for Realtors to satisfy the common law informed consent standard.

In Minnesota, when a buyer and seller hire the same broker in the same transaction, the broker is engaging in dual agency. And because agents derive their authority from their supervising brokers, all the agents also become dual agents. An agent's authority cannot exceed the authority of their broker. However, the concept of designated agency changes all that.

Designated agency

Instead of restricting dual agency further because of its problems, the Realtors are proposing a new law that sidesteps the stigma of dual agency by allowing agents from dual agency firms to pose as exclusive agents. The bill proposes to allow dual agent brokers to appoint one agent to represent a buyer and another agent to represent the seller in the same transaction and promote this form of "representation" as exclusive agency even though the broker is a dual agent. (The business model should be called designated *dual* agency.) The law, if passed in its current form, would conceal the dual agency and double-fee conflicts of the broker. Not only would this law be confusing for consumers; it would intentionally mislead them about the representation that they can expect to receive. This legislation proposes to legalize undisclosed dual agency. That's legalized fraud.

Realtors love dual agency but hate explaining it to clients, because when clients truly understand what it means, they won't agree to it. It is impossible for Realtors to satisfy the common law informed consent standard. That's why they changed the law. That's why they are proposing this new law. Instead of doing the proper thing and eliminating dual agency as an option, they're finding new ways to disguise it.

How can supervising brokers be neutral? They can't.

This new bill proposes that when a designated (dual) agency situation arises, supervising brokers are to remain neutral. But simply stipulating that a broker is neutral does not make it so. By definition, the broker is not neutral. And under the terms of the designated agency law, brokers would have a statutory duty to review confidential negotiating information collected by their agents. With a double commission (sometimes as high as six figures) riding on the deal staying in-house, brokers can't be trusted to be impartial with this information. What kind of supervision can be expected in this situation? What will go on behind closed doors?

It is the broker who has the most conflicts and the biggest financial temptations to access all the private confidential negotiating information of the buyers and sellers and to use that information to ensure the transaction takes place. Collecting the entire commission is not a minor incentive. Likewise, you cannot have multiple licensees of the same broker conducting negotiations and expect that they will receive unbiased supervision from that dual agent broker.

Consider, for instance, a multiple offer situation with agents from within and outside the firm. Consider agents from the same team within a brokerage negotiating against each other. Consider two brand new agents attempting to negotiate a complex transaction without the requisite skillset to negotiate without their broker. Consider the transaction in which the broker represents a developer with hundreds of houses and simultaneously represents a single buyer. It's easy to imagine countless situations in which the broker's ability to supervise becomes hopelessly compromised.

Yet the bill to legalize "designated agency" proposes to allow salespeople to do exactly what their supervising broker is prohibited from doing—negotiating price and terms. Designated agency makes brokers privy to private negotiating information that they otherwise would not have had. Instead of warning consumers not to divulge confidential negotiating information to brokers, this new law would encourage them to do so.

The proposed law would require no disclosures about the broker's inability to supervise their agents or the broker's access to confidential negotiating information and financial incentive to use that information against clients' interests. These are insurmountable conflicts that fiduciaries are supposed to avoid, not invite. Advocating agents are given nowhere to turn to seek needed negotiating advice. But the broker will have access, even a duty, to see all the consumers' confidential negotiating strategies. There are no warnings to consumers not to disclose their negotiating information (such as how high a buyer or how low a seller is willing to go on price) to these tainted advisors.

Dual agency disguised as exclusive agency

Designated agency, as noted above, is promoted to consumers as exclusive representation. Even savvy consumers who don't like the idea of dual agency are likely to believe that designated agency is a legitimate choice. If you're an attorney who understands the intricacies of broker duties and how brokers are paid, not so much. Merely writing a law that says you are an exclusive buyer agent doesn't make it so. A dual agent broker is a dual agent broker.

Low entry standards for real estate licensing exacerbate the problem. This law proposes to allow agents to work completely free of the supervision of their brokers while negotiating on behalf of the broker's clients. That's a big problem when you look at the lowest common denominator—the green agent. Anyone can become a real estate agent. You don't even need a high school degree. Just take a 90-hour class and pass the exam and you become a real estate licensee. Before you can start work, however, you must find a broker who is willing to hold your license and supervise your activities. But under the terms proposed for designated agency, that supervision theoretically vanishes once you begin to advocate on behalf of your client. To whom does the new agent turn for advice? What happens when the new agent's qualifications are abysmally low? The designated agency bill offers no one for them to turn to. Attorneys are trained in the management of conflicts of interest; if any class of professionals could navigate something as complex as a dual agency relationship, it would be them. But a law firm cannot legally represent the buyer and seller in the negotiation of a real estate transaction. The disclosures and conflicts are so great that many believe that the relationship is non-consentable.[7]

Designated agency gives large brokerage firms an unfair marketing edge

Designated dual agency will allow large firm agents to legally misrepresent to the public that they provide the same level of fiduciary oversight that small firms provide. It's unfair to small brokers and to consumers. Small brokers have a huge and legitimate marketing advantage over large firms: Small firms can completely avoid dual agency. Small brokers can offer pure fiduciary services in which neither they nor their agents engage in any form of dual agency. It is called single agency and is the best form of representation available today to consumers. However, Minnesota licensing law and the accompanying statutory disclosures do not provide for this type of representation, probably because big brokers are unable to provide this level of service.

Since small brokers rarely run into their own listings while representing buyers, they can easily avoid dual agency and practice single agency. This is a huge advantage to clients who desire true fiduciary services from their agent and broker. In the rare situation when a dual agency does arise, the broker withdraws and refers the clients to a competitor for a referral fee. When a small firm practicing single agency is a choice, there is no good reason to choose a large brokerage firm.

The Minnesota Association of Realtors is promoting "designated agency" to their membership with this tagline: "Is Dual Agency preventing you from fully representing your clients' best interests? If so, you are not alone!" But of course, their prescribed solution amounts to simply changing a name. Thirty-three years ago, in a guide released as part of the NAR's 1986 Legal Liability Series on agency law, Realtors sang a different tune: "Dual Agency is a totally inappropriate Agency relationship for real estate brokers to create as a matter of general business practice."[8]

Back then, the advice from NAR read like quotes taken from the Restatement of Agency.[9] The same document went on to say, "An agent's duty of loyalty compels him to refuse to accept any employment that would require him to act contrary to, or in competition with, the interests of his principal. Buyers and sellers of real estate are deemed by law to 'compete' with one another and to have 'adverse' interests…. A real estate broker who acts for both the buyer and the seller and does not clearly disclose his status to both parties and receive their informed consent is an undisclosed dual agent. Undisclosed dual agency is universally considered to be a breach of an agent's duty of loyalty to his principal. It is also considered to be an act of fraud…. The disclosures and consents necessary to make a dual agency lawful are so comprehensive and specific that a typical real estate broker cannot undertake them as a matter of routine."

Back then, too, Minnesota licensing law didn't protect licensees from civil liability. Here's how the old law used to read before the Realtors changed it: "The requirements for disclosure of agency relationships set forth in this chapter are intended only to *establish a minimum standard for regulatory purposes, and are not intended to abrogate common law.*" (Emphasis added.)

Conclusion

Realtors have used licensing law to do away with common law consumer protections and insulate themselves from market forces and liability. They have used licensing law to make it possible for them to subject their clients to a catastrophic degradation in the level of service (dual agency) and charge them double for it. It is a travesty of justice to use a licensing law to make it easier to deceive consumers.

The dual agency double fee is not worthy of legislative protection. When did we determine that real estate brokers needed government protection to collect a double fee and subject clients to dual agency and fiduciary abandonment? Collecting a double fee is an unfair profit to begin with, yet Minnesota licensing law treats it as if it were a lofty and important consumer goal. Dual agency is not necessary to sell real estate. It just happens to be the most profitable approach. ▲

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Designated dual agency will allow large firm agents to legally misrepresent to the public that they provide the same level of fiduciary oversight that small firms provide.

Notes

[1] A Realtor is a member of the Realtor Association, the trade association that controls the Multiple Listing Service (MLS). If salespeople don't join the Realtor Association, they can't have access to the MLS. This is why nearly every licensee is also a "Realtor."

[2] Minnesota law creates a licensing hierarchy in which only brokers can contract with consumers and handle money, and brokers are further charged with supervising salespeople (agents). Agents can only work on behalf of brokers and do not have any direct contractual fee or agency relationships with consumers.

[3] Minn. Stat. 82.67 Subd 2 reads, "Disclosures made in accordance with the requirements for disclosure of agency relationships set forth in this chapter are sufficient to *satisfy common law disclosure requirements*." (Emphasis added.)

[4] *Goldstein vs Houlihan Lawrence*, Supreme Court of the State of New York, County of Westchester, 60767/2018. *https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=F6GoWWSthHIOlDuLwceGQw==&system=prod*

[5] Inman News, "Minnesota broker will stop sending listings to Trulia, Realtor.com" (11/21/2011).

[6] Inman News, "Edina Realty does about-face, sends listings to Zillow, Trulia, Realtor.com" (9/30/2014).

[7] See Minnesota Rules of Professional Conduct rule 1.7 and comments 7 and 26-33.

[8] Who Is My Client? A Realtors Guide to Compliance with the Law of Agency. 1986

[9] Restatement Of the Law, Second, Agency 2d.

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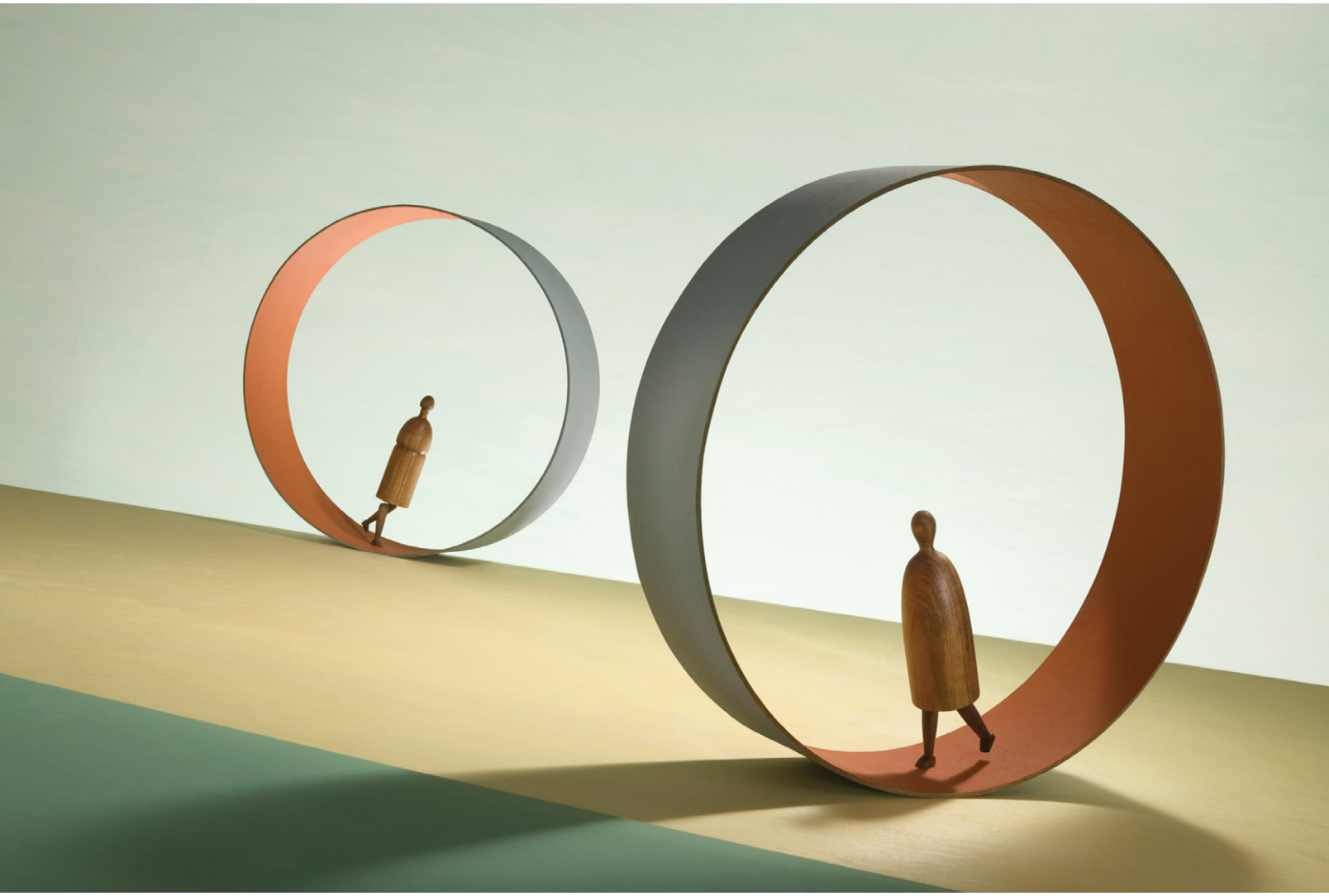


A Tribal Counsel's Guide to

Corporate Compliance

By Mandi Crane

The word "compliance" sends a collective shiver down the spine of many profit-minded organizations. With revenue responsibilities top of mind, corporate leaders (and those they supervise) bemoan having to comply with complex regulatory requirements. At the same time, these leaders are aware of the financial and legal consequences of failing to adhere to regulatory requirements.

In my experience as in-house legal counsel for a federally recognized Indian tribe, compliance work creates a healthy tension. That tension is not only necessary but good, because it fuels responsible innovation and fosters ethical corporate—for tribes, governmental—culture.

EFFECTIVE COMPLIANCE PROGRAMS REDUCE ORGANIZATIONAL MONITORING COSTS AND CREATE INCENTIVES THAT ALIGN EMPLOYEE AND SHAREHOLDER INTERESTS.

Regardless of whether you serve corporate or governmental clients as legal counsel, there are important actions we can take to position our organizations in what I refer to as "compliance peak position"—that generous area of the Yerkes-Dodson bell curve where organizations minimize the risk of both corporate wrongdoing and compliance burnout.

Compliance beginnings

Draconian command-and-control models of corporate compliance from decades past are inefficient and hard on employee morale. The first internal compliance-oriented laws date back to the Interstate Commerce Act of 1887, which created a federal agency, in part, to regulate the railroads.[1] The concept of corporate compliance continued to evolve in the American judicial system in the proceeding decades. The term "compliance" as it's now understood came into the collective consciousness after a series of corporate scandals in the 1970s and 1980s.

In response to these scandals, industry groups worked together to create standard practices for preventing and reporting employee misconduct. Self-policing benefitted business leaders and regulators alike. The United States Sentencing Commission took note; in 1991, it established formal sentencing guidelines that provided incentives to corporate defendants to implement voluntary compliance programs to prevent and remedy regulatory violations.[2]

Organizations today must grapple with increased regulatory complexity and significant compliance expense. The cost of compliance missteps can be significant. Companies that rely exclusively on the strength of corporate policies and procedures backed by punitive consequences to deter employee misbehavior miss a valuable opportunity to appeal to their employees' values and aspirations. Values are powerful drivers of ethical behavior.[3] Effective compliance programs also identify and prevent employee misconduct and align corporate policy and practice with applicable laws, rules, and regulations. In other words, they reduce organizational monitoring costs and create incentives that align employee and shareholder interests.[4]

What do tribal governments have to do with corporate compliance?

Tribal governments are independent sovereign nations, not corporations. But they share many similar interests when it comes to effective compliance practices. Tribal gaming operations are one of the most heavily regulated industries in the United States. They must comply with myriad laws, including federal laws and regulations such as the Indian Gaming Regulatory Act, National Indian Gaming Commission Regulations, federal gaming tax law, and Bank Secrecy Act laws; tribal-state gaming compacts; and internal tribal laws and regulations. Many tribes rely on their gaming operations to provide vital funding for their communities. It is therefore essential that they maximize revenue within the legal and regulatory framework to which they are beholden. Maximizing profit is one important reason to establish an effective compliance program.

What does an effective compliance program look like?

Effective compliance programs share some universal elements. First, they encourage ethical awareness. Second, they hold each individual accountable not only for his or her own actions, but for the larger ethical wellbeing of the organization—executive leadership and front-line employees alike. Third, they reward ethical conduct.[5] They must also have the appropriate legal infrastructure in place to maintain a culture of integrity.

Legal counsel plays a critical role in building the compliance infrastructure necessary to support an ethical culture and reduce regulatory risk. In-house counsel are particularly well positioned to influence organizational culture because they have strong working relationships across a spectrum of operational departments and a keen understanding of the organization's values and objectives. In-house and outside counsel alike are also subject to independent ethical standards imposed by the Minnesota Rules of Professional Conduct. For example, Rule 1.13 requires any attorney representing an organization as a client to report legal misconduct to an appropriate authority within the organization. Rule 1.13 also allows the attorney to resign and make any necessary information disclosures under Rule 1.6 if the organization fails to take action in response to the report of misconduct.

In addition, Rule 2.1 acknowledges that a lawyer may consider "moral, economic, social, and political factors" in advising a client. These considerations are particularly relevant where the law is conflicting or ambiguous, when the question at issue is highly sensitive or involves matters of public interest, or when the client has competing objectives. Recognizing and resolving ethical dilemmas is within every lawyer's purview.

Moving your client into compliance peak position

Serving your client well requires you to work collaboratively with organizational leaders to improve their compliance programs. Here are three ideas to consider as you work to move your organization into compliance peak position:

■ **Conversations matter.** Good relationships are the foundation of corporate compliance work. Legal counsel must be able to build bridges of credibility, trust, and familiarity between the organization's compliance department and corporate management. Legal counsel must also establish strong relationships with industry regulators and follow through with commitments made to them. By understanding and satisfying industry regulators' interests, legal counsel can ensure their business colleagues are free to innovate without unnecessary regulatory interference.[6]

■ **Manage materials.** This point is two-fold. Legal counsel must work diligently to keep corporate policies in lockstep with business practices and regulatory requirements. Fall short on either of these fronts and you invite regulatory scrutiny. Legal counsel must also manage materials in the sense that they have command over the regulatory framework most directly influencing business operations. Start with the text of the basic underlying statute, and move outward from there. Other good practices:

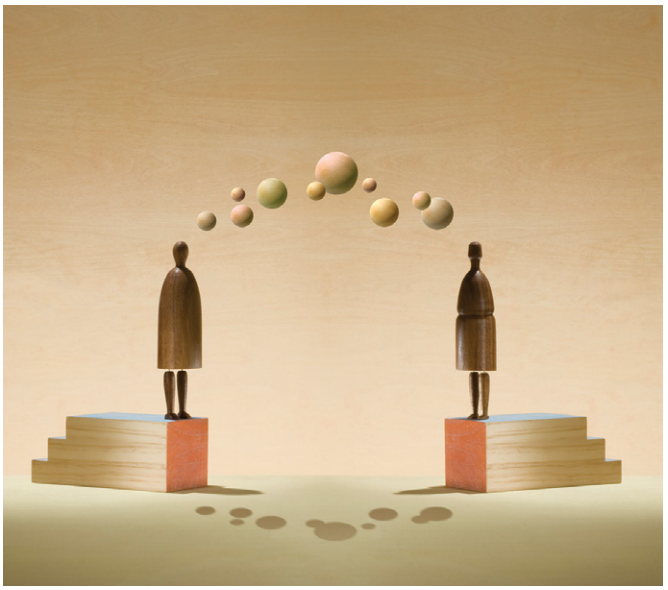
- Make a checklist of regulatory requirements for your client's products and services;
- study the content of regulatory agency websites;
- talk with experienced counsel to understand their methods for navigating complex regulatory standards, staying on top of publications and client updates, and studying other organizations' compliance failures so you can help your organization avoid its own.[7]

■ **Work from values rather than rules.** To meet our professional responsibility obligations and provide value to our clients, legal counsel must understand the organization's guiding values and commitments and give life to them. Legal counsel occupies a unique position: We can influence the development of corporate policy to ensure it meets legal and regulatory requirements as well as encourage our clients to engage proactively with stickier compliance problems. These practices result in increased ethical awareness within organizations, making it more likely employees will ask the right questions and do the right things when faced with an ethical problem.[8]

The Department of Justice Evaluation of Compliance Program checklist provides a series of additional considerations counsel may wish to consult in evaluating an organization's compliance program.[9]

Winning at compliance

Organizations can have strong compliance programs and strong performance. Legal counsel can best contribute by being knowledgeable about industry regulatory requirements and ensuring that their clients' compliance programs are based on values like ethical leadership, appropriate reward systems, fair employment practices, and a willingness to engage in open conversations about compliance issues. With unemployment at historically low rates, every organization stands to benefit from achieving compliance peak performance while also fostering a positive corporate culture and engaging employees. ▲



Disclaimer: The contents of this article do not constitute legal advice and do not necessarily reflect the opinions of my employer.

Notes

[1] Robert C. Bird and Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 Am. Bus. L. J. 203, 210 (2016) *citing* Ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.) *and* Clyde B. Aitchison, *The Evolution of the Interstate Commerce Act: 1887-1937*, 5 Geo. Wash. L. Rev. 289, 289 (1937).

[2] Hui Chen and Eugene Saltes, *Why Compliance Programs Fail,* Harvard Business Review, March-April 2018 at 5.

[3] Scott Killingsworth, *Modeling the Message: Communicating Compliance Through Organizational Values and Culture*, 25 Geo. J. Legal Ethics 961, 961-962 (2012).

[4] Bird and Park, *supra*, at 220.

[5] *See generally* Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, Cal. Mgmt. Rev., 131 (1999).

[6] Andrew S. Boutros et al., *The ABA Compliance Officer's Deskbook*, 5-8 and 168 (American Bar Association 2017).

[7] Boutros, *supra*, at 165-170.

[8] Treviño, *supra*, at 133.

[9] U.S. Department of Justice, Criminal Division, Fraud Section, *Evaluation of Corporate Compliance Programs*, available at *https://www.justice.gov/criminal-fraud/page/file/937501/download.*

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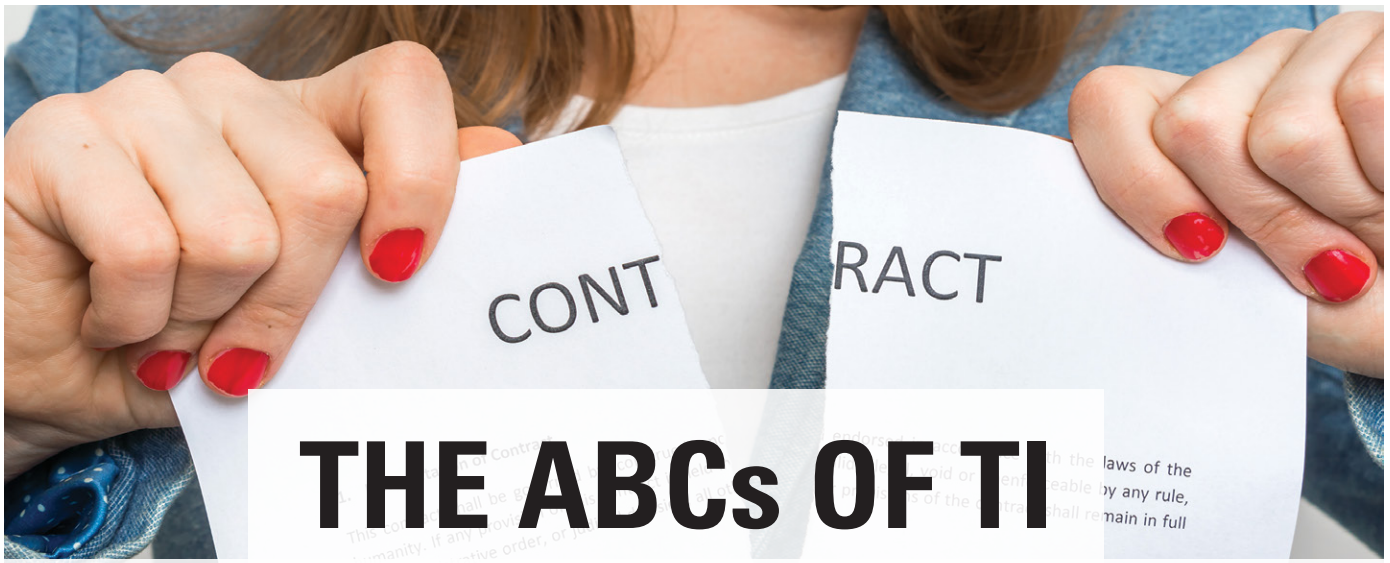


THE ABCs OF TI

Understanding tortious interference with contract

By Joseph Pull

The time-honored commercial litigation claim of tortious interference with contract (TI) gives legal teeth to the intuition that if you and I have a contract, an outsider shouldn't be allowed to profit by persuading one of us to break it. But a perusal of Minnesota case law shows that TI is a claim frequently made and infrequently won.

Why? Well, commercial competition is a good thing. We don't want market competition chilled by fear of overbearing courts imposing tort liability, and business competitors sometimes use TI lawsuits to stifle their rivals in court when the rivals pull ahead in the marketplace. To prevent the use of courts as weapons against fair competition, the law provides that a TI claim can be defeated if the defendant shows the complained-of conduct was reasonable commercial behavior—which TI defendants often are able to do.

The basics of TI in Minnesota can be seen in a recent instance of a party prevailing on a TI claim, contextualized with a sampling of garden-variety unsuccessful TI claims.

Analysis

In Minnesota, tortious interference with contract[1] has five elements:

1. Existence of a contract.
2. Defendant knew of the contract.
3. Defendant intentionally procured a breach of the contract.
4. Without justification.
5. Plaintiff sustained damages as a result.[2]

In *Qwest Comms. Co., LLC v. Free Conferencing Corp.*,[3] the plaintiff persuaded the trial court that it had proved all five elements of TI, then successfully defended its victory on appeal against attacks on four of the five elements.

The facts in *Qwest* were complicated. The plaintiff, Qwest, was a long distance telephone carrier that paid fees to Tekstar, a local telephone carrier that completed calls within a particular geographic region. The fees that Qwest paid, called "tariffs," were stated in a contract between Qwest and Tekstar.

The defendant was Free Conferencing Corp. (FC), an internet free conferencing company. FC sought to profit by exploiting the relationship between Qwest and Tekstar. The tariffs Qwest paid Tekstar were higher than typical tariffs for other local telephone carriers because Tekstar served a rural area, which was more expensive to serve because the carrier infrastructure covered a large area with a sparse population of paying customers. In essence, FC sought to artificially increase telephone traffic into Tekstar's network, then get paid a portion of the high fees received by Tekstar from Qwest for the increase in traffic.

FC carried out its plan by entering into an agreement with Tekstar in which Tekstar agreed to pay FC for setting up conference calls using telephone numbers served by Tekstar. FC marketed free conference calls over the internet, customers used the free conference call service, FC routed the resulting conference calls to Tekstar numbers, and Tekstar charged Qwest for its services in completing the calls. Tekstar then paid FC part of the money it received from Qwest.

Of course, the profits FC received came at Qwest's expense. Qwest challenged FC's business model, citing federal telecommunication regulations. Eventually the Federal Communication Commission ruled that free conferencing companies like FC were not "end users" for the free conference calls—which meant that the agreement between Tekstar and Qwest did not allow Tekstar to bill Qwest for completing the calls.

Qwest then sued FC under Minnesota law for tortiously interfering with the contract between Qwest and Tekstar. After trial, the U.S. District Court for the District of Minnesota agreed with Qwest that the elements of TI had been met:

1. FC knew that Qwest and Tekstar had a contract;
2. FC knew that its free conference call business caused Tekstar to breach its contract with Qwest by billing Qwest for calls which should not have been billed under the contract;
3. FC induced Tekstar to breach the contract by entering into its relationship with Tekstar, which required Tekstar to wrongly bill Qwest;
4. FC had no justification for its actions;
5. Qwest suffered damages as a result.

The court awarded Qwest nearly $1 million in consequential damages, based on expenses incurred by Qwest routing FC's calls through other long-distance carriers to reduce Qwest's cost.

FC appealed the decision, challenging Qwest's proof of four of the elements of TI (procurement, breach of the contract, justification, and damages). The 8th Circuit Court of Appeals affirmed, disposing of FC's arguments concerning procurement, breach, and justification with little trouble. First, the court equated "procurement" with generic tort law causation and concluded FC caused Tekstar to breach Tekstar's contract with Qwest with respect to the billing of FC's calls. Second, the court affirmed that Tekstar's breach of its contract with Qwest was a material breach, since proper billing was a primary purpose of the Tekstar-Qwest contract. Third, the court agreed that FC had notice, prior to contracting with Tekstar, that FC was not an "end user" under federal telecommunication regulations; therefore the court concluded Tekstar could not bill Qwest for FC's conference calls and FC lacked justification for its arrangement with Tekstar.[4]

The appellate court's discussion of the damages issue, too, was not extensive, but that issue in *Qwest* highlights an interesting aspect of TI. The 8th Circuit concluded that the damages claimed by Qwest were foreseeable and flowed naturally from Tekstar's breach of its contract with Qwest; therefore the damages were properly awarded against FC. This conclusion illustrates how TI claims have a flavor of melding tort and contract liability. TI is a tort claim, but Qwest's damages were measured by the foreseeable consequential damages caused by Tekstar's breach of the tariff agreement with Qwest.

In essence, the TI claim allowed Qwest to hold FC vicariously liable for Tekstar's breach of contract. Why didn't Qwest simply sue Tekstar, the party that breached the contract with Qwest? The 8th Circuit opinion provides no explanation. One might speculate that Qwest sought to send a deterrent message that it would aggressively pursue and punish companies that sought to profit from Qwest's relationships with local telephone exchange carriers, without damaging Qwest's relationship with the local carriers themselves.

In any event, *Qwest* was slightly unusual as a Minnesota TI case because the defendant challenged Qwest's proof on four separate elements of TI. More typically, Minnesota cases involving TI claims tend to revolve around just one or two of the elements—frequently the intentional procurement and justification elements.[5]

Cases turning on the question of whether the defendant intentionally procured a breach of contract show a variety of ways plaintiffs have failed to prove this element, such as where the evidence pointed to an individual other than the defendant as the cause of the breach, or where the plaintiff attempted to rely on a coincidence of events to prove causation.[6] In *Sysdyne Corp. v. Rousslang*,[7] the sole element at issue was justification. On this element, the Minnesota Supreme Court emphasized that the appropriate test is "what is reasonable conduct under the circumstances," which is "normally a question of fact."[8] A defendant may show justification by showing she had a "legally protected interest that would be impaired or destroyed by performance of the contract," but there are other ways to show justification also.[9] The *Sysdyne* defendant successfully argued that its reliance on the advice of counsel justified its conduct.

A "legitimate economic interest," such as the defendant's own contractual relationships, can justify interference in another person's contract, so long as "improper means"—such as another tort or illegal action—are not used.[10] An earlier case in which the Minnesota Supreme Court addressed TI, *Kjesbo v. Ricks*,[11] turned on the justification element, but there the plaintiff succeeded in arguing that no justification existed for the defendants' scheme, which used a strawman transaction to exploit a statutory right of first refusal to defeat the plaintiff's contract to purchase a plot of land.

Perhaps surprisingly, there is a fair number of Minnesota TI cases in which the plaintiffs failed to show that any contract was breached at all as a result of the defendants' alleged wrongful conduct. Without a breach of contract, a TI claim fails before the court even reaches the point of considering intentional procurement or justification. TI plaintiffs have sometimes overlooked the fact that if the contract at issue contained a condition precedent that was never fulfilled, then the contract's other obligations never came into existence, so there are no contractual obligations that could be interfered with.[12] A similar elementary pitfall for TI plaintiffs is alleging TI based on the defendant's breach of a contract to which the defendant itself was a party; by law a party may not tortiously interfere with its own contract. TI only applies to a situation where someone else, not a party to the contract, disrupts a contractual relationship.[13]

Conclusion

Tortious interference with contract is a useful commercial tort claim under Minnesota law, but TI plaintiffs must be careful to ascertain that all elements are met when they bring their claims, and they must particularly be prepared to show the defendant intentionally procured a breach of contract through conduct that was unreasonable under the circumstances. ▲

Notes

[1] Also called "wrongful interference with a contractual relationship."

[2] *Sysdyne Corp. v. Rousslang*, 860 N.W.2d 347, 351 (Minn. 2015).

[3] *Qwest Comms. Co., LLC v. Free Conferencing Corp.*, 905 F.3d 1068 (8th Cir. 2018).

[4] *Id.* at 1074-76.

[5] "Justification is the most common affirmative defense to an action for interference." *Johnson v. Radde*, 293 Minn. 409, 196 N.W.2d 478, 480 (1972).

[6] *E.g. Auto Servs. Fin., LLC v. Frugal Indus., Inc.*, No. C7-01-6811, 2003 WL 23816530, at *6 (Minn. Dist. Ct. 8/13/2003) (no procurement of breach because the party to the contract, not the outsider, was the driving force behind the allegedly tortious events); *Community Ins. Agency, Inc. v. Kemper*, 426 N.W.2d 471, 474 (Minn. Ct. App. 1988) (no evidence that buyers who entered into contracts for deed without consent of senior mortgage lender had intentionally interfered with junior lender's contract rights); *Norwest Lighting, Inc. v. Viking Elec. Supply, Inc.*, No. C5-01-851, 2002 WL 77072 *2 (Minn. Ct. App. 1/22/2002) (plaintiff distributor failed to show that defendant supplier caused the termination of plaintiff's contract with a different supplier; coincident timing of termination was not evidence of procurement).

[7] Supra note 2.

[8] *Sysdyne*, 860 N.W.2d at 351.

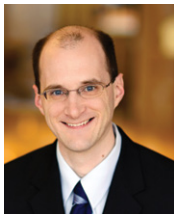
[9] *Id.* at 352.

[10] *Harman v. Heartland Food Co.*, 614 N.W.2d 236, 241-42 (Minn. Ct. App. 2000).

[11] *Kjesbo v. Ricks*, 517 N.W.2d 585 (Minn. 1994).

[12] *See First Union Mgmt., Inc. v. Kmart Corp.*, No. C3-93-2258, 1994 WL 385645, at *2 (Minn. Ct. App. July 26, 1994); *Cunningham Implement Co. v. Deere & Co.*, No. C7-95-1148, 1995 WL 697555, at *3 (Minn. Ct. App. 11/28/1995).

[13] *Bouten v. Richard Miller Homes, Inc.*, 321 N.W.2d 895, 901 (Minn. 1982).



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Landmarks in the Law

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

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CIVIL PROCEDURE

JUDICIAL LAW

Minn. R. Civ. P. 12.02(e); affirming dismissal of defamation case due to absolute privilege and immunity. Plaintiff Keane brought a defamation action against defendant attorney Groth for statements regarding the relationship of the parties made in an answer during a prior breach of contract action. Defendant brought a motion to dismiss under Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted, arguing that the statements were barred by absolute privilege and absolute immunity. The district court granted defendant's motion.

The general rule is that "defamatory statements published during a judicial proceeding are absolutely privileged." On appeal, Keane argued that the district court's dismissal was improper because the defendant had not explicitly cited privilege as an affirmative defense. Moreover, the plaintiff asserted that the statements were not privileged because they were not relevant to the legal dispute under *Matthis v. Kennedy*, 67 N.W.2d 413 (Minn. 1954) (enumerating test for whether a statement is "relevant" to a legal dispute, and therefore privileged). The court of appeals disagreed with the plaintiff, finding that the allegedly defamatory statements were "relevant" to the previous legal dispute, and therefore privileged. As a result, the statements could not form the basis of a defamation action. The court of appeals affirmed the district court's dismissal under Minn. R. Civ. P. 12.02(e). ***Keane v. Groth***, A18-0614, 2019 WL 907498 (Minn. Ct. App. 2/15/2019) (unpublished).

Minn. R. Civ. P. 24.01; affirming denial of motion to intervene by insurer in motion to approve Miller-Shugart settlement. Plaintiff's child was injured by a dog at an in-home daycare run by the defendant. The defendant's home insurer, American Family, denied coverage due to an exclusion in the insurance policy. The plaintiff and defendant reached a *Miller-Shugart* settlement agreement and sought approval and judgment by the court. American Family sought to intervene in the approval and judgment hearing under Minn. R. Civ. P. 24.01. The district court denied the insurer's motion to intervene, and did not allow it to argue on the merits. The insurer appealed.

The Minnesota Court of Appeals affirmed, finding that the insurer did not meet the four-factor test laid out in Minn. R. Civ. P. 24.01. *Daberkow*, at *2 ("a non-party seeking to intervene… must show (1) timely application for intervention, (2) an interest relating to the property or transaction that is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) that the applicant is not adequately represented by the existing parties."). The court found that the insurer's motion failed on the third prong because an insurer may challenge an approved *Miller-Shugart* settlement in a garnishment or declaratory judgment action. The court also found that the district court properly denied the insurer the opportunity to participate in oral argument. ***Daberkow by and Through Daberkow v. Remer***, A18-0472, 2019 WL 664505 (Minn. Ct. App. 2/19/2019) (unpublished).

Minn. R. Civ. P. 60.02; affirming denial of motion to reopen commitment proceedings. In 2014 plaintiff Dooley was civilly committed as a sexually dangerous person (SDP) due in part to a stipulation whereby he agreed to be civilly committed. Four years later, Dooley sought to reopen his civil commitment proceeding under Minn. R. Civ. P. 60.02, arguing that his counsel in the 2014 action was ineffective, and the stipulation should be withdrawn. The district court denied Dooley's Rule 60.02 motion, and Dooley appealed.

The court of appeals found that

Dooley's interpretation of the stipulation was incorrect. The stipulation, according to the court, was not that Dooley agreed to be committed as a SDP, but rather that he agreed to submit the case based on a stipulated record. Moreover, the court found that even if the motion to reopen was timely, it failed on the merits. The court held that Dooley's counsel in the 2014 proceeding was not ineffective despite that counsel's drug convictions more than four years later. Additionally, the court held that the stipulation was a "knowing, voluntary, and intelligent decision" and therefore that the motion to reopen the commitment proceeding was not warranted under Rule 60.02. ***Matter of Civil Commitment of Dooley***, A18-0944, 2019 WL 661662 (Minn. Ct. App. 2/19/2019) (unpublished).

■ **Minn. R. Civ. P. 37; attorneys' fees assessed against non-parties.** This dispute centered on whether trust assets are part of the marital estate subject to distribution upon dissolution of a marriage. Though many of the issues in this case were unrelated to civil procedure, one Rule 37 issue arose—namely, whether attorneys' fees as sanctions under Minn. R. Civ. P. 37 may be assessed against non-parties. The husband, the corporation he worked for, and the husband's father, who owned that corporation, failed to comply with discovery orders and were placed in contempt. The district court found that the husband, the corporation he worked for, and the husband's father owed the wife over $89,000 in attorneys' fees resulting from contempt-related litigation.

The husband's father argued that because he was not a party to the dissolution, Rule 37 sanctions in the form of attorneys' fees could not be assessed against him. The court of appeals found that the father "misconstrued the limitation of the rule." The court compared the case to *Bowman v. Bowman*, 493 N.W.2d 141 (Minn. Ct. App. 1992), wherein attorneys' fees were affirmed against a non-party business partner of one of the parties because he was "an officer of the partnership." Similarly, in this case, the court found that the father was an officer of the business and therefore that assessing attorneys' fees against him was appropriate under Rule 37. ***Kazeminy v. Kazeminy***, A18-0029, 2019 WL 664893 (Minn. Ct. App. 2/19/2019) (unpublished).

■ **Minn. R. Civ. P. 19; landowners as necessary and indispensable parties in ordinance dispute.** The plaintiffs in this case sought judicial review of a township's zoning variance decision. The plaintiffs served the township, but failed to timely serve the landowners who received the variance. The district court found that the landowners were necessary and indispensable parties under Minn. R. Civ. P. 19, and therefore, because they had not been joined, the case must be dismissed. The court of appeals affirmed, finding that the zoning variance was related to the landowner's property, and therefore that they "obviously have an interest in the township's zoning-variance decision." The court was persuaded by the fact that the landowners had already expended over $75,000 in construction costs in reliance on the variance decision. Further, the court found that disposition of the case could impair or impede the landowner's ability to protect their property interests, and thus that the landowners were necessary and indispensable parties. ***Schulz v. Town of Duluth***, ___ N.W.2d ___, 2019 WL 510023 (Minn. Ct. App. 2019).

■ **Minn. R. Civ. P. 60.02; seeking relief from prospective order based on an unconstitutional statute.** Plaintiff Lougee sued the defendant for defamation and other related torts arising out of statements the defendant made to the police concerning Lougee. The suit was dismissed under the Minnesota anti-SLAPP statute, which was later found to be unconstitutional as applied to tort claims. Based on the finding that the anti-SLAPP statute was unconstitutional in certain circumstances, Lougee moved for relief from the dismissal of his suit under Minn. R. Civ. P. 60.02(e)-(f). The district court denied Lougee's motion.

Rule 60.02(e) permits a court to relieve a party from a final judgment, order, proceeding, etc. if "it is no longer equitable that the judgment should have prospective application." The issue was whether an order for dismissal is "prospective" and therefore whether it falls within the purview of Rule 60.02(e). Lougee argued that dismissal is prospective in nature, and therefore covered by 60.02(e), because it has the effect of prohibiting him from bringing a law suit in the future. The court of appeals disagreed, finding that because an order for dismissal does not require a court to supervise changing conduct or conditions, it is not prospective in nature, and therefore not covered by the rule.

Rule 60.02(f) permits a court to relieve a party from a final judgment, order, proceeding, etc. for "[a]ny other reason justifying relief from the operation of judgment." The court of appeals held that this provision did not apply. The court found that Rule 60.02 was intended to strike a balance between the need for finality of judgments and the need for relief in certain circumstances, and that Rule 60.02(f) should only be used in "extraordinary situations." Since this was not an "extraordinary circumstance," the court found that the district court correctly determined that a 60.02(f) motion could not be granted in this case. ***Lougee v. Pehrson***, A18-0026, 2019 WL 418516 (Minn. Ct. App. 2/4/2019) (unpublished).

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COMMERCIAL AND CONSUMER LAW

JUDICIAL LAW

■ **When do some requirements of UCC Article 9 arise?** Uniform Commercial Code (UCC) §9-610(b) requires every disposition of collateral to be commercially reasonable. The Official Comments to §9-610 are of some assistance on the question of what is commercially reasonable, as is §9-627, but ultimately a comprehensive definition of the term is not possible and the resolution of whether a disposition qualifies depends on the facts in a particular case. Given that the sanctions for a misstep can be severe (see §9-625), this issue of what is commercially reasonable has caused trouble for many a secured party.

Recently the Minnesota Court of Appeals, in *Bremer Bank, N.A. v. Matejcek*, was faced with the question of when the commercially reasonable requirement arises. A married couple had obtained a secured loan to purchase a motor home. The debtors divorced and the loan went into default. The wife then requested permission from the lender to sell the motor home after which the proceeds would be turned over to the lender, who agreed to release its lien so the sale could be accomplished. The wife also got a court order transferring sole title to the motor home to her. After the sale, which did not entirely satisfy the debt, the lender sought a deficiency from both debtors, got judgments against both debtors, and the husband appealed asserting he was given no notice of the sale and it was not a commercially reasonable one as required by UCC Article 9. The court said because the lender had taken

no part in the sale, the UCC requirements did not apply to it, and the fact the lender had released its lien was not sufficient to trigger those requirements.

The decision seems absolutely correct and does not seem to create a loophole in the Article 9 requirements because the selling debtor has every incentive to maximize the sale price. Indeed, Comment 2 to UCC §9-610 states the section encourages private dispositions. In short, this procedure seems an attractive alternative to secured party foreclosure if the debtor is informed and willing. It is something to consider because at least it is cheaper than judicial action for both parties and perhaps less risky for a secured party that is not accomplished or wise enough to employ a person who is experienced in conducting foreclosure sales. ***Bremer Bank, N.A. v. Matejcek***, 916 N.W.2d 688 (Minn. App. 2018).

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CRIMINAL LAW

JUDICIAL LAW

■ **Minnesota Imprisonment and Exoneration Remedies Act: "Consistent with innocence" means "agrees with innocence."** Appellant was arrested and tried for a 1993 robbery of a convenience store, with charges including aggravated robbery, kidnapping, second-degree assault, and attempted second-degree criminal sexual conduct. A jury convicted him, but the court of appeals later reversed, finding the district court erred in introducing *Spreigl* evidence. At his second trial, appellant was found not guilty. The district court subsequently denied appellant's petition for certification of eligibility for compensation based on exoneration under the Minnesota Imprisonment and Exoneration Remedies Act (MIERA), concluding that a reversal and remand for a new trial based on erroneously admitted *Spreigl* evidence was not "on grounds consistent with innocence" and that appellant did not establish his innocence by a preponderance of the evidence.

A claim for compensation under the MIERA may be filed only if a person first petitions a court for and receives an order certifying they are eligible for compensation based on exoneration, which requires the person to (1) meet the statutory definition of "exonerated," and (2) either have the prosecutor join the petition or prove their innocence by a preponderance of the evidence. The court of appeals does not reach the second part of this test, as it concludes that the district court correctly concluded that the reversal of appellant's conviction was not on "grounds consistent with innocence."

A person is exonerated under the MIERA of a Minnesota court "ordered a new trial on grounds consistent with innocence and the prosecutor dismissed the charges or the petitioner was found not guilty at the new trial," and that decision becomes final. Minn. Stat. §590.11, subds. 1(1)(ii), 1(2). The court rejects appellant's argument that the earlier reversal of his conviction was based on improper *Spreigl* evidence *as well as* alibi evidence that exonerated him, clarifying that the court's decision made only fleeting references to the alibi evidence in its consideration of whether the admission of the improper *Spreigl* evidence was harmless error.

The court then finds that reversal for erroneously admitted *Spreigl* evidence is not a reversal "on grounds consistent with innocence." The court notes that there are two reasonable interpretations of "on grounds consistent with innocence": "does not contradict innocence" and "agrees with innocence." The prohibition on introducing *Spreigl* evidence is a procedural safeguard, which is irrelevant to the defendant's actual guilt or innocence, and thus does not "agree with innocence," but "does not contradict innocence." However, the court finds that the Legislature intended for "consistent with innocence" to mean "agrees with innocence," both to avoid absurd results and because any other interpretation would render the term ineffectual and superfluous, as the statute already contemplates a conviction that has been reversed or remanded.

The district court's denial of appellant's petition is affirmed. ***Jonathan Edward Buhl v. State***, No. A18-0245, 2019 WL 114172 (Minn. Ct. App. 1/7/2019).

■ **Implied consent: Police permitted to execute search warrant for blood test over driver's objection when police did not read implied consent advisory.** After appellant's arrest for an unrelated matter, police suspected he had been driving while under the influence of methamphetamine. Police did not read appellant the implied consent advisory, but instead obtained a search warrant. Over appellant's objection, police executed the warrant to obtain a sample of appellant's blood, which tested positive for controlled substances. Prior to trial, the district court denied appellant's motion to suppress, and appellant was subsequently found guilty after a jury trial. The issue on appeal is whether police were permitted to execute the search warrant after appellant's DWI arrest (in 2016), even though appellant did not consent and objected to the test. Although nonconsensual blood draws are constitutionally permissible if performed pursuant to a valid search warrant, appellant argues that a test may not be given if a person refuses under the 2014 version of Minn. Stat. §169A.52, subd. 1 (in effect at the time of the offense). The question is whether that statutory provision applies if law enforcement did not read the implied consent advisory to a driver after arresting him or her for DWI.

Section 169A.52, subd. 1, falls within the portion of Minnesota's "Driving While Impaired" chapter, chapter 169A, that lays out the "Implied Consent Laws." Section 169A.52, specifically, establishes civil consequences for test refusal or failure. In contrast, another portion of chapter 169A, titled "Crimi-

nal Provisions," sets criminal offenses and penalties for driving while impaired, and yet another portion, titled "Procedural Provisions," contains provisions that may apply in a criminal DWI prosecution. "The implied-consent law provides a means by which a person who has been arrested for DWI may be tested (or not tested) and thereafter denied driving privileges in an administrative process, with an opportunity for judicial review of a license revocation in a civil proceeding." Other provisions in chapter 169A govern criminal DWI prosecutions, one of which permits evidence of breath, urine, or blood test at trial, without regard to whether the sample was obtained pursuant to the implied-consent law. The court also notes that the implied consent law does not require an officer to invoke the implied consent law, nor does anything in the law prevent an officer from obtaining and executing a search warrant for a sample.

The court holds that section 169A.52, subd. 1, applies only if the implied consent law is invoked by an officer's reading of the implied consent advisory to a driver arrested for DWI. The court finds, therefore, that section 169A.52, subd. 1, unambiguously did not prevent police from executing the search warrant authorizing the taking of a sample of appellant's blood.

Finally, the court notes it would reach the same result even if it had found section 169A.52, subd. 1, to be ambiguous. The district court's denial of appellant's motion to suppress evidence of the result of the blood test is affirmed. ***State v. Brett Michael Wood***, No. A17-1853, 922 N.W.2d 209 (Minn. Ct. App. 1/7/2019).

■ **Domestic assault: Case-by-case analysis of factors in Section 518b.01, subd. 2(b), required to determine if "significant romantic or sexual relationship" exists.** Appellant was convicted of felony domestic assault under Minn. Stat. §609.2242, subd. 4, for "intentionally inflict[ing]… bodily harm" "against a family member or household member as defined in Minn. Stat. § 518B.01, subd. 2." On appeal, he argues the evidence at trial was insufficient to prove the victim, C.P., fit the definition of "household or family member." This definition includes someone with whom the defendant has a "significant romantic or sexual relationship." Minn. Stat. §518B.01, subd. 2(b)(7). "Significant" is not defined, but the statute directs courts to "consider the length of time of the relationship; type of relationship; frequency of interaction between the parties; and, if the relationship has terminated, length of time since the termination." The Supreme Court confirms that these factors in section 518B.01, subd. 2(b), are incorporated in the criminal statute, section 609.2242, subd. 4, by explicit reference and must be considered to determine whether a "significant romantic or sexual relationship" existed. The Supreme Court also finds that the phrase "significant romantic or sexual relationship" is not ambiguous, as its plain meaning is understood by reference to the list of statutory factors in section 518B.01, subd. 2(b).

Appellant and C.P. met in March 2016 at a homeless shelter, where C.P. was employed. They began dating, although C.P. had been living with another man for 12 years, whom C.P. claimed was just a roommate but whom she lied to in order to spend time with appellant. In June and July 2016, appellant and C.P. stayed in hotel rooms together for a number of days, during which time C.P. relapsed after 14 years of sobriety. C.P.'s family reported her missing after she did not communicate with them for 24 hours and missed several shifts at work. When C.P. was located at a hotel with appellant, where she had been for five days, intoxicated and without food, and with bruises and lacerations on her face. C.P. described appellant to police as a "friend," but admitted to having sexual intercourse with him on a number of occasions and that she was "failing in love with him." The court of appeals affirmed appellant's conviction, as does the Supreme Court, finding this evidence sufficient to support the jury's finding that appellant and C.P. were in a "significant romantic or sexual relationship" when the assault occurred. ***State v. Gerald Robinson***, No. A17-0525, 921 N.W.2d 755 (Minn. 1/9/2019).

■ **Robbery: "Personal property" is all property that is not real property.** Appellant was convicted of simple robbery for taking a bottle of liquor from a liquor store without paying. He argued on appeal that the evidence was insufficient to support his conviction because a bottle of liquor owned by a business is not "personal property." The court of appeals affirmed his conviction, as does the Supreme Court.

Under the simple robbery statute, Minn. Stat. § 609.24, it is a crime when someone "having knowledge of not being entitled thereto, takes personal property from the person or in the presence of another…" The Supreme Court notes that it must look beyond the common and ordinary meaning of "personal property," as it has acquired a clear and specialized meaning: any property that is not real property. This meaning is the only reasonable interpretation of the phrase in the context of the robbery statute. ***State v. John Lee Bowen***, No. A17-0331, 921 N.W.2d 763 (Minn. 1/16/2019).

■ **Sentencing: If felony conviction received misdemeanor or gross misdemeanor sentence, count conviction in criminal history score as misdemeanor or gross misdemeanor.** After a jury trial, appellant was convicted of first-degree assault for causing great bodily harm to his live-in girlfriend's 23-month-old child, B.G.D. After appellant alone put a protesting B.G.D. down for a nap, B.G.D. started seizing and vomiting, and was rushed to the hospital for a severe brain injury. Testing revealed significant trauma to B.G.D.'s brain. Dr. Swenson, the child abuse pediatrician who evaluated B.G.D. in the hospital, testified as an expert for the state at trial, testifying regarding "abusive head trauma" (formerly called "shaken baby syndrome") as well as her examination of B.G.D., concluding with an opinion that B.G.D.'s injuries were caused by abusive head trauma. Appellant argues the evidence was insufficient to prove he caused B.G.D.'s injuries, the district court erred by admitting Dr. Swenson's testimony about the cause of B.G.D.'s injuries, and the district court erred in calculating his criminal history score.

The court of appeals first finds the evidence was sufficient to prove appellant caused B.G.D.'s injuries. Next, the court finds that Dr. Swenson's testimony had foundational reliability, because the record establishes it is based on a reliable scientific theory. Here, other theories or evidence were introduced, through the testimony of defense experts, that tended to contradict Dr. Swenson's opinion. However, that does not justify excluding Dr. Swenson's testimony. Assessing the weight and credibility of the experts' opinions is the province of the fact finder. The court also rejects appellant's argument that Dr. Swenson improperly offered an opinion as to appellant's intent. Instead, the court finds Dr. Swenson testified as to an opinion that "embraces the ultimate issue." She gave her opinion—based on her professional experience, the nature, extent, and timing of B.G.D.'s injuries, B.G.D.'s medical history, and B.G.D.'s test results—that his injuries were not accidental. Her testimony did not decide the question of appellant's intent, but provided a medical context for the jury to make its own determination.

Finally, the court rules that appellant's criminal history score was incorrectly calculated. The district court assigned two criminal history points for Appellant's 2014 theft conviction (property exceeding $5,000)—one felony point and one custody status point, as appellant was on probation at the time. Appellant initially received a stay of imposition and was placed on probation for the theft conviction. In 2016, the court amended his sentence and executed a sentence of 342 days, which is within the gross misdemeanor sentencing limits. Thus, for purposes of the sentencing guidelines, appellant received a gross misdemeanor sentence, not a felony sentence. Based on the language of the guidelines, the sentencing commission's comments, and historical application of the guidelines, the court conclude that a felony conviction that results in a gross misdemeanor or misdemeanor sentence should be treated as a gross misdemeanor or misdemeanor for purposes of calculating a defendant's criminal history score. Thus, appellant should not have received a felony point for a theft conviction that received a non-felony sentence. ***State v. Matthew Scott Stewart***, No. A17-2039, 2019 WL 272858 (Minn. Ct. App. 1/22/2019).

■ **Criminal sexual conduct: Minn. Stat. §617.247'S 10-year conditional release term required if, at time of commitment for violation of § 617.247, defendant has an earlier qualifying conviction.** Appellant committed child pornography and first- and second-degree criminal sexual conduct offenses. In August 2009, he committed criminal sexual conduct, and entered a plea to second-degree criminal sexual conduct in January 2010. Adjudication on the criminal sexual conduct charge was stayed in April 2010, but a sentence was executed in January 2012 after two probation violations. In March 2010, child pornography was found on a computer to which appellant had access, and he was charged with child pornography possession in April 2010, to which he pleaded guilty in October 2012. As part of his child pornography sentence, the court imposed a 10-year conditional release term, under Minn. Stat. §617.247, subd. 9.

Subdivision 9 of section 617.247 addresses the conditional release term to be imposed on a person who violates that section. Under subdivision 9, an enhanced conditional release term of 10 years is imposed if the person has previously been convicted of a violation of section 617.247 or other listed statutes related to criminal sexual conduct. The Court finds no ambiguity in subdivision 9 and finds that the single plain meaning of its provisions are as follows: "[A] person convicted under section 617.247 must be sentenced to either a 5-year term of conditional release or, if the person has an earlier qualifying conviction, a 10-year term of conditional release." The Court further holds that the time for determining whether the "earlier qualifying conviction" condition is satisfied is, as the statute explicitly states, "when a court commits a person to the custody of the commissioner of corrections for violating" section 617.247.

Appellant's second-degree criminal sexual conduct conviction is a qualifying conviction listed in section 617.247 and the conviction occurred in August 2011. His warrant of commitment for violating section 617.247 was signed by the district court in October 2012. Appellant plainly qualified for the enhanced conditional release term. ***State of Minnesota v. Everett Overweg***, No. A17-1978, 922 N.W.2d 179 (Minn. 1/23/2019).

■ **Criminal sexual conduct: Substantial step made toward committing third-degree criminal sexual conduct.** Appellant was convicted of attempted third-degree criminal sexual conduct, electronic solicitation of a child, and electronic distribution of material describing sexual conduct to a child for making contact online with a BCA agent posing as a young male. Appellant initiated the conversation, asked the decoy if he wanted to meet up, requested nude pictures from the decoy, and sent the decoy explicit photographs. Even after being told the decoy was 14 years old, appellant continued to ask for nude pictures, asked about the decoy's sexual experience, told the decoy he wanted to engage in sexual acts with him, and made arrangements to meet the decoy at the decoy's "home" while the decoy's "mother" was at work the next day. Appellant went to the address given by the decoy the next day and was arrested when he knocked on the door. On appeal, appellant argues he did not take a substantial step toward committing third-degree criminal sexual conduct.

What constitutes a "substantial step" is defined in case law. There must be an intent to commit the crime, followed by an overt act or acts tending, but failing, to accomplish it, and which amount to more than mere preparation, remote from the time and place of the intended crime. *State v. Dumas*, 136 N.W. 311, 314 (Minn. 1912). Appellant argues his acts were nothing more than mere preparation. He points to cases that he argues hold that some physical contact, words delivered in person, or an attack are required for acts to constitute a "substantial step" toward committing third-degree criminal sexual conduct. However, the court of appeals notes that social media has changed how sexual encounters occur and how sexual crimes are perpetrated. "Actions that historically demonstrated a substantial step toward commission of a sex crime, such as preliminary physical contact, may no longer apply when social media is used to initiate the sexual encounter." The court holds that appellant's actions here were not remote in time or location from the intended criminal sexual conduct and directly tended in some substantial degree to accomplish the crime. ***State v. Brian James Wilkie***, No. A18-0288, 2019 WL 333483 (Minn. Ct. App. 1/28/2019).

■ **4th Amendment: No reasonable expectation of privacy in identifying information given to hotel to rent room.** Police obtained a hotel guest list from the hotel's clerk and learned appellant had rented a room for six hours using a Pennsylvania identification card and paid with cash. This prompted police to check appellant's criminal history, where they discovered numerous drug, firearms, and fraud arrests. Appellant allowed police to enter his room, and police observed a large amount of cash, two printers, and several envelopes. After obtaining a search warrant, police found several fake paychecks from various hotels to "Spencer Alan Hill" at various addresses, a large amount of cash, and check-printing paper that had been loaded into a printer. The district court denied appellant's motion to suppress evidence obtained from his hotel room and convicted appellant of check forgery and offering a forged check after a stipulated evidence trial.

Minn. Stat. §327.12 requires hotel operators to maintain registration records and make them "open to the inspection of all law enforcement." The question on appeal is whether appellant had a reasonable expectation of privacy in the identifying information the hotel collected and was required to share with police under this statute. The court of appeals holds that appellant had no such reasonable expectation of privacy. Appellant voluntarily turned over his identifying information to the hotel, and prior cases have held that, even though appellant may have assumed his information would only be used for a limited purpose, he assumed the risk that the hotel would reveal it to police. Thus, the warrantless

search of the hotel's registration records, through which police obtained appellant's identifying information, did not implicate appellant's 4th Amendment rights. ***State v. John Thomas Leonard***, No. A17-2061, 2019 WL 418508 (Minn. Ct. App. 2/4/2019).

■ **Indecent exposure: Indecent exposure a general intent offense.** Appellant was convicted of indecent exposure. The arresting officer testified at trial that appellant appeared to be intoxicated, but no chemical tests were administered. Appellant testified he smoked what he believed to be shisha, flavored tobacco in a hookah, at the home of an unidentified acquaintance, but that he had an intense reaction, causing him to vomit and black out prior to the incident. The district court found appellant was not entitled to instructions on voluntary or involuntary intoxication, because indecent exposure is a general intent offense, and the court of appeals affirmed appellant's conviction.

The Supreme Court rejects appellant's argument that previous interpretations of the indecent exposure statute added a specific intent requirement. The Court notes that these cases merely draw a distinction between volitional and accidental acts, requiring the state to prove that a lewd exposure was volitional. Furthermore, the court holds that the plain and unambiguous language of the indecent exposure statute creates a general intent crime, as it merely prohibits a person from intentionally engaging in the prohibited conduct (an openly lewd act). The court of appeals is affirmed. ***State v. Mohamed Musa Jama***, No. A17-0481, 2019 WL 944371 (Minn. 2/27/2019).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Disability discrimination; reasonable accommodations rejected.** A municipal accountant's disability discrimination claim was dismissed under the Americans with Disabilities Act (ADA) for several reasons. The 8th Circuit Court of Appeals, affirming a ruling of U.S. District Court Judge Donovan Frank in Minnesota, held that the employee did not show that returning to his original position after a leave of absence while working from home was a reasonable accommodation. He did not establish that his position was eliminated and he was terminated because of a disability, or that the city failed to participate in the required "interactive process" under the ADA. ***Brunckhorst v. City of Oak Park Heights, 914*** F.3d 1177 (8th Cir. 2/4/19).

■ **Public policy; not grounds to overrule arbitrator.** In a much-anticipated ruling, the Minnesota Supreme Court held that the doctrine of "public policy" cannot be invoked to overturn an arbitration decision reinstating a police officer discharged for police brutality and failure to properly report the encounter. The Court held that the arbitrator's determination that the officer did not use "excessive force" and that the reporting requirements were ambiguous established lack of "just cause" for discharge and would not be set aside on appellate review. ***City of Richfield v. Law Enforcement Labor Services,*** 2019 WL 575866 (Minn. Ct. App. 2/13/2019) (unpublished).

■ **Sex discrimination; 'similarly situated' claim denied.** A woman who sued for pregnancy and disability discrimination after she was denied reinstatement following a leave of absence had her claim dismissed. The lower court dismissed the case on grounds that it was time barred, and the 8th Circuit affirmed on other grounds, including the failure to plead that a competing candidate for the same situation was "similarly situated" and went through the reinstatement process, which negated the alleged disparate treatment sex discrimination claim. ***Jones v. Douglas County Sheriff's Dept.,*** 915 F.3d 498 (8th Cir. 2/6/2019).

■ **Age discrimination; position elimination upheld.** An employee whose position was eliminated after she had discussed retiring within the next year was unsuccessful in her age discrimination claim under the Minnesota Human Rights Act. The Minnesota Court of Appeals, affirming a decision of the Blue Earth County District Court, held that there were no genuine issues of material facts regarding whether the claimant's age motivated the employer's decision to eliminate the position, pointing out that there was no direct evidence of discrimination or a *prima facie* case established by her. ***Apel v. Mankato Rehabilitation Center, Inc.,*** 2019 WL 418537 (Minn. Ct. App. 2/4/2019) (unpublished).

■ **Conflict with boss; quitting employee loses.** A bookkeeper for a liquor store in Duluth, who quit her job because she had a conflict with her manager, was denied unemployment compensation. Upholding a decision of the Department of Employment & Economic Development (DEED), the court of appeals held that while the circumstances may have bothered the claimant, giving her a good "personal" reason to quit, the conditions were not so extreme that an average, reasonable worker would have quit and, therefore, warranted denial of unemployment compensation benefits. ***Giernot v. Lake Aire Bottle Shoppe,*** 2019 WL 418619 (Minn. Ct. App. 2/4/2019) (unpublished).

LEGISLATIVE ACTION

■ **Withholding wages.** A bill that would make it a gross misdemeanor for employers to wrongfully withhold wages from employees is pending in the state House of Representatives. H.F. 6 would impose criminal punishment for unpaid aggregate wages of $10,000, or more, and also would empower the Department of Labor and Industry to issues fines of up to $1,000, along with other administrative remedies. The proposal would supplement existing civil penalties for unpaid wages. It is likely to pass the DFL-dominated House but faces uncertainty in the Senate, where Republicans hold a three-member majority.

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FEDERAL PRACTICE

JUDICIAL LAW

■ **Fed. R. Civ. P. 23(f); equitable tolling not available.** In August 2018, this column noted the Supreme Court's grant of *certiorari* in a case presenting the issue of whether the 14-day appeal deadline found in Fed. R. Civ. P. 23(f) is subject to equitable tolling. Reversing the 9th Circuit, the Supreme Court recently unanimously held that Rule 23(f), while a nonjurisdictional claim-processing rule, is not subject to equitable tolling because the plain language of the rule precludes equitable tolling.

The case was remanded to the 9th Circuit to allow it to consider alternative grounds for relief advanced by the plaintiff that it did not consider in its prior ruling. ***Nutraceutical Corp. v. Lambert***, ___ S. Ct. ___ (2019).

■ **28 U.S.C. §§1821 and 1920; 17 U.S.C. §505; costs.** Reversing the 9th Circuit's award of $12.8 million in litigation ex-

penses including expert witness fees, e-discovery expenses, and jury consulting costs, and agreeing with the 8th Circuit decision in *Pinkham v. Camex, Inc.* (84 F.3d 292 (8th Cir. 1996)), the Supreme Court held that the Copyright Act's allowance of "full costs" means only those costs specified in 28 U.S.C. §§1821 and 1920. ***Rimini Street, Inc. v. Oracle USA, Inc.***, ___ S. Ct. ___ (2019).

■ ***En banc* majority; death of judge.** Where the 9th Circuit appeared to split 6-5 in a case decided *en banc*, and one judge in the majority died before the decision was filed, the United States Supreme Court unanimously held that the deceased judge's vote could not be counted as part of the *en banc* majority, noting that "federal judges are appointed for life, not for eternity." ***Yovino v. Rizo***, ___ S. Ct. ___ (2019).

■ **Motion to stay discovery pending resolution of motions to dismiss granted in part.** Where the parties to putative class actions were able to agree on the scope of some—but not all—discovery while motions to dismiss were pending, Magistrate Judge Bowbeer acknowledged the factors governing the resolution of motions to stay discovery while a motion to dismiss is pending, but declined to "take a peak" and consider the merits of the motion to dismiss. ***In re Pork Antitrust Litig.***, 2019 WL 480518 (D. Minn. 2/7/2019).

■ **Fed. R. Civ. P. 26(b)(4)(E); motion for payment of expert fees denied.** Magistrate Judge Wright denied the defendant's motion to compel the plaintiff to pay the defendant's expert's travel costs, finding that it was the defendant or its counsel who were responsible for the decision to have the East Coast-based expert deposed in Minneapolis, and that the parties had not discussed the payment of the expert's travel expenses prior to the deposition. ***Wing Enters. v. Tricam Indus., Inc.***, 2019 WL 522162 (D. Minn. 2/11/2019).

■ **Fed. R. Civ. P. 26(b)(4)(E); payment of expert fees.** In a decision involving multiple disputes over costs relating to expert depositions, Magistrate Judge Leung ordered the plaintiffs and their counsel to compensate the defendants' experts for the "few hours" they spent preparing for their depositions and the "relatively short" amount of time one expert spent reviewing his transcript. Magistrate Judge Leung also found that it would be a "manifest injustice" to require defendants to compensate one of the plaintiffs' experts where that expert had experienced health issues, was unable to recall a number of details during his deposition, and the plaintiffs agreed that it was "no longer feasible" to call him as a trial witness. ***G.C. ex rel. Tsiang v. S. Washington Cty. School Dist. 833***, 2019 WL 586676 (D. Minn. 2/13/2019).

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IMMIGRATION LAW

JUDICIAL LAW

■ **Harm suffered by petitioner does not rise to level of past persecution, nor does he show well-founded fear of future persecution.** The 8th Circuit Court of Appeals held that the harm a Cameroonian asylum applicant suffered in the past (one detention for four days and a subsequent detention for three days that entailed "members of the gendarmerie beat[ing] him with sticks, step[ping] on him, and smash[ing] him with their military boots") did not rise to the level of past persecution. Furthermore, the general and overly broad statements and reports submitted by the applicant, acknowledging that "the Cameroonian government represses, monitors, and even detains political dissidents and activists," failed to show that he, himself, or other ordinary members of the Southern Cameroon National Council (SCNC) are or would be specifically targeted for future persecution. Consequently, Njong failed to meet the more stringent standard of either "clear probability" for the relief of withholding of removal or showing that it was more likely than not he would be tortured upon a return to Cameroon for the relief afforded by the Convention Against Torture (CAT). ***Njong v. Whitaker***, 2018 WL 6815724 (8th Cir. 12/28/2018). *https://ecf.ca8.uscourts.gov/opndir/18/12/173460P.pdf*

■ **Credible fear, expedited removal orders, and the suspension clause.** In a case involving credible fear review of an expressed fear of persecution in the asylum context, the 9th Circuit Court of Appeals reversed the district court's dismissal of the petitioner's *habeas* petition challenging procedures leading to his expedited removal order for lack of subject matter jurisdiction. It held that 8 U.S.C. §1252(e)(2) violates the suspension clause as applied to the petitioner and remanded the case for the district court to exercise jurisdiction to consider his legal challenges to the procedures leading to the expedited removal order. Under the suspension clause, the petitioner must be given a "meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." ***Thuraissigiam v. USDHS***, 2019 WL 1065027 (9th Cir. 3/7/2019). *http://cdn.ca9.uscourts.gov/datastore/opinions/2019/03/07/18-55313.pdf*

But, see *Castro, et al. v. USDHS*, 835 F.3d 422, 450 (3rd Cir. 2016). The 3rd Circuit affirmed dismissal of the *habeas* petitions, finding the district court lacked subject matter jurisdiction under 8 U.S.C. §1252, which restricts judicial review for expedited removal orders issued under section 1225(b)(1). The court also rejected an argument under the suspension clause of the U.S. Constitution: "we cannot say that this limited scope of review is unconstitutional under the Suspension Clause." *http://www2.ca3.uscourts.gov/opinarch/161339p.pdf*

Petition for Writ of Certiorari filed on 12/22/2016. Petition denied on 4/17/2017.

https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16-812.htm

Stay tuned.

ADMINISTRATIVE ACTION

Continuation of documentation for beneficiaries of temporary protected status—Sudan, Nicaragua, Haiti, and El Salvador. The Department of Homeland Security announced that beneficiaries under the temporary protected status (TPS) designations for Sudan, Nicaragua, Haiti, and El Salvador will retain their TPS. This will be the case as long as the preliminary injunction issued on 10/3/2018 by the Northern District of California in *Ramos v. Nielsen*, No. 18-cv-01554 (N.D. Cal. 10/3/2018) enjoining the Department of Homeland Security (DHS) from implementing and enforcing its decisions to terminate TPS for those four nations remains in effect. Furthermore, TPS-related employment authorization is automatically extended through 1/2/2020. And, DHS TPS-related documentation (employment authorization documents, approval notices for those applications for employment authorization, and Forms I-94 (Arrival/Departure Record) is automatically extended through 1/2/2020. 84 *Fed. Reg.* 7103-09 (3/1/2019). *https://www.govinfo.gov/content/pkg/FR-2019-03-01/pdf/2019-03783.pdf*

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INTELLECTUAL PROPERTY

JUDICIAL LAW

Copyright: SCOTUS holds registration required for bringing infringement claim. The U.S. Supreme Court unanimously held that a party suing for copyright infringement must have a federal copyright registration prior to bringing such a claim. Fourth Estate Public Benefit Corporation licensed journalism content to Wall-Street.com, LLC. Wall-Street canceled the license and continued to display Fourth Estate's articles following the license termination. Fourth Estate sued Wall-Street for copyright infringement, even though Fourth Estate had only filed applications to register the articles for copyright protection and had not yet received federal copyright registrations. The Southern District of Florida dismissed the complaint because Fourth Estate's copyright was unregistered, and the 11th Circuit affirmed. The 5th and 9th Circuits, however, have held that registration is made under 17 USC §411(a) when the copyright claimant's application for registration is received by the Copyright Office. The Supreme Court heard the case to resolve this circuit split and to determine the meaning of when "registration of the copyright claim has been made" for the purpose of bringing a copyright infringement claim. The Court held that a copyright owner can only sue for infringement "when the Copyright Office registers a copyright." In its decision, the Court noted the statutory language clearly stated that no infringement action should be instituted until the copyright registration was complete. The statute also provides an exception for a suit to proceed where registration is refused, and it was unreasonable for the registration requirement to be based only on an application for copyright protection since the exception would be superfluous. Although registration processing times have increased, the Court refused to change Congress's statutory mandate. ***Fourth Estate Pub. Benefit Corp. v. Wall-Street.com***, LLC, No. 17-571, 2019 WL 1005829 (U.S. 3/4/2019).

Copyright: Failure to produce original copyrighted work fatal to infringement claim. Judge Frank recently granted a defendant's summary judgment motion for a copyright infringement claim because the plaintiff could not produce an original copy of the software code that was allegedly infringed. Plaintiff Neil Haddley owns the copyright registration of a software program for scanning paper documents into electronic form. Next Chapter Technology (NCT) licensed Haddley's software for use in an NCT product licensed to several Minnesota counties. Haddley sued NCT for allegedly creating an infringing derivative work based on Haddley's software. NCT brought a partial summary judgment motion arguing that its new scanning software, NCT SCAN, was not derivative of the Haddley software source code. The court first noted that Haddley submitted only portions of the software source code for copyright protection. Furthermore, Haddley also admitted that he made subsequent changes to the registered source code and that his claim relied on NCT's creation of a derivative from the original source code. Haddley, however, could not produce a complete copy of the protected source code. Without such a copy, the court could not analyze whether NCT SCAN was substantially similar to the copyrighted software and determine whether NCT SCAN was an infringing derivative work. Because there was no complete copy of Haddley's registered source code available, the court granted NCT's summary judgment motion and dismissed Haddley's copyright infringement claim. ***Haddley v. Next Chapter Tech., Inc.***, No. CV 16-1960 (DWF/LIB), 2019 WL 979151 (D. Minn. 2/28/2019).

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REAL PROPERTY

JUDICIAL LAW

Zoning; Legal Nonconforming Use. Landowner owned and operated a paper mill and a landfill, on adjoining parcels. The landfill permit was granted by the city in 1984 and was a permitted use under the city's zoning ordinance at that time. In 1989, the city amended the zoning ordinance so that the landowner's use of the landfill was a legal nonconforming use. From 1989 to 2012, the landowner operated the landfill with the narrow purpose of accepting its paper mill waste. The landfill did not accept any other waste. The landowner's permit applications to the MPCA, and the permits issued by the MPCA, from 1992 to 2012 specifically listed the use of the landfill as being limited to disposing of its paper mill waste. The paper mill ceased operations in 2012 and the property was sold in 2013. The new owner applied for, and received, a transfer of the MPCA permit in 2013 solely to reflect the change in ownership. In 2014, the new owner submitted an application to MPCA seeking authority to deposit waste generated from operations other than the paper mill.

The city objected to the application that the new owner did not receive local permits for operation of the landfill, and that the proposed use of the landfill was a dramatic change to the nature and source of the landfill. The MPCA indicated it would deny the permit based on the city's objection. The new owner sued the city seeking a declaration that it was entitled to deposit waste generated from operations other than the paper mill into the landfill, consistent with what would have been allowed under the ordinance as it existed in 1984. The district court ruled in favor of the city, finding that the legal nonconforming use of the landfill is limited to waste generated by the paper mill operation. The new owner appealed

and the court of appeals affirmed. The issue was whether the new owner may accept waste from outside sources that were outside the terms of the land-use permit that was transferred to the new owner when it purchased the property in 2013, but that may have been permitted in the original 1984 permit. The court of appeals held that the nonconforming use may not be expanded beyond what was present at the time the use became nonconforming. The actual use at the time of the transfer must be the criteria. Therefore, the court of appeals held that the proposal to accept waste from other sources constituted an impermissible expansion of the prior nonconforming use. ***AIM Development (USA), LLC v. City of Sartell***, A18-0443, 2019 WL 1006800 (Minn. Ct. App. 2019).

■ **Landlord-tenant; eviction; rent abatement.** Tenant notified landlord of habitability claims, but landlord did not fix the issues. Tenant stopped paying rent and landlord commenced an eviction action. The housing court and district court held that tenant had submitted a proper abatement defense to the eviction action. The court of appeals affirmed and held that tenants need not follow the statutory procedures in Minn. Stat. §504B.385 to assert a defense of breach of the covenant of habitability in an eviction case. The court of appeals held that the procedures in Minn. Stat. §504B.385 apply to rent escrow actions and do not constitute a constraint upon the assertion of defenses in an eviction action. The Supreme Court granted review and affirmed. The Supreme Court based its decision on *Fritz v. Warthen*, 298 Minn. 54 (1973), providing that habitability is a defense in an eviction action and held that *Fritz* not expressly modified or abrogated by section 504B.385, which is an affirmative action by a tenant. The Supreme Court also refused to clarify *Fritz* as requiring the tenant to provide written notification of its rent abatement in order to invoke a habitability defense to an eviction. ***Ellis v. Doe***, A17-1611, 2019 WL 1051400 (Minn. Ct. App. 2019).

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TAX LAW

JUDICIAL LAW

■ **"Weird" deductions not permitted to offset amounts received as settlement for emotional distress.** The taxpayer was a successful inventor and business person. After joining a new company, he became concerned about potentially anticompetitive and even possibly illegal activity at his workplace. He consulted an attorney, and then he approached the company with his concerns. He was promptly fired. The termination caused the taxpayer to suffer significant stress, and the resulting physical manifestations included insomnia, trouble digesting food, chronic headaches, trouble concentrating, and neck, shoulder, and back pain.

The tax court found that the physical ailments were a result of the emotional distress caused by the termination. The taxpayer had received no severance pay when he was fired. Eventually, the taxpayer sued the former employer alleging five different causes of action: breach of contract, antitrust violations, civil conspiracy, failure to pay wages, and wrongful discharge. The parties reached a settlement. A portion of the settlement was attributable to unpaid wages, and a portion attributable to "alleged emotional distress." The tax controversy arose when the taxpayer used two deductions to offset the settlement portion attributable to the "alleged emotional distress."

The taxpayer, working with an experienced CPA, timely filed the return and attached to it a Schedule C, Profit or Loss From Business, which included the settlement payment of $125,000. The taxpayer reported on the Schedule C that the trade or business was an "[u]nclassified establishment[ ]," and deducted $23,584 for "[l]egal and professional services" and $101,416 for "personal injury." The taxpayer also deducted another $33,000 for legal fees for that year on the Schedule A, Itemized Deductions. (The settlement was paid over two years, and the taxpayer's approach was similar in the second year.) The commissioner disallowed the deduction of "personal injury" and the tax court agreed. Although settlements on account of personal injury need not be included in income, amounts attributable for emotional distress have no such tax advantage. Payments on account of emotional distress must be included in income, and the payment cannot then be offset through a deduction. The court candidly acknowledged that, "[i]n the end, it may indeed be imprecise to label any psychological ailment nonphysical—and we do find [the taxpayer] to be entirely credible in his description of the distress he suffered. But the Code says what it says... [t]hose payments are therefore not excludable from income under that section, and any unusual deductions… to offset them are disallowed." ***Doyle v. Comm'r of Internal Revenue***, T.C.M. (RIA) 2019-008 (T.C. 2019).

■ **Tax court refuses to consider new issues in a Rule 155 proceeding.** Rule 155 permits the tax court to withhold entry of its decision for the purpose of "permitting the parties to submit computations... showing the correct amount to be included in the decision." Rule 155(a). Rule 155 computations allow the parties to "do the math" so that they have an opportunity to be heard on the "bottom-line tax effect of the determinations made in the Court's opinion." (*Vento v. Comm'r of Internal Revenue*, full citation below.) In an earlier opinion involving these taxpayers, the tax court determined that the taxpayers were not entitled to foreign tax credits for certain amounts paid to the U.S. Virgin Islands because the taxpayers were and always had been citizens of the United States. The payment of taxes in the U.S. Virgin Islands was an attempt to reduce taxation of their U.S.-source income. In their computations, the taxpayers took the novel position that the amounts at issue were deductible as state or local taxes.

The taxpayers also moved for leave to amend their petitions under Tax Court Rule 41(b)(1), setting forth another new legal argument and asserting that both new issues had been tried by consent. Finally, the taxpayers filed a motion to reopen the record to permit the introduction of new evidence relating to their second new legal theory. Reminding the taxpayers that "Rule 155 is not an 'open sesame' for either party to get adjustments for issues not raised in the deficiency notice, in the pleadings, in the pre-trial memoranda, or at trial," the court rejected the taxpayers' attempt to raise new issues in the Rule 155 proceeding and adopted the commissioner's computations. ***Vento v. Comm'r of Internal Revenue***, No. 1168-06, 2019 WL 453762 (T.C. 2/4/2019) (quoting *Litzenberg v. Commissioner*, T.C. Memo. 1988-482, 56 T.C.M. (CCH) 413, 417.).

■ **Written approval not required for substantial understatement penalty.** A taxpaying couple failed to file a return and throughout their interactions with the commissioner and the court, the couple persistently advanced frivolous arguments. Eventually, the commissioner imposed a penalty. One of several issues in this dispute was whether written approval is required when the penalty imposed is one for substantial underpayment. The court held that it is not. The Code provides that "the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty." IRC Sec. 7491(c). The Code also requires that penalties be "personally approved (in writing) by the immediate supervisor of the individual making such determination" except in two instances. Supervisory approval is not required for "any addition to tax under section 6651, 6654, or 6655." Sec. 6751(b)(2)(A). And supervisory approval is not required for "any other penalty automatically calculated through electronic means." Sec. 6751(b)(2)(B).

In this case, the tax court addressed the novel issue of "whether an accuracy-related penalty determined by an IRS computer program is a 'penalty automatically calculated through electronic means'" such that it does not require written approval. Relying on a plain language analysis, and bolstered by the IRS's interpretation of its own obligations, the court held that penalties determined under Sec. 6662(a) and (b)(2) by an IRS computer program without human review are "automatically calculated through electronic means" within the meaning of I.R.C. sec. 6751(b)(2)(B) and thus are exempt from the written supervisory approval requirement. ***Walquist v. Comm'r***, No. 25257-17, 2019 WL 962901 (T.C. 2/25/2019).

■ **Property tax: Reduction in pipeline operating system value.** Northern Natural Gas Company (NNG) appealed the commissioner's determination on the value of their pipeline operating system for property tax purposes. The tax court agreed with NNG that the commissioner had overvalued the property. In reaching this conclusion, the court disagreed with the commissioner on several aspects. First, the tax court increased the capitalization rate utilized by the commissioner in her income approach. The commissioner argued for a lower capitalization rate because NNG had an above-average debt rating. The tax court disagreed, stating that the debt rating needs to be for a hypothetical buyer and not the company holding the property at issue. Next, the tax court disagreed with the commissioner for failing to apply external obsolescence due to regulations under the cost approach. The commissioner argued that any loss from the regulation was due to internal factors and not a result of any external factors. The tax court said it would be contrary to appraisal theory to hold as the commissioner suggests. Thus, the tax court held that the assessed value of the pipeline operating system should be lowered. ***Northern Natural Gas Co. v. Comm'r of Rev.***, Nos. 8864-R & 8976-R (Minn. T.C. 1/30/2019).

■ **Failure to disclose leads to dismissal.** In 2017 and 2018, Wal-Mart timely served and filed petitions under Minn. Stat. Ch. 278 (2018) challenging the 1/2/2016 and 1/2/2017 assessed value of four store locations for property tax purposes. However, Wal-Mart failed to disclose income and expense information to the respective counties. When a property tax petition has been filed with respect to income-producing property, Minn. Stat. §278.05, subd. 6(a) (2018) requires the petitioner to provide certain information to the respondent county assessor by August 1 in the year taxes are due. Failure to comply results in dismissal of the petition. *Id.*, subd. 6(b) (2018). Therefore, the Minnesota Tax Court dismissed all four of Wal-Mart's petitions. ***Wal-Mart Real Estate Business Trust v. Cnty of Mille Lacs***, Nos. 48-CV-17-886 & 48-CV-18-854 (Minn. T.C. 2/21/2019); ***Wal-Mart Real Estate Business Trust (Cottage Grove #2448) v. Cnty of Washington***, No: 82-CV-17-1776 (Minn. T.C. 2/21/2019); ***Wal-Mart Real Estate Business Trust (Oak Park Heights/Stillwater #1861) v. Cnty of Washington***, No: 82-CV-17-1781 (Minn. T.C. 2/21/2019); ***Wal-Mart Real Estate Business Trust (Woodbury #2643) v. Cnty of Washington***, No. 82-CV-17-1777 (Minn. T.C. 2/21/2019).

LOOKING AHEAD

■ **Supreme Court poised to answer whether due process prohibits states from taxing trusts based on the trust beneficiaries' in-state residency.** The Supreme Court granted North Carolina's petition for *certiorari* after North Carolina's Supreme Court affirmed a lower court holding that the state could not justify taxation of a trust on the basis of the residency of a beneficiary. The state argued in support of its petition: "Eleven states, including North Carolina, tax trust income when a trust's beneficiaries are state residents.… There is now a direct split spanning nine states. Four state courts have held that the Due Process Clause allows states to tax trusts based on trust beneficiaries' in-state residency. Five state courts… have concluded that the Due Process Clause forbids these taxes…. The question presented… [d]oes the Due Process Clause prohibit states from taxing trusts based on trust beneficiaries' in-state residency?" ***North Carolina Dept. of Revenue v. The Kimberly Rice Kaestner 1992 Family Trust***, 2018 WL 4942045 (U.S.) at 1. The decision below is reported at *Kimberley Rice Kaestner 1992 Family Tr. v. N. Carolina Dep't of Revenue*, 814 S.E.2d 43 (N.C. 2018), *cert. granted sub nom. N. Carolina Dep't of Revenue v. Kimberly Rice Kaestner 1992 Family Tr.*, No. 18-457, 2019 WL 166876 (U.S. 1/11/2019). Note that Minnesota is one of the states in the "split." In *Fielding v. Commissioner of Revenue*, 916 N.W.2d 323 (Minn. 2018), the Minnesota Supreme Court held that "the Minnesota residency of [the] beneficiary... does not establish the necessary minimum connection to justify taxing the trust's income" and therefore a beneficiary's in-state residency is an insufficient basis for taxation.


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O'MEARA

Shamus O'Meara, a partner with O'Meara Leer Wagner & Kohl and CEO of O&D Group, LLC, along with DLR Group, has launched a new project design providing residential, employment, and life experiences benefitting people with developmental disabilities and others within local communities. Current plans involve a $100 million project with 400 residences combined with local employment, recreation, health, wellness, and education services.


CONN

Gordon Conn has joined Lapp, Libra, Stoebner & Pusch, Chartered, in an of counsel capacity. Gordon brings a wealth of experience and knowledge in business litigation and bankruptcy litigation.


HILL

Jane M. Hill has joined Eckberg Lammers, PC. Hill brings with her over 25 years of experience. Her practice includes civil, business & commercial, and municipal litigation.

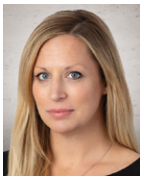

SUGISAKA

Keiko Sugisaka has been elected to the board of directors of Twin Cities Habitat for Humanity. Sugisaka is a partner at Maslon LLP, practicing in the litigation group, and is a member of the firm's governance committee.


VAN ERT

Letty M-S Van Ert has become a shareholder at Tuft, Lach, Jerabek & O'Connell, PLLC. Letty started as a law clerk with the firm in 2007. She focuses her practice in the areas of family law, estate planning, and probate.

Thomas M. Hart has joined Beisel & Dunlevy, PA as an of counsel. He earned his JD from the University of California Hastings College of Law in 1977. Hart has practiced commercial real estate law in Minnesota for nearly 40 years.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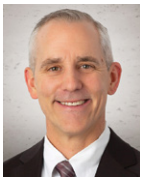
JACOBS


NAPLES


ZELLMER

Fredrikson & Byron PA has opened a new office in Mankato, Minnesota. Joining the firm are transactional business attorneys Jessica A. Buchert, Michael P. Jacobs, David M. Naples, and Randy J. Zellmer.

IN MEMORIAM

Robert C. Kucera, of Bloomington, MN died on January 30, 2019 at the age of 93. Kucera was a graduate of the College of St. Thomas after his service in the U.S. Air Force during WWII. He was a 1952 graduate of the St. Paul College of Law. Bob practiced law in Northfield, and in his later life, in Bloomington, MN. He served in the MN House of Representatives from 1959-1966. He later served as legal counsel for the Minnesota Bankers' Association and as the president of the Insurance Federation of Minnesota.

Michael "Q" Michaux died on February 20, 2019 at the age of 54 after a 15-month battle with cancer. He graduated from the University of Notre Dame and the University of Minnesota Law School. In 2002, he joined United Health Care in Minneapolis, rising through various positions to become president of Optum Payment Integrity.

LeRoy Mitchell Rice died on February 26, 2019, at the age of 96. He served in the U.S. Army during WWII. He graduated from William Mitchell College of Law and was admitted to the bar in 1956. LeRoy was employed for 33 years as trademark counsel at Honeywell, retiring in 1986. He served on the board of the U.S. Trademark Association and was a grateful member of Alcoholics Anonymous for 31 years. Memorials may be offered to Lawyers Concerned for Lawyers.

COMMISSION ON JUDICIAL SELECTION

Gov. Tim Walz announced the appointments to the Commission on Judicial Selection. The 26 appointees include six at-large members and 20 district members, two from each of the 10 judicial districts. The governor a previously announced Lola Velazquez-Aguilu as the chair of the Commission, and all 49 members will serve terms that expire on January 2, 2023.

SHEREE CURRY
At-Large Member, Non-Attorney
NATHAN LACOURSIERE
At-Large Member, Attorney
PATRICK MADER
At-Large Member, Non-Attorney
KEIKO SUGISAKA
At-Large Member, Attorney
JOSHUA TUCHSCHERER
At-Large Member, Attorney
KATHERINE BARRETT WIIK
At-Large Member, Attorney
DAVID METZEN
First Judicial District Member, Non-Attorney
SARAH WHEELOCK
First Judicial District Member, Attorney
ADRIANNA ALEJANDRO-OSORIO
Second Judicial District Member, Non-Attorney
MAYA SALAH
Second Judicial District Member, Attorney
DR. ADENUGA ATEWOLOGUN
Third Judicial District Member, Non-Attorney
ROBERT GILBERTSON
Third Judicial District Member, Attorney
ERICK GARCIA LUNA
Fourth Judicial District Member, Non-Attorney
MELISSA MURO LAMERE
Fourth Judicial District Member, Attorney
JAMES HEPWORTH
Fifth Judicial District Member, Non-Attorney
LYNN JOHNSON
Fifth Judicial District Member, Attorney
PHILLIP DROBNICK
Sixth Judicial District Member, Non-Attorney
DANIEL LEW
Sixth Judicial District Member, Attorney
LISA BORGEN
Seventh Judicial District Member, Attorney
HUDDA IBRAHIM
Seventh Judicial District Member, Non-Attorney
TIMOTHY LINDBERG
Eighth Judicial District Member, Non-Attorney
BRIANNA ZUBER
Eighth Judicial District Member, Attorney
SUSAN BECK
Ninth Judicial District Member, Non-Attorney
MICHAEL GARBOW
Ninth Judicial District Member, Attorney
SHARON VAN LEER
Tenth Judicial District Member, Non-Attorney
VIET-HANH WINCHELL
Tenth Judicial District Member, Attorney

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ATTORNEY WANTED

MALKERSON GUNN Martin LLP seeks experienced, partner-level attorneys specializing in a transactional or litigation real estate practice. We enjoy low overhead, almost no law firm "bureaucracy," downtown Minneapolis offices, sophisticated practitioners and a collegial atmosphere. Please contact: Stu Alger (sta@mgmllp.com).

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EMPLOYEE BENEFITS (ERISA) Associate, Minneapolis, MN. Stinson Leonard Street LLP is seeking an Associate with two or more years of experience to join the Labor, Employment and Employee Benefits Division in our Minneapolis office. SLS is a national law firm with one of the largest Employee Benefit practices in the Midwest. The position offers the ability to join a well-established, growing and highly sophisticated employee benefits practice with attorneys who represent clients in a wide range of industries. The position offers substantial opportunities to work with the firm's corporate finance, financial institutions and general business practice groups and play a key role in merger and acquisitions and Employee Stock Ownership Plans (ESOPs). The ideal candidate will have the following attributes: excellent legal research, writing, and analytical skills; a background in one or more of qualified and non-qualified retirement plans, ESOPs, or health and welfare plans, including ERISA, ACA, HIPAA, and IRC Section 409A experience; and outstanding academic credentials. Pay is competitive for the region. Relocation assistance available. Apply online at: https://recruiting.stinson.com. For questions, contact Jaclyn Steiner, Attorney Recruiting Manager, recruiting@stinson.com. Stinson Leonard Street is an EEO employer. We encourage minority, female, veteran and disabled candidates to apply to be considered for open positions. We offer a competitive compensation and benefits package. We conduct criminal background checks of all individuals offered employment.

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ASSOCIATE ATTORNEY – Workers' Compensation. Arthur, Chapman, Kettering, Smetak & Pikala, PA is a mid-sized law firm seeking an associate to join our workers' compensation practice group. We are a team-oriented firm committed to providing our clients with superior legal services. Candidates must have three plus years of experience handling Minnesota workers' compensation matters. Candidates must also possess a strong work ethic with excellent communication and writing skills. Our firm offers a competitive compensation/benefits package and is dedicated to creating a collegial, diverse workplace. Salary is commensurate with experience. If you are interested in joining our team, please send your cover letter, resume, transcript, writing sample, and salary expectations in confidence to: Attn: Human Resources, recruiting@arthurchapman.com, www.arthurchapman.com, Equal Opportunity Employer.

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CONTRACT LITIGATION Attorney. Blackstock Walters LLC is seeking experienced litigation attorneys to add to its roster of approved contractors for litigation drafting projects. We maintain an active roster of contract attorneys who we notify of available projects consistent with their skill sets. Blackstock Walters LLC is a litigation support company based in Minneapolis, MN, that provides project-based support for civil litigation attorneys, nationwide and internationally, in all phases of litigation. This position will focus on legal research and motion drafting. Our ideal candidate has at least five years of experience with litigation work, including research and motion practice; exceptional writing skills; a high attention to detail; and a problem-solving approach. This candidate will be expected to work with unique and complicated fact patterns and provide sophisticated legal analysis based on original research. First-hand experience with challenging research and analysis is a must. Please submit a cover letter describing your qualifications and interest in this work, a resume, and a writing sample to: Blackstock Walters, LLC, Attention: Lynn Walters, lwalters@blackstockwalters.com

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DUNLAP & SEEGER, PA, a 25-attorney full-service law firm located in Rochester, Minnesota, is seeking associates. Candidates should have strong academic credentials, excellent writing skills and the ability to build client relationships. Please send your resume and cover letter to Dunlap & Seeger, PA, P.O. Box 549, Rochester, Minnesota 55903, or email to: info@dunlaplaw.com.

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GROWING LAW FIRM with offices in Minnesota and North Dakota is seeking applications for an associate attorney position with a focus on personal injury at its St. Paul, MN office. Applicants must be licensed attorneys in the State of Minnesota and in good standing. This position also requires the applicant apply for a North Dakota law license upon hiring. Light travel to North Dakota may be required. Competitive benefits offered. Compensation depends on experience. Please submit a cover letter, resume, and writing sample to Sarah at Sarah@SandLawND.com.

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IN-HOUSE COUNSEL. Outstanding opportunity to assume a career position in an established legal department within the rapidly changing and expanding senior care industry. Benedictine Health System is a faith-based nonprofit organization seeking an attorney who is called to our mission of providing compassionate, quality care with special concern for the underserved and those in need. Reporting to the SVP General Counsel, this position will provide legal advice to system managers and help manage

the system's compliance program. We will consider recent graduates, judicial clerks, and individuals with relevant experience. Excellent writing and research skills are essential, and Minnesota licensure is required within six months of hire. The position is based in Cambridge, but some opportunities to work out of our Shoreview office may be available. Compensation and title will be commensurate with experience. Preferred experience includes: zero to four years in-house, clerkship, law firm, or other experience handling a variety of legal matters. Experience in health care, corporate, and/or employment law. Familiarity with health care compliance and senior care regulatory requirements We offer a competitive benefits package, including paid time off, health & dental insurance, 401(k), and more. To learn more about Benedictine Health System, please visit us at bhshealth.org. To apply for this position please visit: https://careers-bhshealth.icims.com/jobs/3202/assistant-general-counsel/job. Please upload your cover letter with your resume. EEO/AA/Vet Friendly

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LITIGATION ASSOCIATE: Mid-sized firm with national practice in the Minneapolis metro area has an opening for an experienced litigation associate. Three to seven years of experience preferred. This is a fast-paced, sophisticated practice that involves general and commercial litigation matters. Looking for a motivated, hard-working attorney with superior oral and written advocacy skills who is interested in trial experience. Salary commensurate with experience. Please email resume to employment@fmjlaw.com or by mail to 775 Prairie Center Drive, Suite 400, Eden Prairie, MN 55344. FMJ is an EEO/AA employer.

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SJOBERG & TEBELIUS, PA a six-attorney law firm in Woodbury, Minnesota, is seeking a lateral associate with at least five years' experience in an area that would enhance the firm's already well-established estate planning, business planning, probate, family law, employment, real estate, tax and personal injury practice. This ideal candidate will have a strong academic/professional background and a demonstrated ability to build client relationships. Please submit a cover letter, resume, and references to: office@stlawfirm.com. All applications kept confidential.

MINNESOTA LAW specifies that an Assistant County Attorney has the same duties as the County Attorney. This position may entail any and/or all of the statutory duties of the County Attorney's Office as assigned. The primary area of practice initially concentrated on will be misdemeanor and gross misdemeanor criminal prosecution at the city attorney level. The secondary area of practice will concentrate on general criminal prosecution and/or human services/juvenile delinquency. If you are interested in applying for this position, click on the following link: http://agency.governmentjobs.com/blueearthcountymn/default.cfm?action=viewJob&jobID=2346906

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MEAGHER & GEER, PLLP has an immediate opening in its Minneapolis office for an associate attorney. Candidates should have one to four years of experience, be admitted to the Minnesota Bar, possess excellent client service, writing, critical thinking and persuasive speaking skills. Litigation experience or judicial clerkship preferred. For immediate consideration, send resume, cover letter and writing sample to: recruitment@meagher.com.

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MEAGHER & GEER, PLLP is expanding its family law practice and has an immediate opening in its Minneapolis office for an associate attorney. Candidates should have two to five years of experience with family law litigation. Qualified candidates must be admitted to the Minnesota Bar, possess excellent academic credentials and exceptional writing, persuasive speaking and analytical skills, and have a drive for excellence. For immediate consideration, send resume, cover letter and writing sample to: recruitment@meagher.com.

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NICOLET LAW Office, SC is seeking an associate attorney to join our team handling workers' compensation and social security disability working out of our Duluth, Hibbing, & Superior office working hard for our Minnesota clients. We are a client forward law firm with a focus on excellent client service and outstanding results. Our firm offers a competitive compensation/benefits package and is dedicated to creating a healthy work/life balance. If you are interested in joining our team, please send your cover letter, resume, transcript, writing sample, and salary expectations in confidence to: Attn: Russell Nicolet, russell@nicoletlaw.com, www.nicoletlaw.com.

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SLEEPY EYE, MN law office seeks an associate attorney with zero to five plus years' experience to join our practice. Practice areas include estate planning, real estate, elder law, business, and estate and trust settlement. We also serve as the city attorney's office for Sleepy Eye. Please submit a cover letter, resume and writing sample to: alissa@alissafischerlaw.com

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SR. ATTORNEY (Job Code 5600). Location – Bremer Service Center, Lake Elmo, MN. Bremer Bank, National Association is seeking a senior-level attorney to primarily support the organization's deposits, payments, electronic services and treasury management areas. This includes a focus on the support and maintenance of existing products and services as well as activities related to product development strategy and initiatives. In addition, this role supports Privacy related legal and compliance issues, strategies and documentation. Required Qualifications: A combination of education and experience attained through a juris doctorate degree and ten or more years of the following experience, preferably in-house at a bank; Strong substantive background with federal and state financial services laws and regulations regarding deposits, payments and cash management; Strong substantive experience with federal and state privacy laws and regulations applicable to financial institutions; Ability to identify, evaluate and escalate legal risk issues; Ability to understand and integrate details of business and operational policies, guidelines, procedures and systems in applying legal and policy requirements; Ability to handle multiple tasks, prioritize work in a deadline-intensive environment; Exceptional written and verbal communications skills; ability to effectively communicate at all levels of the organization, including senior business leaders, as well as with external constituencies, including external counsel and regulatory officials; Active license to practice law in Minnesota. Those interested should apply at: https://www.bremer.com/careers. Bremer is an Equal Employment Opportunity Employer M/F/Disability/Veteran.

THE OPPEGARD Law Firm, an AV-rated law firm specializing in civil litigation, is looking for associate candidates. Individuals with five to twenty plus years of experience who have excellent academic credentials, outstanding research and writing skills, and a desire to live in the Fargo-Moorhead community would be an ideal prospect. Please send resume and cover letter to: Oppegard Law Firm, Attn: Erica Usselman, P.O. Box 657, Moorhead MN 56561 or eusselman@owqlaw.com

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SMALL SUBURBAN law firm is seeking associate attorney with one to three years' experience in the areas of probate law, guardianship & conservatorship, estate planning, or tax. The candidate should primarily be interested in transactional work, but there will be some litigation aspects involved in the position. Please submit a cover letter, resume, writing sample, and law school transcript to Teresa Molinaro at: teresa@molinarodavis.com.

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SOMSEN, MUELLER & Franta is now accepting applications for experienced attorneys in the areas of estate planning, probate & trust administration, real estate, business & commercial, agriculture, and elder law for office locations in New Ulm, MN. Send resume and three references in confidence to: samanthal@thelegalprofessionals.com or mail to: 106 ½ North Minnesota St, New Ulm MN 56073.

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TRANSPORTATION Group Attorney – Contract & Transactional Associate. Fafinski Mark & Johnson was chosen as one of the best companies to work for by Minnesota Business Magazine and has an open full-time position for a contract and transactional attorney in our Transportation & Logistics Group. FMJ seeks a junior to mid-level associate with two to four years of experience in general corporate or corporate finance experience and a strong academic background. The candidate should have strong drafting and communication skills, the ability to work in a fast-paced, challenging environment and business experience or inclination, if possible. Candidates with experience in transportation-related transactions (aviation, aerospace, railroad, marine industries) or a tax background are preferred. We offer excellent benefits, a salary commensurate with experience, performance-based bonuses and an opportunity for professional growth. This position is a great opportunity for a candidate interested in being an integral part of an internationally recognized transportation practice. Please email resume and cover letter with salary requirements to employment@fmjlaw.com or mail to FMJ-HR, 775 Prairie Center Drive, Ste. 400, Eden Prairie, MN 55344. FMJ is an EEO/AA employer.

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WE CURRENTLY HAVE an opportunity for an assistant counsel to join our corporate legal team located at our corporate headquarters in Plymouth, MN. This position is responsible for the support of routine and complex non-claim legal issues, including policy drafting as well as providing legal support to legal and underwriting commercial property and casualty product line leads. Bar admission required and a minimum of three plus years of legal experience with three or more years specializing in the analysis of commercial property or casualty insurance products. Experience in drafting property and casualty insurance coverage forms preferred. Private practice experience with coverage litigation preferred. For a complete job description and to apply: www.onebeacon.com/careers - Refer to Job #909BR

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ATTORNEY COACH/consultant Roy S. Ginsburg provides marketing, practice management and strategic/succession planning services to individual lawyers and firms. www.royginsburg.com, roy@royginsburg.com, (612) 812-4500.

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NAPLES, Florida-based probate, real estate and estate planning attorney licensed in Minnesota and Florida. Robert W. Groth, PA (239) 593-1444; rob@grothlaw.net

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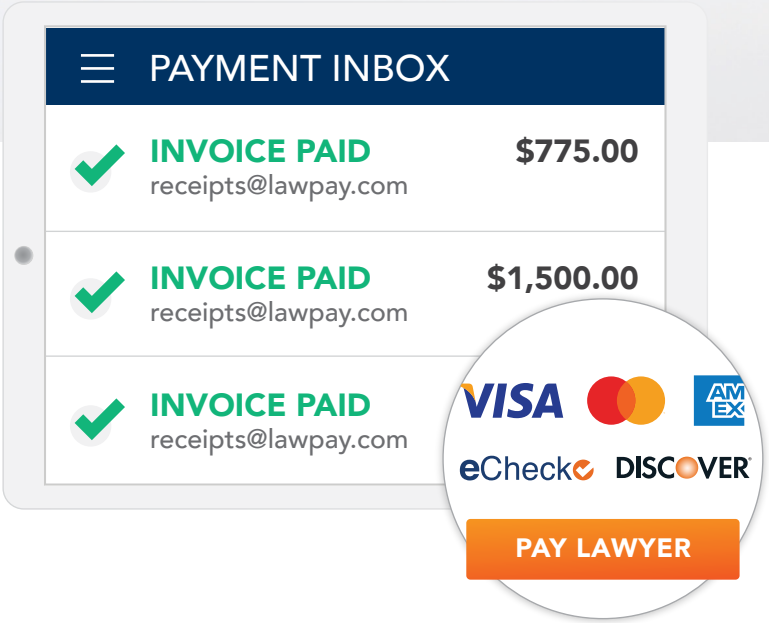

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