OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVII NUMBER X
NOVEMBER 2020
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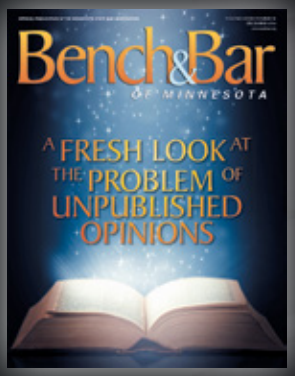

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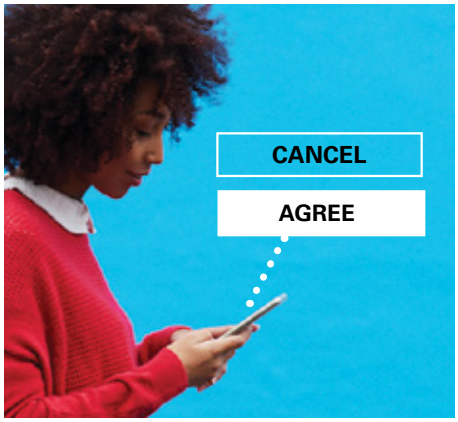

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Extend your (virtual) hand to new lawyers

One of the things I enjoy most about being involved in professional organizations like the MSBA is the opportunity they provide to interact with a wide variety of people I would not otherwise encounter in my practice, and get to know them on a personal level. It is fascinating to learn where people come from, why they became lawyers, and how their careers developed; I also enjoy hearing about their lives outside the law. Often the most interesting tidbits of information surface while huddled around the coffee counter in the 15 minutes before a meeting is scheduled to start.

Unfortunately, the opportunity to interact informally with our colleagues and friends is yet another casualty of covid-19. To be sure, while our new "virtual reality" has (thankfully) enabled most of us to continue to work and to be active in professional organizations, it can have a tremendous negative impact on our ability to make and cultivate personal connections. Things that have happened organically in the past now require more intentionality and effort. And, if I—a more "seasoned" member of the bar—feel this way, can you even imagine how a new lawyer who does not already have established connections in the bar must feel?

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

By the time this column is in print, I will have had the honor of welcoming the newest members of the bar to the legal profession. For quite some time I have been mulling over what to share with the new lawyers at their swearing-in ceremony on October 30, 2020. I will proudly congratulate them on their achievement and tell them that they are entering a profession that values trustworthiness, civility, and hard work. I will also tell them that as a member of this profession they have a duty to uphold the ideals of equal justice, access to justice, and the rule of law.

But I know I also need to acknowledge the tremendous obstacles these newest members of the bar have already encountered, and will likely continue to face, as they embark on their professional lives. From taking the bar examination while wearing a mask and social distancing to securing employment at a time when many law firms are laying off attorneys rather than hiring new ones, these new lawyers are navigating a world full of challenges that many of us never faced or even imagined.

While the MSBA is not able to eradicate many of the challenges facing new lawyers, we can certainly help lessen one of them—the challenge of cultivating professional relationships. Even in a "remote" world, the MSBA can provide opportunities to make the personal connections that are so vital to a successful and meaningful legal career. And, just so it is clear, when I say the MSBA can do this, I mean you—our members.

I ask each of you to reflect on what it was like when you were first admitted to the bar and to think about what would have helped you at that time to feel welcomed into the profession. Then be creative on how you can strive to provide those opportunities to new lawyers at a time when there is very little ability to strike up a casual conversation while grabbing a cup of coffee and waiting for a meeting to start.

This is not a significant ask. It is actually very simple. Invite a newly admitted lawyer in your firm to attend a virtual MSBA committee or section meeting with you. Watch for announcements of new lawyers joining firms or hanging out their own shingle in your community, and offer to meet them for coffee or lunch (socially distanced, of course). If you see a new name on a committee list, make a phone call to introduce yourself and get to know the new person. I can say with the utmost confidence that even the smallest effort by you as a member of MSBA to reach out to a new lawyer will be well-received. Based on my own experience, I believe you, in turn, will also personally benefit from making this connection.

Together, let's model the MSBA's commitment to civility by reaching out to welcome and get to know our new colleagues and share with them the value and importance of membership that we have all enjoyed. Our future depends on it. ▲

Minnesota American Indian Bar Association

24TH ANNUAL SCHOLARSHIP GOLF TOURNAMENT

The tournament was held on September 17, 2020 at The Meadows at Mystic Lake. All proceeds went to the MAIBA Scholarship Fund, which funds scholarships to American Indian law students attending law school in Minnesota.

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MSBA launches association health plan

The Minnesota State Bar Association announced this month that it will offer an association health plan to its members, extending affordable health care to law firms in the state of Minnesota. The MSBA Association Health Plan (*www.Health.MSBAinsure.com*) was developed to meet the unique health care needs of law firms. It will offer a portfolio of health benefits options insured by Medica. The plans are available to law firms that have at least one primary owner in good standing with the MSBA and at least one additional individual on staff. Law firms and their employees will be able to choose from a variety of PPO (Preferred Provider Organization) and Health Savings Account (HSA)-eligible Consumer Directed Health Plans (CDHPs).

Law firms may also select from Medica's broad access PPO network or from a listing of ACOs (Accountable Care Organizations) made available in certain geographic areas throughout the state. Medica will work with any licensed and appointed agent who wants to quote MSBA Association Health Plan to their eligible member clients.

The Mercer Affinity 365+SM platform will provide members and their brokers access to obtain medical coverage quotes for employees and their families. The platform facilitates enrollment and provides ongoing benefit administration to help drive cost efficiencies and employee engagement.

"Law firms of all sizes face significant challenges in providing affordable health insurance for employees. An MSBA-sponsored health plan has been discussed for a number of years and we're excited to be launching this new initiative. The plan offers health insurance options for MSBA attorney members and law firms across the state," said MSBA CEO Cheryl Dalby.

MSBA is quoting these plans for eligible member groups beginning with January 1, 2021 plan effective dates. To request a quote for these plans, interested businesses or their brokers may visit *www.Health.MSBAinsure.com*.

The MSBA Association Health Plan is an industry-based Association Health Plan (AHP) that's fully ACA-compliant, serviced by Mercer and sponsored by the Minnesota State Bar Association. Medical insurance is underwritten by Medica. Plans are not available to member employers outside of Minnesota. Please note that the health coverage offering through MSBA and Medica is currently under review and is pending regulatory approval.

HELP US HELP YOU ▶

Take the Bench & Bar reader's survey by visiting *www.mnbar.org/bench-bar* and let us know more about the kinds of content you find most relevant. Survey closes November 14.

MSBA sections updates

■ The MSBA's annual New Lawyers Leadership Conference will be happening online this year during the week of Nov. 9-13. The theme: "Shedding the Old Normal—A New Lawyers Guide to Succeeding and Leading in a New Normal." The conference will bring together fresh perspectives on the practice of law, leadership, racial justice, and the covid world we all find ourselves in. Join us for dynamic and engaging presentations, diverse and thought-provoking speakers, and practical and insightful tips for a well-rounded career. Learn more about the program and register by visiting *mnbar.org/cle-events*.

■ **Save the date:** The annual Construction Law Case Law Update CLE webinar will be held on December 11 from 12:00 - 1:00 pm. One of the section's most popular events, this program features a summary and analysis of important case law developments in Minnesota construction law over the past year. Register by visiting *mnbar.org/cle-events*.

■ As you may know, the MSBA Civil Litigation Section Governing Council created the online Judges' Courtroom Preferences guide in an effort to assist attorneys who may be appearing before a judge for the first time. With 293 district court judges in Minnesota, the Council works continually to update this list by keeping it accurate and current. You can access the guide by visiting *bit.ly/3man65y*.

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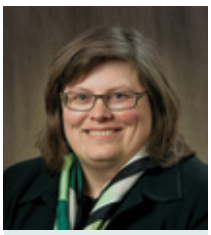
Prosecutorial ethics: Part two

Last month this column focused on prosecutorial ethics. And shortly after it went to print, the Minnesota Supreme Court issued its decision in *In re Pertler*,[1] an important ruling on this topic. Thomas Pertler served as Carlton County Attorney from January 2005 to November 2018. From the chief of police, who understood his own ethical and constitutional obligations, Mr. Pertler learned that an investigation into an officer on the Cloquet Police Department substantiated that the officer had provided incomplete information in a search warrant application, conducted an incomplete investigation, and was subsequently disciplined (suspended) for the misconduct. Contemporaneous correspondence makes it clear Mr. Pertler understood that this information (relevant to the credibility of the officer) was both constitutionally and ethically required to be disclosed in cases where the officer's testimony was material.

Inexplicably, though, Mr. Pertler chose not to disclose this information to attorneys in his office handling cases involving the officer; he appears not to have taken any action at all on the information. Without explaining why, Mr. Pertler did ask an assistant county attorney in his office to draft a *Brady/Giglio* disclosure policy around this time—but once it was drafted, he did not adopt the policy, train his staff about it, or tell anyone what he knew. Inevitably, attorneys in the Carlton County Attorney's Office later learned of the officer's misconduct, and that Mr. Pertler had known this information for some time.



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

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I would like to pause to consider how those attorneys must have felt. Imagine the dread, helplessness, and anxiety in learning that your office had essentially abdicated its constitutional and ethical responsibilities with respect to cases where disclosure would have been required. I imagine, but do not know, that Mr. Pertler must have felt this way as well.

Mr. Pertler was defeated in the November 2018 election, a short time after all of this information started coming to light. Before the election, line prosecutors started dismissing cases involving the officer, many of them felonies—a few involving domestic assault or other crimes of violence. The newly elected county attorney, upon being sworn in, undertook a review of cases involving the officer. The 19 previously dismissed cases remained dismissed, and an additional eight convictions were dismissed, with records expunged, including one case in which the defendant was incarcerated and subsequently released after his conviction was vacated.

Far-ranging impacts

Now let's reflect upon the many people affected by this conduct. Think of all the victims of the alleged crimes that had been charged. None of them received justice. Think of each of the defendants, who had been charged and in some cases convicted without the due process they were entitled to. Think of the defense counsel, including many public defenders, who were stymied in their efforts to effectively represent their clients. Think of the law enforcement personnel charged with protecting and serving the people of Carlton County whose work went for naught, tainted by the misconduct of one of their colleagues.

Ordinarily, the Office of Lawyers Professional Responsibility does not accept anonymous complaints. The allegation that prompted the investigation into Mr. Pertler's conduct was an exception. It can be difficult, despite reporting obligations under Rule 8.3, Minnesota Rules of Professional Conduct, for lawyers or staff to file a complaint against their supervisor. Even with potential protection under state law for whistleblowers, this is a serious undertaking.

Ultimately, Mr. Pertler agreed to stipulate to disbarment, and the Court approved that disposition on September 16, 2020. This is the first Minnesota case I'm aware of where a lawyer was disbarred for conduct that occurred while acting as a prosecutor. In fact, very few prosecutors have been disbarred nationwide. Perhaps the most well-known case is the one involving Michael Nifong, the North Carolina district attorney who prosecuted the matter that became known as the "Duke LaCrosse Case." Mr. Nifong was disbarred in 2007 because he withheld discovery, including potentially exculpatory DNA evidence; directed a witness to withhold evidence; lied to the court and opposing counsel regarding the DNA evidence; and lied to disciplinary authorities investigating his misconduct.

In researching the appropriate disposition for Mr. Pertler's case, this Office repeatedly encountered research from academia questioning the lack of disciplinary enforcement for prosecutorial misconduct.[2] Indeed, the National Registry of Exoneration published a detailed study this fall entitled "Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement." The study— 218 pages long and focused on cases where individuals were cleared based upon evidence of innocence—found that concealment of exculpatory evidence had occurred in 44 percent of exonerations; that prosecutors committed misconduct in 30 percent of exonerations; and that discipline (whether by an employer or regulatory bodies) was generally rare for prosecutors and, when imposed, was often "comparatively mild." The study also opined that one of the root causes of misconduct was ineffective leadership by those in command.

Although the September 2020 study came out after Mr. Pertler stipulated to disbarment, we (myself in particular) were heavily influenced by the lack of serious discipline for prosecutors who have engaged in serious misconduct, when considering the appropriate disposition for Mr. Pertler's case. Professional

discipline is not punishment for the attorney, but rather is imposed to protect the public, protect the profession, and deter future misconduct by the lawyer and others. How can the purposes of discipline be served if serious misconduct is not met with serious discipline? Given the expansive scope of harm in this case, the fundamental dereliction of duty, and the precarious position in which his conduct placed other lawyers, we believed disbarment was the appropriate sanction, and the Court agreed.

What it means

The lesson here is not that any misstep by a prosecutor will get you disbarred. Disbarment remains rare. The lesson is that all prosecutor's offices, state or federal, must put in place, train personnel about, and follow policies that are focused on ensuring that ethical and constitutional obligations are met in every case. As with so many things, the tone is set from the top. If your office rewards or permits bad behavior—or behavior "close to the line"—you may be placing your license at risk, as well as the licenses of those you supervise. If you do not have good policies and are not crystal clear about the consequences of failing to follow those policies, there is a risk that you will not effectively set the standard of conduct expected by the ethics rules.

I hope also that one of the lessons is that if you mess up, you must acknowledge that mistake and work to correct it—no matter how difficult or embarrassing it may be. Mr. Pertler, for inexplicable reasons, did not assist his office in solving the problem created by the lack of prior, timely disclosure, but instead put a deputy in charge and left his post after he lost the election, not even serving out his term until his successor was sworn in—a fact that also weighed in the recommendation for disbarment. Mr. Pertler did not raise any mitigating factors during our investigation, and we often do not know what crosses another bears.

I hope others learn the many lessons embedded in this case. I also hope it is a call to action for all leaders in prosecutor's offices to refocus on ensuring you are leading in an ethical manner, and that you have in place the policies and procedures necessary to assist your staff in meeting their obligations. In 2014, the American Bar Association issued Formal Opinion 467, "Managerial and Supervisor Obligations of Prosecutors under Rule 5.1 and Rule 5.3." It offers good guidance on steps to take to set the tone from the top. The opinion discusses the importance of a culture of compliance, an effective up-the-ladder reporting structure, and the need for discipline and clear remedial measures when policies are violated.

I know this is far easier said than done. Thank you to all of the prosecutors that understand your duty and lead by example as "ministers of justice." I know that cases like Mr. Pertler's are the exception, not the rule, but given the importance of the position, everyone must stay vigilant. As always, our ethics line is open to assist you in meeting your ethical obligations. ▲

Notes

[1] *In re Pertler*, ___ N.W.2d ____, A20-0934, 2020 WL 5552562 (mem) (9/16/2020).

[2] *See, e.g.,* Kevin C. McMunigal, *The (Lack of) Enforcement of Prosecutor Disclosure Rules*, 38 Hostra Law Review 847 (2010).

How to avoid an old scam with a new twist

Picture this: You get contacted by a non-local potential client who wants to hire your firm to represent them in a case involving a local business with which you are familiar. This prospective client provides you with documentation and paperwork attesting to the interactions he has had with the business and what type of work will need to be done moving forward. An engagement letter is signed and a retainer is requested. A few weeks go by with no retainer, until all of a sudden, the local business sends a cashier's check. You contact the client to let him know it has been received and he tells you to deposit the check—and to wire a portion of the sum to an out-of-town entity.

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

Your firm follows the instructions only to learn that the cashier's check bounced. Worse still, upon contacting the local business that supposedly sent the check, you learn that it has no awareness of the case. Or your client.

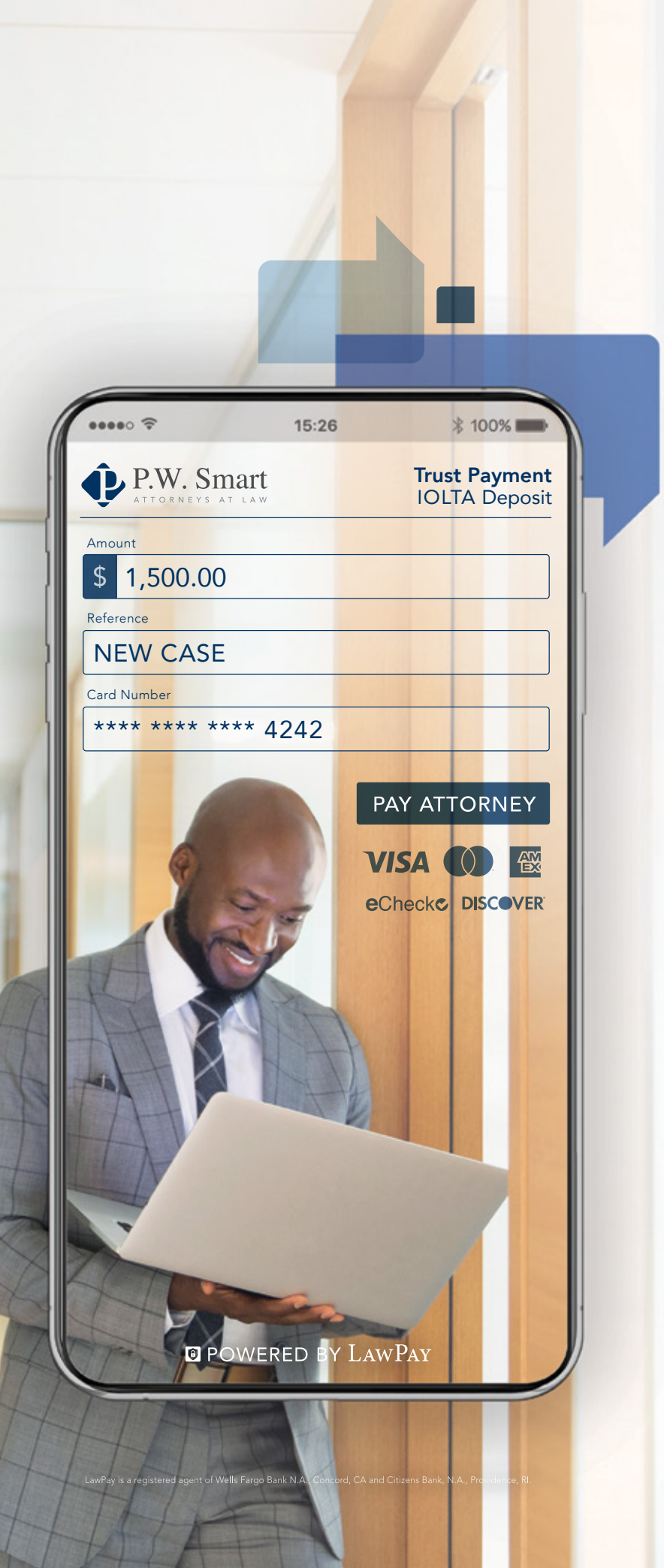
A variation of the tried and true wire transfer scam, this setup is made even more effective by invoking the name of a seemingly legitimate and local third party. I was recently contacted by a firm that unfortunately lost hundreds of thousands of dollars as a result of this scam, and their bank is saying they're on the hook for the sum. This past May, a Boston law firm that had fallen victim to the same con in 2015 had their lawsuit against their bank dismissed by the Massachusetts Appeals Court. The court said, "It was the firm that was in the best position to guard against the risk of a counterfeit check, by knowing its 'client,' its client's purported debtor and the recipient of the wire transfer."[1] That's the stark reality of the matter: In the event of a scam, firms are ultimately responsible for spotting when things are amiss. Relying on your bank to identify a counterfeit check is not an effective strategy.

Like phishing scams and the many other social engineering attacks that a firm may encounter, combatting this type of scam requires vigilance. Consider the last part of the scenario. It's only after the check bounces that the firm finally contacts the third party and finds out they have no knowledge of the situation or the client. Even without a retainer, this should be the first step. If something seems off, out of the ordinary, or simply too convenient, verify the story with the third party. Maybe you will do a bit of extra work without getting paid, but in the long run, you'll save yourself a lot of time and money. Always check and double-check that the parties that are either sending or receiving funds are legitimate.

It is always wise to slow down and act cautiously when dealing with potential social engineering attacks and scams. Confirming identities, waiting for checks to truly clear, and being wary of anything that raises a red flag are all strategies that may help to prevent your becoming a victim. If you believe that a wire transfer fraud has occurred, it is absolutely critical to act fast for any hope of recovery. As these scams don't show any signs of going away, it is important to provide training and education in identifying and reporting fraud. ▲

Notes

[1] *https://www.lawsitesblog.com/2020/05/law-firm-snared-in-312k-email-scam-loses-lawsuit-to-recover-from-bank.html*



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'A direct and positive effect on people's lives'

KOJO ADDO is a personal injury trial lawyer at Schwebel, Goetz & Sieben PA. He started at the firm as a law clerk in 2015 and became an attorney there in October 2017. Kojo has always had a heart for people and takes pride in helping injured people and their families navigate complicated legal and insurance processes. Kojo also serves on the Mitchell Hamline Alumni Board and MSBA New Lawyers Section Committee.

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Why did you go to law school?

From a young age I knew I wanted to pursue a vocation in which I had a direct and positive effect on people's lives. Being a lawyer, though, was not the original plan. My plan was to be a doctor. However, that pursuit changed after realizing that chemistry was not my strong suit. As I progressed through undergrad as a communication studies major and management minor (categorically the opposite of chemistry), I recognized that my skills were geared toward advocacy and consensus building. So getting into law school to become a lawyer was my opportunity to bridge my purpose with a set of skills that seemed to come natural to me.

What's the best professional advice you ever received?

The best professional advice I have received came from a good friend a few years ago and it had to do with life in general; it was that "you are human after all." This short reminder has allowed me take chances, make mistakes, and grow as a person and a lawyer with the understanding that being a lawyer is just a part of my life and not life itself.

Why did you choose to pursue a personal injury practice?

I chose to practice personal injury law because the work is fulfilling and it is an area of law where I know I can be effective. After my first year of law school, I had the opportunity to clerk at Schwebel Goetz & Sieben, the firm I practice at now. As a summer clerk, I provided support on variety of personal injuries case—from large catastrophic injury and wrongful death cases to soft-tissue cases. I recognized that no matter the severity of the case, our clients contact our firm because they need our help and know that we can be an advocate for them; and no matter the severity of the case, the attorneys and staff at the firm put forth their best effort to ensure reasonable and fair compensation for the loss the clients have suffered. At the end of that summer, I knew very clearly what area of law I wanted to practice, the clients I wanted to help, and the people I wanted to work with.

You're the networking and engagement committee co-chair for the New Lawyers Section. Kind of a tough year to take that on, isn't it? Why did you choose that committee?

I agreed to serve as chair of the networking and engagement committee of the New Lawyers Section of the MSBA because I recognize the importance of creating a space where we as lawyers can come together, unwind, and talk candidly about the practice and the effects it has on our lives—while having some fun too. Being the chair of this committee has proven to be a bit of a challenge during a pandemic. However, the committee will not allow a pandemic to prevent the Section from meeting, even if it means connecting via Zoom, having a few cocktails, and carving pumpkins virtually (we are actually doing this, by the way)! This year has taught us the importance of interpersonal connection. It has forced the committee members and myself to think outside the box of conventional networking events and to create meaningful interactions with our members in new ways.

If you hadn't become a lawyer, what do you think you would have done for a living?

If I hadn't become a lawyer, I would probably do something in the restaurant industry. I think it would be awesome to set menus for restaurants or critique food for a living. The other option would be to move to one of the Carolinas and learn to become a barbecue pit master. Food is life; never forget that. I don't plan on leaving private practice anytime soon, so for now it's pizza Fridays, pre-cooked ribs, and hotdogs for me!

What do you like to do in your off-work time?

When I'm not working, you can find me catching up on a Netflix or Amazon series, trying a new recipe, playing a round of golf, or wondering why I'm still a Minnesota Vikings fan.

‘PUBLISHED’ AND ‘UNPUBLISHED’ REVISITED

By Jeff Markowitz and Stephen Warner

A primer on changes wrought in the wake of Justice David Lillehaug's 2016 article on unpublished appellate decisions

Justice David Lillehaug garnered much attention when, in a December 2016 cover story in these pages, he called for five changes to the law governing publication of Minnesota Court of Appeals opinions.[1] Effective August 1, 2020, the repeal of Minn. Stat. §480A.08, subd. 3(c)[2] and amendments to the Minnesota Rules of Civil Appellate Procedure[3] have largely implemented three of Justice Lillehaug's suggestions and furthered the spirit of the other two.

Litigants have good cause to believe that citing unpublished court of appeals opinions in briefing is worthwhile. Such opinions are not binding, but they can—and do—persuade. The court of appeals has made that clear by expressly following unpublished opinions in at least three unpublished opinions and eight published opinions. And the Minnesota Supreme Court has cited such unpublished opinions at least twice.

But a few misconceptions must be dispelled to understand the lay of the land with respect to what were known, until the recent amendments, as unpublished decisions. As we will discuss in more detail, whether Minnesota Supreme Court decisions are published or unpublished is irrelevant to whether they are binding; they are always binding precedent (as long as they are majority opinions, or unanimous[4]). Similarly, but for different reasons, whether district court decisions are "published" is irrelevant to whether they are binding or persuasive—they are never binding, and whether they are persuasive has nothing to do with Westlaw publication.

Under the amendments, litigants on appeal are now invited to weigh in on whether the court of appeals should issue a precedential opinion to clarify Minnesota law. They will be aided in such arguments by new and (in our view) more liberal criteria governing whether to "publish."

The amendments to Minnesota's appellate rules also included three nomenclature changes (the latter two of which had been called for by Justice Lillehaug), which we adjust for in this article: "decisions" are now "opinions," "unpublished" opinions are now "nonprecedential" opinions, and "published" opinions are now "precedential" opinions.[5] These new terms are not only required by the rules but more accurately describe permitted uses. The changes will likely require a bit of an adjustment period for both bench and bar, but, as one author has said, "The only languages that don't change are dead ones."[6]

Don't be shy about citing nonprecedential Minnesota Court of Appeals opinions as persuasive authority

Many of us are familiar with the statutory rule that stated: "[u]npublished opinions of the court of appeals are not precedential."[7] It was repealed, effective August 1.[8] But an equivalent rule is now found in Minn. R. Civ. App. P. 136.01, subd. 1(c) (2020): "Nonprecedential [court of appeals] opinions and order opinions are not binding authority except as law of the case, *res judicata*, or collateral estoppel…."[9] The Minnesota Supreme Court has long embraced the rule (since 2004, *Vlahos*), as has the court of appeals (first in 1993, *Dynamic Air*).[10] Pursuant to the rule, the court of appeals has repeatedly (though not uniformly) declined expressly to follow a nonprecedential opinion based on no stated reason other than that it was not precedential.[11] The district court errs if it cites such opinions "as binding precedent."[12] For example, in *Dynamic Air*, the court of appeals faulted the district court for "relying upon an unpublished opinion for the proposition that a restrictive covenant lacking a territorial limitation is *per se* unenforceable."[13]

But that is not a blanket prohibition on citing nonprecedential court of appeals opinions. To the contrary, "attorneys are not prohibited from mentioning unpublished decisions in pretrial conferences, hearings, trials, memoranda, or briefs."[14] And, as the court of appeals concluded earlier this year in *Adams v. Harpstead* (a precedential opinion), "the district court committed no error in considering an unpublished opinion only for its persuasive value."[15] In support, it quoted case law, under which nonprecedential opinions "may be 'persuasive.'"[16]

While formerly found only in case law, Minn. R. Civ. App. P. 136.01, subd. 1(c), as amended (2020), now codifies the principle that "nonprecedential opinions may be cited as persuasive authority."[17]

Moreover, the court of appeals has—on a number of occasions—expressly followed reasoning or guidance from its nonprecedential opinions. It has done so in at least three nonprecedential opinions (issued in 2004, 2009, and 2018).[18] And it has done so in at least eight precedential opinions: five issued between 2017 and 2019 (after Justice Lillehaug's 2016 article),[19] and the other three issued in 2002, 2009, and 2010, respectively.[20] In *State v. Roy* (2009, precedential), the "exact issue" had been resolved fewer than two years prior in a nonprecedential opinion, and the court "adopt[ed]" that opinion's reasoning.[21] In *Kruse* (2018, precedential) the court followed two of its nonprecedential opinions.[22] This suggests that, even if the court did not see an issue as warranting a precedential opinion in a prior appeal, seeing the issue recur might change its mind.

The Minnesota Supreme Court at least occasionally cites to such nonprecedential opinions. In 2018, in support of the statement that "[w]e have never held that a school generally stands *in loco parentis* with its students, and we will not do so today," the Court's sole supporting citation was a *cf.* citation to *Hollingsworth v. State*, No. A14-1874, 2015 WL 4877725, at *4 (Minn. App. 8/17/2015): "Hollingsworth concedes that schools generally do not owe a duty of care *in loco parentis* to protect students."[23] In 2019, the Court cited *State by Swanson v. Amer. Family Prepaid Legal Corp.*, No. A11-1848, 2012 WL 2505843, at *4 (Minn. App. 7/2/2012) (and one of its own opinions) in support of the proposition that the Minnesota Attorney General's *parens patriae* power to act on behalf of all Minnesotans harmed by a pattern and practice of fraudulent conduct "includes the power to seek equitable restitution."[24]

Furthermore, at least as of December 2016, when Justice Lillehaug "cast[] his vote for or against a petition for review, he no longer g[a]ve[] any weight to whether the Court of Appeals opinion is published or unpublished."[25] In 2013-2014, the Minnesota Supreme Court granted 165 petitions for review (PFRs), of which 88 (51 percent) involved nonprecedential opinions.[26]

There are professional and ethical duties at play too.[27] In *Jerry's Enterprises*—a precedential legal-malpractice opinion—the court of appeals concluded that the district court erred by excluding expert attorney testimony regarding how nonprecedential court of appeals opinions "affected their understanding of the merger doctrine."[28] "The district court should not have excluded testimony of how unpublished opinions of this court might inform an attorney of trends in the law."[29]

Moreover, in an October 1993 column in this publication, the then-director of the Office of Lawyers Professional Responsibility (OLPR) wrote plainly:

> An attorney is preparing a response to a summary judgment motion brought against his client. Opposing counsel has failed to cite an unpublished opinion by the Minnesota Court of Appeals, adverse to the client, which is the only opinion on point in the jurisdiction. Does the attorney have to cite the unpublished opinion in light of Minn. Stat. §480.08, subd. 3, which provides that unpublished Court of Appeals opinions are not precedential?
>
> Yes, the attorney must disclose the adverse unpublished opinion.[30]

That article is consistent with Minnesota Rule of Professional Conduct 3.3(a)(2), which refers to "legal authority," not *binding/precedential* legal authority: "A lawyer shall not knowingly… fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

Of course, both the Minnesota Supreme Court and court of appeals have embraced the notion that "[t]he danger of miscitation is great because unpublished decisions rarely contain a full recitation of the facts."[31] But this danger likely can be alleviated through thoughtful case-by-case legal reasoning. If the nonprecedential opinion is rich with facts and sound reasoning, then arguably the danger of miscitation is entirely absent. If the nonprecedential opinion consists of bare bones—bereft of material facts and rationale—that will probably detract from its persuasive value. Then again, perhaps the opinion is light on facts, but the material facts are all there, or the rationale is instructive. Or perhaps the court got to the outcome you urge now, in the only opinion to have addressed the issue. Citing to it for such ends is not "miscitation." It is being as persuasive as you can be with what you have.

In short, if you find a nonprecedential court of appeals opinion that supports your argument, don't be shy about citing it. It may not be binding. But it can persuade. (Indeed, as the eight examples cited above demonstrate, yesterday's nonprecedential decisions could become tomorrow's precedential opinions.) And even if you don't like what you see in it, you may have an ethical duty to disclose it to the court.

Majority and unanimous Minnesota Supreme Court opinions are binding, even if not "published"

One misconception about unpublished decisions has been that unpublished Minnesota Court of Appeals opinions and unpublished opinions of the Minnesota Supreme Court are treated the same. Minnesota Supreme Court opinions (or, at least, orders), at least on occasion, are unpublished. This practice appears to be reserved at least generally for non-merits rulings, such as whether to strike a notice of related appeal[32] or grant a PFR.[33]

Admittedly, those non-merits decisions may often not include anything that might change, affirm, or clarify the law (but rather simply grant or deny a PFR with no rationale), which obviates the need to inquire whether they are binding on anyone other than the parties. But when the Minnesota Supreme Court in fact decides what the law is in an order, that decision is just as much binding precedent as the Court's merits opinions. That conclusion flows from the basic rule that the Minnesota Court of Appeals and district courts are bound by Minnesota Supreme Court opinions.[34] And it is "consistent with Article VI, section 2 of the Minnesota Constitution, which provides: 'The court of appeals shall have appellate jurisdiction over all courts, *except the supreme court*….'"[35]

This issue was squarely addressed by the court of appeals in *Allinder* (precedential).[36] In *State v. Manns*—an unpublished order—the Minnesota Supreme Court had "clarif[ied] that our holding in *State v. Lee,* that stays of adjudication are to be treated as pretrial orders for purposes of appeal, applies only to stays of adjudication in misdemeanor cases."[37] In *Allinder*, the court of appeals rejected an argument that the unpublished status of the *Manns* order made it nonbinding:

> [T]his court is bound to follow supreme court precedent. There appears to be no authority limiting this duty to the supreme court's published opinions…. Because *Manns* expressly states that *Manns* is clarifying its holding in *Lee,* a published opinion, this court must assume it was intended to have precedential effect.[38]

No party filed a PFR in *Allinder*, and the Minnesota Supreme Court has not weighed in on that issue. But, in our view, *Allinder* is sound, and the Supreme Court would likely follow it.

District court decisions are not binding, even if "published"

The other publication/nonpublication misconception deals with district court decisions. "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."[39] The same is true of Minnesota state district court decisions,[40] which have no "binding precedential effect."[41] They "lack precedential value."[42] They "govern *only* the rights of the parties to the litigation."[43]

No statute or rule makes publication of such decisions relevant to the analysis. Westlaw never "publishes" Minnesota state district court decisions, apart from placing them in its electronic database (we confirmed as much with Westlaw while preparing this article). Westlaw does publish some federal district court decisions, if they are "of general importance to the bench and bar."[44] Westlaw's publication criteria include whether the case involves issues of first impression, clarifies the law, reviews the law, includes unique facts or holdings, or includes "newsworthy" content.[45] District court judges may weigh in on whether Westlaw should "publish" their decisions.[46]

Notwithstanding the above, a court will at least occasionally note that a Minnesota state district court decision was "unpublished," as if to suggest that matters in assessing whether it was binding or persuasive.[47] This appears to occur more frequently when federal district court decisions are analyzed.[48]

Fortunately, when courts do squarely address whether publication of district court decisions matters, they rightly conclude, at least generally: "district court decisions, published or not, can be persuasive authority"[49] and "the distinction between 'published' and 'unpublished' federal district court decisions is meaningless. This is for the simple reason that such decisions bind no one except the parties in the underlying case."[50] Whether Westlaw thinks that a nonprecedential district court decision is important does not make it more or less persuasive.

The 2020 amendments will facilitate an informed increase in precedential opinions

Nothing in the 2020 amendments requires the Minnesota Court of Appeals to issue more precedential opinions. However, that may very well be one of their primary effects, consistent with the five changes Justice Lillehaug called for back in his December 2016 article. Therein, he called for:

1. the "repeal [of] section 480A.08, subd. 3, as an infringement on the judicial branch's authority. The Legislature should not be, and should not want to be, in the business of telling the courts when and how to issue and apply their own opinions";
2. the striking of "the rule that special notice need be given when a non-precedential decision is cited";
3. the changing of "the designations 'published' and 'unpublished' . . . to 'precedential' and 'non-precedential'" "because all Court of Appeals decisions are available online to all attorneys";
4. the Advisory Committee on the Minnesota Rules of Civil Appellate Procedure to "consider a rules change whereby unpublished Court of Appeals opinions deemed especially significant by the bar could be upgraded to precedential status"; and
5. the court of appeals to "try to issue more precedential opinions."[51]

Because of the 2020 amendments, item one has occurred in significant part, items two and three have occurred, and the spirit of items four and five have been substantially furthered.

As to the first and second, the Legislature repealed subdivision 3(c) of Minn. Stat. §480A.08. That eliminated the legislative "publish only" limitation on the court of appeals issuing precedential opinions in only one of five circumstances,[52] and the requirement (which we all loved to hate) that litigants relying on "[u]npublished opinions" provide copies to adverse parties.[53]

As to replacement criteria, the Minnesota Supreme Court enacted new subparagraph (b) to rule 136.01, subdivision 1, of the Minnesota Rules of Civil Appellate Procedure:

> (b) In determining the written form [of the opinion], the panel may consider all relevant factors, including whether the opinion:
> (1) establishes a new principle or rule of law or clarifies existing case law;
> (2) decides a novel issue involving a constitutional provision, statute, administrative rule, or rule of court;
> (3) resolves a significant or recurring legal issue;
> (4) applies settled principles or controlling precedent;
> (5) involves an atypical factual record or procedural history;
> (6) includes an issue pending before the United States Supreme Court or the Minnesota Supreme Court; or
> (7) warrants a particular form based on the parties' arguments, including, but not limited to, the parties' statements allowed by Rule 128.02, subd. 1(f).[54]

These factors include liberalized criteria for issuance of precedential opinions. Specifically, they expressly contemplate potential issuance of precedential opinions to "clarif[y] existing caselaw" (factor 1) or "resolve[] a… recurring legal issue" (factor 3), which conceivably could be done even if governing case law is already clear, or a governing statute is unambiguous.

As to Justice Lilllehaug's third request, the 2020 rule amendments made the nomenclature changes he proposed, primarily by amending rule 136.01 of the Minnesota Rules of Civil Appellate Procedure to replace "unpublished" with "nonprecedential" and "published" with "precedential."[55] These changes are also reflected in amended rule 128.02, subdivision 1(f) (discussed next). The term "opinion" also replaces "decision" throughout rule 136.[56]

As to Justice Lillehaug's fourth request, no rule change was made to provide a mechanism for "upgrad[ing]" nonprecedential opinions to precedential status. But the 2020 amendments do provide for a pretty decent second best, in new subparagraph (f) to rule 128.02, subdivision 1:

> In briefs filed with the court of appeals, a party may include an optional statement as to whether the court's opinion should be precedential, nonprecedential, or an order opinion, and the party's reasons, with reference to Rule 136.01, subd. 1(b).[57]

As to that rule's intent, Minnesota Court of Appeals Chief Judge Susan Segal wrote on behalf of a committee of the court of appeals that, while the committee was neutral on whether to adopt it:

> We included this option based on our understanding that the bar desired the opportunity for counsel to be able to express their opinion on this question to the court. As some committee members have commented, we recognize that parties may currently offer their thoughts on whether an opinion is precedential or nonprecedential by doing so in their brief or during oral argument. And we welcome hearing the parties' thoughts on this topic.[58]

The new rule's invitation—when combined with the court of appeals's demonstrated willingness to follow persuasive nonprecedential opinions in its precedential opinions[59]—provides a next-best-thing means of somewhat upgrading nonprecedential holdings into precedential ones.

Finally, in proposing that the court of appeals "try to" issue more precedential opinions, Justice Lillehaug floated a goal of doubling the percentage issued in 2015 (8 percent).[60] Subsequently, the percentage shifted to around 7 percent in 2016 (94 of almost 1,350 opinions issued);[61] 11 percent in 2017 (152 of 1,365);[62] and 9 percent in 2018 (120 of 1,328).[63]

The 2020 amendments—by inviting attorneys to weigh in on appeal, with the blessing of Minn. R. Civ. App. P. 128.02, subd. 1(f), and the benefit of more liberal precedential-opinion criteria in Minn. R. Civ. App. P. 136.01, subd. 1(b)—may well provide a vehicle for collaboration on appeal between the appellate bench and bar on these matters, leading to thoughtful increases in Minnesota precedent.

We look forward to seeing the benefits of this collaboration unfold. ▲

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Notes

[1] Lillehaug, David L., Ebnet, Nathan J., "A Fresh Look at the Problem of Unpublished Opinions; Why It's Time to Reconsider Minnesota's Approach" at 19, *Bench & Bar of Minnesota* (Dec. 2016).

[2] 2020 Minn. Laws, ch. 82, S.F. No. 3072, §3, *located at https://www.revisor.mn.gov/laws/2020/0/82/laws.0.3.0#laws.0.3.0*

[3] *https://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/RecentRulesOrders/Administrative-Order-Promulgating-Amendments-to-the-Rules-of-Civil-Appellate-Procedure-Effective-August-1-2020.pdf*

[4] When one justice is disqualified, and the remaining six are equally divided so that there is no unanimous or majority opinion, "no precedent is made." *See Sig Ellingson & Co. v. Polk Cnty. State Bank of Crookston*, 242 N.W. 626, 627 (Minn. 1932) (Dibell, J.). Once, in *Nelson*, the Court issued a *per curiam* opinion without any indication of division, and stated that it was "without significant precedential value." *Nelson v. Nelson*, 189 N.W.2d 413, 416 (Minn. 1971). But that appears to have been intended to mean not that the opinion was not binding, but rather that it lacked persuasive value, given that "the points raised [were] without force." *Id.* The supreme court and court of appeals have followed *Nelson*. *See, e.g.*, *Davis v. Davis*, 235 N.W.2d 836, 838 (Minn. 1975); *Melius v. Melius*, 765 N.W.2d 411, 417 (Minn. App. 2009).

[5] *https://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/RecentRulesOrders/Administrative-Order-Promulgating-Amendments-to-the-Rules-of-Civil-Appellate-Procedure-Effective-August-1-2020.pdf*

[6] Crystal, David, *A Little Book of Language*, chapter 21, paragraph 1 (Yale University Press 2010).

[7] Minn. Stat. §480A.08, subd. 3(c) (2018).

[8] 2020 Minn. Laws, ch. 82, S.F. No. 3072, §3, *located at https://www.revisor.mn.gov/laws/2020/0/82/laws.0.3.0#laws.0.3.0*

[9] Supra note 3.

[10] *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 797, 800-01 (Minn. App. 1993).

[11] *See, e.g.*, *Hoff v. Surman*, 883 N.W.2d 631, 636 (Minn. App. 2016); *Columbia Cas. Co. v. 3M Co.*, 814 N.W.2d 33, 38 (Minn. App. 2012).

[12] *Vlahos*, 676 N.W.2d at 676 n.3.

[13] 502 N.W.2d at 800.

[14] *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 691 N.W.2d 484, 494 (Minn. App. 2005), *aff'd as modified,* 711 N.W.2d 811 (Minn. 2006).

[15] 947 N.W.2d 838, 847 (Minn. App. 2020).

[16] *Id.* at *846 (quoting *Donnelly Bros. Constr. Co. v. State Auto Prop. & Cas. Ins. Co.*, 759 N.W.2d 651, 659 (Minn. App. 2009), *review denied* (Minn. 4/21/2009)); *see Dynamic Air*, 502 N.W.2d at 800 ("At best, these opinions can be of persuasive value.").

[17] Supra note 3.

[18] *Williams v. Pine Cnty. Sheriff's Dep't*, No. A17-0964, 2018 WL 1701888, at *2 n.1 (Minn. Ct. App. 4/9/2018); *Afremov v. Amplatz*, No. A03-448, 2004 WL 77851, at *4 (Minn. Ct. App. 1/13/2004) ("While *Bonanza Grain* is not precedential, we adopt its reasoning…."); *see also Ehrman v. Adam*, No. A08-2120, 2009 WL 2746749, at *4 (Minn. Ct. App. 9/1/2009).

[19] *See In re Welfare of Children of A.M.F.*, 934 N.W.2d 119, 123 (Minn. App. 2019); *State v. Defatte*, 921 N.W.2d 556, 562 (Minn. App. 2018), *aff'd,* 928 N.W.2d 338 (Minn. 2019); *Kruse v. Comm'r of Pub. Safety*, 906 N.W.2d 554, 559 (Minn. App. 2018); *Compart v. Wolfstellar*, 906 N.W.2d 598, 610 n.7 (Minn. App. 2018), *review denied* (Minn. 4/17/2018); *Linert v. MacDonald*, 901 N.W.2d 664, 669 (Minn. App. 2017).

[20] *See State v. Zais*, 790 N.W.2d 853, 861 (Minn. App. 2010), *aff'd,* 805 N.W.2d 32 (Minn. 2011); *State v. Roy*, 761 N.W.2d 883, 888 (Minn. App. 2009); *Reinsurance Ass'n of Minn. v. Timmer*, 641 N.W.2d 302, 314 (Minn. App. 2002) ("While not precedential, we are persuaded by the *Frost Paint* analysis."), *review denied* (Minn. 5/14/2002).

[21] *Roy*, 761 N.W.2d at 888.

[22] *Kruse*, 906 N.W.2d at 559.

[23] *Fenrich v. The Blake Sch.*, 920 N.W.2d 195, 202-03 (Minn. 2018).

[24] *State v. Minn. Sch. of Bus., Inc.*, 935 N.W.2d 124, 133-34 (Minn. 2019).

[25] *Supra* note 1, "A Fresh Look at the Problem of Unpublished Opinions" at 18.

[26] *Id.*

[27] Petition in Supreme Court for Review of Decisions of the Court of Appeals, 3 Minn. Prac., Appellate Rules Annotated R 117.

[28] 691 N.W.2d at 495.

[29] *Id.*

[30] Johnson, Marcia A., "Advisory Opinion Service Update," *Bench & Bar of Minnesota* (Oct. 1993).

[31] *Vlahos*, 676 N.W.2d at 676 (citing *Dynamic Air,* 502 N.W.2d at 801).

[32] *See Menard, Inc. v. Cnty. of Clay*, No. A16-0415, 2016 WL 7208722, at *3 (Minn. 5/16/2016).

[33] *See Gunufson v. Swanson*, No. C4-95-1446, 1996 WL 686121, at *1 (Minn. 11/20/1996).

[34] *State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018).

[35] *Id.* (quoting Minn. Const. art. VI, §2 (emphasis added by court)).

[36] *State v. Allinder*, 746 N.W.2d 923 (Minn. App. 2008).

[37] *State v. Manns*, No. A06-478, 2006 WL 8462127, at *1 (Minn. 5/24/2006).

[38] *Allinder*, 746 N.W.2d at 925 (citation omitted).

[39] *See Nygard v. Rogers*, No. A14-2175, 2015 WL 7201171, at *3 (Minn. Ct. App. 11/16/2015) (quoting *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (quoting 18 J. Moore et al., Moore's Federal Practice §134.02[1] [d], p. 134–26 (3d ed. 2011))) ; *see* Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. Chi. L. Rev. 1551, 1597 (2020); *e.g.*, *Howard v. Wal-Mart Stores, Inc.*, 160 F.3d 358, 359 (7th Cir. 1998)..

[40] *But see State v. Behena-Vargas*, No. A03-1954, 2004 WL 1327804, at *4 n.2 (Minn. Ct. App. 6/15/2004) (noting but not reaching argument that "the district court erred by applying the doctrine of stare decisis to rely on a district court opinion").

[41] *O'Rourke v. O'Rourke*, 220 N.W.2d 811, 823 (Minn. 1974).

[42] *Green v. BMW of N. Am., LLC, 826 N.W.2d 530, 537 n.5 (Minn. 2013); see Kmart Corp. v. Cnty. of Stearns, 710 N.W.2d 761, 769-70 (Minn. 2006) ("Decisions of district courts likewise are not regarded as precedent for retroactivity purposes.").*

[43] *In re Guardianship of Tschumy*, 853 N.W.2d 728, 758 (Minn. 2014) (Stras, J., dissenting).

[44] *https://legal.thomsonreuters.com/en/solutions/government/court-opinion-submission-guidelines*.

[45] *Id.*

[46] *Id.*

[47] *See, e.g., Stover v. Home Valu, Inc.*, No. 02-CV-07-1394, 2008 WL 8905530 (Minn.Dist. Ct. 12/3/2008 ("The Dakota County district court order, which is an unpublished, unreviewed order, is not binding upon this Court.").

[48] *See, e.g., Murphy by Murphy v. Harpstead*, No. CV 16-2623 (DWF/BRT), 2019 WL 6650510, at *4 (D. Minn. 12/6/2019), *aff'd as modified,* No. CV 16-2623 (DWF/BRT), 2020 WL 256194 (D. Minn. 1/17/2020); *Okon v. Knutson*, No. 18-CV-0191 (DWF/TNL), 2019 WL 2030568, at *8 (D. Minn. 1/22/2019), *report and recommendation adopted,* No. CV 18-191 (DWF/TNL), 2019 WL 1277521 (D. Minn. 3/20/2019).

[49] *United States v. Copeland*, No. 1:19-CR-9-MHC-RGV, 2020 WL 1131026, at *3 (N.D. Ga. 3/9/2020).

[50] *Cont'l W. Ins. Co. v. Costco Wholesale Corp.*, No. C10-1987 RAJ, 2011 WL 3583226, at *3 (W.D. Wash. 8/15/2011)

[51] Lillehaug and Ebnet, supra note 1 at 19.

[52] ~~(c) The court of appeals may publish only those decisions that:~~

~~(1) establish a new rule of law;~~
~~(2) overrule a previous court of appeals' decision not reviewed by the supreme court;~~
~~(3) provide important procedural guidelines in interpreting statutes or administrative rules;~~
~~(4) involve a significant legal issue; or~~
~~(5) would significantly aid in the administration of justice.~~

Minn. Stat. §480A.08, subd. 3(c) (2018), *repealed by* 2020 Minn. Laws, ch. 82, S.F. No. 3072, § 3, *located at https://www.revisor.mn.gov/laws/2020/0/82/laws.0.3.0#laws.0.3.0*.

[53] *Id.*

[54] Supra note 3.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Letter from Chief Judge Susan Segal to Justice Natalie Hudson and Commissioner Rita DeMules (July 12, 2020) (on file with authors).

[59] *Supra* § I.

[60] Lillehaug & Ebnet, *supra* note 1, at 18-19.

[61] *See* Minnesota Judicial Branch, Report to the Community: The 2016 Annual Report of the Minnesota Judicial Branch 52 (2016) at 52; Minnesota Judicial Branch, Report to the Community: The 2017 Annual Report of the Minnesota Judicial Branch 53 (2017).

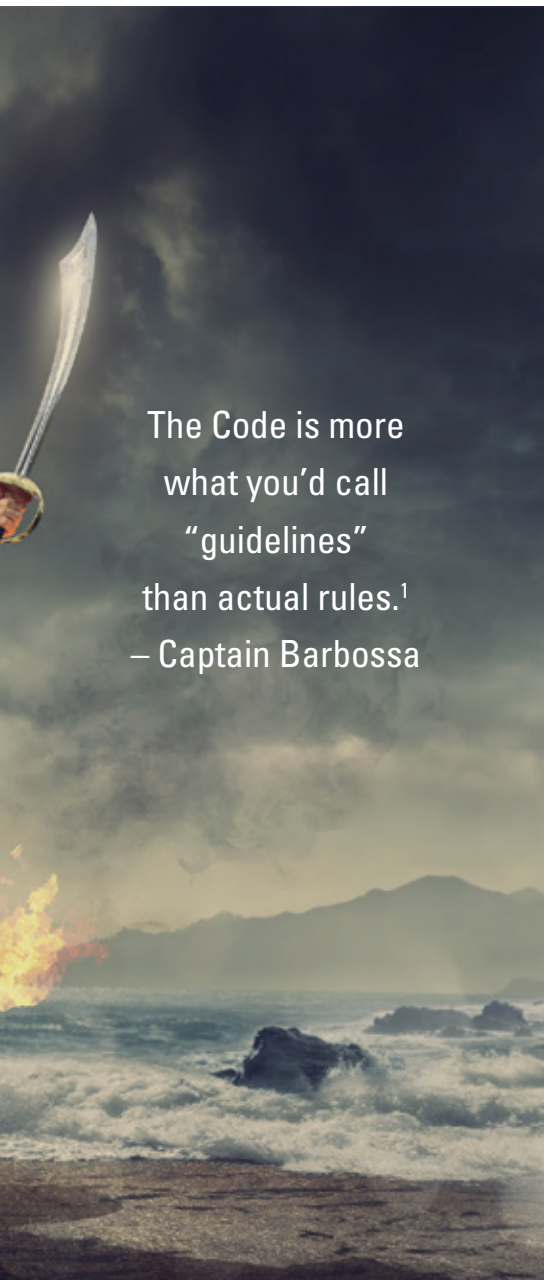
[62] Minnesota Judicial Branch, Report to the Community: The 2017 Annual Report of the Minnesota Judicial Branch 53 (2017).

[63] Minnesota Judicial Branch, Report to the Community: The 2018 Annual Report of the Minnesota Judicial Branch 49 (2018).

Rules are Rules. Really.

A high-profile federal case reminds us that court rules are not just suggestions.

By David F. Herr



We practice in a world of rules—often familiar rules, but also sometimes surprises. That surprise may be a rule we did not know of, or had forgotten, or it may just be a rule we have gotten into the habit of ignoring until it is suddenly enforced. Why does this happen? And should it?

The first principle to understand is that, with all due deference to Captain Barbossa, the rules of court are really rules—not just "guidelines." But then, we are not pirates either. Most procedural rules exist to provide orderly and efficient handling of cases. They were created for a reason and normally are followed. And we should be able to expect the courts and our adversaries to follow them.

Obviously, it helps to know the rules, which requires reading them. But none of us can keep all the rules in mind. There is a good reason that most litigators have a paper-bound rulebook close to the workspace on their desks (or sometimes electronically made part of their workspace). Even when we think we know the rule, we learn to look it up anyway, just to be sure.

A recent 6th Circuit decision, *In re National Prescription Opiate Litigation*,[2] puts the imperative nature of court rules into sharp focus. The twin holdings in the case will make it an oft-cited precedent: First, rules are to be followed. Second, the rules apply to judges too. Just as judges can expect the rules to be followed, the parties should be able to rely on judges to follow them.

Opiates is a decision that is important in complex MDL litigation, but is useful guidance in all types of cases. The judge was assigned by the Judicial Panel on Multidistrict Litigation to preside over massive litigation involving claims brought by individuals and classes against manufacturers and distributors of Oxycontin and similar opiate drugs. The litigation comprised a wide variety of cases with a similarly wide variety of plaintiffs—individuals, classes, businesses, and various governmental entities and subdivisions. The assigned judge entered several orders that some of the defendants found unfair and inconsistent with the rules—and the 6th Circuit agreed, issuing the extraordinary remedy of mandamus, requiring the judge to apply the rules as written. The orders were entered in cases brought by two Ohio counties that were headed for early "bellwether" trials.

The petitions in *Opiates* complained of three orders issued by the transferee judge in those cases. First, the court allowed the plaintiffs to amend their complaint to assert claims that they had previously disavowed and did so 19 months after the deadline for pleading amendments in the pretrial order and a year after the close of discovery. Second, the court refused to hear the defendants' motions to dismiss their claims under Fed. R. Civ. P. 12(b)(6). Third, the court ordered these defendants to produce data on every prescription filled by any of their pharmacies nationally for a 13-year period, despite the fact the upcoming bellwether trial would relate solely to sales in Ohio and affecting the two plaintiff counties. The entire MDL proceeding would not include trials of cases filed elsewhere in the country. Under the Supreme Court's *Lexecon* decision, the transferee court would not be able to try the claims of non-Ohio plaintiffs—they would have to be remanded for trial to the district where they were initially filed.[3]

So, what is so extraordinary—warranting issuance of a writ—about these actions by the transferee judge? Sure, they did not exactly conform to important provisions of the rules of civil procedure, but this was a massive MDL, and "extraordinary cases require extraordinary measures," right? That may have been the transferee judge's view, but it was not the 6th Circuit's. It explicitly rejected the district court's allowance of the amendment to add new, previously abandoned claims on the eve of trial. The rules allow amendments, but the pretrial order in the case set a specific deadline for seeking them. Rule 16 establishes a simple, and important, requirement to guide the courts in considering modification of the deadline: a showing of "good cause."[4]

The 6th Circuit defined the "good cause" requirement of Rule 16 as requiring a showing that "despite their diligence they could not meet the original deadline."[5] The court found that neither the parties nor the court had even attempted to establish diligence. The circuit court rejected the trial judge's superficial assertion that it would be "efficient" to allow the extension of the deadline.

The court held that the defendants had no other means of remedying the harm caused by the district court's amendment order and found that the decision "manifests a persistent disregard of the federal rules"[6] and held that that disregard warranted issuance of an extraordinary writ of mandamus.

TABLE OF RULES PROVIDING FOR EXCEPTIONS

Minnesota Rules of Civil Procedure	
Rule Number	***Applicable situation***
4.05	Standard to be excused for failure to waive service of summons
16.02	Modification of scheduling order
26.01(c)(2)	Excuse for failure to waive objections to pretrial disclosures
26.02(b)(2) & 45.04(a)(4)	Standard for discovery of ESI after showing of it not being reasonably accessible
32.03	Standard for waiver of requirement that deposition testimony be present in non-stenographic form
33.01(a) & (b)	Leave to serve more than 50 interrogatories or set different deadline for responding
35.01 & .04	Grounds for issuance of orders for physical exams and depositions of medical experts
44.02	Grounds for admission of attested copy of foreign record or a summary
47.04	Grounds for excusing juror from service
59.03	Extension of deadline for motion for new trial (and by incorporation, other post-trial motions)
Minnesota General Rules of Practice	
4.02(e)	Standards for overcoming presumption that post-plea criminal proceedings must be open to visual or audio coverage
11.05(a)	Obtaining access to Confidential Financial Source Documents
14.01(b)(3); 14.01(b)(5)	Request for exemption from mandatory e-filing and e-service
111.04	Amendment of scheduling order
131.02(d)(3) & (5)	Motion for use of interactive video teleconference for court proceedings. "Good cause" considerations set forth in Minn. Gen. R. Prac. 131.02(d)(4)
145.04	Excuse from attendance at minor settlement approval hearing
146.01 & .05(i)	Continuance of trial date set for complex cases
303.03(c)	Excuse from meet-and-confer requirements before hearing motions
303.04(e)	Grounds for why notice to opposing party is not required for emergency motion
304.04	Grounds for amendment of scheduling order
305.02(a)	Excusing counsel who will try case from pretrial conference
364.05	Grounds for continuance of hearing
377.09, subd. 5	Grounds for obtaining hearing
512(h)	Grounds for continuance of trial in conciliation court
520(b)	Grounds for vacation of judgment
610	Time to respond to motion
611	Extension of time to obtain transcripts of referee proceedings
707	Extension of deadline for filing grand jury transcript
904.05	Removal of guardian ad litem by judge
Minnesota Rules of Evidence	
412(2)(A)	Deadline for motion by accused to offer evidence of previous sexual conduct of victim
703(b)	Standard for receiving data for limited purpose of showing basis for expert opinion
902	Self-authentication of foreign public documents

Minnesota Rules of Civil Appellate Procedure	
102	Court may supersede provisions of rules (except as prohibited in Rule 126.02)
107.01	Grounds for requiring issuance of cost bond
110.02, subd. 3	Request for extension of time to complete transcript
114.01	Grounds for requiring issuance of cost bond
114.03, subd. 2	Extension of deadline for forwarding of record in administrative appeal.
115.03, subd. 2	Grounds for requiring issuance of cost bond
115.04, subd. 3	Grounds for deadline for service and filing of itemized list of contents of the record
126.02	Grounds for extension of time (except changing time to appeal)
131.02, subd. 1	Grounds for extension of time for filing brief
132.01, subd. 3	Overlength briefs
133.01	Excuse from mandatory mediation in family law cases
139.04	Grounds for disallowance of costs or disbursements
141.01(b) & 141.02(b)	Deadline for seeking recusal in Supreme Court and Court of Appeals, respectively
142.02	Deadline for moving to reinstate appeal following default by appellant
Minnesota Rules of Criminal Procedure	
5.05	Extension of time for Rule 8 appearance
6.06	Extension of time for misdemeanor trial
7.03	Extension of deadline for notice of intent to seek aggravated sentence
8.04(c)	Extension of time for omnibus hearing
9.01, subd. 2(1) & (2)	Standard for requiring prosecutor to disclose information
9.03, subd. 6	Standard for motion to make discovery motion in camera
10.01, subd. 2	Standard for relief from waiver of defense or objection
10.02	Standard for relief from waiver of attack on jurisdiction in misdemeanor case
10.03	Motions relating to omnibus hearing
11.06 & 11.09	Continuance of hearing or trial and deadline for trial
12.04, subds. 3 & 12.07	Motions re: timing of hearing on evidentiary matters and pretrial conferences
18.04, subd. 1	Disclosure of grand juror's name on motion of defendant
19.04, subds. 4 & 5	Date for arraignment and omnibus hearing
26.02, subd. 5(2)	Allowance of late challenge to juror for cause
26.04, subds. 3 & 4	Timing for defendant's motion for new trial and service of supporting documents
28.01, subds. 3 & 4(3)(g)	Standards for court of appeals to suspend application of rules
28.02, subd. 9	Deadline for appellant to order transcript
29.01, subd. 3 & 29.03, subd. 3(f)	Standards for supreme court to suspend application of rules
29.04	Time for petition for review from court of appeals

The court issued its writ on the basis of the untoward allowance of the amendment, but also observed that Fed. R. Civ. P. 12(b) expressly allows a party to bring a motion to dismiss and that a district court may not simply refuse to adjudicate motions properly brought under the rule. That observation was intended to guide the district court in further proceedings on remand. Similarly, the court analyzed the scope of discovery contained in Fed. R. Civ. P. 26(b)(1)—limited it to the claims and defenses of the parties following the 2015 amendments and proportionate to the needs of the case. The court held that discovery of evidence that was not relevant to the Ohio counties' claims was not proportionate to the particular cases and was therefore improper.

Opiates will prove important to multidistrict litigation as a reminder that all judges, including MDL transferee judges, need to apply the rules as written. It based its decision, in part, on the rule recognized by the Supreme Court in *Gelboim v. Bank of America*,[7] that unless cases in a MDL docket are actually consolidated, they retain their individual status and need to be treated as separate cases. But the *Opiates* holding on the legal force of court rules should be even more compelling for the rest of the courts' dockets.

"Rules are rules" does not mean they require a Draconian interpretation. The federal rules—and the Minnesota rules that mirror them—are given broad and justice-seeking interpretation. Each includes a general provision requiring courts to interpret and apply the rules to accomplish the "just, speedy, and inexpensive determination of every action."[8] Rule 1 means something too, and should guide the courts toward a fair set of procedures for every case.

Minnesota's rules are similar in most material ways to their federal counterparts, and the Minnesota Supreme Court has frequently recognized the value of federal decisions interpreting the rules.[9] Minnesota's rules advisory committees have not followed federal rules changes in lockstep, but they have often found that conforming Minnesota's rule to their federal counterparts makes sense.

Minnesota has another key rule—Rule 1.02 in the General Rules of Practice, which allows a judge to modify the application of the rules "to prevent manifest injustice." This rule should provide a clear signpost to lawyers and to judges—Rule 1.02 and Rule 1 of the civil rules allow flexibility in the application of the rules, but they require a showing that flexibility is required in a particular case. A showing of good cause, or the need to prevent manifest injustice, must be made by the parties (or one party) and the court must explain why the rule as written should not be applied.

The civil rules include at least a dozen situations (and the general rules more than a score) where "good cause" is the standard for relief from or modification of the rules. The many rules explicitly embracing the "good cause" standard are set forth in Table 1. Lawyers should not give this requirement short shrift. "Good cause" is not a rigid standard and is inherently context sensitive. Even where the rules do not specifically allow for modification, any rule is potentially changeable in some respect. The facts and circumstances constituting good cause should be demonstrated by affidavit and with particularity. One particularly helpful fact or argument to establish is diligence by the party seeking relief from the strict application of a rule. Conversely, the most compelling arguments from an opponent may be reliance on the rule and prejudice if it is modified by the court. There are, unfortunately, too many cases where a party seeking to avoid a rule simply pleads for relief without making any meaningful showing that it is justified or meets the "good cause" or "interest of justice" standard.

Our rules serve important purposes of establishing procedures for the efficient and consistent administration of justice. They foster predictability. They even allow for exceptions. Lawyers—and judges—can do well to follow both the rules and, where appropriate, the exceptions. ▲

Notes

[1] Pirate Captain Barbossa appeared in the *Pirates of the Caribbean* movie *The Curse of the Black Pearl* (2003), and famously rejected a captive's claim of a right of return to shore under the Pirate's Code, stating:

> First, your return to shore was not part of our negotiations nor our agreement so I must do nothing. And secondly, you must be a pirate for the pirate's code to apply and you're not. And thirdly, **the Code is more what you'd call "Guidelines" than actual rules.** Welcome aboard the Black Pearl, Miss Turner. (Emphasis added).

[2] 956 F.3d 838 (6th Cir. 2020) ("*Opiates*").

[3] *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

[4] Fed. R. Civ. P. 16(b)(4)

[5] 956 F.3d at 943, quoting *Leary v. Daeschner*, 349 F.3d 888, 907 (6th Cir. 2003).

[6] *Id.* at 845.

[7] *Gelboim v. Bank of America Corp.*, 574 U.S. 405 (2015).

[8] Minn. R. Civ. P. 1; *cf.* Fed. R. Civ. P. 1. Some of the Minnesota rules that expressly require "good cause" to obtain modification of the rules are set forth in Appendix A.

[9] *See, e.g.*, *T.A. Schifsky & Sons, Inc. v. Bahr Const., LLC,* 773 N.W.2d 783 (Minn. 2009).

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ANATOMY OF A PRIVACY POLICY

Website privacy policies long seemed a mundane subject—but they're increasingly under scrutiny as a new form of actionable contract

By Julie A. Lewis

This article examines whether, and how, the mundane privacy policy link located at the bottom of most websites becomes a contract between the site sponsor and innumerable site users. In an effort to manage data-related class actions, website sponsors continue to activate the arbitration policies contained in the site's terms and conditions or privacy policy. The motion to compel arbitration is the common gateway to contract formation analysis in the federal courts.

When the privacy policy is elevated to a contract between the site sponsor and its users, all of its terms apply. In a logical extension of web contract formation principles, site sponsors are now defending against breach of contract claims based on privacy policy language that may never have received a serious legal review.

MANDATORY ARBITRATION IS A DOUBLE-EDGED SWORD

Like so many innocuous decisions, *Epic Systems Corp. v. Lewis* was about one thing—whether the Federal Arbitration Act's savings clause preempts the arbitration obligation in an employment contract—and then became about something else.[1] After Justice Gorsuch firmly reiterated the right to impose arbitration by contract, enforcing that right has become a cornerstone of privacy policy litigation.

Current class action privacy policy pre-emptive motion practice focuses on whether disputes should be forced into arbitration as a matter of contract between the site sponsor and the site user. Courts first look to find a contract. If the website's terms or privacy policy is a contract, it is a contract for all intents and purposes.

Assent: Inquiry notice and affirmative acknowledgement

Federal courts are more than willing to enforce mandatory arbitration terms found in website policies if the policies provide adequate notice of the term to the site user and if the facts indicate that the site user assented to the term. (Certain "wrap" agreements convey assent, while others do not.) State law governs contract formation; however, it is not overstatement to say that the federal courts, in applying state law, are creating a set of consistent expectations for website legal agreements.

The contract formation standards under development by the federal courts are based on the court's close scrutiny of the visual presentation on the user's screen. Some of the world's largest website businesses can currently be found on either side of the line.

Contract of adhesion formation. Courts refer to web agreements as contracts of adhesion. Users must agree before they can access the web information, product, or service. To enforce a web agreement, the site sponsor must prove that the user had actual or inquiry notice of the online contract's terms. Most related litigation is over inquiry notice questions.

Inquiry notice of an online agreement depends on the design and content of the website and the agreement's webpage. Online contracts may present as "clickwrap" agreements in which the user clicks an "I agree" box at the end of the terms, "browse wrap" agreements where the terms are posted via a link at the bottom of the webpage or "hybrid wrap"/"sign-in wrap" agreements in which the user registers to use the internet product or service and the signup screen requires asset to the terms of use before the user can access the product or service.

Courts generally do not find notice or assent to a browse wrap agreement because the terms are not made plain for the user on the webpage. In 2016, the 7th Circuit found in *Sgouros v. TransUnion Corp.* that the parties did not agree to arbitrate disputes related to TransUnion's "FREE credit report" and "$1 credit score" because the box that the user clicked to authorize TransUnion's use of the plaintiff's personal information did not mention the website's Service Agreement.[2]

Blue typeface. A vital part of web contract formation analysis is the court's evaluation of the design and visual aspects of the webpages under review. In March 2020, the Northern District of California decided *Arena v. Intuit, Inc.*, holding that Intuit, Inc.'s TurboTax sign-in wrap agreement did not create a valid arbitration agreement.[3] While the agreement's hyperlink appeared immediately under the TurboTax sign-in button and the sign-in page contained an explicit statement that signing in constituted assent to the terms, the hyperlinked text itself was not sufficiently conspicuous.

The hyperlink was presented in blue typeface but was not underlined. Citing the 1st Circuit's 2018 decision in *Cullinane v. Uber Techs, Inc.*, the *Arena* court rejected Intuit's argument that the color difference was adequate inquiry notice. The court relied on plaintiff's expert witness testimony from a cognitive scientist to conclude (1) a consumer would be less likely to notice text in a lighter shade than other text on the same page, (2) the sign-in page contained multiple, confusingly similar hyperlinks (*i.e.*, Turbo Terms of Use/Turbo Tax Terms of Use), and (3) less than 0.55% of users logging into TurboTax's website actually clicked open the terms hyperlink. Even though users were specifically required to accept the "TERMS" to use the services, the court declined to find assent because the acceptance made no reference to knowledge of the terms.

By contrast, on 4/23/2020, the same court found user assent to arbitrate in DoorDash, Inc.'s sign-wrap agreement because the screens were uncluttered, the notice text was close to the sign-up button and the terms and privacy policy hyperlinks, while not underlined, were in blue text and were the only hyperlinks on the page.[4]

The double opt-in and other contract questions

As data privacy litigation gains speed, web businesses have accelerated web page improvements to try to stay ahead of it. In addition to updating website agreements to add the design indicators of assent, companies are updating their arbitration policies to strengthen their position in court, but with mixed results.

Double opt-in: In *Soliman v. Subway Franchisee Advertising Fund Trust Ltd.* (03/05/2020), a double opt-in for promotional sandwiches by texting "Subway" and then responding to "Reply w/ ur ZIPCODE as ur sig 2agree 2 SUBWAY offers" did not bind the plaintiff to the hyperlinked terms and conditions containing an arbitration agreement.[5]

Email modification: In *Wilson v. Redbox Automated Retail, LLC* (03/25/2020), a site user could not have agreed to an email modification adding an arbitration clause when she could not have assented to the original terms due to the site's cluttered and confusing video rental screen.[6]

Pre-checked box: In *Lundbom v. Schwan's Home Service, Inc.* (05/26/2020), the court applied the perspective of "a reasonably prudent smartphone user" to find that the plaintiff agreed to receive text marketing messages by default when her food delivery registration included a pre-checked box indicating consent to receive SMS marketing communications.[7]

Opt out: In *Page v. Alliant Credit Union* (05/18/2020), credit union members were bound by an emailed arbitration amendment to their membership agreement when they did not read the email and did not opt out.[8]

Integration clause: In *Hutt v. XpressBet, LLC* (05/29/2020), the defendant's disclosure of plaintiffs' multiple wagering accounts was actionable only in arbitration because the integration clause in the Terms of Wagering incorporated the arbitration clause into the privacy policy.[9]

Unilateral contract modification clause: In *Miracle-Pond v. Shutterfly, Inc.* (05/15/2020), the plaintiff's continued use of the site constituted acceptance of a subsequent arbitration agreement modification because the original terms of use contained a valid unilateral change in terms provision.[10] (But see *Engen v. Grocery Delivery E-Services USA Inc.* (04/10/2020), in which the U.S. District Court in Minnesota declined to find a valid agreement to arbitrate modification where HelloFresh's numerous emails to the plaintiff did not call attention to the modification and were sent for marketing purposes.[11])

DATA PRIVACY LITIGATION: FROM ASSENT TO CONSENT

Arbitration clause litigation has, even in the past 90 days, tested and defined our understanding of web-based contracts between site sponsors and site users. Now that we know that site sponsors can enforce their arbitration agreements with users when assent is present, site users also know that they can hold site sponsors accountable for the promises made in near dormant (until now) website terms and conditions and privacy policies.

Beyond free-sandwich text opt-ins, interest in how personal information is being used runs high. Personal data is now a commodity. More than general complaints filed under the site sponsor's terms and conditions, violations of the site sponsor's privacy policy lead to recognized and demonstrable damages due to unauthorized access to or use of the site user's personal information.

Personally identifiable information

Personally identifiable information (PII) has taken on the character of property whose ownership and integrity must be defended against hackers, scammers, monolithic corporations, and other nefarious elements on the internet. Every state has some form of privacy protection statute that covers intrusion, interception, or unlawful use of private data and data breach obligations. Certain states, like California, have developed a data privacy code covering many aspects of data use by site sponsors. Federal law separately regulates consumer rights, financial data, children's data, student data privacy, and protected health information.[12]

PII plaintiffs typically combine state and federal statutory claims with contract claims in a data privacy violation complaint. As they develop the new law of web-based contract formation, the federal courts are at the same time developing the parameters for actionable claims, largely in tandem.

State legislation that provides for a private right of action includes:

California Consumer Privacy Act (CCPA):[13] Effective January 1, 2020, this act requires a for-profit business with annual revenues of over $25 million—or one that buys, receives, or sells personal information of 50,000 or more consumers—to meet certain obligations when it operates in California. ("Operates" includes sponsoring a website that is accessible to California residents.) If the business may collect personal information from California residents, the business must:

- provide a clear and conspicuous link for California residents to opt out of the sale of their personal information;
- inform California site users of their right to be forgotten;
- describe the types of PII that is collected;
- allow California site users to obtain a copy of their PII collected by the company or destroy the information at the consumer's request with verification to the consumer;
- make available an email address and toll-free number for data information requests;
- train employees on the CCPA obligations; and
- carry CCPA obligations through to the company's third-party service providers.

Illinois Biometric Information Privacy Act (BIPA):[14] Effective October 3, 2008, the BIPA allows a private right of action for violations, including facial recognition scanning without consent, via online "tags."

Other state legislatures are actively studying legislation that will expand data privacy rights.

Privacy policy

There are three main concerns driving protective privacy policy judicial decisions. All are anchored by lack of consent from the PII owner: data interception, sharing data with third parties for sale or otherwise, and data breach/inadequate security.

Data interception: The U.S. District Court for the Northern District of California found a contract was formed through a conglomeration of Google privacy policies connected to its different devices, platforms, and services. Every time a user's PII was shared with other non-engaged Google services, the contract was breached.[15] When, for example, the Android device privacy policy assured customers that their information would be aggregated and de-identified or when the Google Wallet privacy policy promises that Google would notify users if certain PII is shared with third parties, those promises carried over to Google's internal sharing of PII among any of its various platforms and services.

Data sharing: Similarly, a breach of contract claim against Facebook survived a motion to dismiss when Facebook disclosed user information to its whitelisted apps and business partners without the user's permission and without giving users the ability to prevent the disclosure.[16] Facebook's data use policy promised that apps would be allowed to use information only in connection with the user's friends. Allegations that Facebook conducted extraneous undisclosed sharing of user PII with its business partners stated a breach of contract claim.

Data breach/inadequate security: UnityPoint Health is a healthcare network in Wisconsin, Iowa, and Illinois. In 2018, UnityPoint Health's employee email system was hacked and the hackers obtained access to the PII of 1.4 million patients. UnityPoint Health system gave each system user (patients and others) a copy of its privacy policy. The privacy policy promised that UnityPoint would store personal information "in a secure database behind an electronic firewall" and that system users would receive notice of a data breach within 60 days of discovery.

Four individual system users filed a putative class action in the U.S. District Court in the Western District of Wisconsin in 2018.[17] The defendant argued that there was no separate consideration for the privacy policy, that the privacy policy

was merely a promise to follow the law, and that the privacy policy's unilateral modification provision made it a nonbinding promise.

The court allowed the breach of contract claim to proceed, holding that separate consideration was not required for the privacy policy because it was incorporated in each health services agreement, that the privacy policy promised more than legal compliance, and that the unilateral modification provision was limited to the privacy policy and did not allow UnityPoint Health to modify or withdraw from the health services agreement. The court also noted that it could infer a data breach because UnityPoint Health did not follow the procedures described in the privacy policy.

Federal courts are issuing decisions on website contract claims on a daily basis. Relying on recent precedent that examines the viability of web-based arbitration agreements, courts focus on the site user's assent to be contractually bound and then on the site user's consent to allow the site sponsor to collect, store, and use the site user's PII. Despite the focus on how the contract is presented to site users, what it says still matters. There is enough state legislation (like the CCPA), federal data privacy law, and federal case law to develop guidelines for website privacy policies.

PRIVACY POLICY GUIDELINES

If the lowly privacy policy is now becoming the engine for contract claims against website sponsors that collect PII for any reason, certain updates may mitigate that risk.

Design/placement

■ Links to terms and conditions and an effective privacy policy should be in blue underlined typeface and, preferably, in a font that is larger or more visible than the font around it.

■ User acknowledgments should be highly conspicuous and visible to a reasonable site or smartphone user. Webpage clutter—including marketing and other bids for the user's attention—should be minimized or placed elsewhere on the site.

Site wording/language

■ Conspicuous, specific disclosure of the information being collected.

■ Clear, easy-to-understand authorization requirements that stop the user from accessing the website until the authorization is provided.

■ Obvious and clear visual clues and directions on the webpage should be used for both disclosure and use authorization.

California requirements

If the site will be operative to California residents, it must satisfy the requirements of the California Consumer Privacy Act, including —

- a DO NOT SELL MY INFORMATION button;
- a description of the information being collected and how it will be used; and
- a description of the user's rights under the CCPA.

Policy template: Suggested terms for a website privacy policy

■ Information collected on the website (a specific description of the personal information the website sponsor collects; this may include personal data, financial data, protected health information, and user site use data).

■ How the information is used.

■ Who uses the information and for what purpose.

■ How the information is collected.

■ How the information is stored.

■ Special sections for Protected Health Information, information collected from California residents, information collected about children, information collected from site users in the European Union.

■ Contact information including a dedicated toll-free number and email address for a site user to use to contact the site sponsor with questions about the user's data.

■ Policy effective date.

■ Unilateral material modifications notice and consent. ▲

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Notes

[1] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018)

[2] *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1035 (7th Cir. 2016). But see, *BRADLEY ACALEY, individually & on behalf of all others similarly situated, Plaintiff, v. VIMEO, INC., Defendant.*, No. 19 C 7164, 2020 WL 2836737, at *1 (N.D. Ill. 6/1/2020) (the "Continue With Facebook" window adequately disclosed the website terms and conditions).

[3] *Arena v. Intuit Inc.*, No. 19-CV-02546-CRB, 2020 WL 1189849 (N.D. Cal. 3/12/2020) (Appeal filed by *Andrew Dohrman, et al., v. Intuit, Inc.et al*, 9th Cir., 3/18/2020).

[4] *Peter v. DoorDash, Inc.*, 2020 WL 1967568 (N.D.Cal. 4/23/2020).

[5] *Soliman v. Subway Franchisee Advert. Fund Tr. Ltd.*, No. 3:19-CV-00592 (JAM), 2020 WL 1061328 (D. Conn. 3/5/2020).

[6] *Wilson v. Redbox Automated Retail, LLC*, No. 19-CV-01993, 2020 WL 1445622 (N.D. Ill. 3/25/2020) (appeal filed).

[7] *Lundbom v. Schwan's Home Serv., Inc.*, No. 3:18-CV-02187-IM, 2020 WL 2736419 (D. Or. 5/26/2020) (appeal filed).

[8] *Page v. Alliant Credit Union*, No. 1:19-CV-5965, 2020 WL 2526488 (N.D. Ill. 5/18/2020).

[9] *Hutt v. Xpressbet, LLC*, No. CV 20-494, 2020 WL 2793920, at *1 (E.D. Pa. 5/29/2020).

[10] *Miracle-Pond v. Shutterfly, Inc.*, No. 19 CV 04722, 2020 WL 2513099 (N.D. Ill. 5/15/2020).

[11] *Engen v. Grocery Delivery E-Servs. USA Inc.*, No. 19-CV-2433 (ECT/TNL), 2020 WL 1816043 (D. Minn. 4/10/2020) (appeal filed).

[12] Cf. Gramm-Leach-Bliley Act, 15 U.S.C. 6801, et seq.; Safeguards Rule 16 C.F.R. part 314; Children's Internet Protection Act (CIPA) 20 U.S.C. 9134; Family Educational Rights and Privacy Act (FERPA) 20 U.S.C. 1232g; Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub.L. 104–191, 8/21/1996, 110 Stat. 1936.

[13] Cal. Civ. Code 1798.100, et seq.

[14] Illinois Biometric Information Privacy Act, 740 ILCS 14.

[15] *In re Google, Inc. Privacy Policy Litigation*, 58 F. Supp.3d 968 (N.D.Cal. 2014).

[16] *In re Facebook, Inc. Consumer Privacy User Profile Litigation*, 402 F.Supp.3d 767 (N.D.Cal 2019).

[17] *Fox v. Iowa Health System*, 399 F.Supp.3d 780 (W.D.Wis. 2019).

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CRIMINAL LAW

JUDICIAL LAW

Evidence: Impeachment evidence is misused if the party who called a witness was aware the witness would recant before the witness took the stand. Appellant was convicted of aiding and abetting second-degree murder, attempted murder, and assault, charges that arose from a gang-related drive-by shooting from a car driven by appellant. At trial, J.G., appellant's cell mate, testified. J.G. previously told investigators appellant knew the shooting would take place and had given J.G. a letter stating the opposite for J.G. to give to police as his own writing. J.G. gave that letter and a second letter, written by J.G. on appellant's behalf and consistent with the first letter, to the investigator. J.G. also told investigators he witnessed an argument between appellant and the shooter after the shooting, during which appellant yelled at the shooter because he was supposed to get out of the car before shooting. At trial, however, J.G. denied making these statements and testified he had not met appellant before they shared a jail cell. Over the defense's objection, the district court permitted the state to continue questioning J.G. to elicit what the court characterized as "proper impeachment evidence." The investigator to whom J.G. spoke testified about J.G.'s statements, and the letters that J.G. gave to the investigator were also admitted into evidence. The jury was instructed that J.G.'s testimony was impeachment, not substantive, evidence, and that the content of the letters was to be used to ascertain the author of the first letter. Appellant appeals from the denial of his postconviction petition, arguing the state violated *State v. Dexter*, 269 N.W.2d 721 (Minn. 1978), which precludes calling a witness for the sole purpose of impeaching the witness. The parties agree the state did not know J.G. would recant his statements to police when called to testify, but appellant argues the district court should have stopped questioning J.G. once it was clear J.G. had chosen to recant.

The court of appeals concludes that no *Dexter* violation occurred. The court holds that a *Dexter* violation occurs only if the witness signifies an intent to recant prior to taking the stand. Here, there is no indication the state was aware J.G. would recant or called J.G. for the sole purpose of impeaching him. The appellate courts have not extended *Dexter* to include situations in which a party's witness does recant at trial but is still questioned thereafter, and the court of appeals declines to do so. Thus, the district court did not err by allowing the state to continue questioning J.G. after his recantation.

The court also finds that J.G.'s prior inconsistent statements to police were not given under oath and, therefore, were not admissible as substantive evidence. However, Minn. R. Evid. 607 permits their admission for impeachment purposes only. The court agrees with the postconviction court that J.G.'s out-of-court statements were admitted for impeachment, rather than substantive, purposes. The court also affirms the postconviction court's admission of the first letter J.G. gave to police for the jury to use in ascertaining who wrote the letter. The letter was authenticated and relevant, and the jury was instructed not to use the contents of the letter as substantive evidence.

The court also concludes that the state misstated the law regarding the presumption of innocence, but that appellant's substantial rights were not affected. The court then rejects appellant's arguments regarding the improper admission of other evidence and the exclusion of the testimony of two defense witnesses, finding the postconviction court did not abuse its discretion. The denial of appellant's postconviction petition is affirmed. ***Moore v. State***, A19-1522, 2020 WL 2517081 (Minn. Ct. App. 5/18/2020).

DWI: *Missouri v. McNeely* applies retroactively to challenges of final convictions for test refusal under *Birchfield v. North Dakota*. In 2011, after crashing his vehicle into a median, appellant was taken to the hospital, where police asked him to submit to a blood or urine test. Appellant refused and ultimately pleaded guilty to third-degree test refusal. In his 2017 postconviction petition, appellant argued his conviction was unconstitutional under *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), because it was based on his refusal to submit to a warrantless blood or urine test in the absence of an exception to the warrant requirement. The district court denied appellant's petition and he appealed, but his appeal was stayed pending the Minnesota Supreme Court's decision in *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018). In *Johnson,* the court held *Birchfield* announced a substantive rule that applies retroactively to convictions that were final before the rule was announced. However, the district court was left to determine whether a warrant or an exception to the warrant requirement existed at the time of the test refusal. The district court found that the *per se* exigent circumstances exception (based on the dissipation of alcohol) applied and that, although this exception was invalidated in *Missouri v. McNeely*, 569 U.S. 141 (2013), *McNeely* does not apply retroactively.

The Minnesota Court of Appeals finds that, in the test refusal context, *McNeely*'s rule is substantive and should be applied retroactively. "[T]he requirement that law enforcement secure a warrant or establish an exception to the warrant requirement has a critical 'bearing on the accuracy of the underlying determination of guilt,'" and the driver cannot be convicted of test refusal "[w]ithout constitutional justification for the blood or urine test."

The state acknowledged that no warrant existed for the requested blood or urine tests, but asserted that the *per se* exigency exception applied. However, because the court of appeal concludes here that the *per se* exigency exception does not apply to appellant's case, the district court erred in concluding that an exception to the warrant requirement applied. Thus, appellant's conviction was unconstitutional and is reversed. ***Hagerman v. State***, No. A19-1526, 2020 WL 2828783 (Minn. Ct. App. 6/1/2020).

Harassment restraining order: Violation of a harassment restraining order requires proof of knowledge of facts that would cause defendant to be in violation of order. Appellant was prohibited by a harassment restraining order (HRO) from having contact with M.L.B. or from being within 100 feet of her residence, but her address was not disclosed in the HRO. He was convicted of violating the HRO after walking within 100 feet of M.L.B.'s apartment building. Before the district court and on appeal, appellant argued the state did not prove appellant knew the location of M.L.B.'s residence. The district court found him guilty but specifically found credible his explanation that he was walking in the area of M.L.B.'s apartment for the purpose of going to lunch and that the state did not prove beyond a reasonable doubt that appellant had notice or knowledge of the location of M.L.B.'s residence.

Knowledge of the location from which a defendant is prohibited from being is not required by Minn. Stat. §609.748, subd. 6(a), (b). However, the general common law rule is that proof of *mens rea* is required unless one of two exceptions apply: (1) the statute clearly sets forth a strict liability offense, or (2) the statute creates a "public welfare offense."

Section 609.748, subd. 6, is void of any language concerning *mens rea*, including any language clearly evidencing the Legislature's intent to dispense with *mens rea*. Thus, the first exception to the common law *mens rea* rule does not apply. As to the second exception, Minnesota's appellate courts "have recognized that certain crimes arising from regulatory schemes fall within the 'public welfare' or 'regulatory' category," such as keeping an open bottle of liquor in an automobile, DWI, serving alcohol to a minor, failing to provide proof of vehicle insurance, etc. Section 609.748, subdivision 6, is neither regulatory nor concerned with public welfare, but is, instead, concerned with physical or sexual assault and repeated incidents of intrusive or unwanted acts, words, or gestures. Thus, the court holds it is not a public welfare offense.

As neither exception to the common law rule that proof of *mens rea* is required applies, a conviction under 609.748, subd. 6, requires proof that the defendant had knowledge of the facts that would lead him or her to her to be in violation of an HRO. In this case, those facts included M.L.B.'s address. The record shows the state failed to meet this burden, and, therefore, the evidence is insufficient to sustain appellant's conviction. ***State v. Andersen***, No. A19-0923, 2020 WL 3041277 (Minn. Ct. App. 6/8/2020).

Procedure: Defense counsel's concession of some of the elements of the crimes is not a concession of guilt warranting a new trial. Respondent, a 26-year-old, was charged with first- and third-degree criminal sexual conduct for sexually penetrating a 12-year-old and a 13-year-old. Evidence presented at trial included DNA evidence, cell phone records showing communications between respondent and the two victims and videos of one of the assaults, and statements from the victims identifying respondent.

In written arguments to the district court following a bench trial, defense counsel conceded the victims' ages, respondent's age, the age differential between the parties, and venue in Steele County. The district court found respondent guilty on both counts, making specific findings as to the parties' ages, the age differential, and the county of the crimes. The court of appeals reversed on the grounds of ineffective assistance of counsel, finding that defense counsel's concessions of elements of the crimes conceded guilt without respondent's consent or acquiescence.

The Minnesota Supreme Court reversed the court of appeals. Where ineffective assistance of counsel based on counsel's concession of guilt without the client's consent or acquiescence is claimed, a new trial is warranted without a showing of prejudice. That is, if such an improper concession was made, counsel's performance is considered deficient and prejudice is presumed.

Here, however, respondent's counsel conceded various *elements* of the offense, not respondent's *guilt*. While an analysis of whether guilt was conceded necessarily requires an analysis of whether elements have been conceded, the Court clarifies that an uncontested-to concession on any single element does not necessarily amount to a concession of guilt. On the other hand, a concession on each and every element of the crime is not necessarily required. In this case, counsel conceded fewer than all of the elements of the offenses against respondent, and the elements conceded were undisputed at trial. Counsel never conceded the highly contested question of whether respondent sexually penetrated either victim. Thus, respondent's trial counsel was not ineffective and a new trial is not warranted. ***State v. Huisman***, 944 N.W.2d 464 (Minn. 6/10/2020).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

Covenant not to compete; mootness after injunction expired. A two-year noncompete clause, which had been subject to an injunction, was moot because the employee challenged the injunction after it had already expired. The 8th Circuit Court of Appeals, in a decision written by Judge James Loken of Minnesota, dismissed the appeal and remanded the case because the appeal was brought after the two-year noncompete period and the corresponding injunction had ended. ***Perficient, Inc. v. Munley***, 973 F.3d 914 (8th Cir. 9/3/2020).

Overtime claim barred; employer exempt as common carrier. A flight paramedic lost his claim for unpaid overtime wages when he challenged his company's policy prohibiting overtime unless he worked more than 84 hours over a two-week period. The 8th Circuit, in a decision written by Justice David Stras of Minnesota, held that the claim under the federal Fair Labor Standards Act (FLSA) was not actionable because the employer qualified for exemption under the FLSA as a "common carrier." ***Riegelsberger v. Air Evac. EMS, Inc.***, 970 F.3d 1061 (8th Cir. 8/17/2020).

Collateral workers compensation; collateral tag barred after failure to intervene. A health care provider that did not intervene after receiving notice of an employee's pending workers compensation proceeding cannot later attack the award on collateral challenge. The Supreme Court held that the voluntary declination to intervene after receiving timely and adequate notice of the right to do so bars a subsequent collateral attack on a compensation award. ***Koehnen v. Flagship Marine Co.***, 947 N.W.2d 448 (Minn. 8/12/2020).

Retaliation claim rejected, no causal connection found. A former custodian failed in his attempt to pursue a retaliatory discharge claim against his former school district employer under the Minnesota Whistleblower Statute and the Occupational Safety & Health Act. Affirming a lower court ruling, the Minnesota Court of Appeals held that the claimant did not establish a *prima facie* case with a causal connection between reporting air and water quality concerns and her termination, noting that the employee had disobeyed directives from the school's principal regarding locking the school's fire doors. ***Slaughter v. Independent School District No. 833***, 2020 WL 4579014 (Minn. Ct. App. 8/10/2020) (unpublished).

Missing work while in jail; misconduct upheld, but not aggravated. An employee's challenge to denial of unemployment compensation benefits on grounds that he missed work when he was in jail for two days was upheld on

grounds of disqualifying "misconduct." The court of appeals upheld that determination, but also concluded that the employee was not discharged for "aggravated" employment misconduct, which would have resulted in a longer period of further disqualification. ***Leuze v. Minn. Valley Alfalfa Producers***, 2020 WL 4743505 (Minn. Ct. App. 8/17/2020) (unpublished).

■ **Unemployment reconsideration; jurisdiction terminated when deadline expired.** An employee who challenged denial of unemployment compensation benefits after an unemployment law judge (ULJ) amended some details of the decision after the deadline for reconsideration had expired lost his appeal. The court of appeals held that the ULJ's jurisdiction terminated when the reconsideration request deadline expired, resulting in invalidation of any of the judge's rulings after that date and leading to vacation of the post-reconsideration determination. ***Carroll v. Minn. Apts., LLC***, 2020 WL 4280999 (Minn. Ct. App. 7/27/2020) (unpublished).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **28 U.S.C. §1447(d); scope of review on appeal; *certiorari*.** While most remand orders cannot be appealed, 28 U.S.C. §1447(d) permits appeals from remand orders involving cases removed under 28 U.S.C. §§1442 and 1443. At least six circuit courts—including the 8th Circuit—have held that such an appeal is limited only to consideration of the propriety of the removal under these provisions, while opinions in three circuits have held that appellate review extends to any issue encompassed by the remand order. The Supreme Court recently granted *certiorari* on the question of whether 28 U.S.C. §1447(d) permits a court of appeals to undertake this broader review. ***Mayor and City Council of Baltimore v. BP p.l.c.***, 952 F.3d 452 (4th Cir.), *cert. granted*, ___ S. Ct. ___ (2020).

■ **Fraudulent joinder; motion to remand denied.** Where the defendants removed the action based on diversity jurisdiction and alleged fraudulent joinder of the non-diverse defendant, Chief Judge Tunheim found that there was "no reasonable basis" for any of the claims asserted against that defendant, found that the defendant had been fraudulently joined, and denied the plaintiff's motion to remand. ***Protege Biomedical. LLC v. Duff & Phelps Secs., LLC***, 2020 WL 5798516 (D. Minn. 9/29/2020).

■ **Fed. R. Civ. P. 65(b); temporary restraining order denied.** Where the plaintiffs sought an *ex parte* temporary restraining order and preliminary injunction, Judge Tostrud denied the request for a preliminary injunction on the merits, and noted that the plaintiffs had failed to comply with the requirements for the TRO where they did not file the affidavit or verified complaint required by Fed. R. Civ. P. 65(b)(1)(A), and also failed to certify any efforts made to provide notice to the defendants as required by Fed. R. Civ. P. 65(b)(1)(B). ***Minnesota RFL Republican Farmer Labor Caucus v. Freeman***, ___ F. Supp. 3d ___ (D. Minn. 9/14/2020).

■ **Fed. R. Civ. P. 30(b)(4); motion to compel remote depositions granted.** Applying a "legitimate reason" standard rather than a "good cause" standard, Magistrate Judge Thorson found that the covid-19 pandemic provided a "legitimate reason" for remote depositions and that the plaintiffs had failed to establish any particularized "prejudice or hardship," and granted the defendant's motion to compel the remote depositions of specified witnesses. ***H & T Fair Hills, Ltd. v. Alliance Pipeline L.P.***, 2020 WL 5512517 (D. Minn. 9/14/2020).

■ **Fed. R. Civ. P. 8; short and plain statement; failure to cure deficiencies.** Having previously found that the plaintiff's complaint failed to provide a "short and plain statement" of the claims against each defendant in an action arising out of the alleged improper use of confidential information, Judge Davis granted the plaintiff 30 days to amend its claims with "clarity and brevity." The plaintiff subsequently dropped its claims against two defendants, and incorporated into its amended complaint a chart that, it asserted, provided sufficient notice of the alleged conduct by each defendant. However, Judge Davis found that the chart provided "neither clarity nor brevity," found that the amended complaint continued to violate Rule 8, and denied the plaintiff's request that it be allowed another chance to amend to cure its pleading deficiencies. ***C.H. Robinson Worldwide, Inc. v. Traffic Tech, Inc.***, 2020 WL 5569986 (D. Minn. 9/17/2020).

■ **Multiple frivolous actions; passage of time; injunction not warranted.** Overruling the plaintiff's objections to a report and recommendation by Magistrate Judge Wright, Judge Brasel dismissed the *pro se* plaintiff's "thought control" claims with prejudice, but agreed with Magistrate Judge Wright that an injunction against future litigation and sanctions was not warranted when more than two decades had elapsed since the filing of the plaintiff's last frivolous lawsuits. ***Sykes v. Klemp***, 2020 WL 5768919 (D. Minn. 9/28/2020).

■ **Motion to dismiss; impact of amended complaint.** Where defendants filed a motion to dismiss and the plaintiffs amended their complaint while the motion was pending, Judge Brasel held that the defendants were not required to file a new motion, and that she could consider the motion as being addressed to the amended complaint. ***Halla v. LikeZebra, LLC***, 2020 WL 5517492 (D. Minn. 9/14/2020).

■ **Request for reconsideration denied; failure to comply with L.R. 7.1(j).** Where the defendant sought reconsideration of Judge Wright's claim construction ruling but failed to file a letter requesting permission to file a motion for reconsideration in accordance with L.R. 7.1(j), Judge Wright found that the motion was "not properly before the Court" and denied the request on that basis. ***Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.***, 2020 WL 5512507 (D. Minn. 9/14/2020).

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IMMIGRATION LAW

JUDICIAL LAW

■ **No likelihood of torture based on ethnic minority group membership.** The 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) correctly found the petitioner—a derivative member (through his parents) of the Sudanese minority tribes Yambara and Pojulu—must show more than a mere pattern of general ethnic violence in South Sudan to meet the requirement under the Convention Against Torture (CAT) that he would more likely than not be tortured either by or with the consent of South Sudanese officials if he were returned to the country. "The fact that Lasu is a member of one of sixty ethnic minority tribes that 'could be' tortured does not compel the conclusion that he is more likely than not to be tortured." ***Lasu v. Barr,*** 18-3550, *slip op.* (8th Cir. 7/31/2020). *https://www.ca8.uscourts.gov/sites/ca8/files/opinions/183550P.pdf*

■ **No CAT relief for HIV-positive member of the Begedi Clan in Somalia.** The 8th Circuit Court of Appeals upheld the Board of Immigration Appeals' (BIA) denial of the petitioner's application for deferral of removal under the Convention Against Torture (CAT), when it found the immigration judge committed error with a prediction that the petitioner (a member of the minority clan Begedi) would more likely than not be tortured if returned to Somalia. More precisely, the immigration judge mistakenly relied upon testimony lacking adequate foundation, country reports addressing human rights violations at too high a level of generality, and cited treatment of people with HIV in Somalia that either fell short or was insufficiently widespread to show the petitioner would likely suffer torture. ***Abdi Omar v. Barr***, 18-3351, *slip op.* (8th Cir. 6/26/2020). *https://www.ca8.uscourts.gov/sites/ca8/files/opinions/183351P.pdf*

■ **Obstruction of legal process is not categorically a crime involving moral turpitude (CIMT).** The 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) committed error when it found the petitioner's Minnesota conviction for obstruction of legal process under Minn. Stat. Ann. §609.50, subdiv. 2(2) to be categorically a crime involving moral turpitude (CIMT). Most importantly, it concluded there was a "realistic probability that Minnesota would apply its obstruction of legal process statute to cases lacking the requisite degree of scienter necessary to constitute a crime of moral turpitude," and "the level of harm required to complete the offense was insufficient to constitute a crime of moral turpitude." Accordingly, it granted the petition for review and vacated the BIA's order of removal. ***Ortiz v. Barr***, 19-1285, *slip op.* (8th Cir. 6/23/2020). *https://ecf.ca8.uscourts.gov/opndir/20/06/191285P.pdf*

■ **District court issues preliminary injunction halting president's proclamation that sought to suspend entry of certain nonimmigrants.** On 6/22/2020 and 6/29/2020, the president issued Proclamation 10052 (and an amendment) ("Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak") suspending the entry of certain groups until 12/31/2020, with discretion to extend it further, "as necessary." Section 2 of the proclamation relates to certain nonimmigrant worker visa holders subject to the suspension: (1) L visas: intra-company transfers to non-citizens already employed by American businesses; (2) H-1B visas: highly skilled workers coming to America temporarily to perform services in a specialty occupation for which they are uniquely qualified; (3) H-2B visas: seasonal laborers responding to proven domestic labor shortages; and, (4) J visas: cultural exchange visitors in a variety of work-study programs nationwide.

On 7/22/202, the plaintiffs filed their complaint seeking to invalidate the proclamation based on the grounds that 1) it exceeds the authority of the executive branch (or constitutes *ultra vires* conduct) and 2) for violation of the Administrative Procedures Act (APA).

On 7/31/2020, the plaintiffs filed a motion for a preliminary injunction.

On 10/1/2020, focusing on the first ground, the U.S. District Court (N.D. Cal.) issued a preliminary injunction finding the plaintiffs had standing; were likely to prevail on the merits; and had proven irreparable harm should the injunction not be granted. Accordingly, the court issued a preliminary injunction, observing that "the Court finds that the public interest is served by cessation of a radical change in policy that negatively affects Plaintiffs whose members comprise hundreds of thousands of American businesses of all sizes and economic sectors. The benefits of supporting American business and predictability in their governance will inure to the public." The plaintiffs affected by the preliminary injunction include: Intrax, Inc. (a leading operator of culture exchange programs in the United States), National Association of Manufacturers, U.S. Chamber of Commerce, National Retail Federation, and TechNet. **85 Fed. Reg. 38,263-267** (6/25/2020) (Proclamation). *https://www.govinfo.gov/content/pkg/FR-2020-06-25/pdf/2020-13888.pdf* ; **85 Fed. Reg. 40,085-086** (Proclamation Amendment) (7/2/2020) *https://www.govinfo.gov/content/pkg/FR-2020-07-02/pdf/2020-14510.pdf* ; ***National Association of Manufacturers, et al., v. U.S. Department of Homeland Security, et al.***, No. 20-cv-04887-JSW (N.D. Cal. 10/1/2020). *https://www.courthousenews.com/wp-content/uploads/2020/10/Natl-Manufacturers-v.-Homeland-Security.pdf*

ADMINISTRATION ACTION

DOL issues interim final rule on prevailing wages. The Department of Labor (DOL) issued an interim final rule ("Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States"), with comments due by 11/9/2020, amending regulations having to do with the computation of prevailing wages for permanent labor certifications and labor condition applications (LCAs). **85 Fed. Reg. 63,872-915** (10/8/2020). *https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-22132.pdf*

DHS issues interim final rule on "specialty occupation" and more. The Department of Homeland Security (DHS) issued an interim final rule ("Strengthening the H-1B Nonimmigrant Visa Classification Program"), with comments due by 11/9/2020, revising the definition of "specialty occupation" (with other changes addressing third party worksites and employer-employee relationships, among others) in the regulations devoted to H-1B worker visas. **85 Fed. Reg. 63,918-65** (10/8/2020). *https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-22347.pdf*

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INTELLECTUAL PROPERTY

JUDICIAL LAW

Patent law: Expert not excluded for lack of patent law knowledge. Judge Wright recently denied a motion to exclude a technical expert on the basis that the expert lacked knowledge related to patent law principles. Plaintiff Niazi Licensing Corporation (NLC) sued St. Jude Medical S.C., Inc. for patent infringement related to NLC's patent directed to a catheter system that can be inserted into the coronary sinus of the heart. The parties filed cross motions to exclude expert testimony. St. Jude moved to exclude Dr. Martin Burke on the basis that Dr. Burke did not understand the difference between direct and indirect infringement. Under Rule 702, a witness who lacks the relevant technical expertise for the proffered testimony does not meet the standard of admissibility. Conversely, however, a challenge to the infringement expert's expertise in patent law does not undermine the expert's qualifications related to the subject matter of the proffered testimony. Dr. Burke was offered as an expert in electrophysiology to opine on the medical procedure for implanting permanent pacing leads into the coronary sinus. His qualifications related to these matters were not disputed. NLC did not offer Dr. Burke as an expert on patent law. The court identified no case law suggesting that a technical expert must be capable of reciting the difference between direct and indirect infringement or that such an inability is an appropriate basis for exclusion. The court denied St. Jude's motion to exclude. ***Niazi Licensing Corp. v. St. Jude Med. S.C.***, No. 17-cv-5096 (WMW/BRT), 2020 U.S. Dist. LEXIS 167562 (D. Minn. 9/14/2020).

Patent law: Pleading standard for inequitable conduct. Judge Frank recently granted in part and denied in part defendants' motion to dismiss claims of inequitable conduct. Plaintiff Corning Inc. sued defendants Wilson Wolf Manufacturing Corp. and John R. Wilson seeking declaratory judgments of patent non-infringement, invalidity, and unenforceability of Wilson Wolf's patents. Corning alleged four grounds of inequitable conduct. Pleading inequitable conduct in patent cases, subject to Rule 9(b), requires identification of the specific elements (who, what, when, where, and how) of the material misrepresentation or omission committed before the Patent Office. The pleading must also allege facts sufficient to give rise to a reasonable inference of scienter, including both (1) knowledge of the withheld material information or of the falsity of the material misrepresentation, and (2) specific intent to deceive the Patent Office. The court dismissed without prejudice three of Corning's four inequitable conduct charges. The court found Corning's charge that test data did not support the patent claims (i.e. not that the data was incorrect or falsified) failed to sufficiently plead the knowledge requirement. Corning's charge that the patentee failed to disclose adverse data was dismissed because allegations related to "other data" lacked the particularity to state a claim for inequitable conduct. Corning's charge that patentee failed to disclose the Corning-Wilson interference proceeding was dismissed because Corning only identified several documents it believed should have been disclosed but did not further plead where in those references the material information was found. The court, however, denied the motion to dismiss with respect to the charge that patentee submitted a biased expert declaration. Corning's charge sufficiently pleaded facts that patentee filed an expert declaration that failed to disclose the expert's relationship to the company, facts that the examiner relied on the declaration, the claims and claim limitations that the biased declaration were relevant to, and facts sufficient to infer intent. ***Corning Inc. v. Wilson Wolf Mfg. Corp.***, No. 20-700 (DWF/TNL), 2020 U.S. Dist. LEXIS 185103 (D. Minn. 10/6/2020).

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REAL PROPERTY

JUDICIAL LAW

Cartway damages award order. A district court order awarding damages for landowners affected by a township's grant of a petition for a cartway constitutes a civil judgment that may be

renewed pursuant to the renewal process set forth in Minnesota Statutes section 541.04. At issue in this decision were efforts by defendants in this action to earlier obtain access to their property located at the tip of a peninsula. In 2003, they petitioned South Harbor Township for a cartway. The township granted the petition in 2006 and awarded general damages to the affected landowners. The affected landowners appealed to the district court and obtained a 2008 district court order affirming a township's decision to grant the petition but ordering specific damages to affected landowners. The order was not reduced to a judgment. The petitioning landowners never opened the cartway and therefore did not pay the special damages. In 2018, the affected landowners instituted an action to renew the order awarding the special damages. The parties cross-moved for summary judgment and the district court granted it in favor of the defendants, deciding that the 2008 order was not a renewable judgment and that litigation between the 2008 order and the 2018 litigation barred the 2018 lawsuit. The court of appeals reversed, holding that because the 2008 order established that the defendants could open the cartway as soon as they pay the special damages awarded, it was a "final determination of the rights of the parties in an action or proceeding" as Rule 54.01 defines a judgment, and therefore was subject to renewal under section 541.04 of Minnesota Statutes. ***Ratfield v. South Harbor Twp.***, No. A20-0135, 2020 WL 5507875 Minn. App. 9/14/2020).

■ **Easement grantor rights.** The terms of the grant of a non-exclusive easement define the rights of the easement holder, not the rights of the easement grantor, whose rights depend on its ownership of the burdened parcel and the common law prohibition on unreasonable interference with the easement holder's use of the easement. Furthermore, the party alleging a violation of the easement agreement sufficient to obtain an order preventing the use must submit evidence to show not only an interference, but that the interference is unreasonable. In this decision, the plaintiffs commenced an action to quiet title and obtain a declaration that a driveway easement and a road agreement between tenants-in-common owners of a vacated road did not prevent them from using the road and modifying and using a driveway. The parties made cross-motions for summary judgment. The district court held that the driveway easement and the road agreement prohibited the plaintiffs' use and therefore did not decide whether the use constituted an unreasonable interference. The court of appeals reversed and also decided that the defendants failed to supply evidence that the use was an unreasonable interference and therefore remanded for the entry of judgment in favor of the plaintiffs. ***Dunkley v. Hueler***, No. A19-2047, 2020 WL 5507847 (Minn. App. 9/14/2020).

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TAX LAW

JUDICIAL LAW

■ **Motion to dismiss granted for lack of subject matter jurisdiction.** Mr. Cano filed a notice of appeal challenging the Commissioner of Revenue's 1/28/2020 notice of determination on appeal. Mr. Cano did not serve a copy of his appeal on the commissioner. The commissioner moved for dismissal for lack of subject matter jurisdiction. Mr. Cano orally opposed the motion during a telephone hearing.

A taxpayer wishing to appeal an order of the commissioner must follow statutory filing and service requirements. Within 60 days after the notice date of an order of the commissioner, the appellant shall serve a notice of appeal upon the commissioner and file the original, with proof of such service, with the tax court. *See* Minn. Stat. §271.06, subd. 2 (2018). When an extension is granted, an appellant must within 90 days serve the notice of appeal on the commissioner and file the original notice, with proof the commissioner received a copy, and the filing fee with the court. *See Naji v. Comm'r of Revenue*, No. 8955-R, 2017 WL 811940, at *1 (Minn. T.C. 1/20/2017).

Timely service requirements are prescribed by legislation. When the process and timeline are not followed, the court cannot acquire jurisdiction. *See Auto Motion Sales, L.L.C.*, 2015 WL 2018321, at *1. After receiving an extension, Mr. Cano had until 4/27/2020 to correctly file his appeal. Although Mr. Cano timely filed his appeal with the tax court on 3/27/2020, he never served the commissioner. Because Mr. Cano did not serve a copy of his notice of appeal on the commissioner, the court lacked subject matter jurisdiction and granted the commissioner's motion to dismiss. ***Cano v. Comm'r of Revenue***, 2020 WL 5509737 (Minn. TC 9/9/20).

■ **Property tax: court denies petitioner's motion to amend petition.** On 5/11/2020, petitioner Mark R. Smith filed a property tax petition in Washington County challenging the county assessor's estimated market value for 8 parcels of real property located in Forest Lake. "Box 6 of Smith's Minnesota Tax Court Form 7 petition reads: 'Assessment Date: January 2, 2020, for taxes payable 2021.' The underlined terms appear as blanks on the form, and Smith hand-wrote '2020' and '2021' in the two blanks, respectively." The acknowledgement and waiver of service of tax petition that Mr. Smith obtained from the county identified the tax payable year as 2021, which was also handwritten by Mr. Smith.

Box 5 of the Form 7 petition provides: "'You must ATTACH to this petition… ONE OF THE FOLLOWING: (a) the contested notice of valuation, (b) property tax statement, or (c) legal description of the property (including the Property I.D. Number)." Seven of eight parcels that Mr. Smith identified in his petition had attached a tax statement pertaining to 2019 assessment values, instead of the 2020 assessments dates identified in Box 6.

On 6/12/2020, Mr. Smith filed a motion for leave to amend his petition as follows: "On the real property tax petition line 6. Change the assessment date: January 2, 2020 for taxes payable in the year 2021 to: assessment date: January 2, 2019 for taxes payable in the year 2020. In addition the acknowledgement and waiver of service of tax petition the tax payable year: should read 2020."

Mr. Smith explained that he intended to file challenges pertaining to the 2019 assessment date. The county filed a memo asking the court to decline Mr. Smith's request for leave to amend, stating that Mr. Smith 1) failed to meet the statutory requirement to clearly identify the assessment date when the May 2020 petition reflected an appeal of real estate taxes for assessment year 2020/pay year 2021, and 2) Mr. Smith untimely requested to amend the petition to reflect the appeal period of assessment year 2019/pay year 2020, for which the deadline was 5/30/2020.

Minnesota Statutes section 278.02 states that a Chapter 278 property tax petition need not be in any particular form, but shall clearly identify the property and the assessment date, and clearly assert the claim, defense, or

objection. Additionally, no petition shall include more than one assessment date. A tax court rule requires a property tax petition to specify the assessment date at issue. *See* Minn. R. 8610.0050, subp. 2 (2019). On its website, the tax court makes available to taxpayers the Minnesota Tax Court Form 7, Real Property Tax Petition. To assist taxpayers in satisfying statutory pleading requirements, Box 5 of Form 7 requires taxpayers to describe the subject property by attaching to the petition "(a) the contested notice of valuation, (b) property tax statement, or (c) legal description of the property (including the Property I.D. Number)," and Box 6 requires specifying the assessment date.

Minnesota Rule of Civil Procedure 15.01 states in relevant part "a party may amend a pleading once as a matter of course at any time before a responsive pleading is served… otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." See Minn. R. Civ. P. 15.01. The Minnesota Supreme Court has emphasized that a "motion to amend… should be freely granted, except where to do so would result in prejudice to the other party." See *Marlow Timberland*, 800 N.W.2d at 640 (quoting *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)).

The tax court stated in its analysis that Mr. Smith's Form 7 petition unambiguously identifies the assessment date as 1/2/2020, but Mr. Smith now requests leave to amend his petition to instead identify the assessment date as 1/2/2019. The court concluded that allowing Mr. Smith to amend his petition would be equivalent to letting him file a brand new Chapter 278 claim with respect to the 2019 assessment date. Because Mr. Smith did not request leave to amend his petition until 6/12/2020, after the Legislature's extended deadline of 5/30/2020 due to the pandemic, the court denied Mr. Smith's motion for leave to amend his property tax petition. ***Smith v. Washington Co.***, 2020 WL 5887224 (Minn. TC 9/30/2020).

Written approval by supervisor required before penalty assessment. Taxpayers Dr. Sunil S. Patel and Laurie McAnally Patel had deficiencies totaling $1,700,000 and penalties of just under $400,000 were assessed. In cross-motions for summary judgment, the court addressed the Patels' argument that the Service did not secure timely written supervisory approval for the penalties at issue as required. The court granted in part and denied in part the motion.

Taxpayers who underpay can be subject to various statutory penalties. For example, if a taxpayer underpays due to their "[n]egligence or disregard of rules or regulations" or "[a]ny substantial understatement of income tax," or both, that taxpayer faces an accuracy-related penalty equal to 20% of the portion of an underpayment. See IRC Sec. 6662(a); (b)(1); (2). Similarly, if a taxpayer engages in a transaction lacking economic substance, that taxpayer faces a penalty equal to 20% of the portion of an underpayment attributable to the transaction. IRC Sec. 6662(a) and (b)(6). An even stiffer 40% penalty applies to taxpayers whose underpayment is attributable to one or more "nondisclosed noneconomic substance transactions." Sec. 6662(i).

Before such penalties may be assessed, however, the Service must satisfy certain internal processes, including review by a supervisor. Importantly, that review must culminate in written supervisory approval. IRC Sec. 6751(b)(1) (proving no penalties may be assessed unless the initial determination of such assessment is personally approved in writing by the immediate supervisor of the individual making such determination or such higher level official as the secretary may designate). Recent tax court case law requires that the section 6751(b)(1) approval must be completed before the first formal communication to the taxpayer that demonstrates that an initial determination has been made (e.g., *Belair Woods, LLC v. Comm'r*, 154 T.C. ——, ——(slip op. at 24-25), 2020 WL 58313 (Jan. 6, 2020); *Clay v. Comm'r*, 152 T.C. 223, 249 (2019)).

In this case, the Service was able to demonstrate compliance with the approval requirement for some, but not all, of the penalties at issue. No deductions, large or small, for hair care. "Grooming expenses (e.g., hair and nail maintenance) are inherently personal expenses, and amounts expended for grooming are not deductible regardless of whether an employer requires an employee to be well groomed." *Armstrong v. Comm'r*, No. 23698-18S, 2020 WL 5569699 (T.C.S. 9/17/2020) (denying, among other claimed unreimbursed business expenses, petitioner's $1,775 deduction for grooming expenses). ***Patel v. Comm'r***, T.C.M. (RIA) 2020-133 (T.C. 2020).

Numerous whistleblower decisions. The tax court issued multiple decisions relating to whistleblower claims. The majority of the reported decisions this month resulted in no relief for the whistleblowers. E.g., *Stevenson v. Comm'r*, T.C.M. (RIA) 2020-137 (T.C. 2020) (granting summary judgment to IRS because the IRS Whistleblower Office did not abuse its discretion in rejecting petitioner's claim on the ground that he did not provide information regarding any federal tax violation); *Neal v. Comm'r*, T.C.M. (RIA) 2020-138 (T.C. 2020) (rejecting whistleblower's challenge to the sufficiency of the administrative record and holding that on the basis of the administrative record as certified by the IRS, the WBO did not abuse its discretion when it denied petitioner's claim of a whistleblower award); *Damiani v. Comm'r*, T.C.M. (RIA) 2020-132 (T.C. 2020) (holding that, "[o]n the basis of this record, we have no difficulty concluding that the Office did not abuse its discretion in rejecting petitioner's claims for failure to allege any Federal tax issue" and therefore granting summary judgment the commissioner); *Friedel v. Comm'r*, T.C.M. (RIA) 2020-131 (T.C. 2020) (granting summary judgment after

having "no difficulty concluding that the Office did not abuse its discretion in rejecting petitioner's claims").

In two cases, however, the Service's motion for summary relief was rejected in whole or in part: *Doyle and Moynihan v. Comm'r*, T.C.M. (RIA) 2020-139 (T.C. 2020) (rejecting the Whistleblower Office's determination that its own criminal investigation did not "proceed[ ] with any… action" for purposes of I.R.C. sec. 7623(b)(1) was not supported by the administrative record and thus constituted an abuse of discretion and therefore denying commissioner's motion for summary judgment); *Worthington v. Comm'r*, T.C.M. (RIA) 2020-141 (T.C. 2020) (denying whistleblower's motion for summary judgment in which he asked the court to "order strict compliance with the intent of congress and the IRS manual, to 'require the whistleblower office to analyze whistleblower claims' and analyze them under the proper IRS codes supported by form 211" but also rejecting the commissioner's motion for summary judgment because the WBO's final determination letter was equivocal as to whether it constituted a threshold "rejection" based on the face of the whistleblower's claim or a substantive "denial" making a decision not to audit after performing research outside the claim).

■ **Kentucky nonprofit corporation not entitled to elect S Corp status.** In 2012 Waterfront Fashion Week, Inc. was organized under Kentucky law as a nonstock, nonprofit corporation. The organization was established for the purpose of holding the Fashion Week event and distributing proceeds from the event to qualified recipients, including Waterfront Park. Unfortunately, Waterfront was not able to find sufficient sponsors or contributors to break even, and eventually the president (the petitioner in this case) decided to assume "complete control" over planning Waterfront Fashion Week, abandoned plans for Waterfront to obtain federal tax-exempt status, and began treating Waterfront as a "for-profit business that [he] owned entirely." He contributed over $275,000 to Waterfront representing over 85% of the total cost of Waterfront Fashion Week.

In 2014, in his capacity as Waterfront's president, petitioner filed an election for Waterfront to be treated as an S corporation, effective retroactively to the date of its incorporation in 2012. Petitioner later filed untimely individual income tax returns for his taxable years 2012 and 2013, claiming Waterfront's reported operating losses as offsets against his individual taxable income. By notice of deficiency respondent disallowed these claimed pass-through losses.

In granting the commissioner's motion for summary judgment, the tax court considered the intersection of S Corp shareholder requisites and Kentucky's nonprofit corporations law. The court concluded that the "petitioner, as an officer and director of Waterfront, subject to the constraints of the Act and Waterfront's articles of incorporation, lacked ownership rights in Waterfront equivalent to those of a shareholder for purposes of applying subchapter S." Noting that "[t]axpayers are generally bound by the form of the transaction they choose," the court similarly rejected the petitioner's substance-over-form argument. The petitioner argued the court should regard Waterfront as, in substance, a for-profit entity because petitioner "intended Waterfront to be a for-profit entity and 'objectively operated' it 'consistently with it being a for-profit entity that he owned entirely.'" Finally, the court held that Waterfront's failure to seek federal tax-exempt status had no bearing on its nonprofit status under state law. ***Deckard v. Comm'r***, No. 11859-17, 2020 WL 5569696 (T.C. 9/17/2020).

ADMINISTRATIVE ACTION

■ **IRS guidance.** In response to a federal district court opinion, the IRS has updated its guidance on the Economic Impact Payment Eligibility. In *Scholl v. Mnuchin*, the court held that the IRS cannot deny an Economic Impact Payment to someone who is incarcerated if that individual otherwise satisfies the criteria for receiving a payment. The court enjoined the Treasury from "withholding benefits pursuant to 26 U.S.C. §6428 from plaintiffs or any class member on the sole basis of their incarcerated status." *Scholl v. Mnuchin*, No. 20-CV-05309-PJH, 2020 WL 5702129 (N.D. Cal. 9/24/2020). The Service has requested a stay of the district court's preliminary injunction, and while the request for the stay is pending, the case is moving forward at the district court.

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MARTÍNEZ-ALEMÁN

Ceiba Fôrte Law Firm received the Clio 2020 Reisman Award for Excellence in Client Service. The firm is owned by attorney Inti Martínez-Alemán, who focuses his practice on helping Spanish-speaking clientele with civil, business, and employment matters.


SWENSON

David P. Swenson joined Patterson Thuente IP and was named litigation practice chair. Swenson has more than 25 years of experience handling IP matters involving patents, trademarks, copyrights, and trade secrets, as well as contract, product liability, employment, and other high-stakes civil disputes.


KIM

Soobin Kim joined Fredrikson & Byron as an officer in the mergers & acquisitions, private equity, and international groups.


LILLEHAUG

Retired Minnesota Supreme Court Justice David Lillehaug rejoined Fredrikson & Byron in a part-time, senior role that will focus on corporate and government investigations and complex litigation. He will also serve from time to time as "a special master" to judges overseeing litigation and as an occasional arbitrator and mediator.


DIEHM

Tami Diehm has been selected as the new firm president of Winthrop & Weinstine, effective January 1, 2021. Diehm will be the first woman to hold the position in Winthrop's history. Her practice includes representing clients in complex real estate transactions.

Sarah Peterson joined Collins, Buckley, Sauntry & Haugh, PLLP as an associate. Peterson graduated from the University of St. Thomas School of Law and will practice in the area of family law.


ALLYN


UTLEY


YELLOWHAMMER

Gov. Walz announced the appointments of Julie Allyn, Maximillia Utley, and Terri Yellowhammer as district court judges in Minnesota's 4th Judicial District. All three seats will be chambered in Minneapolis. Allyn serves as an assistant U.S. attorney at the U.S. Attorney's Office for the District of Minnesota. Her appointment will fill a vacancy that occurred upon the retirement of Judge Ronald L. Abrams. Utley is a senior assistant Hennepin County attorney. Her appointment will fill a vacancy that occurred upon the appointment of Judge Theodora Gaïtas to the Minnesota Court of Appeals. Yellowhammer is the American Indian Community Relations Development Manager for Hennepin County. Her appointment will fill a vacancy that occurred upon the retirement of Judge Fred Karasov.

Alexander MacDonald "Sandy" Keith, aged 91, died on October 3, 2020. In 1959 he was elected to the Minnesota Senate representing Olmsted County. He was lieutenant governor of Minnesota from 1963 to 1967. After losing an election for governor in 1966, he returned to Rochester to practice family law at the firm Dunlap and Seeger, which he had earlier helped found. He was appointed to the Minnesota Supreme Court in 1989 as an associate justice and from 1990 to 1998 served as chief justice of the Minnesota Supreme Court.

Lois Beverly Wattman died on September 28, 2020. She graduated from William Mitchell Law School in 1980. She spent her entire professional life specializing in health care policies, retiring just a few years ago. She worked for the Minnesota Medical Association, Blue Cross Blue Shield of Minnesota, the Allina Health System, and served as the president and principal of Lilydale Partners.

Sidney Kaplan died on September 29, 2020. Sid built a prominent law practice in his 50-plus-year career. Sid was an important mentor to many, but he felt especially lucky to have finished the last 18 years of his practice with his law partner Shane Swanson.

Matthew Sean Williams died of COVID-19 at age 40. Williams graduated from what was then Hamline University School of Law in 2014 and worked for Consilio, a global firm that does legal document review.

William Neil Bernard died on August 1, 2020. After serving in the Navy he attended the University of Minnesota, graduating with a degree in aerospace engineering in 1954. He graduated from law school in 1964 and moved his family to Willmar, MN.

Bruce Winthrop Blackburn died on August 14 at age 87. He attended the University of Minnesota Law School and graduated in 1959. Bruce's first job out of law school was in the trust department at Northwestern National Bank in Minneapolis. From there he entered general practice with a small law firm called Nielsen, Stock & Blackburn. In 1986, following a series of mergers and acquisitions, he became a senior partner at Oppenheimer Wolff & Donnelly. He retired from Oppenheimer, with many successes and great working relationships, at age 80.

Larry Rapoport died September 11, 2020. After law school Larry joined the Office of the Hennepin County Attorney, prosecuting difficult cases and rising to be the position of chief deputy for the late Justice George Scott. Upon leaving the county attorney's office, Larry not only entered private practice, but continued his public service by working tirelessly as a part-time public defender. Larry's expertise in the courtroom, his timeless knowledge of every judge and nearly all members in the criminal defense bar, made him a formidable adversary, an excellent trial lawyer, a good friend, and a premier criminal defense lawyer over his astounding 55-year career.


HALEY

Gov. Walz announced the appointment of SHERRY HALEY as a district court judge in Minnesota's 5th Judicial District. She is the Jackson County attorney. Haley's appointment will fill the vacancy created by the appointment of Hon. Gordon Moore to the Minnesota Supreme Court. This seat will be chambered in Nobles County.


HALEY

BASSFORD REMELE announced that MARK R. WHITMORE has been elected as the firm's chief executive officer and JESSICA L. KLANDER has been elected to its board of directors. Whitmore is a trial lawyer who represents and counsels health systems and other businesses professionals. Klander defends businesses and professionals against liability and malpractice claims.


HALEY


SCHWEIGER

CAITLIN SCHWEIGER was awarded a Benjamin B. Ferencz Fellowship in Human Rights and Law from World Without Genocide, a human rights organization at Mitchell Hamline School of Law. Schweiger graduated from Mitchell Hamline in May 2019. She currently works as a law clerk for Judge Christian Sande at the Hennepin County Civil Court and serves on the MSBA Human Rights Committee.


GRANDSTRAND

KAREN L. GRANDSTRAND was named by Concordia College as one of its 2020 Alumni Achievement Award (AAA) honorees, the college's highest honor. Grandstrand is a shareholder at Fredrikson & Byron and chairs the firm's bank & finance group.

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