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DID YOU KNOW

A NOTE ON LEGAL CERTIFICATION

In July's issue of Bench & Bar, we provided the current roster of all MSBA Certified Legal Specialists in the areas of Civil Trial (189 Minnesota attorneys), Criminal Law (56), Labor & Employment Law (103), and Real Property Law (272). The designation "certified specialist" provides the professional with a time-honored method of informing the public and their peers that their specialty qualifications have been tested, documented, and certified by an accrediting organization.

The MSBA has been an accredited agency of the Minnesota State Board of Legal Certification since 1987, but did you know that there are five other entities that certify Minnesota attorneys in other specialty areas? The other agencies include the American Board of Certification, whose certification areas include Business Bankruptcy (5 Minnesota attorneys), Consumer Bankruptcy (2), and Creditors' Rights (1); the International Association of Privacy Professionals, which certifies in Privacy Law (5); the National Board of Trial Advocacy, which certifies in the areas of Civil Trial (57), Criminal Law (7), Family Law Trial Advocacy (12), and Truck Accident Law (1); the National Association of Counsel for Children, which certifies in Child Welfare Law (0); and the National Elder Law Foundation, which certifies in Elder Law (3).

Many of our members are certified in these areas and we'd like to congratulate them on their achievements as well. You can find more information on these other certifying bodies and the certification process at *www.blc.mn.gov/accredited-agencies.* ▲

Update IOLTA BANK ON JUSTICE

With interest rates on the rise, the MSBA has updated its list of banks that qualify for recognition through our Bank on Justice Program. These banks offer a rate of greater than 0.5% interest on IOLTA accounts–thereby doing their part to support access to justice in our community. IOLTA revenue contributes essential funding for civil legal services and pro bono programs, which help people meet their families' basic needs for shelter, safety, and health.

While many factors go into choosing where to bank, we hope that you will consider selecting one of these banks for your IOLTA needs. By selecting a Bank on Justice financial institution, you can increase the amount of money going to civil legal aid in our state, potentially by thousands of dollars. Thank you to the following banks for supporting access to justice:

Arcadian Bank
Bank of America
BMO Harris
Community Bank Mankato
First National Bank North
Merchants Bank
Wells Fargo

Is your bank on the list? If not, please reach out and encourage them to raise their rate. ▲

Pro bono and donor spotlight ADAM TERWEY

Adam Terwey is the executive director of St. Croix Legal Services, a nonprofit that builds pro bono into the heart of their operations. In the words of their mission statement, they "provide high-quality legal services exclusively pro bono or on an income-based, sliding fee scale for individuals and families of modest means. In addition to our primary goal of providing access to the legal system, we are dedicated to developing and supporting programs and policies designed to close the 'justice gap' on state and national levels."

Just as St. Croix Legal Services has been incorporated as a MN non-profit since 2015, Terwey has consistently achieved North Star Lawyer status for the past seven years. For Terwey, doing pro bono is just part of living up to his values. "It serves God and country in the sense that helping those living in poverty or facing other struggles is one of my religious values," he notes, "and enabling access to the legal system helps maintain integrity and respect for our government institutions.

"Sometimes," he adds, "you are the only person who has been able and willing to help. This makes the work more rewarding."

Terwey keeps pro bono at the heart of all his work in a way that ensures it doesn't feel separate from his non-pro bono clients, and he urges the community to do the same. "The need is ever-increasing," Terwey says, "and providing this type of work benefits the larger community by reducing the impact of unrepresented people on our legal system. It results in more just and fair outcomes. It is rewarding and clients are grateful."

To check out the work that Terwey and the rest of the St. Croix Legal Services team is doing, visit their website at *stcroixlegal.org,* and visit our Pro Bono Opportunities page *www.mnbar.org/pro-bono f*or information on how to make pro bono part of your practice. ▲

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OCTOBER 28, 2022

8th Judicial District
DECEMBER 2, 2022

6th Judicial District
JANUARY 26, 2023

9th Judicial District
MARCH 24, 2023

3rd Judicial District
APRIL 28, 2023

CLE credits are available. For more information visit: www.mnbar.org/one-profession

ETHICAL OBLIGATIONS
If you have questions regarding your ethical obligations, please call the ethics help line at 651-296-3952

YOUR ETHICAL DUTIES IN DEALING WITH *UNREPRESENTED PERSONS*

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

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

It's a fact of legal practice that you will frequently encounter unrepresented individuals in the course of your work for a client. Many litigants or opposing parties in transactions are *pro se* for a variety of reasons, including lack of access to affordable legal representation. Witnesses are often unrepresented. Lately we have seen an uptick in complaints where lawyers have failed to be mindful of their ethical obligations to unrepresented persons. Because of this fact, I thought a refresher on the rules would be helpful.

Rule 4.3, Minnesota Rules of Professional Conduct (MRPC)

Rule 4.3, MRPC, conveniently entitled "Dealing with Unrepresented Person," sets out several requirements that a lawyer must meet. The rule seeks to avoid misunderstandings by the unrepresented person about the lawyer's role, and thus implicitly to prevent any overreaching by the lawyer.

First, Minnesota's Rule 4.3(a) forbids a lawyer to state or imply that the lawyer is disinterested. That last term doesn't mean bored or uncaring; it means, as the comment to the rule explains, that a person not experienced in dealing with legal matters might incorrectly assume that a lawyer is disinterested in his or her loyalties or serves as a disinterested or neutral authority on the law. If the lawyer's client's interests are in fact adverse to the unrepresented person, a lawyer may not falsely state or imply anything to the contrary.

Minnesota's Rule 4.3(b) states that a lawyer shall clearly disclose that her client's interests are adverse to the unrepresented person if the lawyer knows, or reasonably should know, that those interests are adverse. Importantly, the rule is framed as obligatory and the obligation is not only triggered when there may be a misunderstanding about the lawyer's role—but rather is present whenever the interests are adverse. As the plain language of the rule indicates, the obligation is measured objectively and encompasses a lawyer who either actually knows the interests are adverse or *should know* the interests are adverse. If the interests of your client are adverse to those of the unrepresented person, you must clearly state this fact.

Rule 4.3(c) adds that whenever a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role, the lawyer shall make reasonable efforts to correct the misunderstanding. Again the obligation is placed on the lawyer to recognize and correct.

No legal advice

Finally, the rule adds a special obligation concerning legal advice when dealing with an unrepresented person. Rule 4.3(d) prohibits an attorney from giving legal advice to the unrepresented person, except for the limited advice to secure their own legal counsel, if the lawyer knows or reasonably should know that the person's interests conflict with the interests of the lawyer's client. The rule does not require an attorney to advise an unrepresented person in all instances to secure counsel, although since Rule 4.3(c) places the obligation upon a lawyer to reasonably know if the person misunderstands the lawyer's role, caution is advised.

Easy enough, right? These are the professional responsibility rules many of us learned in law school, and they make sense. Do not state or imply you are neutral/disinterested, clearly disclose any adversity in interests, clarify if there may be a misunderstanding, and do not give legal advice other than to advise the unrepresented person to get their own lawyer. Let's review some scenarios in which failing to follow this rule can lead a lawyer astray.

Problem situations

Certain situations lend themselves to misunderstandings more readily than others. Say, for example, a lawyer previously represented two individuals jointly, but the parties then had a falling out and the lawyer chose to represent one of the parties in an unrelated matter. Rule 1.9, MRPC, allows lawyers to represent client interests adverse to a former client unless the matter is the same or substantially related to the prior representation, and informed consent is not needed. The former clients, if now unrepresented, may misunderstand their former lawyer's role, believing the lawyer is neutral/disinterested or even still protecting the former client's rights. A clear statement by the lawyer setting out who they represent, and the nature of any adversity, can avoid confusion.

Other situations present the temptation to give legal advice. Many family law matters, landlord-

tenant matters, or consumer collection actions, to name a few, may involve a dispute with an unrepresented person. The difficulty may not be that the adverse party is unaware that the lawyer's client has interests adverse to the unrepresented individual, or that the individual is confused by the lawyer's role. In these situations, the chances are high that you will be asked for your legal advice and inclined to offer an opinion to move the matter along.

What if, for example, the unrepresented person asks questions of the lawyer that involve an explanation of the available rights (Do I have the right to...? What if I...?)? While a lawyer may negotiate the resolution of a matter with an unrepresented person, it is a fine line between negotiating and advising about the terms of an agreement. In these situations, it may be permissible to state, for example, "It is my opinion that the law allows XYZ (state client's position regarding the applicable matter), however, I am not your lawyer, this is my client's position, and the only advice I can give you is to secure your own legal counsel." As comment [2] to Rule 4.3, MRPC, states, a lawyer may "explain the lawyer's own view of the meaning of a document or the lawyer's view of the underlying legal obligations."

Similarly, you might be tempted to answer procedural or other legal questions posed by a *pro se* adverse party, or a witness. When is my answer due? Do I need to comply with this subpoena? If I do not want to comply with this subpoena, what can I do? While you might be able to provide general legal information (such as would be provided by the clerk's office or in the summons as required by rule), when you start providing advice that incorporates legal analysis (applying the law to the facts of a given situation), not only are you likely violating Rule 4.3(d), MRPC, but you run the risk of establishing an attorney-client relationship—which, according to the Court, can be formed whenever a lawyer gives legal advice to an individual seeking advice under circumstances where it is reasonable for the individual to rely upon the advice.* Always double-check your statements to unrepresented persons to ensure you are not providing legal advice. Everyone benefits when you state clearly that you cannot provide legal advice and the unrepresented person should secure counsel of their own choice if they have questions or concerns.

Conclusion

Lawyers often find themselves dealing with an unrepresented adversary or witness. Avoiding misunderstandings is the key component in any such dealing. Following the requirements of Rule 4.3, MRPC, prevents misunderstandings and is your ethical obligation. You can never say "I am not your lawyer" too often—and, where applicable, "my client's interests are adverse to your interest." Even if the unrepresented person understands the lawyer's role, giving legal advice, except the advice to secure counsel, is not allowed. If you have questions regarding your ethical obligations, please call our ethics help line at 651-296-3952, or visit our website at *www.lprb.mncourts.gov*.

* *In re Severson*, 860 N.W.2d 658, 666 (Minn. 2015) (discussing the contract and tort theory of creating an attorney-client relationship).

THE CYBER SAFETY REVIEW BOARD'S FIRST REPORT *AND THE IMPACT OF LOG4J*

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

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

This past spring, I wrote about the newly created Cyber Safety Review Board and its focus on uniting the public and private sectors in reviewing security incidents and providing recommendations for improvement ("What we can already learn from the Cyber Safety Review Board," March 2022). The board made the recently discovered Log4j vulnerability the subject of its first report, "Review of the December 2021 Log4j Event."*

The report provides a thorough explanation of the vulnerability as well as a disclosure timeline. The response and immediate aftermath were summed up this way: "One interview with the Board revealed that 'no one in the industry was sleeping that weekend [following the vulnerability's announcement]—they were trying to patch millions of servers.'" Many experts believed that this was perhaps the worst vulnerability ever observed, and the possible risks continue to exist given its pervasive nature. The board "found that organizations that responded most effectively to the Log4j event understood their use of Log4j and had technical resources and mature processes to manage assets, assess risk, and mobilize their organization and key partners to action... However, few organizations were able to execute this kind of response, or the speed required during this incident, causing delays in both their assessment of the risk and their management of it." The report describes the substantial resources that were required by many organizations and agencies in the midst of the initial mitigation period.

The report recommends that organizations continue to acknowledge and address the ongoing risk brought about by the Log4j vulnerability. While it states that fewer documented attacks have occurred as a result than initially expected by experts, the ubiquitous nature of the vulnerability requires ongoing remediation efforts. In total, 19 actionable recommendations are laid out in the report, listed under four general categories:

1. Address continued risks of Log4j
2. Drive existing best practices for security hygiene
3. Build a better software ecosystem
4. Investments in the future

With these themes in mind, key action items involve ongoing response, documentation, and mitigation of the Log4j vulnerability. It is suggested that organizations have a vulnerability response program in place, and that renewed emphasis be placed on secure software development. As for future improvements, the board puts forth the possibility of a Cyber Safety Reporting System (CSRS) to "contribute to a system-wide view of the cyber ecosystem and expand and centralize the existing external reporting of coordination of cyber safety issues. Built on a voluntary model, a CSRS could incentivize anonymized reporting of exploitable vulnerabilities in key libraries, software code bases, and key projects." The report also suggests examining the benefits of creating a central inventory of all software used across federal agencies, otherwise known as a Software Security Risk Assessment Center of Excellence (SSRACE).

The CSRB's first report demonstrates how a thorough review and a commitment to learning from one's mistakes can assist in creating a roadmap to future improvement. The board provides a wealth of information regarding the history of the Log4j vulnerability and the initial response, but its true value lies in its assessment of what is required to learn from the incident and promote actionable cultural change between the public and private sectors.

The report starts by noting, "We write this report at a transformational moment for the digital ecosystem. The infrastructure on which we rely daily has become deeply interconnected through the use of shared communications, software, and hardware, making it susceptible to vulnerabilities on a global scale." In response to the cyber risks we currently face, President Biden initiated the Cyber Safety Review Board. By combining the efforts of the private and public sectors, the board offers a unique viewpoint in investigating incidents and providing practical and objective measures for improvement. Rather than investigating incidents with the main purpose of defining what went wrong and assigning blame, the report prioritizes a lessons-learned approach that takes into account what went right while also identifying any changes that should be made to bolster cybersecurity. Within our organizations, reviewing the report in its entirety may be a useful exercise in proactively assessing the strength of our own security cultures—as well as whether applicable measures contained in the report are being implemented. ▲

NOTES

* *https://www.cisa.gov/sites/default/files/publications/CSRB-Report-on-Log4-July-11-2022_508.pdf*

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Q: WHAT HAS BEEN YOUR BEST DAY AS A LAWYER?

TRACY REID

Tracy Reid has practiced law for 20 years in the area of family law and Social Security disability, and now defends juveniles with the Hennepin County Public Defender's office.

"YOUR HONOR, THIS IS A MATTER OF LIFE AND DEATH."

That was my best moment as a lawyer. It passed in slow motion in my brain as the words fell out of my mouth like a made-for-TV movie.

My best day as a lawyer boils down to a single hearing. Emily Cooper and I started our private law firm to help the poor who could not access free legal aid. In doing so, we committed to doing pro bono as often as we could. A nonprofit we were acquainted with was helping a grandmother who needed to consent to heart surgery for her grandson. Years prior, she had picked up her grandson from the hospital shortly after his birth and raised him as her child due to his mother's inability to care for him. Child protection had not intervened, and until then, she had no reason to need legal documentation of this arrangement. The child had been enrolled in school, advanced through well-child visits, and was approaching his teens.

Sadly, at the time she was sent to us, the need for heart surgery was immediate and the surgery was scheduled later in the week, if legal consent could be obtained. Emily and I filed emergency paperwork and got an emergency hearing. I was the lucky one who got to argue the family's cause. Needless to say, it was an easy order for any judge to sign, and Grandmother was granted emergency custody of the child.

The surgery happened on schedule, it went great, and I got the best moment of my career.

ESTHER AGBAJE

Esther Agbaje is a staff attorney with the Public Health Law Center at the Mitchell Hamline School of Law. She also currently serves as a state representative for House District 59B in the Minnesota Legislature.

SHORT ANSWER: ONE OF THE ENJOYABLE ASPECTS OF BEING AN ATTORNEY IS THE ABILITY TO HELP PEOPLE SOLVE THEIR PROBLEMS.

This isn't to say that that attorneys have all the answers, but rather that we are a good resource for outlining your options. When I volunteer with the Housing Court Advice Clinic, I listen to tenants who are going through a stressful housing situation, and I help them figure out their options or prepare for what to expect in court. Usually, people need support in how to talk with their landlords to resolve simple disputes. One time, I helped a student obtain their security deposit by providing guidance on a letter to their landlord. The landlord was not complying with returning the security deposit, and it was needed by the student so that they could have the resources to move into a better location.

As a litigator, I appreciated negotiations with the opposing party because it meant that my client could resolve a situation more quickly than going through the stress of a lengthy courtroom process. In my new role, I get to help organizations and advocacy groups strategize about how to prevent young people from smoking and finding ways to advance health equity by stopping the flow of nicotine products. Being a problem solver attracted me to law in the first place, and I'm glad to have opportunities to continue to support others in finding a resolution to important issues.

ROBERT SCHUNEMAN

Robert Schuneman is an attorney with the Tentinger Law Firm in Apple Valley. His practice includes civil litigation, real estate, consumer bankruptcy, and estate planning.

She never told me what type of cancer she had, only that she was dying. She didn't want to talk about herself, only about how she could care for her two minor children after she died. When we transferred the last of her real estate holdings to the trust I created for her, her aura of worry was gone, replaced by quiet resignation. I left her house knowing that my work was more than crafting a trust and transferring property into it—it provided peace of mind for my client, allowing her to die knowing she would still be providing for her children.

This is one example of the positive effects I've been privileged to help my clients produce in their lives. The best day of my life as a lawyer? It's all those days when I know for a fact that my client's life has been made better by the work I did for them.

These moments of affirmation have happened to me in several practice situations: getting a larger-than-expected settlement in a civil matter, helping a client obtain a harassment restraining order and evict an abusive former partner, helping a landlord evict a problem tenant, etc.

Of course, this type of in-the-moment affirmation doesn't happen every day or with every client. But it does happen often enough for me to know that this is the work I was meant to do. It's the work I want to do, and I'm grateful for the opportunity to do it.

THE BEST DAY OF MY LIFE AS A LAWYER? IT'S ALL THOSE DAYS WHEN I KNOW FOR A FACT THAT MY CLIENT'S LIFE HAS BEEN MADE BETTER BY THE WORK I DID FOR THEM.

THIS IS PART 2 OF A TWO-PART SERIES ON THE BAR EXAM AND THE FUTURE OF LAWYER LICENSING IN MINNESOTA.

The bar exam considered

A law professor, a law school administrator, and a recent examinee share their views of the present-day test. Is this still how we should be licensing lawyers?

'Poorly designed to serve [its] purpose'

BY CAROL CHOMSKY

We rely on the bar exam to determine whether an applicant has the minimum competence to practice law, but the exam is poorly designed to serve that purpose. In its current incarnation, the exam essentially tests the ability of applicants to take an exam, not their ability to practice law. The exam focuses heavily on memorization of legal principles and issue-spotting, rather than testing the broad range of skills that lawyers need.

Every study of lawyers, including a recent one by IAALS (the Institute for the Advancement of the American Legal System), documents that new attorneys need a range of lawyering skills more than they need recall of doctrinal specifics. Many new lawyers engage directly with clients and take primary responsibility for client matters, so they need to know how to work with clients successfully. They need to know how to manage caseloads, negotiate with opposing counsel, and develop strategies for solving client problems. None of that is tested on the bar exam.

Not only does the bar exam focus too much on knowledge of doctrine, it tests that knowledge in a way that is divorced from the way that lawyers actually use legal rules. The exam requires memorization of hundreds, maybe thousands, of detailed legal rules. Test-takers cram rules, exceptions, and exceptions-to-the-exceptions—all details that are not remembered past the exam itself. Lawyers don't operate based on memory that way. They remember fundamental principles of law and then research or confirm the details—and check whether the law has changed.

Continued on page 14

'A reliable, valid, and objective measure'

BY DENA SONBOL

It is wise and necessary to test an applicant's legal skills and knowledge to ensure minimum competence before granting licensure into the legal profession. As it stands today, the Uniform Bar Exam (UBE), adopted in Minnesota and 39 other jurisdictions, is effective at doing just that. Until we have a more reliable, fair, and objective alternative that will ensure minimum competence, we should maintain the bar exam. While there may be some undesirable aspects of the bar exam, there are many desirable qualities and outcomes that make it a reliable, valid, and objective measure of competence.

The UBE's most desirable quality is that it tests core legal skills necessary for law practice: reading comprehension; legal analysis, which requires logic and critical thinking skills; and legal writing. As a profession, we should not admit people to practice who lack these core skills. While the bar exam does not test all the skills needed to practice law, it is effective at measuring the core skills and should not be dismissed simply because it does not cover everything.

The second most desirable quality of the UBE is that it is a mostly objective and fair assessment of minimum competence. The MBE (Multistate Bar Examination) counts for 50 percent of the total points and consists of multiple-choice questions covering seven subject categories. The questions are carefully and thoughtfully written and properly vetted to have little subjectivity. An examinee either knows the law and can perform legal analysis or they cannot.

Continued on page 16

'An inadequate measure of minimum competence'

BY TYLER WESSMAN-CONROY

Practicing law is an extraordinary privilege and responsibility. And it is imperative that we assess the minimum competence of attorneys before they enter the legal profession. But the bar exam is an inadequate measure of minimum competence.

I sat for the July 2022 bar exam in Minnesota. As a recent examinee, I was extraordinarily privileged. I had the help of my family and professional network throughout my exam preparation. My wife is expecting our third child very soon and, although she was limited in what she could give during my exam preparation, she was incredibly supportive. My mother lived with us and helped to care for our children while I was in law school and during my bar exam preparation.

I had to continue working while studying for the bar exam, but I was able to reduce my hours at work to free up more time to study. Because I took time off, I earned half as much to support our family during those months of preparation as I ordinarily would have. Fortunately, my wife also works and that lessened the financial impact on our family. Even though I reduced my hours, I still needed to work more than my bar preparation course recommended. Many bar preparation companies suggest not working at all, or at a minimum, not working during the two weeks leading up to the exam.

Continued on page 18

'Poorly designed to serve [its] purpose'

Continued from page 13

CAROL CHOMSKY is a professor at the University of Minnesota Law School, a member of the Collaboratory on Legal Education and Licensing for Practice, and was co-chair of one of the working groups participating in the MBLE comprehensive two-year study of the bar examination.

Experienced lawyers may remember more details in their areas of expertise, but even they typically refer to cases, statutes, regulations, and secondary sources, rather than relying solely on memory. The IAALS study confirms this as well. New lawyers and their supervisors noted over and over that relying on memory was the surest way to make mistakes, especially in the early years of practice. Successful lawyers know where to find the law they need and how to learn new doctrine. They do not rely on remembering legal rules.

The exam also asks test-takers to answer questions based on two-dimensional hypotheticals. But lawyers don't react to carefully crafted fact patterns. Lawyers work with clients, witnesses, and the written record to figure out the facts—to piece together the story that they will ultimately tell as they represent their clients' interests. Collecting and working with facts is an essential skill for lawyers, but it's not on the bar exam. The bar exam remains stuck in an artificially constructed universe, with static, unambiguous, and predigested facts—and a mythical set of standard legal rules that exist nowhere.

Finally, the exam is what psychometricians call "speeded." It tests the ability to answer quickly, not thoughtfully. Applicants must answer 200 multiple choice questions with just 1.8 minutes to read, understand, and analyze each question. They must write a series of essays with only 30 minutes to read the facts, analyze the situation, identify the law involved (and remember the needed details), consider how to apply that law to the facts, and write their analysis. And then in only 90 minutes, applicants must read a fact pattern and file of cases, statutes, and other materials; extract the legal principles from that file; analyze how to apply the law; and write an analysis. The exam creates pressure to answer, answer, answer, rather than to think and answer. It asks test-takers to make snap judgments when such hurried judgments harm clients. Lawyers work under time pressure, but good legal work requires preparation and care—not shooting from the hip.

A recent study by Professor Steven Foster engaged 16 practicing lawyers in taking a simulated version of the multiple-choice portion of the bar exam. Not one of the lawyers who took the exam passed it. The best of the group answered just 52 percent correctly, and most scored far below that. An exam that practicing lawyers regularly fail is not a reasonable test of minimum competence.

Because the test is so artificial, preparing for it requires purchase of expensive bar review materials and courses. NCBE, which authors the exam, gives applicants only a general outline of the subjects that will be tested. Test-takers must purchase expensive commercial outlines of the rules that the bar review companies believe the exam will cover. And it isn't enough to purchase those outlines—preparation requires months of focused study, memory drills, and exam-taking practice. That is usually unpaid time for applicants who have just spent most or all their resources—and then some—paying for legal education. As a recent study by the AccessLex Institute confirmed, the bar exam is a test of resources, not ability.

A RECENT STUDY BY PROFESSOR STEVEN FOSTER ENGAGED 16 PRACTICING LAWYERS IN TAKING A SIMULATED VERSION OF THE MULTIPLE-CHOICE PORTION OF THE BAR EXAM. NOT ONE OF THE LAWYERS WHO TOOK THE EXAM PASSED IT. THE BEST OF THE GROUP ANSWERED JUST 52 PERCENT CORRECTLY, AND MOST SCORED FAR BELOW THAT. AN EXAM THAT PRACTICING LAWYERS REGULARLY FAIL IS NOT A REASONABLE TEST OF MINIMUM COMPETENCE.

If all of that is not enough, the exam undermines the well-being of law students, who face the prospect of an unreasonable and ineffective exam knowing that it bears no relationship to the work they will do in practice. And this ill-suited bar exam has constrained the diversity of our profession. It creates a barrier for those with disabilities and produces disparate outcomes by race. White test-takers pass in significantly higher percentages than every other racial category, an issue that has been known but ignored for decades. Whatever the explanation for the exam's disparate racial impact (differential access to resources and the presence of stereotype threat seem likely contributors), retaining an exam that disproportionately excludes candidates of color, while failing to test the knowledge and skills actually needed by attorneys, is totally unacceptable.

Although NCBE has promised to address some of these concerns in a modified exam, a written exam will always fall short in testing many critical skills of lawyering. It is time to explore additional pathways that allow applicants to prove their competence by actually *doing* legal work, with access to the sources and materials used in practice. ▲

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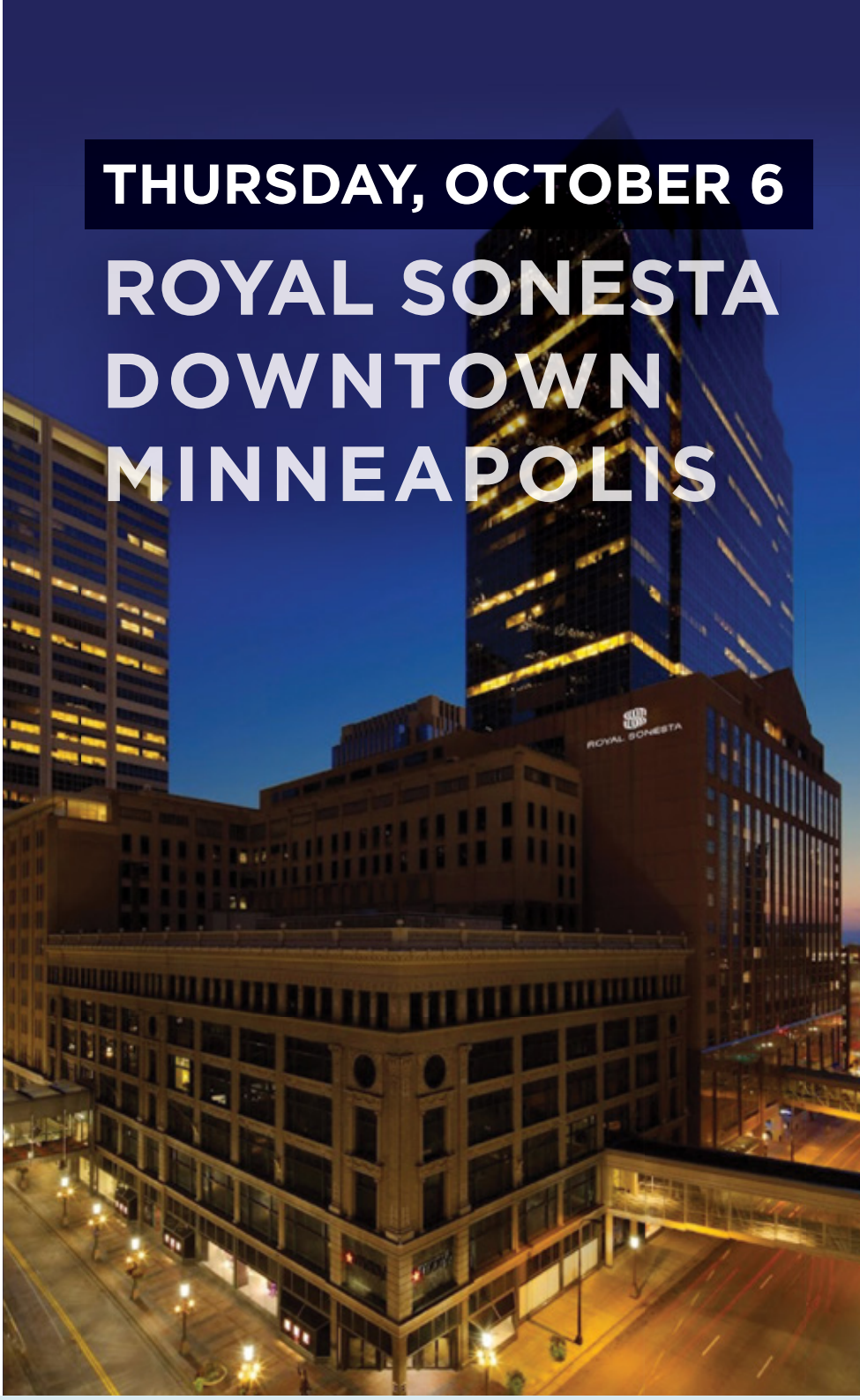

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'A reliable, valid, and objective measure'

Continued from page 13

One downside of the MBE is that the scope of the material tested is notably deep. In practice, lawyers must know the rules and the exceptions to the rules, and they must be able to recognize when they need to conduct more research. The MBE demands much deeper knowledge of the subjects covered than is required of many lawyers in practice. The NextGen Bar Exam is being designed to decrease the depth of tested material.

The MPT (Multistate Performance Test) portion of the UBE counts for 20 percent of the total points and equalizes all examinees by giving them the law in cases, statutes, and other guidance, and the facts in a client file containing depositions, police reports, or other documents. All examinees are measured on their ability to synthesize the law and cull through a client file to demonstrate reading comprehension, legal analysis, and legal writing. The MPT is a fair assessment of minimum competence, and the NextGen Bar Exam will incorporate more assessments that equalize examinee resources and focus on testing skills rather than memorization.

The final part of the UBE, the MEE (Multistate Essay Exam), is the most problematic in terms of fairness and objectivity. The MEE counts for 30 percent of the total points and consists of six essays on 12 subject categories. This is too much and not reflective of the requirements of law practice. A new lawyer would require on-the-job training to be considered competent to practice law effectively and ethically in all these areas. Also, there is an inherent subjectivity in grading the MEE that is more pronounced than in MPT grading. The MPT asks examinee to address specific issues and limits them to the law provided, but the MEE prompts can be open-ended, and the examinee is not limited by any law. A competent and prepared examinee may read an MEE and not identify all the issues (or identify too many). Yet the point sheet for scoring the MEE is rigid and only awards points for specific issues. Fortunately, the NextGen Bar Exam will address most of these concerns, as the entire NextGen Bar Exam will cover eight foundational subject categories instead of 12 and the pure essay format of the MEE will be eliminated.

The UBE is not perfect, but it is still a reliable, valid, and objective measure of minimum competence. Those who oppose the UBE argue that it is resource- and time-prohibitive for an applicant to successfully prepare for the exam, resulting in disparate outcomes for certain examinees. This, too, is an insufficient reason to eliminate the bar exam.

Despite the resources and time required to prepare for and pass the bar exam, thousands of examinees pass every year. Certain factors make it more likely for an applicant to pass the bar exam. The most crucial factors in determining bar passage are, not surprisingly, knowledge and skills. The extent of knowledge and skills an examinee can attain during the bar study period is correlated with their level of knowledge and skills when they begin studying, and the resources and time they have available to build their knowledge and skills. Further, the level of knowledge and skills an examinee has when they begin studying is correlated with how well they did in their bar-tested law school courses.

Whether an examinee does well in bar-tested law school courses is correlated with an examinee's LSAT score, another exam some rally against. Yet the LSAT tests the very same skills that are core to law school success and bar passage, such as reading comprehension, logic, and critical thinking. To the extent that educational, social, and economic experiences yield lower LSAT scores and are clustered more frequently within various groups of people, the bar exam, which tests the same skills, will reflect the same disparity of experiences among people. This need not be the case, though.

There is not clear evidence of the cause of this disparity. Perhaps the disparity has to do with a law student's experience or their experience before law school. Instead of eliminating the bar exam, law schools can and should be doing more to prepare their students for the bar exam while in law school and to reduce the resource and time deficits that examinees experience in preparing for the bar exam. This may include reducing tuition costs; administering assessments in law school that better simulate the timed, closed-book nature of the bar exam; offering bar prep classes during law school; providing discounted commercial bar prep courses; or offering free bar tutoring services.

An objective measure like the UBE, or its successor the NextGen Bar Exam, also provides necessary accountability to the nearly 200 ABA-accredited law schools in this country and protection to consumers of legal education. Law schools have an interest in remaining ABA-accredited, and objective metrics like bar passage ensure that law schools admit and prepare students for competent law practice.

Indeed, the first gatekeepers to the practice of law in most jurisdictions are the law schools. So long as the law schools remain susceptible to the free market economy, their financial viability will necessarily reign supreme. For the sake of our profession, though, we must insist that competency to practice law continues to reign supreme. Right now, the UBE is holding the line and the NextGen Bar Exam is expected to do the same as well as to address the shortcomings of the UBE. Until we have a more reliable, fair, and objective alternative that measures minimum competence, we need to have a bar exam. ▲

DENA SONBOL has served as dean of academic excellence and professor of law at Mitchell Hamline School of Law (MHSOL) since 2017. In her role, she prepares students to pass the bar exam in all 50 jurisdictions. Prior to joining the faculty at MHSOL, she was a legal analysis and writing professor for five years at Southern University Law Center, a historically Black university in Baton Rouge, Louisiana. She is a magna cum laude graduate of Hamline University School of Law and practiced real estate law in the Minneapolis office of Stinson LLP prior to joining academia.

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'An inadequate measure of minimum competence'

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TYLER WESSMAN-CONROY graduated magna cum laude from the University of St. Thomas School of Law and sat for the Minnesota bar exam in July 2022. He and his wife have two (soon to be three) young children. Prior to law school, Tyler graduated from St. John's University and went on to earn a Master of Divinity degree from Boston College and taught theology, religion, and social ethics at the high-school level for seven years. After becoming licensed as an attorney, Tyler plans to practice at Conroy Law Office, Ltd., in Monticello, Minnesota.

I had a job. I had others helping to support our family. I had skilled professional mentorship. I have a job waiting for me after law school that, if I do not pass the exam on the first try, will still be waiting for me while I take the bar exam again.

The bar exam is undoubtedly high stakes. I was fortunate that the stakes were not as high for me as they were for many of my law school classmates and fellow examinees who were equally as competent but who may not have had as much privilege. And yet, despite that, taking the bar exam was still one of the most difficult things I have ever experienced.

Physically and mentally, preparing for the bar exam was the unhealthiest two-three months of my life for numerous reasons. The lack of movement and exercise. The constant guilt that I should not be playing with my children (ages six and three) because my time would be better spent reading outlines and working through flash cards. The uncertainty about my future and the constant pressure of knowing that it was all riding on a two-day exam. The stress and anxiety of my fellow examinees on the day of the bar exam was palpable.

The bar exam purports to be a test of *minimum* competency. Yet the volume of information, the depth with which a successful examinee must memorize, understand, and analyze the information, and the unrealistic time constraints under which the exam is administered are not at all reflective of minimum competence or the actual practice of law.

I studied as hard as I could for the bar exam, within my circumstances, and completed nearly all the program materials provided by my commercial bar preparation company. If I or other examinees mastered 85 percent of the material in a particular area of law (some of which we may never practice in) and the National Conference of Bar Examiners tests heavily in the remaining 15 percent, we may not be considered minimally competent. Our efforts during law school and in preparing for the bar exam are meaningless in terms of licensure. Our futures as practicing attorneys depend entirely on whether we are deemed minimally competent during a two-day exam taken in an intensely controlled environment and under unreasonable time constraints, and whether we have the extensive resources (time, money, and mental and emotional support) needed to prepare for the exam.

In theology there exists the notion of sacramentality—that we use ritual, tangible experiences to encounter something greater and to become transformed through that encounter. In the practice of law, there should be a process or experience that transforms us to be ready to undertake the great privilege of representing clients' legal rights and interests. Working hard and sacrificing to achieve a purpose is important for us as humans and lawyers. But when hard work and sacrifice are accompanied by barriers and gatekeeping measures that exclude qualified lawyers of all backgrounds from the practice of law, they no longer serve their purpose.

Every subject and skill tested on the bar exam can be evaluated in another way. Successful passage of the bar exam does not tell me whether someone is capable of practicing law. It tells me only that someone is adept at memorization and test-taking. And it risks excluding individuals who would be excellent attorneys simply because they are not.

As a former teacher, I understand pedagogy and how to help people learn. Much of my law school experience and much of my preparation for the bar exam failed to prepare me for the practice of law. I have worked with my father-in-law, a lawyer, for a little over a year now. I have learned more about the practice of law by shadowing him and being present in his law office.

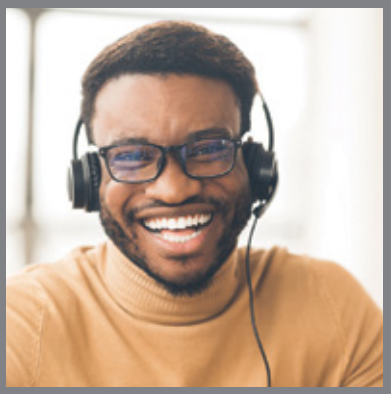
An apprenticeship model that involves learning through experience and having trustworthy attorneys attest to my abilities after reviewing my legal work product and witnessing my interactions with clients is a much more accurate assessment of my competence and fitness to practice law.

I am also in full support of subject-based competency exams—shorter exams that objectively test a lawyer's competence in a particular area or areas of the law in which the lawyer intends to practice.

After I completed the bar exam in July, I reached out to several attorneys who had been mentors to me in law school, and I asked them how they felt after finishing the exam. They all said that they walked out of the exam feeling terrible about themselves and uncertain about how they had performed. Not one said they walked out of the exam feeling competent or confident that they had passed.

These people were all high-achieving students in law school who are now highly successful and competent attorneys. That was telling to me. If the bar exam was a test of minimum competency, most of these attorneys should have left the exam tossing their hats in the air like Mary Tyler Moore and feeling hopeful and accomplished.

I am glad to see that Minnesota is evaluating the efficacy of the bar exam and considering alternative paths to attorney licensure. ▲



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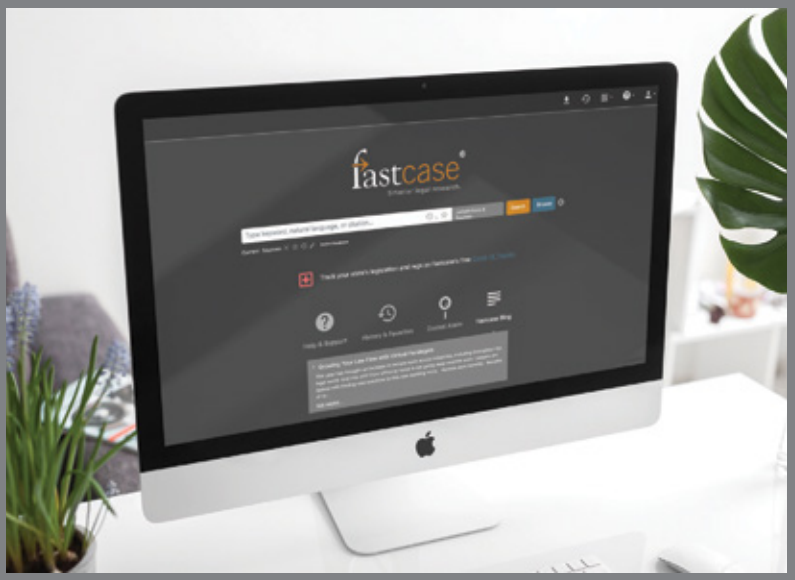

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GETTING PAID WITH CRYPTO

The legal ethics issues you need to know

BY ARAM DESTEIAN AND TIMOTHY GREENFIELD

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The term *cryptocurrency* often evokes images of a shadowy, mysterious, digital currency used on the black market for dark web transactions. Even as making payments with digital assets gains more acceptance, "cryptocurrency" still evokes widespread skepticism amidst very real (and to many investors, very costly) fluctuations in value. Even the most widely used[1] forms of cryptocurrency, Bitcoin and Ethereum, can experience overall value losses of nearly $1 trillion in one month,[2] adding to lingering concerns about the overall financial downside of the asset as an investment vehicle.

Take the seemingly apocryphal story of computer programmer Laszlo Hanyecz, who in May 2010 agreed to pay 10,000 Bitcoins in exchange for two pizzas.[3] At the time, 1 Bitcoin was worth pennies, meaning the purchase equated to roughly $41. Over time, those pizzas became much more expensive (and valuable)—$3.24 million in November 2014, $71,700,000 in November 2017, $140,250,000 in November 2020, and $629,420,000 in November 2021.[4] But the cost of Laszlo's pizzas underwent an even wilder ride in 2022. Between March 7 and March 28, Laszlo's pizzas would've fluctuated between $390,788,600 and $475,751,200. Two months later—between May and June—the pizzas become a relative bargain as their value drops from $377,190,000 to $295,205,240.

Volatility is, for lack of a better term, baked into any cryptocurrency conversion to U.S. dollars. A fee paid in Bitcoin or other digital currency could be worth significantly different amounts over a short period of time. Attorneys and firms considering whether to accept cryptocurrency as payment should keep in mind the fluctuation of value tied to these digital assets.

This naturally raises significant ethical considerations for any firm or attorney confronting this decision. As these solely "digital coins" continue their ascendency into the global economy, any measures put in place to transact, convert, or store a cryptocurrency asset by a firm must at present be made without formal guidance from the Office of Lawyers Professional Responsibility, Lawyers Professional Responsibility Board, or the Minnesota Supreme Court.

In an era of uncertainty—both regarding its valuation and the regulatory environment in which it operates—attorneys are right to be wary about accepting cryptocurrency as a form of payment for legal services. The ethical risks with accepting cryptocurrency payments pose significant and unavoidable challenges. However, a negotiated and reasonable fee agreement can set forth the terms of immediate conversion of the digital asset into U.S. dollars to limit the attorney's ethical risk.

WHAT IS CRYPTO?

Cryptocurrency is a virtual medium of exchange that exists only electronically.[5] Cryptocurrency is not money, and it is not issued, backed, or supervised by any government. Simply put, Bitcoin and other digital assets only have value because people are willing to pay for them.

Unlike traditional banking, the cryptocurrency system operates peer-to-peer, without an intermediary, and uses the digital asset to represent value. Cryptocurrency assets rely on digital encryption technology to record transactions on a distributed, virtual ledger known as a blockchain.[6] Cryptocurrency offers instantaneous payment with no transaction fees, near-anonymity, and ease of sending money across national borders[7]—but with no central bank, no government, and no FDIC-insured equivalent to ensure against loss. In addition, most virtual currency is stored on digital wallets on potentially risky online platforms.[8] As acceptance of cryptocurrency becomes more widespread, clients may prefer the advantages these assets provide over traditional methods of payment.

As evidenced by President Biden's March 2022 executive order,[9] proposed rules by the Securities and Exchange Commission,[10] and newly proposed bipartisan Congressional legislation,[11] there is no lack of interest in creating a framework for regulating digital assets.[12] It is too early for comprehensive review of these proposals' impact. In the meantime, the most important government guidance on these assets is the IRS's classification of cryptocurrency as property, which requires sellers of cryptocurrency to report gains and losses on their tax return.[13]

THE VALUE OF CRYPTOCURRENCY ASSETS IS DERIVED SOLELY FROM WHAT PEOPLE ARE WILLING TO ACCEPT AS PAYMENT. THIS CREATES THE CONDITIONS FOR WHICH CRYPTOCURRENCIES ARE WELL-KNOWN: MASSIVE VOLATILITY AS AN INVESTMENT VEHICLE, SOMETIMES RESULTING IN INTRADAY GAINS OR LOSSES OF 10 TO 20 PERCENT.

THE WILD RIDE: A HISTORY OF CRYPTOCURRENCY'S VOLATILITY

Bitcoin and other cryptocurrency assets share many of the same characteristics of legal currency.[14] Unlike fiat currencies such as the U.S. dollar, which derive their value by government decree, or commodities such as gold and silver, which have intrinsic value, the value of cryptocurrency assets is derived solely from what people are willing to accept as payment. This creates the conditions for which cryptocurrencies are well-known: massive volatility as an investment vehicle, sometimes resulting in intraday gains or losses of 10 to 20 percent.[15]

Despite its meteoric rise in value leaving early adopters well off, Bitcoin and other cryptocurrencies still experience *considerable* shifts in their valuation. For example:

- The first Bitcoin crash in 2018 resulted in a loss of nearly $700 billion of total capitalization after its value plummeted by 80 percent.[16]
- Throughout 2020 and 2021, Bitcoin and other digital assets saw a surge of popular interest, leading to Bitcoin's market capitalization exceeding $2.4 trillion by May 2021 and reaching its-time USD high of $68,990.90 in November 2021. However, the bust began to follow the boom.
- Beginning in early 2022, the first Bitcoin crash of the year caused Bitcoin to reach a low of $28,825.76 within the same 52-week period as its all-time high, accounting for over $1 trillion in lost value, a sum greater than the infamous 1929 Black Friday crash and a value loss of over 60 percent.[17] But the worst was yet to come.
- After failures in the cryptocurrency lending industry[18] and amidst global economic uncertainty, the global cryptocurrency marketplace cratered in the summer of 2022, leading to a "crypto winter."[19] Nearly five years of gains were erased, and now the total capitalization of Bitcoin, Ethereum, and other assets trade hovers around $1 trillion, down sharply from its peak value of $3 trillion in November 2021.[20] At its lowest in June 2022, Bitcoin traded around $17,800.[21] Many of the "retail" investors in cryptocurrency suffered significant losses, particularly if they began investing during the pandemic.[22]
- Stablecoins (like Terra, Luna, and Tether) were meant to be a more reliable means of exchange with their price pegged to the U.S. dollar.[23] However, these stablecoins were not backed by cash, treasuries, or any other traditional assets, and were algorithmically tied to each other—causing a devastating knock-on effect once their values cratered.[24]

In just one year, predictions of both a burst bubble and rapid adoption have come to fruition. These wild swings and public regulatory skepticism only seem to embolden concerns held by market observers that cryptocurrency assets amount to a type of Ponzi scheme or that the price of Bitcoin will fall to or below $10,000.[25] Whatever its trajectory, the volatility should lead attorneys and firms to think carefully about how and whether the digital asset can reasonably represent the value of legal services.

WHAT ARE THE LEGAL ETHICS ISSUES?

Any Minnesota attorney considering accepting payment in cryptocurrency must consider the ethical ramifications of receiving a payment that could be quite different in value from the time the fee is quoted to the time the bill is invoiced. Transactions with fluctuating value for legal services undoubtedly create ethical uncertainty, since any challenge to a fee agreement under the Minnesota Rules of Professional Conduct risks potential discipline by the Office of Lawyers Professional Responsibility.

Issue 1: Rule 1.5, MRPC, prohibits an attorney from making an agreement for, or charging, an unreasonable fee, and imposes stringent requirements for flat-fee agreements.

Because of cryptocurrency's seemingly inherent volatility, some may question whether a fee paid in cryptocurrency can be considered "reasonable" if wild swings in the valuation occur. An arrangement exchanging Bitcoin or other digital coins for legal

services could mean the client is paying $200 per hour in one month and $500 the next. Such variations in value could result in client complaints that the fee charged is unreasonable. Conversely, if the market value of the digital currency used as a payment quickly fell, the attorney could feel underpaid for their services.[26]

If an attorney wishes to accept cryptocurrency as payment, these risks must be addressed in the fee agreement. A fee or retainer agreement contemplating the use of cryptocurrency as payment must address the timing of converting the cryptocurrency asset, who pays transaction fees, and other allocations of risk between the attorney and client. Most importantly, there should be no ambiguity regarding who holds the risk of gain or loss. Like any fee agreement, the exchange rate from cryptocurrency assets into U.S. dollars can be readily negotiated, but the end result must not be unreasonable or unconscionable.

While Rule 1.5 does not specifically address payment with virtual currencies, the rule does apply to all forms of payment between attorney and client for legal services. Rule 1.5(b) requires the attorney to communicate "the basis or rate of the fee... to the client" in writing.

Rule 1.5(b)(1) addresses flat-fee arrangements. Here, cryptocurrency could be the method of flat-fee payment if "agreed to in advance in a written fee agreement signed by the client." The virtual asset would then be treated as the lawyer's property upon payment, but only if the fee agreement complies with Rule 1.5(b)(1). However, because any flat fee is refundable, payment in a volatile asset like cryptocurrency creates considerable ambiguity (and therefore risk) in determining "the unearned portion of the fee" to be refunded (to the extent a refund of any fees becomes required). Until the volatile and uneven cryptocurrency market cools down, the asset should only be considered a method of paying legal fees already incurred and agreed to in U.S. dollars, minimizing the risk to a firm's billing cycle and compliance with trust account rules.

Issue 2: Does accepting virtual currency trigger the requirements of Rule 1.8(a), MRPC, which governs business transactions with clients?

Because cryptocurrency is considered property, any transaction where the attorney's fee is paid with cryptocurrency triggers the requirements of Minnesota Rule of Professional Conduct 1.8(a). That rule generally prohibits counsel from entering business transactions with clients or knowingly acquiring a pecuniary interest adverse to a client. Further, while Rule 1.8 normally does not apply to ordinary fee arrangements, its requirements must be met when a lawyer accepts "other nonmonetary property as payment of all or part of a fee." Thus, given the IRS's classification of cryptocurrency as property, any payment using cryptocurrency must be treated as an in-kind payment just as if the fee was being paid by exchange of a tractor, snowmobile, or radio advertising. While this method of payment generally raises "no special concerns" with the OLPR, the rules are clear that such payments implicate Rule 1.8(a) and require special consideration.[27]

Under Rule 1.8(a), before entering into a "business transaction" with a client, a lawyer must (1) provide the client written disclosure of the terms; (2) provide the client an opportunity to confer with independent counsel; and (3) obtain written, informed consent from the client to the agreement. Rule 1.8(a) generally requires that the transaction itself be fair to the client—something that wild swings in the value of a cryptocurrency asset might call into question. Rule 1.8(a) also requires that the transaction's essential terms be communicated to the client in writing in a manner that can be reasonably understood—something that may be a challenge with an ever-changing regulatory landscape. Thus, attorneys should ensure they meet the requirements of 1.8(a) by using a clear and well-drafted retainer agreement before proceeding with any transaction in which they accept cryptocurrency as payment for legal services.

Issue 3: Does accepting virtual currency as payment for legal services comply with the requirements of Rule 1.15, MRPC?

Minnesota Rule of Professional Conduct 1.15 is critically important when considering whether to accept cryptocurrency as a form of payment for legal services. To begin, because of its status as property, cryptocurrency cannot be directly deposited into banks and therefore cannot be held in a client trust account used by Minnesota lawyers under Rule 1.15. Client trust accounts must be established at eligible financial institutions—"banks or savings and loan associations authorized by federal or state law to do business in Minnesota." Thus, unless the cryptocurrency asset is immediately converted into U.S. dollars and subsequently held in a client trust account, the asset must be stored as property and therefore cannot be accepted as an advanced payment of fees or costs. On this issue the rules are abundantly clear: Any attorney who accepts cryptocurrency for payment of advanced fees and costs will necessarily violate Rule 1.15(a), which requires client funds held by a lawyer to be held in a trust account.

The only way an attorney can "hold" a client's cryptocurrency assets is under a non-monetary arrangement—like being entrusted with a client's files, a work of art, or some other piece of tangible personal property. However, agreeing to hold a client's digital assets requires technological and financial expertise to ensure the safekeeping of the property. Beyond that, the risk of theft is high and consequently increases an attorney's exposure to personal liability.

This is because cryptocurrency transactions are unregulated, anonymous, and irreversible, making cryptocurrency a regular target for digital fraud, misappropriation, and theft. Losses from scams and theft on cryptocurrency trading platforms totaled over $10 billion by 2021, and widely publicized hacks, thefts, and misappropriations continue to plague those holding cryptocurrency assets.[28] While security systems have improved, cryptocurrency exchanges run on open, unregulated infrastructure, sometimes exempted from traditional regulations affecting banks and conventional money service businesses. Operating without a regulatory safety net is precarious enough, but the growing sophistication in attacks targeting cryptocurrency exchanges and wallets should give attorneys pause before accepting and holding a digital asset. Thus, while there is no *per se* ban on an attorney holding a digital asset for a client, such an agreement would expose the attorney to substantial risk given the legal and ethical risks associated with the loss of client property.[29]

EXISTING GUIDANCE FROM OTHER JURISDICTIONS

Minnesota is among many states that have not issued direct ethics guidance on accepting cryptocurrency as payment for legal services. Some jurisdictions, like Virginia and California, are considering or have issued draft opinions on the issue. Other states appear likely to consider further guidance after the May 2022 crash or federal regulation. However, four bar associations

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have weighed in with their own ethical guidance about whether and how their attorneys can accept cryptocurrency as payment. Generally, the opinions issued in the infancy of cryptocurrency's acceptance seem to impose more restrictive obligations upon the attorney and firm.

Nebraska: Ethics Advisory Opinion 17-03 (September 2017)

A Nebraska attorney may accept Bitcoin and other cryptocurrencies as payment for legal services but must assure the fee charged remains reasonable.[30] Nebraska's opinion states that lawyers may accept payments in digital currencies but must immediately convert them into U.S. dollars. Any refund of monies is also made in U.S. dollars and not in digital currency. The rate of conversion into U.S. dollars must be based on "objective market rates immediately upon receipt" but the timing of "immediately upon receipt" is not clearly defined.[31]

North Carolina: Formal Opinion 5 (October 2019)

Provided they meet the requirements of Rule 1.8(a), North Carolina attorneys can take virtual currency as a flat fee for legal services, but not as an advance payment, settlement, or as "entrusted funds to be billed against, or held for the benefit of the lawyer, the client or any third party."[32] Because of the risk inherent in cryptocurrency—the value of virtual currencies "fluctuates significantly and unpredictably from day to day"—there should also be an agreement between the lawyer and client on when the valuation of the virtual currency is determined.[33]

New York City: Formal Opinion 2019-5 (July 2019)

The New York City Bar Association requires attorneys who accept cryptocurrency as payment to comply with Rule 1.8(a) because of "differing interests in negotiating the fee agreement" between attorney and client once cryptocurrency is involved.[34] Rule 1.8(a) applies because of the "drastic market fluctuations" that might affect an attorney's interest in "conducting the representation so as to maximize the value of the client's payment" and "compromise the lawyer's professional judgment."[35]

District of Columbia: Ethics Opinion 378 (June 2020)

DC lawyers can accept cryptocurrency as payment for legal services as long as the fee agreement is fair and reasonable, and the lawyer can safeguard the virtual property.[36] While the DC bar ethics rules require lawyers' fees to be reasonable, they don't preclude accepting "potentially volatile assets" as payment.[37] Lawyers who accept an advance retainer in cryptocurrency are subject to Rule 1.8(a), which requires a reasonable agreement with terms that have been explained in writing and that's fair to the client.[38]

CHARTING A CAUTIOUS COURSE: ACCEPTING CRYPTOCURRENCY AS PAYMENT

If an asset is worth what people are willing to pay for it, cryptocurrency and other forms of digital assets are here to stay. Before accepting any digital-only asset as payment for legal services, attorneys should create and implement plans to (1) mitigate the volatility risk and follow the requisite ethical obligations to ensure that the risk is shifted *away* from the client; (2) utilize properly regulated and licensed cryptocurrency exchanges; (3) establish a reasonable but nearly instantaneous time of conversion of the asset into U.S. dollars or some other legal tender; and (4) discuss these issues with the client at the outset as well as in the attorney's engagement letter and written fee agreements. Of note, issues related to fee agreements are a major contributing source of discipline imposed by the OLPR, so accepting payment in this technologically divergent method should give every practitioner pause and occasion careful scrutiny of their fee agreements. ▲

NOTES

[1] Some virtual currencies, like Dogecoin, were created as a 'meme' but still experienced rapid growth in value over the last decade. *See* Caitlin Ostroff & Caitlin McCabe, *What Is Dogecoin, How to Say It, and Why It's No Longer a Joke,* The Wall Street Journal, *https://www.wsj.com/articles/what-is-dogecoin-how-to-say-it-and-why-its-no-longer-a-joke-thanks-elon-11612820776* (last updated 6/2/2021).

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Understanding the Veterans Restorative Justice Act

Protecting our communities by serving our veterans

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Published studies spanning over two decades show that sentencing schemes such as the VRJA yield savings of $2,000 to $13,000 per military veteran criminal defendant.

Rodger Brodin is a Vietnam-era Marine Corps veteran and the sculptor responsible for "A Monument to the Living." The statue—a green man wearing a utility uniform, boots, combat gear, and a bandolier of ammunition—stands with shoulders shrugged and palms open with splayed fingers. The plaque at the base of the statute reads, "Why do you forget us?" The statue is a constant reminder to the politicians at the Minnesota State Capitol that they have a responsibility toward military members, especially those who fight in America's military campaigns.

With that promise in mind, the Minnesota Legislature passed the Veterans Restorative Justice Act (VRJA) on June 30, 2021. Gov. Tim Walz later signed the VRJA into law, effective August 1, 2021.[1] Its enactment followed years of effort from the Veterans Defense Project and other organizations lobbying at the State Capitol.[2] The VRJA's passage shows that our state can protect Minnesota communities when a particularly vulnerable population is provided with resources to address homelessness, suicide, mental health, and chemical dependency needs.[3]

Military veterans charged with crimes are much less likely to commit new crimes if they have completed ordered programs that are recommended through a validated risk-need assessment while given a legal incentive to do so.[4] As if the proven decrease in recidivism is not enough reason for the VRJA, studies also show the cost-effectiveness as well as the improved control over growing court calendars for criminal justice systems that implement diversion programs such as the VRJA.[5]

Pretrial diversion programs similar to the VJRA provide better outcomes for participants, including less time spent incarcerated, avoidance of criminal convictions that otherwise would make finding gainful employment difficult, and improved substance use and mental health outcomes.[6] This means fewer people are incarcerated and post-adjudicative resources such as probationary supervision and prisons are not as frequently used. Published studies spanning over two decades show that sentencing schemes such as the VRJA yield savings of $2,000 to $13,000 per military veteran criminal defendant.[7]

WHY WE NEED VRJA: THE LESSONS OF VIETNAM

Until the last decade or so, our nation has never adequately addressed the mental health of veterans after they complete their military service. Returning military veterans often deal with the demons of service in self-destructive, reckless, and vicious ways. That behavior echoes through society, destroying the lives of veterans, their families, and often the communities from which both came.[8] While most of our veterans return from their service to become immediate assets to their communities, many find themselves suffering from invisible injuries. Left untreated, some of these veterans will find comfort in alcohol and drug abuse. Service-related trauma and resulting self-destructive behavior often manifest in criminal behavior; the veterans who suffer from this trauma historically found themselves demonized and discarded by the criminal justice system and ultimately exiled into prisons and mental hospitals, or simply rendered homeless and destitute.[9] This struggle with mental and chemical health has been a recognized, publicly visible consequence of military service for many years yet has remained a taboo subject. Brockton Hunter, a Minneapolis criminal defense attorney and a founding member of the Veterans Defense Project, calls this phenomenon "a painful and inconvenient reminder of the true cost of war[ ]."[10]

The relationship between war and a postwar rise in criminality has become conventional wisdom.[11] Combat—and, in some instances, intense preparation for combat—can damage people physically and psychologically. Combatants, those who train for combat, and even the loved ones of combatants are subjected to and often compelled to engage in violence.[12] The physical injuries associated with war, including exposure to toxins and illicit drug use during combat, have been linked to postwar psychological and behavioral problems and ultimately to violent behavior. Concussions and other brain injuries suffered during battle were suspected of causing mental derangement and criminal behavior, including violent offenses, in some veterans of the American Civil War and World War I.[13]

But violent behavior doesn't stem only from physical injury. Directly witnessing and engaging in serious violence is psychologically distressing. Historically we have recognized these moral injuries as war-related trauma, often referred to as *battle fatigue*, *shell shock*, and *soldier's heart*.[14] When we train and condition people in the use of violence and then send them into war to perform unimaginable tasks, we should not be surprised when some bring their wars home with them and act out against their own communities.[15] But while the totality of research definitively links combat with physical and psychological injury that leads to criminal behavior, little research has been done to examine how best to curtail criminal behavior after military service.

Our country has endured an ongoing and staggering impact for our abandonment of the warfighters from the Vietnam War.[16] Almost 50 years after the end of the war, countless Vietnam-era veterans who were either drafted or volunteered remain incarcerated, homeless, and/or battling mental and chemical health issues.[17] Others chose suicide to end their suffering. Some scholars estimate that Vietnam-era veteran suicide deaths range as high as 150,000 to 200,000.[18] Among the 3.5 million Americans to serve in the Vietnam War, some estimates place the number of warfighters suffering from post-traumatic stress disorder (PTSD) at up to 1.5 million.[19] Studies show a direct correlation between combat exposure and violent acts and criminal propensity.[20] One estimate suggests that "the social cost of the increase in violence and crimes due to the Vietnam War was roughly $65 billion."[21]

The effects of the Vietnam generation of returning warfighters have also cost the rest of American civil society. Families have been destroyed. Jobs have been lost. Taxpayer-funded treatment arrived too late and made too little difference in helping those unfortunate souls. This is particularly appalling in light of what we know now: Veteran advocates see involvement in the criminal courts as opportunities for intervention before more serious offenses or consequences occur.

American society finds itself at the tail end of another set of major conflicts. Operation Iraqi Freedom officially ended on December 15, 2011. The War in Afghanistan ended officially on August 30, 2022. Unlike those conscripted into the Vietnam War, the warfighters of the United States' two longest-running military campaigns were not plucked from a draft.[22] Instead, the United States military sustained these wars with only a small volunteer military that recycled troops back into combat. A large portion of our active-duty service members have served at least two combat tours. Many have served more, especially those service members serving in the ground combat capacity. Our country has been engaged in our nation's two longest wars at the same time with the smallest per capita military force our nation has had since before World War II.[23]

The problem of the coming wave of criminality is compounded by battlefield injury. Warfighters are now dealing with traumatic brain injury (TBI) in greater numbers than in any previous American conflict. The nature of the wars in Iraq and Afghanistan and the enemy's prolific use of improvised explosive devices have made TBI more likely among combatants.[24] Moreover, improvements in body armor and battlefield medicine make surviving explosions more likely than in previous conflicts. TBI are particularly relevant in the criminal justice context because of the recently discovered causality between such injuries and impulsive violence.[25]

Warfighters must contend not only with the injuries they sustain, but the stigma attached to invisible physical and psychological injuries. American military culture demands mental and physical strength and stamina and, implicitly, an inherent denial of mental injury for fear of being rendered combat-ineffective. This mindset forces the injured to deny (to themselves and to anyone else) that they even are injured. And that mindset persists even after the injured leave military service.[26] When untreated, these injuries are addressed through self-medication using alcohol and drugs. This substance abuse will often lead to exacerbated symptoms, which in turn lead to self-destructive, reckless, or violent behavior.[27]

Knowing these things, a group of attorneys and veteran advocates saw the criminal justice system as an opportunity to provide direct intervention to troubled veterans. Their work started Minnesota's first veterans' treatment courts and ultimately, the passage of the VRJA, codified in Minnesota Statutes, section 609.1056.

THE VETERANS RESTORATIVE JUSTICE ACT AND VETERANS' TREATMENT COURTS

A veterans' treatment court is a problem-solving specialty court that involves heavy collaboration between judges, defense attorneys, prosecutors, probation officers, and treatment providers.[28] These practitioners form a team that addresses the risks posed by the veteran participant's previous criminal behavior through treatment planning and intense supervision in a courtroom setting.[29] The VRJA was conceived with the veterans treatment court model as the Act's inspiration.[30] The connection between the Act and the treatment courts is not difficult to grasp: Veterans treatment courts reduce recidivism among those served by them. This saves communities money and improves public safety.[31]

Veterans treatment courts, like other problem-solving courts, are a viable alternative to standard criminal courts in which a defendant is subjected to the standard adversarial series of court hearings. Instead of the litany of criminal court proceedings, participants in a veterans' treatment court are intensely supervised in a court setting that immediately addresses the changeable factors that contribute to criminal recidivism.[32] The veterans treatment court is not an adversarial proceeding where a defense attorney and prosecutor argue before a jurist. Instead, they partner with chemical and mental health treatment providers to establish a plan of rehabilitation, supervision, and monitoring.[33]

Participants in a treatment court are required to appear in court on at least a bi-weekly basis and attend recommended treatment sessions.[34] Participants must be subject to random substance abuse testing. Many find the increased rigor and structure a positive change, since it replicates the demands of a military schedule.[35] The result is a participant-centered, highly structured court with the goal of connecting veterans to veteran-centered holistic rehabilitation and eventual reintegration into the community. This alternative is proven to reduce criminal recidivism and substance abuse at a greater rate than simple incarceration.

This veterans' treatment court structure contains most of the salient insights on which the VRJA is based. The law was the product of 18 months of negotiations between criminal justice partners brought together in a working group hosted by the Veterans Defense Project. The working group consisted of prosecutors, public defenders, representatives from both the state and federal veterans' affairs departments, and veteran advocates.[36] That collaboration identified the needs presented by the effects of one's military service while recognizing that not every judicial district can establish a dedicated veterans treatment court.

The sentencing scheme established by the VRJA also provides a uniform approach to Minnesota's veterans treatment courts. Rep. Sandra Feist, DFL-New Brighton, encapsulated the working group's sentiment this way: "This isn't just something nice that we're doing for veterans....When [veterans] engage in the rehabilitative path, they are having multiple meetings per week, they are being forced to confront their past, they are forced to seek the treatment they need. It's a much harder path than just sitting in a jail cell."[37] Certainly, the interests of justice demand that a criminal defendant who acquired a criminal record due to a mental health condition or physical injury stemming from United States military service should be restored to the community of law-abiding citizens. And for the proponents of the VRJA, the VRJA represents the firm endorsement of a restorative post-plea, pre-adjudication model where successful completion of rehabilitative treatment and intensive monitoring is met with a dismissal of charges without a conviction entered.

MINNESOTA STATUTES, SECTION 609.1056

The VRJA provides a framework to Minnesota courts regarding the disposition of cases involving a veteran charged with a crime. The VRJA does not create a veterans treatment court in every county or jurisdiction in Minnesota, but it does present a post-plea option for veterans by allowing courts to offer access to programs and treatment for service-related conditions that contributed to the criminal offense. The VRJA further provides opportunities for criminal defendants to collaborate with a county veterans' service officer and the U.S. Department of Veterans Affairs to maximize benefits and services available to the criminally charged veteran. The VRJA provides uniformity to the veterans treatment courts currently operating in Minnesota. The VRJA is codified in Minnesota Statutes, section 609.1056. Veterans sentenced under the VRJA will receive the benefit of a stay of adjudication of sentence in exchange for participating in intensive supervision, treatment, aftercare, and other rehabilitative programming.

Eligibility

A veteran is eligible for the benefits of the VRJA when the veteran demonstrates through clear and convincing evidence a connection between their military service and the criminal offense. To be eligible, the veteran must release records of their service and/or professional evaluations supporting their claim that their military service and the criminal charge(s) are related.[38] On that record, the presiding judge must determine if the military veteran defendant "suffers from an applicable condition, whether that condition stems from service in the United States military, and whether the offense was committed as a result of the applicable condition."[39]

Subdivision 1(1) of Minn. Stat. §609.1056 defines "applicable condition" as "sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or a mental health condition." The applicable condition requirement is intentionally broad and recognizes that military service, even outside of combat exposure, can have severe negative impacts upon service members. One would not have difficulty understanding how a veteran who suffered from military sexual trauma, training accidents, or exposure to the revulsions of combat far outside of the combat zone would be traumatized.

But beyond the association between a military veteran's physical or mental injury and their criminal behavior, a veteran's eligibility under the VRJA rests upon the severity of the crime(s) charged. While serious crimes are excluded (for example, murder or criminal sexual conduct), a veteran charged with crimes as serious as domestic assault, burglary, felony driving while impaired, and drug crimes in the third degree can be eligible. Specifically, the VRJA makes a veteran charged with a severity level 7 crime or below eligible to receive a stay of adjudication per subdivision 1(2) of Minn. Stat. §609.1056. The VRJA recognizes that veterans who commit up to severity level 7 offenses are likely the veterans in the most need of immediate therapeutic intervention; without it, they pose the greatest and longest-lasting threat to public safety.

The VRJA also permits probationary sentences for crimes that would otherwise require an executed prison sentence. Under subdivision 4 of Minn. Stat. §609.1056, a military veteran defendant is eligible for a sentencing departure for offenses that are higher than severity level 7. But unlike the conditions required for eligibility, a veteran defendant must also demonstrate they have engaged in meaningful rehabilitative efforts in addition to and for the purposes of treating the applicable condition. This means the military veteran defendant and their attorney must find appropriate rehabilitative programming instead of waiting for the court to order it. The VRJA does not allow probationary sentences for crimes that require predatory offender registration.

Judicial determinations

The VRJA also provides for discrete decision points for judges. A judge conducting hearings under the VRJA must determine if a military veteran defendant is eligible for VRJA sentencing. The same judge must also determine whether the military veteran defendant has successfully completed the necessary treatment, rehabilitation, aftercare, and all other conditions of probation such that the veteran defendant is no longer a threat to public safety. If a judge makes this determination, the charge(s) against the defendant are dismissed.

Unlike many current veterans' treatment courts in Minnesota, the VRJA requires the court to determine eligibility rather than the prosecutor. Information for that determination is presented in open court through testimony and evidence, like a sentencing hearing for criminal defendants seeking mitigation from a statutorily prescribed punishment. In veterans treatment courts where the prosecutor acts as a gatekeeper, often the gatekeeping function has no stringent guidelines for admission. Uninformed and ill-trained prosecutors sometimes defer to their assessment of a veteran's chances of success and rehabilitation instead of an assessment of the veteran's likelihood to reoffend and need for rehabilitation and treatment. Some prosecutors will arbitrarily defer to less serious offenses as a benchmark for eligibility.

A veteran is eligible for the benefits of the VRJA when the veteran demonstrates through clear and convincing evidence a connection between their military service and the criminal offense.

Sometimes, those same prosecutors base their criteria for eligibility upon what is politically palatable as the gauge for protecting public safety. The VRJA does away with that possibility by providing uniform guidance to judges and political insulation to the prosecutor engaged in that decision-making process. To be sure, the prosecutor still has input and can contest eligibility in a public hearing. The prosecutor also has input and can also challenge a veteran defendant's eligibility for dismissal of the charge after the probationary period has expired. But the judge remains the final arbiter for both eligibility and benefit.

The same justification and policy considerations that make the judge the better arbiter of eligibility also apply to the legal disposition of a veteran defendant's case. Putting the decision of dismissing criminal charges after completion of court-ordered conditions of probation in the purview of the court insulates both prosecutor and the process from political pressure. Indeed, shifting the otherwise traditional prosecution role to the judiciary acknowledges the responsibility that government has toward citizens who are sent to war. This ensures that the foreseeable effects of combat upon those who served are efficaciously addressed, regardless of public opinion.

Subdivision 3 of Minn. Stat. §609.1056 governs the hearing conducted at the end of the veteran defendant's supervision period. The sentencing court must conduct a hearing to entertain arguments supporting and opposing dismissal of the charges. As in the eligibility hearing, the court may entertain written submissions, testimony, and evidence. Subdivision 3(b) requires the victim(s) of the military veteran defendant's crime(s) to be notified of the hearing and their right to object to dismissal of the charges. The veteran defendant enjoys the burden of demonstrating with clear and convincing evidence that they (1) complied with the conditions set by the court; (2) completed court-ordered treatment; (3) do not pose a danger to the victims or any other people; (4) significantly benefited from court-ordered programming, such that dismissal of the charge(s) is in the interests of justice.

The VRJA also promulgates the factors necessary in determining the interests of justice. These factors include:

1. the defendant's completion and degree of participation in education, treatment, and rehabilitation as ordered by the court;
2. the defendant's progress in formal education;
3. the defendant's development of career potential;
4. the defendant's leadership and personal responsibility efforts;
5. the defendant's contribution of service in support of the community;
6. the level of harm to the community from the offense;
7. the level of harm to the victim from the offense (with the court's determination of harm guided by the factors for evaluating injury and loss contained in the applicable victim's rights provisions of chapter 611A); and
8. the statement of the victim, if any.

Note that the above eight factors are all necessary in the court's finding that the interests of justice have been met.

Should the court find that the interests of justice are not being met because the veteran defendant has not met the clear and convincing evidentiary standard, the court may then adjudicate guilt and impose a sentence as the court deems fair and just. If the veteran defendant has proven that dismissal is warranted, the court shall discharge and dismiss the criminal charges.

FREQUENTLY ASKED QUESTIONS

How does the VRJA define "member of the United States military?"

The VRJA is designed for a "defendant who was, or currently is, a member of the United States military..."[40] The VRJA requires the defendant to release records related to the defendant's service in the United States military. The implication, therefore, is that a member of the United States military is one who has served in the United States military, regardless of discharge status, length of service, deployment status, or whether service is with the National Guard or reserve components. The VDP Working Group that designed the initial language of the VRJA intended to cast the widest possible net for those who have served in the military.

Does the VRJA override the Trog factors?

State v. Trog[41] allows sentencing courts to impose a consequence for a criminal charge that is less than the recommendation from the Minnesota Sentencing Guidelines. District courts are permitted to depart from the sentencing guidelines when they determine the existence of substantial and compelling circumstances.[42] Subdivision 4 of Minn. Stat. §609.1056 allows a sentencing court to also impose a lesser sentence than that recommended under the same sentencing guidelines. Subdivision 4 further provides for a waiver of statutory mandatory minimum sentences. Any mitigated departure would require the sentencing court to find the same conditions exist for the military veteran defendant as the defendant seeking a stay of adjudication under the VRJA. The VDP Working Group intended for subdivision 4 to provide enough of a justification for a mitigated departure from the sentencing guidelines without additional *Trog* factors.

Is there a right to present testimony, cross examination, and exchange discovery for the eligibility and disposition hearings?

In a standard veterans treatment court, the court team (judge, defense attorney, prosecutor, Veterans Affairs representative, probation or community corrections representative) discuss each potential defendant's participation in veterans treatment court. This discussion necessarily addresses the defendant's eligibility, including any underlying mental health and physical injury diagnoses involved in the criminal accusations against the defendant. The team also discusses the potential treatments and therapies that could be offered should the defendant be allowed to participate in veterans treatment court. Assuming the defendant is allowed to participate in veterans treatment court, the team continually monitors the progress of that defendant as the defendant continues through treatment, aftercare, living situations, drug testing, employment, and any other programming and life goals imposed by the court. In some courts, the defendant is required to submit self-assessments periodically; the treatment court team reviews these assessments to gauge the defendant's continued transformation and reduction in likely recidivism. When the defendant is on the cusp of completing and graduating from treatment court, the team conducts a final assessment of the defendant's progress and accomplishments and determines whether graduation from treatment court is deserved.

The hearings promulgated by the VRJA are meant to emulate the processes conducted in veterans treatment court staffing meetings. Both hearings are meant to provide the same arguments and information to the judge that would be shared and discussed in a staffing meeting in veterans treatment court. Presumably, that will mean each party will be able to call witnesses and present evidence. This means that parties should be sharing the information with each other. It also means the court may allow for parties to cross-examine witnesses. Treatment providers and representatives from the Veterans Affairs Medical Center may be asked to provide information about the military veteran defendant's diagnoses and recommendations for rehabilitative programming. The point of each hearing is to convey as much information as practicable and necessary for the court to make a reasoned determination under the VRJA of the defendant's eligibility and, ultimately, if discharge and dismissal are merited. ▲

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NOTES

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LANDMARKS IN THE LAW

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Criminal Law
JUDICIAL LAW

Right to a public trial: Proper remedy for public trial violation during *Schwartz* hearing is remand for new hearing. A jury found appellant guilty of second-degree intentional murder, rejecting appellant's claim of self-defense. In an anonymous, post-trial questionnaire, one juror stated she informed others of the "*obligation* to retreat" she reported learning in permit-to-carry classes. Appellant moved for a *Schwartz* hearing for the district court to question the jurors about this extraneous information appellant argued could have prejudiced the jury. Due to the jurors' schedules, the court divided the hearing into two parts, with two jurors being questioned at an earlier date. The court ordered the first hearing closed to the public, to prevent the first two jurors' testimony from influencing those who would be questioned later. The court of appeals found appellant's right to a public trial was violated by closing the first hearing to the public and remanded the case to conduct a new *Schwartz* hearing to question the first two jurors in an open hearing.

The Supreme Court notes that it has never addressed whether the right to a public trial applies to a Schwartz hearing but assumes without deciding here that it does. The purpose of a *Schwartz* hearing is to build a record of past facts relevant to limited and discrete issues (that is, whether misconduct occurred during jury deliberations). It is also a standalone proceeding that can easily be separated from the rest of the trial. A *Schwartz* hearing, therefore, is similar to a pretrial suppression hearing for purposes of determining the appropriate remedy for a public trial violation. A violation of the right to a public trial during a suppression hearing is remedied by remanding for a new hearing, rather than granting a new trial.

Here, the public trial right violation affected the testimony of only two jurors. Thus, on remand, only these two jurors need to be re-questioned, unless they testify in a manner that is materially different from how they testified in the original proceeding. In that case, the district court should conduct a new, public *Schwartz* hearing to re-question the remaining 10 jurors. ***State v. Jackson***, 977 N.W.2d 169 (Minn. 7/6/2022).

Guilty plea: No manifest injustice requiring withdrawal of guilty plea when defendant is not questioned about uncontested previous convictions. Appellant pleaded guilty to a complaint charging appellant with felony violation of a domestic abuse no-contact order (DANCO), in which the state alleged appellant was previously convicted of two separate violations of a DANCO. While entering his plea, he was not asked by anyone about his previous convictions. His plea was accepted, but before sentencing appellant moved to withdraw his guilty plea. The district court denied his motion, but the court of appeals reversed, because the factual basis failed to adequately support appellant's plea, since the plea colloquy made no reference to or acknowledgement of any prior DANCO violations.

In this case, the charge was enhanced from a gross misdemeanor to a felony because of appellant's prior convictions. The prior convictions are alleged in the complaint, and appellant had the opportunity to review the complaint and discuss his plea with his lawyer. Appellant also does not contest the validity of the prior convictions. Under these circumstances, appellant's failure to expressly acknowledge those convictions in the plea colloquy does not give rise to a manifest injustice. Therefore, withdrawal of his guilty plea was not required. This holding is narrow and the Supreme Court encourages district courts to ensure plea colloquies are thorough. ***State v. Epps***, A20-1151, 2022 WL 2709436 (Minn. 7/13/2022).

Accomplice after the fact: The statutory maximum sentence for being an accomplice after the fact when the principal offender is subject to life imprisonment is more than 20 years. Appellant pleaded guilty to aiding an offender to avoid arrest and being an accomplice after the fact for helping her husband and son hide evidence. Her husband and son were indicted for first-degree premeditated murder,

so appellant acknowledged in her plea petition she could be sentenced to "imprisonment for one half of a life sentence." The district court sentenced appellant to 48 months for her accomplice-after-the-fact conviction. The court of appeals affirmed. Appellant argues the district court did not have authority to sentence her, because the statutory maximum penalty for being an accomplice after the fact—one-half of the statutory maximum penalty for the principal offense—cannot be determined when the principal crime is first-degree murder, an offense punishable by an indeterminate period of time.

The accomplice-after-the-fact statute, Minn. Stat. §609.495, subd. 3, is clear that to determine the sentence for violating the statute, the court looks to the maximum sentence that the principal offender could receive and calculates one-half of that sentence. Here, the maximum sentence for the principal offense is life. While the length of a life sentence will vary among offenders, Minnesota's homicide sentencing scheme is such that a life sentence must be more than 40 years, the maximum sentence for second-degree murder. Thus, one-half of a life sentence must be more than 20 years. Appellant's sentence does not exceed this statutory maximum, so her sentence is authorized by law. ***State v. Miller***, A21-0221, 977 N.W.2d 592 (Minn. 7/13/2022).

■ **Cruel and unusual punishment: Mandatory life sentence without the possibility of parole is not unconstitutionally cruel for 21-year-old convicted of first-degree premeditated murder.** Appellant, 21 years old, appealed his conviction for first-degree premeditated murder as well as his mandatory sentence of life without the possibility of parole. The Supreme Court first finds sufficient circumstantial evidence to support his conviction. The Court then holds that a mandatory life sentence without the possibility of parole for a 21-year-old convicted of premeditated murder is not unconstitutionally cruel. The Legislature dictated that offenders convicted of first-degree premeditated murder be imprisoned for life without the possibility of parole. Statutory punishments are presumed constitutional and appellant has not met the heavy burden of showing that "our culture and laws emphatically and well-nigh universally reject" this sentence. *State v. Chambers*, 589 N.W.2d 466, 479 (Minn. 1999). Appellant also has not shown his punishment is disproportionate to his offense. He was not a juvenile at the time of the offense, the offense involved premeditation, and the offense was calculated and put many people's lives at risk. Thus, appellant's sentence is not unconstitutionally cruel. ***State v. Hassan***, A21-0453, 977 N.W.2d 633 (Minn. 7/13/2022).

■ **Privilege: Sexual assault counselor privilege does not permit disclosure of privileged records in a criminal proceeding without victim's consent.** Respondent was charged with second-degree criminal sexual conduct. He moved for an *in camera* review of records relating to the 15-year-old victim held by the Hope Coalition, a nonprofit organization supporting survivors of sexual assault that had a counselor present at a police interview of the victim. The district court granted respondent's motion. The coalition argued it had an absolute privilege under Minn. Stat. §595.02, subd. 1(k), to protect the victim's counseling records from disclosure. The district court denied the coalition's request for reconsideration. After the coalition failed to produce any records for *in camera* review, the district court granted respondent's request for a subpoena for the records. The district court denied the coalition's motion to quash the subpoena and the coalition filed a petition for writ of prohibition. The Minnesota Court of Appeals denied the coalition's petition.

Minn. Stat. §595.02, subd. 1(k), provides that "[s]exual assault counselors may not be allowed to disclose any opinion or information from or about the victim without the consent of the victim." The issue here centers on the meaning of "may not be allowed to disclose." The Supreme Court holds that the plain meaning of "may not" in this statute is prohibitive—that is, it is synonymous with "shall not." Thus, sexual abuse counselors are statutorily prohibited from disclosing privileged records in a criminal proceeding without the victim's consent, and a district court may not order otherwise.

The Court further concludes that respondent's rights to confront his accuser and to present a complete defense were not violated by nondisclosure of the privileged records. The state has a compelling interest in protecting the privacy of sexual assault victims, and the sexual assault counselor privilege is narrowly tailored to achieve that interest. The Court holds that respondent's constitutional rights do not outweigh the interest in protecting victims' privacy. Because the sexual assault counselor privilege cannot be pierced in criminal proceedings, the district court was unauthorized by law

when it denied the coalition's motion to quash the subpoena. The writ of prohibition requested by the coalition is issued. ***In re Hope Coalition***, A21-0880, 977 N.W.2d 651 (Minn. 7/13/2022).

Speedy trial: Trial delays caused by statewide covid-19 orders did not violate speedy trial rights. Appellant was charged with threats of violence and assault in January 2020. He demanded a speedy trial in February 2020. Covid-19 was declared a global pandemic in March 2020. As a result, the Supreme Court ordered that no new trials would begin. Per the Supreme Court's orders, appellant's trial was delayed twice, to June 2020. Prior to both delays, appellant reiterated his speedy trial demand. After a court trial, appellant was found guilty of both charges. He argues on appeal that his speedy trial right was violated.

To determine whether a defendant's speedy trial right has been violated, the court considers the *Barker* factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant.

A trial held more than 60 days after a speedy trial demand is considered presumptively prejudicial. Here, appellant's trial started 105 days after his first demand. As to the reason for the delay, the parties agree the delay was attributable to the state, but they disagree on the weight this factor should be assigned. The court holds that delays related to the judicial system's response to the pandemic do not weigh against the state. The court distinguishes between internal factors (such as court congestion), which do weigh against the state, and external factors (such as covid), which do not. As to the third *Barker* factor, appellant repeatedly demanded a speedy trial and opposed delays. The court rejects the state's suggestion that the reason *why* appellant demanded speedy trial is relevant to this factor. The frequency and force of appellant's demands weigh in his favor. The final factor, however, weighs against appellant. The court finds he was not unfairly prejudiced by the 45-day delay.

Balancing all four factors, the court concludes "the State brought [appellant] to trial quickly enough so as not to endanger the values that the right to a speedy trial protects." ***State v. Paige***, A20-1228, 2022 WL 2826253 (Minn. 7/20/2022).

Self-defense: Defendant may act in self-defense to resist a noninjurious offense. Appellant was charged with domestic assault after pulling his girlfriend from a doorway and causing her to fall in response to her attempt to prevent him from leaving. At his trial, the district court instructed the jury on self-defense, specifically instructing that appellant could use reasonable force to "resist an *assault* against the person." The jury found him guilty.

The Minnesota Court of Appeals holds that the district court's self-defense instruction was erroneous, "because the law of self-defense justifies a person to use force more broadly to resist any *offense* against the person," not only to resist an *assault*. The self-defense statute, Minn. Stat. §609.06, subd. 1(3), on its face does not limit self-defense to resisting only an assault or other offenses resulting in bodily harm. The Legislature included a bodily harm component in the use of deadly force statute that immediately follows and relates to the self-defense statute, evidencing that the Legislature's omission of a bodily harm prerequisite from the self-defense statute was intentional. This interpretation of self-defense is also consistent with legislative history and common law.

However, the court affirms appellant's conviction. Appellant failed to object to the instruction at trial, so the instruction is reviewed for plain error. The instruction was erroneous, but it was not plain, because this interpretation of the self-defense statute had not been clarified in case law at the time of the erroneous instruction. ***State v. Lampkin***, A20-0361, 2022 WL 2912048 (Minn. Ct. App. 7/25/2022).

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Employment & Labor Law
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Failure to bargain; unfair labor practices upheld. Charges of unfair labor practices by an employer for failing to bargain in good faith with his union and other improprieties in connection with an expiring collective bargaining agreement were upheld. The 8th Circuit Court of Appeals held that the National Labor Relations Board properly found the transgressions and imposed the proper remedies for them. ***NLRB v. Noah's Ark Processors, LLC***, 31 F.4th 1097 (8th Cir. 04/22/2022).

Injunction dismissed; no irreparable harm. A request

for injunctive relief by a union representing court reporters regarding the Judicial Branch's policy on preparation of *in forma pauperis* transcripts was rejected. The Minnesota Court of Appeals, affirming a Ramsey County District Court ruling, held that there was no "irreparable harm" to support injunctive relief and there was no impermissible judicial bias. ***Teamsters Local 320 v. Minnesota Judicial Branch***, 2022 WL 1298127 (8th Cir. 05/02/2022) (unpublished).

■ **Disability discrimination; accommodations offered.** A longtime University of Minnesota employee lost her disability discrimination claim under the Americans with Disabilities Act (ADA). Affirming a ruling of U.S. District Court Judge Patrick Schiltz, the 8th Circuit Court of Appeals held that the university provided ample accommodations for the employee, who refused to accept them. ***Ehlers v. University of Minnesota***, 34 F.4th 655 (8th Cir. 052/02/2022).

■ **Deputy sheriff; arbitration overcomes litigation.** The claims of a deputy Ramsey County sheriff that the county improperly sent "matching" deferred compensation funds to her rather than directly to the deferred comp fund was barred by an arbitration clause in the deputy's union collective bargaining agreement. Reversing a ruling of the Ramsey County District Court, the Minnesota Court of Appeals held that the court lacked subject-matter jurisdiction because the claims were subject to the arbitration clause in the labor contract with the county. ***Schaber v. Ramsey County***, 2022 WL 1616625 (8th Cir. 05/23/2022) (unpublished).

■ **Unemployment compensation; intoxicated worker loses.** An employee who was intoxicated at work was denied unemployment compensation benefits. The appellate court, upholding an administrative determination, held that the record supported a determination of disqualifying "misconduct." ***Larsen v. First State Bank SW***, 2022 WL 1615857 (8th Cir. 05/23/2022) (unpublished).

■ **Loan refused; benefits denied.** An employee who quit because he was denied a personal loan by his employer was not entitled to unemployment benefits. The appellate court ruled that the employer's resignation was not for a "good reason" caused by the employer. ***Hubbard v. Preferred Concrete Const. Inc.***, 2022 WL 1613286 (8th Cir. 05/23/2022) (unpublished).

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JUDICIAL LAW

■ **Diversity jurisdiction; representations in brief; "objective" factors.** Accepting representations in an appellate brief regarding the citizenship of the members of the plaintiff limited liability partnership, noting the "lack of contrary evidence," and finding that the "objective" factors relating to the defendant's domicile established the presence of diversity jurisdiction, the 8th Circuit affirmed the denial of the defendant's motion to dismiss for lack of diversity jurisdiction. ***Wagstaff & Cartmell, LLP v. Lewis***, ___ F.4th ___ (8th Cir. 2022).

■ **Personal jurisdiction; single sale of product.** The 8th Circuit affirmed a Missouri district court's dismissal of trademark and unfair competition claims for lack of personal jurisdiction where the defendant maintained an interactive website but had made only one alleged infringing sale in Missouri. ***Brothers & Sisters in Christ, LLC v. Zazzle, Inc.***, ___ F.4th ___ (8th Cir. 2022).

■ **Award of costs affirmed; litigation strategy and timing.** Affirming an award of costs following the award of summary judgment to the defendants, the 8th Circuit rejected plaintiffs' argument that defendants should not have been awarded costs related to discovery and class certification when they could have moved to dismiss the action under Fed. R. Civ. P. 12, finding that "[a] defendant may choose how best to defend a lawsuit." ***Hoekman v. Education Minnesota***, ___ F.4th ___ (8th Cir. 2022).

■ **Fed. R. Civ. P. 56(d); denial of continuance to conduct discovery affirmed.** The 8th Circuit found no abuse of discretion in Judge Ericksen's denial of the plaintiff's request

for a continuance to conduct additional discovery in conjunction with the defendants' motion for summary judgment, finding that the information sought was of "marginal relevance," "scattershot," and a "fishing expedition." ***Yassin v. Weyker***, 39 F.4th 1086 (8th Cir. 2022).

Lack of standing; no injury in fact. The 8th Circuit affirmed a district court's dismissal for lack of standing of an action brought by the State of Missouri, which challenged certain elements of the American Rescue Plan Act, finding that the state lacked standing to challenge a "potential interpretation" of the Act, meaning that it had not alleged an "injury in fact" sufficient to confer standing. ***Missouri v. Yellen***, ___ F.4th ___ (8th Cir. 2022).

No implied privilege waiver; motion to compel election of defenses denied. While finding that he was empowered to require defendants to elect their defenses, Magistrate Judge Docherty denied plaintiffs' motion, finding no express or implied waiver of attorney-client privilege or work product protection that might support the motion, and rejecting plaintiffs' other arguments as well. ***In re: EpiPen Direct Purchaser Litig.***, 2022 WL 2438234 (D. Minn. 7/5/2022).

Fed. R. Civ. P. 37(d); failure to appear at depositions; dismissal with prejudice. Where the plaintiffs failed to attend their properly noticed oral depositions after their requests for "paper depositions" were rejected in a case with a history of "contentious" discovery, Judge Frank rejected their argument that the defendant should have filed a motion to compel, and instead granted the defendant's motion to dismiss with prejudice pursuant to Fed. R. Civ. P. 37(d) and awarded the defendant its reasonable expenses relating to the two depositions and the motion. ***Bailey v. First Transit, Inc.***, 2022 WL 2670068 (D. Minn. 7/11/2022).

Motion for class certification denied; numerosity. Judge Tostrud denied the plaintiff's motion for class certification on a WARN Act claim, finding that the potential class of 15 plaintiffs "was not so numerous that joinder of all members is impracticable." Alternatively, Judge Tostrud found that the plaintiff's separate age discrimination claim would have made her an inadequate class representative. ***Duffek v. iMedia Brands, Inc.***, 2022 WL 2384171 (D. Minn. 7/1/2022).

Fed. R. Civ. P. 12(b)(6) issue preclusion; effect of grant of prior motion to dismiss. Judge Menendez denied a Fed. R. Civ. P. 12(b)(6) motion to dismiss, finding that issue preclusion barred the motion when a similar motion had been denied in a related case, rejecting the defendant's argument that issue preclusion did not apply absent a "final judgment." ***Samaha v. City of Minneapolis***, 2022 WL 2392528 (D. Minn. 7/1/2022).

Motions to compel arbitration granted; dismissal versus stay. Granting the defendants' motion to compel arbitration, Judge Wright exercised her discretion to dismiss—rather than stay—the action. ***Howard v. Life Time Fitness, Inc.***, 2022 WL 2374130 (D. Minn. 6/30/2022).

Chief Judge Schiltz also granted a motion to compel arbitration. However, finding that "the issue of arbitrability is for the arbitrator" under the applicable AAA rules, he stayed the action instead of dismissing it. ***Winter v. UCB Inc.***, 2022 WL 2442497 (D. Minn. 7/5/2022).

■ **Motion for *vacatur* of order denied.** Where an order for judgment on the pleadings was mooted by subsequent legislation before a judgment was entered, Chief Judge Tunheim denied a subsequent motion to vacate the order, distinguishing the relevant procedure in the district court from decisions that appear to require *vacatur* on appeal. ***Southern Glazer's Wine & Spirits, LLC v. Harrington***, 2022 WL 2346421 (D. Minn. 6/29/2022).

■ **Motion to compel production of social media granted in part.** Where the defendant in an employment discrimination case sought to compel the production of more than six years of the plaintiff's social media, arguing that it was relevant to the issue of the plaintiff's alleged emotional distress, Magistrate Judge Docherty found that the request for all social media was "not proportional to the needs of the case," but ordered plaintiff's counsel to review plaintiff's social media and to produce information relating to her mental health and employment. ***Krapf v. Novartis Pharms. Corp.***, 2022 WL 2452259 (D. Minn. 7/6/2022).

■ **Motion for default judgment denied; entry of default set aside.** While describing the defendant's "untimely response [as] no model for a defendant's conduct," Judge Menendez denied the plaintiff's motion for default judgment and vacated the clerk's entry of default where the plaintiff eventually filed an answer and counterclaim, and the plaintiff failed to establish any prejudice. ***Delve Health, LLC v. Graham***, 2022 WL 2609060 (D. Minn. 7/8/2022).

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Indian Law
JUDICIAL LAW

■ **Federal and state governments have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.** Following Castro-Huerta's conviction in Oklahoma state court for child neglect that occurred against his tribal-member stepdaughter, the Supreme Court decided *McGirt v. Oklahoma*. The Oklahoma Court of Criminal Appeals vacated Castro-Huerta's conviction based on the *McGirt* decision's holding that because the crime occurred in Indian country and involved an offense committed by a non-Indian against an Indian, the federal government had the exclusive jurisdiction to prosecute the crime. The Supreme Court reversed the decision, finding that federal law had not preempted the state's jurisdiction in this case, and thus "the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country." ***Oklahoma v. Castro-Huerta***, 142 S. Ct. 2486 (2022).

■ **Federal prosecution following prosecution in a Court of Indian Offenses does not constitute double jeopardy.** Tribal member defendant Denezpi pleaded guilty to an assault charge in the Court of Indian Offenses of the Ute Mountain Ute Agency and was sentenced to time served. Denezpi was later indicted on the same underlying events in the United States District Court for the District of Colorado, where he was convicted and sentenced to 360 months of imprisonment. Denezpi appealed, arguing the dual sovereignty doctrine prohibited his second conviction because the Court of Indian Offenses was a federal agency, the same as the District of Colorado. The United States Supreme Court affirmed the 10th Circuit, holding that the double jeopardy clause of the 5th Amendment to the United States Constitution was not violated because the two offenses were defined by separate sovereigns: by the Ute Mountain Ute Tribe in the Ute Mountain Ute Code, and by the United States in the United States Code. The Court held that the double jeopardy clause "prohibits separate prosecutions for the same offense; it does not bar successive prosecutions by the same sovereign," meaning there was no violation of the clause in Denezpi's case. ***Denezpi v. United States***, 142 S. Ct. 1838 (2022).

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Intellectual Property
JUDICIAL LAW

■ **Trademark: Defendant's website and single purchase insufficient to establish personal jurisdiction in forum.** A panel of the United States Court of Appeals for the 8th Circuit recently affirmed a Missouri district court's grant of a motion to dismiss for lack of personal jurisdiction in a trademark infringement matter. Brothers and Sisters in Christ, LLC (BASIC) is a limited liability company based in Missouri that owns the trademark "love happens."

BASIC alleged that Zazzle, Inc., a California corporation, sold a shirt with a "love happens" logo to at least one Missouri resident and shipped the shirt to Missouri. BASIC sued Zazzle for federal trademark infringement; federal unfair competition; unfair and deceptive trade practices; common law trademark infringement and unfair competition; and dilution and injury to business reputation in the Eastern District of Missouri. Zazzle moved to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction. The district court granted the motion. BASIC appealed. The 8th Circuit held that the applicable federal statute, the Lanham Act, did not authorize nationwide personal jurisdiction so the existence of personal jurisdiction depends on the long-arm statute of the forum state and the federal due process clause. To analyze claims of specific jurisdiction, a court considers the totality of the circumstances of five factors: (1) the nature and quality of defendant's contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) convenience of the parties. The court held Zazzle's single act was insufficient to establish specific jurisdiction because Zazzle had not taken some action by which it purposefully availed itself of the privilege of conducting activities within the forum state. BASIC only alleged that a Missouri consumer accessed Zazzle's nationally available website and purchased a shirt. Accordingly, the Court held BASIC failed to show that Zazzle deliberately reached out beyond its home and affirmed the district court. ***Bros. & Sisters in Christ, LLC v. Zazzle, Inc.***, No. 21-1917, 2022 U.S. App. LEXIS 21228 (8th Cir. 8/2/2022).

Trademark: Lack of rights in a particular mark does not bar infringement of other marks containing same or similar words. Judge Frank recently denied cross-motions for summary judgment related to a remanded trademark infringement action. In 2012, plaintiffs Select Comfort Corporation and Select Comfort SC Corporation (Select Comfort)—known for their Sleep Number Bed—sued defendants John Baxter; Dires, LLC; Craig Miller; and Scott Stenzel for trademark infringement, trademark dilution, false advertising, unfair competition, and related state-law claims. Defendants filed a counterclaim seeking a declaration that Select Comfort did not have trademark rights in the phrase NUMBER BED. In the Fall 2017 trial, the jury found Select Comfort did not have trademark rights in NUMBER BED. The case was appealed to the 8th Circuit, which affirmed the jury's decision related to rights in NUMBER BED but vacated and remanded on almost all other aspects. On remand, defendants moved for summary judgment on plaintiffs' trademark infringement claim to the extent that any portion of the claim relied on defendants' use of the term NUMBER BED. Defendants argued that because the jury found Select Comfort lacked rights in NUMBER BED and the 8th Circuit affirmed, any claim based on the use of the phrase must fail. The court, however, disagreed. "The issue resolved with respect to Defendants' counterclaim was whether Plaintiffs had trademark rights in NUMBER BED, not whether any use of the words NUMBER BED in advertising infringed other trademarks, namely the SLEEP NUMBER trademark." Because use of NUMBER BED may be found to be confusingly similar to the SLEEP NUMBER trademark, factual issues remained

for the jury, and defendants' summary judgment motion was denied. ***Select Comfort Corp. v. Baxter***, No. 12-2899 (DWF/TNL), 2022 U.S. Dist. LEXIS 132147 (D. Minn. 7/26/2022).

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Tax Law
JUDICIAL LAW

Sale of real estate lots results in capital loss. Most introductory income tax classes teach students to distinguish ordinary assets from capital assets. Attentive students realize that the favorable treatment of capital gains combined with the relatively unfavorable treatment of capital losses often incentivizes taxpayers to label an asset "capital" if its disposition results in a gain, but "ordinary" if its disposition results in a loss. In *Musselwhite v. Comm'r*, T.C.M. (RIA) 2022-057 (T.C. 2022), a taxpaying couple claimed an ordinary loss of just over $1 million after the sale of undeveloped lots in a subdivision. The commissioner disagreed with the characterization and issued a notice of deficiency as well as an accuracy-related penalty.

The court, applying the multifactor test set out by the 4th Circuit, agreed with the commissioner. Among the factors to be considered are (1) the purpose for which the property was acquired; (2) the purpose for which the property was held; (3) improvements, and their extent, made to the property by the taxpayer; (4) the frequency, number, and continuity of sales; (5) the extent and substantiality of the transaction; (6) the nature and extent of the taxpayer's business; (7) the extent of advertising or lack thereof; and (8) the listing of the property for sale directly or through a broker. In this dispute, the court held that factors 1 through 6 weighed against the taxpayers and only factors 7 and 8 weighed in the taxpayer's favor. Since the overwhelming weight of the factors was against the taxpayers, the court determined that the lots in the hands of the taxpayers were not stock in trade, inventory, or property primarily held for sale to customers in the ordinary course of business. The lots therefore were capital assets and the loss was not properly characterized as ordinary. ***Musselwhite v. Comm'r***, T.C.M. (RIA) 2022-057 (T.C. 2022).

Clear and unambiguous settlement agreement entitles county to summary judgment. Cutters Grove Building LLC entered into a settlement agreement with Anoka County. The agreement covered several tax years – including years 2016 (Pay 17) through 2019 (Pay 20). The agreement specified that "Pay 20 will be held at $1,400,000[.]" The parties adhered to the agreement for several years, but in 2020, Cutters Grove attempted to challenge the assessed value of the property as of 1/2/2019. The county, referencing the settlement agreement, invited Cutters Grove to voluntarily dismiss the petition. Cutters Grove refused. The county, relying on the settlement agreement, moved for summary judgment. The tax court held that the settlement language was clear and unambiguous and that Cutters Grove was contractually obligated to the agreement it negotiated with the county. The court also referenced the strong interest in enforcing settlement agreements. Since there was no issue of material fact, the court granted the county's motion for summary judgment. ***Cutters Grove Bldg. LLC, v. Cnty. of Anoka,*** No. 02-CV-20-2360, 2022 WL 2351535 (Minn. Tax 6/27/2022).

Property tax: Petitioner overcomes *prima facie* validity of assessment of airplane hangar. After Ronald Enright's tax bill jumped from under $1,000 to $3,736, he challenged Itasca County's assessment of the value of his airplane hangar, which sits on land leased from the Itasca County Airport. The tax court held that Mr. Enright overcame the presumptive validity of the assessment by introducing a page of the county's own appraisal, which includes a sale that was not considered by the county when setting the assessment. The tax court rejected the county's mid-trial motion to dismiss under Rule 41.02 without deciding whether such a motion is proper. ("Whether Itasca County may bring a motion to dismiss under Rule 41.02(b) of the Minnesota Rules of Civil Procedure at the close of a property tax petitioner's case is an open question.") In its analysis, the court credited the testimony and appraisal of the Itasca County assessor's trial appraisal. Testimony revealed that prior assessments had been artificially low, because prior assessments had incorrectly valued the hangar as pole-style construction, which is less valuable than the I-beam steel construction of Mr. Enright's structure. The court adjusted the market value from the previously assessed value of $138,200 to the trial appraisal of $111,400. ***Enright v. Cnty. of Itasca***, No. 31-CV-20-1076, 2022 WL 2911927 (Minn. T.C. 7/19/2022).

Property tax: Attorney's explication of opposing appraisal theory insufficient to exclude appraisal report and anticipated appraisal testimony. In a dispute surrounding the value of a shopping center in Washington County, the taxpayer moved *in limine* to exclude the county's appraisal report and the anticipated appraisal testimony of its expert. The taxpayer asserted that the appraisal report was deficient in numerous ways, such as failing to account for certain incentives. Reasoning that the "'principal function of a valuation trial is to test the foundation reliability of the parties' competing appraisals,'" the court rejected the motion. The taxpayer relied solely on his

lawyer's explication of appraisal theory and the lawyer's own critique of the county's expert report. The court reminded the movant that "comments of counsel are not evidence" and as such the court had no evidence on which the court could grant the motion to exclude. ***Tamarack Vill. Shopping Ctr., LP v. Cnty. of Washington***, No. 82-CV-20-2003, 2022 WL 2721405 (Minn. T.C. 7/13/2022) (citing *1300 Nicollet, L.L.C. v. Cnty of Hennepin,* No. 27-CV-17-06284 et al., 2020 WL 7121467 (Minn. Tax 12/1/2020)).

Excise tax: Taxpayer's "ring of estoppel" argument insufficient for summary judgment. In 2004, Clair R. Couturier accepted a buy-out from his company. The company agreed to exchange $26 million for Mr. Couturier's ESOP stock and Couturier's relinquishment of various interests (including a nonqualified deferred compensation plan, an Incentive Stock Option plan, and a Value Enhancement Incentive plan). The company paid the $26 million through a $12 million cash payment to Couturier's IRA and a $14 million promissory note payable to the IRA. (The note was paid in full in 2005.) On his 2004 return, Couturier characterized the $26 million payment as a rollover contribution to his IRA. He did not indicate that any of the $26 million was an excess contribution.

The IRS got wind of this contribution after the Department of Labor investigated Couturier for an alleged violation of his fiduciary duties under ERISA. The IRS opened an investigation, during which it determined that the value of the alleged rollover was significantly less than the $26 million claimed. The IRS calculated that only about $830,000 of the claimed rollover was eligible for that treatment. That meant that the additional $25 million was an "excess contribution." Excess contributions to IRAs generate excise taxes, which are imposed for each taxable year until the original excess contribution is distributed to the taxpayer and included in income. The excise tax on taxpayer's alleged excess contribution totaled just shy of $8.5 million.

Couturier argued that since the IRS had not challenged the excess contribution in 2004, the IRS was estopped from assessing the excise tax. The tax court disagreed. "[N]othing in [the Code], the Treasury regulations, or any other IRS authority" makes the assertion of an income tax deficiency a precondition for determining an excise tax deficiency. In fact, the court noted, there are many reasons the IRS might impose the excise tax and not assert an income tax deficiency. Further, not every excess contribution stems from an income tax deficiency. The excise tax is not conditioned on whether the taxpayer has an income tax liability, whether the taxpayer has filed (or the IRS has examined) an income tax return, or whether the IRS has issued the taxpayer a notice of deficiency in income tax. The court similarly rejected Couturier's related argument that the IRS's inaction with respect to his 2004 income tax return amounted to tacit approval of the position, such that the imposition of the excise tax resulted in the IRS taking an inconsistent position. Inaction, the court explained, does not amount to tacit approval. Couturier's motion for summary judgment was denied. ***Couturier v. Comm'r***, T.C.M. (RIA) 2022-069 (T.C. 2022).

Matter of first impression: Commissioner held to concession in estate dispute. William DeMuth awarded a power of attorney to his

son, Donald DeMuth, which authorized the younger DeMuth to give gifts to his brothers and other family members in amounts not exceeding the annual exclusion for the federal gift tax. Eventually, the senior DeMuth entered an end-stage medical condition, and Donald DeMuth caused several final checks to be written in accordance with the POA. Eleven checks were delivered, but 10 of those checks were not paid until after William DeMuth died. DeMuth's executor did not include the value of those checks in his estate. The IRS issued a notice of deficiency, which determined that the value of the ten checks that were not paid was properly included in William DeMuth's estate. Eventually, the parties submitted the case for decision without trial under Rule 122. The tax court first determined that under Pennsylvania law, the value of the ten checks was properly included in the gross estate.

The tax court could not stop there, however, because the IRS had conceded in brief (based on a misunderstanding of the law) that the value of three of the checks ought not be included in the estate's value. The court therefore faced the issue of "whether or not we are to hold respondent to a concession he made on brief in the context of a case that has been submitted for decision without trial under Rule 122 when the concession is inconsistent with the applicable law." Analogizing to similar instances in which the court has disallowed the commissioner to withdraw concessions, the court held the commissioner to its concession and excluded the value of the three conceded checks. ***Est. of DeMuth v. Comm'r***, T.C.M. (RIA) 2022-072 (T.C. 2022).

Taxpayer-attorney deemed vexatious litigant not permitted to deduct expenses related to challenging disbarment. In 2008, the Los Angeles County Superior Court declared Charles Kinney to be a vexatious litigant for commencing, prosecuting, and maintaining numerous unmeritorious litigations. Four years later, Mr. Kinney was disbarred. Mr. Kinney attempted to deduct litigation costs relating to his professional disciplinary action, the earlier superior court declaration that he was a vexatious litigant, personal/individual suits he filed against neighbors regarding property disputes, and a suit he filed against judge and law clerk. Kinney asserted that the expenses were properly deducted as business expenses; he reasoned that he was trying to protect his Schedule C self-employment business from destruction, and/or that he was acting as whistleblower in respect to other litigation. The tax court rejected these arguments as meritless. The court similarly rejected his attempts to deduct other expenses. ***Kinney v. Comm'r***, T.C.M. (RIA) 2022-081 (T.C. 2022).

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Torts & Insurance
JUDICIAL LAW

Defamation; matters of public concern. Defendant took a dance class from plaintiff instructor in 2011. Later, the parties began a consensual romantic relationship. However, in 2015, an incident occurred that defendant contended was not consensual, and the parties' relationship ended. In 2020, defendant posted a public message on her Facebook profile in which she accused plaintiff and others of sexually assaulting her. Plaintiff then filed suit for defamation. The district court granted defendant's summary judgment motion, holding that the evidence indicated the statements were true, and because they involved a matter of public concern and plaintiff could not prove actual malice.

The Minnesota Court of Appeals reversed and remanded. The court first held that a genuine issue of material fact as to the statements' falsity precluded summary judgment. In so holding, the court noted that while there was undisputed evidence of sexual contact, there was evidence that it was consensual. Second, the court held that the statements at issue did not involve a matter of public concern. In reaching its conclusion, the court noted that "the determination of whether speech involves a matter of public or private concern is based on a totality of the circumstances, and courts should consider the content, form, and context of the speech, with no one factor being dispositive." The court stated: "The United States Supreme Court's focus on the 'thrust and dominant theme' of the communication, cited approvingly by the Minnesota Supreme Court, counsels us that [defendant's] statement is personal in nature. To hold that this accusation is a matter of public interest—which would take the question of the truth or falsity of [defendant's] statement from the jury—would stretch current Minnesota law, based on the nature of the #metoo movement. And that is not the role of an intermediate court."

Judge Wheelock filed an opinion concurring in part and dissenting in part. Judge Wheelock agreed that plaintiff had presented sufficient evidence to withstand summary judgment on the issue of falsity. However, Judge Wheelock would have held that the statements involved a matter of public concern. ***Johnson v. Freborg***, A21-1531 (Minn. Ct. App. 7/25/2022).

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MEMBER NEWS

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

Mackenzie Sedlack has joined Lanners & Olson, PA as an associate attorney. Sedlack focuses her practice on family law and private criminal defense.

John R. Stoebner has joined Manty & Associates, PA as an attorney. He will be practicing in the areas of bankruptcy, bankruptcy litigation, and real estate law. His real estate experience includes representing clients in both residential and commercial real estate acquisitions and sales, leasing, and refinancing.

Andrew Hunstad has joined Jeffrey Sheridan and DeAnne Dulas as a shareholder in the law firm now known as Sheridan, Dulas & Hunstad, PA. Hunstad focuses his practice on complex, high-asset divorce matters and will continue growing the firm's family law practice.

Lauren Fink has been appointed a shareholder at Maser, Amundson & Boggio, PA. Fink assists her clients in the implementation of estate, long term care planning, special needs, and business succession plans.

Joe Simmer joined Lommen Abdo's litigation team in June. He has extensive private litigation law firm and in-house insurance company experience. He will be working in insurance defense, professional liability, and other types of litigation.

Burns & Hansen, PA announced that **Barton Gernander** has become a partner in the firm. Gernander represents clients in civil litigation and corporate matters. Also, **Graciela Bloch** and **Jeffrey Domingues** have joined the firm as associate attorneys. Bloch represents clients in family law, and Domingues represents clients in civil litigation matters.

Amanda Sperow has joined Borgelt, Powell, Peterson & Frauen, SC as an associate attorney. Her practice areas include property insurance coverage and defense, liability coverage and defense, and subrogation.

Jeffer Ali and **Daidre Burgess** were named principals at Patterson Thuente IP. Burgess left an engineering role at 3M to pursue law school and started her career in patent law at the firm. Ali received his JD from the University of Minnesota Law School and a Doctor of Pharmacy from the University of Michigan.

Claire Bruner-Wiltse has joined Heimerl & Lammers, LLC to lead the firm's employment law practice.

Daniel L. Bruzzone has joined Merchant & Gould PC as a partner in the electrical practice group. As a physicist and engineer, Bruzzone launched his passion for patent law while working in product development at 3M.

Sarah B. Bennett has joined Fredrikson & Byron as an officer in the real estate, corporate & securities, bank & finance, and mergers & acquisitions groups.

The MSBA Tax Law Section honored **Ben Wagner** with the Jack Carlson Distinguished Service Award.

The firm previously known as Erickson & Wessman is now **Veritage Law Group.** Veritage is a combination of two words – "veritas," which is Latin for "truth," and "heritage." While the firm's name and logo have changed, they have not changed the scope and delivery of legal services and will continue to focus in the areas of estate planning and trust and estate administration.

In memoriam

ARTHUR PATRICK LEIGHTON
died on August 2, 2022 at age 88. He spent his entire career at Moore, Costello and Hart, including serving as managing partner before retiring in 2001. He was active on many boards and civic organizations and served as president of the Minnesota State Bar Association and Ramsey County Bar Association.

PETER T. MCGOUGH
died on August 4, 2022 at 66. McGough spent his career as an attorney and real estate developer and broker. A longtime business partner and friend recently described him as having the highest raw IQ of anyone he knew.

JAMES ROBERT WALDHAUSER
passed away on August 1, 2022 at the age of 70. He specialized in worker's compensation claims throughout his 35 years of practicing law. He served as president of the Cousineau, Waldhauser & Kieselbach Law Firm from 2012-2016.

DAVID E. ZINS
died on July 23, 2022 at the age of 83. He was in private law practice in St. Louis Park his entire life.

Mitchell Hamline welcomes Jared Mollenkof and Octavia Carson to faculty

BY TOM WEBER

Mitchell Hamline School of Law is pleased to announce the appointment of Jared Mollenkof and Octavia Carson to the faculty. They are two of five new faculty members who recently joined the law school. The appointments of Kim Vu-Dinh, Jason Marisam, and Forrest Tahdooahnippah had been previously announced and were featured in the May/June, 2022 issue of Bench & Bar.

Jared Mollenkof
assistant professor of law

Mollenkof joins Mitchell Hamline from Hennepin County, where he'd been an assistant public defender since 2019. Before that, he was a public defender in Nashville for seven years handling serious felony cases, most recently with the complex litigation team.

Mollenkof graduated from Georgetown Law, where he served in leadership of the Black Law Students Association; wrote and edited for the *Law Weekly* student newspaper; and was involved in the Juvenile Justice Clinic.

In 2019, Mollenkof was named a mentor in residence at Yale Law, where he counseled students interested in public defense careers, and he has served in leadership roles for the ACLU, No Exceptions Prison Collective, Black Lives Matter, and the Minnesota Freedom Fund. Mollenkof has played 15 seasons in a gay kickball league and is currently captain of his team.

Octavia Carson
visiting assistant professor

A U.S. Navy veteran with a background in journalism, Carson graduated first in their class at Thomas Jefferson School of Law in San Diego; was editor-in-chief of the school's law review; and interned for two federal judges.

After law school, they were selected as an honors attorney for the U.S. Department of Justice and clerked for the Board of Immigration Appeals. Carson also founded a non-profit that has raised more than $200,000 to support Black bar exam applicants. They are engaged in national efforts to reform the bar exam and increase diversity in the legal profession.

Carson has taught English as a second and foreign language; speaks Spanish and basic Chinese; and plays semi-professional football for the Washington Prodigy of the Women's National Football Conference.

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ATTORNEY WANTED

ATTORNEY WANTED
Anishinabe Legal Services is seeking an attorney to provide civil legal assistance and court representation to program clients before area Tribal Courts, State Courts, and Administrative Forums. This attorney will be housed out of our main office on the Leech Lake Reservation in Cass Lake, Minnesota. Compensation: $62,000+ D.O.E. Generous benefit package includes individual and family health and dental insurance, paid time off, and life insurance. Hybrid in-office/work at home and flex scheduling available. To apply: Please email a cover letter and resume to Executive Director Cody Nelson, at: cnelson@alslegal.org. Applications will be accepted until the position is filled.

ASSOCIATE ATTORNEY WANTED
Jardine, Logan & O'Brien PLLP is a midsize law firm in the east metro looking for an Associate Attorney with three to five years of experience in civil litigation and/or workers' compensation. Excellent communication skills and writing skills required. Insurance defense experience a plus. Our firm offers an extensive history of providing excellent legal services to our clients. This is an exciting opportunity for a bright and energetic attorney to work with an established law firm. Salary commensurate with experience. Jardine, Logan & O'Brien PLLP is an Affirmative Action/Equal Employment Employer. Please go to https://www.jlolaw.com/careers/ to apply.

ATTORNEY
The North Dakota Securities Department is a regulatory agency responsible for the administration of the North Dakota Securities Act, which governs the offer and sale of securities in the state. The Department regulates investment industry firms and professionals, capital formation involving the offer and sale of securities, and the investigation of investment fraud and other securities law violations. This position is responsible for providing legal advice and opinions to the Securities Commissioner; overseeing enforcement actions related to Department investigations and examinations; drafting orders, rules and legislation; representing the Department in administrative hearings, legislative hearings, and civil court proceedings. Salary Range: $8,874-$9,500/month plus benefits including fully paid family health insurance and defined benefit pension. The position has location and remote work flexibility. Applicants must have a Juris Doctorate degree, a license to practice law in North Dakota, and a minimum of two years of work experience practicing law. Visit the North Dakota Securities Department on LinkedIn to apply.

CORPORATE ASSOCIATE ATTORNEY - PRIVATE BUSINESS
Stinson LLP is seeking an Associate with three or more years of experience to join our Private Business practice. Qualified candidates will have three or more years of experience with mergers and acquisitions, contract negotiations, corporate governance, entity selection and formation, business succession planning, and private equity transactions, will possess excellent academic credentials, and have strong writing, analytical, organizational, leadership and communication skills. For position description, visit: Corporate Associate Attorney | All Opportunities (ultipro.com) For questions, contact recruiting@stinson.com. Stinson LLP is an equal opportunity employer.

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Maslon LLP is seeking an associate with up to two years of experience to work in its Financial Services practice group. A successful candidate will be a highly motivated self-starter who is able to work well in a fast-paced environment. This position provides an excellent opportunity to do sophisticated legal work in a mid-size law firm setting. Prior experience with corporate or municipal bond structures, securitization trusts, bankruptcy, or representation of financial institutions acting in various agency roles, is preferred but not required. To apply, please send a resume and cover letter to Angie Roell, Legal Talent Manager, at: angie.roell@maslon.com.

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Small, growing litigation firm with national personal injury defense practice seeking a lawyer with 5 to 15 years' experience in personal injury and/or trial work. Strong writing, researching and interpersonal skills are necessary. Licensure in other states is a plus. Please send resume and/or direct inquires to: jgernes@donnalaw.com.

PRIMARY REAL ESTATE AND ESTATE PLANNING ATTORNEY
Successful practice near BWCAW Real Estate / Estate Planning complete office with FFE and three established paralegals. Mark Ludlow: markludlow@mac.com or 612-817-4069.

SPECIAL EDUCATION ATTORNEY
Solo practice in Stillwater seeks associate attorney to join expanding practice in exciting civil rights law representing students and families in special education and other school matters. Experience preferred but willing to train new lawyer for partnership track position. Email: agoetz@schoollawcenter.com.

STAFF ATTORNEY IN-HOUSE OPPORTUNITY
Phillips Distilling is currently seeking to fill a newly added Staff Attorney opportunity. The Staff Attorney serves as the Company's primary source of corporate legal expertise, partnering with external counsel on key Corporate initiatives as needed. This position works on a wide range of legal matters providing advice, protection, and legal interpretation, and leads and manages the Company's Regu-

latory Compliance function and team of five employees. For a full description of duties, visit: www.phillipsdistilling.com.

STAFF COUNSEL
Minnesota Counties Intergovernmental Trust is seeking applicants for the position of staff counsel. MCIT is a joint powers government entity made up of Minnesota counties and associated public entities that pool resources to provide property, liability and workers' compensation coverage to members. The staff counsel is key to helping MCIT carry out its mission of providing cost-effective coverage with comprehensive and quality risk management services to its members. Duties include legal research and analysis, education and training. MCIT offers a collaborative work environment, excellent benefits and a pension plan. Applicants must have a law degree; license to practice in Minnesota; three years of experience in law, government, service organizations or the insurance industry; possess a valid driver's license; and access to a reliable vehicle. See position description and application requirements at: MCIT.org/employment-opportunities/.

REAL ESTATE ASSOCIATE ATTORNEY
Moss & Barnett, A Professional Association, seeks an attorney to join its real estate practice group. Preferred candidates will have a minimum of two years' real estate experience, superior academic qualifications, and a distinguished work record. This position will have an emphasis in buying and selling real estate, commercial lease negotiations, title and survey review, and real estate development and finance. Salary commensurate with experience and qualifications. Position eligible for participation in associate bonus program. Interested candidates should email cover letter, resume, law school transcript and writing sample to Carin Del Fiacco, HR Director: carin.delfiacco@lawmoss.com. Moss & Barnett is an affirmative action/EEO employer. No agencies please.

ASSOCIATE ATTORNEY – ESTATE, PROBATE AND REAL ESTATE LAW
Farrish Johnson Law Office is a seven-attorney law firm in Mankato, Minnesota with a collaborative culture and experienced support staff. We have a need for an associate attorney with 0-3 years of work experience with an interest in estate planning, probate and real estate. Starting salary is $70,000 with bonus potential the first year. Please send a resume and cover letter via email to: sfink@farrishlaw.com. All applications will be held in confidence.

FAMILY LAW ATTORNEY
Gjesdahl Law, PC, is seeking an associate attorney to join our family law practice in Fargo-Moorhead. Gjesdahl Law is a family law firm that consists of seven attorneys, five paralegals, and two staff members. It handles issues in North Dakota and Minnesota related to family crisis and transition, including divorce, paternity, child custody and support, spousal support, adoption, assisted reproduction, estate planning, and probate. Its diverse practice is both challenging and intellectually stimulating. A preferred candidate will: (1) be inspired by helping people; (2) have excellent writing skills; (3) be interested in learning strong litigation and negotiation skills; (4) want to benefit from dedicated, intentional mentoring; (5) desire to work within a collaborative culture; and (6) have a history of achievement evidenced by his or her G.P.A. Compensation and benefits reflect regional market

rates. Please submit cover letter, resume, and transcript to: Lindsay Austfjord, lindsay@gjesdahllaw.com.

ASSOCIATE GENERAL COUNSEL - CORPORATE

Position Summary: Otter Tail Corporation is seeking an Associate General Counsel to provide legal services to Otter Tail Corporation and its subsidiaries. Reporting to the General Counsel, the Associate General Counsel-Corporate will provide advice on legal, regulatory, and business issues to meet business objectives and mitigate risk. The position may office out of either our Fargo or Fergus Falls location. The successful candidate will have the ability to plan and deliver persuasive and high-quality oral and written communications and have a demonstrated ability to build collaborative internal and external relationships. Applicants must be forward thinking with a willingness to take constructively independent positions in a manner that furthers the goals of the organization. Meticulous attention to detail and strong organizational skills are a must. Key Duties and Responsibilities: Securities/SEC and Corporate Governance – Review and advise regarding SEC filings, including 10-K, 10-Q and other periodic reports, Proxy Statement, and other investor relations materials. Reporting - Support insider equity ownership for reporting purposes relating to Section 16 insider transaction reports. Corporate Secretary support - Support the Corporate Secretarial function, including preparation of materials for Board of Directors and Committee meetings and the Corporation's Annual Meeting of Shareholders. Overnight, multi-day travel is required to support Board of Director meetings. Entity management – Oversee entity management, minute books and minutes of the Corporation, Board, Committee and subsidiary board and related minutes. Financing – Support the finance department in any equity offerings, debt financing, credit agreements and any other financing projects. Contract/Business Legal Services – Interpret laws, prepare legal documents, advise management, and represent the corporation and its subsidiaries in business related matters. Internal Legal Issues – Review documentation, investigate, interview, identify risks and determine how to proceed or mitigate. Education and Experience Requirements: Juris Doctor degree required. Three to five years of progressive experience relative to the position. Applicants must be licensed to practice law in Minnesota or North Dakota. With offices in Fargo, ND and Fergus Falls, MN, Otter Tail Corporation is a diversified utility company with nearly $1 billion annual revenues and 2,200 employees across multiple industries. We offer a comprehensive salary and benefits package. Hybrid work arrangements will be considered. To apply, go to: www.ottertail.com and visit our careers page. In addition to the on-line application, candidates must upload a current resume and cover letter. Applications will be accepted until the position is filled.

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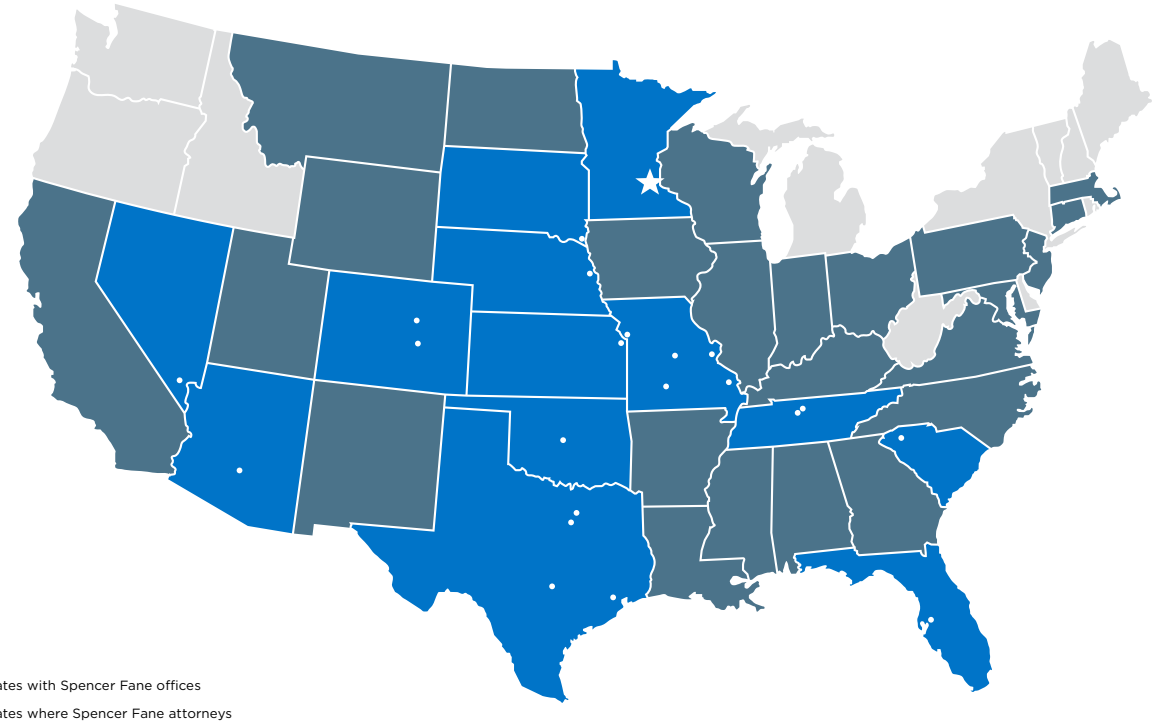

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