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WHO'S THE BOSS?

BY PAUL FLOYD

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

As I begin my presidency of the Minnesota State Bar Association, I've received a number of much-appreciated kind wishes from friends, colleagues, students, and clients. Yet every now and then when I mention my upcoming presidency, I hear something along the lines of: "Congratulations! Now you're the head honcho," the "top dog," the "big cheese," "numero uno," or "You're the boss." While of course responsibilities and duties do come with the office, I feel uncomfortable being called or viewed as the boss at the MSBA. After all, what does it really mean to be "the boss?"

Some people, upon hearing the question, "Who's the boss?" think of the 1980s sitcom featuring Tony Micelli (Tony Danza), a widowed, retired major league baseball player who relocates to Connecticut with his daughter (Alyssa Milano) to work as a live-in housekeeper for divorced ad executive Angela Bower (Judith Light), who has a young son. One of the most popular sitcoms of the 1980s, it broke new ground with its gender-role reversal between Tony and Angela. The show was nominated for over 40 awards and won a Prime-time Emmy Award and a Golden Globe Award. Great show, but maybe a sitcom is not the best model for my presidency.

For others, "Who's the boss?" evokes memories of a political TV drama from the 1990s starring Kelsey Grammer as the hard-as-nails mayor of Chicago, whose character has recently been diagnosed with Lewy body dementia, a degenerative neurological disorder. The series was full of political intrigue, corruption, and scandals. This is getting closer to the presidency of a bar association, just not in Minnesota (we hope).

Then there's "Undercover Boss," an American reality television series from 2010 through 2022. Each episode depicts a person who is the president or some other executive-level officer at a major business going undercover as an entry-level employee to discover the faults and shortcomings in the company. At the end of the show, the boss resumes his or her true identity and calls in the selected employees to the corporate headquarters. The boss rewards hardworking employees through promotions and material or financial rewards, while other employees are given corrective training. The bar association staff isn't really large enough for me to successfully spy on and they would probably just get creeped out. Not a good first impression.

Of course, the real "Boss" is Bruce Springsteen. This year, 73 years young, he is back on tour with the E Street Band to wide acclaim. Springsteen's recording career spans more than 50 years. He has released 21 studio albums, garnered 20 Grammys, won an Oscar, been inducted into the Rock and Roll Hall of Fame, and received a Presidential Medal of Freedom and a Kennedy Center Honor. With all these accolades, one might assume Springsteen chose the nickname The Boss for himself. But nothing could be further from the truth. Andrew Delahunty, the author of the Oxford Dictionary of Nicknames, recalled to the BBC in 2009: "In the early days when he and the E Street Band played gigs in small venues, it was Bruce's job to collect the money and pay the rest of the band," says Delahunty. "This led them to start calling him The Boss, a nickname which has stuck."[1] Like any good leader, Springsteen made sure his band and others who performed with him were paid. Interestingly, it was his band members who came up with the name, not Springsteen himself—in large part because of his fair and equitable treatment of the band both on and off the stage.[2] He was The Boss you wish you had. Yet, Springsteen has said he is uncomfortable with his nickname and has said: "I hate bosses. I hate being called the boss."[3]

The character qualities that led others to affectionately call Springsteen "The Boss" are more in line with my idea of the proper role of a bar president—one who empowers other bar leaders and shares the credit. Anyone has been active in the MSBA knows that no one person is "The Boss" at the MSBA, and it is certainly not me as president. Instead, our success is a collaborative effort involving our dedicated professional staff and our many volunteer lawyers, whose work together makes the MSBA relevant and meaningful to our members and to the profession. The MSBA has many volunteer bar leaders—officers, directors, assembly members, section and committee members, and past presidents—who all work hard to make the MSBA a bar association of which we all can be proud. My goal as your bar president this year is to focus more on "we" than "me."

My success this year should be measured not by whether I garner awards or put on a great show but how well we do together as a bar. There is really only one "Boss" and that is Bruce Springsteen. ▲

NOTES

[1] See, Joe Taysom, Why Bruce Springsteen hates being called 'The Boss', Far Out Magazine at *https://faroutmagazine.co.uk/why-bruce-springsteen-hates-being-called-the-boss/.*

[2] A&E Television Networks' website: Biography.com at *https://www.biography.com/musicians/bruce-springsteen.* ("The Boss and the E Street Band").

[3] See, Bruce Springsteen, Encyclopedia.com at *https://www.encyclopedia.com/people/literature-and-arts/music-popular-and-jazz-biographies/bruce-springsteen*

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MSBA

COMING BACK TO THE BAR

Change was in the air throughout the 2023 MSBA Convention, which took place at the Minnesota CLE Conference Center in Minneapolis June 21-22. In addition to its being the first entirely in-person convention since the conclusion of the pandemic, the gathering featured the passing of the gavel from outgoing MSBA President Paul Peterson to 2023-24 President Paul Floyd; a valedictory State of the Judiciary address from Chief Justice Lorie Skjerven Gildea, who is departing the Court October 1; and sessions on Minnesota's new adult-use cannabis law and the ethical implications of ChatGPT and other emerging AI resources. Running coach and two-time Olympian Khadevis Robinson provided the keynote address.

Chief Justice Gildea's address included a recounting of the successes of Minnesota courts' digital initiatives, highlighted by the launch of Minnesota Court Records Online (MCRO) and the Court's continuing post-pandemic embrace of remote hearings in many kinds of cases. The convention proceedings weren't all work, however; attendees enjoyed a president's reception at the popular Fogo de Chao restaurant on day one and took in a Twins afternoon game on day two. ▲

Legal Aid Donor Spotlight: DEBRA BULLUCK

To see our full collection of spotlights, visit mnbar.org/access-to-justice-spotlight

Debra Bulluck recently joined Moss & Barnett as an associate in its family law division. Before that, she represented survivors of domestic abuse and sexual assault at Standpoint and clerked under Referee Mary Madden in Hennepin County for three years. At Berea College, Bulluck participated in the freshman program "Walk the Walk," where participants engaged in a silent simulation depicting what survivors may experience after reporting domestic and sexual violence. The experience stuck with her and helped propel her into the legal field.

Having been behind the bench, on the public interest side with Standpoint, and now in private practice, Bulluck has a holistic view of the role of the various legal actors in effectuating public good. With regard to domestic and sexual violence, the private sphere can facilitate breaking down stereotypes regarding who can abuse and be abused. The courts, as neutral entities, can be receptive to training on domestic and sexual violence. The public interest actors educate courts and others about the nuances of violence and possibly counterintuitive behaviors that survivors may exhibit during legal proceedings, among other advocacy matters. For Bulluck, civil issues such as domestic and sexual violence are "an everybody problem," which all facets of the legal system must work together to alleviate.

Now at Moss & Barnett, Debra notes that the beauty of private practice is being able to turn around and donate to organizations such as Standpoint. From her time behind the bench, Debra knows the importance of competent counsel in intimate violence cases and how civil organizations like Standpoint aid survivors in legal proceedings. She encourages others to donate both time and money to legal aid organizations when possible. (Profile by Cheyenna Gonzalez Pilsner, U of M Law School JD candidate 2025.) ▲

Q: If you could time-travel and spend a year in some other place and time, when and where would you choose?

JERRI ADAMS BELCHER
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There is no time like the present, so I would choose to stay in 2023. However, if I could live anywhere for a year, I would live and work in the Bay area. On a personal note, the Bay area has sentimental meaning to my family. We have fond memories of hiking in the region and enjoying the culinary scene. It would be such a treat to have a daily view of the San Francisco Bay.

As a plaintiff's side employment attorney, I've always viewed California as a leader in progressive workplace policies. Right now, everyone is waiting to see how disruptive artificial intelligence will be to the workforce. California has proposed several bills to regulate automated employment decisions tools and to minimize negative consequences in an employment context. While legislation is still being introduced, I would love to watch and learn from Californians the best practices in protecting workers' rights as the use of artificial intelligence continues to expand in the workplace.

JESSICA INTERMILL
Jessica Intermill represents tribal nations in matters of treaty rights, federal Indian law, and tribal law. As a land-history consultant, she helps individuals and organizations learn the history of the land they stand on and locate themselves in our shared story.
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My work has taught me that now is always. Other times and places exist all around us. We drive streets that were platted by surveyors in the 1840s and 1850s. Those surveyors followed on the heels of treaty negotiators who strong-armed land cessions throughout the 1800s for their own economic and political gain. The treaty negotiators relied on an 1823 opinion by Chief Justice John Marshall validating U.S. power to take land from indigenous occupants because the land was "empty." That unanimous decision of the "courts of the conqueror" (C.J. Marshall's words) relied on the Doctrine of Discovery. And that centuries-long legal tradition of European countries stood on Papal bulls of 1452, 1455, and 1493, claiming the globe and its people for Christianity and commerce.

The Church repudiated the Doctrine of Discovery in March of this year. It wrote that the doctrine "fail[ed] to recognize the inherent human rights of indigenous peoples" and it rejected the doctrine's legitimization of "immoral acts[.]" But *Johnson v. M'Intosh*, 21 U.S. 543 (1823) is still good law; the Supreme Court expressly relied on it in 2005. Our homes, offices, and cabins are in Minnesota—not Mni Sota Makoce—because the Vatican of the 1500s, the fur trade of the 1600s and 1700s, and robber barons of the 1800s are all with us today.

And. Just as the decisions of centuries past influence our "now," our decisions today shape the world to come. Tomorrow is also here today. Whether we intend to or not, we will time-travel with our decisions, just as our forebearers have. The only question is what kind of ancestors we decide to become.

LANDON ASCHEMAN
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It sounds interesting to go back in time and spend a year seeing the world from a new perspective. I'm going with the assumption that I can't actually change the past. But I could go back in time and see how America truly was before anyone traveled from Europe, I could watch the pyramids being built, or spend time with the dinosaurs right before their extinction. Heck, I would be tempted to go all the way back in time and watch the universe being born, assuming I would be able to survive a year in the void. But I think surviving in the void, or with the dinosaurs, or even simply surviving before the modern age would be less than pleasant.

(Ascheman continued)

Thinking of traveling to the future, assuming you wouldn't be able to change the future upon your return, I'm not sure that's information I would want to have, especially if there was no chance to change anything. If the future isn't static, I might go forward in time to a point where we solve some of our current world challenges, spend the year learning as many solutions as possible, and return to share that knowledge. However, then we fall into a bootstrap paradox like the one in *Bill and Ted's Excellent Adventure*, when Bill and Ted learn Rufus's name from future Bill and Ted.

Overall, I would prefer to spend that year right now, with my family and friends. We have a wonderful home, with so many fun activities, swimming, soccer, game nights. I enjoy my work, I have the time to give back, and I get to spend time with so many wonderful people.

I think I would spend my year right now, right here, doing what I love with those I care about. Okay, if I could take them with me, I would totally go on a world cruise for the year. ▲

CONGRATULATIONS, BECKER AWARD WINNERS!

The group of honorees for the 2023 Becker Awards—presented annually to attorneys, paralegals, administrators, or other staff employed by private, nonprofit agencies that provide legal services to low-income clients—is nothing short of inspiring. Nominated by their peers and then selected by a group of volunteers from the Access to Justice Committee, the following individuals have been recognized in the four major award areas.

There were two honorees for the Legacy of Excellence Award, **Lynn Marie Mickelson** of Rainbow Health and **Gregg Trautwein** of Legal Services of Northwest Minnesota. Mickelson has played a crucial role in advocacy, mentorship, and supervision across the state of Minnesota. Trautwein has dedicated over 42 years of his career to the field of civil legal aid.

This year's Emerging Leader Award was presented to **Taryn Trujillo Risom** of Mid-Minnesota Legal Aid. She has dedicated her legal career to improving low-income families' wellbeing through healthcare-legal partnerships.

Lexie Robinson from the University of Minnesota Law School received the Law Student Award. Robinson spent the past year volunteering with the ACLU-MN, aiding women and children affected by rights violations at ICE detention centers.

Rachel Albertson of Legal Aid Service of Northeast Minnesota was honored with the Advocate Award. She has worked to improve the justice system for all individuals, regardless of privilege or location.

This year's awards included a special posthumous citation for **Cindy Jarvi,** who worked for the Minnesota Disability Law Center at Mid-Minnesota Legal Aid. Jarvi, who died last fall at 69, was recognized with an Advocate Award for her tenacity in representing her clients and the legacy of compassion she leaves behind.

HOT TOPICS *in legal ethics*

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.

What is happening around the country in the world of legal ethics? "A lot" is the short answer. For this month's column, I thought you might enjoy a brief discussion of some current hot topics.

Confidentiality

Have you followed the dispute between the Securities and Exchange Commission and Covington & Burling? The SEC is seeking through an administrative subpoena the names of 298 publicly traded clients of the law firm to determine whether a 2020 cyberattack against the firm resulted in a leak of non-public information that was subsequently used in illegal trading. Eighty-three law firms filed an amicus brief opposing this disclosure under both attorney-client and confidentiality grounds. As of this writing, the parties were at an impasse, with enforcement up to a federal judge in the District of Columbia.[1] Remember, your duty of confidentiality under the ethics rules is broader than the attorney-client privilege doctrine; confidentiality covers all "information relating to the representation of a client" under Rule 1.6(a), Minnesota Rules of Professional Conduct (MRPC). A client's name and the fact of the representation falls within the scope of this rule, unless disclosure falls within an enumerated exception in Rule 1.6(b), MRPC (of which there are several).

Artificial intelligence

How various forms of artificial intelligence will impact the practice of law is obviously a hot topic. Attorneys in New York are learning the hard way that you cannot use ChatGPT to write your brief or find cases for you because the product will make up cases that do not exist but apparently look great on paper. Using ChatGPT, lawyers in the case of *Mata v. Avianca* cited six cases that were, apparently unbeknownst to them, wholly fictitious in a submission to the court. As this is written, an order to show cause why the lawyers should not be sanctioned is in process.[2] While this case is getting a lot of press, I know that this same thing happened in March in Minnesota. This should surprise me, but it does not.

Your duty of competence under Rule 1.1, MRPC, requires you to understand the benefits and risks of using technology in your practice.[3] It should also go without saying that you need to read the cases you cite to the court, and that you are responsible for having measures in place to ensure that those who assist you in creating work product also understand and comply with the ethics rules.[4]

Nonlawyers permissibly practicing law

As many of you know, Minnesota is currently conducting a pilot program that allows approved paralegals to provide broader, specifically enumerated legal services (under the supervision of a lawyer) in certain types of cases. Many states have implemented or are implementing similar programs. This effort began many years ago in Washington state—which recently sunset its program due to costs while allowing those already licensed to continue—and has grown to include Utah, Arizona, Oregon, and New Hampshire, in addition to Minnesota. Several other states have programs in process (Colorado, Connecticut, New Mexico, New York, North Carolina, and South Carolina), while some states have stopped efforts that were afoot (California and Florida). The structure of permissible programs differs depending on the jurisdiction, but they are alike in allowing trained nonlawyers to provide legal services under specific circumstances that would ordinarily be prohibited as the unauthorized practice of law.

As part of these efforts, jurisdictions are again asking how to define the practice of law, and what can and should be allowed by nonlawyers—including by non-humans, given the growing sophistication of artificial intelligence. Most people cannot afford lawyers, and many legal problems are not complex but do require specialized knowledge. Where these lines should continue to be drawn to protect the public is a particularly hot topic.

Due diligence on clients

The American Bar Association Standing Committee on Ethics and Professional Responsibility will be proposing a rule change at the ABA Annual Meeting in August to amend Model Rule 1.16 to incorporate an express ethical duty to "inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation" consistent with the ethics rules.[5] This proposed rule change is the result of a years-long effort to address concerns by the Treasury Department and others that lawyers may be unwittingly facilitating money-launder-

ing or other illegal conduct through the provision of legal services. While you have never been able to ignore red flags that your legal services were being used to facilitate unlawful conduct, the purpose of this rule change is to make the duty of inquiry part of the black-letter law.

Expanding multijurisdictional practice

The ABA is also currently studying proposed changes to Model Rule 5.5 relating to multijurisdictional practice in an effort to expand the ability of lawyers to practice across state lines. Since I have been in my position (and I am sure before then), there have been efforts to push licensure that is essentially nationwide in scope (once licensed in one jurisdiction, you are free to practice in any jurisdiction, except if special requirements exist to appear in court). While certainly more convenient for counsel, no one has yet figured out how to address the issues such a proposal would cause in the absence of a national regulatory scheme—which does not exist and cannot exist in a system where each state's Supreme Court (and in some instances, legislatures) regulates the profession in their jurisdiction. It will be interesting to see where this effort leads.

Frivolous claims and advocacy

Lawyers involved in challenging the November 2020 election have been the subject of public discipline proceedings in numerous jurisdictions, including but not limited to Rudy Giuliani (New York and D.C.), Jenna Ellis (Colorado), John Eastman (California), L. Lin Wood (Georgia), and Sidney Powell (Texas). More cases are likely to follow. These cases are not particularly novel in that it has long been ethically prohibited under Rule 3.1, MRPC, to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." What is more challenging, however, is the context in which these cases arise—extreme partisan politics. One commentator at a CLE I attended suggested regulators need to take care not to politicize discipline or penalize "aggressive advice." There is no doubt that the courts and discipline authorities will continue to debate where the line should be drawn between zealous advocacy and disciplinable conduct: a hot topic indeed!

Trust account schools and other proactive programs

Many jurisdictions, whether through their discipline offices or client security funds, are expanding efforts to assist lawyers in ethically meeting their trust accounting obligations by creating and expanding trust account schools. At a regulators' roundtable I attended in early June, several jurisdictions reported increasing their trust account training, such as Mississippi, California, and Ohio, and others have similar efforts in process. I hope that Minnesota will join this growing list in the next year. Other states are expanding efforts to provide, and in some cases make mandatory, practice-essential training or ethics schools, particularly for solo practitioners. Although resource-intensive, such programs are in my opinion a good value proposition for both lawyers and the clients we serve. It is exciting to see these proactive efforts continue to gain traction in jurisdictions.

Conclusion

This is a small sampling of topics that have the attention of legal ethics professionals. Another hot topic of interest to me that I will cover in a future column is the role of the First Amendment in attorney regulation, particularly as applied to attorney social media use. For some, such topics are beyond boring—but please know that a lot of ethics nerds are thinking deeply about these and other topics so that you do not have to! ▲

NOTES

[1] *Security Exchange Commission v. Covington & Burling, LLP*, Court File No. 1:23-mc-00002-APM (D.D.C. filed 1/10/2023).

[2] *Mata v. Avianca, Inc.*, Court File No. 1:22-cv-01461-PKC.

[3] Rule 1.1, MRPC, Cmt. [8] ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engaging in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.")

[4] Rules 5.1, 5.3, MRPC (requiring those with managerial and direct supervisory authority to take "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that" lawyers and non-lawyer's conduct conforms to the rules and is compatible with the professional obligation of the lawyer).

[5] ABA Resolution 100.

ChatGPT: *The human element*

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.

ChatGPT is continuing to make headlines. It seems like the talk surrounding AI is continuing to evolve as well. Sam Altman, the CEO of OpenAI, admits that even he is a little afraid of the possibilities.[1] On May 16, Altman told a Senate Judiciary subcommittee that "regulatory intervention by governments will be critical to mitigate the risks of increasingly powerful models."[2] During this hearing, Altman highlighted the double-edged nature of AI—the potential loss of jobs, but likewise the potential creation of new jobs; the risk of voter fraud and misinformation, but also the ways in which AI can be used to counter these issues.

The May 16 hearing is being seen by many commentators as what one called "the beginning of what will likely be a long, but broadly bipartisan, process regulating the use of AI and its amazing promise.... [A] regulatory roadmap is beginning to coalesce."[3] Altman proposed strict adherence to safety requirements and extensive testing processes in AI development, all within the structure of federal regulation and oversight. Acknowledging the great potential for worldwide harm as a result of misused or unrestrained AI technologies, Altman emphasized the need for government and industry collaboration and transparency.

Last month I wrote that ChatGPT was still banned in Italy owing to numerous privacy concerns ("This article is human-written: ChatGPT and navigating AI," May/June Bench & Bar). Since then, it's been reinstated after adding certain disclosures and controls.[4] This episode illustrates the tweaks to AI's functioning that will likely continue to be made. In the meantime, however, some of the previously hypothetical crises have indeed come to fruition.

In May, a New York City attorney was found to have used ChatGPT to find case citations for court documents.[5] When these citations were found to be fake, he admitted to using ChatGPT in conducting his research. In a sworn affidavit, he stated that he has "never utilized Chat GPT as a source for conducting legal research prior to this occurrence and therefore was unaware of the possibility that its content could be false."[6] As with any new technology that an organization may plan on incorporating, it is critical to conduct research and create a plan for how it will be best implemented. A quick Google search easily reveals that ChatGPT is rather notorious for giving misleading or even completely false information in conversations. In this case, the consequences for not knowing ChatGPT's weaknesses have been steep.

Partly in response to this event, restrictions are being adopted to manage AI in the courtroom. U.S. District Judge Brantley Starr of the Northern District of Texas, for example, "has ordered attorneys to attest that they will not use ChatGPT or other generative artificial intelligence technology to write legal briefs because the AI tool can invent facts."[7] Though Judge Starr acknowledged some possible uses of the technology that could be appropriate in other situations, he banned using AI alone for legal briefing given its unreliability. Regardless of its application, verifying the authenticity and accuracy of what ChatGPT produces is the user's responsibility, especially within the legal community.

In addition to the ethical issues on display in this particular case, ChatGPT is even being viewed by some as a harbinger of the end—human extinction. What will happen when jobs are replaced by AI? What if life as we know it is taken over by "minds" more powerful than ours? This alarmist view is tempered by the idea that this is a tool that can be used carefully and efficiently to improve human life, not tear it asunder.

Within the cybersecurity field, many experts believe that AI holds the key in combatting the ever-growing number and variety of cyberattacks that are perpetrated daily. If AI can be used to develop sophisticated phishing campaigns, maybe AI is the best resource we have to combat those types of attacks. As far as detection and mitigation goes, ever-evolving AI could be a deal breaker in how organizations scan and respond to cyberattacks. But some take it even a step further. Could AI possibly be the foolproof cybersecurity solution we've been hoping for all along?

Maybe not. In his recently published book, *Fancy Bear Goes Phishing: The Dark History of the Information Age in Five Extraordinary Hacks,*[8] Yale Professor Scott J. Shapiro describes the dangers of solutionism, especially within the realm of cybersecurity. He explains that cybersecurity technology tools are often touted as the best of the best, with AI frequently being the deciding factor as to what makes one product better than any other. But Shapiro goes on to point out that technological fixes are not always what's needed to correct cybersecurity problems. "Cybersecurity is not a primarily technological problem that requires a

primarily engineering solution," he writes. "It is a human problem that requires an understanding of human behavior." Similarly, though ChatGPT "passed" the bar,[9] it is not bound to the same standards required of an actual attorney, who must be qualified to deal with "human problems." Judge Starr further highlights this disqualifying feature of AI in his ban: "Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle."[10]

Though I frequently discuss the "human element" of cybersecurity, I think the prevalence of AI and the fears surrounding its ascent are making us all question the "human element" in other industries. For one, AI poses a data security risk—consider an employee who inputs confidential data into a conversation. Or a breach that compromises chat history. But AI may also pose a greater "security" risk as many see it—the risk to human beings' way of life. Within the legal community, it's been challenging to weigh the risks and benefits, as both seem abundant. Ethical guidelines and governance rules will undoubtedly continue to be created to manage the strengths of AI in relation to its pitfalls. In the meantime, it is important to keep an eye on how AI is being used today. Establishing firm requirements for its use and setting clear expectations can help mitigate risk. ▲

NOTES

[1] *https://www.cnbc.com/2023/03/20/openai-ceo-sam-altman-says-hes-a-little-bit-scared-of-ai.html*

[2] *https://www.cnn.com/2023/05/16/tech/sam-altman-openai-congress/index.html*

[3] *https://www.forbes.com/sites/michaelperegrine/2023/05/17/sam-altman-sends-a-message-to-corporate-leaders-on-ai-risk-management/?sh=42ab1e96dbef*

[4] *https://www.bbc.com/news/technology-65431914#*

[5] *https://www.forbes.com/sites/mattnovak/2023/05/27/lawyer-uses-chatgpt-in-federal-court-and-it-goes-horribly-wrong/?sh=4a4c089d3494*

[6] *https://storage.courtlistener.com/recap/gov.uscourts.nysd.575368/gov.uscourts.nysd.575368.32.1_1.pdf*

[7] *https://www.cbsnews.com/news/texas-judge-bans-chatgpt-court-filing/*

[8] Shapiro, Scott. J. *Fancy Bear Goes Phishing: The Dark History of the Information Age, in Five Extraordinary Hacks,"* Farrar, Straus and Giroux, 2023.

[9] *https://www.abajournal.com/web/article/latest-version-of-chatgpt-aces-the-bar-exam-with-score-in-90th-percentile*

[10] *https://www.txnd.uscourts.gov/judge/judge-brantley-starr*

UNDERSTANDING THE STAGES OF BRIEF

BY CASSANDRA JACOBSEN AND FINN JACOBSEN cjacobsen@cozen.com fjacobsen@sjjlawfirm.com

CASSANDRA (CASSIE) JACOBSEN is an associate at Cozen O'Connor, focusing on complex commercial litigation and advising employers on a variety of employment issues.

FINN JACOBSEN is a partner at Smith Jadin Johnson PLLC, providing guidance to his clients on all issues involving homeowners associations.

Like so many, we spent a significant portion of the covid pandemic working remotely from our one-and-a-half-story home in south Minneapolis, utilizing whatever space we had available as an office. Although we are grateful for that time, we grew far too familiar with each other's work idiosyncrasies (read: bad habits).

Cassie learned that Finn is likely to save his physical to-do list before his family in a house fire (only marginally kidding), while Cassie relies on an electronic calendar to organize her schedule. Finn learned that Cassie needs music to write, while he needs complete silence (good luck getting that with three kids and two dogs). We also learned that we undergo the "stages of brief" whenever we tackle any substantial writing project. The stages, derived from the five stages of grief (denial, anger, bargaining, depression, and acceptance), can be applied to nearly any significant project that a young attorney may encounter.

The first two stages, denial and anger, hit hard and fast. The moment you get the e-service notification, the feelings of inadequacy set in. What did I do wrong? Did I miss a dispositive fact? A case? *Should I even be a lawyer?* These feelings quickly shift to anger when you realize that in fact it's opposing counsel that has it wrong. How could they even bring this motion? It's procedurally deficient. It ignores a key issue. Is this sanctionable? *How dare they.*

Once you start your research, you begin to bargain. With yourself, with precedent, with your facts and opposing counsel's position. Unless you are lucky and find that case that is directly on point (you know, that one your partner told you exists and demands that you find), you find two dozen cases that any good lawyer could either argue in your favor or distinguish. You can't see the forest for the trees.

After conducting extensive research and thoroughly reviewing and coming back to the relevant cases at least four times, you may start to feel overwhelmed, disheartened, lost in the weeds. Depression sets in. Clearly, since not every fact is in your favor, you're going to lose.

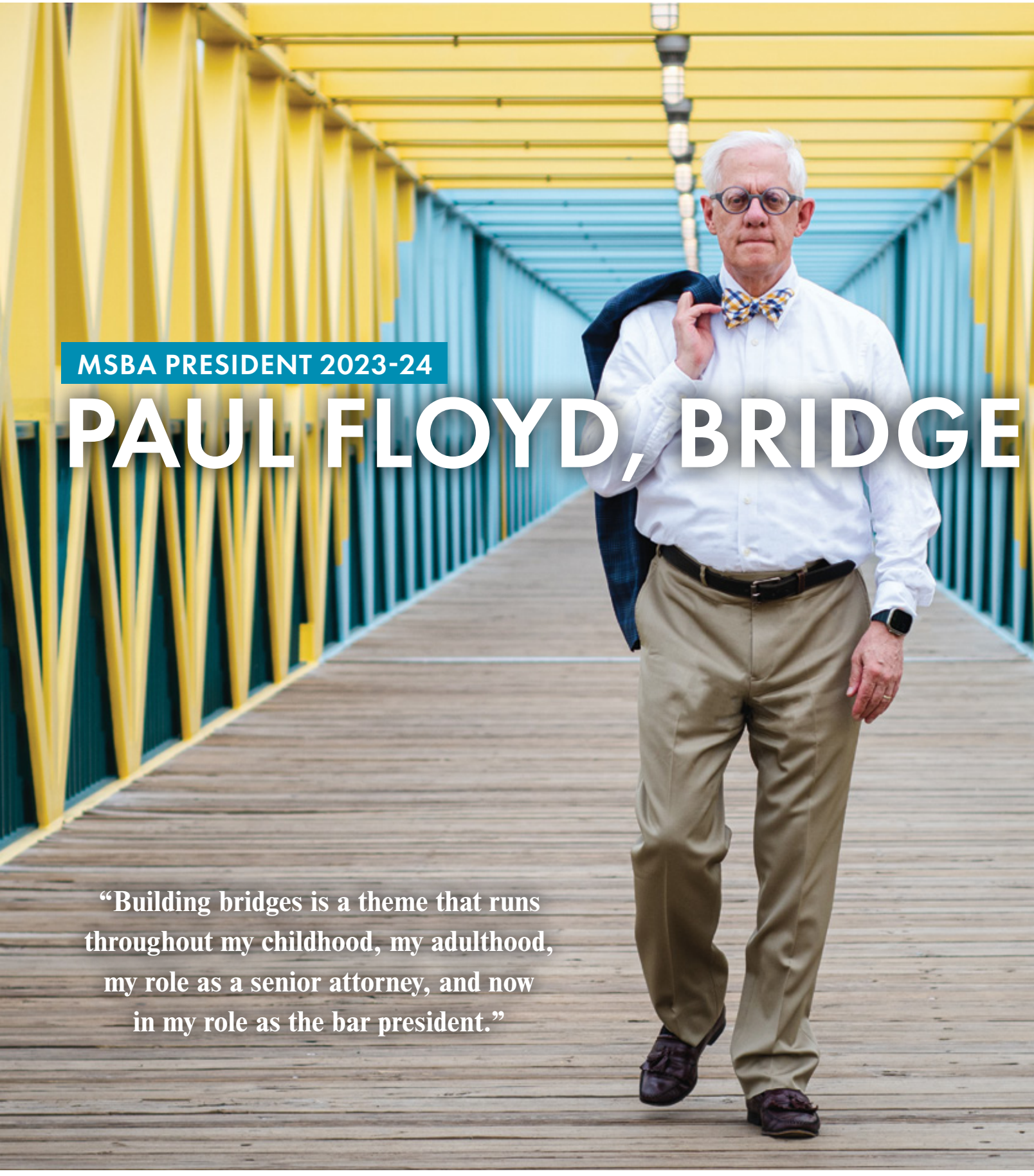
Finally, there comes a point of acceptance. If you have done your job correctly, your level of understanding and knowledge of the issue (and likely the case) surpasses that of anyone else, including your client, opposing counsel, and certainly someone who is picking up your brief for the first time. The running joke in our household is we no longer ask if the other has finished drafting their brief; we ask if they will win. When the answer is an unequivocal and immediate "Yes," preceded by an explanation as to why, then we know they have completed the task. In fact, the number of seconds it takes to respond is often a good indicator of how much longer the process will take.

This is also the phase where it is crucial to acknowledge that, as lawyers, we tend to be very hard on ourselves—and to remember that our job is to make the best out of the facts and the law as they exist in this current moment. Sometimes that means you've done the best with what you have. *That* is when you are finished.

Obviously each individual's approach may vary, but the gist is that it is common to experience self-doubt at some point during the writing process. So what measures can new lawyers adopt to ease the writing process? Here are some practical pointers:

- Do not procrastinate, just start writing. Getting started is half the battle, and it's less daunting to revise imperfect writing than to have nothing at all. You'll thank yourself later on.
- Don't let the perfect be the enemy of the good. Once you start writing, avoid spending an excessive amount of time perfecting one sentence. Just go ahead with your ideas. You can always go back with fresh eyes and make necessary revisions later.
- Don't reinvent the wheel. Ask your colleagues for sample documents or find ones online. This saves you and the client time and money and gives you a solid starting point.
- Know when you are done. After seeing a case four times, you're likely done researching that issue. It is too easy to vanish down a research rabbit hole.
- Tailor your writing to suit your intended audience. Even when drafting legal documents for the court, avoid incorporating unnecessary legal jargon or complex terminology.

So when the next assignment crosses your desk, don't fret. Open up your favorite research tool, your Word document, and start chipping away. ▲



MSBA PRESIDENT 2023-24

PAUL FLOYD, BRIDGE

"Building bridges is a theme that runs throughout my childhood, my adulthood, my role as a senior attorney, and now in my role as the bar president."

BUILDER

BY AMY LINDGREN

PHOTOS BY SARAH MAYER

If you ask Paul Floyd how he sees himself, the response won't be glib or simple. He's been thinking about this for a while; as the incoming president of the Minnesota State Bar Association, he knows he'll be introducing himself to 13,000 members statewide, becoming the public face of the organization that both serves attorneys and gives them a voice. Eventually Floyd does settle on an answer: He sees himself as a person who builds bridges, creating a conduit for communication and a pathway for people with divergent viewpoints to connect and find previously unrecognized common ground.

"Building bridges," he says, "is a theme that runs throughout my childhood, my adulthood, my role as a senior attorney, and now in my role as the bar president." Those are the broad strokes covering his 67 years; the specifics include 40 years of law practice, a seminary degree, 25 years of volunteering for a Ukrainian-based nonprofit, leadership of two bar associations (MSBA makes three), and more than two decades as an adjunct professor for two universities—all built upon a foundation of barely speaking or reading in the first years of his life and growing up with the expectation of being a housepainter.

Hard times

According to Floyd's twin sister, Leslie Floyd, she, Paul, and their older brother, David, grew up impoverished—a fact Paul didn't seem to register until his mother completed their financial forms for college grants. "That's when I realized we were poor," she recalls Paul saying. But Leslie, a historian by profession, remembers in scholarly detail the turn-of-the-century farmhouse the family rented in Lima, Ohio after moving from nearby Cuyahoga Falls when their parents divorced. The weathered home had bats in the attic and no upstairs heat, despite winter temperatures that regularly dipped below freezing. Paul and David shared one of the two bedrooms, while Leslie and their mother shared the other. The family of four had no car, which meant a four-mile walk for the kids to hang out at the mall and a somewhat embarrassing weekly ride to church in the funeral home director's black limousine. "My mother didn't feel comfortable at the Baptist church because she was divorced," Leslie recalls, "but she encouraged us to go. The local funeral home guy would come get us and we used to lie flat in the back so the neighbors wouldn't see us in the limousine."

These stories are told with a laugh and the acknowledgement that a lot of people were "of modest means" in their community. Like other kids, the Floyds earned extra money delivering the newspaper, and Paul played with his friends in the back lot of the nearby ball-bearing plant, more than once sustaining injuries that required stitches. The 1960s and '70s were a tumultuous time to grow up in Lima, an industrial town that experienced racial discord and violence, accompanied by frequent lockdowns at their high school. Through it all, their mother went to work every day in advertising at the Montgomery Ward store, and the Floyd children walked to school and back. Their parents had divorced when the twins were five, and their dad returned to South Carolina, where he'd been raised. Paul says they didn't have much contact with him except for one conversation he remembers from his teens when his dad called from jail. The state of Ohio had apparently caught up with their father for not paying child support, resulting in a six-month stint on a chain gang down south.

Leny Wallen-Friedman, Floyd's recently retired law partner, describes him as "dedicated to public service. You can just see that from what he's done. He has a very good vision and he's effective at moving organizations forward. A lot of people are willing to help but they're not skilled at it the way he is."

Despite not interacting with their father, the Floyd children did travel south many summers to see their paternal grandparents, an experience that deeply impressed Paul. Seeing southern towns that were effectively segregated made him think more critically about race issues and kindled his instinct to be a bridge between the perspectives held by the northern and southern sides of his own family. Floyd says. "I've always struggled over the north-south dynamic in our family. I don't have an answer to it, but I'm sensitive to the reality that was inherently there." If he didn't consider himself impoverished as a youth, Floyd sees the picture more clearly now. In particular, he remembers being deemed a remedial student in grade school, which might not have happened in a family with more resources. First came the years when he didn't speak, relying on his sister to do the talking. That began to clear up just when it was time to learn math and reading—two things he couldn't seem to master. Someone finally realized when he was eight or nine that he couldn't see the board, but by the time he received his free glasses from the Lions Club, he was hopelessly behind. A case of dyslexia that wasn't diagnosed until well into his adult years further complicated his education. For lack of resources and guidance, Floyd did poorly in school. Assuming he wasn't college material, he set his sights instead on a career working with his hands.

A gift from a stranger

As soon as he was old enough, Floyd took a job selling paint and tools at the local Sears store. He spent his junior and senior years of high school running track, earning Cs and Ds in his classes, and riding his sister's sparkly purple banana-seat bike back and forth to work. (His own bike had been stolen.) He had chosen house-painting as a likely vocation and probably would have stuck to that plan if something fairly amazing hadn't happened: A stranger offered to pay half of his tuition if he went to college. To be fair, this wasn't a complete stranger—it was someone with whom Floyd had struck up a correspondence after hearing him speak at a youth rally. Tony Campolo, a left-leaning evangelical speaker who would eventually become one of President Clinton's spiritual advisors, made Floyd an offer he couldn't refuse: Attend one of three religious colleges recommended by Campolo, and he would pay half the cost.

For the first time, Floyd says, college seemed real to him. Of the three options, he chose Judson College outside of Chicago, where he majored in political science and history. It was a tiny campus that was only recently accredited at the time he enrolled, but it had an unbeatable policy: Students earning high grades would be comped half of their tuition—which for Floyd could mean no tuition costs at all because of Campolo's gift. Floyd threw himself into the challenge, not just earning honors but managing to complete his degree in two and a half years.

Floyd still needed student jobs to pay for his room and board, which was a stroke of luck on two counts: It was at one of those jobs that his future wife, Donna, first saw him, while another position led to his interest in law. In truth, Donna would probably have seen him anyway in their time at Judson, since there were only 500 students on campus. But Floyd stood out as one of the college janitors, frequently mopping floors or cleaning the halls as she walked past. They hung out with mutual friends, and Paul eventually asked her out to a drive-in movie. That first date is memorable on many counts, Donna says, not least because Paul's cousin was in the front seat—Paul still didn't have a driver's license, much less a car. The three of them arrived at the movie in his aunt's Mustang, and the cousin turned halfway around in the driver's seat to keep up a conversation with Paul and his date in the back. The movie was *Blazing Saddles*, and it wasn't until much later that Paul told Donna he wasn't sure if he should laugh at the more bawdy jokes in front of her.

Despite its cringe-inducing potential, the outing went well enough to yield another. Eventually Donna and Paul set a date to marry two days after graduation. In the meantime, Floyd's other job as a teaching assistant for his political science professor was helping to set his professional course. His professor was also an attorney in private practice and one day he asked Floyd if he'd like to see an appellate court proceeding. Floyd jumped at the chance, traveling with another student into Chicago to see his professor argue a case at the 7th Circuit Court of Appeals. On the same trip, the professor took them to another courtroom in Cook County where they were able to observe a civil trial involving police officers who had shot and killed the Black Panther Party activists Fred Hampton and Mark Clark at their Chicago apartment in 1969. Floyd recalls seeing the courtroom reconstruction of the shooting scene, and the strings used to show the trajectory of the bullets. Between his professor's intellectual arguments in the first case and the drama of the second, Floyd's mind was made up: "I knew I wanted to be an attorney."

But first, there was the matter of his writing. Although Floyd was making good grades, his undiagnosed dyslexia continued to plague his paperwork. Without his asking, a Judson teacher took him aside and stated bluntly, "If you don't learn how to spell and write and articulate well, people will assume you're ignorant. No one will believe anything you say and you'll have no credibility." As Floyd recalls, she spent a semester tutoring him privately, telling him to forget everything he'd tried to learn in high school and start over. "She actually invested in me," he says. The lessons took and, although Floyd never fully mastered spelling, he improved

FIVE FACTS ABOUT PAUL

1) He graduated 8th in his law school class and served as editor of Law Review despite his undiagnosed dyslexia.

2) He has listened to approximately 100 of The Great Courses on tape, on topics ranging from art and literature to history and game theory.

3) He and Kate MacKinnon, a fellow associate at an early job, once researched so deeply for relevant case law that they ended up giving their firm's partner something they found from the Queen's Bench in England—the 19th-century Victorian era of British case law. Of note: This was pre-internet.

4) He was on the cover of Minnesota's Journal of Law & Politics not once but twice in the 1990s—a rare distinction even if the covers were partly a spoof of his buttoned-down demeanor.

5) In 2000, he put his practice on pause for several months to study psychology and marriage and family therapy before deciding to re-launch a law practice focused on helping attorneys build and manage their own businesses.

to the point that law school no longer seemed out of reach. Even so, he put off enrollment to follow one more piece of advice from his political science professor: Try something else before law school so you know better what kind of law you want to practice. Floyd chose seminary as his "something else," applying at St. Paul's Bethel Seminary. Shortly afterward, Donna was offered an actuarial position in Minneapolis. The two moved north and began their married and professional lives.

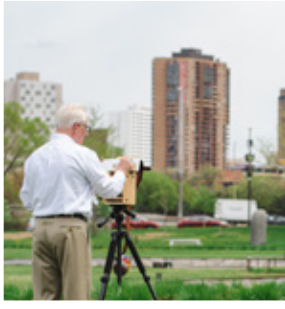
Launching a career

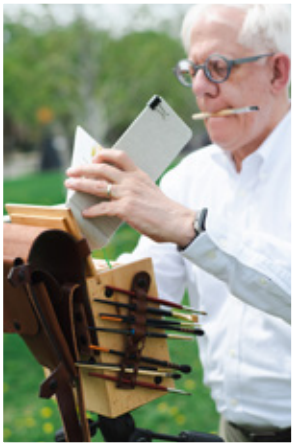
So, if Floyd went to seminary, why isn't he a pastor instead of a lawyer? First, because he maintained his love for the law even through four years of theological training and a Master of Divinity degree (with honors) in New Testament Studies. And second? They told him not to become one. Apparently the program's personality and vocational testing suggested that he would be likely to wash out if he went into pastoral ministry. Not one to ignore good advice, Floyd tilted his studies to the theological side and savored the experience of learning for its own sake. He also enjoyed traveling around the country co-teaching seminars on youth ministry and the exposure to different points of view that it gave him. Three months after graduating from Bethel, he arrived at William Mitchell for his first law school classes; three years later he began his career clerking for Justice C. Donald Peterson at the Minnesota Supreme Court and then moved into a litigation practice as an associate at Arthur Chapman & Michaelson.

Kate MacKinnon, who practices from the Law Office of Katherine L. MacKinnon in St. Paul, remembers meeting Floyd when she started as an associate in the same firm a year after he did. "We were both kind of nerdy," she remembers, "so we hit it off." They worked on numerous cases together while also representing the firm at law school recruiting events and sharing what MacKinnon calls "a certain level of dog-with-a-boneyness" in searching for arcane case law to support their legal arguments. She remembers Floyd as being simultaneously very funny and very "buttoned down, even for Minnesota." For his part, Floyd remembers receiving important advice from MacKinnon. Trying to sound more like his own notion of a lawyer, Floyd had begun swearing in their conversations. To which he says MacKinnon replied: "Stop that. That's not you. First of all, the f-word is not believable when you say it. You don't even do it convincingly. And second, you don't need it. You think it makes you sound stronger but it doesn't." Floyd says he hung up the phone from that conversation thinking, "She just gave me a gift. Kate was saying, 'Go with being the nice guy. Instead of trying to sound tough, be patient, and if the other attorney is being unreasonable, you can give people just enough rope to hang themselves.'"

And so he became a nice-guy lawyer, a bridge builder, a person who holds high standards and helps others do the same. It would take a few more years, but the same process of developing his identity as an attorney would also lead him away from litigation to transactional law, and then to his current focus on helping other attorneys navigate issues in their own practices. Eric Cooperstein, a Minneapolis attorney and friend whose practice is devoted to ethics, has

Paul Floyd is "driven by service, not by ego," says attorney and friend Eric Cooperstein. "He's not afraid to ask for help or new ideas."





JUST THE FACTS

BIO BITS ON PAUL FLOYD

FAMILY

- Raised in Cuyahoga Falls and Lima, Ohio by a single mother, Patricia Ann Floyd
- Siblings: older brother David and younger sister Leslie *(Paul's twin, born seven minutes later)*

EDUCATION

- Post-graduate studies in Marriage & Family Therapy, Bethel Theological Seminary *(2000-2001)*
- Juris Doctorate, *cum laude*, William Mitchell College of Law *(1983)*
- Master of Divinity, Bethel Theological Seminary *(1980)*
- Bachelor of Arts with Honors, Political Science, Judson College *(1976)*

LEGAL CAREER

- Shareholder, Wallen-Friedman & Floyd, PA, Minneapolis *(2002-present)*
- Shareholder, Paul M. Floyd, PA, Minneapolis *(2000-2002)*
- Partner, Rau & Floyd, PLLP, Minneapolis *(1996-2000)*
- Partner and associate, Fruth & Anthony, PA, Minneapolis *(1987-1996)*
- Associate attorney, Arthur Chapman & Michaelson, Minneapolis *(1984-1987)*
  - Judicial law clerk, Justice C. Donald Peterson, Minnesota Supreme Court *(1983-1984)*

PROFESSIONAL LEADERSHIP ROLES & MEMBERSHIPS (SELECTED)

- President, Minnesota State Bar Association *(2023-2024)*; Executive Council member *(2020-present)*
- Chair, MSBA Solo Small Firm Council *(2019-2020)*; council member *(2018-2020)*
- President, Hennepin County Bar Association *(2016-17)*; Executive Council member *(2013-2017)*
- Board of Directors, Hennepin County Bar Association *(2005-2007; 2012-2018)*
- Member, Hennepin County Bar Foundation *(2003-2007; 2013-2018)*
- President, Hennepin County Bar Foundation *(2006-2007)*
- Co-Chair, MSBA Challenges to the Practice of Law Task Force *(2013-2015)*
- Member, Ethics Panel, Hennepin County Bar Association *(1992-1998; 2000-2003)*
- 8th Circuit vice president, Federal Bar Association *(1996-1999)*
- President, Minnesota Chapter of the Federal Bar Association *(1993-1994)*

ADDITIONAL WORK EXPERIENCES

- Adjunct professor, St. Thomas University School of Law *(2018-present)*
- Adjunct professor, Bethel University College of Adult & Professional Studies *(2018-present)*
- Adjunct professor, Bethel University MBA program *(2005-present) (lead faculty)*
- Adjunct professor, Bethel University College of Arts & Sciences *(2005-2009; 2016-2023)*

CERTIFICATIONS & BAR ADMISSIONS

- Minnesota
- Federal Circuit Court of Appeals
- United States District Court, District of Minnesota
- 8th Circuit Court of Appeals
- United States Supreme Court

HONORS

- Minnesota Super Lawyer, 10+ years
- AV rating by Martindale-Hubble, *since 1997*
- American Jurisprudence Awards in law school (1st in class) for civil procedure, contracts, professional responsibility, and wills/trusts

CIVIC VOLUNTEERING

- Shepherd's Foundation, Ukraine *(1995-present)* team member, board member, current president of the Board of Directors
- Call for Justice, LLC, Minneapolis, board member *(2010-2016)*; chair *(2015-2016)*
- Judson University, Elgin, Illinois, trustee *(2015-2018)*

seen some of that evolution since meeting him in connection with a case in 2007. "Even in the time I've known him," Cooperstein says, "I've seen Paul's views on things evolve. He's the kind of person who can engage in self-reflection, and he's very open-minded." Cooperstein sees Floyd's practice as a good fit for his many interests, as well as his goal of helping others. "Paul loves the business side of law," he says. "I don't know if there are a lot of lawyers who regularly read the *Harvard Business Review,* but he does and he applies what he reads with the attorneys he counsels."

If the change in his practice fits Floyd's evolving vision of himself, so too does his consistent level of volunteer and leadership work. Whether it derives from wanting to pay back the investment others have made in him, or a simple desire to be of service, Floyd has managed to give away thousands of hours of high-level work in his career. His volunteering has ranged from leadership roles in churches where he and Donna have been members to his affiliation since 1997 with Shepherd's Foundation, a nonprofit serving people in Ukraine, where he has traveled more than a dozen times. Dr. Marshall Wade, the foundation's board chair, credits Floyd (currently the organization's president) with a huge impact, particularly on the Ukrainian side of the operations. "Paul is a fantastic consultant in terms of the business side, and certainly the legal ramifications of decisions," Wade says.

The travelers: Paul and Donna Floyd on bike trips in the Netherlands and Door County, Wisconsin (lower left).

Wade notes that the level of corruption in Ukraine in the early days of Floyd's involvement was pervasive, making his style of ethical leadership even more impactful as he helped the group adapt from its original mission of providing health services to becoming a camp for disabled children to its current role as an assistance center for war refugees since the Russian invasion. Located about 90 miles south of Kyiv, the foundation considered closing at one point because of problems with government compliance. As Wade relates, "Paul just kept working the problem. He said, 'I think we can do this,' and he just kept pushing through, breaking it down until we got through it. Paul was pivotal in just working the problem and not giving up."

In addition to his work with nonprofits and churches, Floyd has also contributed significant time to multiple bar associations. Besides the MSBA leadership track now culminating in his year as president, he has also served as president of both the Hennepin County Bar Association (2016) and the Minnesota Chapter of the Federal Bar Association (1993-1994). Leny Wallen-Friedman, Floyd's recently retired law partner, describes Floyd as "dedicated to public service. You can just see that from what he's done. He has a very good vision and he's effective at moving organizations forward. A lot of people are willing to help but they're not skilled at it the way he is." Wallen-Friedman, who was Floyd's partner for more than 20 years before retiring, also notes with a laugh that Floyd was never driven to find work when they practiced together. "We always had enough work," Wallen-Friedman says, "but he was never interested in working extremely hard. He always wanted to have a balance so he could do these other things in his life. To a certain degree he was ahead of his time on that."

One of those other things in Floyd's life has been teaching, a pursuit he took up in 2005 as an adjunct professor for Bethel University, where he currently serves as a lead faculty member in the MBA program. In 2018, he began teaching on business subjects at the University of St. Thomas School of Law. In his sessions with students, Floyd acts as an instructor and as a mentor, and also shares from his own life in the hopes of helping others with unseen difficulties. He has been open about his own dyslexia, and that openness is sometimes rewarded when students approach him for advice or support for their own learning disabilities.

Another of those "other things" Floyd has made time for throughout his career has been international travel and bike trips with Donna, as well as more local bike trips with friends such as Dennis Smith, an attorney and long-time mentor who now lives in Colorado. Smith calls his friend "an exceptional cyclist" who makes trips fun. At 67, Floyd is still biking, still practicing law, still volunteering, still providing bar leadership. At an age when many are slowing down, he seems to be picking up speed, adding pursuits such as art to his list of activities (see sidebar, next page).

As Floyd enters his MSBA leadership year, he intends to continue building bridges, contributing his skills as a mediator and advocate. "I think what I bring is the ability to listen and to allow people to have a voice and feel like they're part of the bar association," he says. "It's not an initiative or an agenda, because I've learned that the process is more important. If the people in the room feel they have made a contribution, the decision will reflect them and they'll be more likely to support it. I can be a bridge to make that happen, to let the bar association find its own voice." Cooperstein, who served as HCBA president just ahead of Floyd, says his friend does well in leadership roles because "he's driven by service, not by ego. He's not afraid to ask for help or new ideas." Cooperstein believes Floyd will get that help if he asks, because of the bridges he has taken care to build during his career. "Paul knows a lot of lawyers and he's stayed in contact with them over the years," Cooperstein says. "He'll be bringing that to the table when he's president." ▲

Floyd acquired his passion for watercolors by accident after encountering an art teacher on vacation in Door County, Wisconsin not long before the pandemic.

The artful lawyer

It might be the nature of law, or perhaps the presumed nature of the people drawn to law, but artistry is not one of the attributes popularly associated with the profession. As a rule, clients want their attorneys to be competent, learned, persistent—but artistic? For Paul Floyd, practicing art as a discipline has been a part of his life since around 2009, or about a third of the time he's been a practicing lawyer.

According to Paul's wife, Donna Floyd, it started with photography. As she recalls, he had a new camera that he brought along on a trip to Alaska. From there it was visits to the zoo, where she says he would take "about 50 pictures of every animal." If that sounds somewhat aggravating, it did have a payoff: free hotel nights and gift certificates from contests he entered, and a growing list of organizations using his photos. His recently retired law partner, Leny Wallen-Friedman, estimates Floyd has taken "north of 100,000 photos," demonstrating an all-in type of commitment to the form.

Floyd might have stayed with photography as his primary creative outlet if it hadn't been for a chance encounter with an art instructor on vacation in Wisconsin's Door County around 2019. The instructor led a group exercise in watercolor and Floyd got the bug. Then, when the pandemic hit, he found his opportunity to dive into the art form. It didn't take long before he had ordered a portable painter's kit online, letting him set up easily in art museums or paint in plein air. A small park near Floyd's home in St. Paul became a favorite haunt as he practiced his new skills during the covid shutdown.

But this wasn't a pandemic bread-making fad for Floyd. Instead of retiring his watercolor kit when restrictions eased, Floyd doubled down. He discovered that he could make quick pictures while waiting for meetings to start, or more elaborate sketches of the meetings themselves, in the style of a courtroom artist. He even carries the painting box onto airplanes now, whiling away the flight using a dry watercolor technique. "It's true on a plane you have turbulence," he notes, "but you just go with the bumps. Sometimes it ends up being an abstract."

That's a go-with-the-flow mentality Floyd doesn't apply to law in quite the same way. As he explained in a 2021 Hennepin Lawyer article, "Surprises in watercolors are a good thing. Surprises in law are rarely, if ever, a good thing."

Floyd still takes photos while traveling, but now he also documents his vacations by making a drawing in advance of each site he and Donna plan to visit. These dedicated notebooks become a sort of guide for the trip, letting him anticipate and learn about each place in advance, before taking notes about them in real time.

In addition to being enjoyable, Floyd's artistic endeavors may be benefiting him in other ways. Numerous studies suggest that making art improves skills ranging from communication to managing projects to empathizing with others. In the Hennepin Lawyer article, Floyd noted another benefit of doing art: gaining a fresh perspective. As he wrote, "I once painted a scene only to turn it upside down and realize that it looked so much better reversed. It is my subconscious at work."

Which brings us back to those clients who may not realize the benefits of employing an artistic lawyer. Now Floyd's clients can add perspective to the list of attributes they appreciate, knowing that he can see things from more than one angle, finding the best approach to the problem. ▲

Federal courts open the gates to Minnesota punitive-damages claims

BY NICK BULLARD AND LUKE WETTERSTROM

The threat of punitive damages is a game-changer in civil litigation. It ratchets up the financial stakes and imperils the defendant's reputation—often creating intense pressure to settle. Get ready for more of this game-changer in federal court, thanks to a recent shift in case law.

Until recently, federal courts enforced a Minnesota law, known as the "gatekeeping statute," that makes it harder for parties to request punitive damages. For 30 years, federal courts enforced this gatekeeping statute pursuant to the *Erie* doctrine, which governs when state laws apply in federal court.

The 30-year streak is over. In 2017, Minnesota's federal courts began reexamining the gatekeeping statute in light of the U.S. Supreme Court's 2010 decision in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*[1] A split has emerged since then. Most judges in the District of Minnesota now refuse to enforce the gatekeeping statute, making it easier for parties to request punitive damages. But a persistent minority still enforces the statute, and other judges have not yet weighed in.

This shifting landscape poses challenges for lawyers practicing in Minnesota federal court. The standard for requesting punitive damages varies from judge to judge, and key issues remain unresolved. This article aims to shed light on this subject and help lawyers avoid pitfalls awaiting them in federal court.

Pleading punitive damages: A comparison of federal and Minnesota practice

The Minnesota Legislature enacted the gatekeeping statute as part of the Tort Reform Act of 1986.[2] The law clamps down on punitive damages in three ways:

- **Timing restriction.** The gatekeeping statute prohibits plaintiffs from pleading a punitive-damages claim in the initial complaint. Instead, after discovery, a plaintiff must move to amend the complaint to request punitive damages.[3]
- **Affidavit requirement.** The statute requires plaintiffs to support the motion to amend with affidavits showing the factual basis for punitive damages.[4]
- **Screening requirement.** A court may not grant the motion unless it finds the plaintiff has established a "*prima facie*" case for punitive damages.[5]

None of those restrictions exist in the Federal Rules of Civil Procedure. In fact, they arguably conflict with Rules 8(a), 9(g), and 15.

Unlike the gatekeeping statute, Rule 8(a) permits punitive-damages claims in an initial complaint.[6] Similarly, Rule 9(g) says "special damages... *must* be specifically stated" in the pleadings.[7] If punitive damages are "special damages"—a topic on which courts disagree[8]—Rule 9(g) seems to require plaintiffs to request them in the initial complaint.

Likewise, the federal rule governing amendment of pleadings, Rule 15, has no affidavit or *prima facie* screening requirements like the gatekeeping statute. Under Rule 15, a plaintiff can amend the complaint without court permission in the initial phase of the case.[9] After that, court permission is required but must be "freely give[n]."[10] The plaintiff need only allege enough facts—assumed to be true—to state a plausible claim for punitive damages.[11] There is no requirement to submit supporting affidavits or evidence.[12]

A very brief refresher on the *Erie* doctrine

This apparent conflict between Minnesota and federal practice raises an important issue for lawyers in Minnesota: Which set of rules applies in federal diversity cases? This is where the *Erie* doctrine comes into play.

Under the *Erie* doctrine, federal courts in diversity cases must apply state "substantive" law and federal "procedural" law.[13] Some laws are clearly substantive. For example, Minnesota law sets the substantive standard that must be met to award punitive damages ("deliberate disregard for the rights or safety of others").[14] But other laws blend procedure and substance. The gatekeeping statute is a good example. It requires a process for pleading punitive damages (procedural) to limit frivolous punitive-damages claims (substantive). Laws that blend procedure and substance create the trickiest *Erie* problems.

In 2010, the U.S. Supreme Court refined the *Erie* doctrine in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*[15] *Shady Grove* instructs that a federal court exercising diversity jurisdiction should not apply a state law if (1) a federal rule of civil procedure "answer[s] the same question" as the state law and (2) the federal rule is valid.[16] Courts need not "wade into *Erie's* murky waters" when a federal rule meets both requirements.[17]

The old consensus: The gatekeeping statute applies in federal court

In 1987, Judge Donald Alsop was the first to consider whether the gatekeeping statute applies in federal court, and he concluded it did not, because the statute is "procedural in nature."[18] But the next year, Judge Edward Devitt reached the opposite conclusion.[19]

For the next 30 years, district judges uniformly followed Judge Devitt's conclusion that the gatekeeping statute applies in federal court.[20] Even Judge Alsop changed his view.[21] During this period, the Eighth Circuit affirmed four decisions applying the gatekeeping statute in federal court, signaling approval of the practice (though it never analyzed the *Erie* issue).[22]

The law was settled. In federal court, a plaintiff could not include a claim for punitive damages under Minnesota law in the initial complaint. If the plaintiff later moved to add a claim for punitive damages, federal courts would enforce the gatekeeping statute instead of Rule 15.

The new emerging consensus: Rule 15 trumps the gatekeeping statute

After *Shady Grove*, district judges began looking at the issue anew. This reexamination arose in the context of motions to amend to add punitive-damages claims—were those motions governed by the gatekeeping statute or Rule 15?

Magistrate Judge Franklin Noel was the first to reexamine this issue in 2017. Judge Noel concluded the gatekeeping statute and Rule 15 "address the same subject matter"—the requirements for a motion to amend—so Rule 15 governs under *Shady Grove*.[23]

Since Judge Noel's 2017 decision, all but two of the judges to consider this issue have agreed that Rule 15, not the gatekeeping statute, governs a motion to add a punitive-damages claim. This new consensus includes five Minnesota district judges (Nancy Brasel, Kate Menendez, Ann Montgomery, Patrick Schiltz, and John Tunheim)[24] and seven magistrate judges (Hildy Bowbeer, John Docherty, Dulce Foster, Franklin Noel, Steven Rau, Becky Thorson, and Elizabeth Cowan Wright).[25] Federal judges outside Minnesota have also joined the consensus.[26]

The two exceptions are Magistrate Judge Leo Brisbois and Judge Wilhelmina Wright. Judge Brisbois "disagree[s]" with Judge Noel's 2017 decision because, in his view, Rule 15 and the gatekeeping statute "can peacefully co-exist."[27] In 2022, Judge Wright affirmed Judge Brisbois's enforcement of the gatekeeping statute, agreeing "the pleading of punitive damages" must "conform" to the gatekeeping statute's requirements.[28]

Many Minnesota federal judges still have not weighed in on this issue since Judge Noel's 2017 decision. Judge Donovan Frank and Magistrate Judge Tony Leung have continued to apply the gatekeeping statute, but without *Erie* analysis.[29] Judge Eric Tostrud noted "the recent intra-District trend has been not to apply" the gatekeeping statute but did not reach the issue.[30] As of the publication of this article, the other seven active and senior Minnesota federal judges have not addressed this issue since 2017. (They are Judges Jerry Blackwell, Paul Magnuson, David Doty, Michael Davis, Joan Ericksen, David Schultz, and Jon Huseby.)

Ultimately, the Eighth Circuit may need to intervene to resolve this intra-district split. But that may not happen for a while. This issue tends to evade appellate review because the decision to apply (or not apply) the gatekeeping statute usually is not immediately appealable.

Remaining questions and pitfalls

While awaiting clarity from the Eighth Circuit, lawyers and judges will need to continue to work through other important issues regarding the gatekeeping statute.

May a plaintiff include a punitive-damages claim in the initial complaint?

A major unsettled question is whether a plaintiff may include a punitive-damages claim in the initial complaint—something the gatekeeping statute prohibits but the federal rules permit.

Judge Noel's 2017 decision, and the following decisions, do not squarely address that issue. As mentioned, those decisions analyze whether Rule 15 or the gatekeeping statute governs a motion to amend to add a punitive-damages claim. The decisions do not address whether the plaintiff could have included such a claim at the outset instead of later moving to amend.

This timing issue presents a different *Erie* analysis. In the context of a motion to amend, the *Erie* analysis pits the gatekeeping statute against Rule 15. But on the timing issue, the question is whether to apply the gatekeeping statute (which prohibits punitive-damages claims in the initial complaint) or Rules 8 and 9(g) (which do not).

Case law on this issue is sparse since *Shady Grove*. In 2021, Judge Tunheim enforced the gatekeeping statute's prohibition on punitive damages in initial pleadings, but without *Erie* analysis.[31] On the other hand, Judge Menendez in 2019 refused to strike an initial punitive-damages claim but analyzed the issue "as though [the plaintiff] had filed a motion to amend."[32]

Minnesota lawyers will have to await further case law on this issue. Two data points, however, suggest federal judges ultimately may jettison the gatekeeping statute's timing restriction. First, Judge Schiltz analyzed a similar Minnesota statute—barring a complaint from including a claim for bad-faith denial of insurance benefits—in light of *Shady Grove* and concluded it conflicts with Rule 8.[33] Second, federal judges have analyzed other states' gatekeeping statues on punitive damages in light of *Shady Grove* and concluded they conflict with the federal rules.[34] Even before *Shady Grove*, a federal appellate court held that Rule 8 trumps a state statute prohibiting punitive damages in the initial complaint.[35]

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What can defendants do to challenge punitive-damages claims?

Assuming plaintiffs can now threaten punitive damages in federal court right out of the gate, defendants still have means to eliminate that threat early in litigation.

Specifically, defendants can move to dismiss for failure to state a plausible claim under Minnesota's *substantive* standard for punitive damages. After *Shady Grove*, federal judges agree Minnesota's substantive standard still governs in federal court.[36] And it is a high bar. Under Minnesota law, punitive damages are permitted only if the defendant acted with "deliberate disregard for the rights or safety of others"[37]—requiring "egregious" misconduct.[38] Even at the pleading stage, plaintiffs must allege facts plausibly suggesting the defendants acted with deliberate disregard for the rights or safety of others.[39]

Does the gatekeeping statute apply in federal question cases?

Thus far, this article has focused on federal *diversity* cases. But federal courts also adjudicate Minnesota law claims under supplemental jurisdiction in federal question cases. Does the gatekeeping statute apply in those cases?

The answer depends on whether the *Erie* doctrine applies in supplemental jurisdiction cases. Every Supreme Court case to apply an *Erie* analysis has arisen in diversity jurisdiction.[40] While the Court has suggested *Erie* applies beyond diversity cases—and most courts assume it does—the issue remains unresolved.[41]

This has led to another intra-district split in the District of Minnesota. Before *Shady Grove*, Judge Raymond Erickson concluded the gatekeeping statute is "equally applicable" in supplemental jurisdiction cases.[42] But in 2019, Judge Susan Richard Nelson concluded the gatekeeping statute "is inapplicable" in such cases.[43]

Minnesota lawyers should watch for other judges to weigh in on this issue—or for the Eighth Circuit to resolve it.

Conclusion

There is now a split of authority on the critical question of whether Minnesota's gatekeeping statute applies in federal court. Most district judge say no, but others say yes, and still others have not yet decided. Until the Eighth Circuit resolves this issue, lawyers should check where the judge assigned to their case stands on this issue. Stay tuned for more litigation and developments on this issue in the years to come. ▲

NOTES

[1] 559 U.S. 393, 406 (2010).

[2] *Kuehn v. Shelcore, Inc.*, 686 F. Supp. 233, 234 (D. Minn. 1988).

[3] Minn. Stat. §549.191.

[4] *Id.*

[5] *Id.*

[6] *See* Fed. R. Civ. P. 8(a)(3) ("A pleading which sets forth a claim for relief must contain... a demand for the relief sought, which may include... different types of relief.").

[7] Fed. R. Civ. P. 9(g) (emphasis added).

[8] *Compare Maglione v. Cottrell, Inc.,* 2001 U.S. Dist. LEXIS 25022, at *6 (N.D. Ill. 2001), *with Nal II, Ltd. v. Tonkin,* 705 F. Supp. 522, 528 (D. Kan. 1989).

[9] Fed. R. Civ. P. 15(a)(1).

[10] Fed. R. Civ. P. 15(a)(2).

[11] *Orange Rabbit, Inc. v. Franchoice, Inc.*, 2020 U.S. Dist. LEXIS 79825, at *15 (D. Minn. 2020).

[12] *See* Fed. R. Civ. P. 15; *Orange Rabbit,* 2020 U.S. Dist. LEXIS 79825, at *10.

[13] *Hanna v. Plumer*, 380 U.S. 460, 465 (1965).

[14] *See* Minn. Stat. §549.20, subd. 1; *Orange Rabbit*, 2020 U.S. Dist. LEXIS 79825, at *10.

[15] Supra note 1.

[16] *Id.* at 397. *Shady Grove* was a 4-1-4 fractured decision, but the plurality opinion and Justice Steven's both advanced substantially similar tests. *Id.* at 421 (Stevens, J., concurring).

[17] *Id.* at 398.

[18] *Jacobs v. Pickands Mather & Co.*, 1987 U.S. Dist. LEXIS 13673, at *2 (D. Minn. 1987).

[19] *Fournier v. Marigold Foods, Inc.*, 678 F. Supp. 1420, 1422 (D. Minn. 1988).

[20] *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 2017 U.S. Dist. LEXIS 193938, at *3 n.1 (D. Minn. 2017) (collecting cases).

[21] *Sav. Bank v. Green Tree Acceptance, Inc.*, 739 F. Supp. 1342, 1353 (D. Minn. 1990).

[22] *See Popp Telecom Inc. v. Am. Sharecome, Inc.*, 361 F.3d 482, 491 n.10 (8th Cir. 2004); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1118 (8th Cir. 1999); *Bunker v. Meshbesher*, 147 F.3d 691, 696 (8th Cir. 1998); *Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd.*, 32 F.3d 1244, 1255 (8th Cir. 1994).

[23] *Bair Hugger*, 2017 U.S. Dist. LEXIS 193938, at *10.

[24] *Speed RMG Partners, LLC v. Arctic Cat Sales, Inc.*, 2021 U.S. Dist. LEXIS 254721, at *14 (D. Minn. 2021) (Brasel); *Mgmt. Registry, Inc. v. A.W. Cos.*, 2019 U.S. Dist. LEXIS 226063, at *42 (D. Minn. 2019) (Menendez); *Urbieta v. Mentor Corp.*, 2018 U.S. Dist. LEXIS 120808, at *8 (D. Minn. 2018) (Montgomery); *Selective Ins. Co. v. Sela*, 353 F. Supp. 3d 847, 858 (D. Minn. 2018) (Schiltz) (in dicta); *Mgmt. Registry, Inc. v. A.W. Cos.*, 2020 U.S. Dist. LEXIS 15513, at *7 (D. Minn. 2020) (Tunheim).

[25] *Zimmerman v. Standard Ins. Co.*, 2021 U.S. Dist. LEXIS 111598, *15 (D. Minn. 2021) (Bowebeer); *Russ v. Ecklund Logistics, Inc.*, 2022 U.S. Dist. LEXIS 52314, at *14 (D. Minn. 2022) (Docherty); *McNamara v. Kuehne*, 2023 U.S. Dist. LEXIS 30945, *7 (D. Minn. 2023) (Foster); *Rogers v. Mentor Corp.*, 2018 U.S. Dist. LEXIS 81245, at *23 (D. Minn. 2018) (Rau); *Ramirez v. AMPS Staffing, Inc.*, 2018 U.S. Dist. LEXIS 71118, at *13 (D. Minn. 2018) (Thorson); *Orange Rabbit*, 2020 U.S. Dist. LEXIS 79825, at *15 (Cowan Wright).

[26] *E.g.*, *In re Testosterone Replacement Therapy Prods. Liab. Litig. Coordinated Pretrial Proceedings v. Actavis, Inc.*, 430 F. Supp. 3d 516, 551 (N.D. Ill. 2019); *Jenkins v. Immedia, Inc.*, 2019 U.S. Dist. LEXIS 70894, at *14 (D. Colo. 2019).

[27] *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC*, 2018 U.S. Dist. LEXIS 74102, at *12 (D. Minn. 2018); *see also Rilley v. Money-Mutual, LLC*, 2018 U.S. Dist. LEXIS 218771, at *13-14 (D. Minn. 2018).

[28] *Johannessohn v. Polaris Indus.*, 2022 U.S. Dist. LEXIS 149766, at *7 (D. Minn. 2022).

[29] *Bhatia v. 3M Co.*, 323 F. Supp. 3d 1082, 1103 (D. Minn. 2018) (Frank); *Parada v. Anoka Cty.*, 2019 U.S. Dist. LEXIS 157328, at *18 (D. Minn. 2019) (Leung).

[30] *BCBSM, Inc. v. GS Labs, LLC*, 2023 U.S. Dist. LEXIS 15593, at *71 (D. Minn. 2023).

[31] *Bergman v. Johnson & Johnson*, 2021 U.S. Dist. LEXIS 152758, at *17–18 (D. Minn. 2021).

[32] *Mgmt. Registry*, 2019 U.S. Dist. LEXIS 226063, at *42.

[33] *Sela*, 353 F. Supp. 3d at 857.

[34] *E.g.*, *Kilburn v. Autosport Acquisitions*, 2021 U.S. Dist. LEXIS 17404, at *4 (E.D. Mo. 2021).

[35] *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1295–99 (11th Cir. 1999), *vacated in part on other grounds*, 204 F.3d 1069 (11th Cir. 2000).

[36] *E.g.*, *Speed RMG*, 2021 U.S. Dist. LEXIS 254721, at *20.

[37] Minn. Stat. §549.20 subd. 1(a).

[38] *Lundgren v. Eustermann*, 370 N.W.2d 877, 882 (Minn. 1985).

[39] *Speed RMG*, 2021 U.S. Dist. LEXIS 254721, at *21.

[40] Alexander A. Reinert, *Erie Step Zero*, 85 Fordham L. Rev. 2341, 2352 (2017).

[41] *Id.*

[42] *Ulrich v. City of Crosby*, 848 F. Supp. 861, 866 n.5 (D. Minn. 1994).

[43] *Benner v. St. Paul Pub. Schs*, 380 F. Supp. 3d 869, 910 (D. Minn. 2019).

After years of gridlock, the whirlwind

Note: *The full text of the new chapters of law referenced here can be found at: www.revisor.mn.gov/laws/2023/0*

BY BRYAN LAKE

Partisan divisions, few compromises, limited accomplishments: These were the essential elements of every Minnesota legislative session recap from 2015 through 2022. During those years neither major political party had simultaneous control of the House, Senate, and governor's office—the trifecta, as it is known—and, predictably, the divisions in government caused constant gridlock.

Following another such legislative stalemate in 2022, politicos looked ahead to the November midterm elections, in which DFL Gov. Tim Walz was on the ballot along with every seat in the DFL-controlled House and GOP-majority Senate. In the first half of 2022, the political environment favored Republicans, who appeared poised to benefit from voters' concerns about inflation and crime. Democrats also carried the traditional midterm albatross of holding the White House and thus receiving most of the blame for the nation's ills.

Conventional wisdom at the time was that Republicans were likely to hold their majority in the state Senate and had a good shot at flipping the House and potentially wresting control of the governor's office, too. But just a month after the 2022 legislative session ended, the Supreme Court's decision overturning *Roe v. Wade* dramatically changed the political landscape. It put abortion top-of-mind for many voters and energized the DFL base. With that tailwind, Walz was re-elected and Democrats not only maintained their majority in the House but flipped the Senate by a one-seat margin.

The DFL wave on Election Day washed away the partisan logjam at the Capitol, leading Gov. Walz to declare: "The era of gridlock in St. Paul is over."

A transformative session

The DFL's razor-thin majority in the Senate was secured with victories in a few extremely tight races, which left the winners on thin ice politically. And Democrats' one-seat advantage essentially gave veto power to every DFL senator. Many observers expected those factors to shrink and slow the DFL agenda, but they turned out to be more speed bump than stop sign.

The new Democratic majorities started the session fueled by grand ambitions and a record budget surplus, and they proceeded to move a large volume of major legislation with great velocity. Depending on one's political views this could have been either delightful or disastrous, but there was no denying that Minnesota was a changed place by the time the session ended.

When the dust settled, an astonishing assortment of noteworthy policy changes had passed. Tuition at public colleges and universities was eliminated for students with family incomes under $80,000. Special protections were granted to those seeking abortions or gender-affirming care in Minnesota. Marijuana was legalized. The use of no-knock search warrants was severely restricted. The largest child tax credit in the nation was established. Felons were given the right to vote upon release from incarceration instead of upon completion of probation. Gun control measures were adopted. Programs were established to ensure paid family and medical leave and earned sick and safe time. There was a record-sized bonding package and substantial funding increases for education, housing, and transportation. The list of historically significant legislation seemed endless.

Justice system funding

In the midst of the tidal wave of legislation, the MSBA was very pleased that lawmakers did not overlook the justice system.

Well before major budget bills were passed, lawmakers provided additional funding to the Office of the Attorney General to assist with criminal prosecutions (**Chapter 8**), and they filled a current biennium funding deficiency at the Office of Administrative Hearings (**Ch. 23**).

The most important measure, however, was **Ch. 52**, the omnibus judiciary and public safety bill. It contained substantial pay raises for judges and court staff, as well as an extra pay bump for law clerks. Courts were also given funding for case backlogs, new treatment courts, mandated psychological services, and courtroom technology enhancements. But the most eye-catching allocations were massive, truly historic funding increases for public defenders and civil legal services. These much-needed investments will dramatically improve access to justice in Minnesota and aid in recruiting attorneys to serve underprivileged populations.

The MSBA agenda

In addition to advocating for increased funding for the justice system, the MSBA had four policy priorities this year, all of which focused on helping under-resourced and unrepresented citizens. At the top of the list was a bill from the MSBA's Access to Justice Committee that creates a right to counsel for public housing tenants in breach-of-lease cases. After a few years of gaining traction but not reaching the governor's desk, the proposal finally got across the finish line this year as part of **Ch. 52**. Attorney Larry McDonough, who was instrumental in developing and passing the right-to-counsel proposal, said it "will improve access to justice and level the playing field for public housing tenants who are involved in the most complicated types of breach-of-lease eviction cases."

The remainder of the MSBA's policy agenda consisted of a trio of Tax Law Section initiatives that were incorporated into **Ch. 64**, the omnibus tax bill. The first two proposals provide single-member LLCs and their sole members with a pair of tax benefits that are already available to other forms of LLCs: (1) a personal income tax credit for the sole member for income taxes paid by the LLC in other states; and (2) a sales tax exemption for the transfer of taxable items from the sole member to the LLC. Dan Kidney, an attorney and CPA who helped craft these concepts, said they will help disregarded single-member LLC owners by eliminating two tax traps that they are frequently unaware of.

The final Tax Law Section proposal simplifies service requirements for property tax petitions. Lynn Linne, a tax controversy attorney at Fredrikson & Byron, helped negotiate the final version of the bill with interested parties. She notes that now "counties and taxpayers will have a clear and simple understanding of the service requirements for property tax petitions." Linne also emphasized that the bill will prevent taxpayers from having their cases dismissed solely due to failure to comply with overly burdensome and unnecessarily complicated service requirements.

Much credit and gratitude is owed to the chief authors of these bills: Rep. Hodan Hassan (DFL-Minneapolis) and Sen. Zaynab Mohamed (DFL-Minneapolis) for the right-to-counsel bill; Sen. Warren Limmer (R-Maple Grove) for the property tax petition bill; lawyer-legislator Sen. Judy Seeberger (DFL-Afton) for the single-member LLC changes; and lawyer-legislator Rep. Esther Agbaje (DFL-Minneapolis) for the property tax petition and single-member LLC bills.

In addition to our priority bills, the MSBA collaborated with the Minnesota uniform law commissioners on **Ch. 21**, a modified version of the Uniform Electronic Wills Act. The bill unanimously passed both chambers of the Legislature under the guidance of its chief authors, lawyer-legislators Rep. Sandra Feist (DFL-New Brighton) and Sen. Bonnie Westlin (DFL-Plymouth).

Sen. Westlin and fellow lawyer-legislator Rep. Kelly Moller (DFL-Shoreview) also introduced **HF3204/SF2759**, a package of family law reforms crafted by the Family Law Section and other stakeholders. The bill did not receive a committee hearing but remains in play for the second year of the legislative biennium.

On top of the bills noted above, the MSBA endorsed several other pieces of legislation that were signed into law, including the following:

- prohibiting fees on uncertified court documents (**Ch. 52**);
- reducing gross misdemeanor maximum sentences to 364 days (**Ch. 52**);
- barring conversion therapy for minors and vulnerable adults (**Ch. 28**);
- allowing undocumented immigrants to acquire driver's licenses (**Ch. 13**); and
- eliminating unconstitutional statutes related to adultery, sodomy, and fornication (**Ch. 52**).

The MSBA was active behind the scenes as well, offering technical suggestions and drafting assistance on numerous bills. Many thanks are due to the MSBA members who volunteered to share their expertise and improve the lawmaking process.

Omnibus judiciary and public safety bill

For attorneys who are curious about potential legislative changes affecting their practice areas, the most obvious place to look is **Ch. 52**, the omnibus judiciary and public safety bill. At over 500 pages, the behemoth bill was packed with significant policy changes. Among them were a slew of tenants' rights provisions that include:

- prohibiting landlords from requiring tenants to declaw or devocalize pets;
- requiring disclosure of all nonoptional fees in lease agreements;
- giving tenants the right to make move-in and move-out inspections;
- restricting landlord entry;
- barring landlords from requiring early renewal of leases lasting longer than 10 months;
- forbidding landlords, in many circumstances, from penalizing tenants or terminating leases for conduct that occurs away from the rental building;
- allowing tenants to terminate leases upon infirmity; and
- requiring written notice before bringing eviction actions for unpaid rent or other unpaid financial obligations.

Ch. 52 also included some high-profile items like no-knock search warrant restrictions, background checks for firearm transfers, and extreme-risk protection orders. A long list of other policy changes was adopted, too, some of which directly affect lawyers, such as allowing licensed attorneys to apply for MN Government Access accounts so they can view and print MNCIS documents for free.

In the criminal law realm, **Ch. 52** expands the categories of crimes motivated by bias as well as the list of qualified domestic-violence-related offenses. It also modifies the surreptitious intrusion statute, the aiding-and-abetting felony murder statute, and the penalties for "swatting." It establishes automatic expungement of certain criminal records and creates new crimes for carjacking and organized retail theft. Additionally, the legislation grants tribal nations probation and post-release supervision authority, allows for prosecutor-initiated sentence adjustments, and gives police authority to attach tracking devices to vehicles without a court order.

Miscellaneous provisions of **Ch. 52** align fentanyl and heroin penalties; enable survivorship of personal injury actions after death; establish a statewide office of appellate counsel to represent parents in juvenile protection matters; and modify procedures for retrieving contents from impounded vehicles and allow vehicle owners to sue for violations. The legislation also creates a Clemency Review Commission that will make recommendations to the Board of Pardons.

These and other **Ch. 52** provisions not covered here have various effective dates. Careful study of the legislation is recommended.

Other legislation of interest to attorneys

Ch. 3 adds a definition of race to the MN Human Rights Act that includes hair texture and hair styles *(effective 8/1/23).*

Ch. 15 creates criminal penalties for unauthorized possession or purchases of catalytic converters *(effective 8/1/23).*

Ch. 16 modifies the Minnesota Indian Family Preservation Act *(effective 8/1/23).*

Ch. 19 allows courts to determine if current or former military members are eligible for deferred prosecution prior to findings of guilt *(effective 8/1/23).*

Ch. 27 modifies labor trafficking provisions and increases penalties *(effective 8/1/23).*

Ch. 34 prohibits intimidating, interfering, and deceptive conduct related to elections *(effective 6/15/23).*

Ch. 51 adopts the recommendations of the Workers' Compensation Advisory Committee *(various effective dates).*

Chapter 53, the omnibus jobs and labor bill, includes the following provisions:

- prohibits most non-compete agreements *(effective 7/1/23);*
- establishes protections for warehouse workers *(effective 8/1/23)*, meat and poultry processors *(effective 1/1/24)*, and agriculture and food processing workers *(effective 8/1/23)*;
- bars restrictive franchise agreements *(effective 5/25/23);*
- updates provisions related to the Public Employment Labor Relations Board *(effective 5/25/23);*
- creates the Nursing Home Workforce Standards Board *(effective 5/25/23);*
- strengthens construction worker wage protections *(effective 8/1/23);*
- modifies construction indemnification agreements *(effective 5/25/23); and*

establishes earned sick and safe time for employees *(effective 1/1/24).*

Ch. 57, the omnibus commerce bill, contains elements that: provide remedies to debtors with coerced debt *(effective 1/1/24)*; establish civil penalties for selling essential consumer goods or services for "unconscionably excessive prices" during a governor-declared abnormal market disruption *(effective 5/25/23)*; modify common interest community provisions related to fines and fees *(effective 8/1/23)*; and prohibit boat insurance policies from excluding family members *(various effective dates).*

Ch. 58 creates crimes for using "deepfake" technology to influence an election or disseminate sexual images or videos *(effective 8/1/23).*

Ch. 59 establishes a paid family and medical leave program *(various effective dates).*

Ch. 63 legalizes cannabis for adult use *(various effective dates).*

Ch. 68, the omnibus transportation bill, prohibits holding a cell phone while driving *(effective 8/1/23)* and reduces some transit rider misconduct penalties from misdemeanors to petty misdemeanors while establishing misdemeanor penalties for other transit rider misconduct *(effective 7/1/23).*

Looking ahead

The 2024 legislative session will begin on February 12. ▲

BRYAN LAKE is the MSBA's lobbyist. He has worked with members and staff to promote and protect the MSBA's interests at the state Capitol since 2009.

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LANDMARKS IN THE LAW

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

Administrative Law
JUDICIAL LAW

Judicial review of validity of rule; timeliness. The Minnesota Court of Appeals held that an administrative law judge (ALJ) erred in determining that an email from the Minnesota Gambling Control Board to electronic pulltab vendors was not an unpromulgated rule. The court also held that the challenge to the ALJ order was timely, despite coming more than two years afterward.

In 2012, the Legislature charged the board with authority to "adopt rules it deems necessary to ensure the integrity of electronic pull-tab devices" and examine electronic pulltabs before authorizing their lease or sale in Minnesota. In 2019, the board emailed three vendors to inform them that, going forward, the board would authorize what is known as "open-all" functionality for pull-tab devices, reversing previous board policy. The Shakopee Mdewakanton Sioux Community petitioned for an ALJ to determine whether the email was an unadopted rule, under Minnesota Statutes, section 14.381. On 5/21/2020, the ALJ dismissed the challenge to the email, finding it was not an unpromulgated rule. On 7/1/2022, the Shakopee Mdewakanton Sioux Community filed a section 14.44 petition for the court of appeals to determine whether the email pronouncement constituted a valid rule.

The court first addressed an issue of first impression: whether a time limit applies to an action under section 14.44 petitioning the court of appeals to determine whether a rule is valid, when the action challenges an ALJ order issued under section 14.381. The court determined that, because it has original jurisdiction over section 14.44 petitions, these petitions are not subject to any time limits, such as the usual 30-day or 60-day appeal period. As a result, the community's petition was not time-barred.

The court then addressed the merits. It determined that the email was an unpromulgated rule because it announced a general policy "allowing for future approval of electronic-pull tabs with open-all functionality." The court concluded that the board cannot use the invalid unpromulgated rule as the basis for any agency action. ***In re Shakopee Mdewakanton Sioux Community***, 988 N.W.2d 135 (Minn. Ct. App. 2023).

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Criminal Law
JUDICIAL LAW

Riot: Person driving with passengers hanging from car, in a reckless manner, and close to onlookers is considered armed with a dangerous weapon. Respondent was charged with second-degree riot (armed with a dangerous weapon) for organizing and participating in intersection takeovers where participants spun cars in "donuts" close to onlookers while passengers hung from open windows of the cars. The district court granted respondent's motion to dismiss for lack of probable cause, finding that the cars were not dangerous weapons.

The court of appeals reverses, finding that although the use of the cars may not have intentionally or actually caused serious injury, a jury could reasonably find that the cars were used in a manner "likely to" cause death or great bodily harm. As relevant here, a person is guilty of second-degree riot if he gathers with at least two others and disturbs the peace by intentional conduct and "is armed with a dangerous weapon or knows that any other participant is armed with a dangerous weapon." Minn. Stat. §609.71, subd. 2. The court of appeals finds these circumstances left a fact question for the jury on the dangerous weapon element.

A "dangerous weapon" is any "device or instrumentality that, in the manner it is used... is calculated or likely to produce death or great bodily harm." Minn. Stat. §609.02, subd. 6. The district court focused on "what was intended and what actually occurred" (the "calculated to" aspect of the dangerous weapon definition), "but did not address whether a jury might determine that the manner in which the cars were being used would likely kill or greatly injure" (the "likely

to" portion of the dangerous weapon definition). *Abdul-Salam*, 988 N.W.2d at 498. The state presented evidence of the cars being driven in a reckless manner, with passengers hanging from and on top of the cars, and in close proximity to onlookers, as well as video evidence of an onlooker actually being struck by a car. This evidence is sufficient to present to the jury the question of whether the cars were dangerous weapons. ***State v. Abdus-Salam***, A22-1551, A22-1552, 988 N.W.2d 493 (Minn. Ct. App. 4/3/2023).

Probation revocation: District court is not required to follow joint recommendation to reinstate probation. Appellant pleaded guilty to introducing a controlled substance into a correctional facility. The district court granted a downward dispositional departure, staying execution of the presumptive 24-month prison sentence for five years. Appellant failed to abide by his probationary conditions when he failed to complete a long-term chemical dependency treatment program, tested positive for drugs and alcohol, and was charged with DWI and drug possession. Appellant admitted to three violations at his probation violation hearing. The state, probation department, and appellant jointly recommended continued probation and a long-term treatment program. The district court, however, revoked appellant's probation and executed his prison sentence.

Under the *Austin* factors, before probation is revoked, the district court must (1) "designate the specific condition or conditions that were violated," (2) "find that the violation was intentional or inexcusable," and (3) "find that [the] need for confinement outweighs the policies favoring probation." *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). Appellant disputes the district court's conclusion as to the third *Austin* factor. This factor requires that the district court balance the state's interest in ensuring rehabilitation and public safety against the probationer's interest in freedom. Revocation and imprisonment should be ordered only if, based on the original offense and the offender's intervening conduct, (1) "confinement is necessary to protect the public from further criminal activity by the offender," (2) "the offender is in need of correctional treatment which can most effectively be provided if he is confined," or (3) "it would unduly depreciate the seriousness of the violation if probation were not revoked." *State v. Modtland*, 695 N.W.2d 602, 607 (Minn. 2005). Here, the district court found the second and third factors supported revocation and imprisonment.

First, the Minnesota Court of Appeals notes that the district court is not required to adopt the probation department's recommendation as to whether probation should be revoked. Nor is the district court bound by agreements of the parties. The court here did not err simply because it did not accept the joint recommendation in this case.

Second, the court of appeals explains that the district court determined that revocation and imprisonment were appropriate because appellant needed treatment in a confined setting, as opposed to the same treatment program he failed to complete previously, and that reinstating probation would depreciate the seriousness of appellant's violations, because he was previously granted a departure over the state's objection and his violations were serious in nature and undercut the reasoning for the departure. The district court based its revocation decision on proper grounds and provided a detailed explanation of its reasoning. The district court's revocation order is affirmed. ***State v. Fortner***, A22-1459, 989 N.W.2d 368 (Minn. Ct. App. 4/10/2023).

Criminal sexual conduct: Guilty verdicts for completed and attempted third-degree criminal sexual conduct are not legally inconsistent. After a jury trial, appellant was found guilty of completed and attempted third-degree criminal sexual conduct. He was convicted of completed third-degree criminal sexual conduct, which was affirmed on direct appeal. In his postconviction petition, he argued the sexual assault nurse and a BCA scientist testified falsely at trial, the prosecutor engaged in misconduct, and that the guilty verdicts were legally inconsistent. The postconviction court declined to hold an evidentiary hearing and denied appellant's petition.

The court of appeals first concludes that the postconviction court erred in finding appellant's petition was time-barred. However, the court next rejects appellant's argument that he received ineffective assistance of counsel at trial due to his attorney's failure to object to statements that amounted to prosecutorial misconduct and failed to raise this argument on direct appeal. Even assuming the prosecutor's remarks were error, the court decides there is no reasonable likelihood the jury's verdicts would have been different absent the remarks.

The court also rejects appellant's second ineffective assistance argument based on his attorney's failure to raise the issue of legally inconsistent guilty verdicts. Verdicts are legally inconsistent only if proof of the elements of one offense negates an element of the other. Appellant argues that case law adds an element to attempted third-degree criminal sexual conduct: that the underlying substantive crime was not completed. Obviously, proof of this element would negate the completed criminal sexual conduct offense. However, the case law appellant relies on interpreted an earlier version of the attempt statute, which explicitly required a failure to accomplish the attempted offense. This requirement was subsequently removed. There are no other elements of either the attempted or completed third-degree criminal sexual conduct offenses that require proof that negate any elements of the other offense. Therefore, the guilty verdicts were not legally inconsistent and appellant's trial counsel did not render ineffective assistance by failing to raise the issue.

As to appellant's false testimony claim, the court finds appellant failed to meet the requirements of the *Larrison* test. *Gilbert v. State*, 982 N.W.2d 763, 770 (Minn. Ct. App. 2022), *rev. granted* (Minn. 2/22/2023). Appellant failed to show the testimony was false or that the jury would have reached a different conclusion without the false testimony. The district court's denial of appellant's petition is affirmed. ***Tichich v. State***, A22-1063, 989 N.W.2d 692 (Minn. Ct. App. 4/17/2023).

Murder: Police officer may be convicted of second-degree unintentional felony murder for causing another's death when using unreasonable force. Appellant was on-duty as a Minneapolis police officer when he arrested the victim for attempting to use counterfeit money at a local business. During the arrest, the victim resisted, necessitating the use of force by a number of police officers. Eventually, the victim was placed in a prone position on

the ground and was held in place by three officers, including appellant, who placed his knees on the victim's back and neck. The victim eventually became unresponsive and was later pronounced dead at the hospital. The state's medical expert opined that the victim died due to a sudden loss of heart and respiratory functions during the process of law enforcement restraint.

Due to substantial pretrial publicity, the defense raised concerns of safety and a tainted jury pool, but the district court denied appellant's motions for a change of venue, jury sequestration, continuances, and additional peremptory challenges. The jury ultimately found appellant guilty of third-degree murder and second-degree manslaughter, and the court denied appellant's motion for a new trial. The court convicted appellant of second-degree unintentional murder based on the underlying offense of third-degree assault and imposed an upward durational departure of 270 months' imprisonment.

First, the court of appeals finds the district court did not abuse its discretion by denying appellant's change of venue, continuance, and sequestration motions. The court concludes that appellant failed to show the jury was actually prejudiced by the pretrial publicity and that the publicity was not so corrupting as to create a presumption of prejudice. Next, the court determines that the district court did not abuse its discretion by failing to conduct a *Schwartz* hearing to investigate alleged juror misconduct, as appellant had the opportunity to thoroughly question all jurors and was granted sufficient peremptory challenges. Third, the court denies appellant's challenges to the jury instructions, holding that the district court's instructions were not plainly erroneous and any error was harmless. Fourth, the court concludes the state did not present cumulative evidence on the use of force.

Fifth, the court finds the district court did not abuse its discretion by excluding a presentation slide from Minneapolis Police Department training materials for lack of foundation, and, sixth, that the exclusion of the out-of-court statements of the passenger in the victim's car prior to the incident was proper under the hearsay rules. Seventh, the court affirms the district court's denial of appellant's motion for a new trial based on prosecutorial misconduct, finding any alleged misconduct to be harmless beyond a reasonable doubt. Eighth, the court finds appellant is not entitled to a new trial for the district court's failure to have sidebar conferences transcribed, finding no authority for granting a new trial on these grounds. Ninth, the court holds that the cumulative effect of the district court's alleged errors did not deprive appellant of a fair trial. Tenth, the court affirms the upward durational sentencing departure, finding support in the record for the aggravating factors cited by the district court (particular cruelty and abuse of a position of trust and authority). The court also declines to address appellant's challenge to the third-degree murder conviction, as he was not actually convicted of or sentenced for this offense.

Finally, the court rejects appellant's argument that a police officer cannot be convicted of felony murder based on assault. The court concludes first that second-degree felony unintentional murder based on third-degree assault does not create a strict liability offense, because, under statutory definitions and case law, assault-harm requires intent to commit the act of applying force to the victim's body. The court also holds that a police officer can be convicted of second-degree unintentional felony murder based on using unreasonable force constituting third-degree assault. Police officers are authorized to use only reasonable force to effectuate a lawful arrest. When the force used is unreasonable, the officer can be liable for assault. If that assault results in death, the officer may be liable for second-degree unintentional felony murder. Ultimately, the court finds that the state proved every element of second-degree felony murder beyond a reasonable doubt. Appellant's conviction and sentence are affirmed. ***State v. Chauvin***, A21-1228, 989 N.W.2d 1 (Minn. Ct. App. 4/17/2023).

Driver's license revocation/suspension: Suspension for an out-of-state conviction may not be overturned because it was based on illegally obtained evidence. Appellant had a Minnesota driver's license when he was convicted of a DWI offense in Wisconsin based on a blood test showing an alcohol concentration over 0.08. The arresting officer did not have a warrant and told appellant there would be additional penalties if he refused to submit to the blood test. As a result of the Wisconsin conviction, his Minnesota license was suspended.

The Commissioner of Public Safety may suspend a driver's license if the driver committed an offense in another state that, if committed in Minnesota, would be grounds for suspension. One reason a license may be suspended in Minnesota is if the driver is convicted of driving a motor vehicle with an alcohol concentration of 0.08 or more. Here, the district court found that appellant was convicted of an offense that prohibits a person from driving a motor vehicle with a blood alcohol concentration of 0.08 or more. The elements of this Wisconsin offense are elements that, if proved in Minnesota, would justify a conviction for violating Minn. Stat. §169A.20, subd. 1(5) (operating a motor vehicle with an alcohol concentration of 0.08 or more). Thus, had this offense been committed in Minnesota, it would be grounds for suspension of appellant's driver's license. However, appellant argues that the Wisconsin conviction cannot be used to suspend his Minnesota license because his 4th Amendment and due process rights were violated in the Wisconsin case.

First, the court of appeals notes that a civil proceeding regarding driving privileges "is not concerned with 'punishment or incarceration,' but rather, with 'an exercise of the police power for the protection of the public.'" *Underhill*, 989 N.W.2d at 917 (quoting *Recker v. State, Dep. Pub. Safety*, 375 N.W.2d 554, 557 (Minn. Ct. App. 1985)). Appellant does not have the same rights in this civil proceeding as he would in a criminal proceeding and is not entitled to raise the alleged constitutional violation in the Wisconsin case to challenge his suspension in Minnesota.

Next, the court also rejects appellant's due process argument. Without deciding whether the test should be applied in these circumstances, the court finds that appellant failed to satisfy the *Johnson-Morehouse* test. Under this test, "[a] license revocation violates due process when: (1) the person whose license was revoked submitted to a breath, blood, or urine test; (2) the person prejudicially relied on the implied consent advisory in deciding to undergo the testing; and (3) the implied consent advisory did not

accurately inform the person of the legal consequences of refusing to submit to the testing." *Johnson v. Comm'r Pub. Safety*, 911 N.W.2d 506, 508-09 (Minn. 2018); *see also Morehouse v. Comm'r Pub. Safety*, 911 N.W.2d 503 (Minn. 2018). The court finds that appellant failed to establish the third requirement of this test. An officer may not inform a driver that refusal to submit to a warrantless blood test will result in criminal penalties. The officer did not tell appellant that he would be punished criminally, only that he could face some unspecified additional consequences, and an unclear or incomplete advisory does not violate due process. Appellant's suspension is affirmed. ***Underhill v. Comm'r Pub. Safety***, A22-1108, 989 N.W.2d 909 (Minn. Ct. App. 4/24/2023).

Driver's license revocation/suspension: Advisory is insufficient to sustain revocation if it is inaccurate, misleading, or confusing. Appellant's driving privileges were revoked after he was arrested for DWI and submitted to a blood test, conducted pursuant to a search warrant, which revealed the presence of methadone. Prior to the test, the arresting officer told appellant, "I applied for a search warrant for a blood draw, and refusal to take a test is a crime." The district court sustained the revocation of appellant's driving privileges.

Under Minn. Stat. §171.177, subd. 1, "[a]t the time a blood or urine test is directed pursuant to a search warrant... the person must be informed that refusal to submit to a blood or urine test is a crime." Case law makes "clear that a license revocation cannot be sustained based on the results of a chemical test if the driver was not provided an advisory regarding the criminal consequences of failing to submit to a test." *Nash*, 989 N.W.2d at 708-09. As to advisories that are allegedly inadequate, the court of appeals applies the *McCormick* rule that whether an implied consent advisory complies with statutory requirements "depends on whether the given advisory, considered in its context as a whole, is misleading or confusing." *McCormick v. Comm'r Pub. Safety*, 945 N.W.2d 55, 60 (Minn. Ct. App. 2020).

Under this rule, the court finds the advisory in this case was inadequate. Minn. Stat. §171.177, subd. 2, provides that "[a]ction may be taken against a person who refuses to take a blood test only if a urine test was offered..." Here, the officer never offered appellant a urine test, so appellant could not have been prosecuted for test refusal, even if he had refused the blood test. Thus, the officer's advisory was an inaccurate statement of the law, was misleading, and cannot be the basis for the revocation of appellant's driving privileges. ***Nash v. Comm'r Pub. Safety***, A22-1238, 989 N.W.2d 705 (Minn. Ct. App. 5/1/2023).

4th Amendment: Automobile exception applies to warrantless search of a purse in a car where there is probable cause to believe drugs were in the car. Appellant was the sole passenger in a car driving on I-94 when the car was pulled over due to lane change violations. The officer smelled marijuana in the car and asked appellant and the driver to step out. Appellant

took her purse out of the car with her but placed it on the trunk of the car at the officer's direction. The officer put the purse back inside the car and searched it, finding Clonazepam, for which appellant did not have a prescription. Appellant was charged with fifth-degree possession of a controlled substances and moved to suppress evidence obtained from the purse search. The district court denied her motion and she was found guilty after a stipulated facts trial. The court of appeals affirmed.

Under the automobile exception to the 4th Amendment's warrant requirement, police may "search a car without a warrant, including closed containers in that car, if there is probable cause to believe the search will result in a discovery of evidence or contraband." *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016). The exception does not permit police to search persons inside the car without a warrant.

In the context of a premises warrant, the Supreme Court previously held that the search of a purse carried by the defendant to the premises during the execution of the premises warrant was not within the scope of the warrant and constituted a search of the defendant's person. *State v. Wynne*, 552 N.W.2d 218, 220 (Minn. 1996). The Court declines to extend this holding, finding homes and automobiles distinct. There is much less expectation of privacy in an automobile and the mobility of cars increases the risk of the loss of evidence or contraband.

The warrantless search of appellant's purse was constitutional under the automobile exception, because the officer had probable cause to believe contraband or evidence of a crime was in the car when he smelled marijuana in the car and because the purse was a container inside the car at the time, probable cause arose. ***State v. Barrow***, A21-0776, 989 N.W.2d 682 (Minn. 5/3/2023).

MIERA: Petitioner fails to establish "any evidence of factual innocence" if claim of innocence turns on a legal issue. Appellant was originally convicted of second-degree manslaughter following the shooting death of one of her former boyfriends by another former boyfriend who appellant knew had conflict with the victim yet asked him to bring her to the victim's home on the day of the shooting. The Supreme Court reversed her conviction, finding a defendant cannot be negligent unless the defendant has a duty that he or she breached and the state failed to prove appellant owed a duty to control the shooter or a duty to protect the victim. The district court and Minnesota Court of Appeals agreed that appellant was "exonerated" under the Minnesota Incarceration and Exoneration Remedies Act (MIERA) (Minn. Stat. §§611.362-611.368).

The MIERA provides a multi-step process for receiving compensation if a formerly convicted person is exonerated and meets specified criteria. The first requirement, at issue here, is that the petitioner obtain a district court order "under section 590.11 determining that the person is entitled to compensation based on exoneration." Minn. Stat. §611.362, subd. 1. In relevant part, a person is exonerated if a court reverses their "conviction on grounds consistent with innocence," which means the court reversed their conviction "and there is any evidence of factual innocence...". *Id.* at subd. 1(c)(2).

The Court applies its interpretation of the phrase "any evidence of factual evidence" in *Kingbird v. State*, 973 N.W.2d 633 (Minn. 2022), and draws a distinction between actual and factual innocence. Here, as in *Kingbird*, appellant's "claim of innocence is not restricted to or based on facts, and instead turns on an issue of legal significance–the meaning of the statutory term 'culpable negligence'... and the requirement that the State prove that she had a 'legal duty' that made her criminally responsible for the criminal action of a third party." *Back*, 2023 WL 3606283 at *4. Her conviction was not overturned because the facts changed. Without a showing of factual evidence, appellant was not "exonerated" under the MIERA and is not entitled to an order declaring she is eligible for compensation. ***Back v. State***, A20-1098, __ N.W.2d __, 2023 WL 3606283 (Minn. 5/24/2023).

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Employment & Labor Law

JUDICIAL LAW

Age discrimination; constructive discharge rejected. A claim of constructive discharge due to age discrimination by a 62-year-old employee who unsuccessfully sought promotions (which were given to younger candidates who received better scores during the interview process) was rejected. The 8th Circuit Court of Appeals, affirming a lower court ruling, held that the claimant, who retired about a year after he was passed over for the promotions, could not pursue the case because the company's policy expressly allowed hiring managers to base promotional decisions solely on the interview process and other considerations were not required to be taken into account. Because the claimant failed to show any "pretext or pattern" of age discrimination, the case was properly dismissed by the lower court on summary judgment. ***Bonomo v. The Boeing Company***, 63 F.4th 736 (8th Cir. 3/29/2023).

Equal Pay Act violation claimed; base salary differential insufficient. A $75,000 base salary differential between a woman and a man who were in identically titled positions did not create a viable Equal Pay Act claim. The 8th Circuit, affirming a lower court decision, pointed to the broader experience that the man had compared to the woman, who also received overtime compensation and had a more generous incentive compensation plan than her male colleague. Because the company had legitimate, non-discriminatory justifications for the disparity in base salary, the case was properly dismissed. ***O'Reilly v. Daugherty Systems, Inc.***, 63 F.4th 1193 (8th Cir. 3/29/2023).

Disability pension benefits; no abuse of discretion. Trustees of a pension fund did not abuse their discretion in violation of the Employee Retirement Income Security Act (ERISA) when denying a claim for disability pension benefits. The board did not abuse its discretion in rejecting the claim, even if a conflict of interest was alleged. ***Ruessler v. Boilermaker-Blacksmith National Pension Trust Board of Trustees***, 64 F.4th 951 (8th Cir. 4/3/2023).

Negligent hiring; discriminatory immunity bars claim. Discriminatory immunity under Minn. Stat. §466.03, subd. 6, barred a negligent hiring claim against a charter school assistant regarding sexual abuse of a student

by a school employee. The Minnesota Court of Appeals, affirming a ruling of the Hennepin County District Court, held that hiring decisions constitute the type of "balancing [of] policy objectives" that involve the immunity principle. ***Doe v. Best Academy***, 2023 WL 2961825 (Minn. Ct. App. 4/17/2023) (unpublished).

St. Cloud police; union certification allowed. The withdrawal by the Bureau of Mediation Services (BMS) of its earlier certification of a union as the exclusive bargaining representative for all supervisory employees of the St. Cloud Police Department support division was overturned. The Minnesota Court of Appeals reversed and remanded the decision because the agency did not consider whether the employees were supervisory personnel, which rendered its decision to withdraw the union's certification lacking in substantial evidentiary support. ***Law Enforcement Labor Services, Inc. v. City of St. Cloud***, 2023 WL 2769070 (Minn. Ct. App. 4/3/2023) (unpublished).

Unemployment compensation; benefits denied due to bad behavior. An employee who made vulgar and inappropriate social media posts in violation of her employer's policies was denied unemployment benefits. The court of appeals upheld an administrative determination rejecting the employee's claim that her misconduct was due to chemical dependency on grounds that while she had "a few drinks," she was not intoxicated when she did the postings. ***Langer v. Mayo Foundation for Medical Education and Research,*** 2023 WL 2961751 (Minn. Ct. App. 4/17/2023) (unpublished).

Unemployment benefits; covid noncompliance. Yet another employee lost an unemployment compensation claim due to noncompliance with her company's covid vaccination policies. The court of appeals followed prior rulings holding that unjustified noncompliance constitutes disqualifying "misconduct." ***Royer v. Inventiv Health, Inc.***, 2023 WL 3047602 (Minn. Ct. App. 4/24/2023) (unpublished).

Unemployment compensation; not actively seeking work. An employee who quit her job was barred from receiving unemployment benefits because she was not available for or actively seeking other employment within the scope of her limitations after she quit her job. The appellate court upheld a determination of ineligibility under the "actively seeking" clause of Minn. Stat. §268.085, subd. 1(4)(5). ***In re Vue,*** 2023 WL 3047979 (Minn. Ct. App. 4/24/2023) (unpublished).

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Environmental Law
JUDICIAL LAW

Supreme Court significantly contracts scope of Clean Water Act jurisdiction over wetlands. On May 25, 2023, the Supreme Court of the United States issued a decision in *Sackett v. Environmental Protection Agency*, significantly contracting the jurisdictional reach of the federal Clean Water Act (CWA) over wetlands. The majority decision, penned by Justice Alito and joined by Justices Roberts, Thomas, Gorsuch, and Barrett, is the most consequential CWA decision in decades, one likely to exclude millions of acres of formerly jurisdictional wetlands from federal regulation.

Since the mid-1970s, the federal agencies charged with implementing the Act, the Environmental Protection Agency (EPA) and the Army Corps of Engineers, have held that the statutory term "Waters of the United States" (WOTUS), which defines the jurisdictional reach of the CWA, extended not simply to traditional navigable waters (TNWs) such as lakes, rivers, and oceans but also to wetlands "adjacent" to such waters, and that "adjacent" wetlands included both those that were contiguous to TNWs as well as those that were simply nearby. The agencies' most recent regulatory definition of WOTUS, for example, encompasses noncontiguous wetlands if they demonstrate a "significant nexus" to a TNW, a determination the agencies have made on a case-by-case basis by considering a wide range of hydrological and ecological factors. Land developers and other regulated parties seeking to fill or impact wetlands have typically encountered this process when seeking a "jurisdictional determination" from the Corps as to whether a federal dredge-and-fill permit is required under Section 404 of the CWA. Critics of the agencies' "significant nexus" test argued that it was an overly broad reading of the statute and an unwarranted interference with states' traditional authority to regulate the use of land and water.

In *Sackett*, the Supreme Court agreed. Based on a textual analysis of the key statutes and a review of the Court's prior case law on CWA jurisdiction—including *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985), *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159 (2001) (SWANCC), and *Rapanos v. United States*, 547 U. S. 715 (2006)—the Court held that the CWA's use of the term "waters" in "waters of the United States" refers only to (1) "geographical features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes'" and (2) adjacent wetlands that are "indistinguishable from those bodies of water due to a continuous surface connection." To assert jurisdiction over an "adjacent" wetland under the CWA, the Court held, a party must demonstrate two circumstances:

1. the adjacent body of water constitutes a "water

of the United States" (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and

2. the wetland has a "continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins."

The Court rejected calls by concurring Justices Kavanaugh, Kagan, Sotomayor, and Jackson for a traditional, broader reading of "adjacent" to include wetlands "nearby" TNWs, not simply those that are contiguous to TNWs. Notably, all nine justices either wrote or signed on to opinions that rejected the "significant nexus" test, and all nine agreed that the Sacketts' wetlands were not jurisdictional.

The decision has immediate ramifications for regulated parties and prompts many questions. For starters, the case effectively invalidates much of EPA's and the Corps' new definition of WOTUS, which was published earlier this year and relied heavily on the "significant nexus" test. Now, only wetlands with a "continuous surface connection" to a TNW will be subject to federal jurisdiction. So, for example, if even a narrow strip of reliably dry land exists between a wetland and a TNW, that may be sufficient under *Sackett* to remove the wetland from federal jurisdiction, notwithstanding any "significant nexus" between the wetland and TNW. The *Sackett* decision will also force the agencies to revise their longstanding guidance on making jurisdictional determinations as well as the Corps' Wetlands Delineation Manual. The decision will also have an impact on EPA's approach to enforcing wetland-related violations of the CWA.

In the meantime, the Court's decision raises significant practical questions, including but not limited to:

- How will the Corps handle pending or past jurisdictional determinations that were based on the now invalidated "significant nexus" test?
- How will the EPA handle pending enforcement actions where the alleged violations were premised on the "significant nexus" test?
- Under the Court's new "continuous connection" test, how difficult does it have to be to discern the boundary between a water and a wetland for the wetland to be covered by CWA?
- How does the "continuous connection" test apply to the many kinds of wetlands that typically do not have a surface water connection to a covered water year-round—for example, wetlands and waters that are connected for much of the year but not in the summer when they dry up to some extent?
- How does the test operate in areas where storms, floods, and erosion frequently shift or breach natural river berms?
- Can a continuous surface connection be established by a ditch, swale, pipe, or culvert?

The agencies are likely to publish new guidance on how they will address these and other questions, which undoubtedly will be tested in the lower courts as well in the months and years ahead.

Importantly, because the Court's decision will remove many wetlands from federal jurisdiction, state wetland-protection laws will play a larger role in determining which regulatory requirements will apply to land developers and others seeking to impact wetlands. These requirements vary significantly from state to state. For example, Minnesota has a well-developed regulatory program governing impacts to wetlands, including the state's Wetland Conservation Act and the Minnesota Department of Natural Resources' Public Waters Work Permit program, which together protect a broader range of wetlands than were covered even under EPA's and the Corps' "significant nexus" test. For developers in Minnesota, then, the *Sackett* decision may not change the scope of regulated wetlands, although it may remove the need to obtain an often-costly federal Section 404 wetland permit and the attendant Section 401 state certification. Conversely, in other states that have minimal state wetland regulation, the *Sackett* decision could substantially reduce the regulatory steps required to impact wetlands. ***Sackett v. Environmental Protection Agency***, 598 U.S. ___ (2023).

LEGISLATIVE ACTION

Governor signs environmental budget bill banning PFAS. On 5/24/2023, Minnesota Gov. Tim Walz signed the One Minnesota Budget into law. In doing so, Gov. Walz signed 12 separate budget bills into law, which included the $1.7 billion Environment, Natural Resources, Climate, and Energy Omnibus Bill.

As the name implies, the omnibus bill provides future budgets and funding for numerous initiatives and programs across multiple departments and agencies within the state; all with the aim of prioritizing the protection and sustainability of Minnesota's environment, natural resources, and recreation. The bill appropriates hundreds of millions of dollars for the Minnesota Department of Natural Resources, the Minnesota Pollution Control Agency, the Board of Water and Soil Resources, the Metropolitan Council, the Conservation Corps, and other organizations.

The bill also invests hundreds of millions of dollars in specific projects to boost clean energy and decarbonization, such as investments and incentives for the installment of solar panels on schools and public buildings as well as rebates for the installation of electric heat pumps in homes and the purchase of electric vehicles. The bill also provides over $100 million for building, repairing, and maintaining the state's parks, trails, boat ramps, and fish hatcheries, as well as planting trees, restoring wetlands, and combating the spread of aquatic invasive species and chronic wasting disease in the Whitetail deer population. The bill further invests $100 million to prepare for climate change and extreme weather events through climate resiliency grants for communities to upgrade aging infrastructure.

The omnibus bill also establishes the most far-reaching per- and poly-fluoroalkyl substances (PFAS) ban across the country. PFAS substances are a family of man-made chemicals that have historically been used in the production of nonstick and waterproof manufactured goods and are very resistant to degradation, often persisting in the environment for decades, and are linked to cancer, thyroid disease, and reproductive problems in humans.

Beginning 1/1/2025, about a dozen products will be outright prohibited from sale within the state if those products contain intentionally added PFAS. Those enumerated products are: 1) carpets and rugs; 2) cleaning products; 3) cookware; 4) cosmetics; 5) dental floss; 6) fabric treatments; 7) juvenile products; 8) menstruation products; 9) textile furnishings; 10) ski wax; and 11) upholstered furniture.

Furthermore, beginning 1/1/2026, manufacturers of products sold within the state that contain intentionally added PFAS must notify the state of those products, as well as declaring the purpose for which PFAS is used in the product and the amount of PFAS within the product.

And finally, beginning 1/1/2032, *all products* that contain intentionally added PFAS will be prohibited from sale within Minnesota, unless the product has been deemed exempt because it is essential for the health, safety, or functioning of society, and there are no reasonable alternatives.

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Federal Practice
JUDICIAL LAW

Fed. R. Civ. P. 50; no post-trial motion required for "purely legal issues." In March 2023, this column noted the Supreme Court's grant of *certiorari* in a case that raised the question of whether a post-trial motion under Fed. R. Civ. P. 50 is required to preserve a legal issue previously resolved by the trial court on summary judgment.

A unanimous Supreme Court recently answered that question in the negative, finding that a "district court's purely legal conclusions at summary judgment... merge into the final judgment, at which point they are reviewable on appeal." ***Dupree v. Younger***, ___ S. Ct. ___ (2023).

Diversity jurisdiction; attempted "snap" removal rejected. Where a diverse defendant removed an action on the basis of diversity jurisdiction before a nondiverse defendant was served, the nondiverse defendant was subsequently served, the plaintiff's motion to remand was denied by the district court, and the district court certified the order denying remand pursuant to 28 U.S.C. §1292(b), the 8th Circuit reversed the district court, finding that "service does not matter in evaluating the diversity of the parties," and that a "snap removal cannot cure a lack of complete diversity." ***M&B Oil, Inc. v. Federated Mut. Ins. Co.***, 66 F.4th 1106 (8th Cir. 2023).

CAFA; amount in controversy. Where the defendant removed a putative class action under CAFA, and the district court granted the plaintiff's motion to remand on the basis that the defendant had not established that the amount in controversy exceeded $5 million, the 8th Circuit reversed, holding that a declaration stating that the defendant sold more than $5 million of the disputed product was "sufficiently particular" to support removal under CAFA. ***Brunts v. Walmart, Inc.***, ___ F.4th ___ (8th Cir. 2023).

Failure to instruct jury on punitive damages not plain error. The 8th Circuit found no "plain error" in a district court's failure to instruct a jury on punitive damages where the district court stated its intent to defer its final ruling on punitive damages unless and until the jury found for the plaintiff, the jury awarded the plaintiff $1 in compensatory damages, and the plaintiff failed to renew his request for punitive damages before the jury was discharged. ***Riggs v. Gibbs***, 66 F.4th 716 (8th Cir. 2023).

Waiver of right to arbitration. Chief Judge Schiltz denied the defendants' motion to compel arbitration, where that motion was filed more than seven months after the action was commenced, and after the defendants had agreed to consolidate related actions, filed a Rule 12 motion to dismiss, participated in the submission of a Rule 26(f) report, participated in a Rule 16 conference, and entered into a stipulated protective order without ever mentioning the potential arbitration of plaintiffs' claims.

Chief Judge Schiltz also rejected the defendants' argument that they did not "know" of their right to arbitrate until roughly five months after the action was commenced, when their counsel first "read and analyzed" the contracts, finding that the defendants were "presumed to know" of arbitration provisions contained in contracts they drafted. ***In re Pawn Am. Consumer Data Breach Litig.***, 2023 WL 3375712 (D. Minn. 5/11/2023), *appeal filed* (8th Cir. 5/26/2023).

Fed. R. Civ. P. 62(d); requests for stays pending appeal granted and denied. Judge Menendez granted a stay pending appeal of her order granting injunctive relief in an action involving the right to carry handguns, finding that the law was "far from settled" and that defendants would be "irreparably harmed" in the absence of a stay. ***Worth v. Jacobson***, 2023 WL 3052730 (D. Minn. 4/24/2023).

Judge Tunheim denied a stay pending appeal of his order granting preliminary

injunctive relief, finding that the defendants were unlikely to succeed on appeal and that the other relevant factors all favored the plaintiff. ***Rud v. Johnston***, 2023 WL 2760533 (D. Minn. 4/3/2023).

Motions to amend granted; "delay alone" does not warrant denial of motion. In several recent orders granting motions to amend complaints, Magistrate Judge Docherty has found that "delay alone is insufficient justification for denying a motion to amend," and that the party opposing the motion to amend must also establish prejudice. ***Security Bank & Trust Co. v. Cook Inc.***, 2023 WL 3276486 (D. Minn. 5/5/2023); ***Berry v. Hennepin Cnty.***, 2023 WL 3244827 (D. Minn. 5/4/2023).

28 U.S.C. §1292(b); certifications for interlocutory appeal denied. Despite agreeing with the plaintiff that the question on which it sought certification for interlocutory appeal under 28 U.S.C. §1292(b) involved a "controlling question of law," Judge Tunheim found no substantial grounds for a difference of opinion, and that an interlocutory appeal would not advance the ultimate termination of the litigation. Accordingly, the motion was denied. ***Fed. Ins. Co. v. 3M Co.***, 2023 WL 3686814 (D. Minn. 5/26/2023).

Judge Frank also rejected defendants' certification request pursuant to 28 U.S.C. §1292(b) in a patent case, finding that they met none of the elements of the controlling three-part test. ***Corning Inc. v. Wilson Wolf Mfg. Corp.***, 2023 WL 3306506 (D. Minn. 5/8/2023).

Trial subpoena to corporation quashed. Judge Brasel granted a non-party corporation's motion to quash a trial subpoena directed to it, finding that a corporation's obligation to designate a witness to testify on its behalf under Fed. R. Civ. P. 30(b)(6) extends to depositions, but not to trial testimony. ***Ferrin v. Experian Info. Sols., Inc.***, 2023 WL 3588351 (D. Minn. 4/27/2023).

Sanctions, sanctions and more sanctions. While describing the plaintiff's complaint, amended complaint, and opposition to the defendant's motion to dismiss as "frivolous," Chief Judge Schiltz acknowledged that 28 U.S.C. §1927 does not reach the mere "filing" of a complaint, but awarded the defendant almost $5,000 in fess it incurred in moving to dismiss the amended complaint. ***Towle v. TD Bank USA, N.A.***, 2023 WL 3018665 (D. Minn. 4/20/2023).

Granting plaintiff's motion for a sanctions-related default judgment against two defendants, Judge Wright found that the defendants had "repeatedly engaged in willful violations of this Court's order," had twice been held in contempt, and had refused to pay their contempt fines or the attorney's fees they had been ordered to pay. ***Powerlift Door Consults., Inc. v. Shepard***, 2023 WL 3012037 (D. Minn. 4/18/2023).

Where the plaintiff failed to respond to discovery requests and also failed to respond to defendants' motion to compel, Magistrate Judge Leung granted the motion to compel and awarded the defendants their attorney's fees incurred in association with that motion pursuant to Fed. R. Civ. P. 37(a). ***Kruse v. City of Elk River***, 2023 WL 3144317 (D. Minn. 4/29/2023).

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Immigration Law

JUDICIAL LAW

No jurisdiction to review BIA discretionary decision; cancellation of removal. In March the 8th Circuit Court of Appeals held that it lacked jurisdiction to review the Board of Immigration Appeals' (BIA) discretionary decision that the petitioner failed to establish his qualifying relatives would suffer "exceptional and extreme hardship" if he were removed to Mexico, deeming him ineligible for cancellation of removal. As in previous cases, the court noted and rejected the petitioner's attempt to circumvent the jurisdictional bar through an argument that the agency applied an incorrect legal standard by failing to account for the cumulative effect of the hardships presented. ***Garcia-Pascual v. Garland***, No. 20-2529, *slip op.* (8th Circuit, 3/14/2023). *http://media.ca8.uscourts.gov/opndir/23/03/202529P.pdf*

No political opinion here, actual or imputed. In February the 8th Circuit Court of Appeals found the record supported the Board of Immigration Appeals' (BIA) determination that the petitioner never expressed a political opinion or anti-corruption sentiment, nor did the MS-13 gang ever impute such a position to him when threatening him. The court further added that any error in the BIA's failure to address the indictment of the brother of the president of Honduras on drug charges was harmless since that information would not cure the deficiency in the petitioner's asylum request; i.e., the lack of evidence that his resistance to the gang had anything to do with an actual or imputed political opinion. ***Aguilar Montecinos v. Garland***, No. 21-2333, *slip op.* (8th Circuit, 2/10/2023). *https://ecf.ca8.uscourts.gov/opndir/23/02/212333P.pdf*

ADMINISTRATIVE ACTION

Asylum: Additional protocols on safe third country agreement between United States and Canada. On 3/28/2023, the Department of Homeland Security and Department of Justice announced modifications to their regulations implementing the additional protocols of 2022 to the Safe Third Country Agreement (STCA) between the United States and Canada. Under STCA and its implementing regulations, a foreign national seeking asylum or other protection from persecution or torture must apply in the first country of entry (i.e., United States or Canada) unless (s)he qualifies through an exception. Thus, an asylum seeker arriving at a land border port of entry (POE) in the United States from Canada (or in transit through the United States during removal by Canada) would be barred from pursuing asylum or other protection claim relating to fear of persecution or torture in the United States. As a result, if that individual fails to qualify through an exception, (s)he would be returned to Canada to pursue the asylum claim. In like fashion, an asylum seeker from the United States arriving at a land border POE in Canada would be turned back to the United States. Under the regulations implementing the additional protocols of 2022 to the STCA, coverage is expanded to those asylum seekers who enter in areas located between POEs on the U.S.-Canada land border, including certain bodies of water as determined by the United States and Canada, and make a claim for asylum or other protection relating to

fear of persecution or torture within 14 days after such crossing. **88 Fed. Reg. 18227-41** (2023). *https://www.govinfo.gov/content/pkg/FR-2023-03-28/pdf/2023-06351.pdf*

TPS extension and re-designation: Somalia. On 3/13/2023, the U.S. Department of Homeland Security (DHS) announced the extension of the designation of Somalia for temporary protected status (TPS) for 18 months, from 3/18/2023 through 9/17/2024. Those wishing to extend their TPS must re-register during the 60-day period running from 3/13/2023 through 5/12/2023. The secretary also redesignated Somalia for TPS, allowing additional Somalis to apply who had continuously resided in the United States since 1/11/2023 and were continuously physically present in the United States since 3/18/2023. The registration period for these new applicants runs from 3/13/2023 through 9/17/2023. **88 Fed. Reg. 15434-43** (2023). *https://www.govinfo.gov/content/pkg/FR-2023-03-13/pdf/2023-04735.pdf*

Implementation of parole process changes for Haitians and Cubans. On 4/28/2023, the Department of Homeland Security announced that Secretary Alejandro Mayorkas had authorized a change in the parole process for Haitians and Cubans. In short, those who have been interdicted at sea after 4/27/2023 will be ineligible for the parole process introduced on 1/9/2023. That process involved certain steps for certain nationals of those two countries and their immediate family members "to be considered on a case-by-case basis for parole and, if granted, lawfully enter the United States in a safe and orderly manner." That is: (1) have a supporter in the United States who agrees to provide financial support for the duration of the beneficiary's parole period; (2) pass national security and public safety vetting; (3) fly at their own expense to an interior POE (port of entry), rather than entering at a land POE; and (4) possess a valid, unexpired passport. Those who failed to avail themselves of this parole process, and instead enter the United States without authorization between POEs, are generally subject to return or removal. Individuals deemed ineligible for the parole process include those who were ordered removed from the United States within the previous five years; entered unauthorized into Mexico or Panama after 1/9/2023; entered the United States without authorization between POEs after 1/9/2023 (except those individuals permitted a single instance of voluntary departure or withdrawal of their application for admission in order to maintain their eligibility for the parole process); or otherwise deemed ineligible for a favorable exercise of discretion. According to DHS, this action is "intended to enhance border security by responding to and protecting against a significant increase of irregular migration... to the United States via dangerous routes that pose serious risks to migrants' lives and safety, while also providing a process for certain such nationals to lawfully enter the United States in a safe and orderly manner."

Haiti: **88 Fed. Reg. 26327-29** (2023) *https://www.govinfo.gov/content/pkg/FR-2023-04-28/pdf/2023-09014.pdf*

Cuba: **88 Fed. Reg. 26329-31** (2023*) https://www.govinfo.gov/content/pkg/FR-2023-04-28/pdf/2023-09013.pdf*

FY2024 H-1B registration numbers announced by USCIS. USCIS recently announced that it received 758,994 eligible registrations for FY2024 (474,421 registrations in FY2023) and 110,791 applications were selected. *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process*

DHS and DOS develop regionally focused approach to western hemisphere migration following end of Title 42. On 4/27/2023, the Department of Homeland Security (DHS) and Department of State (DOS) announced a new round of measures seeking through a more regionally based approach to reduce unlawful migration across the western hemisphere (while partnering with Mexico, Canada, Spain, Colombia, and Guatemala) by expanding lawful pathways for protection, creating stiffer consequences for failing to use those lawful pathways, and opening regional processing centers in Colombia and Guatemala—all the while facilitating "a safe, orderly, and humane processing of migrants."

The Centers for Disease Control's temporary Title 42 public health order expired at 11:59pm on 5/11/2023 and the U.S. government returned to U.S.C. Title 8 (Aliens and Nationality) to "expeditiously process and remove individuals who arrive at the U.S. border unlawfully."

In sum, individuals crossing into the United States at the southwest border without authorization or using a lawful pathway—and without scheduling a time to arrive at a port of entry—are presumed ineligible for asylum under a new proposed regulation, unless an exception applies in any specific case.

Highlights of this new policy include:

- expanded access to the CBPOne app to appear at a U.S. port of entry;
- new family reunification parole processes;
- doubling the number of refugees from the western hemisphere;
- opening regional processing centers across the western hemisphere to facilitate access to lawful pathways;
- launching an aggressive anti-smuggling campaign targeting criminal networks in the Darien Corridor;
- increasing the removal of those without a lawful basis to stay;

• combatting smuggler misinformation; and
• expeditiously processing and removing individuals who arrive at the southwest border and have no legal basis to remain.

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Intellectual Property
JUDICIAL LAW

Patent: Rejection of infringement claims absent a showing of "enablement." The Supreme Court unanimously affirmed a Federal Circuit decision invalidating patent claims for lack of enablement. Amgen produces and holds patents for antibodies that help reduce forms of cholesterol that lead to cardiovascular disease, heart attack, and stroke. Amgen was subsequently granted additional patents that purported to claim "the entire genus" of such antibodies. Accompanying the patents was the disclosure of amino acid sequences for 26 different antibodies and two methods of making undisclosed antibodies– "roadmap" and "conservative substitution" methods. Soon after receiving these patents, Amgen sued Sanofi, a direct competitor, for infringement. Sanofi counterclaimed that the asserted claims were invalid under the Patent's Act's enablement requirement. Patents must describe the claimed invention "in such full, clear, concise, and exact terms as to enable any person skilled in the art... to make and use the [invention]." 35 U. S. C. §112(a). The Supreme Court held that Amgen's claims for making the undisclosed antibodies were not sufficiently enabled. Neither party disputed that the 26 disclosed antibodies were enabled. The Supreme Court, however, held that the roadmap and conservative substitution methods did not enable the full scope of the claimed genus. Even accepting the allowance for a reasonable degree of experimentation, Amgen's claims exceeded the Court's most broad precedent involving patent claims. The Court analogized the methods to mere "research assignments" and upheld the Federal Circuit's invalidation of Amgen's patent claims. ***Amgen Inc. v. Sanofi***, No. 21-757 (U.S. 5/18/2023).

Copyright: Narrowing of the first factor of fair use. The Supreme Court in a 7-2 decision affirmed the 2nd Circuit's ruling reversing summary judgment against defendant Lynn Goldsmith. Goldsmith was originally commissioned by Newsweek magazine to take a photo of Prince, the musician, for an article. Years later, Goldsmith granted a one-time limited license of the photograph to Vanity Fair for artist illustration. Andy Warhol used the photo for his reference, resulting in a series of derivative Prince illustrations. After Prince's death, Vanity Fair's parent company contacted the Andy Warhol Foundation for the Visual Arts, Inc., resulting in the use of a photo. Goldsmith saw the photo on the cover of a magazine and notified Warhol of potential copyright infringement. In response, Warhol sued Goldsmith for declaratory judgment of noninfringement and alternatively fair use. Warhol sought this judgment to continue commercial licensing of the photo of Prince. The district court granted summary judgment in favor of Warhol but was reversed by the 2nd Circuit, which held that the fair use factors favored Goldsmith. Warhol petitioned the Court seeking reversal on the first fair use factor, as the Warhol foundation believed his work was sufficiently transformative. The Supreme Court held that the "purpose and character" of the original work and Warhol's rendition substantially share the same commercial purpose–which weighs against fair use. While the commercial purpose of Warhol's work was not dispositive, the Court weighed this against Warhol's claims of transformation. The Court reasoned that reading §107(1) so broadly as to include mere additions of subjective expression would interfere with the original creator's bundle of rights, which includes the rights to reproduce and to prepare derivative works. Thus, given that the pictures would be used for the same purposes commercially (depiction of Prince on a magazine cover), the Court affirmed the 2nd Circuit and rejected the claim of fair use. Chief Justice Roberts and Justice Kagan dissented, stating that this doctrinal shift does not serve copyright's core purposes of fostering creativity, and that this overly stringent regime "stifle[s] creativity by preventing artists from building on the work of others." ***Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith***, No. 21-869 (U.S. 5/18/2023).

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Probate & Trust
JUDICIAL LAW

Civil lawsuit properly dismissed when probate court first obtains jurisdiction. The personal representative of an estate initiated a probate proceeding and filed an inventory that included firearms and ammunition. The decedent's son notified the personal representative's attorney that he owned the firearms listed on the inventory. Two days later, the personal representative transferred the firearms to Pheasants Forever. The next year, the decedent's son initiated a civil lawsuit against the personal representative and alleged that the transfer of the firearms constituted fraud and conversion. The district court dismissed the son's complaint. The district court found that the probate court and district court had concurrent jurisdiction over the firearms at issue and, because the probate court was the first to obtain jurisdiction, all claims relating to the firearms were required to be decided in the probate proceeding. The Minnesota Court of Appeals affirmed, finding that the civil action and the probate proceeding involved the same parties, concerned the same subject, and tested the same rights. The court of appeals further found that the ownership of the firearms could be addressed in the probate proceeding because the district court in a probate proceeding has the power to hear and dispose of all matters relevant to the determination of the extent of the decedent's estate and the claims against it. ***Randy Hook v. Brenda Hook, et al.***, A22-1140, 2023 WL 2467808 (Minn. Ct. App. 3/13/2023).

Attorney-in-fact has no affirmative duty to act. The decedent amended her estate plan to exclude her grandson. The decedent informed her attorney that her plan was to deposit $30,000 into a payable-on-death account and to make her grandson the beneficiary. The decedent's attorney-in-fact knew of the decedent's intention but took no action to set up the account. There was no evidence that the decedent instructed her attorney-in-fact to open the account. The grandson filed suit and, among other things,

alleged that the attorney-in-fact breached his fiduciary duty by failing to establish the payable-on-death account. The district court determined that the attorney-in-fact owed the decedent a fiduciary duty and that he breached that fiduciary duty by failing to administer an account for the decedent's "payable-on-death gift" of $30,000 to her grandson. The court of appeals reversed. The court quoted Minn. Stat. §523.21, which provides: "The attorney-in-fact has no affirmative duty to exercise any power conferred upon the attorney-in-fact under the power of attorney." Therefore, while the attorney-in-fact had the power to open an account for the benefit of the decedent's grandson, he had no duty to exercise that power without a directive from the decedent. ***In re Estate of Maryetta Louis Andrews***, A22-0996, 2023 WL 2639588 (Minn. Ct. App. 3/27/2023).

A district court may *sua sponte* raise the issue of venue. The decedent died in the state of Georgia. One of the decedent's alleged creditors filed a petition and sought the appointment of a personal representative in Hennepin County. The decedent's surviving spouse objected to the petition and argued that the decedent did not reside or own property in Minnesota on his death. The district court *sua sponte* raised the issue of improper venue and scheduled a hearing. After the hearing, the district court dismissed the petition without prejudice for lack of proper venue. The court of appeals affirmed, as the alleged creditor had presented no evidence that the decedent held any beneficiary interest in any trusts administered in Minnesota or that the decedent owed debt in Hennepin County. Because the decedent was not domiciled in Minnesota at the time of his death, once the district court determined that the decedent did not own property in Minnesota, it had no option but to dismiss the case. ***In re Estate of Stephen D. King***, A22-1262, ___N.W.2d___, 2023 WL 3574230 (Minn. Ct. App. 2023).

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Tax Law
JUDICIAL LAW

Supreme Court affirms discovery and valuation of Minneapolis Hyatt Regency. The owners of the downtown Minneapolis Hyatt Regency challenged several tax years of the county's assessment. The parties brought the dispute to the Minnesota Tax Court, where, prior to trial, the property owner sought discovery of, *inter alia*, income and expense information and assessor's data for 10 other Minneapolis hotels. The tax court permitted discovery of information related to four of those properties–specifically, it required production of information about the four hotel properties that the county gave its assessor, and that the county's assessor relied on in his appraisal. Following trial, the tax court issued extensive findings of fact, conclusions of law, and a memorandum in which the court adopted neither the county's nor the property owner's suggested value. Although not adopting his valuation, the court adopted much of the property owner's expert's analysis and then made significant adjustments to the appraiser's calculations in several areas.

On appeal to the Minnesota Supreme Court, the property owner challenged the tax court's discovery and evidentiary rulings, as well as the adjustments the tax court made to the property owner's expert valuation. The reviewing court affirmed. The Supreme Court focused first on the discovery dispute. The Court was tasked with divining the statutory intent of what Justice Thissen in his concurrence termed a "puzzle" created by the "amalgam [of] rules governing discovery of income property assessment data in the context of tax litigation." Both the majority and concurring opinions focus heavily on the discovery dispute. The opinions provide a cogent explanation of the various rules at issue and the challenge of reconciling those rules. The Court concluded that the tax court followed a reasonable process for reconciling these puzzling rules and did not abuse its discretion in the discovery dispute. The concurring opinion concluded by "highlight[ing] the problematic and potentially unfair practical outcomes—one noted by the tax court—of the statutory scheme created by the Legislature." The scheme gives the parties asymmetrical information, which potentially favors the taxing authority. It also raises privacy concerns for nonlitigant property owners. Justice Thissen wrote, "Perhaps this is the balance the Legislature intended to strike through the operation of four different statutes agglomerated over the course of 20 years. If not, it is up to the Legislature to engage with the stakeholders and devise a different solution." ***1300 Nicollet, LLC v. Hennepin Cnty.***, ___ N.W.2d ___ (2023).

Discovery orders following *1300 Nicollet*. Following the Minnesota Supreme Court's *1300 Nicollet, LLC v. Hennepin Cnty.*, ___ N.W.2d ___ (Minn 2023) decision, the tax court addressed several similar requests for discovery of information about non-party taxpayers. In two cases, the tax court clarified the meaning of the important term "assessor's records." In *Ameriprise Financial, Inc. v. Hennepin County*, 2023 WL 385660 (Minn. Tax, 6/6/2023) the court ordered the county to produce an unredacted copy of the assessor's files, denied portions of the taxpayer's motion to compel, and ordered each party to bear its own expenses in relation to the motion. In *IRC Cliff Lake, LLC v. Dakota County*, 2023 WL 3856405 (Minn. Tax, 6/6/2023), the court denied without prejudice the taxpayer's motion to compel. In both cases, the tax

court adopted a definition of the term "assessor's records" as follows: "'[a]ssessor's records' refers to all materials in an assessor's possession pertaining to the subject property, inclusive of any information about separate properties even if qualifying as 'income property assessment data.'" The court continued, "'Assessor's records' does not extend to information about separate properties unless that information is contained with 'assessor's records' for the subject property."

In *G&I VIII WF Plaza, LLC. v. Hennepin County*, 2023 WL 3768077 (Minn. Tax, 6/1/2023), the tax court applied the balancing test as endorsed by *1300 Nicollet* and ordered disclosure of income property assessment data for non-party properties. Hennepin County ultimately did not oppose the disclosure, but some of the non-party property owners opposed disclosure of their data. The court observed that the "unopposed and strict protective order we file today will mitigate the harm to owners of separate properties by preventing public dissemination and limited data access to Well's counsel and expert appraiser."

SCOTUS deems Hennepin County's tax sale a "classic taking." A Hennepin County resident sued the county, alleging a 5th Amendment violation after the county sold her condominium in a tax sale and retained all the proceeds, which included more than the amount the homeowner owed in unpaid property taxes and fees.

Hennepin County imposes annual taxes on real property, and, if after three years of delinquency, the property owner has not redeemed their property, title vests to the State of Minnesota and any excess proceeds remain with the county. Minn. Stat. §273.01, 281.17(a), 281.18 (2022). In 2010 the resident, an elderly woman, moved out of her condo and into a senior community. She did not pay property taxes after she moved out, and subsequently accrued approximately $15,000 in delinquent taxes. Hennepin County, acting under Minnesota's forfeiture procedures, seized the condo and sold it for $40,000, which extinguished the resident's existing $15,000 debts. The county retained the remaining $25,000. It was this $25,000 that the resident asserted as an unconstitutional taking.

The Court first rejected the county's argument that the taxpayer lacked standing; the plausibility of financial harm is sufficient to establish standing, it ruled. The substantive question that remained was whether the "remaining value is property under the Takings Clause, protected from uncompensated appropriation by the State." *Tyler v. Hennepin Cnty, Minn.*, No. 22-166, 2023 WL 3632754, 4–7 (U.S. 5/25/2023). Minnesota had historically recognized that its homeowners have property interest in excess of proceeds from tax sales, but in 1935 the state enacted a new law providing that homeowners forfeit interest in their homes when they fall behind on taxes. The resident, according to the county, therefore, had no property interests protected by the takings clause.

The Supreme Court rejected the county's argument and held unanimously that history and precedent favored the resident. While the county had the power to recover unpaid property taxes through a tax sale, the "[County] could not use the toehold of the tax debt to confiscate more property than was due." *Tyler*, No. 22-166, at 4. The county's confiscation of excess proceeds affected a "classic taking in which the government directly appropriates private property for its own use." *Id.* (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 324 (2002)). The Court reasoned the resident "has stated a claim under the Takings Clause and is entitled to just compensation." *Tyler*, No. 22-166, at 4.

Looking more broadly at the concept and origins of a taking, the Court recognized the doctrine of takings, and traced the limitation of takings up to the value of debts to the Magna Carta. Following the doctrine across the ocean, the Court found "consensus that a government could not take more property than it was owed held true." *Id*. at 6.

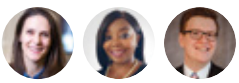
"The Takings Clause was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Tyler*, No. 22-166, at 8 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Finding that the resident has plausibly alleged a taking under the 5th Amendment, and noting that the resident agrees that relief under the Takings Clause would fully remedy her harm, the Court reversed the judgment, quipping, "The Taxpayer must render unto Caesar what is Caesar's, but no more." *Tyler*, No. 22-166 at 9. ***Tyler v. Hennepin Cnty, Minn.***, No. 22-166, 2023 WL 3632754, 4–7 (U.S. 5/25/2023).

Federal income tax: Minnesota Chippewa member's income not exempt under 1837 treaty. Members of the Chippewa tribe have the right to "hunt, fish and gather the wild rice" on traditional Chippewa land according to an 1837 treaty with the United States. Petitioner, an enrolled member of the federally recognized Chippewa tribe, argued that this right ought to be interpreted to mean that the income he earned as an attorney specializing in Indian law was exempt from self-employment tax. The tax court, speaking through Senior Tax Court Judge Mark Holmes, disagreed.

Income tax exemptions are construed strictly in favor of the United States (*see McCamant v. Commissioner,* 32 T.C. 824, 834 (1959)) and "to be valid, exemptions to tax laws should be clearly expressed." *Squire v. Capoeman*, 351 U.S. 1, 6 (1956). When it comes to interpreting doubtful expressions in treaties with Indian tribes, however, issues are to be resolved in the tribe's favor. *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

Petitioner's argument hinged upon a 2015 8th Circuit case, *United States v. Brown*, in which the circuit court concluded that "Chippewa Indians' exercise of their usufructuary rights included selling what they hunted, fished, or gathered in order to make a modest living." 777 F.3d 1025, 1031 (8th Cir. 2015). The petitioner analogized his practice of law to hunting, fishing, and gathering wild rice as exempted by *Brown*. Petitioner pressed for an interpretation of the 1837 treaty that preserved the Chippewa's right to make a modest living regardless of how that income was earned.

The tax court was not persuaded. While "[t]he right to hunt, fish, and gather may be the means to a 'modest living,'" there is no clear expression within the 1837 Treaty, as required under *Squire*, that those means be tax-free. *Bibeau*, 2023 WL 3619588 at 2. ***Bibeau v. Comm'r of Internal Revenue,*** T.C.M. (RIA) 2023-066 (T.C. 2023).



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Sam Lacy joined Maslon LLP as an attorney in the litigation group. Lacy focuses on corporate and securities litigation, government investigations and white-collar defense, and construction and real estate matters.

Laurann J. Kirschner is now a partner at Galowitz Olson, PLLC. Kirschner has been with the firm for five years and focuses her practice on estate planning, guardianship and conservatorship, and estate administration.



Nathan Z. Heffernan, Karlen Padayachee, and **Christopher L.B. Scott** joined Lommen Abdo. Heffernan concentrates his practice on all areas of litigation, including commercial litigation and insurance coverage and defense. Padayachee advises business owners in a wide range of legal matters from business entity formation to buy-sell transactions. Scott works in the areas of insurance defense, civil litigation, professional liability, medical malpractice, wrongful death, personal injuries, and criminal and traffic defense.

Kevin Pillsbury joined Miner's Inc./Super One Foods as its general counsel. Pillsbury was previously a partner at a Duluth law firm where he practiced in the areas of employment law, business law, and litigation.

Kate Radsan joined Latitude as director of legal recruiting and placement in the company's Minneapolis office. Radsan brings more than 30 years of experience as an attorney, nonprofit board member, and business owner.


Maslon LLP announced the addition of partner **Evan Berquist** to the firm's corporate & securities group and attorney **Emily Liebman** to the litigation group. Berquist focuses on mergers and acquisitions, strategic financing transactions, and general corporate and commercial matters. Liebman has a background as a prosecutor in both the Hennepin County and Ramsey County Attorney's Offices.

Sara N. Westerberg has joined the Ed Shaw Law Office as an associate attorney focusing on family law. Westerberg graduated from Mitchell Hamline School of Law in June 2022 with experience in Alternative Dispute Resolution and certification as a Rule 114 mediator.

Jennifer L. Thompson of JLT Law was admitted to the U.S. Supreme Court Bar in open court on June 8 as part of the ABA Senior Lawyers Division. Thompson's practice is focused on Minnesota child protection cases statewide.

In memoriam

JAMES FERGUSON BODIN died January 4, 2023 at the age of 78. He graduated from the University of Minnesota Law School in 1969. He began his law practice with his father-in-law at Edwards, Edwards and Bodin, where he practiced Indian and real estate law. Bodin founded St. Louis County Title Co. in 1972. The title company grew into a family business that included his wife and three sons. He continued to work and mentor his three sons throughout his life as attorney for Guardian Title in Maplewood, Boundary Title, and St. Louis Title in Duluth.

SHANNON COLLEEN CAREY, age 47, passed away on June 11, 2023. She earned her law degree from William Mitchell College of Law. Carey practiced law at SiebenCarey in Minneapolis for 19 years.

Mitchell Hamline 2023 Student Award of Merit winners named

Shortly before their graduation in June from Mitchell Hamline School of Law, students **Michelle Furrer**, **Marilys Solano**, and **Jayashree Venkateswaran** were named Student Award of Merit recipients for 2022. All three were part of the class of students that entered law school in August 2020 at the height of the COVID pandemic. Their studies were entirely online for their first year. The award, from the Mitchell Hamline Alumni Association, honors graduating students whose contributions and participation in organizations and other events go beyond the normal expectations for a student, and who exhibit a strong commitment to diversity, equity, and inclusion.

Michelle Furrer '23

Michelle Furrer continued to manage her family's ranch in rural Washington during law school, attending partially online through Mitchell Hamline's blended-learning enrollment option and sometimes joining meetings online from the seat of a tractor.

"Her ability to balance academic pursuits with family responsibilities is a testament to her strength, resilience, and determination," said Furrer's husband, fellow student Chris Furrer.

Furrer was president of Mitchell Hamline's Environmental Law Society this year and served on the law review for two years, including as Notes and Comments Editor this year. After recently finishing as a legal resident for Minnesota Supreme Court Justice Anne McKeig '92, Furrer is now clerking for a judge in Washington.

Marilys Solano '23

A first-generation Latina student from Miami, Solano served this year as both treasurer for Mitchell Hamline's Student Bar Association and vice president of the Latine Law Student Association. She is also a member of the Black Law Students Association.

Solano also worked part time as a research assistant with Professor Jill Bryant and Research Librarian Alisha Hennan following the progeny of corporate entities that have profited from industrial slavery (or peonage). She's been a guardian ad litem for the past two years, calling it "one of the most rewarding experiences I have ever been a part of.

"I am excited to continue impacting my community for the children."

Jayashree Venkateswaran '23

Born and raised in India, Venkateswaran earned an MBA there before eventually moving Minnesota. Becoming an immigration paralegal sparked her interest. "Going back to school when most people are comfortably settled in their careers is not something I imagined I'd do," she said.

At Mitchell Hamline, Venkateswaran was a student director in the Health Law Clinic; helped prepare a training for physicians on completing naturalization waivers; and provided technical support to legislators on a new law that allows Minnesotans to apply for drivers' licenses regardless of immigration status. All of which happened while undergoing treatment for breast cancer.

"I want to be a role model for my daughter and show her the sky is truly the limit when it comes to going after what makes you happy," added Venkateswaran.

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