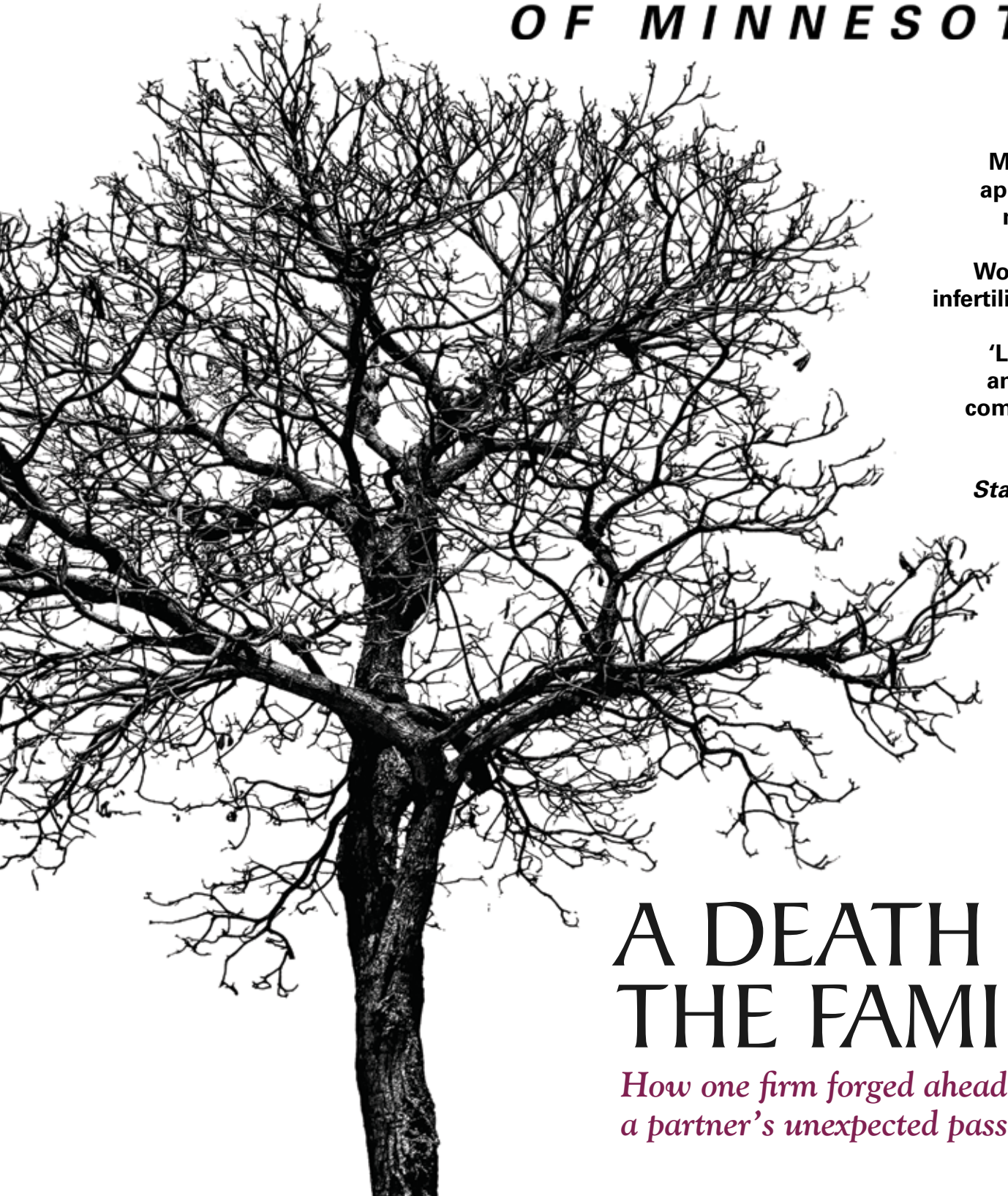
OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVIII NUMBER V
MAY/JUNE 2021
www.mnbar.org

Bench&Bar OF MINNESOTA



Minnesota's approval of a new Line 3

Working with infertility and IVF

'Long covid' and workers compensation

Media got *State v. Khalil* all wrong

A DEATH IN THE FAMILY

How one firm forged ahead after a partner's unexpected passing

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www.mnbar.org/pro-bono-reporting

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Thank you to the In-House Counsel Community for making a difference!

Now, more than ever, having a lawyer makes all the difference in protecting a home, finding safety, and ensuring equal access to health care. This past year brought an overwhelming need for help, and Legal Aid's creativity and innovation protected access to justice in our community.

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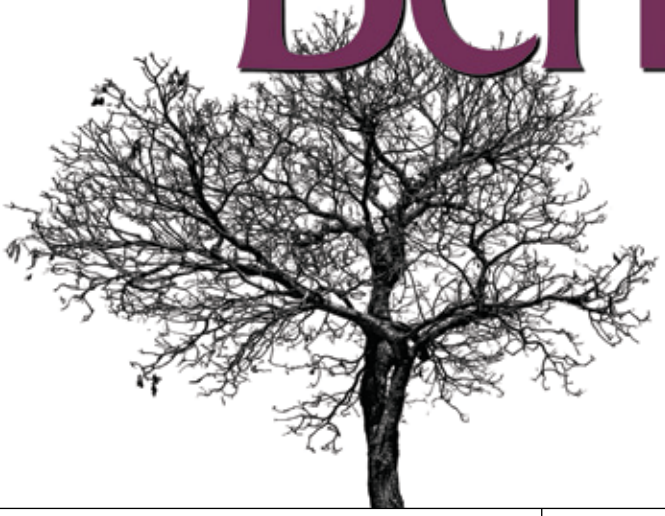

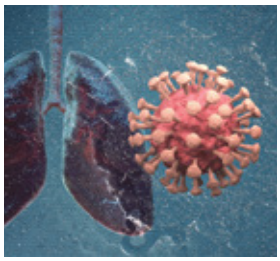

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Official publication of the
Minnesota State Bar Association
www.mnbar.org | (800) 882-6722

MSBA

Bench & Bar of Minnesota (ISSN 02761505) is published Monthly, except Bi-Monthly May/June by the Minnesota State Bar Association, 600 Nicollet Mall STE 380, Minneapolis, MN 55402-1641. Periodicals postage paid at St Paul, MN and additional mailing offices. **Postmaster:** Send address changes to Bench & Bar of Minnesota, 600 Nicollet Mall STE 380, Minneapolis, MN 55402-1641. Subscription price: $25.00 for members which is included in dues. Nonmembers $35.00 per year. Some back issues available at $5.00 each. Editorial Policy: The opinions expressed in *Bench & Bar* are those of the authors and do not necessarily reflect association policy or editorial concurrence. Publication of advertisements does not constitute an endorsement. The editors reserve the right to accept or reject prospective advertisements in accordance with their editorial judgment.

WE'D LIKE TO HEAR FROM YOU: To query potential articles for Bench & Bar, or to pass along your comments on matters related to the profession, the MSBA, or this magazine, write to editor Steve Perry at sperry@mnbars.org or at the postal address above.

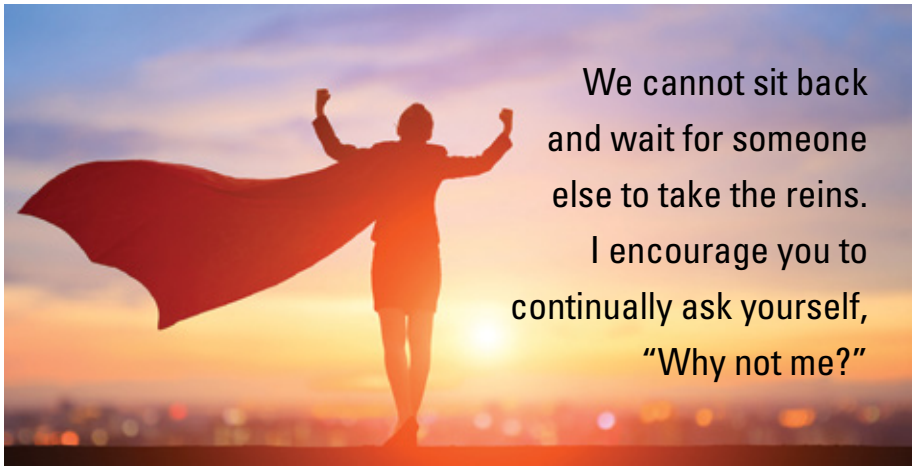
Why not you?

In early May, I attended my daughter's graduation from Illinois Wesleyan University in Bloomington. While we were required to wear masks and social distance throughout the ceremony, it was one of the first relatively "normal" things I had done in quite a long time. And because my parents—whom I had not seen in-person since last June—were also able to attend, it was even more special.

The excitement of the occasion and the fact that it was a big milestone for my daughter heightened my attentiveness during the commencement ceremony; I found myself listening closely to each speaker on the program, not wanting to miss any of their words of advice.

The keynote address was particularly interesting. Geisha J. Williams was the first and, to date, the only Latina CEO of a Fortune 200 company, and has been recognized as the highest-ranking Latina leader in business. She is the former CEO and president of PG&E Corporation, one of the largest combined natural gas and electric energy companies in the United States. Before joining PG&E in 2007, Ms. Williams worked for over two decades at Florida Power and Light Company, where she was vice president of power systems after having worked her way up through a variety of positions of increasing responsibility. At the time of the commencement address, Ms. Williams was serving as an independent board member and chair of Osmose Utility Services, Inc., as a member of the supervisory board of Siemens Energy, Inc., and as an independent director of Artera Services, LLC. She also serves on the board of directors of Bipartisan Policy Center, a think tank in Washington, D.C.

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



During her remarks, Ms. Williams did not focus on her personal achievements. (I learned about her background through a web search.) Instead, she told the story of an interaction she had with the then-president and CEO of Florida Power and Light Company shortly after she graduated from college and started working there. The president engaged her in a conversation about the future of the company. Ms. Williams balked when the president asked her if she could see herself in his position one day; the president pressed her on her hesitation, asking her a very simple question: "Why not you?"

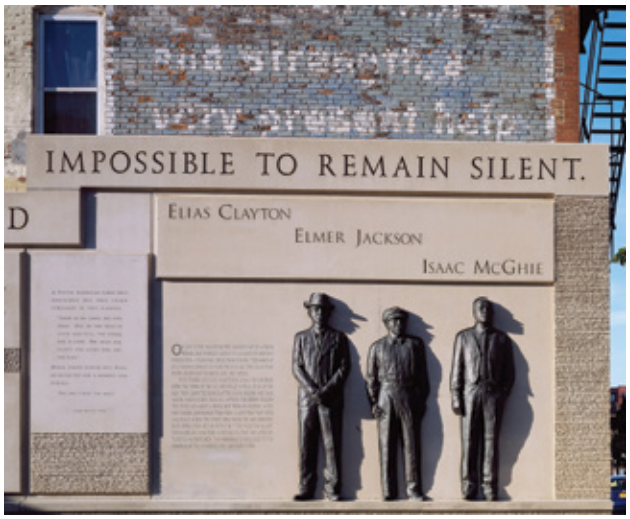
Ms. Williams told the graduates that this question was a turning point in how she perceived her own abilities. She realized in that moment that she was capable of effectuating change in the world and in business. She challenged the Illinois Wesleyan University graduates to ask themselves this same question.

Ms. Williams' message made me think about my career as an attorney and my role as a bar leader. It is an understatement to say that our society in general and the legal profession in particular are in the midst of some very important and challenging issues. It would be easy to express doubt on one's ability to address—and better yet, resolve—these issues. But, why not me? Why not you?

Lawyers are problem-solvers. We have the ability to effect change in society. We can help to eradicate instances of racial inequality in our justice system. We can work toward ensuring equal access to justice and upholding the rule of law. We can also confront head-on the problems facing our own profession by taking concerted steps toward improving lawyer well-being and work-life balance. But we can only accomplish these things through individual action and engagement. We cannot sit back and wait for someone else to take the reins. I encourage you to continually ask yourself, "Why not me?"

This is my last president's column. My entire year as MSBA president took place in the virtual world. Every meeting I attended and every speech or presentation I gave was done on Zoom, Microsoft Teams, or Webex. While I can't help feeling some regret for missing out on what I have always found to be the most rewarding part of the MSBA—the personal connections and interactions—I am so grateful for the opportunity to lead the MSBA, and so proud of the way the MSBA weathered the covid storm.

Thank you for allowing me to serve in this important role. ▲



This month: Duluth lynchings centennial symposium

In conjunction with the covid-19-delayed centennial observance of the 1920 lynchings of African American circus workers Isaac McGhie, Elmer Jackson, and Elias Clayton in Duluth, Minnesota, the Collaborative Legal Community Coalition is presenting a half-day online symposium, "Understanding our Duluth Lynchings: Racial Violence in America & the Road to Justice & Reconciliation," on June 14.

The program, which begins at 9 a.m., includes a keynote address by Bryan Stevenson, the founder and executive director of the Equal Justice Initiative (EJI) in Montgomery, Alabama, and author of the NYT bestseller *Just Mercy.* You can find more program details (including CLE credits) and register by visiting *mnhum.org/event/understanding-lynching-violence.*

Remote resources for pro bono attorneys

As the covid-19 pandemic fades, at least for the summer, public law libraries remain eager to assist attorneys who volunteer their time to help those in need. Library support may involve access to helpful legal research resources, especially for the attorney who takes pro bono clients with issues outside the attorney's usual practice area.

Thomson Reuters has extended remote access to Westlaw during the pandemic. The Minnesota State, Hennepin County, and Ramsey County Law Libraries can help attorneys with remote access to Westlaw. (It's not known how long Thomson Reuters will continue to offer remote access via public law libraries.)

Pro bono attorneys may contact the following law libraries about remote access:

Minnesota State Law Library: 651-297-7651
Hennepin County Law Library: 612-348-2903
Ramsey County Law Library: 651-266-8391

Pro bono attorneys in other metro area counties should also contact their local public law library to learn what resources they provide. A full directory of county law libraries is available at *bit.ly/2RrRCye* .

For MSBA members

The following online resources are available to MSBA members: Fastcase for online access to primary legal materials; eBooks; mndocs and practicelaw for online forms templates and practice resources. Attorneys access these resources directly from the MSBA (*www.mnbar.org*).

Becker Awards winners

The Bernard P. Becker Legal Services Staff award is presented annually to attorneys, paralegals, administrators, or other staff employed by a private, nonprofit agency that provides legal services to low-income eligible clients. The Becker Student Volunteer Award is presented to a law student who has demonstrated a commitment to providing legal services to low-income persons. Congratulations to the 2021 winners, who were announced last month.

Legacy of Excellence:
Laura Melnick, Southern Minnesota Regional Legal Services
Gwen Updegraff, Legal Aid Service of Northeastern Minnesota

Emerging Leader:
J. Singleton, Mid-Minnesota Legal Aid, Legal Services State Support

Advocate:
Milca Dominguez de Corral, Legal Assistance of Dakota County

Law Student:
Ashley Meeder, University of Minnesota Law School

2021 MSBA CONVENTION –
Connect with Your Colleagues Online!

June 24 & 25, 2021

The 2021 Convention Is Live Online!

This year it's more important than ever to connect with your colleagues. The Convention's engaging online platform will allow you to view all the presentations from the comfort of your home or office and to participate as much as you want to. Plus, you'll have many opportunities to interact with your fellow attendees.

Minnesota lawyers are musicians, entrepreneurs, volunteers, artists, experts, coaches, board members, teachers, writers, leaders, athletes, mentors, inventors and more. You'll meet some of Minnesota's most interesting lawyers at the 2021 MSBA Convention.

We look forward to seeing you online this June!

FEATURED SPEAKERS

CHIEF JUSTICE LORIE SKJERVEN GILDEA

Chief Justice Gildea has served as the Chief Justice of the Minnesota Supreme Court since 2010. Prior to that she served as an associate justice from 2006 to 2010 and as a district judge in the Fourth Judicial District from 2005 to 2006.

PATRICIA LEE REFO

Patricia Lee Refo is the President of the American Bar Association. As a partner at Snell & Wilmer in Phoenix, Refo concentrates on complex commercial litigation and internal investigations. She chairs the firm's Professional Liability Litigation Group.

SIMON TAM

Simon Tam is best known as the founder and bassist of The Slants, the world's first and only all-Asian American dance rock band. He helped expand civil liberties by winning a unanimous victory at the Supreme Court of the United States for a landmark case, *Matal v. Tam*, in 2017. He also leads The Slants Foundation, a nonprofit that supports arts and activism projects for underrepresented communities.

How the Online Convention Will Work

- Powered by the Remo conference platform, the 2021 MSBA Convention will take place completely online.
- Every session will feature live access to the speakers for questions and answers.
- All Convention materials will be provided electronically.
- In early June, all registrants will receive easy-to-follow instructions for joining the Convention online.

See you online for the 2021 MSBA Convention!

THURSDAY, JUNE 24

8:30 a.m.
JOIN ONLINE

8:30 – 8:45 a.m.
ANNOUNCEMENTS

8:45 – 9:00 a.m.

Presidential Welcome

– *Dyan J. Ebert, MSBA President*
Quinlivan & Hughes, P.A.; Saint Cloud

9:00 – 9:45 a.m.

Slanted: How an Asian American Troublemaker Took on the Supreme Court

– *Simon Tam*
Musician - Author - Activist; Cincinnati, Ohio

9:45 – 10:00 a.m.
BREAK – MEET FRED DUDDERAR
Duluth Lawyer and North Shore Photographer

10:00 – 10:45 a.m.
ED TALKS

- **Wills for Heroes**
  – *Susan Link*
  Maslon LLP; Minneapolis
- **The First Amendment, Truth and the Media**
  – *David A. Schultz*
  Hamline University; Saint Paul

10:45 – 11:00 a.m.
BREAK – MEET SAHR BRIMA
Lawyer and Love You Cookie Entrepreneur

11:00 – 11:45 a.m.

2021 U.S. Supreme Court Update

– *Aaron D. Van Oort*
Faegre Drinker Biddle & Reath LLP; Minneapolis

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11:45 a.m. – 1:00 p.m.

LUNCH PRESENTATIONS

- 12:00 – 12:15 p.m.

  State of the Judiciary Address

  – *Chief Justice Lorie Skjerven Gildea*
  Minnesota Supreme Court; Saint Paul

- 12:15 – 12:30 p.m.

  Remarks by American Bar Association President Patricia Lee Refo

- 12:30 – 12:45 p.m.

  Passing of the Gavel Ceremony

  – *Dyan J. Ebert, MSBA President*
  – *Jennifer A. Thompson, Incoming MSBA President*

1:00 – 1:45 p.m.

ED TALKS

- **"Self, Divided" and Other Nonfictions**

  – *John T. Medeiros*
  Nilan Johnson Lewis PA; Minneapolis

- **The Black Big Law Project**

  – *Brandon E. Vaughn*
  Robins Kaplan LLP; Minneapolis

1:45 – 2:00 p.m.

BREAK – MEET ELISSA MEYER

Lawyer and Yoga Instructor

2:00 – 3:00 p.m.

Elimination of Bias: Mapping Prejudice – The Hidden History of Race and Prejudice in the Twin Cities

1.0 elimination of bias credit applied for

– *Kirsten Delegard Ph.D.*
University of Minnesota; Minneapolis

3:00 – 3:15 p.m.

BREAK – MEET LARRY MCDONOUGH

Lawyer and Musician

3:15 – 4:00 p.m.

Who We Are Now: Lessons from the Pandemic

– *Sybil L. Dunlop*
Greene Espel PLLP; Minneapolis

4:00 – 4:30 p.m.

President's Reception

Enjoy live music and conversation online with your colleagues!

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FRIDAY, JUNE 25

9:00 a.m.

JOIN ONLINE

9:00 – 9:45 a.m.

Minnesota Appellate Case Law Update

– *Panel of Minnesota Supreme Court Justices and Minnesota Court of Appeals Judges*
– *Moderator: Justice G. Barry Anderson*
Minnesota Supreme Court; Saint Paul

9:45 – 10:00 a.m.

BREAK – MEET SHARON HERLAND

Retired Lawyer, Artist and Studio Owner

10:00 – 11:00 a.m.

ED TALKS

- **Where in the World Is Ellen Abbott?**

  – *Ellen A. Abbott*
  Repurposed Lawyer; Nomadland

- **How to Survive Practicing Law with Your Spouse**

  – *Kathryn M. Lammers*
  Heimerl & Lammers LLC; Minnetonka

- **How to be an Effective Leader in Your Community**

  – *Amran A. Farah*
  Greene Espel PLLP; Minneapolis

11:00 – 11:15 a.m.

BREAK – MEET CATHRYN SCHMIDT

Lawyer and Opera Singer

11:15 a.m. – 12:15 p.m.

Critical Conversation: The Future of Greater Minnesota Law Practice – Opportunities and Challenges

– *Shari P. Fischer*
Fischer Law PA; New Ulm
– *Antonio Tejeda Guzman*
Law Office of Tejeda Guzman, Ltd.; Willmar
– *Joshua M. Heggem*
Pemberton Law P.L.L.P; Fergus Falls
– *Justice Gordon L. Moore III*
Minnesota Supreme Court; Saint Paul
– *Judge Rachel Sullivan*
Sixth Judicial District; Hibbing
– *Moderator: Leanne R. Fuith*
Associate Professor and Dean of Career and Professional Development; Mitchell Hamline School of Law; Saint Paul

12:15 – 12:30 p.m.

BREAK – MEET JULES PORTER

Lawyer and Video Game Developer

12:30 – 1:30 p.m.

Ethics: Maintaining Wellness through the Pandemic

1.0 ethics credit applied for

– *Jennifer S. Bovitz*
Office of Lawyers Professional Responsibility; Saint Paul

1:30 – 1:45 p.m.

BREAK – MEET TINA BURNSIDE

Lawyer and Curator of the Minnesota African American Heritage Museum and Gallery

1:45 – 2:15 p.m.

The Other Side Workgroup: An Open Forum on Post-Pandemic Court Operations

MSBA

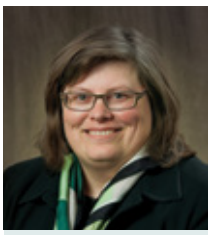
Register online today at www.msbaconvention.org

Mythbusters: Lawyer discipline edition

This year marks the 50th anniversary of the creation of the Office of Lawyers Professional Responsibility. In 1971, the Minnesota Supreme Court appointed the first Administrative Director of the Office, R.B. Reavill, having created the Lawyers Professional Responsibility Board the prior year. Since 1971, OLPR directors have written columns for Bench & Bar, advising the bar on ethics topics of interest. To ensure as broad a reach as possible, Bench & Bar allows us to republish these articles on our website, where you can find all of those articles archived today. On two occasions—in 1984 and again in 2013—Directors have written columns devoted to busting myths about the Office and the discipline system. In this anniversary year, let's see if I can demystify some beliefs about the Office, presented in no particular order.

Belief #1: Only clients can file complaints.

This is not true. In Minnesota, as in many states, there is no standing requirement to file a complaint. Who is making the complaint may figure in determining whether there is a reasonable basis to believe misconduct may have occurred—the standard we use to determine if we should investigate. But opposing parties, opposing counsel, members of the public, family members, etc., may file a complaint, and we will give it the same consideration we give a client complaint. There is also no statute of limitations to file a discipline complaint. The passage of time may necessarily impact our ability to investigate misconduct, but it has long been a core part of the process to disfavor any barriers to alleging misconduct.



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.

SUSAN.HUMISTON@COURTS.STATE.MN.US

Belief #2: Anonymous complaints are not investigated.

Mostly true, but there are exceptions. If the Office receives a complaint from an anonymous source, the Office will consider a number of factors, including whether the alleged misconduct is serious, the level of detail provided, whether an investigation can effectively occur without an identified complainant, and whether the conduct alleged involves personal rather than professional misconduct. The Office does not want to be used to advance personal agendas, but also understands that fear of retaliation may affect a person's willingness to come forward, even when there is an ethical duty to report misconduct. The discipline imposed in the *Pertler* matter in 2020 (former county attorney disbarred for withholding information regarding a police officer) started with an anonymous complaint.

Belief #3: The Director can initiate an investigation without a complaint.

True, but there are good checks in place. Rule 8(a), Rules on Lawyers Professional Responsibility, provides that "with or without a complaint," the Director—upon a reasonable belief that professional misconduct has occurred—may conduct such investigation as is appropriate. But the rule also provides that investigations on the sole initiative of the Director need the approval of the Executive Committee of the Lawyers Professional Responsibility Board. The two most common reasons to seek approval, as noted in the 2013 mythbusters article, remain news reports of a lawyer's felony criminal arrest or conviction, or court of appeals decisions involving attorney misconduct.

There are other areas in which a Director's file might be initiated without a complaint and without Executive Committee approval (because the investigation is not on the sole initiative of the Director), including trust account misconduct discovered after an overdraft notice is received on a lawyer's IOLTA account, misconduct of another lawyer (such as a lawyer's supervisor) discovered while investigating a complaint against a subordinate lawyer, or a report of discipline from another disciplinary agency against a Minnesota lawyer. Director-initiated complaints account for very few investigation annually, but help to ensure that misconduct is not ignored for lack of a complaining party.

Belief #4: The Director may have an open investigation against me without my knowledge.

Not true. The Director's office always provides notices of investigations to attorneys. I have heard from some lawyers under the impression that our summary dismissal notices mean that we reviewed a matter without their input, because the document is entitled "Determination that Discipline is Not Warranted Without Investigation." I'm not sure where that language came from, but I agree it looks like we make a discipline determination without input from you—though it's actually how we explain to the complainant that we are not investigating their complaint.

This is often the first notice a lawyer gets that a complaint has been filed, but it also indicates that no investigation will be conducted for the reasons stated. If we or a district ethics committee are investigating a complaint against you, you will receive a document entitled "Notice of Investigation." If you do not keep your address up-to-date with the Lawyer Registration Office (*lro.mn.gov*), however, you might not receive that notice in a timely fashion. We do spend a surprising amount of time chasing down lawyers.

Belief #5: Only lawyers investigate lawyers.

Not true. Public members play a very important role in Minnesota's discipline system. District ethics committees, by rule, are composed of at least 20 percent public members. These individuals do not just advise on discipline recommendations by the committee, but conduct investigations themselves. While this can be disconcerting for lawyers, it is by design. Public members make up a large share (40 percent) of the Lawyers Professional Responsibility Board as well. Board members (including public members) review decisions by the Director not to investigate a complaint, or to dismiss a complaint after investigation, if a complainant appeals that determination. This information is provided to complainants in the notice regarding their appeal rights. I hear from a lot of complainants that this is very meaningful to them: They like to know that their concerns may be heard by a non-lawyer. Public members also sit on panels of the board to review charges of public discipline for probable cause (ensuring that the public perspective is represented) and also sit on panels that hear appeals by lawyers to private admonitions. While we will likely never convince some members of the general public that a self-regulated system is more than the fox guarding the henhouse, public member participation in discipline decisions goes a long way toward countering that belief.

Belief #6: Lawyers involved in discipline do not know what it is like to practice law.

Not true. Staff attorneys in the Office, including myself, have practiced in a wide variety of practice areas and settings before joining the Office. We have experience in large firms, small firms, solo practice, in-house counsel positions, and government agencies, including in the area of criminal law, both prosecution and defense. Further, most cases are initially investigated at the district ethics committee, which is composed of practicing attorneys in your local community. Attorney board members come from a variety of practices as well, and include MSBA members and non-MSBA members. Our discipline investigations and reviews of discipline determinations greatly benefit from this diversity of legal experience.

Belief #7: Lawyer well-being does not matter in discipline.

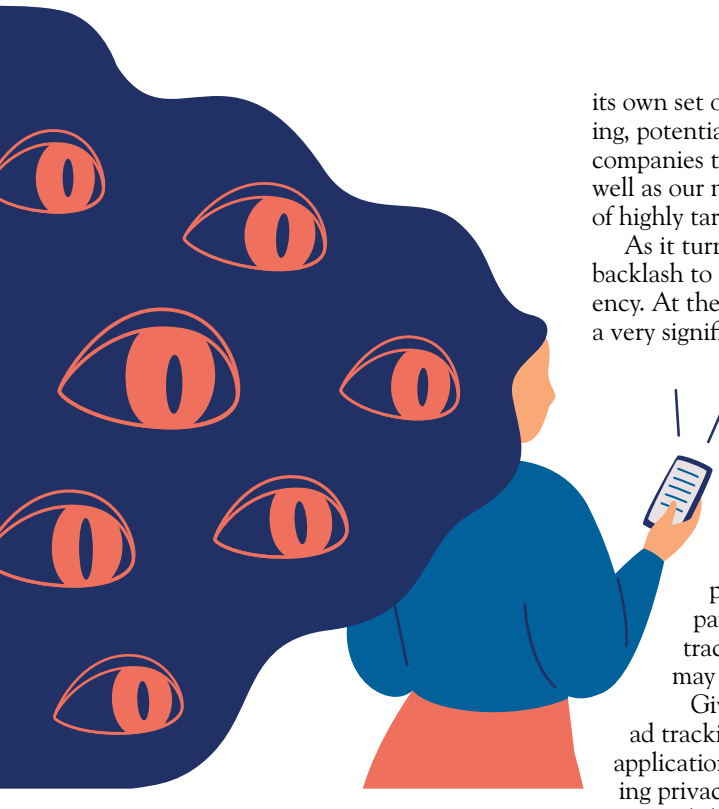
Not true, although it can certainly feel this way to affected attorneys. Lawyer discipline is not punishment, but rather is about protecting the public and the profession and deterring future misconduct by that lawyer and other lawyers. Because discipline is largely about objective factors, the subjective, personal aspects of the situation may have less impact than a lawyer would like. But those factors are taken into consideration if raised by a lawyer in mitigation. We work very hard to understand why something occurred as well as what occurred, but we recognize that it can be difficult for lawyers to raise sensitive issues, particularly in public matters. We frequently refer lawyers to lawyer assistance programs like Minnesota Lawyers Concerned for Lawyers (*mnlcl.org*), and use private probation where appropriate to help lawyers get back on track. We see firsthand the impact of untreated substance use and mental health issues, and want nothing more than to see lawyers get the help they need to maintain an ethical practice.

Belief #8: OLPR only focuses on discipline.

Investigating and prosecuting violations of the ethics rules is the majority of our work. But we also present at CLEs; run an ethics hotline that provides free ethics advice to thousands of attorneys a year; serve as a trustee for disabled or deceased lawyers who do not have a succession plan in place; provide staff support to the Client Security Board and administer the Client Security Fund; staff a large probation department; provide support to Lawyers Board committees on proposed rule changes and the issuance of ethics opinions; train and mentor district ethics committee volunteers; administer an overdraft notification program aimed at trust account compliance; handle the annual registration of thousands of professional firms under the Professional Firms Act; provide written disclosures of discipline history upon authorization of counsel; maintain a website with a wealth of ethics information; and handle reinstatements to and resignations from the bar. Whew! When I was hired, I was surprised at the breadth of the OLPR's work, and remain very proud of all that we do.

There may well be other misconceptions about the work of the Office, but I hope this article has dispelled some myths. If you have questions about what we do and how we do it, please let me know. And, remember, we are available to answer your ethics questions: 651-296-3952. ▲

Apple's new iOS strikes a blow for data privacy



How many times have you found yourself discussing something with a friend or coworker only to see an ad for that very thing appear a few moments later? I, like many, have often had this bizarre experience and while it's easy to laugh these moments off as merely "creepy," it's remarkable to think about the vast amounts of data that are routinely collected about us. I was recently interviewed by CBS to discuss the often ignored reality that we allow huge amounts of data about us to be collected, stored, and traded every single day.[1]

Though many people actually like the convenience of customized ads, others see them as an invasion of privacy. I have often said that utilizing the many conveniences of technology requires a trade-off of our security, but the all-encompassing reach of the internet should give everyone pause. It turns out that downloading a variety of apps on our phones and mindlessly clicking our assent to all the terms and conditions comes with its own set of consequences—including, potentially, that we willingly allow companies to track our conversations as well as our movements for the purposes of highly targeted advertising.

As it turns out, there is a growing backlash to this obvious lack of transparency. At the end of April, Apple released a very significant update—iOS 14.5. Essentially, "app tracking transparency" allows users to accept or reject tracking activity on an app by app basis, but it also serves, in the words of a Wired article, to "simply expose how many apps participate in cross-service ad tracking, including some you may not have suspected."[2]

Giving users the power to deny ad tracking permission to particular applications is a huge step in preserving privacy. Apple has also recently created the privacy nutrition label, "requiring every app—including its own—to give users an easy-to-view summary of the developer's privacy practices… The privacy nutrition labels give users key information about how an app uses their data—including whether the data is used to track them, linked to them, or not linked to them."[3]

Though Apple's decision has many critics—Facebook is a primary opponent—the update underscores Apple's continued commitment to user privacy. Furthermore, the update still allows for customizable advertising by leaving the decisions to the individual. Apple's decision to support user control is certainly a step in the right direction. While no one measure can bring order and fairness to the mass data-sharing that goes on around us, it underscores the fact that users should have power to determine which personal information is shared about them, and with whom. Digital advertising isn't necessarily a bad thing, but it should be done transparently and with permission. Openly complying with data privacy regulations is essential for establishing trust with consumers, as an increasing number of individuals begin to pay attention to how their data is handled. In fact, recent data shows that since the update has been released, only about 4 percent of U.S. users have allowed apps to track them.[4]

While the United States does not currently have universal federal legislation related to data privacy or security, Apple's move may be indicative of a larger push to better establish and uphold user rights. Apple CEO Tim Cook has gone so far as to acknowledge data privacy as a fundamental human right, a position that other individuals and organizations are increasingly taking.

For the legal community, this movement highlights the raising of the stakes around data security. Even the largest organizations are now acknowledging the value of our personal data—and attorneys, as we all know, have a similar if not greater obligation to protect client data. Clients should always understand how their information is collected, stored, and protected. And those data privacy considerations must be taken into account when assessing the strength of internal cybersecurity measures. ▲

Notes

[1] *https://minnesota.cbslocal.com/2021/04/27/how-much-does-the-internet-know-about-us/*

[2] *https://www.wired.com/story/ios-app-tracking-transparency-advertising/*

[3] *https://www.apple.com/newsroom/2021/01/data-privacy-day-at-apple-improving-transparency-and-empowering-users/*

[4] *https://mashable.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.

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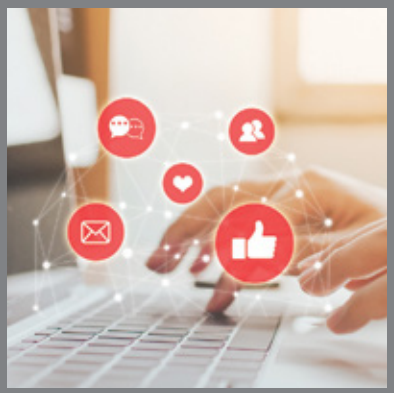

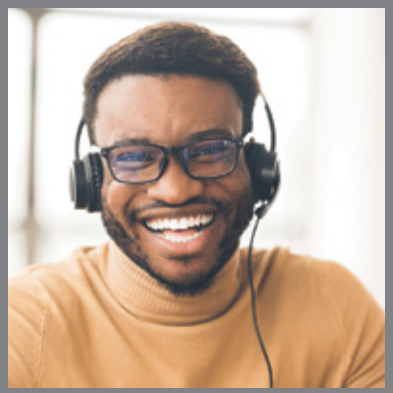

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Why I went to law school

"I didn't go to law school to be a lawyer." I know, it's almost sacrilege to say. Perhaps all the more so in this publication, and with this audience. But it's the truth.

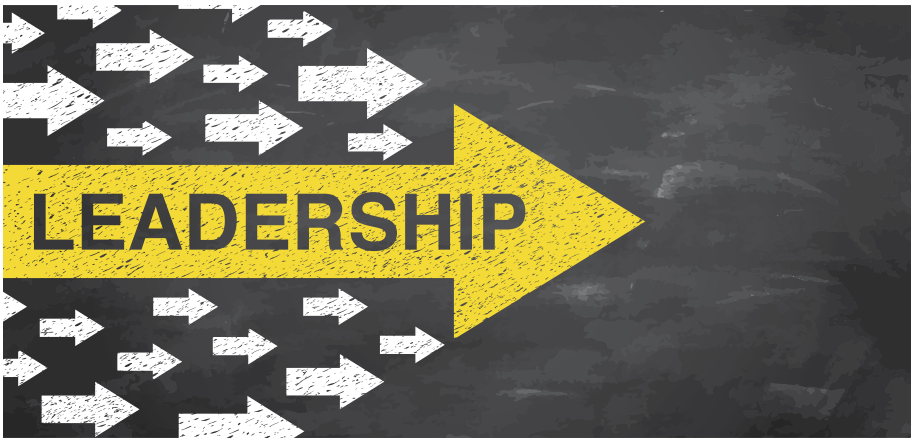
I went back as a non-traditional student in my 40s. Initially, the bright idea was that the juris doctorate would be the terminal degree and magic ticket into tenure-track teaching. I had been teaching undergraduate political science, and graduate public policy classes, part-time while also holding elected office—first on the Duluth City Council and later in the Minnesota Legislature. Teaching was a role I genuinely enjoyed (still do!), and could see myself doing full-time.

But as we all know, the law degree is one of the most—if not *the* most—diverse and practical doctoral degrees, and by the end of my first semester at Hamline University School of Law I realized that with it, I could do so much more. Yes, practicing law was on that list of potentialities, but it was actually quite low. Near the bottom. Perhaps last.

Throughout law school people would ask, "What kind of lawyer do you want to be?" or "What kind of law do you want to practice?" Each and every time I would respond truthfully, "I'm not going to law school to be a lawyer." The responses I got ran the gamut from confusion to surprise to shock. We all know law school is no joke. It's stressful, time-consuming, and expensive. When you're doing it, it takes everything you have, and if like me you're a non-traditional student with job, family, and military reserve commitment, the sacrifice law school requires is quite a lot.

So the skeptical responses were fair. But here's the thing: After that first semester, I knew that the best use of my law degree would be applying it to work I had already done. Training I had already received. Leadership. Work I was already doing, and would continue to do, for the rest of my career. I am mission-driven and throughout my career I've been drawn to public service.

While working my way through law school I was also serving in the Minnesota State Senate. Ther e, the application was obvious. I quickly saw why the



Legislature attracted so many members with legal background and experience. From legal construct, to drafting, and application and interpretation, I now had a new skillset that was helpful in my legislative work. I didn't have to rely solely on others to convert an idea into legislation. I was able to do more of that heavy lifting myself.

A year after leaving the Legislature, I found myself headed to Afghanistan on a one-year combat deployment. Even there, the law degree and legal training found useful application. Twice while deployed, I was tasked by the command LEGAD (Legal Advisor) to conduct 15-6 investigations. My role was to investigate an incident, examine evidence, and interview witnesses. A 15-6 investigation is used to ascertain facts and report them to the appropriate appointing authority. While this was not my primary duty during my deployment, I was the most qualified command member to take on these investigations because of my legal training.

A short year later, after returning from my deployment, I found myself being asked to step into a new leadership role as the interim executive director of the Duluth Entertainment and Convention Center. The DECC, like many large venues in Minnesota, was severely impacted by the pandemic and by the executive orders that affected operations. An organization of 500 employees, with a $12 millon budget, it had essentially been on pause for three months when I arrived. I was surprised to find that the executive director leadership role was exactly why I *did* go to law school.

I use property, contracts, insurance, employment, and finance on a regular, if not daily, basis. My legal training and background have allowed me to first stabilize the organization and then help lead it forward in historically uncertain times. The legal reasoning and analysis I learned in law school have helped me objectively analyze multiple factors, and in turn communicate them succinctly, both internally and externally.

My role as a licensed attorney has also saved the organization real money. Instead of hiring everything out to a third-party attorney, I am able to do a good deal of pre-work in-house, and then run a fairly finished draft by another attorney with deep public law experience for review and revisions.

I didn't go to law school to be a lawyer. Truth. I went to law school to learn and earn an entirely new set of skills, and then apply them to my work of building and leading teams that make a public difference. ▲

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Work hard and be nice: A post-pandemic prescription

It took a global pandemic, but the world is beginning to recognize the importance of prioritizing wellness alongside productivity. In the last year, we witnessed entire industries shutting down for months while scientists and doctors scrambled to identify and contain a new and unpredictable virus. We experienced mandates for social distancing and mask wearing to protect individuals and those around them.

Reasonable minds can differ as to the need for and efficacy of shutting down the way we did, but our health system and our world were experiencing a public health crisis. When individuals experience a serious illness, they must focus on regaining their health before they can devote energy toward anything else. Likewise, as a society, at least for a brief period of time, we needed to be as focused on being nice to ourselves and those around us as we were on working hard.

The pandemic is (hopefully) coming to an end and the light of a new normal is on the horizon, but the balancing of well-being and productivity must remain a focus, especially in the legal profession. To some of us, such a statement sounds ludicrous. We sacrificed a lot to get where we are in our careers, and we need to prove to ourselves, our colleagues, and our clients that we are willing to do whatever it takes to get excellent results and remain successful. For decades, lawyers have built their practices on working longer and longer hours—and expecting everyone in their employ to do the same—to maximize profit.

It's easy to talk about the importance of well-being, but it can be challenging for anyone, especially lawyers, to actually pursue a balanced life. Many lawyers want to spend more time with their families or their personal interests, but worry that doing so will diminish their status within their organization. The competitive nature of many firms can lead some to believe they cannot afford to prioritize their well-being, lest they fall behind their peers.

But lawyers are human beings with minds and bodies that at some point need rest and rejuvenation to function at their highest level. A lawyer who lacks personal well-being is far more likely to make a mistake that could harm her clients as well as her firm's reputation and bottom line. A firm that does not value the well-being of its members and employees may face expensive malpractice or ethics claims in addition to attrition. On the flip side, firms and organizations that encourage well-being on their teams will enjoy increased engagement, lower attrition, and higher productivity. (For more about the business case for lawyer wellness, see Patty Beck and Alice M. Sherren, "Happy lawyers are productive lawyers," B&B Jan. 2020.)

Thankfully, we don't have to choose between "working hard" *or* "being nice." When we make a conscious decision to value hard work *while* achieving balance and well-being in our professional and personal lives, everyone benefits. As Stephen Covey, author of the bestseller *The 7 Habits of Highly Effective People*, said: "We must never become too busy sawing to take time to sharpen the saw." In that book, Covey tells the following story:

> Suppose you were to come upon someone in the woods working feverishly to saw down a tree.
>
> "What are you doing?" you ask.
>
> "Can't you see?" comes the impatient reply. "I'm sawing down this tree."
>
> "You look exhausted!" you exclaim. "How long have you been at it?"
>
> "Over five hours," he returns, "and I'm beat! This is hard work."
>
> "Well, why don't you take a break for a few minutes and sharpen that saw?" you inquire. "I'm sure it would go a lot faster."
>
> "I don't have time to sharpen the saw," the man says emphatically. "I'm too busy sawing!"

As Covey explains, "sharpening the saw" means taking time to rest and refresh in all areas of our lives: physical, spiritual, mental, and social/emotional. When we invest this time in ourselves, we are healthier, more effective, and more productive.

Lawyers, legal professionals, and legal employers should seize this almost-post-pandemic moment to think about how we can spend more time "sharpening the saw" in our daily lives. We don't have to go back to the unhealthy work habits we practiced before the pandemic. We can do better; we can be better. We can work hard and be kind to ourselves and others by taking care of ourselves and encouraging others to do the same. When lawyers are nice to themselves and work hard while taking time to rest and restore, they are more likely to be productive, engaged, and fulfilled—personally and professionally. ▲

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'Most of my career has involved helping the injured worker'

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What's your most vivid memory of law school?

There are so many fond (and a few not so fond) memories of law school. However, the intense feelings I had on my first day at William Mitchell College of Law will always be permanently etched in my memory bank. I was overwhelmed with anxiety, nerves, and uncertainty. I questioned why I was there and whether I could even succeed, especially with so many smart and accomplished classmates. Fast forward 30 years, and now it's me who is trying to comfort my kids having similar feelings as they embark on their college experience.

What kind of law did you initially want to practice, and why?

I always thought I would be an international law attorney. In fact, I spent one semester during my third year in law school studying in Japan through Temple University's international law program and I loved it. I was enamored with the notion of representing international corporate clients and I wanted to see the world as part of my job. Those aspirations pivoted during my last semester when I started clerking at a firm that focused on representing railroad workers throughout the country. The clerkship soon turned into a job offer, and there went my international law practice.

How were you drawn into the workers' compensation, workplace investigations, and personal injury work you do now?

Most of my career has involved helping the injured worker in some capacity. That includes fighting for that railroad worker injured due to someone's negligence under the Federal Employers Liability Act, or the aggrieved employee who is harassed or discriminated against because of her gender in violation of Title VII, or the police officer who suffers from PTSD as a result of his repeated exposure to traumatic incidents throughout the course of his career.

Growing up, I experienced firsthand the devastating effects of what a work-related injury can do to a family, economically and physically. My mother worked in a factory for over 25 years until she retired, and during that time, she sustained a work injury that required surgery. Being a low-wage earner who was raising eight kids, she could not afford to miss a paycheck. So the injury and resulting wage loss had a significant impact on her and our family. Already challenged by the language barrier and fearful that she would lose her job, my mother was even more overwhelmed by the complex claims process that ensued.

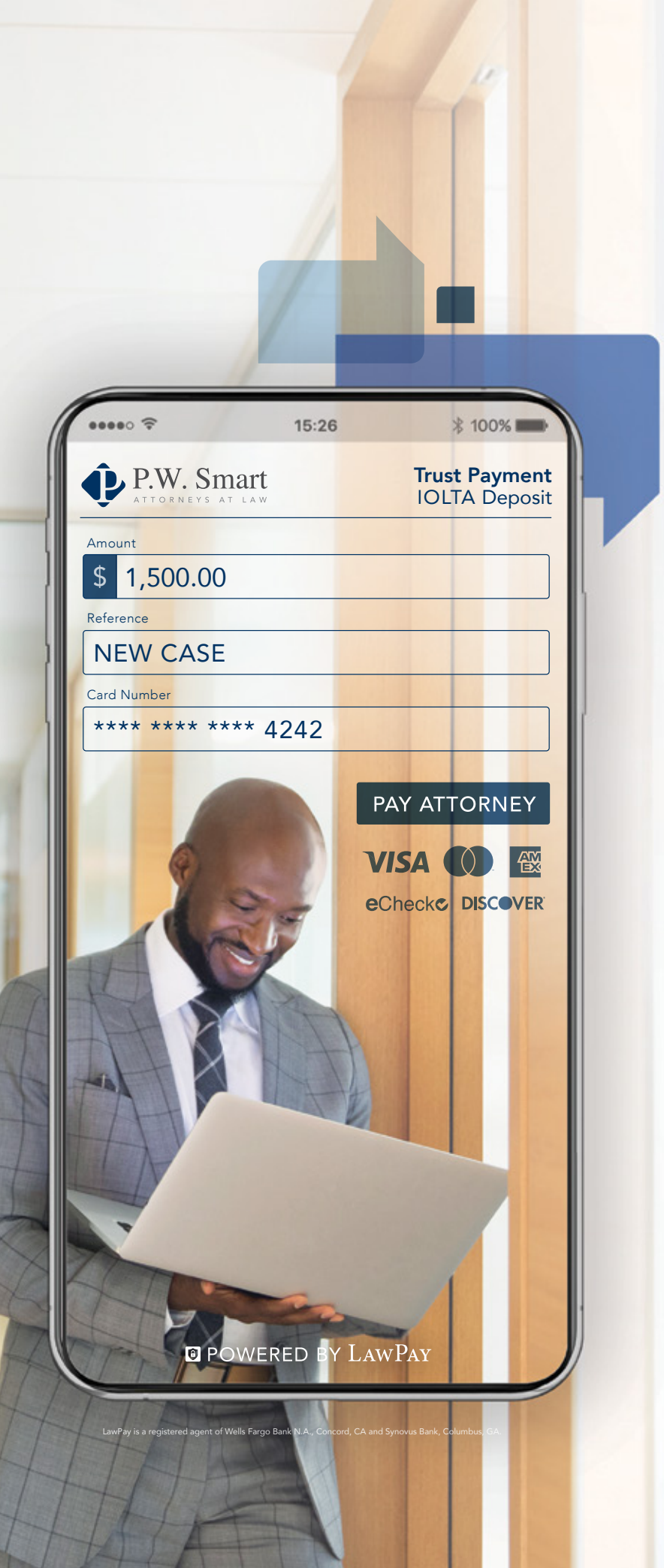
Now, when I represent clients in similar situations, I often reflect back on my mother's experience and try to understand what they may be going through as I help them navigate the legal process. Perhaps that's why I tend to root for the underdogs.

Tells us a little about how you like to spend your time when you aren't working. We understand you're a longtime volleyball coach, yes?

Yes, I was the head varsity volleyball coach at Benilde-St. Margaret's School for eight seasons, while still practicing law. Go Red Knights! Never in my wildest dreams did I think I would get into coaching, especially at that competitive level. But an opportunity came up that offered me a chance to share my knowledge and love of the game with some awesome student-athletes, including my two daughters—who I got to coach before they graduated! It was a great experience and one I'll always cherish. I've recently stepped down from that coaching position due to work demands, so now I get to enjoy just being a spectator at my daughter's games. I also enjoy traveling with my family and trying out new foods. In addition, I have a love-hate relationship with golf.

What's the best personal or professional advice you ever received?

I am a refugee boat person who fled from war-torn Vietnam in 1975. When our family immigrated to this country, we literally had no resources other than each other and the generous sponsoring families. Despite this, my parents repeatedly reminded us that we were living in a country full of abundance and opportunities, but what we decided to do with it was up to us. Their advice was to always use education to create the opportunities to better myself and once I reached a level of success, to share my blessings with those less fortunate. This advice guides me every day. ▲



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A DEATH IN THE FAMILY

How one firm forged ahead after a partner's unexpected passing

By Morgan Kavanaugh and Christopher Johnston

It's the call no lawyer ever wants to get: A friend and colleague in your law firm has unexpectedly passed away. In January 2020, we got that call. Our friend and senior partner at the firm, Kyle Hegna, died tragically in a snowmobile accident. Kyle (a 1985 graduate of Gustavus Adolphus College who earned his JD at William Mitchell College of Law in 1989) had been a founding partner of the Edina law firm Wilkerson & Hegna, P.L.L.P. with Gary Wilkerson. In 2015, we became partners of the firm.

Kyle was the type of person who was always positive and smiling no matter how stressful the situation. His laughter would fill the office. Kyle was more than a partner and colleague; he was a close friend and mentor. As a small, tightknit law firm, the news of Kyle's death shocked us. We had just celebrated a successful 2019 and were looking forward to 2020. The feeling was like a punch to the gut.

There are numerous articles on the rules that pertain to handling client matters after the death of an attorney. In Minnesota, the Rules of Professional Conduct Rule 1.3 requires that a lawyer must act with reasonable diligence and promptness in representing a client, and Rule 1.4 requires reasonable communication between the lawyer and the client. In short, have a plan. Be prepared for the unexpected and do not lose sight of the client even during a crisis. This article focuses on practice pointers for small firms arising from our experience as we navigated the situation.

The framework that worked for us was five-fold.
(1) Assess and rally the team;
(2) get organized and prepare for the mental toll;
(3) resist any immediate major changes;
(4) focus on client communication and marketing; and
(5) review the partnership agreement and Minn. Stat. §319B.08.

Assess and rally the team

As we struggled to come to terms with the news ourselves, we came to the hard realization that this moment was not ours to spend mourning. We had the duty to act and act quickly to protect our co-workers, staff, and clients, as well as Kyle's legacy.

On the day we learned of Kyle's death, the remaining partners met in the evening at our offices in Edina. We worked out the points of a plan to guide the firm in the coming months from both a legal and business perspective. Kyle was a founding partner, and while we each had our own practices, he was the pillar of the firm with many important legacy clients.

With the loss of a named partner, staff will have questions and concerns about how the firm will look going forward and the security of their employment. This is human nature. We knew we would need all hands on deck to deal with the challenges of the coming weeks and months. Long hours would be required from everyone. To that end, we reached out to each member of the firm to let them know the unfortunate news, but also to answer questions and assure each person that the firm was continuing forward with a plan. Although in shock, our highest duty was still to our clients and we needed to communicate that to our team. The mantra was, *write it all down and stick to the plan*. Shock and mourning affect us all differently, and often at different times. The knowledge that we had a plan became an anchor during those first few weeks and helped ensure that our team would buy in to the plan going forward.

Get organized and prepare for the mental toll

During our crisis, we benefitted from the fact that our firm had always been very collaborative. We made the decision long ago to have an open door policy when discussing our cases with each other, regardless of its being non-billable time. This firm culture helped us maintain a big-picture sense of the firm's case load, along with the workload of our staff and associates. We were also fortunate to practice in the same general areas of the law, which meant we had the existing legal and practical knowledge to transition files within the firm. Thanks to the help of our staff, active files were well-organized and we could transition into them without excessive or duplicative work. If files are disorganized or there is not a basic understanding of all current cases being handled within the firm, it may be impossible to comply with the due diligence and communication requirements of Rules 1.3 and 1.4 in the immediate aftermath of a partner's death.

In addition to transitioning Kyle's files, we each had to manage our own existing files and calendars. The most urgent matter before us was a trial set for February. Kyle had prepared to attend this trial for several months prior to his death. While we were familiar with the case generally, Kyle was the lead. Fortunately, Kyle's clients were understanding and very accommodating to the situation. We were also fortunate to practice in a state with understanding and accommodating attorneys and judges; we did not have any issues obtaining continuances in cases when requested. But, of course, in order to request such continuances, it is crucial to know the important dates and deadlines and promptly inform everyone involved in the case of the situation.

As part of our initial meeting, we decided that we would contact every one of Kyle's clients personally, whether they had active matters or not. We started by jointly preparing a list of names and phone numbers of all clients. We then broke out the list between urgent client matters, open client matters, and no open matters. Each of us took a portion of that list and began making calls, starting with the most urgent client matters. The sole purpose of the first call would be to inform clients that Kyle had died. We kept detailed notes of each call we made, and then set dates for follow-up conversations depending on their open legal matter.

Kyle had become friends with many of the clients he represented over the years. Nobody had prepared us to deal with the mental challenge of informing Kyle's friends and colleagues of the news. It was extremely difficult to make hundreds of calls met with disbelief or tears, day after day until the list was finished. It drained us. But it was also cathartic to hear from people connected to Kyle and share good memories of him. As a firm, we would take several breaks to debrief with one another throughout the day, eat lunch together, and generally talk about how each of us was handling the experience. This time to connect and process not only helped us survive those first couple of weeks, but also brought us closer together.

Resist any immediate major changes

In the weeks following the news, we heard from hundreds of people reaching out to wish us well or just to check in on how we were doing. That is something that most people expect from any crisis they face, and it was obviously very helpful. But you will probably also hear from people you did not expect or want to hear from. Other law firms may believe the firm is vulnerable to acquisition.

We received several calls and inquiries from other local firms asking about our interest in joining their firms or merging. Certainly there are business opportunities for law firms to acquire or merge with other firms all the time. There is no harm in taking these calls and listening to the sales pitch. Our team decided early on to commit to moving forward with the team we had in place. More importantly, we also felt that it was not an appropriate time to consider these inquiries, given our mental state. We wanted to focus on our clients, our staff, and the business moving forward. We felt a strong desire to preserve and continue Kyle's legacy. Even considering those inquiries at that time would have distracted us from our plan and immediate goals. As a practical matter, avoiding any immediate major changes after a crisis allowed us to better evaluate our options and to process significant amounts of information and emotions. It put us in the best position to make hard decisions.

The same can be said for firm operations in general. For your staff and clients, losing a senior partner is a major disruption.

The more you can keep the same, at least for the short term, the better. For us in particular, that meant putting aside some system and software changes that were in progress. We also decided that the firm name would not immediately change, and instead waited until February 2021 to announce the firm's name change to Wilkerson, Hegna, Kavanaugh & Johnston, PLLP.

Focus on client communication and marketing

How you deal with the immediate aspects of a crisis such as a partner's death carries long-term implications for the law firm. Again, we were fortunate to be a very collaborative group, so most of Kyle's clients had worked with everyone in the firm to some degree. From a marketing and business standpoint, it is important to make those connections between all partners and clients so that the firm can transition clients to other partners should the unexpected strike. And you must act fast. There is only a short window of time to impress upon clients that the firm is up to the task.

Kyle Hegna with his family.

Soon after our initial calls to clients, we filled our calendars with lunches, happy hours, and any opportunities to continue the personal connection with existing clients. Unfortunately, in March 2020, covid-19 led to lockdowns and quarantine, putting an abrupt end to those social activities that attorneys have traditionally relied upon for marketing. Like many others, we transitioned to new ways of making connections, primarily through video conferencing. In some ways, this allowed us to have a broader reach with existing clients, near and far, who were also by necessity becoming more receptive to these new forms of communication. We also expanded our digital marketing to include email newsletters and updates to ensure clients understood that we were still here, operating as usual, and ready to handle anything they needed.

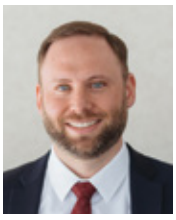
Review the partnership agreement and Minn. Stat. §319B.08

In addition to handling client matters with due diligence and ensuring business continuity at the firm, there is another immediate concern that is uncomfortable to address: What happens to the deceased partner's ownership interest in the firm?

In our business practice, it seems that many clients only look at their partnership agreements if something goes wrong. Interestingly enough, many lawyers operate the same way. A partnership agreement does not have to be very complex. Prior to Kyle's death, we had been reviewing and updating the firm's partnership agreement on an annual basis. At the very least, we would have a conversation about worst-case scenarios. What worked for our practice was a pretty basic and simple partnership agreement, but every firm will have different needs.

Depending on the type of firm and practice area, the valuation of partnership shares could be the most difficult point to determine. Business valuation of any type can be challenging, but this is especially true for law firms. If you do not establish a valuation method in your partnership agreement, Minn. Stat. §319B.08 governs professional firms and the effect of the death of a partner. The default rule in Minn. Stat. §319B.08 to value ownership interests is to use "book value." "Book value," according to the statute, is determined "in accordance with the Minnesota professional firm's regular method of accounting, as of the end of the month immediately preceding the death." Do you know what the "book value" of your firm is at this moment? If your partnership agreement does provide a valuation mechanism and does not define book value, then it is generally defined as "the value of fixed assets, plus cash, plus A/R (accounts receivable), minus debt." Having a working understanding of your firm's business and a reliable CPA to navigate these questions is critical in resolving these difficult issues.

There are also important timing requirements to keep in mind. Set forth in Minn. Stat. §319B.08, they include tendering notice of an offer to the deceased owner's estate within 90 days of the partner's death. In addition, you should consider what the firm is capable of offering as a means of payment for the shares. Generally speaking, a lawyer's value lies in their billable time. When the ability to bill time ends, that will affect the firm as a business and its ability to pay the estate for those shares. While we all would like to put a high value on the business that we have worked hard to build, it is important to think about what is realistic for the firm to pay for an ongoing business that has just lost a partner and that partner's ability to generate revenue. So in addition to having an agreed valuation method, it is vitally important to establish the mechanism for valuing shares and how it will be funded when the partner passes away. Even if the default rule works just fine for many firms, you should still be aware of what that means from a practical perspective for the firm. Always bring a qualified CPA into the discussion. ▲



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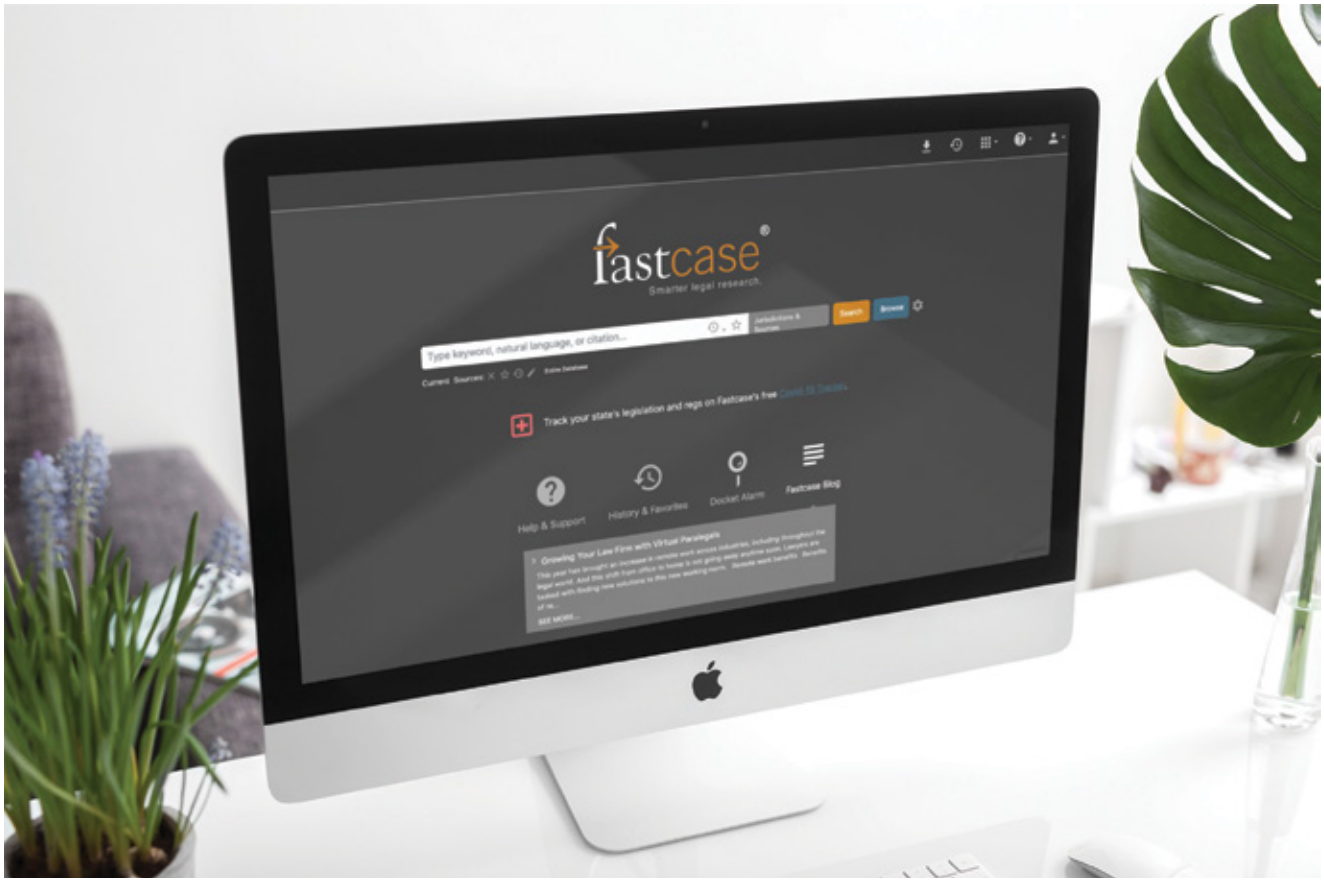

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WHEN THE PUBLIC INTEREST ISN'T

Minnesota's approval of a new Line 3

By Jessica Intermill

On a spring morning in 2018, Minnesota Public Utilities Commissioner Katie Sieben began reading a prepared statement. "There is no good outcome," she said, "where I can sleep easy at night knowing I made the right decision with the facts available."[1]

She spoke to a crowd that filled the St. Paul conference room and spilled into hallways and auxilliary rooms. They had come to hear the decision of the five-member Minnesota Public Utilities Commission regarding Line 3. Enbridge, a Canadian energy-transportation company, was seeking to build the new oil pipeline across northern Minnesota and could not do so without PUC approval of a certificate of need and route permit. But Commissioner Sieben was not the only one who struggled.

An hour into the meeting, Commission Chair Nancy Lange reached for tissue to blot tears as her words caught in her throat.[2]

"It feels like a gun to our head that somehow compels us to approve a new line," Commissioner Dan Lipschultz said shortly afterward.[3]

The commissioners unanimously approved the certificate of need, a crucial step toward a new Line 3.

Enbridge billed its project as a "replacement" for an existing pipeline of the same name that brings Canadian tar-sand oil to market. The current 34-inch Line 3, in place since the 1960s, only operates at about half-capacity. The new 36-inch pipeline will not follow the 282-mile line it purports to replace. Instead, Enbridge sought permission to abandon the existing pipeline and tear a largely new 337-mile path. The new Line 3 would carry 760,000 barrels of crude oil—nearly 3.2 million gallons—across Minnesota every day.

That crude would tunnel through the Mississippi River at two different points, including near its headwaters. It would cross 192 surface waters and various state-designated trout streams; run within 1,000 feet of 3,913 wetlands, 88 streams, and 57 lakes; and tunnel within a half-mile of 17 wild rice lakes. The route largely stretches across land ceded by treaties that the U.S. Supreme Court has recognized protect tribal members' right to "hunt[], fish[], and gather[] the wild rice, upon the lands, the rivers and the lakes included in the territory ceded."[4] In 2019, the Minnesota Court of Appeals vacated the 2018 certificate of need because it rested on an inadequate Environmental Impact Statement.[5]

Editor's note: *This is the first installment of a two-part article exploring structural bias and racism within the law in the context of the Line 3 oil pipeline expansion. Part 1 examines the agency approval process and the role of the public in that process. Part 2 explores the racialized impact of that facially neutral approval in the context of Minnesota's legal history.*

When the PUC reconvened last year, Winona LaDuke addressed the commissioners on behalf of intervenor Honor the Earth. "We know each other because I've been coming here for seven years," she said. "For seven years, I've been driving down from my reservation in northern Minnesota to your hearings. I've done that because I want the system to work."[6] She had heard Commissioner Lipschultz two years earlier describe the gun to his head compelling him to approve Line 3. Approving permits for the line, though, said LaDuke, "is putting a gun on *my* head."[7]

The PUC states that a "key function[] of the commission" is to "balance the private and public interests affected" by each project and "appropriately balance these interests in a manner that is 'consistent with the public interest.'"[8] But questions that hang on a "public interest" analysis often turn on what interests—and which public—decisionmakers prioritize.

The PUC's interest in utilities

Since its beginning, the PUC's predecessor agencies prioritized expansion of cheap utilities—often over public opposition.

One of the earliest "public interests" that Minnesota courts identified was railroad expansion. That interest was so strong that it displaced otherwise ordinary landowner remedies like ejectment.[9]

The PUC traces its origin to this interest. Its ancestral predecessor was established by 1871 legislation that began with rail safety inspections, but just three years later turned to railroad-rate oversight. An 1885 law continued to focus on rate discrimination without any countervailing concern that utility expansion could undermine *other* public interests. But even then, contemporary critics noted that expansion of utilities like railroads prioritized the interests of capital over people. A 1907 political cartoon showed railroad baron J. J. Hill demur at the "timid creature" while the railroad industry knocked "the public" off its feet.

The public's interest in Line 3

Fast forward a century. The Environmental Impact Statement made clear that a new Line 3 would more than triple the current Line 3's greenhouse gas output to 273.5 million tons per year.[10] That's about the same as adding 50 new coal-fired power plants or 38 million vehicles. The EIS also confirmed that "Wild rice lakes, many of which are designated for use by American Indians or designated as Traditional Cultural Properties... would be impacted."[11]

Beyond ecological impacts, the EIS noted that Enbridge situated its preferred line route through census tracts with "minority populations that meaningfully exceed their county levels," namely, through indigenous populations.[12] This siting implicated treaty rights and amplified concern "regarding the link between an influx of temporary workers and the potential for an associated increase in sex trafficking, which is well documented, particularly among Native populations."[13]

The Department of Commerce's Division of Energy Resources—whose sister division conducted the EIS and held 49 "open mic" public meetings to receive comments on that analysis—opposed the line. It concluded that "in light of the serious risks and effects on the natural and socioeconomic environments of the existing Line 3 and the limited benefit that the existing Line 3 provides to Minnesota refineries, it is reasonable to conclude that Minnesota would be better off if Enbridge proposed to cease operations of the existing Line 3, without any new pipeline being built."[14]

An administrative law judge, too, took extensive public comment to prepare the administrative record of the certificate of need and route permit for the PUC. She conducted 16 hearings across the state attended by about 5,500 people, building a record of public comment from 724 speakers that was over 2,600 pages long. In each city, she held separate hearings in the afternoons and evenings to accommodate the schedules of people who work both days and nights. After the three-month process, she completed a 300-plus-page report that included more than 40 pages summarizing public comments concerning the new Line 3.[15]

Not everyone opposed Line 3. Several labor unions, for example, intervened to support approval of the new Line 3 as a job creator in a region experiencing an economic slowdown. But the ALJ emphasized that unlike the interests of Enbridge—a modern-day Canadian J. J. Hill—the *public's* interest was in construction; it was not a specific endorsement of a new Line 3.

"The Railroads — A Timid Creature." Illustration by Charles L. Bartholomew, Minneapolis Journal 1907, courtesy Hennepin County Library.

"The importance of these economic benefits to northern Minnesota are not insubstantial," the ALJ found, but rather "would exist with respect to *any* infrastructure project of this magnitude."[16] Thinking past Line 3 to build a renewable-energy infrastructure with union-protected prevailing-wage jobs would satisfy the public interest in economic development *and* water quality. But only Line 3 was on the table.

Of 72,249 written public comments submitted, 68,244 opposed a new Line 3.[17] The ALJ recommended against Enbridge's request because it did not "minimize[] the impacts on human settlement, the natural environment, the economics within the route, the State's natural resources, and the cumulative potential effects of future pipeline construction." She favored a "true replacement" in the existing trench.[18]

But the ALJ wasn't the decisionmaker.

The PUC's interest in the public

The PUC's embedded bias toward utility expansion has long blinded it to the interests of any larger public. In the 1970s, electrical co-ops sought to build a 430-mile-long high-voltage line through 476 farm properties in west-central Minnesota. Powerline opposition, described in scholarship by the late U.S. Sen. Paul Wellstone, was broad.[19]

The law was, conceivably, in the farmers' favor. The 1971 Minnesota Environmental Rights Act applied to the project and declared the state's policy "to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings[.]"[20] A law requiring that the agency's power plant and transmission siting decisions consider and "comport with the public interest" also applied to the project.[21]

More than 60 percent of all Minnesotans and 70 percent of rural Minnesotans opposed the line.[22] The Minnesota Energy Agency, the agency then designated to review applications for certificates of need, approved it anyway.

So it was for the new Line 3.

After months of taking public comment, a multi-week evidentiary hearing, and a 400-page report, the process moved from the ALJ to the PUC. Like a set of filters, the permitting process squeezes public comment through an increasingly fine sieve. In the contested-case process, the ALJ collected undiluted comments from the public and distilled them into a report. The PUC staff took that 400-page report and ground it—and 55 other documents—into 46 pages of "staff briefing papers" that recommended granting Enbridge the certificate of need and its preferred expansion route.[23]

The staff briefing did not include any discussion of the extensive public comment on the case. But it did note that "the Commission need not engage in the exercise of reviewing the ALJ Report" itself since "[t]he Commission traditionally leaves it to staff to ensure that the final written order identifies the parts of an ALJ Report that have been adopted, with or without modification, and the parts [that] have not been adopted."[24]

That filtered record moved forward to the five PUC commissioners who sat on the dais in June 2018 to decide whether to grant the certificate of need and route permit.

Commissioners had decided not to move those decisive meetings from their accustomed conference room to a larger one, despite "the large number of parties and the significant public interest in the case[.]"[25] They reserved 60 percent of the 173 seats for parties, press, and staff, leaving only around 70 "general admission" seats for the public who had submitted tens of thousands of comments.

The PUC allocated these remaining seats with no-cost tickets on a first-come, first-served basis. Interested attendees showed up increasingly early each day to queue up for the coveted tickets. But when citizens arrived, they found unexpected rules that limited participation.

One member of the public recalled, "Sometimes people were allowed to leave temporarily to use the restroom, other times doing so meant forfeiting your seat for the day."[26] Another noted, "Sometimes we could switch out the people in line, sometimes we couldn't. Sometimes we could bring water bottles in, the next we day we couldn't."[27] The prohibition on water bottles at the meetings, which would often stretch for hours and sometimes the whole day, "was particularly frustrating for some attendees."[28]

Questions that hang on a "public interest" analysis often turn on what interests—and which public—decisionmakers prioritize.

3,000 people joined the Pope County "March for Justice" to demonstrate against the proposed powerline. St. Cloud Daily Times, March 6, 1978. Photo by Mike Knaak.

On June 4, 2018, faith leaders delivered a letter with 575 faith leader signatures, including five bishops, to the PUC and to the governor's office. Photo courtesy Julia Nerbonne, Minnesota Interfaith Power & Light.

Some of the parties weren't much better off. Enbridge and the intervenors could skip the line with "party tickets" that reserved their seats. Most parties received five tickets each. But the PUC allocated the Red Lake Band of Chippewa Indians and White Earth Nation—two different parties, both of whom the ALJ had allowed to intervene to defend their separate interests—a total of five tickets to share between the two. The PUC gave 10 reserved tickets to Enbridge.

That 2018 meeting stretched on for several days to determine whether to grant the certificate of need and to consider Enbridge's preferred route. After opening statements, though, the commissioners directed the hearing, posing their own questions to the parties they wanted to hear from, and making their own statements into the record. The public could not comment at the hearing and parties could not rebut or cross-examine the testimony of other parties.

Meanwhile, as the days progressed, PUC staff "thought certain parties abused their reserved tickets by distributing them to individuals that staff did not consider to be party representatives, such as children." The PUC, though, had no policy defining who could serve as a party representative. Even as the public fought to enter the room, "many of the seats reserved for parties went unoccupied."[29]

Tensions escalated when, at PUC staff direction, St. Paul police removed two individuals with party badges from the building "because they were holding more than one ticket at a time."[30] Here too, the "rule" purportedly violated was not contained in any notice. PUC staff nonetheless refused to let the party representatives return.

Unsure who to contact to get their clients back into the building, the affected parties docketed a letter addressing the commissioners they appeared before.[31] When the chair reopened the meeting the following day, she acknowledged the filing but said the commission would not address it because it was not the subject of the hearing. One intervenor responded with "an irregular oral objection[.]"[32] When the chair began to call the docket, counsel for the Sierra Club interrupted, pleading, "I am in this room as a contract attorney without a client."[33] The meeting recessed.

Once reconvened, nerves continued to fray. Near the end of the same day, when the chair noted that another intervenor rose to offer a germane comment, Commissioner John Tuma shrugged that he didn't "*need* to hear from" the intervenor, but relented to accept the comment "if somebody else wants to hear from them."[34]

The PUC granted Enbridge a certificate of need on a 5-0 vote and allowed the Canadian company to cut its new preferred route across Minnesota. The commissioners pushed what they called a gun away from their own temples.

Between a court and a bulldozer

It is understandable that agencies harbor their own biases. Judicial doctrines, though, can unintentionally import these agency interests into case law. Take again the case of the 1970s Power War. When the Minnesota Supreme Court reviewed the MEQB's powerline decision—and the board's failure to undertake early environmental analysis—it deferred to the agency even as it expressed hesitation.

The farmers, the Court said, raised "serious questions about the conclusory nature of much of" the agency's environmental analysis.[35] And the Court agreed that it "may also be true that MEQB in the future should be more vigilant in protecting the alleged interests of the public and that it should play more of an active role as an advocate of environmental values."[36] But "[t]hese considerations" could not disturb the agency's environmental review.[37] As the 8th Circuit Court of Appeals noted in a different environmental case, this is the "difficulty of stopping a bureaucratic steam roller, once started[.]"[38]

Today, 50 years into that "more vigilant" future, our courts must ensure that the public interests that our Legislature values are ones that agencies meaningfully consider.

Toward a broader public interest

Last year, Minnesota's Office of the Legislative Auditor issued a report detailing the PUC's public-participation processes in general, and the Line 3 processes in particular.[39] It wasn't pretty.

When asked directly, PUC commissioners say that "The role of the public is central and foundational[,]" to PUC decisions, and "It is critically important for the commissioners to have robust public involvement."[40] In theory, grounding the law's requirements in the perspectives of Minnesotans affected by regulatory decisions ensures that "participants in PUC proceedings help [commissioners] determine how to balance the many criteria in the law."[41]

In the case of Line 3, though, the system that purports to rely on public input worked to discourage and discount precisely that input. Decisionmakers are not likely to appreciate the wisdom of a person's experience when they won't trust that person with a water bottle.

Today, 50 years into that "more vigilant" future, our courts must ensure that the public interests that our Legislature values are ones that agencies meaningfully consider.

The legislative auditor concluded its report with a punch list of concrete recommendations to improve the PUC's public-participation process.[42]

Reviewing courts, too, must also be alert to biases that can hide behind, and skew, agency decisionmaking. "PUC officials told [the legislative auditor] the Line 3 case was an anomaly and that the agency's practices, which they believe generally work well, should not be judged on this one case alone."[43] Various courts, though, are reviewing *this* case.[44] A self-confessed anomaly can all too easily cross into an abuse of discretion.

Last year, the PUC revisited its approval of Line 3 to consider a revised EIS. It held the first—and only—public hearing that allowed citizens to speak directly to the commissioners about whether to approve Line 3. Again, most public commenters opposed the project.

Gaagigeyaashiik (Dawn Goodwin), a member of the White Earth Nation, rose to speak to the commissioners. She made reference to the 2018 proceedings. She had testified to the ALJ, but had not been allowed to address the commissioners. "It is my inherent responsibility as a member of the wolf clan to protect the environment and the people. That's why I sit here today. I was denied the chance to speak during the first round.... I was troubled during that time as I listened to all the deliberations. Commissioner Tuma referenced that he did not understand our connection, the Native American connection, to the land. He likened it to a *romantic* relationship. I was appalled. I felt very disrespected by those words. But I could not speak."[45]

When the meetings concluded, the PUC's vote was no longer unanimous. Commissioner Schuerger voted against Line 3 three times, concluding that the revised EIS was inadequate, that Enbridge had not proven its case for a certificate of need, and that Enbridge's preferred route was not in Minnesota's interest. But he was only one vote.

Enbridge began construction on the new Line 3 in December 2020, and expects to complete the pipeline and begin transporting oil this year. ▲

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Notes

[1] Minn. Pub. Util. Comm'n Mtg., June 28, 2018 at 28:25, available at *minnesotapuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=750* (last visited 3/3/2021).
[2] *Id.* at 1:01:35.
[3] *Id.* at 1:12:25.
[4] Treaty with the Chippewa, 7 Stat. 536 (7/29/1837); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).
[5] *In re Applications of Enbridge Energy, Ltd.*, 930 N.W.2d 12 (Minn. App. 2019).
[6] Minn. Pub. Util. Comm'n Mtg., 2/3/2020 at 1:10:15, available at *minnesotapuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=1136* ("Feb. 3, 2020 PUC Mtg.") (last visited 3/2/2021).
[7] *Id.* at 5:56:45.
[8] Minnesota Public Utilities Commission, About Us, *mn.gov/puc/about-us/* (last visited 1.27/2021).
[9] *Miller v. Green Bay, W. & St. P. Ry. Co.*, 60 N.W. 1006, 1007 (Minn. 1894); *Watson v. Chi., M. & St. P. Ry. Co.*, 48 N.W. 1129, 1131 (Minn. 1891).
[10] Final Environmental Impact Statement for the Line 3 Pipeline Project – Revised, 2/12/2018 at 5-466, available at *mn.gov/eera/web/file-list/3196/* (last visited 2/23/2021).
[11] *Id.* at 11-16.
[12] *Id.* at 11-5.
[13] *Id.* at 11-20, 11-22.
[14] After extensive review, Minnesota Commerce Department releases expert analysis and recommendation on the certificate of need for Enbridge's proposed Line 3 oil pipeline project, Minn. Commerce Dept. (9/11/2017), available at *content.govdelivery.com/accounts/MNCOMM/bulletins/1b655ef* (last visited Feb. 26, 2021).
[15] Findings of Fact, Conclusions of Law, and Recommendation, OAH 65-2500-32764, Docket 14-916 (Apr. 24, 2018) at §III(A), available at *www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showeDocketsSearch&showEdocket=true* (last visited 3/5/2021).
[16] *Id.* at 256 (emphasis added).
[17] *Id.* at 406.
[18] *Id.* at 11, 363.
[19] Paul Wellstone and Barry M. Casper, *Powerline: The First Battle of America's Energy War*, University of Minnesota Press (2003). With the advent of renewable resources, many of today's climate advocates believe that expanding transmission infrastructure is a critical part of our needed renewable energy transition.
[20] Minn. Stat. Ch. 116D.01 (1973).
[21] *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312 (Minn. 1977) (citing Minn. Stat. 116C.55-116C.60 (1976)).
[22] Steven R. Anderson, Power Line Controversy, MNopedia, available at *www.mnopedia.org/event/power-line-controversy* (last visited 2/1/2021); Electrifying Minnesota, Powerline Controversy, 1972-79, Minnesota State Historical Society, available at *www.mnhs.org/sites/default/files/exhibits-to-go/electrifying-minnesota/emn_powerline_controversy_panel1.pdf* (last visited 2/1/2021).
[23] Minn. Pub. Util. Comm'n Staff Briefing Papers June 18, 19, 26 & 27, 2018 Agenda, Docket 14-916 (6/8/2018), available at *www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showeDocketsSearch&showEdocket=true* (last visited 3/2/2021).
[24] *Id.* at 42-43.
[25] Public Utilities Commission's Public Participation Processes 2020 Evaluation Report, Officer of the Legislative Auditor (July 2020) ("Auditor's Report") at 68, available at *www.auditor.leg.state.mn.us/ped/pedrep/puc2020.pdf* (last visited 3/1/2021).
[26] *Id.* at 70.
[27] *Id.* at 75.
[28] *Id.* at 75.
[29] *Id.* at 71.
[30] *Id.* at 77.
[31] Sierra Club and Northern Water Alliance Letter to Commission, Docket 14-916 (6/27/2018) available at *www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showeDocketsSearch&showEdocket=true* (last visited 3/3/2021).
[32] Auditor's Report, *supra* note 25 at 78.
[33] Minn. Pub. Util. Comm'n Mtg., 6/27/2018 at 22:09, available at *minnesotapuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=748* (last visited 2/26/2021).
[34] *Id.* at 6:28:45.
[35] *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 327 (Minn. 1977).
[36] *Id.* at 326.
[37] *Id.* at 326-27.
[38] *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995 (8th Cir. 2011) (quoting *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (Breyer, J.)).
[39] *See generally* Auditor's Report *supra* note 25.
[40] *Id.* at 13.
[41] *Id.*
[42] *Id.* at List of Recommendations.
[43] *Id.* at 78.
[44] Dan Kraker, Minn. Pub. Radio, Line 3 opponents file federal suit to try to block pipeline (12/29/2020), available at *www.mprnews.org/story/2020/12/28/line-3-opponents-file-federal-suit-to-try-to-block-the-pipeline* (last visited 3/4/2021).
[45] 2/3/2020 PUC Mtg., *supra* note 6 at 56:23

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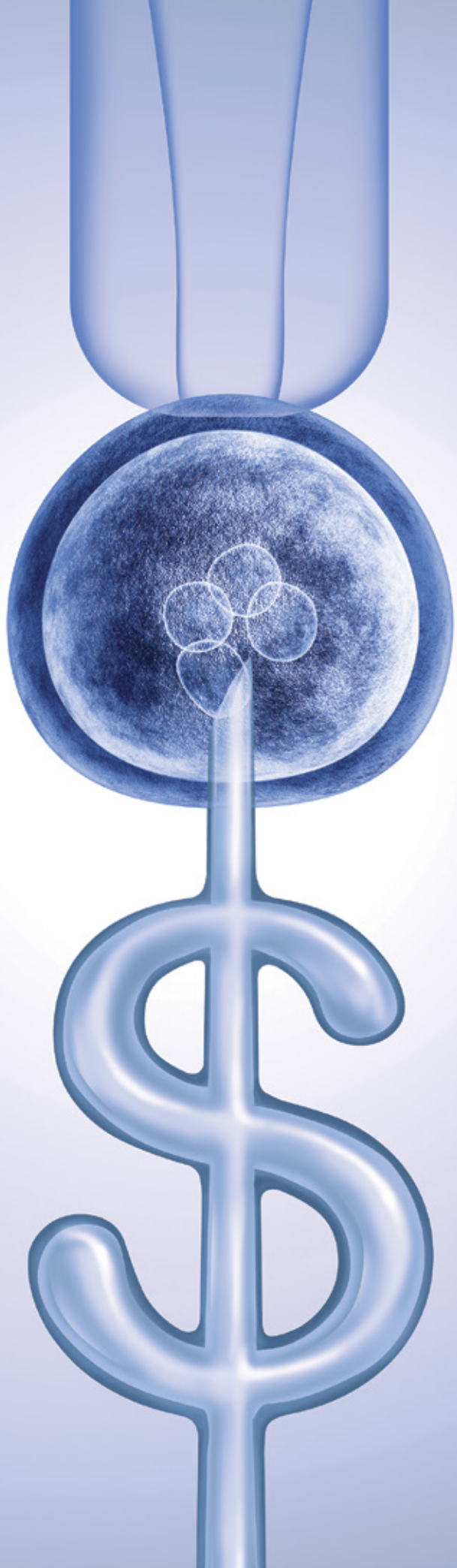
One cycle of IVF, including medications, may cost $25,000 or more.

On average, individuals need three to six cycles of IVF to have one baby.

Minnesota does not require medical insurance plans to provide coverage for fertility insurance benefits.



Working with infertility and IVF

A primer for managers on supporting employees who experience reproductive issues

By Ashleigh Leitch

Imagine your direct report blocks off time on your calendar for a private meeting. During the meeting, they inform you for the first time that they have been diagnosed with infertility and have decided to begin fertility treatments. What do you say? As their manager, what's your next move? What policies are in place to guide you and your direct report?

The purpose of this article is to provide practical advice for managers to support employees experiencing infertility or fertility treatments. From the standpoint of employers, this is not just humane policy. Issues with fertility or pregnancy loss implicate employees' legal rights in the workplace, and employers need to know how to comply with federal, state, and local laws relating to infertility. This article will suggest template infertility policies to promote a consistent and legally compliant approach to meeting the needs of employees and businesses. And it will conclude with suggestions for managing with emotional intelligence during what can be a very stressful and anxious time for employees.

Understanding infertility, pregnancy loss, and fertility treatments

The American Medical Association and the World Health Organization classify infertility as a complex disease in which a person is unable to get pregnant after one year of non-contraceptive, heterosexual sex.[1] It is a complex disease because many factors, known or unknown, may result in an infertility diagnosis. Both men and women may be diagnosed with infertility.[2]

Because of the stigma historically associated with infertility and pregnancy loss, many people remain unaware that these experiences are relatively common. Statistically, 10-15 percent of heterosexual couples in the U.S. experience infertility.[3] Ten to 20 percent of known pregnancies end in miscarriage, which occurs when the pregnancy is lost before the 20th week.[4] Each year, about 24,000 pregnancies end in stillbirth, which occurs when the pregnancy is lost after the 20th week.[5] The term "pregnancy loss" describes both miscarriage and stillbirth. Individuals may experience pregnancy loss without being diagnosed with infertility, and vice versa.

There are several types of fertility treatments, just as there are many reasons that employees may undergo treatments. The range of treatment options include intrauterine insemination (IUI) as well as assisted reproductive technologies like in vitro fertilization (IVF). Individuals may also choose IVF to preserve their fertility by freezing eggs or embryos. The Centers for Disease Control and Prevention (CDC) estimates that nearly 2 percent of all babies born in the U.S. each year are conceived through assisted reproductive technologies.[6] This number is growing as more LGBTQ and single people use IVF to conceive. Although the technology has advanced over time, success rates vary significantly from individual to individual.

Managers should know that fertility treatments are a highly emotional, time-sensitive, and financially stressful matter that provides no guarantee of a baby.[7] IVF treatments involve weeks of hormone injections at precise timing intervals, in addition to other medications and vitamin regimens. Individuals may experience heightened emotion due to these hormonal medications, in addition to grief after unsuccessful treatment cycles.

The time-sensitive nature of IVF also creates stress, especially when it conflicts with regular work schedules.[8] In addition to the injections mentioned above, the typical IVF cycle entails regular—sometimes daily—appointments over a two-week period for blood draws and ultrasounds to measure hormone levels and follicular growth.[9] The fertility clinic may schedule or reschedule these appointments with limited notice depending on the results of blood draws or ultrasounds. Furthermore, the timing of some events is inflexible. For example, delaying an embryo transfer by even one day may cause the cycle to fail.[10] Employees will likely need at least one day off work to undergo the egg retrieval under anesthetic.[11]

Finally, IVF treatments are stressful in part because they are so expensive, and insurance typically provides limited (if any) coverage for fertility treatments. One cycle of IVF, including medications, may cost $25,000 or more.[12] Studies estimate that, on average, individuals need three to six cycles of IVF to have one baby.[13] Minnesota does not require medical insurance plans to provide coverage for fertility insurance benefits, though some states do.[14] Because offering fertility insurance benefits may be a valuable tool for employee recruitment and retention, employers may be interested in expanding their fertility insurance benefits.[15] For example, employers are encouraged to evaluate options for fertility benefits with their insurance brokers prior to open enrollment each year.

Employment laws related to infertility and fertility treatments

Depending on the employee's individual medical needs and treatments, the following types of laws may apply: leave of absence, disability, and anti-discrimination.

Leave of absence

Employees may need time away from work to receive medical care and treatment related to their fertility. Under the federal Family Medical Leave Act (FMLA), eligible employees of covered employers may take a job-protected, unpaid leave of absence for a serious health condition.[16] Either the employee must have a serious health condition that leaves them unable to perform the essential functions of their job, or they must provide care for a family member who has such a serious health condition.[17] Under these terms, FMLA may be available to individuals who wish to support and care for their partners after their partners have been diagnosed with infertility or are undergoing fertility treatments.

Absent an underlying medical condition, however, receiving an infertility diagnosis or undergoing fertility treatments may not qualify as a serious health condition. The following are examples of potentially serious health conditions: 1) surgery on reproductive organs to prepare for pregnancy, such as removing endometrial tumors or assisting with sperm flow;[18] bed rest due to pregnancy complications;[19] or depression or anxiety arising from infertility or pregnancy loss.[20] This is an individualized inquiry requiring supporting documentation from a health care provider.

If eligible, employees are entitled to up to 12 weeks of unpaid leave per year for medical care and parenting leave. (The downside to using this leave to cover fertility treatments is that, in the event the fertility treatments lead to childbirth in the same year, there is less time available for parental leave.) If ineligible for the FMLA, employees may use their PTO or earned sick and safety leave (ESST) to receive pay while away from work. The ESST ordinances in the cities of Minneapolis, Saint Paul, and Duluth provide paid-time-off benefits for eligible employees, and those benefits cover time away from work to receive medical care and treatment related to fertility.[21]

Disability

Federal and state laws prohibit employers from discriminating against employees because of their disabilities and require employers to provide reasonable accommodation to disabled employees.[22] Not all employees experiencing infertility or undergoing fertility treatments have a disability. One example is LGBTQ employees who may be fertile but still require reproductive assistance to create their families. A second example is infertility caused by advanced age.

ADA coverage hinges upon the cause of the individual's infertility or their need for fertility treatments. A "disability" is an impairment that substantially limits a major life activity.[23] Reproduction is a major life activity.[24] If the employee has been diagnosed with an impairment limiting their reproduction, they have a disability and qualify for disability-related protections. For example, a diagnosis of endometriosis may limit reproduction. Chemotherapy to treat testicular cancer may also limit reproduction. Both qualify as disabilities, thereby triggering anti-discrimination protection and the obligation to make reasonable accommodations.

An employee with a disability is entitled to a reasonable accommodation to enable them to perform their essential job duties, as long as it does not create an undue hardship for the employer.[25] Managers should consult the employee's job description to evaluate whether a particular job duty is "essential." Examples of reasonable accommodations may include a temporary leave of absence (even if not eligible under the FMLA), additional break time or modified work hours to accommodate hormone injections and medical appointments, the option to work remotely, and modified work duties to reduce stress.[26] Actions like these are unlikely to constitute an undue hardship for employers, especially if the accommodation is granted for a defined, temporary time period.

Anti-discrimination

Federal and state laws prohibiting discrimination may apply to employees experiencing infertility or fertility treatments. Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, prohibits discrimination or retaliation against individuals on the basis of their sex.[27] The U.S. Supreme Court has held that Title VII prohibits employers from "discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job."[28] Some jurisdictions have interpreted this to apply to fertility treatments to become pregnant.[29]

The Minnesota Human Rights Act (MHRA) prohibits discrimination or retaliation against individuals on the basis of sex, pregnancy, or disability, and requires employers to provide reasonable accommodation to employees with disabilities.

Managing with emotional intelligence

When your employee discloses their infertility diagnosis to you, it is best to handle that information like any other medical condition—with care, confidentiality, and respect for the employee's individual needs. React with empathy, and commit to looking into the organizational resources available to the employee. For starters, managers should consult with Human Resources and the—newly updated! (see sidebar)—employee handbook to provide information regarding available health insurance benefits and time away from work policies.

> Managers should know that fertility treatments are a highly emotional, time-sensitive, and financially stressful matter that provides no guarantee of a baby.

Some other practical tips:

- Do a web search before you ask general questions to your employee. Undoubtedly, this article will not answer all your questions about infertility and IVF treatments. There are many useful resources online to inform yourself on general topics. If you have specific, job-related questions regarding the employee's treatment plan, go ahead with asking those questions respectfully—just as you would for any other medical condition or treatment.

- As a general rule, don't offer advice. The employee has made their decision based on advice from their professional medical providers. The one possible exception to this general rule is if you have personal experience with infertility or fertility treatments and have the kind of relationship with the employee in which you share personal information. Even then, make sure that the employee is comfortable with hearing your advice before you share.

- Ask the employee how you and the organization can support them. What kind of temporary flexible work arrangements or scheduling can you offer to the employee as a reasonable accommodation? What benefits are available to the employee? Gauge what kind of emotional support and privacy the employee wants. Some employees may welcome your regular check-ins while others may prefer more privacy. Ask what type of support would make the employee feel comfortable.

- If the employee's absence from work requires disclosure to other colleagues, ask for the employee's input on how to inform others. Some employees may wish to be open about their infertility or fertility treatment journey. Others may desire more privacy. As with all medical issues, only inform those who need to know, and give the employee discretion as to informing others.

- Do not immediately begin planning for the employee's pregnancy and parental leave. Fertility treatments have varying success rates. While it's natural to be optimistic and wish the best for your employee, it is best to cross that bridge when you get to it.

- Handle all medical information confidentially. If you receive medical documentation, put it in a separate, confidential section of their personnel file.

In conclusion, managing employees through their infertility and fertility treatments presents many challenges in the workplace. Understanding employees' legal rights to leave, reasonable accommodation, and other benefits set the baseline for complying with federal, state, and local laws. Beyond that baseline, successful managers will also recognize that these issues present important opportunities to build trust and create a supportive work environment for employees facing infertility and fertility treatments. ▲

UPDATING THE EMPLOYEE HANDBOOK

Given the prevalence of fertility issues, many employers are adding policies to their employee handbooks. Below are two template policies relating to infertility and treatment. Tailor these templates to reflect your organization's practices.

TEMPLATE FERTILITY POLICY

The purpose of this policy is to provide support to employees diagnosed with infertility or undergoing fertility treatment. The Company provides support in the form of leave, reasonable accommodations, and insurance benefits. For the purpose of this policy, a fertility treatment includes intrauterine insemination (IUI), in vitro fertilization (IVF), fertility preservation (such as egg freezing), or other similar assisted reproductive technologies. Human Resources may ask for supporting documentation of your infertility diagnosis or need for fertility treatments from your health care provider. Any medical documentation you provide will be handled confidentially.

Employees receive __ days of [paid/unpaid] leave to receive medical care for their infertility diagnosis or to undergo fertility treatmeånts. If eligible for FMLA leave, your fertility leave will run concurrently with your FMLA leave. If you need additional leave, you may use your PTO or ESST.

If you have a disability, the Company will provide reasonable accommodation to enable you to perform the essential functions of your position, unless such accommodation is an undue hardship for the Company. Please see the Reasonable Accommodations policy for more information. Depending on your circumstances, examples of reasonable accommodations may include: additional leave, a flexible work schedule, or a modified workload.

The Company provides the following fertility benefits to employees: [details on applicable policies, for example medical insurance or a short-term disability policy]. Additionally, you may access the Employee Assistance Program (EAP), which provides counseling services to cope with the emotion and stress that may arise from infertility or fertility treatments. Please see the insurance plan documents for additional details. If you have any questions about this policy, please contact Human Resources.

TEMPLATE BEREAVEMENT POLICY

The purpose of this policy is to provide support to grieving employees. Employees receive ___ days of [paid/unpaid] bereavement leave when they experience pregnancy loss, the death of their immediate relative, or the death of their partner's immediate relative. For the purpose of this policy, "pregnancy loss" is defined to include miscarriage and stillbirth, and an "immediate relative" is defined as a parent, grandparent, sibling, or child, or a person of equivalent familial significance to the employee. "Immediate relative" also includes a step-parent, a step-grandparent, step-sibling, and step-child. To request bereavement leave, contact Human Resources as soon as practicable. Employees may also use their PTO if they need additional leave.

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Because offering fertility insurance benefits may be a valuable tool for employee recruitment and retention, employers may be interested in expanding their fertility insurance benefits.

Notes

[1] Sara Berg, *AMA backs global health experts in calling infertility a disease*, AMA (6/13/2017), *https://www.ama-assn.org/delivering-care/public-health/ama-backs-global-health-experts-calling-infertility-disease*

[2] *Id.*

[3] *Infertility*, Mayo Clinic, *https://www.mayoclinic.org/diseases-conditions/infertility/symptoms-causes/syc-20354317* (last visited 2/21/2021).

[4] *Miscarriage*, Mayo Clinic, *https://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/symptoms-causes/syc-20354298#:~:text=About%2010%20to%2020%20percent,doesn't%20realize%20she's%20pregnant* (last visited 2/21/2021).

[5] *Id.*

[6] *ART Success Rates*, Centers for Disease Control and Prevention, *https://www.cdc.gov/art/artdata/index.html* (last visited 2/21/2021).

[7] Dr. Pragya Agarwal, *Infertility In The Workplace: Women Are Still Suffering In Silence*, FORBES (3/8/2020), available at *https://www.forbes.com/sites/pragyaagarwaleurope/2020/03/08/infertility-in-the-workplace-women-are-still-suffering-in-silence/?sh=293b1b682c30* (last visited 2/21/2021).

[8] Serena G. Sohrab and Nada Basir, *Employers, It's Time to Talk about Infertility* Harvard Business Review (11/11/2020), available at *https://hbr.org/2020/11/employers-its-time-to-talk-about-infertility* (last visited 2/21/2021).

[9] Lisa Rabasca Roepe, *Managing Workers Undergoing Fertility Treatments or Surrogacy* SHRM (4/28/2020), available at *https://www.shrm.org/resourcesandtools/hr-topics/people-managers/pages/managers-and-fertility-treatments-.aspx*

[10] Katherine Goldstein, My Boss Said, "I Understand What You're Going Through, but You Have a Job to Do," SLATE (1/30/2019), *https://slate.com/human-interest/2019/01/infertility-workplace-pregnancy-challenges-2019.html* (last visited 2/21/2021).

[11] Lisa Rabasca Roepe, *Managing Workers Undergoing Fertility Treatments or Surrogacy* SHRM (4/28/2020), available at *https://www.shrm.org/resourcesandtools/hr-topics/people-managers/pages/managers-and-fertility-treatments-.aspx* .

[12] Amy Klein, "IVF Is Expensive. Here's How to Bring Down the Cost," N.Y. TIMES (4/18/2020) *https://www.nytimes.com/article/ivf-treatment-costs-guide.html* (last visited 2/12/2021).

[13] *Id.*

[14] *State Laws Related to Insurance Coverage for Infertility Treatment*, National Conference of State Legislatures (6/12/2019) *https://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx* (last visited 2/21/2021).

[15] *Work Coverage Resource Hub – For Employers*, RESOLVE The National Infertility Association, *https://resolve.org/what-are-my-options/insurance-coverage/coverage-at-work/work-coverage-resource-hub-for-employers/* (last visited 2/23/2021).

[16] The Family Medical Leave Act of 1993, 29 U.S.C. §§2601, *et seq.*; *see also Fact Sheet #28: The Family Medical Leave Act*, U.S. Dept. of Labor, Wage and Hour Division (Revised 2012) *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28.pdf* (last visited 2/21/2021).

[17] *Id.*

[18] 29 C.F.R. §825.102.

[19] 29 C.F.R. §825.102, subd. 2.

[20] 29 C.F.R. §825.113(d) (expressly stating that mental health conditions may qualify).

[21] Minneapolis Sick and Safe Time Ordinance Ord. No. 2016-040, available at *https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT2AD_CH40WORE_ARTIINGE_40.10TI* ; St. Paul Earned Sick and Safety Time Ordinance Sec. 233.01, available at *https://library.municode.com/mn/st._paul/codes/code_of_ordinances?nodeId=PTIILECO_TITXXIIIPUHESAWE_CH233PUHESAWE_S233.01STLEPUIN* ; Duluth Ordinance No. 10571, Section 29E-1, available at *https://duluthmn.gov/city-clerk/earned-sick-safe-time/ordinance-no-10571/* .

[22] Americans with Disabilities Act (ADA), 42 U.S.C. §§12112 (prohibiting discrimination); 12112(b)(5)(A) (requiring reasonable accommodation); Minnesota Human Right Act ("MHRA"), Minn. Stat. §363A.08, subd. 2 (prohibiting discrimination), Minn. Stat. §363A.08, subd. 6 (requiring reasonable accommodation).

[23] 42 U.S.C. §12102.

[24] ADA Amendments Act of 2008, 42 U.S.C.A. §12101 (stating that "reproductive functions" are a major life activity for purposes of the ADA); *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (holding that reproduction is a major life activity).

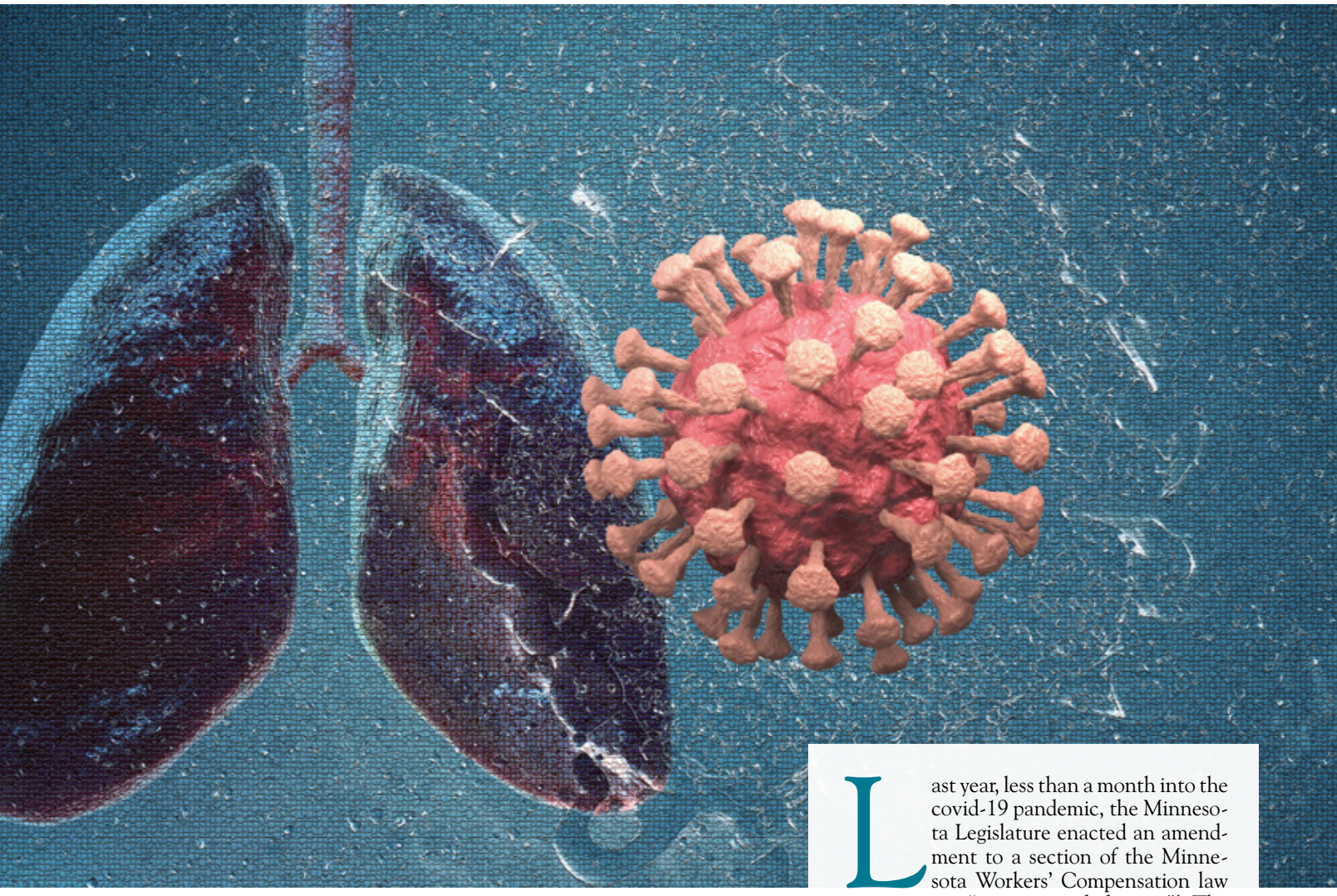
[25] 42 U.S.C. §12112(b)(5)(A).

[26] *LaPorta v. Wal-Mart Stores, Inc.*, 163 F.Supp.2d 758, 766 (W.D. Mich. 5/22/2001) (holding that infertility is a disability under the ADA and that time away from work for medical treatments is a reasonable accommodation).

[27] 42 U.S.C. §2000e--2(a)(1); *see also Enforcement Guidance on Pregnancy Discrimination and Related Issues*, U.S. Equal Employment Opportunity Commission (6/15/2015), available at *https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#_ftn26* (last visited 2/23/2021).

[28] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 206 (1991).

[29] *Hall v. Nalco Co.*, 534 F.3d 644, 648-49 (7th Cir. 2008) (holding that the employer unlawfully discriminated against female employee for taking time off to undergo IVF because her employment termination was due to her sex-specific quality of childbearing capacity, not her sex-neutral condition of infertility).



Covid, 'long covid,' and workers compensation

The workers' compensation system will be dealing with coronavirus-spawned claims for a long time to come

By Robb P. Enslin

Last year, less than a month into the covid-19 pandemic, the Minnesota Legislature enacted an amendment to a section of the Minnesota Workers' Compensation law pertaining to "occupational disease."[1] The amendment, subdivision 15(f) 1-6, created a "rebuttable presumption" that "an employee who contracts COVID-19 is presumed to have an occupational disease arising out of and in the course of employment" if the employee meets two criteria. First, the employee must be what has come to be known as a "frontline worker." Second, the employee must have a documented positive test or a diagnosis by a qualified medical professional based on the employee's symptoms.

Minnesota is not alone. Every state in the U.S. currently has some form of workers' compensation framework, and several states have enacted laws or issued executive orders specific to covid-19 infection, though there is wide variance between the laws in the various states. California and Wyoming, for instance, cover all workers under their covid-19 legislation, while states like Illinois, New Jersey, and Vermont cover all workers who meet their states' "essential" designation, such as grocery store employees. Minnesota, like Wisconsin, has limited its coverage to frontline health care workers and first responders.[2]

Few would question the wisdom of this type of legislation. After all, our police, fire, and health care workers have been on the frontlines of the pandemic for over a year now. The crisis required quick action—especially in its early days—to ensure that confusion and conflict between frontline employers and employees over sick time or vacation days would not disrupt our response to unprecedented times. Now we find ourselves facing difficult and unexpected questions, many of which are as novel as the virus itself.

Perhaps the most complicated and controversial question particular to the legal field is the impact of "long covid"—the growing collection of post-viral symptoms being reported by patients weeks or months after their initial infection. The debate has already begun regarding the validity of these complaints, as demonstrated in recent back-and-forth in the pages of the Wall Street Journal.[3] Symptoms with purely subjective manifestations (such as "brain fog" and chronic fatigue) are being linked to covid infection, but the research is only just beginning. Workers' compensation judges will soon find themselves in the unenviable position of weighing medical opinions that rely on exactly the same evidence but reach diametrically opposed conclusions on causation.

Who is entitled to the rebuttable presumption?

For workers' compensation attorneys practicing in Minnesota, the questions over coverage begin with the very first clause of the amendment, which defines who is entitled to the rebuttable presumption. Employees entitled to the rebuttable presumption are limited to the following:

- licensed peace officers;
- firefighters, paramedics, and EMTs;
- certain employees of state or municipal detention or treatment facilities;
- health care providers, nurses, or "assistive employees" employed in a health care, home care, or long-term care setting with direct covid-19 patient care or "ancillary" work; or
- persons providing child care for first responders and health care workers.

This does not mean people who fall outside of those categories cannot file a claim for an occupational disease if they contract covid-19 at work, but they are not entitled to the assumption that their covid-19 was work-related.

But even with respect to those occupations listed in the statute, there is room for disagreement. For instance, the terms "assistive employee" and "ancillary work" are not specifically defined. It's no stretch to assume any employee who worked in a hospital or health care setting during the early days of the pandemic would count themselves in one of the covered categories, while employers and insurers would seek more concrete definitions.

This is no small matter, since the Minnesota Supreme Court, in *Linnell v. City of St. Louis Park,*[4] found that statutory presumptions are "…something more than a procedural device initially relieving the employee of proving causal relationship between (the conditions of) his occupation and the disease which results in his disability…" and instead place a "substantial burden" on the employer to show the disease was caused by "recognized causative factors which are not related to (the employee's) occupation." In short, whether the presumption applies to the employee determines who has the burden of proof, and it is no surprise that plaintiff's attorneys and insurance defense attorneys are jockeying to either include or exclude broad swaths of workers who fail to fit neatly in a "frontline" category.

Occupational disease vs. ordinary diseases of life

The term "occupational disease" has been on the books in Minnesota workers' compensation law for 100 years and has its own long and complex history. For those unfamiliar with workers' compensation or the term occupational disease, here is a (very) brief summary: Minn. Stat. 176.011 subd. 15(a) defines occupational disease as a "…physical disease arising out of and in the course of employment peculiar to the occupation in which the employee is engaged and due to causes in excess of the hazards ordinary of employment…" Perhaps the best known examples of occupational diseases are asbestosis, silicosis, and mesothelioma (all caused by exposure to asbestos), although there are many others.

"Occupational disease" is contrasted with "ordinary diseases of life to which the general public is equally exposed outside of employment…[,]" which are generally not compensable under Minnesota's Workers' Compensation law.

As it applies to covid-19, if an employee is a frontline worker in Minnesota and has tested positive for covid-19 (or was diagnosed by a licensed physician, physician's assistant, or APRN), it is automatically presumed to be an "occupational disease" and the employee should be entitled to benefits.

The benefits provided by Minnesota's workers' compensation law cover more than just health care. If a work injury or occupational disease causes a worker to miss time and suffer wage loss, those wages may be covered. If a work injury or occupational disease results in permanent disability, long-term economic support may be available.

This last point is especially relevant considering our preliminary and incomplete understanding of the long-term effects of covid-19 infection. For instance, a study published in the Journal of the American Medical Association (JAMA) found that 78 of 100 covid-19 patients had abnormal cardiac MRIs two months after getting sick, and 60 of 100 had MRIs showing heart muscle inflammation.[5] Another study published in Nature Medicine indicated that 60 percent of patients showed signs of minor lung inflammation on a CT scan.[6] Most concerningly, this study was focused on patients who were completely asymptomatic. The list of potential complications of covid-19 infection only continues to grow, now including thrombotic complications, myocardial dysfunction and arrhythmia, acute coronary syndromes, acute kidney injury, gastrointestinal symptoms, hepatocellular injury, hyperglycemia and ketosis, neurologic illnesses, ocular symptoms, and dermatological complications.[7]

In early May of this year, Mayo Clinic released a study of 100 covid-19 patients in its new Covid-19 Activity Rehabilitation Program (CARP)—established to study and treat patients with post-covid issues—which showed patients suffering from post-covid symptoms were younger (mean age 45), healthier (75 percent had not been hospitalized for their initial covid-19 infection and most had no pre-existing co-morbidities), and more likely to be female (68 percent). Symptoms included mood disorders, fatigue, and perceived cognitive impairment.

Attorneys in our firm, for example, are already beginning to see workers' compensation insurers denying coverage for these poorly understood long-term impacts of covid-19 infection. No one is shocked by these denials. After all, how can anyone—attorneys, insurance claims adjusters, or workers' compensation judges—make a decision on the relationship between an employees' health issues and their previous covid infections when we are only beginning to study the subject? The National Institutes of Health has recently announced that $1 billion will be allocated to investigate "long covid"—known at NIH as "PASC" (post-acute sequelae of covid-19 infection)—but this research has barely started.[9] (Note: Mayo Clinic uses the term "post-covid-19 syndrome," or PCS.)

Asymptomatic carriers

The question of workers' compensation coverage for PASC for employees with a confirmed diagnosis is complicated enough, but what about those employees who were never tested because they never had symptoms? We have become all too familiar with the term "asymptomatic carriers"—those individuals who exhibit no symptoms during active covid-19 infections. It is still not fully known how many people may be asymptomatic carriers, but a January 2021 study in the Annals of Internal Medicine estimated that at least one-third of covid-19 positive individuals are asymptomatic.[10]

Since early indications are that asymptomatic patients are not immune from the long-term PASC impacts of the disease, workers may soon find themselves struggling to show evidence of an infection that they never knew they had in order to meet the requirements of Minnesota's statute.

The options are limited at this point. According to the CDC, a person who has been infected may continue to test positive for up to three months. So an employee who may be suffering from PASC may still test positive if tested in time. But for those who have missed their window for a positive test, things are more complicated. An antibody test will determine if a person had a prior infection but cannot determine when. Further, most people cannot simply go and get a covid-19 antibody test. Luckily, there is an easy way to get an antibody test that has the dual benefit of being good for society as well: Donate blood. Many blood banks are performing free antibody tests on all blood donations. If your blood contains covid-19 antibodies, you may be notified and given the option to donate your plasma for research.[11]

Is an antibody test showing that you had covid-19 at some point enough to meet the requirements of Minn. Stat. 176.011 subd. 15(f)(2)? The language of the statute requires that "the employee's contraction of COVID-19 must be confirmed by a *positive laboratory test*…" The question of whether an antibody test taken weeks, months, or even years after initial infection would fulfill this requirement seems destined for the Workers' Compensation Court of Appeals, if not the Minnesota Supreme Court.

To complicate matters further, those who have been vaccinated may test positive for antibodies, potentially destroying any evidence of a previous infection that may entitle them to benefits. Will frontline workers who failed to get tested before getting the vaccine be out of luck if they later suffer from PASC?

What happens after December 31, 2021?

The Legislature recently removed one potential source of litigation by changing the original sunset date of May 1, 2021 to December 31, 2021. As such, questions regarding the bounding of the statute and what impact it could have on employees and insurers won't arise (at least in the courts) until 2022. But the questions will be there: What is the rationale for bounding the rebuttable presumption differently than Gov. Walz's emergency declaration? What is the rationale for bounding it at all, if the research shows covid-19 causes such serious long-term effects? Should this be a permanent fixture in Minnesota's workers' compensation framework, like mesothelioma?While the "rebuttable presumption" created by the amendment is critical for those who faced the pandemic head-on for the last year, it is not necessary for filing a claim for workers' compensation benefits. Employees will still be able to make a claim without the presumption statute, albeit with a higher burden of proof. How the courts will handle these claims is yet unknown, but case law provides some hints.

Two cases that appear analogous to PASC situations are *Olson v. Executive Travel MSP, Inc.*,[12] and *Baker v. Farmer's Union Marketing and Processing*.[13] In *Olson*, an employee contracted influenza type-b while traveling abroad for work and suffered severe long-term and permanent complications. In *Baker,* an employee at a pet food processing plant contracted histoplasmosis from coming in contact with turkey and chicken carcasses and also developed long-term serious health conditions as a result of the illness. In both cases, the employee was ruled to be entitled to workers' compensation benefits. Yet, strangely, in both cases, the courts held that the benefits were granted as a result of "personal injuries" arising out of and in the course of employment, and specifically *not* as "occupational diseases." Whether that distinction has an impact on how future courts choose to follow or diverge from these precedents in PASC situations is a mystery.

Regardless of whether the window really does "close" as of December 31, 2021, the occupational disease statute grants employees three years to commence an action once the employee has "knowledge of the cause" of their injury or impairment. This rule was established by the Minnesota Supreme Court in a 1982 case, *Bloese v. Twin City Etching, Inc.*[14] The Court found that the three-year clock begins to tick when the employee has "sufficient information concerning the nature of an injury or illness, its seriousness, and its probable compensability to move a reasonable person to make inquiry concerning his rights." This virtually ensures lawyers and judges in Minnesota's workers' compensation field will be struggling with questions of the compensability of PASC complications for years to come.

More questions than answers

This article does not even scratch the surface of a host of additional questions—for instance, variants. Does the law cover the South American or South African variants, both of which have been detected in Minnesota during the active period of the law? Will courts have to decide which variants are covered for PASC complications? And what about the vaccine? Injuries from vaccines are already covered under Minn. Stat. 176.011, subd. 16., but what impact will the amendment have?

All of these questions and more are sure to keep lawyers, judges, and politicians busy for years, and likely decades, into the future. ▲

Notes

[1] Minnesota Statute 176.011 subd. 15 – Occupational Disease *https://www.revisor.mn.gov/laws/2020/0/72/*

[2] *https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx*

[3] See *https://www.wsj.com/articles/the-dubious-origins-of-long-covid-11616452583?mod=article_inline* and *https://www.wsj.com/articles/the-science-behind-long-covid-and-the-desire-to-wish-it-away-11617143543* for opposing views on the validity of post-covid symptoms.

[4] 33 W.C.D. 602, 305 N.W.2d 599 (Minn. 1981).

[5] *https://jamanetwork.com/journals/jamacardiology/fullarticle/2768916*

[6] *https://www.nature.com/articles/s41591-020-0965-6.pdf*

[7] *https://www.nature.com/articles/s41591-020-0968-3*

[8] *https://www.mayoclinicproceedings.org/article/S0025-6196(21)00356-6/fulltext*

[9] *https://www.nature.com/articles/d41586-021-00586-y*

[10] *https://www.nature.com/articles/s41591-020-0965-6.pdf*

[11] *https://www.redcrossblood.org/donate-blood/dlp/covid-19-antibody-testing.html*

[12] 437 N.W.2d 645, 41 W.C.D. 793 (Minn. 1989).

[13] slip op. (W.C.C.A. 3/14/2000).

[14] 34 W.C.D. 491, 316 N.W.2d 568 (Minn. 1982).

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Anatomy of a Misreading

News and social media got the point of *State v. Khalil* all wrong

By Hannah Martin

On March 24, 2021, the Minnesota Supreme Court issued its decision in *State v. Khalil*, reversing and remanding a third-degree criminal sexual conduct charge that involved a mentally incapacitated or physically helpless complainant. Judging from the first line of the opinion, the Court knew its decision would be problematic: "This case arises from an experience no person should ever have to endure."

It's the sort of language courts use when they anticipate that the public is not going to like the result. Similarly, the fact that the Court spent four pages discussing qualifying phrases and comma placement in the criminal sexual conduct statute indicates to the legal community that what follows will be an unpopular opinion, and they wanted to articulate thoroughly the reasoning behind their decision.

The Court's instinct was correct. As soon as this opinion was released, the Court's acknowledgment of the victim's experience and its extensive statutory interpretation did not matter. The response to the decision, both in traditional and social media, was explosive. And the overriding theme was that the Minnesota Supreme Court had condoned "drunk rape"—or worse, created a fresh loophole in the law to allow it.

Unfortunately, this response fundamentally mispresented the Court's opinion in important and damaging ways. The Supreme Court's decision was fairly straightforward: The district court improperly instructed the jury based on a clear misreading of the statute that unfairly prejudiced the defendant.

Reversal and remand of this case is undoubtedly a hardship for the victim, as well as the district court, which now must expend additional resources to retry the case. But it is not a loss for the public. Nor does it make it harder to prosecute sexual assault cases involving alcohol. (This is because the statute, as currently written, covers intoxicated sexual assault through a different criterion in the law, the "physically helpless" standard.)

Media coverage

The media coverage portrayed this decision as the Minnesota Supreme Court deciding that "drunk rape no longer exists." The impression was left on the community that if you chose to drink alcohol, and someone sexually penetrated you without your consent, Minnesota law no longer considered this a crime. Among the headlines that appeared in local and national publications:

- "Felony rape charge doesn't apply if victim got drunk on her own, Minnesota Supreme Court rules"[1]
- "Minnesota Supreme Court says rape victims too intoxicated to consent aren't 'incapacitated'"[2]
- "Minnesota Supreme Court throws out rape conviction because intoxicated woman willingly consumed alcohol"[3]
- "A Minnesota man can't be charged with felony rape because the woman chose to drink beforehand, court rules"[4]

These headlines are taken from mainstream organizations such as the Star Tribune, USA Today, and Washington Post. In many of these papers, the articles describe the implications of the opinion better than the headlines do. Journalists nonetheless wrote that "Minnesota is among a majority of states that treat intoxication as a barrier to consent only if victims became drunk against their will" (Washington Post)[5] and "…the Supreme Court said Khalil could not be guilty of the sole charge he was convicted on because the woman did not fit the state's legal description of being mentally incapacitated" (CNN).[6]

The mischaracterization of the Court's opinion has far greater implications than the decision itself. Mainstream media coverage suggesting that "drunk rape" no longer exists in Minnesota quickly turned viral on social media. Some public reactions shared on Instagram, Facebook, and Twitter:

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- "RAPE IS LEGAL WHEN VICTIM HAS GOTTEN DRUNK. Wait! What? Minnesota Supreme Court has ruled that a man who had sex with a woman while she was passed out on his couch cannot be guilty of rape because the victim got herself drunk beforehand."[7]
- "In the latest—& likely most terrible—example of substance use shaming, now the Minnesota Supreme court has ruled that date rape is legal. Our society is sick…"[8]
- "Minnesota Supreme Court overturns a felony rape conviction because the woman voluntarily got intoxicated. So, in Minnesota, an intoxicated woman is fair game to rapists…because she asked for it."[9]
- "Somehow missed the Minnesota Supreme Court legalizing the rape of drunk women."[10]

Some of these posts went viral, having upwards of 100,000-300,000 likes or reposts.

What does the case actually say?

J.S., the victim in this case, became intoxicated after voluntarily drinking alcohol. Khalil, the defendant, invited her to accompany him to a party at his house. J.S. passed out and woke up to Khalil penetrating her vagina with his penis. Khalil was charged with third-degree criminal sexual conduct, among other charges, which prohibits sexual penetration with a mentally incapacitated or physically helpless complainant.

At trial, the jury instructions included the definition of both "physically helpless" and "mentally incapacitated." The physically helpless standard is included in the third-degree criminal sexual conduct statute as an alternative to "mental incapacitation." *Physically helpless* means that a person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate non-consent. The statutory definition of "mentally incapacitated" requires the complainant to lack judgment to give reasoned consent to sexual penetration because drugs or alcohol have *been administered without his or her agreement*. The definition seems unambiguous: The alcohol or other substances must be consumed against the person's agreement, or in other words, involuntarily.

But during deliberations, the jury asked the district court to clarify whether Khalil had to have administered the alcohol to J.S. without her agreement for her to qualify as mentally incapacitated. The judge improperly instructed that "you can be mentally incapacitated following consumption of alcohol that one administered to one's self… or separately something else that's administered without someone's agreement."

The jury found Khalil guilty of third-degree criminal sexual conduct. There is no way to know whether the jury based its decision on the improper definition of mental incapacitation, or if it found the victim was physically helpless at the time of the assault. The fact that the jury could have based its guilty verdict on an improper and material definition was enough to prompt the Minnesota Supreme Court to reverse and remand for a new trial.

The legal implications of the Minnesota Supreme Court's decision do not reach beyond this case. The case will be remanded, and assuming the state opts not to dismiss the charges, Khalil has the right to a new trial. At that trial, the district court will presumably remedy its error based on the Supreme Court's reversal and instruct the jury accordingly.

Other implications

Since this decision, there have been many calls for the Legislature to change the statute to include voluntary intoxication into the definition of "mental incapacitation." It has been referred to as the "intoxication loophole" since *Khalil* came out.

As noted above, the statute as currently written covers intoxicated sexual assault through the "physically helpless" standard. The definition of physically helpless does not expressly include voluntary intoxication; in practice, however, "drunk rape" cases are prosecuted under this definition because the complainant is frequently asleep or not conscious, or they are unable to communicate nonconsent because of their level of intoxication. Like almost all statutes, and certainly all criminal law statutes, the criminal sexual conduct statutes could be improved. But *Khalil* did not create an "intoxication loophole."

The improper coverage of this decision has another disturbing side effect—discouraging victims of sexual assault from reporting to the police if they were voluntarily intoxicated at the time of the assault. Following an assault, a social media user who had seen the *Khalil* commentary might well believe that "drunk rape" no longer exists in Minnesota. Then, with a simple Google search, their beliefs would be confirmed by Star Tribune and CNN headlines supporting that proposition. No one should be required to have a law degree or to read the entire opinion to understand the limited scope of this case. Headlines intended to grab your attention or cause panic will have unintended consequences for the victims of sexual assault. ▲

Notes

[1] *https://www.twincities.com/2021/03/24/felony-rape-charge-doesnt-apply-if-victim-got-herself-drunk-supreme-court-rules/*
[2] *https://www.startribune.com/minnesota-supreme-court-says-rape-victims-too-intoxicated-to-consent-aren-t-incapacitated/600038050/*
[3] *https://www.usatoday.com/story/news/politics/2021/03/27/minnesota-supreme-court-drunk-rape-victim-not-incapacitated/7027981002/*
[4] *https://www.washingtonpost.com/national-security/2021/03/26/minnesota-rape-alcohol/*
[5] *https://www.washingtonpost.com/national-security/2021/03/26/minnesota-rape-alcohol/*
[6] *https://www.cnn.com/2021/03/30/us/minnesota-rape-conviction-overturned/index.html*
[7] @BombshellDAILY (Twitter)
[8] @RyanMarino (Twitter)
[9] @RTMcFadyen (Twitter)
[10] @WFKARS (Twitter)

Landmarks in the Law

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CRIMINAL LAW

JUDICIAL LAW

■ **Procedure: A precedential court of appeals opinion is binding immediately upon filing.** Appellant was charged with second-degree and third-degree murder, as well as second-degree manslaughter, following the death of a single victim. The district court granted appellant's motion to dismiss the third-degree murder charge, because appellant's death-causing actions were specifically directed at only one particular person. The Minnesota Court of Appeals subsequently issued a precedential opinion in *State v. Noor*, 955 N.W.2d 644 (Minn. Ct. App. 2021), which held that "a conviction for third-degree murder… may be sustained even if the death-causing act was directed at a single person." *Id.* at 656. The state then moved to reinstate appellant's third-degree murder charge, but the district court denied the motion, finding that the court of appeals opinion did not become binding "until the deadline for granting review by the Minnesota Supreme Court has expired."

The court of appeals holds that the district court erred by refusing to treat *Noor* as binding precedent. *Stare decisis*, as reflected in the Minnesota Rules of Civil Appellate Procedure, requires the district courts to "'stand by things decided' by [the appellate court] until a different decision is made by the Supreme Court." No appellate rules exist that limit the precedential effect of a court of appeals opinion that the court labels precedential. Giving precedential appellate opinions immediate authoritative effect also "promotes consistency, predictability, and stability in the law…" Once a precedential opinion from the court of appeals is filed, it immediately becomes binding authority. Reversed and remanded for reconsideration of the state's motion to reinstate the third-degree murder charge. ***State v. Chauvin***, 955 N.W.2d 684 (Minn. Ct. App. 3/5/2021).

■ **Wrongfully obtaining public assistance: State need not prove intent to defeat purposes of all public assistance statutes.** In 2012, to obtain public assistance benefits, appellant submitted a number of forms on which he denied having any assets or unearned income and asserted that he paid rent of $400 per month. His application was approved. He applied for recertification for the next four years, each time stating he had no assets or unearned income and paid a monthly rent of $400-425. An investigation revealed thousands of unreported funds in various bank accounts, 12 cars, and thousands of dollars in gambling winnings. Appellant also never rented the home listed on his application forms, but had, instead, signed a contract for deed and owned the property outright as of July 2015. Ultimately, a jury found him guilty of wrongfully obtaining benefits of more than $35,000.

On appeal, appellant argues his conviction should be reversed because the state failed to prove he acted with the intent to defeat the purposes of all of the public assistance statutes listed in the wrongfully obtaining public assistance statute, Minn. Stat. §256.98, subd. 1. The statute makes it a crime to wrongfully obtain public assistance "with intent to defeat the purposes of" a number of listed statutes, joined by the conjunction "and." The court of appeals finds, however, that interpreting the list as conjunctive would produce an absurd result, noting "[t]here could be no sound reason" to require an intent to defeat the various purposes of all the listed benefits programs. The state need only prove an intent to defeat the purposes of one of the listed statutes. The appellate court also finds the district court did not err in its jury instructions or restitution order, and appellant's conviction is affirmed. ***State v. Irby***, 957 N.W.2d 111 (Minn. Ct. App. 3/8/2021).

■ ***Missouri v. McNeely* does not apply retroactively on collateral review.** Respondent was convicted of test refusal in 2010, after he refused warrantless

urine and blood tests. Since then, *Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), were decided. Under *McNeely*, alcohol dissipation is not a *per se* exigent circumstance justifying a warrantless blood test, and whether a warrantless blood test is reasonable must be determined on a case-by-case basis based on the totality of the circumstances. Under *Birchfield*, "test refusal… may be criminalized consistent with the Fourth Amendment only when there is a warrant for the test or a warrant exception applies." Respondent's petition for post-conviction relief was denied, but the Supreme Court ultimately held that *Birchfield* applied retroactively to respondent's petition because it announced a new substantive rule. On remand, the district court did not address whether *McNeely* applied, but found respondent was entitled to post-conviction relief. The court of appeals reversed but held that *McNeely* applied retroactively.

On the state's petition for review, the Supreme Court considers whether *McNeely* applies retroactively to respondent's post-conviction petition. A new rule is applied retroactively only on direct review of convictions that were final before the new rule was announced, unless the rule is substantive or a "watershed" rule of criminal procedure. The parties agree *McNeely* announced a new rule and that it is not a watershed procedural rule, so the remaining question is whether it announced a new substantive rule.

New substantive rules "narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). The rule in *McNeely*, however, is procedural, as it controls the manner of determining whether an exigency exists. "Exigent circumstances was a valid exception to the warrant requirement both before and after *McNeely*. The Court in *McNeely* simply clarified how the State proves that exception." This analysis is the same in both the DWI and test refusal contexts. Therefore, *McNeely* does not apply retroactively to respondent's post-conviction challenge.

The district court did not properly apply the pre-*McNeely* standard for exigent circumstances in this case, so the case is remanded for the district court to determine if the test refusal statute was constitutional as applied to respondent. ***Johnson v. State***, 956 N.W.2d 618 (Minn. 3/24/2021).

■ **Burglary: Second-degree burglary requires proof a defendant committed burglary while possessing tools specifically to gain access to money or property.** A surveillance camera inside a convenience store captured a glass pane shattering, after which appellant stepped through. Appellant put boxes of cigars and cigarettes into a bag and left. After a jury trial, appellant was convicted of second-degree burglary.

As is relevant in this case, second-degree burglary requires entry into a building without consent, the commission of a crime therein, and the possession of a tool to gain access to money or property "when entering or while in the building." Minn. Stat. §609.582, subd. 2(a). Looking to case law and the dictionary, the court of appeals notes that the phrase "to gain" requires the state to prove the burglar possessed a tool for the purpose of gaining access ("the means, place, or way by which a thing may be approached" or "passageway") to money or property.

The court agrees that the evidence is insufficient to prove that appellant possessed and used a tool to gain access to money or property when he entered the store, because the evidence was inconclusive as to how the glass was broken. The court also rejects the state's argument that the gloves and garbage bag were tools appellant used to gain access to money or property once inside the store. Even assuming gloves or a plastic bag are "tools," mere possession of tools is insufficient. Once inside the store, appellant had access to the items he stole. He did not use the gloves or bag to *gain access* to them. Appellant's conviction is reversed. ***State v. Nixon***, 957 N.W.2d 131 (Minn. Ct. App. 3/29/2021).

■ **Traffic violations: Driving with tires touching the edge of a fog line constitutes moving the vehicle "from the lane."** A trooper observed the outside edge of the passenger side tires of appellant's vehicle briefly touch the fog line on the right side of a highway. The trooper stopped appellant's vehicle and he was ultimately arrested for fourth degree DWI.

Minn. Stat. §169.18, subd. 7(1), requires that "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety." The court of appeals concludes that even brief contact with the fog line violates section 169.18, subd. 7(1). From prior case law and the language of the statute, the court infers that a "lane" is the area between the painted lines, not the lines themselves. Any movement at all outside of this area is a violation of the statute, which aims to prevent collisions outside of a vehicle's lane that "can occur when even a small portion of a car extends out of bounds."

The trooper here had reason to suspect appellant violated section 169.18, subd. 7(1), and, therefore, had reasonable suspicion to stop appellant's vehicle. ***Soucie v. Comm'r of Pub. Safety***, 957 N.W.2d 461 (Minn. Ct. App. 3/29/2021).

■ **Homicide: Depraved mind murder requires an eminently dangerous act committed with the mental state of reckless disregard of human life.** While intoxicated, appellant drove a snowmobile at a high rate of speed and collided with an eight-year-old child, who later died. At trial, the district court gave the model jury instruction on third-degree depraved mind murder, to which appellant did not object. The jury ultimately found appellant guilty on the third-degree murder charge. He appealed, challenging the court's instructions on the mental state required for third-degree depraved mind murder. The Minnesota Court of Appeals found the jury instruction was erroneous, but that it was not plain error. The Supreme Court granted petitions for review from both appellant and the state.

The third-degree depraved mind murder statute states that "[w]hoever, without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, is guilty of murder in the third degree…." The jury instruction in question is as follows: "The defendant's intentional act which caused the death of [the child] was eminently dangerous to human beings and was performed without regard for human life. Such an act may not be specifically intended to cause death and may not be specifically directed at [the child], but it was committed in a *reckless or wanton manner* with the knowledge that someone *may* be killed and with a heedless disregard of that happening." The Supreme Court finds that the instruction was erroneous.

The Court first summarizes its previous cases discussing depraved mind murder, noting that dicta from those cases caused confusion regarding the required mental state, leading some to believe a reckless act was required, as opposed to a mental state of reckless disregard of life. The court clarifies that "the mental-state element for third-degree depraved

mind murder requires a showing that the eminently dangerous act was committed with a mental state of *reckless disregard of human life*" (emphasis in original). The offense does not include "a mental-state element that requires a showing that the *act* was committed in a *reckless manner*" (emphasis in original).

The Court specifically holds that "a defendant is guilty of third-degree murder, when based on the attending circumstances: (1) he causes the death of another without intent; (2) by committing an act eminently dangerous to others, that is, an act that is highly likely to cause death; and (3) the nature of the act supports an inference that the defendant was indifferent to the loss of life that this eminently dangerous activity *could* cause."

The jury instruction here, which mirrored CRIMJIG 11.38, incorrectly attaches the reckless component to the act itself. But even if this error was plain, it did not affect appellant's substantial rights, as it is not reasonably likely it had a significant effect on the verdict. Appellant's conviction is affirmed. ***State v. Coleman***, 957 N.W.2d 72 (Minn. 3/31/2021).

■ **Firearms: A driver of a motor vehicle on a public highway is in a "public place."** Appellant was arrested for DWI and told police his phone was in the center console of his vehicle, next to his pistol. Appellant had a valid permit to possess a pistol. He was charged with, among other offenses, carrying a pistol in a public place while under the influence of alcohol. The district court granted his motion to dismiss, determining that the appellant's private vehicle was not a public place. But the court of appeals reversed, finding that the public highway on which appellant drove was a public place.

Minn. Stat. § 624.7142, subd. 1(4), notes that "[a] person may not carry a pistol on or about the person's clothes or person in a public place… when the person is under the influence of alcohol." "Public place" is not defined in the statute, and dictionaries provide multiple reasonable definitions. Thus, the Supreme Court first determines the statute is ambiguous.

Multiple canons of construction support a conclusion that the statute prohibits carrying a pistol in a motor vehicle that is driven on a public highway. First, the "mischief to be remedied" is carrying a pistol in public while impaired, which endangers others. This danger is present even if the person is in a vehicle. The "object to be attained" by the statute is public safety, specifically, reducing injury to people from the discharge of a pistol in a public place. Vehicles are mobile and may be driven in close proximity to people in public places, so prohibiting an impaired driver from carrying a pistol on a highway promotes the purpose of the statute. As to the "consequences" of the court's interpretation, the Court notes that its holding is narrow, does not open the door to warrantless vehicle searches, and protects the public while imposing only a minimal burden on carry permit holders. The Supreme Court affirms the decision of the court of appeals. ***State v. Serbus***, 957 N.W.2d 84 (Minn. 3/31/2021).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Sex harassment, retaliation; claim denied.** A woman's lawsuit for sex harassment retaliation after she quit and claimed constructive discharge was dismissed. The 8th Circuit affirmed a lower court ruling on grounds that the claimant did not give her employer reasonable opportunity to address her workplace harassment complaints, and she also failed to engage in statutorily protected conduct to buttress her retaliation claim. ***Lopez v. Whirlpool Corp.***, 989 F.3d 656 (Minn. Ct. App. 3/4/2021).

■ **Reinstatement of employees; reconsideration denied.** The rejection of a wrongful termination claim by a railroad conductor under the Federal Railway Safety Act was upheld. The 8th Circuit ruled that the Administrative Review Board did not err in denying the employee's request for reconsideration of the declination of the employee's petition for review. ***Soo Line Railroad, Inc. v. Administrative Review Board***, 990 F.3d 596 (8th Cir. 3/4/2021).

■ **Sheriff's salary; 23% increase allowed under statute.** The Freeborn County sheriff was entitled to an increased salary because the County Board did not "articulate any reasoning in setting the figure at $97,020 for 2019." The Supreme Court reversed the Minnesota Court of Appeals and upheld the Freeborn County trial court decision establishing a 23% salary increase to $133,951 under Minn. Stat. §387.20, which authorizes the challenge to salaries of sheriffs. ***In re year 2019 Salary of Freeborn County Sheriff***, — N.W.2d —— (Minn. Ct. 3/10/2021).

■ **Off-duty employment; officer not defended or indemnified.** An off-duty St. Paul police officer was not entitled to be defended and indemnified by the city for a lawsuit brought against him in Minnesota for off-duty work as a private security guard at a homeless shelter. The Supreme Court held that the defense and indemnification statute, Minn. Stat. §466.07, did not apply because the officer was not "acting in performance of the duties of the position" of a police officer in connection with the incident, which involved his failure to detect a knife in possession of a resident there.

■ **Arbitration award; "wellness pay" permitted.** An arbitration ruling that teachers in a Minneapolis School District were entitled to "wellness pay" benefits under their union contract was upheld. The court of appeals affirmed a decision of the Hennepin County District Court that the petition by the union was timely and the benefit was permissible under the bargaining agreement. ***Special School Dist. No, 1 Minneapolis Public Schools v. Minneapolis Federation of Teachers***, 2021 WL 955462 (Minn. Ct. App. 3/15/2021) (unpublished).

■ **Unemployment compensation; time period extended**. The provision in an executive order issued by Gov. Walz suspending "strict compliance" with the state unemployment insurance law during the covid pandemic permitted a belated appeal by an applicant of an initial denial for benefits. Reversing a ruling of an unemployment law judge (ULJ) with the Department of Employment & Economic Development (DEED), the court of appeals held that the order entered under the Emergency Management Act, Minn. Stat. §12.01, *et seq.* allowed the late filing, although it did not extinguish the deadlines altogether. ***In re Murack***, 2021 WL 852083 (Minn. Ct. App. 3/8/2021) (unpublished).

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **Minnesota Supreme Court clarifies contested case hearing standard for environmental permits.** The Minnesota Supreme Court issued an opinion clarifying the standard that determines when the Department of Natural Resources (DNR) must grant a contested case hearing (CCH) on a permit to mine (PTM) under Minn. Stat. 93.483, subd. 3(a). Because the CCH standard in §93.483, subd. 3(a) is essentially identical to the standard for when the Minnesota Pollution Control Agency (MPCA) must grant a CCH under Minn. R. 7000.1900, subp. 1, the opinion is also relevant to MPCA's review of CCH requests regarding MPCA-issued permits such as NPDES/SDS permits, air permits, and Clean Water Act section 401 certifications.

The NorthMet case involved a challenge to a permit to mine and two dam safety permits the DNR recently issued to PolyMet Mining Inc. to build and operate Minnesota's first copper-nickel mine. Environmental and tribal groups submitted comments on the draft permits and requested a CCH; DNR denied the CCH requests; and the groups appealed both the permits and the CCH denials.

The opportunity to request a CCH arises during the comment period on a proposed permit, prior to issuance of the final permit. CCHs are conducted by administrative law judges and, especially for large controversial projects, can resemble district court trials and add up to a year to the process of obtaining a permit. Minn. Stat. 93.483, subd. 3(a) specifies that the DNR commissioner must grant a CCH petition if she finds that there is a material issue of fact in dispute concerning the completed application before the commissioner; the commissioner has jurisdiction to make a determination on the disputed material issue of fact; and there is a reasonable basis underlying a disputed material issue of fact so that a contested case hearing would allow the introduction of information that would aid the commissioner in resolving the disputed facts in order to make a final decision on the completed application.

The Supreme Court rejected the court of appeals' broad interpretation of when a CCH must be held. The court of appeals had held that if a petitioner simply presented evidence of significant conflicting factual issues, DNR was required to hold a CCH. The Supreme Court held that this interpretation improperly read DNR's discretion out of the statute. DNR has discretion, the Court held, "to determine whether a hearing on the factual disputes in a petition for a contested case hearing will 'aid' the agency in making a final decision on the completed application."

Applying this standard to DNR's rejection of the environmental and tribal groups' CCH requests, the Court held that substantial evidence in the record supported DNR on some but not all issues in the CCH request. Specifically, while the Court held that there was substantial evidence supporting DNR's rejection of a CCH (or the issues had not been properly raised) regarding (a) the tailings basin upstream construction design, (b) alternatives to a wet closure basin design, (c) whether the planned bentonite amendment will negatively impact dam stability, (d) financial assurance, and (e) investor Glencore's involvement, the Court held that there was not substantial evidence in the record supporting DNR's denial of a CCH on the issue of whether bentonite amendment is a practical and workable reclamation technique that will satisfy DNR's reactive waste rule. Thus, DNR ordered a CCH on this single issue.

The Supreme Court also held that the environmental and tribal groups had satisfied a standing requirement unique to DNR's CCH statute. Subdivision 1 of section 93.483 provides that a CCH may be requested by "[a]ny person owning property that will be affected by the proposed operation…" The Supreme Court agreed with the court of appeals that the environmental and tribal groups had standing to seek a CCH under this standard. The key phrase "affected by the proposed [mining] operation" did not refer only to individuals owning property directly adjacent to the mining project but also to those property owners whose properties would be "affected" by the project, meaning "acted upon, influenced, or changed" by the possible release of pollutants from the tailings basin or by the risk of dam failure. The groups had met this standard, the Court held.

Finally, the Supreme Court rejected DNR's longstanding practice of not establishing fixed terms for mining permits, concluding that the statutory word "term" meant a fixed, definite period of time. The Court held that DNR erred by issuing the PTM without a fixed term.

The Supreme Court remanded to DNR to hold a CCH on the issue of the effectiveness of the bentonite amendment and, thereafter, to fix the appropriate term for the PTM. The Court also concluded that the court of appeals had prematurely reversed the dam safety permits to allow for reconsideration after a CCH on the PTM. If, after the PTM CCH, reconsideration of the dam safety permits is necessary, then at that point, the Supreme Court held, the DNR in its discretion may modify the dam safety permits. ***Matter of NorthMet Project Permit to Mine Application Dated December 2017***, ___ N.W.2d ____ 2021 WL 1652768 (Minn. 4/28/2021).

Minnesota Supreme Court holds PUC need not conduct environmental review for affiliated-interest agreement for power produced outside of Minnesota. The Supreme Court issued an opinion addressing the issue of whether the Minnesota Environmental Policy Act (MEPA) requires the Minnesota Public Utilities Commission (MPUC) to conduct an environmental review under Minnesota law before deciding whether to approve affiliated-interest agreements for the construction and operation of a power plant in a neighboring state.

The issue in front of the Court arose when Minnesota Power filed a petition with MPUC in 2017 seeking approval for its Energy*Forward* resource package, as required under Minnesota law. Specifically, the petition included a proposal for the Nemadji Trail Energy Center (NTEC), a natural gas power plant, to be located in Superior, Wisconsin. Minnesota Power proposed that NTEC would be jointly owned and developed by South Shore Energy LLC, a Wisconsin affiliate of Minnesota Power, and Dairyland, a Wisconsin generation and transmission cooperative.

As required under Minnesota law, Minnesota Power sought MPUC review and approval of its three affiliated-interest agreements with South Shore associated with NTEC. The first agreement was for South Shore to sell its portion of the capacity produced at NTEC to Minnesota Power; the second was for South Shore to assign its rights and responsibilities as construction agent for NTEC to Minnesota Power; the third was for South Shore to assign its rights to act as the operating agent of NTEC to Minnesota Power. MPUC referred the Energy*Forward* plan and the affiliated-interest agreements to a contested case hearing before an administrative law judge (ALJ). The ALJ concluded that Minnesota Power failed to establish that the capacity purchase from NTEC was needed and reasonable, and therefore recommended that MPUC deny Minnesota Power's petition. After the ALJ recommendation, respondent Honor the Earth filed a petition with the Environmental Quality Board (EQB) to request MEPA review of the NTEC plant. EQB referred the petition to MPUC as the government unit responsible for making such decisions.

The MPUC did not adopt the ALJ's recommendations, instead finding that the capacity purchase from NTEC, as proposed by Minnesota Power, was needed and reasonable since it constituted a cost-effective resource for Minnesota Power to meet its energy needs as it works toward retiring older coal-powered resources.

In addressing the request for MEPA review, MPUC determined that its jurisdiction is limited to power plants proposed to be built in Minnesota; therefore, because NTEC was to be built in Wisconsin and was not a cross-border project, the power plant was not subject to Minnesota permitting and environmental review regulations. MPUC further determined that there was no "project" subject to MEPA review as approval of the affiliated-interest agreements would not grant permission to Minnesota Power to construct or operate a power plant. Instead, Minnesota Power would need to obtain such permission from the Wisconsin regulators.

Respondents appealed MPUC's decision to the Minnesota Court of Appeals. The court of appeals reversed MPUC's decision, concluding that "MEPA requires all state agencies to consider 'to the fullest extent practicable' the environmental consequences flowing from their actions." *In re Minn. Power's Petition for Approval of the EnergyForward Res. Package (in re Minn. Power)*, 938 N.W.2d 843, 850 (Minn. App. 2019) (quoting Minn. Stat. §116D.03, subd. 1 (2020)).

Upon review of the court of appeals' holding, the Supreme Court held that the court of appeals erred when it held that MPUC's approval of Minnesota Power's affiliated-interest agreements was a "project" that would be subject to MEPA regulations. In reviewing the plain language of Minn. Stat. §216B.48, the Court first determined that nothing within the plain language of the text pointed to the Legislature contemplating the need for environmental review simply because a regulated utility enters into and seeks MPUC approval of an affiliated-interest agreement. Second, the Court determined that MPUC approval of affiliated-interest agreements serves the purpose of ensuring fairness of the deal—making sure that the agreement is reasonable and consistent with the public interest. Finally, the Court determined that MPUC's review of an affiliated-interest agreement is focused on whether the agreement is fair to ratepayers and whether it is actually needed and reasonable in order to meet consumer demand.

The review need not be as broad as the one that would be required under an environmental impact statement or environmental assessment worksheet.

The Court further held that MPUC's approval of the affiliated-interest agreements did not grant permission to Minnesota Power to construct and operate NTEC in Wisconsin, as MPUC does not have the authority to permit such construction or operation in another state. The Court found that MPUC approval of the affiliated-interest agreements did not meet the criteria to be considered a "project" under MEPA, and as such, did not cause environmental effects. Therefore, MEPA review would not apply to MPUC's decision to approve the affiliated-interest agreements. The Court remanded the case to determine whether MPUC's approval of the affiliated-interest agreements was supported by substantial evidence. ***In the Matter of Minnesota Power's Petition for Approval of the EnergyForward Resource Package***, Nos. A19-0688, A19-0704, 2021 WL 1556816, ___ N.W.2d ____ (Minn. 2021).

ADMINISTRATIVE ACTION

■ **EPA usurps MPCA in listing impaired wild rice waters.** In late April the U.S. Environmental Protection Agency (EPA) sent a letter to the Minnesota Pollution Control Agency (MPCA) identifying 30 Minnesota waters that EPA determined to be impaired under Minnesota's controversial Class 4A 10 mg/L sulfate water quality standard, which applies to "water used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels." Minn. R. 7050.0224, subp. 2. EPA's listing follows a 3/26/2021 letter to MPCA in which EPA partially disapproved MPCA's Clean Water Act (CWA) section 303(d) List of Impaired Waters still requiring Total Maximum Daily Loads (the "303(d) List"), which MPCA submitted for EPA approval, as required by the CWA, on 2/25/2021. EPA's partial disapproval was based on MPCA's decision to not list any waters as impaired for the wild rice sulfate standard (WRSS) in part 7050.0224, subp. 2.

By way of brief background, although the WRSS was adopted decades ago, MPCA only started enforcing it relatively recently. Following complaints by mining and other groups about the rule's lack of clarity regarding the waters to which it applied, the Minnesota Legislature, in 2011 and 2015, passed legislation limiting MPCA's ability to enforce the WRSS and prohibiting MPCA from listing waters as impaired for the WRSS until MPCA amends the rule to identify the specific waters to which the standard applies. (2015 Minn. 1st Spec. Sess. Ch. 4, Art. 4, Sec. 136.) Pursuant to these directives, MPCA in August 2017 issued a set of proposed rules repealing the 10 mg/L standard, establishing an equation-based approach for determining the protective sulfate level for a water body, and identifying 1,300 "wild rice waters" that would become subject to the new standard.

In January 2018, however, the administrative law judge presiding over the rulemaking proceeding issued a report disapproving of all major components of the proposed rule, including the proposed list of wild rice waters, which the ALJ determined was under-inclusive. In April 2018, MPCA withdrew the proposed rule, leaving the 10 mg/L standard in place. MPCA has not yet undertaken renewed rulemaking on the WRSS.

In February 2021, when MPCA submitted its 303(d) list to EPA, MPCA identified seven waters that it considered to be subject to the WRSS and that exceeded the WRSS. But MPCA indicated it did not include these waters on the 303(d) list because it was barred from doing so by state law. In response, EPA, in its 3/26/2021 letter, disapproved of MPCA's decision not to include the seven waters on the 303(d) list and indicated that EPA would itself list waters impaired for the WRSS pursuant to 40 C.F.R. §130.7. EPA's 4/27/2021 letter does just that, identifying 30 waters it has concluded are both subject to the WRSS and impaired for the WRSS. EPA set a 30-day comment period on the proposed listing and indicated that EPA is in the process of evaluating additional data received from tribal governments and may identify other sulfate-impaired waters as a result of that process. The initial comment period ran until 5/31/2021. ***Letter from Tera Fong, EPA Region 5, D to Katrina Kessler, MPCA, re Addition of Waters to Minnesota's 2020 List of Impaired Waters under Clear Water Act, Section 303(d)*** (4/27/2021).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **Personal jurisdiction; substantial business in forum state.** In March 2020, this column noted the Supreme Court's grants of *certiorari* in two cases (including one from the Minnesota) addressing whether Ford was subject to personal jurisdiction only if its conduct in the state gave rise to the plaintiff's claims.

The Supreme Court recently rejected Ford's argument that it was subject to specific personal jurisdiction only if it had designed, manufactured, or sold the particular vehicles at issue, instead finding that when a company "serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit." ***Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.***, 141 S. Ct. 1017 (2021).

■ **No waiver of arbitration despite participation in litigation; dissent.** Where the plaintiff filed an FLSA action in the Southern District of Iowa, the defendant moved to dismiss the action in favor of a Michigan action under the first-filed rule, the defendant lost that motion,

answered the complaint, participated in a mediation with the Michigan plaintiffs, and then moved to compel arbitration of the Iowa action eight months after that action was commenced, the 8th Circuit reversed the district court and found that the defendant had not waived its right to arbitrate because the "nature" of its motion to dismiss "did not address the merits of the dispute," and because the plaintiff had not been prejudiced by the delay.

Judge Colloton dissented, arguing that the motion to dismiss and the filing of an answer that "made no mention of arbitration" were both acts that were "inconsistent" with the right to arbitrate. ***Morgan v. Sundance, Inc.***, 992 F.3d 711 (8th Cir. 2021).

■ **Untimely *forum non conveniens* motion waives argument.** Where one defendant waited 18 months before bringing a motion to dismiss based on the doctrine of *forum non conveniens*, the 8th Circuit found that the district court had abused its discretion when it granted that motion because the 18-month delay was "sufficiently untimely." The 8th Circuit further commented that requiring that forum non motions be brought at an early stage in the litigation "promotes judicial economy" and "prevents defendants from engaging in impermissible gamesmanship." The court also noted that "when a party spends substantial time in a forum" before bringing a forum non motion, "it belies the claim that the forum is truly inconvenient." ***Estate of I.E.H. v. CKE Restaurants Holdings, Inc.***, ___ F.3d ___ (8th Cir. 2021).

■ **Motion to dissolve preliminary injunction provisionally granted; dissent.** Where a district court granted a preliminary injunction in November 2017, the defendant did not appeal from the entry of that injunction, the defendant moved to dissolve the injunction in March 2019, the motion was denied in May 2019, and the defendant appealed from the denial of that motion, an 8th Circuit panel found that changed circumstances—the passage of time—warranted a grant of the motion if the preliminary injunction was not replaced by a final order (either granting a permanent injunction or vacating the preliminary injunction) by 10/31/2021.

Judge Erickson dissented from the injunction ruling, asserting that the defendant's failure to identify "subsequent changes in law or fact" meant that the 8th Circuit lacked jurisdiction over that portion of the appeal. ***Ahmad v. City of St. Louis***, ___ F.3d ___ (8th Cir. 2021).

■ **Fed. R. Evid. 403; jury instructions; cumulative error; judgment reversed.** Determining that Judge Frank abused his discretion in admitting multiple pieces of evidence where the "minimally" probative value of that evidence was "substantially" or "unfairly" outweighed by the risk of unfair prejudice to the defendants, and that one jury instruction also constituted an abuse of discretion, the 8th Circuit found that the cumulative effect of these errors affected the defendants' "substantial rights," vacated the judgment, and remanded the case for a new trial. ***Krekelberg v. City of Minneapolis***, 991 F.3d 949 (8th Cir. 2021).

■ **Fed. R. Civ. P. 23(f); class certification reversed.** After granting the defendants leave to appeal a class certification order pursuant to Fed. R. Civ. P. 23(f), the 8th Circuit found that the district court had abused its discretion in certifying a plaintiff class pursuant to Fed. R. Civ. P. 23(b)(3) where a "prevalence of... individual inquiries" was required, and because it was an improper "fail-safe" class. ***Ford v. TD Ameritrade Holding Corp.***, ___ F.3d ___ (8th Cir. 2021).

■ **Mandamus; right to jury trial.** Where the district court struck the defendant's demand for a jury trial, the 8th Circuit granted her petition for a writ of mandamus and found that she had a "clear and indisputable right to a jury trial." The 8th Circuit also found that the defendant was not required to seek interlocutory review under 28 U.S.C. §1292(b) before seeking mandamus. ***In Re: Brazile***, 993 F.3d 593 (8th Cir. 2021).

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IMMIGRATION LAW

JUDICIAL LAW

■ **Supreme Court: Notice to appear must be a single document to trigger stop-time rule.** The U.S. Supreme Court held that a notice to appear (NTA) sufficient to trigger the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) stop-time rule (within the cancellation of removal context and its 10-year requirement of continuous presence in the United States) must be a single document containing all information about a removal hearing as specified under 8 U.S.C. §1229(a)(1). More specifically, it must include: 1) nature of the proceedings against foreign nationals; 2) legal authority under which the proceedings are conducted; 3) acts or conduct alleged to be in violation of law; 4) charges against them with statutory provisions alleged to have been violated; 5) advisory that they may be represented by counsel and given time to secure said counsel; 6) written record of address and telephone number with consequences for failing to provide such information; 7) time and place at which proceedings will be held with consequences for failing to appear at such proceedings.

In view of the Court's decision in *Pereira v. Sessions*, 585 U.S. ___ (2018), finding inadequate a notice to appear lacking the hearing time and place, the government in the instant case argued its acts of sending two NTAs over the span of two months (with the second one containing information about the time and place for the hearing) collectively met the requirements under 8 U.S.C. §1229(a)(1). The Court agreed to hear the case after some circuits had accepted the government's "notice by installment theory," while others did not, arguing that a single NTA must be issued in

order to trigger the stop-time rule. The Court agreed with the latter and opined that "words are how the law constrains power. In this case, the law's terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him." ***Niz-Chavez v. Garland***, 593 U.S. ___, No. 19-863, *slip op.* (2021). *https://www.supremecourt.gov/opinions/20pdf/19-863_6jgm.pdf*

■ **Supreme Court: Convictions, burden of proof, and eligibility for cancellation of removal.** The U.S. Supreme Court affirmed the 8th Circuit, finding that, under the Immigration and Nationality Act, certain nonpermanent residents seeking cancellation of removal bear the burden of proving they have not been convicted of certain criminal offenses (e.g., crime of moral turpitude) barring their eligibility for such relief. Here, the foreign national had "not carried that burden when the record shows he has been convicted under a statute listing multiple offenses, some of which are disqualifying, and the record is ambiguous as to which crime formed the basis of his conviction." ***Pereida v. Wilkinson***, 592 U.S. ___, No. 19-438, *slip op.* (2021). *https://www.supremecourt.gov/opinions/20pdf/19-438_j4el.pdf*

■ **Temporary protected status (TPS) is not an "admission" for cancellation of removal purposes.** The 8th Circuit Court of Appeals held that the petitioner's grant of temporary protected status (TPS) pursuant to INA §244(e) did not eliminate the requirement that he provide evidence he was "admitted" (i.e., "lawful entry… into the United States after inspection and authorization by an immigration officer") in order to establish eligibility for cancellation of removal under INA §240A(a). The court noted that its decision in *Velasquez v. Barr*, 979 F.3d 572 (8th Cir. 2020), dealing with TPS and "admission" in the adjustment of status context, was distinguishable given Congress's intent to create a legal fiction by its express stipulation that TPS status be considered an "admission" for adjustment of status and change of status purposes under 8 U.S.C. §1254a(f)(4). Consequently, the petitioner's grant of TPS in the instant case was not an "admission" for cancellation of removal purposes. ***Artola v. Garland***, 19-1286, *slip op.* (8th Cir. 5/5/2021). *https://www.ca8.uscourts.gov/content/19-1286-fredis-artola-v-merrick-b-garland*

■ **Khat, federal controlled substances, and asylum.** The 8th Circuit Court of Appeals held that the petitioner was removable because of his Minnesota conviction for possession of khat, which contains at least one of two substances listed in the federal schedules, related to federal controlled substances under INA §237(a)(2)(B)(i). The court further affirmed the Board of Immigration Appeals' conclusion that the petitioner's claimed membership in a "particular social group consisting of those suffering from mental health illnesses, specifically [post-traumatic stress disorder]" failed to comprise a socially distinct group. That is, Somali society does not make "meaningful distinctions based on the common immutable characteristics defining the group." ***Ahmed v. Garland***, 19-3480, *slip op.* (8th Cir. 4/8/2021). *https://ecf.ca8.uscourts.gov/opndir/21/04/193480P.pdf*

■ **Particularly serious crime analysis: Consider all reliable information, including mental health conditions.** The 8th Circuit Court of Appeals held that the immigration judge and Board of Immigration Appeals (BIA) had impermissibly refused to consider the Iraqi petitioner's mental illness as a factor in determining whether he was barred from the relief of withholding of removal based on a conviction for a particularly serious crime. The court concluded the BIA's categorical bar on considering the petitioner's mental health evidence was an arbitrary and capricious construction of INA §241, reaffirming its position in *Marambo v. Barr* that "all reliable information" pertaining to the nature of the crime, including evidence of mental health conditions, may be considered in a particularly serious crime analysis. ***Shazi v. Wilkinson***, 19-2842, *slip op.* (8th Cir. 2/11/2021). *https://ecf.ca8.uscourts.gov/opndir/21/02/192842P.pdf*

ADMINISTRATIVE ACTION

■ **DHS announces 22,000 additional H-2B temporary non-agricultural worker visas.** In April the Department of Homeland Security announced a supplemental increase of 22,000 visas for the H-2B temporary non-agricultural worker program as the economy reopens with an increased need for temporary seasonal workers. The H-2B visa program "is designed to help U.S. employers fill temporary seasonal jobs, while safeguarding the livelihoods of American workers" by requiring those employers to test the U.S. labor market and certify there are insufficient workers who are "able, willing, qualified, and available" to do the work. At the same time, 6,000 of those visas will be reserved for nationals of the Northern Triangle countries of Honduras, El Salvador, and Guatemala in order to expand "lawful pathways for opportunity in the United States" consistent with the President's Executive Order 14010 on "Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border." The 22,000 visas will be made available in the coming months by way of a temporary final rule to be published in the *Federal Register*. U.S. Department of Homeland Security, *News Release* (4/20/2021). *https://www.dhs.gov/news/2021/04/20/dhs-make-additional-22000-temporary-non-agricultural-worker-visas-available*

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INTELLECTUAL PROPERTY

JUDICIAL LAW

Trademarks: Voluntary dismissal of Lanham Act claim deprives court of supplemental jurisdiction. Judge Ericksen recently dismissed without prejudice an action for breach of contract and trademark infringement after Country Inn & Suites by Radisson, Inc. voluntarily dismissed its Lanham Act claims in its motion for summary judgment. Country Inn sued defendants Alexandria Motels, Inc.; Lake Country Motels, LLC; and Vibha Patel related to breach of a license agreement. Country Inn alleged that Alexandria Motels breached the license agreement, that Lake Country Motels and Patel breached their guarantees, and that the defendants continued to use Country Inn's trademark after the termination of the license agreement. In its motion for summary judgment, Country Inn sought judgment on its breach of contract claims and attorneys' fees claims but voluntarily dismissed the Lanham Act trademark infringement claims (Count IV) and false designation of origin/federal unfair competition claims (Count V). Following Country Inn's dismissal of Counts IV and V, the court either had an obligation to dismiss the action for lack of subject-matter jurisdiction or an option to decline to exercise supplemental jurisdiction over the remaining claims. The court found no reason to exercise supplemental jurisdiction over the remaining claims, and dismissed the action without prejudice. ***Country Inn & Suites by Radisson, Inc. v. Alexandria Motels, Inc.***, No. 19-cv-1485 (JNE/LIB), 2021 U.S. Dist. LEXIS 78983 (D. Minn. 4/26/2021).

Copyright: Use of application programming interfaces deemed "fair use" under the Copyright Act. The Supreme Court of the United States recently held that Google's use of application programming interfaces (APIs), part of Oracle's Java SE platform that uses the Java programming language, to build a new Android platform constituted permissible "fair use." Following the Court of Appeals for the Federal Circuit's reversal of the district court's finding of fair use, Oracle appealed, and cert was granted. When considering whether use of a work constitutes fair use, courts consider four statutory factors: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. §107. Google's use of the APIs served an organizational function akin to the Dewey Decimal System, which is different from code that executes a task. The use was transformative because Google used only the portions of code necessary to create the Android platform, which furthered the development of computer programs and the creative process that is supported by the constitutional objective of copyright itself. Google's copying of 11,500 lines of Oracle's API code supported fair use because Google used only 0.4% of the Sun Java API (2.86 million lines of code) and because the used lines did not include the "heart" of the original work's creative expression. Finally, the risk of creativity-related harms to the public outweighed any potential harm to Oracle as Oracle was not competing in the smartphone market. The court held the copying constituted "fair use" and reversed the Federal Circuit. The case was remanded for further proceedings in conformity with its opinion. ***Google LLC v. Oracle Am., Inc.***, 141 S. Ct. 1183 (2021).

JOE DUBIS
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TAX LAW

JUDICIAL LAW

"Stupid tax policy": Advance premium credit creates trap for unwary insureds. The Affordable Care Act (ACA) provided for various tax credits, one of which is the premium assistance tax credit (PTC). The PTC subsidizes health insurance premiums for taxpayers whose income in the tax year was between 100% and 400% of the federal poverty line. Unlike most tax credits, the PTC benefits are not claimed after the taxpayer files a return. "Instead, the ACA provides for advance payment of the PTC if taxpayers qualify under an advance eligibility determination. These advances are paid directly to the insurer in monthly payments and the insurer, in turn, reduces the premium charged to the insured taxpayers by the amount of the APTC received."

As the tax court explains, "[w]hile the APTC helps to ease the timing burden by spreading the payments throughout the tax year, it also creates a potential trap for taxpayers whose household income increases year over year. Specifically, if taxpayers who qualified for a PTC in a prior year increase their household income to more than 400% of the Federal poverty line in a following year, they may continue to receive an APTC to which they are not entitled in that year. To recover the erroneous payments, the law requires such taxpayers to reconcile the amount of APTC they received with their actual eligible credit amount when they file their income tax return.… If taxpayers receive more APTC than they are due, they owe the excess credit back to the Government and must repay it as an increase in tax." ***Aschenbrenner v. Comm'r***, No. 2676-20S, 2021 WL 1661227, at *2 (T.C. 4/1/2021).

Several cases were reported this month in which taxpayers were caught in this trap. *See also, e.g.*, ***Gates v. Comm'r***, No. 1475-20S, 2021 WL 1521726, at *3 (T.C. 3/12/2021) (expressing sympathy with the petitioners and noting "that petitioners are not the first taxpayers who have found themselves in similar situation faced with unexpected Federal tax consequences because of poor or erroneous tax advice received with respect to the

premium tax credit"); ***Antilla-Brown v. Comm'r***, No. 14511-19S, 2021 WL 1720005, at *2 (T.C. 3/18/2021) (involving a particularly sympathetic taxpayer who, due to a combination of factors, faced a tax rate of 580% on the $956 by which she and her spouse exceeded 400% of the federal poverty level; this court had particularly strong language: "I noticed that the government had no defense on the grounds of tax justice here. There is none. This is stupid tax policy to have such a high rate of tax on working people when they enter retirement.")

■ **Minnesota Supreme Court ruling influences tax court to deviate from Rule 8100 default rule.** Enbridge Energy, Limited Partnership (EELP) owns and operates an interstate petroleum pipeline system in Minnesota and throughout the upper Midwest and elsewhere. The Minnesota portion of the pipeline system is known as the Lakehead system. Previously, the tax court concluded that the commissioner overvalued EELP's pipeline system for assessment dates of January 2012, January 2013, and January 2014. *See Enbridge Energy, Ltd. P'ship v. Comm'r of Revenue*, No. 8579-R et al., 2019 WL 5995766, at *2 (Minn. T.C. 11/5/2019). In the 2017 consolidated trial, the court was asked to consider the three main approaches to value—market, cost, and income. In that case, EELP presented testimony from two experts who stated that the sales comparison approach had no validity at all in the appraisal process and asked the court not to consider it. Without offering additional evidence, the commissioner also asked the tax court to not consider the sales comparison approach. Both parties encouraged the court to consider the cost approach to valuation, but the court rejected the cost approach, reasoning that: 1) EELP was not rate-regulated during the years at issue, and 2) the tax court was not bound by the cost approach. *See* Minn. R. 8100; *see also Enbridge Energy, Ltd. P'ship v. Comm'r of Revenue*, No. 8579-R et al., 2018 WL 2325404, at *15-*23 (Minn. T.C. 5/15/2018). Having rejected the sales comparison and cost approaches, the court concluded that the income approach to valuation was appropriate, and the total unit value of the Lakehead system was $3,595,398,000; $3,292,362,000; and $3,416,667,000 as of the respective assessment dates.

The commissioner filed a discretionary appeal of the tax court's order and challenged the court's rejection of Rule 8100 as binding on the tax court. *See Comm'r of Revenue v. Enbridge Energy, LP (Enbridge I)*, 923 N.W.2d 17, 19 (Minn. 2019). The Supreme Court granted review and analyzed the tax court's decision to reject the cost approach in light of Minnesota Administrative Rule 8100, concluding that the tax court erred by determining it was not bound by Rule 8100, and remanded for proceedings consistent with the Court's ruling.

Considering the Supreme Court's decision, the tax court agreed that the record was sufficient to reach a determination of value under the cost approach. With Rule 8100 in mind, the tax court reevaluated its conclusion under the income approach, concluding to the value of the Lakehead system as $2,947,220,888; $2,807,096,461; and $2,685,631,007 as of the respective assessment dates. The tax court then evaluated the system under the cost approach and concluded the Lakehead system was valued at $4,209,710,781; $4,856,317,249; and $6,766,060,594 under the cost approach as of the respective assessment dates. After determining valuations under both the income and cost approach, the court evaluated how much weight should be given to each approach. The commissioner argued that the two approaches should be given equal weighting. EELP argued that the tax court should give the income approach no less than 80% weight. Reasoning that Rule 8100.0300 dictates equal weighting even though the pipelines being assessed under the Rule are, by definition, income-producing, the tax court concluded that the cost and income approaches should be weighed 50-50.

EELP filed a motion for amended findings arguing that the tax court erred: "(1) by misapplying Rule 8100's reconciliation provisions; (2) by indiscriminately taxing construction work in progress (CWIP); and (3) by making inadvertent numerical and computational errors in determining apportionable values." The motion, however, was stayed because the presiding judge left the tax court. Before the motion was reassigned, the tax court ruled in another matter involving EELP's 2015 and 2016 assessments. *See Enbridge Energy, Ltd. P'ship v. Comm'r of Revenue*, Nos. 8858-R & 8984-R, 2019 WL 2853133 (Minn. T.C. 6/25/2019). EELP appealed the tax court's 2015 and 2016 decision to the Minnesota Supreme Court. *See Enbridge Energy, Ltd. P'ship v. Comm'r of Revenue*, Nos. 8858-R & 8984-R, 2019 WL 5995805 (Minn. T.C. 11/5/2019). On appeal, EELP raised three issues: "(1) the court's application of Rule 8100's reconciliation provisions; (2) the court's treatment of CWIP; (3) and the court's treatment of external obsolescence."

The Minnesota Supreme Court ruled on all three issues raised by EELP, and issued its decision, known as *Enbridge II*, in July 2020. Relevant to this matter, is the Court's evaluation of "whether the tax court erred by placing equal weight on the cost and income indicators of value to calculate the unit value of the pipeline system." The Supreme Court held that the tax court erred in applying equal weight, explaining that the rules recognize that the tax court has the discretion to depart from the valuation formula "whenever the circumstances of a valuation estimate dictate the need for it." Minn. R. 8100.0200. However, "[i]n failing to recognize that it had the discretion to depart from the default weightings if dictated by the circumstances of the case, the tax court erred as a matter of law." The Supreme Court reversed and remanded "for the limited purpose of allowing the tax court to consider whether the circumstances of this case dictate a need to depart from the default weightings," and, if so, the tax court must fully explain its reasoning.

Following the Supreme Court's ruling in *Enbridge II*, the tax court lifted the stay on EELP's motion and allowed for an amended motion to amend the tax court's findings. In its amended motion, EELP asks the tax court: "(1) to use its discretion to depart from Rule 8100's default weighting provision and adopt the reconciliation percentages advocated by EELP's appraiser at trial; and (2) to correct inadvertent numerical and computation errors." The commissioner argued that although the Supreme Court clarified that the tax court may exercise discretion to deviate from the default equal weightings in Rule 8100, the circumstances in this case do not dictate that the court do so.

The tax court agreed with EELP that the Supreme Court's decision in *Enbridge II* required it to modify its previous determination to assign a 50% weighting to the income and cost approaches, and that the record is sufficient to reach a determination on proper weighting.

When valuating property, the tax court is not required to give weight to all three valuation approaches. It may also place a greater weight on one approach over the others. *See Equitable Life Assur. Soc'y of U.S. v. Cty. of Ramsey*, 530

N.W.2d 544, 554 (Minn. 1995). Using multiple approaches is generally useful to serve as checks upon each other. *Id.* "[T]he three valuation approaches are neither exclusive nor mandatory and the quantity and quality of available data ultimately determines which approaches are useful and how much weight each is given." *Nw. Racquet Swim & Health Clubs, Inc. v. Cty. of Dakota*, 557 N.W.2d 582, 587 (Minn. 1997). The income approach usually receives considerable weight if the subject property is an income-producing asset, while the cost approach generally does not lend itself to accurate valuations of older properties. See *KCP Hastings, LLC v. Cty. of Dakota*, 868 N.W.2d 268, 275-76 (Minn. 2015); *Menard Inc. v. Cty. of Clay*, 886 N.W.2d 804, 819-20 (Minn. 2016). Ultimately, the weight placed on each approached depends on the reliability of the data and the property being evaluated. *Id.* "Pipelines, such as the Lakehead system, however, are special purpose properties, which can be reliably valued using the cost approach." *Guardian Energy, LLC v. Cty. of Waseca*, 868 N.W.2d 253, 261-62 (Minn. 2015).

After evaluating the evidence in the record, and the appraisal theory supported by expert testimony, the tax court agreed with EELP that the income approach should be afforded 80% weight and the cost approach should be given 20% weight. The court valued Lakehead system at $3,199,718,866 for January 2012, $3,216,940,619 for January 2013, and $3,501,716,925 for January 2014. ***Enbridge Energy, Limited Partnership v. Comm'r of Revenue***, 2021 WL 935006 (MN Tax Court 3/9/2021).

■ **Tax law proves a change in state legislation is needed.** On 12/30/2019, petitioner Bridgette Williams filed forms M1PR seeking to recover property tax refunds for rent paid in 2016 and 2017. The commissioner responded by issuing two notices of change denying the refund requests because the applications for refund were not filed within the time limit allowed by state law. Ms. Williams filed an administrative review appeal of the two notices of change, conceding that her refund claims were filed late, but explaining it was due to circumstances beyond her control. "Ms. Williams explained she did not receive her Certificate of Rent Paid in time, because her landlord had passed away, and her new landlord spent the remaining time gaining legal rights to the property to release her Certificate." Additionally, Ms. Williams stated her own medical condition deterred her from timely filing. The commissioner reviewed and denied the administrative appeal. The commissioner acknowledged the basis for the appeal but explained that the statute does not provide for any exceptions to the one-year limit for filing an original return.

On 4/16/2020, Ms. Williams timely filed an appeal with the tax court. "The Notice of Appeal asserts that the physical or mental incapacity of Ms. Williams and her landlord 'tolls the time of filing.'" The commissioner responded that the refunds were correctly denied under Minnesota law and brought a motion for judgment on the pleadings pursuant to Minn. R. Civ. P. Rule 12.03 and Minn. R. ch. 8610.0070, subpart 5. Ms. Williams appeared at the motion hearing and opposed the commissioner's motion.

Under Minnesota law, "[a]ny claim for refund based on rent paid must be filed on or before August 15 of the year following the year in which the rent was paid." Minn. Stat. §289A.18, subd. 5 (2020). Further, "[a] property tax refund claim... is not allowed if the initial claim is filed more than one year after the original due date for filing the claim." Minn. Stat. §289A.40, subd. 4 (2020). The tax court has previously interpreted these two statutes as having created a filing deadline one year beyond the statutory due date for filing property tax refund claims. *See Halonen v. Comm'r of Revenue*, 2019 WL 2932260, at *2 (Minn. T.C. 7/2/2019). Based on this interpretation, the due date of Ms. Williams' latest tax refund claim, 2017, was 8/15/2018 with the last filing deadline being one year later, on 8/15/2019. Ms. Williams did not file her claim for rent paid for 2016 and 2017 until December 2019; therefore, both claims were untimely.

Ms. Williams argued that "the doctrine of equitable tolling permits [the tax] court to toll the statutory time limit" for extraordinary circumstances. "The doctrine of equitable tolling allows a court to consider the merits of a claim when it would otherwise be barred by a statute of limitations." *Sanchez v. State*, 816 N.W.2d 550, 560 (Minn. 2012). The Minnesota Supreme Court has stated "where a statute gives a new right of action, not existing at common law, and prescribes the time within which it may be enforced, the time so prescribed is a condition to its enforcement...." *State v. Bies*, 258 Minn. 139, 147, 103 N.W.2d 228, 235 (1960). Further, the Supreme Court acknowledged that because the Legislature has created the right, it also has "the power to impose any restrictions it sees fit." *Id.* The tax court, therefore, does not have the authority to toll the statutory deadline for property tax refund claims. The court previously stated in a nearly identical case that the outcome "appears unjust," and reiterates that statement here. *See Mays v. Comm'r of Revenue*, 2001 WL 561335 (Minn. T.C. 5/15/2001). It is up to the Legislature to allow for tolling in special circumstances. Unfortunately, the tax court lacks the authority to provide Ms. Williams relief, and affirmed the commissioner's denial of the 2016 and 2017 property tax refund requests. ***Williams v. Comm'r of Revenue***, 2021 WL 1206480 (MN Tax Court 3/26/2021).


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WHITMORE

Pam Whitmore joined Eckberg Lammers as a shareholder, attorney, and Rule 114 Qualified Neutral. Whitmore focuses her practice on municipal law, conflict management solutions, employment law, and alternative dispute resolution/mediation.


FOSS

Jessica L. Foss, a Fredrikson & Byron shareholder, has been elected a fellow of the American College of Trust and Estate Counsel. Foss is based in her firm's Fargo office and works closely with individuals, families, and business owners to achieve their estate planning goals.


SJOBERG

Catherine "Trina" Sjoberg has joined Winthrop & Weinstine, PA with the firm's real estate development and transactions practice. Trina is an MSBA Board Certified Real Property Law Specialist with more than 20 years of experience representing real estate clients in a wide variety of matters.


FLANAGAN

Betsy Flanagan has been named the managing principal of Fish & Richardson's Twin Cities office. Flanagan's practice focuses on complex patent litigation, with an emphasis on life sciences, biotechnology, and pharmaceutical litigation.


WHITE

Kenneth R. White has been elected a fellow of the American Academy of Appellate Lawyers, one of the few in Minnesota and the only selected attorney in greater Minnesota. His Mankato-based law firm focuses on civil litigation, appellate practice, and research and writing for other lawyers. He also serves as an adjunct professor at the University of St. Thomas School of Law.

Edward R. Culhane and Daniel Sathre have joined Greenstein Sellers PLLC as partners and Mitchell Sullivan has joined as an associate attorney. Culhane is a seasoned transactional attorney, Sathre will continue his practice devoted to commercial litigation, and Sullivan's focus is in real estate.

Samantha Ivey and Gail Mattey have joined Atticus Family Law, SC. Both represent clients in family law matters, including divorce, custody, child support, parenting time, spousal maintenance, adoption, orders for protection, and juvenile protection legal needs.

Thomas H. Carey, age 84, of rural Biwabik (Lake Eshquaguma) died April 15, 2021. Between 1964 and 1986, he served as a well-known civil trial attorney for the Trenti and the Cope & Peterson law firms of Virginia, MN. He served as a state district court trial judge in Minnesota from 1986 to 2000. He also mentored many students as an adjunct professor at William Mitchell College of Law.

Robert Tansey passed away on April 4, 2021 at 78. He received his law degree from the University of Minnesota and spent his career as a respected trial lawyer. He absolutely loved doing battle in the courtroom, delighted in mentoring the next generation, and taught his family the fine skill of debate at home.

James Thomas Hart, died on March 15, 2021 at age 91. He was assistant city attorney for the city of Saint Paul as well as general counsel for the Saint Paul Housing Authority. He moved to Ely after his retirement in 1994.

Robert Carl 'Bob' Parta died on March 6, 2021 at age 78. He graduated from the University of Minnesota Law School. He served as an attorney in private practice in the city of Anoka and in public service as chief deputy county attorney for Anoka County.

Manuel Jesus Cervantes, age 70, of St. Paul passed away on March 31, 2021. He graduated from law school in 1980 and became an attorney at the AFL-CIO. In 1986, he was appointed as a judge on the Minnesota Workers' Compensation Court. From 1992-2002 he was a referee in Ramsey County District Court, presiding over cases in family, juvenile, and domestic abuse court. He was named as St. Paul city attorney and state administrative law judge. In 2018, the Minnesota State Bar Association presented Cervantes with the Rosalie E. Wahl Judicial Award of Excellence for his outstanding work as a judge and for improving the state's quality of justice.

R. Bertram 'Bert' Greener, age 80 of Minneapolis, passed away on March 23, 2021. Greener attended Duke University Law School. He joined Fredrikson & Byron in 1969, practicing there for 40 years. Greener provided legal counsel for the Billy Graham Evangelistic Association and was a founding member of Minnesota Lawyers Mutual Insurance.

Walter Frederick Mondale died on April 19, 2021. Graduating from the University of Minnesota Law School in 1956, Mondale became the Minnesota attorney general in 1960 at age 32. He served in the U.S. Senate from 1964 to 1976, having a profound impact on society-changing legislation such as the Fair Housing Act of 1968. After serving as vice president from 1977 to 1981, Mondale practiced law at the Winston & Strawn law firm for a period of time. He became the Democratic nominee for president of the U.S. in 1984. After joining Dorsey in 1987, he twice returned to public service for periods of time before rejoining the firm.

Jeanette Frederickson, age 75 of St. Paul, passed away April 22, 2021. She started her career as an art teacher and moved to Minneapolis to obtain a Master's degree in deaf education, and then attended law school at William Mitchell. She had a long career in family law, eventually starting her own firm, Frederickson and Associates.

Lawrence Zelle died on May 8, 2021. Zelle attended the University of Minnesota Law School and from there launched a distinguished legal career, during which he made countless close friends.

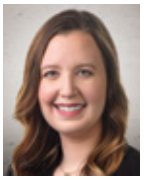
DAYTON KLEIN

Gov. Walz appointed Julia Dayton Klein as district court judge in Minnesota's 4th Judicial District. Dayton Klein will be replacing Hon. Thomas S. Fraser and will be chambered in Minneapolis in Hennepin County. Dayton Klein is a partner and trial lawyer at Lathrop GPM.

HUNTINGTON

STEEN

Bryan Huntington and Jacob Steen have been elected as shareholders of Larkin Hoffman. Huntington represents clients in the enforcement of property rights. Steen focuses his practice in government approvals, including liquor licensing, business licensing, zoning, environmental review, and other regulatory matters.



HABEIN

Laura A. Habein joined Fredrikson & Byron in the business & tax planning group. Habein guides business owners in strategic planning initiatives to meet their long-term objectives.

WASSWEILER

William P. Wassweiler was named the Minnesota Chapter of the Turnaround Management Association's 2020 Trustee Counsel of the Year. Wassweiler is a commercial litigation partner at Ballard Spahr.

Timothy Walsh joined Saul Ewing Arnstein & Lehr as a partner in the real estate practice. Walsh represents commercial developers and companies with commercial real estate needs.

Olivia Cooper and Devon Holstad joined Winthrop & Weinstine as associate attorneys in the business & commercial litigation practice.

VOLPE

SAUFLEY

Clarissa Volpe and Jacob Saufley joined Melchert Hubert Sjodin PLLP. Volpe joins the firm and will focus in the areas of municipal law and real estate law. Saufley joins the firm's real estate, business & corporate, and municipal practice groups.

WEBBER

Gov. Walz appointed Charles Webber as district court judge in Minnesota's 1st Judicial District. Webber will be replacing the Hon. Rex D. Stacey and will be chambered in Shakopee in Scott County. Webber is currently a partner at Faegre Drinker Biddle & Reath LLP.

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ASSOCIATE ATTORNEY. Rajkowski Hansmeier Ltd., a regional litigation firm with offices in St. Cloud, MN and Bismarck, ND, has an opening for an associate attorney with two to four years' experience to join its team of trial attorneys. Our firm has a regional practice that specializes in the handling of civil lawsuits throughout the State of Minnesota, North Dakota and Wisconsin, including a significant volume of work in the Twin Cities. We offer a collegial workplace with experienced trial attorneys who are recognized leaders in their field of practice. We are seeking an associate who has relevant experience, strong motivation and work ethic along with excellent communication skills. Our lawyers obtain significant litigation experience including written discovery, motion practice, depositions coverage, trial and appellate work. We try cases and are committed to training our younger attorneys to provide them with the skills to develop a successful litigation practice. Competitive salary and benefits. Please submit resume, transcript, and writing sample to: Human Resources, Rajkowski Hansmeier Ltd.,11 Seventh Avenue North, St. Cloud, MN 56302, 320-251-1055, humanresources@rajhan.com, EOE.

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ASSOCIATE ATTORNEY Litigation. Arthur, Chapman, Kettering, Smetak & Pikala, PA is a team-oriented firm committed to providing our clients with superior legal services and we are seeking a highly motivated attorney to join our busy civil litigation practice. The ideal candidate will possess anywhere from 5-12 years of practical litigation experience. Candidates should have excellent research and writing skills, possess a strong attention to detail, be resourceful, and be genuinely interested in litigation work. Candidates with both Minnesota and Wisconsin licenses will take preference. Our Firm is dedicated to creating a collegial, diverse workplace and we offer a competitive compensation/benefits package. If you are interested in joining our team, please specify this position in your cover letter and send along with a resume, salary expectations, and writing sample(s) in confidence to: Arthur, Chapman, Kettering, Smetak & Pikala PA, Human Resources, Recruiting@ArthurChapman.com, Equal Opportunity Employer.

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ATTORNEY — LABOR and Employment Law. Small labor and employment law firm that represents management in both the public and private sector is seeking an attorney with a demonstrable interest and/or experience in public and/or private sector labor and employment law including labor arbitration, collective bargaining and employment law issues such as ADA, FMLA, FLSA, DPA, OML and PELRA. The individual must be detail oriented, organized, have excellent legal research and writing skills and be highly motivated. The successful individual must be dedicated, able to work in a fast-paced environment and provide high quality client services. Please provide resumé to Susan Hansen at SHansen@mgh-lawfirm.com. Madden Galanter Hansen, LLP, 7760 France Avenue South, Suite 290, Bloomington, MN 55435.

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BOYCE LAW FIRM, LLP, in Sioux Falls, South Dakota has an opening in its trusts & estates practice area for a lateral attorney with three to ten years of experience in private practice or relevant experience in the trust industry. Qualified candidates will have a background in advanced estate planning and/or trust administration, superior communication skills, and be highly self-motivated. Ideal candidates will have an existing book of transferable business and LLM in Taxation. Boyce Law Firm LLP is a top-rated, multi-specialty law firm. Compensation will be commensurate with education and experience. Benefits include generous 401K, health insurance, annual CLE tuition, professional dues and memberships and numerous incidentals. Confidential inquiries, including resume and cover letter should be directed to Jennifer Bunkers, Boyce Law Firm, LLP, PO Box 5015, Sioux Falls, SD 57117-5015 or to jebunkers@boycelaw.com. For more information about Boyce Law Firm, please visit: www.boycelaw.com.

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COMMERCIAL LITIGATION attorney opportunities with Vogel Law Firm. Applications are invited for attorneys with interest, experience and expertise in the areas of commercial litigation, bankruptcy, and creditors' rights. We are seeking attorneys interested in working in our Fargo, ND; Moorhead, MN; and/or Apple Valley, MN offices. Our attorneys are also expected to possess excellent writing and analytical skills and strong academic credentials. Trial experience is highly preferred. For further information on the firm's practice areas and attorney profiles, see the firm's website at www.vogellaw.com. Application must include resume, references, and writing sample directed by mail or email to: Robert G. Manly, Vogel Law Firm, 218 NP Avenue, Fargo, ND 58107-1389. rmanly@vogellaw.com, EOE.

CREDITORS' REMEDIES, Bankruptcy & Work-Out Attorney - Winthrop & Weinstine, an entrepreneurial, full-service law firm, located in downtown Minneapolis has an excellent opportunity for an associate attorney in its fast-paced Creditor's Remedies, Bankruptcy & Work-Out practice. Qualified candidates will have excellent academic credentials, strong analytical abilities, excellent oral and written skills and a strong work ethic. It is highly preferred that the candidate have bankruptcy experience, either a bankruptcy clerkship or extensive bankruptcy clinic experience. Winthrop & Weinstine offers competitive salary and benefits and a team approach to providing our clients with top quality service. EOE. Please apply at: https://bit.ly/3tTvvP5

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FAMILY LAW ATTORNEY, Conmy Feste Ltd., North Dakota's oldest continuing law practice, is seeking resumes for an experienced attorney to join its family law practice. For well over a century, Conmy Feste Ltd has centered its philosophy on a tradition of excellence. Located in downtown Fargo, the firm represents a broad array of clients. Successful candidates must have a law degree, be licensed or seeking licensure to practice law in North Dakota and Minnesota and have excellent interpersonal, written and verbal communication skills. Preferred candidates will have three to seven years of experience with family law. Interfacing with clients and working independently are a must. We are looking for someone with a solid work ethic to deliver great service to our clients and positively influence our practice. This full-time position offers a competitive compensation and benefit package including health and life insurance, a 401(k) profit-sharing plan, Section 125 Flex Benefits and more. If you would like to join our firm, send a resume, writing sample, law school transcript and cover letter along with references to Conmy Feste Ltd., Attn: Wendy Ritchison, P.O. Box 2686, Fargo, ND 58108-2686 or email to accounting@conmylaw.com.

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HELLMUTH & JOHNSON, PLLC, a mid-size law firm in Edina, MN seeks a highly motivated associate attorney for its Estate Planning practice group. Four plus years of experience drafting estate planning documents, gift and estate tax planning, probate, guardianships and conservatorships, trust administration, charitable planning, and family business succession planning required. Successful candidate will possess practice area confidence, excellent communication, writing and critical-thinking skills. Email cover letter and resume to kthaemert@hjlawfirm.com.

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INTELLECTUAL PROPERTY – Trademark Prosecution Associate, Faegre Drinker is actively recruiting a trademark prosecution associate to join the Trademark, Copyright, Advertising and Media (T-CAM) Team for our thriving Intellectual Property practice. This position offers the opportunity to play a key role in growing our existing trademark, copyright, and advertising practice in our Chicago, Indianapolis, Minneapolis, Washington D.C., San Francisco or Denver offices. Successful candidates should have two to three years of experience in trademark advice, counseling, and prosecution, preferably with TTAB experience. Experience with copyright, advertising, licensing, sweepstakes and privacy matters is a plus. Candidates must be collaborative and motivated to succeed in a client-focused, team-oriented environment. Candidates must also have excellent academic credentials and have strong written and oral communications skills. We are willing to consider reduced hours arrangements. If you are looking for an opportunity with a growing, collaborative firm, please apply online at: www.faegredrinker.com and include your cover letter, resume, writing sample and law school transcript.

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INTELLECTUAL PROPERTY Litigation Associate. Faegre Drinker is actively recruiting a litigation associate to join our thriving Intellectual Property practice. This position offers the opportunity to work across all areas of intellectual property law for a national and international client base from our Chicago, Denver, Indianapolis, Minneapolis, Silicon Valley, Washington D.C. or Wilmington offices. Successful candidates should have two to four years of patent litigation experience or a federal clerkship and at least one year of patent litigation experience. Candidates must be collaborative and motivated to succeed in a client-focused, team-oriented environment. Preferred candidates will have excellent academic credentials and strong written and oral communications skills. If you are looking for an opportunity with a growing, collaborative firm, please apply online at: www.faegredrinker.com and include your cover letter, resume, writing sample and law school transcript.

LEGAL COUNSEL — Estate Planning and Tax. Federated is seeking an attorney to provide legal advice to the Life Company regarding advanced life insurance sales. This person will also need to provide training and case support in basic needs and estate planning/business succession planning, and oversee the development of research, sales tools, and marketing materials for the Life Company. This position requires an individual with strong communication and relationship building skills in a fast-paced, customer-focused environment. Responsibilities also include: Provide direction to life staff and supervise special projects. Advise and assist management, sales representatives, and clients on estate business planning issues. Train sales representatives on advanced life and retirement issues to improve life and disability sales, and oversee the investigation and resolution of complaints. Monitor company procedural and compliance issues pertaining to life, disability income, and retirement products. Required Qualifications: Juris doctorate and current license to practice law in Minnesota. Prefer designations including CLU or ChFC, and/or LLM degree in estate planning or taxation. Minimum of three to five years' work experience in general business environment demonstrating estate planning, taxation, or advanced underwriting knowledge. https://careers-federatedinsurance.icims.com/jobs/3143/job

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LIVE AND PLAY in the beautiful Brainerd Lakes Area! Ed Shaw Law Office seeks an Associate Attorney to join our team to practice in real estate, probate, wills, business, and family law! While we value experience, it is not required; We believe a solid work ethic and your personal integrity are what is most important. We are seeking the right person to work in a progressive, open and affirming, covid safe, collegial, family friendly atmosphere with two dogs! New associate will work from both offices in Brainerd and St. Cloud. If you are looking for a great place to work with a solid opportunity and a potential partnership track, please send your cover letter and resume to: cathy@edshawlaw.com. Responsibilities include: Initial interviews with potential clients, advise clients on legal situations, prepare and draft legal documents, negotiate settlements when possible, make court appearances and handle all aspects of your client's case. Benefits package: Competitive salary, commissions, paid time off, health insurance, retirement plan, continuing legal education reimbursement, mal-practice insurance paid.

MADIGAN, DAHL & HARLAN, PA is a dynamic, AV-rated, downtown Minneapolis law firm, with a national practice including litigation, transactional and corporate matters. We seek an associate attorney with two to four years' experience. The successful candidate will assist with, and assume responsibility for, a challenging blend of litigation and transactional work. Duties will range from drafting and responding to pleadings and discovery to negotiating and revising complex transactional documents. We offer a competitive salary and excellent benefits package. All candidates should have superb academic credentials. Please email cover letter, writing sample, references, and resume to: hubbard@mdh-law.com.

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THE MINNESOTA JUDICIAL Branch is pleased to announce an opening for a part-time (32 hours/week) Child Support Magistrate Position in the Fourth Judicial District, which includes Hennepin County. This position performs highly responsible professional legal work adjudicating expedited child support process cases. Child Support Magistrates are appointed by the Chief Judge of the District where the magistrate will primarily serve, subject to confirmation of the Supreme Court. This will be a statewide appointment. This at will position serves at the pleasure of the judges of the judicial district and is supervised by the Child Support Magistrate Manager. Work assignments are carried out with a substantial degree of discretion and independent judgment within the framework of state laws and rules of procedure applicable to the expedited child support process. This position will work remotely from a home office, but will also hear cases in other locations in the District and may be asked to assist in other judicial districts, as necessary. To apply, please follow this link: https://www.governmentjobs.com/careers/mncourts/jobs/3053098/part-time-child-support-magistrate-32-hours-week?sort=PostingDate%7CDescending&pagetype=jobOpportunitiesJobs.

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

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TRUST & ESTATES Attorney. Robins Kaplan LLP seeks a staff attorney with a minimum of three to five years of experience in estate planning, probate, trust administration, guardianships/conservatorships, and related tax areas to help us provide exceptional service to our clients. We need strong drafting and communication skills, extensive client-facing experience, solid academics, and team players. Apply if you would like to practice law in an environment where new challenges and growth are approached with energy, enthusiasm and team work, where you work directly with clients and where your efforts are appropriately rewarded with competitive compensation and premium benefits. Applicants must be admitted, or eligible to become admitted, to practice in Minnesota. Apply online at https://www.robinskaplan.com/careers/current-openings

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TRUST AND ESTATE Planning Associate. Attorney wanted – Moss & Barnett, A Professional Association, seeks a wealth preservation and estate planning associate. Preferred candidates will have two to four years' experience in drafting sophisticated estate planning documents, tax planning, estate and trust administration, and conflict resolution. Candidates should have superior academic qualifications, strong research and writing skills and a distinguished work record. Salary commensurate with experience and qualifications. Position eligible for participation in associate bonus program. Interested candidates should email cover letter, resume, law school transcript and writing sample to Carin Del Fiacco, HR Manager: carin.delfiacco@lawmoss.com.

Moss & Barnett is an affirmative action/EEO employer. No agencies please.

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TRUSTS & ESTATES Associate. Stinson LLP is seeking an Associate with one to five years of law firm experience to join the Tax Trusts & Estates Division in our Minneapolis office. Qualified candidates must be licensed or eligible to be licensed in Minnesota, have one to five years of experience in estate planning, probate, and trust administration, and have a strong interest in drafting. Please apply online at: www.stinson.com/careers-current-opportunities.

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TAX ATTORNEY Larkin Hoffman, one of the largest full-service business law firms in Bloomington Minnesota, is seeking a highly motivated attorney with 10+ years of experience to join our corporate and business law team. Candidates should have a background and demonstrated experience in complex corporate and partnership tax-related and business transactions, tax planning, compliance, and tax driven structural considerations. They should also have knowledge in Federal, state, local and foreign tax related issues, financial transactions tax matters related to structuring mergers, acquisitions and reorganizations, and the taxation of real estate transactions. We are looking for an attorney with outstanding academic credentials, drafting skills, communications skills, a dedication to client service and a commitment to excellence in the practice of law. Candidates with a book of business is required. Larkin Hoffman offers a collegial and energetic work environment with attorneys who are recognized leaders in their areas of practice. We are motivated to attract and retain talented and diverse attorneys into our growing firm and are committed to the training and professional development of our attorneys. Working at Larkin Hoffman has the benefit of being located in a prime office location outside the downtown core at Normandale Lake Office Park for easy access with complimentary parking. If you are interested in joining our team, please send your resume and cover letter to: HR-Mail@LarkinHoffman.com.

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WENDLAND UTZ, an established law firm in Rochester, MN, seeks associate attorney for general business and commercial law practice, including litigation. Strong academic credentials and excellent writing skills are required. Experience preferred. Candidates should be self-motivated, eager to develop client relationships, and able to manage a diverse caseload. Please submit resume, transcript and writing sample to: HR@wendlaw.com.

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FRANKLIN D. AZAR & Associates, PC is the largest Personal Injury Plaintiffs firm in Colorado and has represented thousands of people entitled to recover damages from injuries in all types of accidents, from dangerous and defective products, and from employers not paying adequate wages. The firm maintains a powerful team of, in many cases renown, lawyers. Every attorney in our firm benefits from a collegial environment with open access to some of the most experienced and reputable attorneys in Colorado. Requirements: Demonstrate strong dedication to personal injury law and a passion for helping people. Possess strong organizational and writing skills. Be energetic, hard-working, and a team-player. Have experience with complex litigation two years of experience preferred but all candidates will be considered. Franklin D Azar & Associates offers a comprehensive benefits package and competitive compensation based on results. Send resumes to: malcolmo@fdazar.com.

OFFICE SPACE

MINNETONKA SUITES and individual offices for rent. Professional office buildings by Highways 7 & 101. Conference rooms and secretarial support. Furnishings also available. Perfect for a law firm or a solo practitioner. Office with 10 independent attorneys. Call: 952-474-4406. minnetonkaoffices.com

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EDINA OFFICE SPACE Available. Our professional, innovative and unique office space contains private offices, office suites, open workspaces, and multiple meeting rooms, all offering state-of-the-art technology and enhanced safety precautions, along with premium amenities. Learn more at Collaborativallianceinc.com or email: ron@ousky.com.

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OFFICE SPACE located at 4525 Allendale Drive. Rent ($700 – $950/month) includes telephone system, internet, color copier, scanner, fax, conference room, receptionist, kitchen, utilities and parking. Contact Nichole at: 651-426-9980 or nichole@espelaw.com.

SHARED OFFICE space and shared support staff available with a successful immigration and personal injury attorney available July 1st, 2021. Modern, attractive building at the intersections of Highway 100, 694, and 94 in Brooklyn Center twenty (20) minutes away from the courthouses in Minneapolis and Anoka. The office is located at 6160 Summit Drive North, Brooklyn Center. Contact: ewiafe@ernestwiafelaw.com, phone: 651-321-4713 and eric@eric-richardlaw.com, phone: 612-250-2492.

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IF YOU ARE LOOKING for a boutique law office space for one person, in a Class A building in the heart of Edina's Southdale business district, for $500/month call 612-874-8550. This fully furnished office is available immediately. Photos will be provided upon request.

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OPPORTUNITY TO TRANSITION and relocate your practice: Consider the possibility that you can have the best of both worlds. Living in a small south-central Minnesota city (with numerous lakes in the vicinity), and yet be within one-hour travel distance to downtown Minneapolis, or St. Paul. The close metro access will allow for the possible enjoyment of more time with extended family that may live in the area, as well as the many social, sports, recreational, and economic opportunities of the Twin Cities without the attendant hassle and expense. I am interested in selling my law office building and possibly my practice to an interested attorney who may want to relocate here. My office building is a highly visible turn-key set up located one block from the Rice County Courthouse in Faribault, Minnesota. My building is located on a State Highway that runs through the City. My office is also within 25 miles of the Courthouses for two other neighboring Counties. In addition, there are also communities with populations of over 20,000 residents to draw on for a client base within 20 miles of Faribault, a community itself of over 20,000 residents. The office building itself is mid-century modern design and approximately 1,700 square feet with three offices, two workstations, and two conference rooms. It has a large paved parking lot with seven individual parking stalls. You may ask how could I move my practice to Faribault? There is opportunity here for you to reboot and grow your practice and to do so relatively quickly. All it requires is that you have experience, dedication, and a good reputation as a skilled and ethical attorney. You can market your services online for local clients with immediate success. I would be happy to discuss other details or plans you may have with you on how to accomplish this transition. Gary L. Voegele 102 – 4th Street NW Faribault, MN 55021. Phone: 507-334-2045, Email: gary@glvlaw.com, www.glvlaw.com.

POSITION AVAILABLE

FACULTY, LIMITED-TERM, Real Estate — University of St. Thomas Opus College of Business, Minnesota. The Finance Department at the University of St. Thomas Opus College of Business invites applications for a full-time, limited-term position in real estate, beginning in September 2021. Limited-term appointments will be without tenure and are not tenure track appointments. Primary duties of the position include teaching undergraduate and graduate courses in commercial real estate, recruiting and advising real estate majors, reviewing curriculum, and coordinating curricular and co-curricular student activities. The position also serves as the director of the Shenehon Center for Real Estate. More information is available on the university listing. Interested applicants must apply through the online system at: https://facultyemployment-stthomas.icims.com/jobs/5092/job

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MINNESOTA LAND TRUST is seeking a paralegal to assist staff attorneys with conservation easements, title work, and other projects. Experience required as a paralegal in the area of real estate. Details at https://mnland.org/about/employment/

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MINNESOTA LAND TRUST is seeking a staff attorney to draft and review conservation easements, fee title real estate transactions, and other projects. Details at: https://mnland.org/about/employment/#attorney.

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MID-MINNESOTA Legal Aid is seeking a Deputy Director to oversee its Minneapolis office. $66,868-$92,617 DOE. For details, go to: www.mylegalaid.org/employment.

PROFESSIONAL SERVICES

ED SHAW LAW Office is pleased to announce that Blake D. Lubinus has joined the firm. Blake brings more than 10 years of experience and will focus mainly on wills, trusts, probates, business law, real estate, and civil litigation. Blake and our team are ready to help you and your clients with any legal issues in the Brainerd and St. Cloud areas. Feel free to cal:l 218-825-7030 or email Blake@edshawlaw.com.

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ADD MEDIATION SKILLS to your tool kit! 40-hour Family Mediation Skills via Zoom June 10-11-12 and 17-18, 2021. CLE, Rule 114 and CEU credits. For more information, contact Janeen Massaros a:t smms@usfamily.net or Carl Arnold at: carl@arnoldlawmediation.com Online registration and payment information at tinyurl.com/june2021mediation

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EXPERT WITNESS Real Estate. Agent standards of care, fiduciary duties, disclosure, damages/lost profit analysis, forensic case analysis, and zoning/land-use issues. Analysis and distillation of complex real estate matters. Excellent credentials and experience. drtommusil@gmail.com, 612-207-7895.

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

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MEDIATION TRAINING: Qualify for the Supreme Court Roster. Earn 30 or 40 CLE's. Highly rated course. St. Paul, 612-824-8988, transformativemediation.com.

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VALUESOLVE ADR Efficient. Effective. Affordable. Experienced mediators and arbitrators working with you to fit the procedure to the problem — flat fee mediation to full arbitration hearings. 612-877-6400. www.ValueSolveADR.org.

PLACE AN AD: Ads should be submitted online at: **www.mnbar.org/classifieds**. For details call Jackie at: 612-333-1183

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