OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVI NUMBER IX
OCTOBER 2019
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Litigating Harassment in the #MeToo Era

A lingering gap between the letter of the law and the mood of the culture is yielding strikingly disparate outcomes in sexual harassment cases

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Steve Perry
sperry@mnbars.org

Design & Production
Jennifer Wallace

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Domestic Violence

October is National Domestic Violence Awareness Month. So, at a minimum, let's be aware. Knowledge, after all, is said to be power. Let's also beware of believing that awareness is enough. It's not. We should support those who take action against this plague; and we should find avenues for action. Not just for a single month, but as part of our ongoing consciousness. Here is some background, or (more hopefully), some foreground, for our moving forward.

Fortunately, we've moved beyond the time when we ignored or downplayed domestic violence as a private or personal matter—a notion that too often prompted police, friends, and family members not to "meddle." That's good, but the known numbers are stark and disturbing. Nationally, three women a day are killed by their intimate partners. Over 50 percent of those deaths are caused by gunshot (with death being five times more likely when there is a gun in the room). Almost 40 percent of the deaths are caused by beating, stabbing, or strangulation. Fully half of the victims were "together" with their murderers; almost one-third were separated or trying to leave. These are death's numbers "only." The number of victims of domestic violence, apart from the killings, is almost beyond counting. In Minnesota there are over 50 battered women's shelters or safe sites. Not enough. Imagine this: We could fill Target Field 18 times with Minnesota women who have experienced rape, physical violence, or stalking. Along the way, one-third of homeless women are homeless as a result of domestic violence; and three-fourths of us know, whether we realize it or not, a victim of domestic violence.

TOM NELSON is a partner at Stinson LLP (formerly Leonard, Street and Deinard). He is a past president of the Hennepin County Bar Association.

Thankfully, Minnesota has been a leader against domestic violence. In the 1970s, Minnesota established the Women's Advocates Shelter in St. Paul—the first shelter for battered and endangered women in the United States. In the late '70s, the Domestic Abuse Project was founded—the first domestic abuse treatment program for abusive men, and for women and children survivors. During the 1980s, the Duluth Domestic Abuse Intervention Project created the first coordinated initiative to respond to domestic violence—the "Duluth Model," or CCR (Coordinated Community Response)—a unique and award-winning approach, now nationally and internationally emulated, involving police, prosecutors, judges, probation officers, advocates, and others. Minnesota is also the home of internationally-renowned leaders in this realm—Global Rights for Women (*www.globalrightsforwomen.org)* and The Advocates for Human Rights (*www.theadvocatesforhumanrights.org*).

On the national front, we are in the midst of important history. In the 1990s, two especially important advances were made—first, the declaration that "human rights are women's rights and women's rights are human rights;" and second, the passing of the Violence Against Women Act (VAWA). That statute created the possibility of perpetrator accountability, as well as the potential of support services for women. The U.S. House of Representatives has passed the 2019 reauthorization of the statute, which is now pending in the Senate. The current reauthorization initiative includes the expansion of the Act to transgender victims of domestic violence, and attempts to deal with the "boyfriend loophole" (an odd phrase—but one that reflects the reality that federal law currently prohibits a person convicted of domestic violence, or under a protective restraining order, from having a gun, but only if that person is married to, living with, or sharing a child with the victim). Meanwhile, Minnesota continues to consider what is sometimes called "Extreme Risk" or "Red Flag" legislation.

The reauthorization of VAWA also contains important developments relating to Native Americans—into whose lands many of our ancestors immigrated, and who were finally recognized fully as U.S. citizens in 1924. For example, the act affirmed the authority of Indian Country governments to prosecute certain non-Indians who violate qualified protective or restraining orders, or who commit domestic or dating violence against Native Americans on tribal lands.

This really matters. American Indian women face murder rates that are more than 10 times the national average; Minnesota itself has the 9th highest rate of missing and murdered Indigenous women in the country. The Minnesota Legislature recently created the Missing and Murdered Indigenous Women Task Force—the first such initiative to collect such important information, try to understand it, and then do something about it.

How can you help? How can you get help? (Remember, lawyers are both victims and perpetrators of domestic violence.) Here are a few resources:

- Domestic Violence/Sexual Assault/Sex Trafficking: 1-866-223-1111
- Minnesota Coalition for Battered Women (*www.mcbw.org*)
- Domestic Abuse Project: (*www.domesticabuseproject.com*)
- Domestic Abuse/Harassment Resources Sheet (*www.mncourts.gov/documents/2/public/protective_orders/phone_number_resource_sheet.pdf*)

This is central to our opportunity and obligation to serve our profession and our communities—our cultural contract and our duty of citizenship. Our goals and priorities are clear and shared: safety for victims and their children; accountability, intervention, and rehabilitation for abusers and perpetrators; and the continuing refusal to accept, tolerate, minimize, or turn a blind or a merely-wincing eye toward domestic violence. Becoming even more aware will help us to care—and help us dare to take action. Be aware; be safe; help make the lives of others safe; seek and offer help. Ask yourself and others: "Are you safe?" ▲

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MSBA Minnesota State Bar Association

The Minnesota State Bar Association is coordinating Pro Bono Week, a national effort in conjunction with the ABA. The celebration honors the work of Minnesota lawyers who provide pro bono representation throughout the year, and highlights opportunities for pro bono service to low-income and vulnerable clients in civil legal matters.

If you would like more information about Pro Bono Week or want to participate please contact the MSBA Pro Bono Development Director, Steve Marchese, at (612) 278-6308 or smarchese@mnbar.org.

North Star LAWYER

Attention North Star Lawyers

This month the MSBA celebrates Pro Bono Week (October 21-25, 2019), putting a focus on the important work of pro bono attorneys in Minnesota. It's also a good time for MSBA members to review their pro bono hours for the year in preparation for North Star Lawyers certification. The MSBA North Star Lawyers program recognizes members who provide 50 or more hours of pro bono service during the calendar year. With just a couple of months left in 2019, now is a great time for members to see if they are on track to certify for the year. If not, contact your local or favorite legal aid provider to take another case, advise a client at a clinic, or draft a brief for a limited scope client. Members can also use ProjusticeMN (*www.projusticemn.org*) to find out about organizations and volunteer opportunities, or contact MSBA Public Service Director Steve Marchese (*smarchese@mnbars.org*/612-278-6308) for ideas. Last year, 934 MSBA attorneys provided over 110,500 hours of service and certified as 2018 North Star Lawyers. Let's make 2019 an even bigger year for pro bono; certification will open in mid-December. For more information, check out the North Star Lawyers webpage (*www.mnbar.org/NorthStar*).

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Upcoming MSBA Certification events

The MSBA's Certification Program will be offering four certification exams in the upcoming months. All the exams will be held at the MSBA offices in Minneapolis. The dates for the exams are as follows:

- Labor & Employment Law: Saturday, October 26, 2019
- Criminal Law: Early 2020
- Civil Trial Law: Saturday, March 28, 2020
- Real Property Law: Saturday, April 25, 2020

In addition, the Real Property Law Certification Board is hosting several Study Group/CLE sessions to prepare for the certification exam in April. A list of the upcoming sessions/CLEs and registration details are available on the MSBA website at *www.mnbar.org/members/certification/real-property-law*. Any questions regarding certification can be directed to Sue Koplin (*skoplin@mnbars.org*/612-278-6318).

Have you noticed a change in Fastcase?

The MSBA and Fastcase recently rolled out the new Fastcase 7 interface as the default user experience for MSBA members. This simplified user interface provides a Google-like start to your legal research. Simply type your query in the search field to get underway. Then FC7 gives you several options to refine or enhance your search results. You can also use the Live Chat feature to connect with reference attorneys who can answer your technical questions and help you find the results you need.

Want to learn more? Check out one of the four free monthly CLE webinars from Fastcase at *www.fastcase.com/webinars*, or schedule a one-on-one session with the MSBA's Mike Carlson to learn more about this valuable MSBA member benefit at *www.mnbar.org/1o1*.

Use Fastcase to search for yourself

Many experts say you should periodically run internet searches on yourself—on platforms such as Google and other search engines—to maintain and protect your online presence. Did you know that Fastcase offers you similar opportunities? You can now search the complete Bench & Bar of Minnesota archive in Fastcase to check what's being said about you. Not only will you find your litigation results but every time you're mentioned. And while Docket Alarm—another Fastcase product—is currently an add-on service, searches are free. So you can see where you've appeared in court filings in Minnesota and beyond. Give it a try.

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Practicing law without liability insurance

I recently fielded a question from a trial court judge asking if it was ethical to engage in private practice in Minnesota without malpractice insurance. The answer: yes. The questioner was a bit incredulous at the answer—as I admit I was before taking this job. I always assumed that everyone in private practice carried malpractice insurance. Sure, government lawyers probably did not, and I could see where in-house counsel did not need insurance, but of course everyone else was required to carry insurance, right? Nope.

This is true in all U.S. states save two: Oregon and Idaho. The U.S. stands in stark contrast to its international peers in this regard. Most developed countries require some form of professional liability insurance for lawyers in private practice. All Australian states, all Canadian provinces and territories, most of the European Union, and several Asian countries require varying levels of insurance.[1] The required insurance in those countries is usually not *de minimus*, either: Minimum coverage in Australia is $1.5 million AUS; British Columbia, $1 million CAN; England and Wales, €2 million; and Singapore, 1 million SGD. In contrast, the minimum coverage in Oregon is $300,000 per occurrence/$300,000 aggregate, and in Idaho, $100,000 per occurrence/$300,000 aggregate. This is fascinating to me given the old saw about how litigious America is compared to other developed countries.

Disclosure requirements

While Minnesota does not require malpractice insurance, we do require attorneys in private practice to disclose in their annual registration statement whether they carry professional liability insurance, and the name of the provider.[2] In 2004, the American Bar Association adopted a model rule on insurance disclosure. Thereafter, Minnesota and 23 other states enacted some form of disclosure requirement, and that information can be found by legal consumers in Minnesota, should they know to look, on Minnesota's lawyer registration website.[3] I am particularly intrigued, however, by the seven states that chose to adopt a requirement of direct disclosure to clients. Since 1999, for example, South Dakota's ethics rules have required attorneys who do not carry at least $100,000 per claim in liability insurance to disclose that fact to their clients in every written communication.[4]

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

The numbers

Because Minnesota requires disclosure, we know generally how many lawyers represent private clients but do not carry insurance. Based upon data collected in Minnesota as of August 2019, of the 12,995 lawyers who disclosed on their annual registration that they represent private clients, 10,715 (82.45 percent) disclosed they carry liability insurance, leaving 17.55 percent uncovered. Due to data limitations, we do not know the types of practices those uninsured lawyers maintain. Are they solo or small firm practitioners? Do they mainly handle personal claims for individual legal consumers? Illinois estimates that as many as 40 percent of solo lawyers are uninsured. In a 2017 survey in Washington, 28 percent of solo practitioners reported being uninsured.[5]

I was curious to see if there was any correlation between uninsured lawyers and discipline, so we pulled some quick numbers. Just looking at 2019 public discipline: Of the 25 lawyers publicly disciplined this year, only 8 (32 percent) reported carrying insurance when they last updated their annual registration. Because Minnesota does not retain malpractice disclosure information year over year, we were unable to look at whether the attorney carried coverage at the time of the misconduct.

Another interesting but perhaps not surprising statistic is that solo and small firm practitioners represent a disproportionate share of malpractice claims, according to the ABA Profile of Legal Malpractice Claims (2012-2015).[6] For that period, insurers who participated in the survey reported that 34 percent of claims were against solo practitioners and 32 percent were against firms with two to five lawyers, for a total of over 65 percent of claims against firms with five or fewer lawyers! From a public protection perspective, this is not a comforting story: The segment of lawyers with the highest percentage of malpractice claims against them also report a higher lack of insurance.

The current landscape

Perhaps because of numbers like these, several states have taken up efforts to study the issue of mandatory malpractice insurance. As noted, only Oregon and Idaho require coverage for lawyers in private practice. Oregon has required insurance since 1977, and provides insurance through a shared risk pool. All Oregon lawyers who are not exempt pay $3,300 annually to the Fund, and receive coverage of $300,000 per occurrence/$300,000 in aggregate, with no deductible, and $50,000 in annual covered defense costs.[7] Idaho became the second U.S. jurisdiction to require insurance on January 1, 2018. Idaho lawyers who represent private clients must carry $100,000 per occurrence/$300,000 in aggregate, and must submit proof of insurance to renew their licenses.

Several other states have recently formed task forces to look at mandatory malpractice, and have seen their efforts stymied in large part by factions of the bar militantly opposed to required coverage. The Washington state bar (a unified bar) recently rejected a recommendation for mandatory insurance, despite a unanimous task force recommendation in favor of requiring coverage. This is particularly interesting (or hypocritical?) in view of the requirement that Washington's limited license legal technicians must carry insurance.

The Nevada state bar petitioned the Nevada Supreme Court in 2018 to require malpractice coverage, but portions of the bar objected, and the Nevada Supreme Court denied the petition on the grounds that inadequate detail or support for the rule change was provided. In 2017 California's legislature required the bar to form a working group to study the issue. That working group recently recommended against mandatory insurance absent further data, but recommended further study of broader disclosure requirements.

Illinois has gone in a different direction. Beginning in 2017, lawyers who do not carry malpractice insurance but represent private clients must complete a four-hour online risk-management course every two years. This course helps lawyers identify risk areas in their practice and offers suggestions for improvement.

The factors that augur for requiring insurance are largely obvious, and were articulated in a recent article in this magazine in July 2019.[8] Such a mandate ensures meaningful remedies in cases of malpractice—and lawyers do make mistakes. It strengthens the reputation of the profession and protects lawyer's assets. It also strengthens the profession—lawyers with insurance have better access to risk management assistance and continual learning, including remediation services when things do go wrong. It also promotes self-regulation, and to me, it is an obligation inherent in a self-regulated profession: We have a responsibility to ensure that consumers of legal services are financially protected when mistakes are made.

Those opposed to mandatory insurance have cited the fact that there is no proof that there is harm going un-remedied. They also argue that any requirement would encourage litigation against lawyers; that the cost of insurance can be prohibitive; that a lawyer may be uninsurable (though reportedly all Idaho lawyers who sought coverage obtained it); and that it could discourage pro bono or low bono work—a presumably cost-related argument. And the libertarians among us see most, if not all, regulation as harmful.

Conclusion

I have spoken with other judges who are just as surprised as the above caller that lawyers are not ethically required to carry insurance in private practice. The more I look at the issue, however, I am not surprised that lawyers have successfully lobbied against such a requirement to date. Minnesota does not require doctors to carry liability insurance, either. While many do because of hospital or health plan requirements, it is not a requirement of licensure.[9] But ultimately I agree with the (rejected) conclusion of the Washington State Task Force, after its extremely thorough and thoughtful review of the matter, that "[a] license to practice law is a privilege, and every lawyer engaged in the business of providing legal services should be financially responsible for the effects of his or her own mistakes."[10] Because the task force ultimately concluded that legal liability insurance is generally affordable, available, and the right thing to do, it should be required in a profession that is regulated in the public interest. ▲

Notes

[1] Washington State Bar Association Mandatory Malpractice Insurance Task Force, Report to the WSBA Board of Governors (February 2019) at 26-27, *https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-report.pdf?sfvrsn=558e03f1_0*.

[2] Rule 22, Minnesota Rules of the Supreme Court on Lawyer Registration.

[3] *https://www.lro.mn.gov/for-the-public/lawyer-registration-database-search-public/*

[4] Rule 1.4(c), South Dakota Rules of Professional Conduct ("If a lawyer does not have professional liability insurance with limits of at least $100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that: (1) "This lawyer is not covered by professional liability insurance;" or (2) "This firm is not covered by professional liability insurance.") *See also* Rule 1.4(d), SDRPC ("The required disclosure in 1.4(c) shall be included in every written communication with a client."

[5] WSBA Task Force Report at 11.

[6] ABA Standing Comm. on Law Prof. Liability, Profile of Legal Malpractice Claims 2012-2015, at 7 (September 2016).

[7] WSBA Task Force Report at 23.

[8] Seth Leventhal, *The Case for Mandatory Legal Malpractice Insurance*, Bench & Bar (July 2019).

[9] A quick web search discloses that seven states, including Wisconsin, have minimum liability insurance requiremnts for doctors, and some additional states require insurance to avail yourself of state tort reform caps for medical malpractice claims.

[10] WSBA Task Force Report at 45.

James C. Erickson, Sr.

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Regular Bench & Bar columnist Tony Zeuli is an intellectual property trial lawyer with Merchant & Gould. Prior to becoming a registered patent attorney, Tony worked in the field of nuclear physics for the University of Chicago and Department of Energy at Argonne National Laboratory. Tony is a frequent speaker and writer on patent litigation issues at national intellectual property law conferences such as those sponsored by the American Intellectual Property Law Association and the Association of Patent Law Firms, and his articles have appeared in national publications such as The Federal Lawyer. Tony can be reached at 612.371.5208 or at tzeuli@merchantgould.com or by visiting merchantgould.com/zeuli.

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AI and its impact on law firm cybersecurity

The rise of artificial intelligence has a number of implications within the legal community. Apart from its impact on operational tasks and its potential for increasing efficiency, AI will likely feature as an element of in-house cybersecurity policies and practices.

Efforts to counteract cyber threats are becoming as sophisticated as the technologies we use on a daily basis. Law firms are especially at risk of cybercrime due to the sensitive information they create and store. Personally identifying information, data relating to litigation, and client communications are only some of the data types a typical law firm will store and access on a daily basis. This data make law firms prime targets for a variety of threat actors, especially when paired with less-than-ideal security standards. In the face of ever-expanding threats, many organizations are turning to artificial intelligence to assist in their cybersecurity initiatives. At a time when budgeting for security is often not seen as a priority, it is significant that almost half of enterprises surveyed in a recent study by the Capgemini Research Institute (*Reinventing Cybersecurity with Artificial Intelligence*) say that their budgets for cybersecurity AI will increase by an average of 29 percent in Fiscal Year 2020.[1]

As organizations grow and embrace new technologies, their risk of data breaches and cyber events increases. More employees, more devices, and trends toward BYOD (bring your own device) policies, cloud infrastructures, and remote work all make for potential sources of vulnerability. The Internet of Things also creates a much wider zone in which cybercriminals can act. With this pattern in mind, organizations have to consider what the best course of action will be when, not if, they are attacked. Law firms use these technologies too, often managing them with convenience and ease of use as the top priorities.

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.

Focusing on detection

As set forth in the Capgemini study, at this point enterprises are largely turning to AI solutions for the purposes of detection. As cyber events come to seem increasingly inevitable, organizations are facing the fact that early detection may be the best course of action. The sooner a cyber event is detected, the sooner it can be mitigated. Speedy mitigation helps organizations keep the costs associated with breaches as low as possible by ensuring that threat actors have less time to exploit vulnerabilities and exfiltrate data.

But as AI is implemented over time, it will also be beneficial in creating proactive solutions, both predictive and responsive.[2] These methods will undoubtedly spur new policies as organizations learn to use AI to its fullest potential.

It remains to be seen how AI will be incorporated into each facet of a cybersecurity policy, but it will most likely continue to be an instrumental component of a strong security program for its reactive and proactive potential. Reduced attack times make for a reduction in the financial, operational, and reputational risks that organizations face from cyber events. Its implementation may also evolve into a requirement of cyber insurance policies, along with regularly scheduled risk assessments.

The human element

With IT professionals increasingly overburdened, the use of AI to bolster security efforts helps to minimize human error. But the human component can never be completely removed. False positives and issues brought about by insufficient data will still need to be monitored and assessed by security professionals. In spite of its myriad benefits, especially within settings where confidential data is at stake, AI will never be a foolproof safety net. The complexities of developing security cultures, creating proactive strategies, and navigating the intricacies of public response and mitigation strategies are still issues that will require human attention.

Early detection, network intrusion scanning, email attack surveillance, and user behavior analysis are just some of the ways that AI is being used to strengthen security.[3] Given this multitude of functions, many experts believe that AI will also be put to use by cybercriminals, with large-scale cyberattack campaigns a primary concern. As these issues materialize, they will require the expertise of security professionals to create sustainable solutions. The defensive capabilities of AI will be needed to counteract the ways in which it can be utilized aggressively by bad actors. This technology poses yet another instance of organizations and security professionals alike needing to balance security with convenience, and ease of use with the acknowledgement that no security measure is ever going to be a "cure-all."

The legal community is undoubtedly tasked with maintaining the highest of standards in regard to protecting client data. As AI continues to shape the ways in which law firms conduct business, it is critical to stay apprised of its equally important role in reinforcing security postures. ▲

Notes

[1] *https://www.forbes.com/sites/louiscolumbus/2019/07/14/why-ai-is-the-future-of-cybersecurity/#1322c0a4117e*

[2] *Id.*

[3] *https://resources.infosecinstitute.com/ai-in-cybersecurity/#gref*

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Litigating Harassment in the #MeToo Era

A lingering gap between the letter of the law and the mood of the culture is yielding strikingly disparate outcomes in sexual harassment cases

By Andrew Murphy and Terran Chambers

As the stories of celebrities who popularized the #MeToo movement fade into the background, attorneys around the country continue to grapple with the movement's effects on the broader workforce. Those effects are beginning to manifest themselves in new trends in workplace sexual harassment claims. This article highlights a few of them.

The #MeToo movement gained significant traction in October 2017, following sexual abuse allegations against the Hollywood producer Harvey Weinstein, as well as numerous prominent figures in the entertainment industry, professional sports, and state and local governments. The attention to sexual harassment coincided with a less publicized but steady uptick in the number of sexual harassment allegations in the workplace in fiscal year 2018. A report from the Equal Employment Opportunity Commission (EEOC) showed a big jump in workplace sexual harassment claims:[1]

- The EEOC saw a more than 12 percent increase in charges alleging sexual harassment over the prior fiscal year, reversing a year-over-year decrease since 2010;
- The EEOC filed 66 harassment lawsuits on behalf of claimants, 41 of which included allegations of sexual harassment, reflecting a more than 50 percent increase in sexual harassment lawsuits over the prior fiscal year;
- The EEOC recovered nearly $70 million for victims of sexual harassment through litigation and administrative enforcement, up from $47.5 million during the prior fiscal year. [2]

But while the #MeToo movement has spurred an increase in sexual harassment *claims*, a larger question is whether it has influenced the *results* of those claims. While that largely remains an open question, cases are starting to coalesce along three different paths, with strikingly distinct outcomes: 1) cases in which courts continue to apply traditional standards (often resulting in defense judgments for employers); 2) cases going to trial and resulting in enormous plaintiffs' verdicts; and 3) cases ending in high-value settlements.

Courts applying traditional sexual harassment standards

As a threshold matter, courts are continuing to apply traditional legal standards despite the increased attention to sexual harassment claims in news media and popular culture. These standards are difficult for plaintiffs to meet.

The basic elements of a sexual harassment claim include:

1) the claimant is a member of a protected group;
2) the claimant was the subject of unwelcomed sexual harassment;
3) a causal nexus existed between the harassment and the protected group status;
4) the harassment affected a term, condition, or privilege of employment; and
5) the employer knew or should have known of the harassment and failed to take prompt and effective remedial action.

The #MeToo movement has drawn the most attention to the fourth element, which focuses on whether the conduct at issue constitutes harassment under the law. To prevail on this element, a plaintiff must show that the unwelcomed conduct was "sufficiently severe or pervasive to create an environment that a reasonable person would find hostile or abusive and that actually altered the conditions of the victim's employment."[3] Historically, courts have maintained a very high bar for what constitutes "severe or pervasive" conduct. In perhaps the largest disconnect between the #MeToo movement and the law, physical touching, lewd comments, and propositions for sex—which are culturally perceived as highly inappropriate and lie at the core of the #MeToo movement—are often not sufficient to constitute an actionable claim.

In a September 2018 case in the Northern District of Georgia,[4] for example, the plaintiff alleged three different male employees sexually harassed her by inappropriately touching her—including in her private areas—and making several sexually suggestive comments. The court ultimately granted summary judgment for the employer, relying on a number of cases in which similar, if not more egregious, conduct was found to be insufficiently severe or pervasive. The court also found that even if the conduct alleged were severe and pervasive, the plaintiff did not explain how the allegations interfered with the conditions of her employment. In support of that conclusion, the court pointed to the plaintiff's testimony that she enjoyed her job notwithstanding how she was treated.

As another example, in a 2018 case in the Western District of New York,[5] the plaintiff alleged a male coworker made sexually suggestive comments to her, used a bottle of salad dressing to make sexual gestures toward her, and openly expressed interest in seeing private parts of her body.

The court again granted summary judgment for the employer, stating that the limited number of allegations over 13 months could not be characterized as "pervasive," and that no reasonable jury could consider the male employee a "constant source of interference" because the plaintiff admitted he only interacted with her once per week. The court concluded "[t]aken as true, the incidents alleged by Plaintiff represent the sort of sporadic, 'offensive utterances' that—while distasteful—cannot reasonably be construed as objectively severe."

Precedent requires most courts to continue to apply this standard. Indeed, while the #MeToo movement is several years old culturally, the pace at which the legal system moves means that many cases filed during the movement's pendency have not been subject to appellate review.

This has led to frustration among some lower courts. In December 2017, for example, one Hennepin County District Court judge recognized the incongruence between popular culture and the law and, while granting summary judgment for the employer, stated:

> Our courts need to revisit the issue of what facts constitute those sufficiently severe or pervasive acts to alter the conditions of the victim's employment and create an abusive working environment. Cases which emanate from the 1980s, 1990s, or even the first decade of the present millennium no longer accurately reflect conduct that alters the conditions of a victim's employment and creates an abusive working environment. Times change, and with them so too do the standards of conduct. This Court doubts that anyone would reasonably find some conduct, once found unactionable, is still unactionable today.... There has been a sea-change in cultural attitudes toward sexual harassment.... It is not a leap to say that gone are the days when men can use the workplace to further their prurient interests. Unwanted sexual advances, belittling sexual banter, touching, and mocking sexual language are no longer viewed as merely boorish, obnoxious, chauvinistic, or immature—they should be actionable.

Juries, however, are not so constrained.

Juries awarding large plaintiffs' verdicts

Juries have more latitude to factor cultural changes into their decisions. On that score, the #MeToo movement has ushered in a new era of substantial jury verdicts in sexual harassment cases. For example, in a March 2019 case in New York,[6] a female plaintiff alleged her male supervisor made verbal comments of a sexual nature, made sexual sounds and gestures (including licking his lips and breathing heavily), and slapped her backside. The jury awarded the plaintiff $1.7 million in compensatory damages and $11 million in punitive damages, for a total verdict (exclusive of fees and costs) of $12.7 million.

In a September 2018 California case,[7] two female plaintiffs alleged that their male supervisor made sexually inappropriate comments to them, touched one of them on the knee and in private areas, took pictures of one from behind, and pushed one up against the wall and told her he would make her a manager if she had sex with him. After the plaintiffs complained, they were removed from the work schedule. The jury awarded the plaintiffs $2 million for past emotional distress, $3 million for future emotional distress, and $6 million in punitive damages, for a total of $11 million before attorney's fees and costs.

Similarly, in a February 2019 New York case,[8] a 32-year-old female plaintiff alleged that her 61-year-old male manager told her she would be required to have an affair with a leader if she wished to remain employed, falsely bragged to others about sleeping with her, cornered her as she was walking to a bathroom, pinned her against a wall, and tried to kiss her. When she told him that she was going to file an internal complaint, she was demoted. Ultimately, the jury awarded her $1.5 million for emotional distress and $500,000 for her claim of retaliation, for a total of $2 million before attorney's fees and costs.

Finally, in an April 2019 California case,[9] the female plaintiff alleged that her male supervisor brought a male stripper to work dressed in a police uniform, made her watch pornographic videos, required her to follow his social media accounts (where he regularly posted photos and videos of sexual poses or situations), and sexually assaulted her twice by running his hand over her, once outside her dress and once under her dress. She alleged that she believed her employment was terminated for refusing to have sex with him. The jury ultimately awarded her $3.1 million in compensatory damages and $8 million in punitive damages, for a total of $11.1 million.

These verdicts reveal several important trends. Most significantly, disproportionate punitive damages awards—some of which are double and triple compensatory damages—signal that juries are sending a strong message about what they view as unacceptable workplace behavior, likely shaped by the #MeToo movement.

Parties negotiating large settlements

Finally, somewhere in between defense judgments and large jury verdicts, parties are negotiating high-value settlements. For example, in a December 2018 California case,[10] Eliza Dushku, star of the CBS television show *Bull*, made allegations of sexual harassment against her co-star, including that he made several sexual remarks like "here comes legs," and stated in front of others that he would bend her over his leg and spank her. Dushku also alleged that when shooting a scene with a windowless van, her co-star said he would take her to his "rape van," which was reportedly filled with sexual objects. Finally, when Dushku made a gesture with three fingers, her co-star suggested in front of others that she wanted to have a threesome with him and another cast member. When Dushku confronted him about this behavior, she was written off the show. Dushku and CBS reached a settlement agreement wherein CBS paid Dushku $9.5 million, the price of her entire contract.

In another 2018 California case,[11] a female police officer for the city of Los Angeles alleged her new supervisor sexually harassed her by massaging her shoulders, placing his hand on her thigh, leering at her in a sexually suggestive way, and making comments about her body, despite her repeated requests that he stop. The parties reached a settlement agreement in which the police officer agreed to resign in exchange for $1.6 million.

Of course, many settlements are kept confidential, limiting the universe of data. But these settlements illustrate the unique pressures that the intersection of the #MeToo movement and the law place on litigants. On the one hand, plaintiffs have an incentive to try to settle claims because the law continues to impose high hurdles for sexual harassment claimants. On the other hand, employers

may have an incentive to settle claims to which they have strong legal defenses, but which present challenging public relations problems in the #MeToo era.

What's next?

All of this has resulted in efforts, both nationally and in Minnesota, to change the law to better align with the cultural norms exemplified in the #MeToo movement. In both 2018 and 2019, for instance, the Minnesota Legislature considered bills that sought to change the definition of sexual harassment by explicitly stating that an intimidating, hostile, or offensive environment does *not* require the harassing conduct or communication to be "severe or pervasive." While the bill has yet to pass, it is likely to be re-introduced in coming legislative sessions.

Nor are these efforts limited to the Legislature. The Minnesota Supreme Court has taken up the issue, reviewing the Minnesota Court of Appeals' January 2019 grant of summary judgment in *Kenneh v. Homeward Bound.*[12] In that case, the plaintiff alleged her coworker made sexually charged comments, licked his lips, and offered to cut and style her hair. In affirming summary judgment for the employer, the Minnesota Court of Appeals stated:

> While these actions may be boorish and immature, they do not rise to the level of actionable harm. And, as noted above, the fact that [plaintiff] was "uncomfortable, embarrassed, and upset" about [her coworker's] behavior does not render the conduct actionable as sexual harassment.

The Minnesota Supreme Court granted the petition for review, which stated, "[t]he severe or pervasive standard is causing women to face an absurd and impossible burden in these cases in Court." If the Supreme Court agrees to change the standard, it would mark one of the most tangible legal effects of the #MeToo movement.

Conclusion

The #MeToo movement continues to influence workplace sexual harassment claims. While cases that have reached resolution during the movement have produced varied results, the movement has generally highlighted the gap between what is culturally acceptable in the workplace and what is legally actionable under current law. That gap will be the subject of litigation and legislative efforts for a long time to come. ▲

Notes

1 *https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm*
2 *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111 (8th Cir. 1997).
3 *Id.*
4 *Benson v. Solvay Specialty Polymers*, 2018 WL 5118601 (N.D. Ga. 8/7/2018).
5 *Figueroa v. KK SUB II, LLC*, 289 F.Supp.3d 426 (W.D.N.Y. 2018).
6 *Mayo-Coleman v. American Sugar Holding, Inc.* 2019 WL 1034078 (S.D. New York, 3/5/2019).
7 *Meadowcroft v. Silverton Partners, Inc.*, Case No. BC 633239 (Los Angeles Cnty. Super. Ct., Cal. September 2018).
8 *Tulino v. Ali*, 2019 WL 1447134 (S.D. New York, 2/27/2019).
9 *Taylor, et al v. David, et al*, No. BC649025 (Cal. Super., April 2019).
10 *Eliza Dushku v. CBS* (California, December 2018).
11 *Clarke v. City of Los Angeles*, 2018 WL 7078077 (Cal. Super., 8/14/2018).
12 *Kenneh v. Homeward Bound, Inc.*, No. A18-0174. 2019, Minn. App. Unpub. 2019 WL 178153 (1/14/2019).

ANDREW MURPHY litigates employment cases throughout the country, defending employers in class and collective actions, including cases of nationwide scope. He has particular expertise and experience in Fair Labor Standards Act (FLSA) litigation, matters involving alleged independent contractor misclassification, and cases involving joint employment and agency liability claims.

ANDREW.MURPHY@FAEGREBD.COM

TERRAN CHAMBERS defends employers of all sizes in employment-related litigation, including claims of discrimination arising under Title VII, the Family Medical Leave Act, the Americans with Disabilities Act, and comparable state laws, as well as claims of retaliation arising under state and federal anti-discrimination and whistleblower statutes.

TERRAN.CHAMBERS@FAEGREBD.COM

Mitchell Hamline student aims to use law degree to help people in parents' homeland of Liberia

BY TIM POST

Mitchell Hamline student Nikita Luyken's career goal is to help people in the West African nation of Liberia, the country her parents left in the late 1980s to escape civil war. Luyken is on her way to earning the real-world skills needed to fulfill that dream through the clerkships she's taken while attending law school.

The third-year student just started a position at Jardine, Logan, & O'Brien, a law firm in Lake Elmo, where she'll work on a wide range of assignments from business litigation to civil rights.

That move comes after she spent more than a year working in the St. Paul City Attorney's Office. The clerkship, which she started in the summer of 2018, had her doing the real work of a lawyer representing the St. Paul Public Housing Agency—handling first appearances, attending motion hearings, doing legal research, and communicating daily with clients. "It's pretty unique to be able to act as an attorney while you're still in law school," she says, noting that the clerkship was hard but fulfilling work. "At the end of the day we're maintaining homes and providing homes for people who otherwise wouldn't have a place to stay."

Luyken's desire to help others was inspired by the work of her mother, who set up a nonprofit to support disadvantaged youth in Liberia after leaving her home country and settling in the U.S. The non-profit gathers and sends food, medicine, and water sanitation equipment to Liberia. Luyken's mother has traveled back and forth from the U.S. to West Africa over the years to coordinate delivery of those supplies.

Luyken isn't waiting until she graduates to help people in need. When she's not studying or working as a legal clerk, Luyken helps low-income families prepare their taxes through Prepare + Prosper, a St. Paul-based nonprofit. She also works to encourage friends, family members, and other people in the Liberian community in the Twin Cities to pack relief supplies to be sent to Liberia.

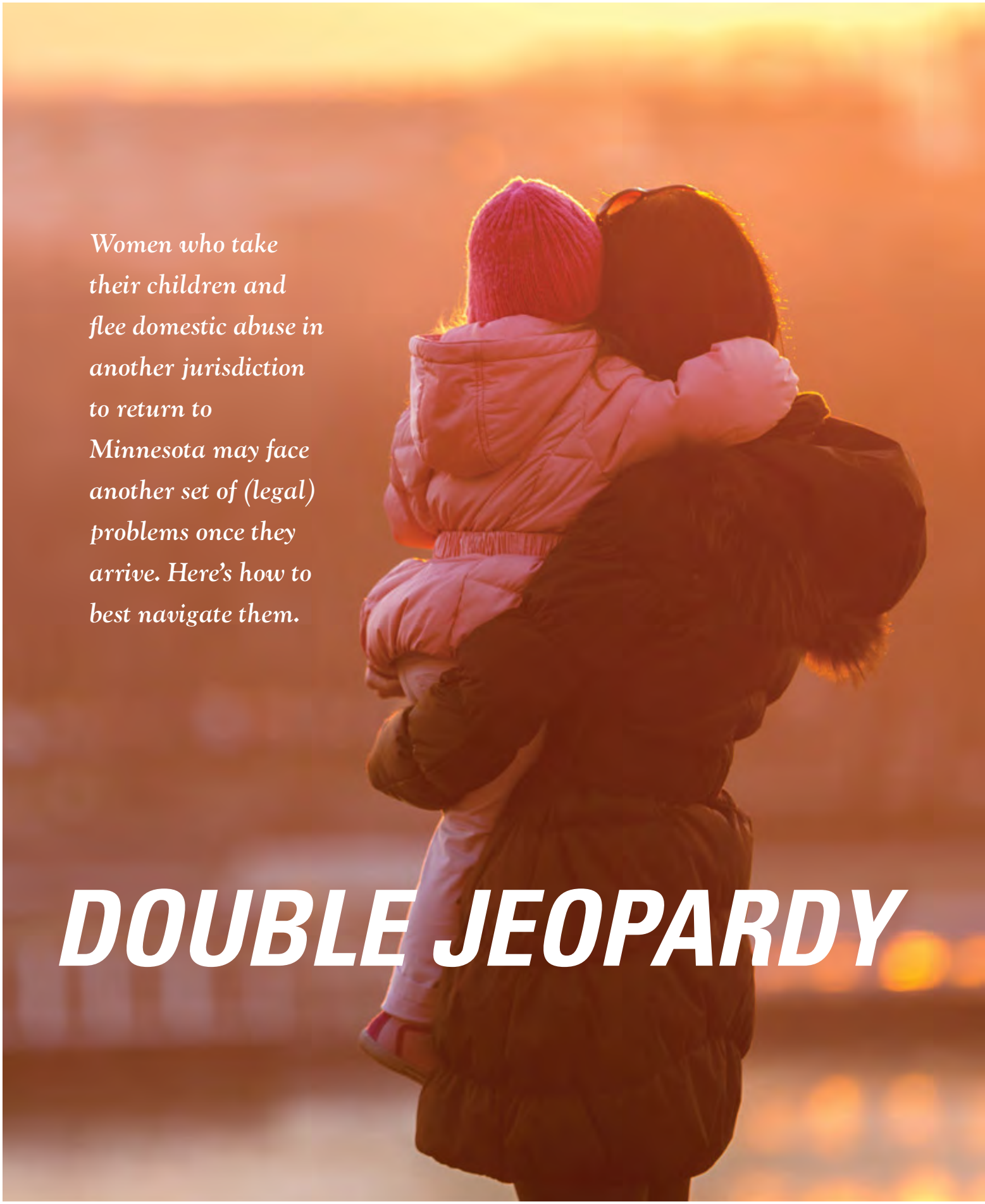
Whether it's through volunteering, or the work she's doing as a law clerk, Luyken says she wants to help those in need.

"The sky is the limit in law school," she says. "You have a platform to be able to make an impact on a lot of peoples' lives. Use that platform for something good. Use that in the community to make it better."

Luyken is a full-time student at Mitchell Hamline now, but she started in the part-time program. At the time, her mother was in Liberia and Luyken had to work while going to law school. She said she's grateful for the flexibility of the part-time program that allowed her to do that. During her 2L year, her mother returned to the U.S., and Luyken switched to the full-time program and also started working as a law clerk.

Luyken expects to graduate in the spring of 2020. She's not sure what she'll do after graduation but hopes to become a litigator while keeping her eyes on the ultimate goal of someday starting her own firm in Liberia.

"I definitely want to try to do my best to give back to the place where my parents came from," she says.



Women who take their children and flee domestic abuse in another jurisdiction to return to Minnesota may face another set of (legal) problems once they arrive. Here's how to best navigate them.

DOUBLE JEOPARDY

Understanding the civil legal implications of fleeing domestic abuse with children across state and national borders

By Allison Maxim

October 2019 is the 30th annual National Domestic Violence Awareness Month. In recognizing the occasion, I am grateful for the opportunity to share my knowledge and experience regarding the intersection of domestic violence and interstate and international family law jurisdiction to promote awareness of this complicated area of the law.

Ending an abusive relationship is difficult at best and downright dangerous at worst. As a divorce and family law attorney, I have counseled numerous clients in the midst of ending an abusive relationship—from advising them on the steps they should take to keep themselves safe when their partner is served with a petition for dissolution to counseling them on the risks and benefits of entering into an agreement with their abusive partner in concomitant order for protection and family court proceedings. But there is no situation more complex and fraught with potential detrimental legal consequences than when a woman living in another state or country leaves an abusive relationship to return with her children to the state they call home. This article focuses on the civil laws that affect women fleeing an abusive partner to "come home" to Minnesota with their children, and the potential legal consequences of taking such action.

I focus on women because research has established that "[i]n an increasingly interconnected world, one group of battered women overlooked and in dire need of our attention... is mothers who flee with their children for safety across international borders." As an attorney working in the trenches on such issues, women are the ones I have seen experiencing the harsh legal consequences after they flee an abusive relationship and come home to Minnesota. I simply have not had experience with men facing a similar situation, which is not to say they do not exist. My intent here is to raise awareness about the detrimental consequences women and children fleeing domestic abuse may experience and to offer insight for other practitioners working in an area of law that may brush up against such issues so that a potentially detrimental situation can be spotted right away and the victim advised accordingly.

To many women, ending a relationship with an abusive partner and returning to the state in which they grew up, where their parents and extended family reside, is a logical step for their own and their children's safety and wellbeing. Indeed, women who flee with children may have few other options to keep themselves and their children safe from their partner's violence. Women in an abusive relationship, who may be isolated and have little or no access to support or resources, are very unlikely to be thinking about the law and how taking action to leave an abusive relationship may violate the law or otherwise affect their legal rights.

As one scholarly article noted, "It is not surprising that in their search for safety, mothers flee across national boundaries. What is surprising is the web of international treaties and domestic legislation and programs in the United States that may work against securing safety for battered mothers and their children who have fled from abusive partners." It is therefore often incomprehensible to women and their support networks when they flee an abusive partner only to face subsequent accusations of "abducting" their children, accompanied by legal action for the return of their children to the state or country from which they fled.

The web of international treaties and domestic laws in question includes both criminal and civil laws. It is the impact of the civil laws that is of concern here—primarily the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and The Convention on the Civil Aspects of International Child Abduction adopted at The Hague on October 25, 1980 (Hague Convention), although state laws related to legal residence may also come into play. While there are certain protections in these laws for women who flee domestic abuse with their children, the reality is that the laws can and do work against women in very harsh ways, especially those who cannot substantiate the domestic violence they have experienced with actual evidence of their bruised bodies and battered psyches.

The UCCJEA

The UCCJEA was created to deter interstate parental kidnapping and to promote uniform jurisdiction and enforcement provisions in interstate child custody matters. It is a uniform state law drafted by the National Conference of Commissioners of Uniform State Laws (now known as the Uniform Law Commission), and has been enacted in every U.S. state (except Massachusetts) as well as the District of Columbia, Guam, and the Virgin Islands. The UCCJEA governs a court's subject matter jurisdiction regarding child custody, answering the question of whether a court has authority to make a decision in a child custody case that involves more than one state, tribe, or territory. The UCCJEA also applies to foreign countries, which are treated as a state of the United States for the purpose of determining child custody jurisdiction.

The UCCJEA was created to deter interstate parental kidnapping and to promote uniform jurisdiction and enforcement provisions in interstate child custody matters.

According to the UCCJEA, a Minnesota court has the authority to make a permanent, initial decision about custody considering the best interests of a child if 1) Minnesota is the child's "home state;" 2) there is no "home state," but a child and at least one parent have a significant connection with Minnesota and there is substantial evidence in Minnesota relating to the child's care, protection, training and relationships; 3) Minnesota is a more appropriate forum; and 4) no state has jurisdiction under any of the other three

There is no situation more complex and fraught with potential detrimental legal consequences than when a woman living in another state or country leaves an abusive relationship to return with her children to the state they call home.

bases for jurisdiction (that is, there is a vacuum because the family has not resided in one state long enough).

The UCCJEA prioritizes home-state jurisdiction in an initial child custody proceeding as it is only when a child has no home state, or the home state declines jurisdiction, that another court may exercise jurisdiction. "Home state" is defined as the state in which the child lived with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. (Note, however, that a period of temporary absence from the state is considered part of the six-consecutive-month timeframe.) For the purposes of determining child custody under the UCCJEA, a proceeding for divorce is included in the definition of a "child custody proceeding" under Minn. Stat. §518D.102(e).

The UCCJEA does include a provision that instills the court with temporary emergency jurisdiction, granting a Minnesota court the authority to determine temporary child custody "if the child is present in this state... and it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." This provision of the UCCJEA plays a vital role in protecting many women and children fleeing domestic abuse across state and national lines. However, the temporariness of temporary emergency jurisdiction can be a problem for women fleeing domestic violence. A child custody decision based on a court's temporary emergency jurisdiction can turn into a permanent custody determination if there is not a competing custody action in the state from which a woman fled—but if an abusive partner files a permanent custody action in another state (or if one was already started), the protection of a Minnesota court order granting a mother temporary emergency custody of her children will typically only remain in place until an order is obtained from a court of the state having initial child custody jurisdiction as outlined above.

Another provision of the UCCJEA that can play a complicating role for women fleeing domestic violence is the provision related to simultaneous proceedings in Minnesota Statute Section 518D.206. In general, if a custody proceeding has been commenced in a different state, Minnesota may not exercise jurisdiction unless the proceeding in the other state has been terminated or is stayed pending Minnesota taking jurisdiction based on its being a more convenient forum. In other words, when a woman flees domestic violence by returning to Minnesota and a child custody action has already been commenced in the state she leaves, she must participate in that proceeding to preserve her legal rights. But depending on the circumstances, she may also have legal options to request that the Minnesota court take jurisdiction over child custody.

The UCCJEA and flight from domestic abuse across state lines

A situation that implicates the UCCJEA is generally fact-specific. A situation that implicates the UCCJEA and involves domestic abuse is not only fact-specific but also urgent. I have learned that one small fact in a woman's situation can mean the difference between being able to make a compelling legal argument to protect herself and her children from returning to the state or country from which she fled and being left without a colorable legal basis to argue against such a return. In many situations, it is imperative to take legal action quickly in order to avoid the complication of simultaneous court proceedings.

Let's take Jen as our hypothetical example. Jen, a young woman living with her husband and two young children in Texas, grew up and attended college in Minnesota. She met her husband in college and they married shortly after graduation. After working in Minnesota for a few years, her husband was offered a higher-paying job in Texas. Jen was pregnant with the couple's second child at the time. She was reluctant to leave her family in Minnesota, and her marriage was rocky, but her husband promised that things would be better for them away from family and in a warmer climate, and that they would return to Minnesota someday. Jen and her husband relocated to Texas for his job.

But the higher-paying job was more demanding for her husband than Jen expected. Their relationship did not improve; after the birth of their second child, it got worse. The verbal attacks from her husband that occurred in Minnesota evolved into physical attacks, rape, and threats to harm her and the children should she leave him. He was also in complete control of the couple's finances, leaving Jen with no access to funds other than a credit card with a set limit that she was permitted to use. Jen grew depressed and anxious. She found it hard to get out of bed some days, but as a parent she had to be there for her children. Her husband taunted her about her looks and told her she was a terrible mother. He questioned where she went, what she did, and with whom she spent time. In short, Jen was financially dependent, battered, terrified, isolated, and alone, caring for two small children full-time in a small city where she hardly knew anyone. After 18 months of living this way, Jen finally confided in her parents—who immediately purchased her and her children airline tickets to return to Minnesota.

Jen's return to Minnesota is where the rubber hits the road; at this point, her action or inaction could have a huge legal impact. The fact that Jen did not intend to permanently live in Texas and her husband's promise to return to Minnesota are key facts in Jen's situation. Other factors could help or hinder Jen's claim that Minnesota has jurisdiction over a divorce and to determine child custody. As such, when a Jen, or the parent of a Jen, calls you, a Minnesota attorney, in a panic, to ask about her legal options in Minnesota, you need to obtain as much information as possible.

First and foremost, it needs to be determined whether Jen can make the claim that Minnesota is her domicile based on the fact that she did not intend on living in Texas permanently. In order to obtain a divorce in Minnesota, an individual must reside in, or be a domiciliary of, Minnesota for 180 days. Jen was not a resident of Minnesota for 180 days immediately preceding the commencement of a divorce if she moves forward immediately upon her return to Minnesota, as she does not meet the legal requirements for residency. However, if there is sufficient evidence to support a claim that Jen and her husband never intended to relinquish Minnesota as their permanent abode, then Jen can file for divorce in Minnesota asserting that she is a domiciliary of Minnesota, because according to Minnesota case law, a "[m]ere change of residence, although continued for a long time, does not effect a change of domicile."

This, in turn, supports the legal argument that Minnesota has "home state" subject matter jurisdiction over child custody under the UCCJEA, because maintaining Minnesota as her domicile shows that the time Jen and the children spent in Texas was a "temporary absence" from the children's "home state" of Minnesota under the UCCJEA. To determine whether these legal bases for Minnesota jurisdiction exist, the following questions need to be answered:

- Are there written communications between Jen and her husband discussing the temporary nature of their stay in Texas?
- Did Jen and her husband own a home prior to moving to Texas? If so, did they sell their home or keep it?
- Did Jen maintain her Minnesota driver's license?
- Did Jen and her husband file Minnesota tax returns?
- Did Jen maintain her own or the children's primary care doctors in Minnesota?
- Did Jen or her husband maintain bank accounts in Minnesota?

If the answer to most of these questions is yes, then there is a colorable claim for Jen to file for divorce in Minnesota claiming it as her domicile and further asserting that Minnesota has jurisdiction over child custody under the UCCJEA because the time she and the children lived in Texas constituted a temporary absence from the state.

A woman in Jen's position who can claim Minnesota as her domicile should take immediate legal action related to custody of the children upon arriving back in Minnesota. Being the first to commence a divorce (or a stand-alone custody action) in a situation like Jen's results in a higher likelihood that her husband's inevitable challenge to Minnesota's child custody jurisdiction will be defeated. If a woman in a situation like Jen's does not move forward swiftly, she runs the risk of having to defend herself in two state court custody proceedings and losing her case for Minnesota to take jurisdiction over child custody.

Time is very much of the essence in these matters. For example, consider the scenario where, upon her return home, Jen—understandably exhausted from the abuse and isolation she experienced—sequesters herself in the warmth of her family's support and decides to take her time in deciding what to do next regarding her relationship with her husband. She and her husband have some communication. He expresses anger that she left but is also apologetic about his behavior and promises to go to couple's counseling and to "do better" when she returns. Based on their communications in the weeks following her return to Minnesota, she does not believe she needs to make any decisions right away about whether to pursue a divorce or remain married and return to Texas.

Jen's husband, on the other hand, is very angry that he is not getting the response he wants from Jen, which is for her to commit to returning to Texas with the children. After three weeks of trying to cajole her back to Texas, he hires the most aggressive attorney he can find and files a child custody action in Texas, asserting that Texas is the children's "home state" under the UCCJEA. He further alleges that Jen abducted the children in an attempt to alienate them from him and that Jen is psychologically unstable. He requests the immediate return of the children and for them to be placed in his sole custody.

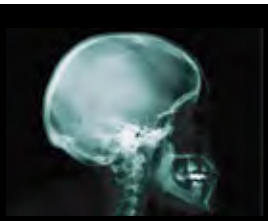
Assuming Jen can claim Minnesota as her domicile and make a colorable argument that her children's absence from Minnesota was temporary, she can still move forward with a divorce in Minnesota, asking the Minnesota court to determine child custody. But her chances of having Minnesota decide child custody have decreased, making her situation significantly more unpredictable. She is going to have to ask that the Minnesota and Texas courts confer as required under the UCCJEA. And if Texas finds that it has UCCJEA "home state" jurisdiction, the Minnesota court—whose jurisdiction was invoked only after a case was filed in Texas—is very likely to defer to the Texas court on child custody jurisdiction. In this scenario, Jen's legal situation is significantly more complex and dire.

Ultimately, no matter which state determines child custody, the court must apply its own substantive law to the unique circumstances of the family's situation. If there is a custody proceeding in the state from which a woman fled with her children, the court will still have the authority to consider the circumstances and the domestic abuse that has occurred. It may very well be that, by agreement or court order, she is granted custody of her children and granted permission to relocate with them to Minnesota. It could also be that a woman like Jen is defined as a child abductor and parental alienator, and deemed to be uncooperative and unstable—resulting in the abusive partner being granted custody of the children and using such circumstances to continue the pattern of abuse.

It is important to be aware of the potential legal consequences facing women who flee domestic abuse with their children. There is much more to say about the nuances of how the UCCJEA can affect women fleeing domestic abuse—both positively and negatively. And the UCCJEA is not the only law that impacts a woman fleeing domestic violence with her children. When a woman flees domestic violence across national lines, her children may be returned to the country from which she fled under either the UCCJEA or the Hague Convention.

As you can see, fleeing domestic abuse without promptly taking legal action can result in a woman being accused of abducting her children across state or national lines and alienating the children from the other parent. It can result in a court order for the children's return to an abusive partner, forcing a woman to choose whether to return to the place she just fled—where she may have no financial resources or social support, and may not even know the language. It can result in a woman having to navigate the complications of defending herself in two states or countries. In brief, the consequences of a woman's return to Minnesota can be psychologically and financially devastating. It is a situation that needs to be handled with awareness and care. ▲

ALLISON MAXIM, M.A., J.D. is a solo attorney at her St. Paul firm, Maxim Law, PLLC. She practices exclusively in the area of local, interstate, and international divorce and family law.
ALLISON@MAXIM-LAW.COM



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"You don't have to swing hard to hit a home run. If you got the timing, it'll go."

—Yogi Berra

"Time is an illusion."

—Albert Einstein

MINNESOTA ADOPTS

UNDERSTANDING THE NEW TIMING RULES FOR MINNESOTA LITIGATION

Take your pick, but we think Yogi Berra's insight on timing may be deeper than Albert Einstein's. Time in litigation is no illusion, and it is definitely worth getting right. After January 1, 2020, it should be a bit easier to get it right.

Timing in Minnesota litigation practice is about to become more important—but probably more effortless as well. Come the new year, most of us will have to relearn how to count days for Minnesota cases. In June, the Minnesota Supreme Court announced extensive—if not exactly earth-shaking—changes to the rules of civil procedure, civil appellate procedure, and general rules of practice, which simplify how to count days in determining deadlines.[1]

The changes follow—at least in broad strokes—the changes made to the federal rules in 2009.[2] All days are generally counted (with a few exceptions, there is no more omitting of weekends and holidays from the calculation, even for short periods), and most of the rules' time periods are adjusted to a 7-, 14-, 21-, and 28-day period schedule. A bonus benefit of this simplification of deadlines is that a response, depending on how a document is served or filed, will generally be due on the same day of the week as the event that triggers the deadline. So it should become less frequent for a deadline to fall on a weekend or holiday.

History

These changes have had a long gestation period. The Federal Rules of Civil Procedure were amended in 2009 in regard to timing, and they have functioned well in federal practice. Later that year, the Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure recommended in its report that the Minnesota rules follow the federal lead. The advisory committee renewed this recommendation in a 2017 report to the court, encouraging adoption of the federal counting rules after consideration by the Court's other advisory committees. In 2016, the MSBA also recommended making these changes in a petition filed with the Court. The Court invited public comments on the proposed changes, and there were no substantial objections to making the proposed amendments, though the Court accepted its advisory committee's recommendation that other interested committees consider the changes. We reported the committee's earlier recommendations—including proposed amendments unrelated to timing that were adopted in 2018—in our earlier Bench & Bar article.[3]

Both the Minnesota Supreme Court Advisory Committee on Rules of Civil Appellate Procedure and the Minnesota

RULES OF CIVIL PROCEDURE

SPECIFIC CHANGE	RULE NUMBER
3 days changed to 14	55.01(b)
5 days changed to 7	4.042
	5.05
	32.04(c)
10 days changed to 14	4.042
	12.01 [2x]
	15.01
	26.06(d)
	35.04
	59.04
	68.01(a); 68.01(e); 68.02(a); 68.02(d)
10 days changed to 21	4.042
15 days changed to 14	59.05
20 days changed to 21	4.042
	12.01 [4x]; 12.06
	15.01
	27.01(b)
	53.07

RULES OF CIVIL APPELLATE PROCEDURE

SPECIFIC CHANGE	RULE NUMBER
5 days changed to 7	105.02, 105.03
	115.03
	116.03
	120.02
	134.01
	140.02
10 days changed to 7	110.02
	111.01
10 days changed to 14	107.02
	109.02 [3x]
	110.02 [4x]
	111.01
	115.04 [2x]
	131.01 [2x]
	132.01
	140.01 [2x]
	143.05
15 days changed to 14	109.02
	110.03 [2x]
20 days changed to 21	111, subd. 4

By Hon. Eric Hylden, Michael B. Johnson, and David F. Herr

NEW TIMING RULES

PRACTICE THAT WILL TAKE EFFECT ON JANUARY 1, 2020

Supreme Court Advisory Committee on General Rules of Practice met and endorsed the move to this simplified version of day-counting. Both committees proposed specific amendments, and the court adopted changes in all these rules, each taking effect on January 1, 2020.

Effective date

These amendments take effect on January 1, 2020, and the amendments apply to further proceedings in actions pending on the effective date and to those filed later. The orders adopting the rules initially applied the changes only to actions filed after the effective date, but the Supreme Court amended those orders to create the uniform application of the new rules to all new proceedings in cases, subject only to the ability of the courts to order that the old rules would apply to a particular circumstance. (References to both orders are included in note 1.) We expect there would be few occasions where obtaining an exemption from the new rules, in favor of the old, would be necessary, and that these would be confined to the first month or so of 2020.

Scope of changes

These amendments are extensive in number. The changes are inventoried in the table accompanying (see above this article), with the most significant changes made to Minn. R. Civ. P. 6, which changed the rules for counting time (without itself changing any deadlines). The simple description of this change is that the omission of counting legal holidays and weekend days for certain short periods is gone—all days are counted. Coupled with this far-reaching change are myriad adjustments in the specific deadlines imposed throughout the rules.

For sheer volume of changes, the general rules win easily. Counting a deletion and an adjoining addition as a single change, the court's order on the general rules effects more than 120 changes to specific timing deadlines. But numbers, as is often so, are not really a very good measure of the magnitude of these changes. The key change doesn't really affect any specific time limit—it is the amendment of Minn. R. Civ. P. 6 to change the rules for counting days that drives the majority of the remaining changes. The fundamental change is that for all time periods under the rules, the first day continues to be omitted, but every ensuing day is counted. Saturdays, Sundays, and legal holidays are no longer excluded. This means that for periods that don't span a legal holiday, 7 days under the new counting rules is equivalent to 5 days under the old counting regime. In turn, that general

equivalency drives many of the specific changes—nearly every occurrence of an old 5-day deadline is changed to 7 days.

In addition to adjusting shorter time limits to account for the different counting rules, the 2019 amendments also simplified the time limit by standardizing most of the limits that are shorter than 30 days into either a 7-day, 14-day, 21-day, or 28-day limit. Several 30-day limits also became 28-day limits—but (quite consciously) not those relating to post-trial motions, where the time to appeal would be affected. The changes to 10-day limits are a little less predictable than the 5-day limits, as they generally are lengthened to 14 days, but occasionally shortened to 7. Twenty-day limits are uniformly changed to 21 days, and 15-day limits are similarly always transformed to become 14-day limits.

The new set of deadlines will prove easy to master—just as the 2009 federal changes have proven to be—but in the near term, lawyers will have to pay attention to the new rules. Mercifully, many of the deadlines are lengthened. Although a few 10-day deadlines will become 7-day deadlines, most are extended to allow 14 days. All 20-day deadlines are converted to 21 days.

The simplification of deadlines should bring three kinds of benefits. First, they are easier to predict and to remember. The overall number of different deadlines is reduced. Even more important, the change will allow most deadlines to fall on a weekday. Because most documents are required to be served and filed electronically, if a response is allowed or required, the 7/14/21/28 regime will result—at least the majority of the time—in the due date for that response falling on the same day of the week. The amended rules retain the provisions of Rule 6, allowing an additional day for service or filing made after 5:00 p.m. and three additional days after service or filing by mail. Third, there is an advantage of counting "state" days the same way "federal" days are counted—not because the federal method is intrinsically superior, but because uniformity of state and federal practice is preferable, at least where there is no good reason for a difference.

What doesn't change

Many aspects of timing under the rules remain unchanged. Time limits measured in hours, weeks, months, or years do not change. Existing time limits of 7, 14, 21, and 28 days don't change. Thirty-day deadlines are not generally reduced to 28 days where the shortened deadlines would create undue risk of missing jurisdictional deadlines that cannot be extended.

The established counting mechanics continue—you don't count the first day, you count the last day, etc. If the end date of a specified period is a Saturday, Sunday, or legal holiday, the next day that is not one of those is the required end date. Legal holidays are defined just as they are now: as defined by statute[4] for the state or any state-wide branch, and also any day that the U.S. Postal Service does not operate.

The rules continue to provide for extra time for service by mail (where that is still allowed) or service late in the day. Three extra days are allowed where a document is served by mail, and one day where it is served late in the day.

A life-ring is available

The Minnesota Supreme Court's orders adopting all these changes incorporate the provision of Minn. R. Civ. P. 81.01(b), making the amendments apply to both pending and new actions after the effective date of January 1, 2020. The Court expressly incorporated the safe harbor allowed by the rule "to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible, or would work injustice, in which event the former procedure applies." Given the non-Draconian nature of these changes, as well as the general liberal approach given to deadlines where there is no game-playing or prejudice to the court or other parties, this exception will probably rarely need to be invoked.

A word on counting backwards

Because Minnesota practice involves many deadlines that are measured a specified number of days before an event (typically a scheduled hearing), the rule now includes express directions to count "backwards" from the event, and if the "last" day falls on a holiday or weekend day, the due date count extends back to the last day that is not one of those days. This is a monumental change—not because it is viewed as changing the existing practice, but because it should obviate the endless confusion on this question.

Practice pointers

At least in the short term, you'll need to check and double-check the deadlines under the amended rules.

Review the forms and procedures used in your practice and update them to conform to the new time limits. The table that accompanies this article may be helpful there.

Consider taking a "close is good enough" approach to slight timing miscues made by your adversary, especially during the first part of 2020—the courts will hear, but not genuinely welcome—most motions over "their brief was untimely by a day so we need to strike the hearing." There often is a way to work out such a problem short of "Gotcha!"

Your staff will appreciate receiving a tutorial on the new counting regime. Their questions may also help clarify any remaining uncertainties you have.

One notable exception was consciously made to retain the 10-day period for removal of a judge under R. Civ. P. 63.03. Several other exceptions were also made in the General Rules of Practice.

Conclusion

The advisory committees continue to monitor the rules and eagerly seek to know about how they are working to help achieve the "just, speedy, and inexpensive determination of every action."[5] ▲

Judge ERIC HYLDEN is a district court judge in Duluth. He has served as chair of the Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure throughout the consideration of these timing changes. He thanks his law clerk, Jordan Leitzke, for his contributions to this article.
ERIC.HYLDEN@COURTS.STATE.MN.US

MICHAEL B. JOHNSON is senior legal counsel in the Legal Counsel Division of Minnesota State Court Administration. Mike serves as staff to the advisory committee.
LEGALCOUNSELRULES@COURTS.STATE.MN.US

DAVID F. HERR practices at Maslon LLP in Minneapolis and is reporter for the advisory committee.
DAVID.HERR@MASLON.COM

The authors are indebted to the entire membership of the advisory committee for their hard work on these amendments. The wisdom of the group clearly exceeded that of any single member.

GENERAL RULES OF PRACTICE

SPECIFIC CHANGE	RULE NUMBER
1 day to 24 hours	602
1 day changed to 7	136.01
2 days changed to 7	113.03(b)
3 days changed to 72 hours	4.03
3 days changed to 7	115.03(c)
	115.04(c)
	208
5 "business days" changed to 7 days	611(c)
5 days changed to 7	113.03(b)
	114.09(b)(2)
	126
	141.01
	303.01(c) [2x]; 303.03(a)(3)
	353.02
	359.01
	361.01; 361.02; 361.03 [2x]; 361.04
	364.05; 364.09
	365.04
	371.04 [2x]
	372.04 [2x]
	377.10
	416(b) [2x]
	509(b); 509(d) [2x]
	510(a)
7 days to 14	115.04(b)
9 days to 14	115.03(b)
10 days changed to 7	104
	108
	114.05

REVIEW THE FORMS AND PROCEDURES USED IN YOUR PRACTICE AND UPDATE THEM TO CONFORM TO THE NEW TIME LIMITS.

SPECIFIC CHANGE	RULE NUMBER
10 days changed to 14	9.04 [2x]
	107
	114.09(b)(2), (e) [4x]
	114, App. II(G)
	126
	141.01
	303.03(a)(1)
	360.02
	361.02; 361.02; 361.03
	363.04
	364.14
	370.06 [2x]
	371.05; 371.07 [2x]
	372.06 [2x]
	377.04; 377.05
	508
	703
14 days changed to 21	115.04(a)
	303.03(a)(2)
	372.04
15 days changed to 14	128
20 days changed to 21	8.07(a)
	114.09(e); (f) [2x]
	119.05(c) [2x]
	122
	364.03
	370.01; 370.04 [2x]; 370.05 [2x]
	371.01; 371.05
	372.01
	377.02; 377.05
	515
	519
	520(a) & (b)
	521(b) [2x], 521(c); 521(e)
30 days to 28	114, App. II(D), II(G)
	146.03
	304.03(a)
	366.01 [2x]
	377.04; 377.05
	410(a); 410(b)
	418(c)
	510(b) [2x]
45 days to 30	363.04

Notes

[1] The Court's 6/20/2019 adoption orders, including commentary from the Court as well as the text of the adopted rules, is available on the Court's website at:

Civil Rules: *http://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/RecentRulesOrders/ORADM048001-062019.pdf*

General Rules: *http://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/RecentRulesOrders/ORADM098009-062019.pdf*

Civil Appellate Rules: *http://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/RecentRulesOrders/ORADM098006-062019.pdf*. Amended orders that modify the application of the amendments to actions pending on the 1/1/2020 effective date, each entered on 8/6/2019, are also available on that site:

Civil Rules: *http://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/RecentRulesOrders/ ORADM048001-080619.pdf*

General Rules: *http://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/RecentRulesOrders/ ORADM098009-080619.pdf*

Civil Appellate Rules: *http://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/RecentRulesOrders/ ORADM098006-080619.pdf*

[2] This follows the advisory committees' general preference for maintaining similarity between the state and federal rules, at least where the federal rules make some sense and issues unique to state court litigation don't suggest that a different course is better. *See generally* David F. Herr, *A Parting of Ways: Amendments to the Civil Rules—State and Federal*, 57 Bench & Bar of Minn., May/June 2000, at 29.

[3] *See* Hon. Eric Hylden, Michael B. Johnson & David F. Herr, *Wide Variety of New Civil Rules Take Effect in July*, 75 Bench & Bar of Minn., May/June 2018, at 18.

[4] *See* Minn. Stat. §645.44, subd. 5.

[5] *See* Minn. R. Civ. P. 1.

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Trends in E-Scooter Litigation

An update on the still-evolving body of law

By Kyle Willems

The past two summers have introduced residents of Minneapolis and St. Paul to one of the hottest trends in personal transportation: e-scooters. In the spring of 2018, e-scooters became an overnight sensation and completely disrupted the Twin Cities' personal transportation marketplace. As in every market where e-scooters have been introduced, their sudden popularity means there is little jurisprudence directly addressing the unique tort-based issues they create. The purpose of this article is to give an overview of these issues and to provide an idea of what e-scooter jurisprudence may develop in Minnesota based on some notable legal developments coming out of Minnesota's sister jurisdictions.

What are they?

E-scooters are electronic scooters owned by a variety of tech companies, most notably Bird, Lime, JUMP, Lyft, and Spin. Of the four active e-scooter companies in the Twin Cities area, all four (JUMP, Lyft, Spin, and Lime) currently have agreements with the City of Minneapolis to provide scooters, and two (Lime and JUMP) have similar agreements with the City of St. Paul. Bird, one of the two biggest scooter providers, decided to opt out of the Minneapolis-St. Paul marketplace for 2019.

E-scooters are relatively simple to use. A first-time user needs to download the e-scooter company's application to their smartphone. Post-download, the app typically requires that the user first review and accept a liability waiver. The user must also click through various usage and safety instructions, and then digitally input a payment source to enable access to any of that company's e-scooters scattered throughout the Minneapolis and St. Paul metropolitan areas. The user is able to locate available e-scooters via the app's GPS location feature.

After reading through and acknowledging the variety of instructions and safety warnings, as well as clicking through the various waivers and indemnity agreements, users can walk up to an e-scooter and access it via their smartphones.[1] Once a scooter is active, the rider can use the scooter as he or she sees fit, traveling up to 15 miles per hour.[2] When the rider is done with the e-scooter, it can be left anywhere.

IN THE TWIN CITIES E-SCOOTERS CANNOT BE RIDDEN ON SIDEWALKS AND MUST BE RIDDEN IN BIKE LANES WHERE AVAILABLE

The e-scooters are battery operated. When they run out of power, the scooter services typically use independent contractors to pick up the e-scooters and charge them.[3] Scooter services will pay the contractors to charge the scooters and return them to the streets.[4]

Methods of e-scooter maintenance and servicing vary by company. Bird, for example, previously utilized independent contractors, trained via YouTube videos, to service their scooters.[5] These contractors would get notified when the e-scooter provider received reports of mechanical issues on an e-scooter and go out, retrieve, and service the e-scooter on their own. More recently, Bird has changed the way the company services its e-scooters from independent contractors to in-house employees who work in their distribution centers.[6] Other e-scooter providers, like Lime, have always had their e-scooters serviced by company employees who work in the providers' distribution centers.[7]

Litigation trends so far

Major e-scooter cases are popping up in Minnesota's sister jurisdictions. These cases are mostly in their infancy, so it is difficult to determine how the courts will come down on the claims that are asserted. The tort claims so far include: rider negligence, negligent design, negligent manufacturing, negligent marketing, distribution of defective e-scooters, public nuisance, unlawful business practices, premises liability, failure to maintain and service, failure to warn of dangerous defects, gross negligence, and common carrier liability.[8]

Rider vs. e-scooter company claims

Some of the most common yet difficult claims are those brought by e-scooter riders against e-scooter companies. These claims are difficult for a variety of reasons, most notably because a condition precedent to using an e-scooter is that a rider e-sign a liability waiver. Like many of their sister jurisdictions, Minnesota courts routinely enforce liability waivers and the acknowledgment-of-risk provisions contained therein.[9]

Because of the potential bar to recovery presented by liability waivers, e-scooter riders are left with few ways to assert claims against an allegedly negligent e-scooter company. In recent high-profile attempts to hold e-scooter companies liable, riders are rooting their claims, in large part, in the products liability and products liability-related realms.[10] The claims in these cases vary, but some involve allegations that e-scooter companies and e-scooter manufacturers negligently manufactured the e-scooters, negligently trained and supervised contractors and other individuals tasked with day-to-day maintenance, otherwise negligently maintained and serviced the e-scooters, and even failed to ensure the software that governs the e-scooters is bug-free.[11]

These cases are complex and so we can expect it to be many months, if not years, before they yield any meaningful jurisprudence. Of course, this presumes these cases do not settle before then. What we have already learned from them is that if e-scooter companies are going to have any significant tort exposure to riders, it is probably going to be a result of products liability claims.

Pedestrian vs. rider claims

Current data shows that a significant percentage of e-scooter claims are the result of riders colliding with motor vehicle or pedestrian traffic.[12] These cases are largely analogous to traditional motor vehicle accident cases, where a trier of fact has to decide whether one or both parties to the collision is negligent, and if so, what apportionment of fault is to be assigned.

A 2017-18 study conducted by the Journal of the American Medical Association (JAMA) gives us some insight into the causes of the collisions that lead to these types of claims. The study showed that 9.4 percent of riders failed to comply with traffic laws and that 26.4 percent were observed riding e-scooters on sidewalks, where scooters are typically not permitted.[13] This data tells us that we are likely to see a significant number of cases caused by the negligent conduct of e-scooter riders, requiring discovery on not just how, but where, an e-scooter rider was using the e-scooter at the time of the collision.

9.4% of riders fail to comply with traffic laws

26.4% of riders are seen on sidewalks where scooters not permitted

Premises liability claims

Perhaps some of the most unique claims born out of the e-scooter revolution are premises liability claims. As discussed above, riders can decide to stop using their e-scooter whenever and wherever they want. This means that e-scooters can be left haphazardly on a lawn, in front of a building, on a public sidewalk, or in other high-traffic areas. If an e-scooter is laid down on its side, it can become difficult to see, thereby creating a trip-and-fall hazard. For a possessor of land, this can create serious premises liability concerns.

As an example, a rider might go to a restaurant and then lay down an e-scooter at the restaurant's entrance. Shortly afterward, another customer trips over the e-scooter and sustains serious injuries. In this case, the business owner may be liable. At a minimum, significant discovery would likely need to be conducted on the issues of actual and constructive notice, and whether or not there is a duty to warn of the hazards posed by e-scooters.

In other scenarios, municipalities may become liable for pedestrian trip-and-fall claims that are the result of e-scooters being strewn about public sidewalks and in parks. The way public property trip-and-fall cases play out could have severe ramifications for the future of e-scooters in public places. Despite various protections afforded via governmental immunities, the potential risk of exposure gives municipalities an incentive to heavily regulate, or even ban, e-scooters on public property.

The e-scooters are also creating ADA-related premises liability issues. Because they are routinely left on public walkways, disabled persons could have difficulty traversing these walkways. This is exactly the argument being made by plaintiffs in a class action lawsuit against Bird, Lime, and their e-scooter manufacturers. In *Labowitz, et al. v. Bird Rides, Inc., et al.*, the plaintiffs allege that since there are no docking stations or designated parking locations for the e-scooters, they are being left in the middle of the sidewalks and thus limiting disabled persons' ability to use the sidewalks and walkways.[14] The complaint in that case was filed on October 31, 2018, and discovery is currently ongoing.

Developments in e-scooter class action litigation

As previously noted, there are several high-profile e-scooter class action cases in which the plaintiffs assert a variety of tort claims.[15] Some of the more interesting claims being asserted are those for nuisance.[16]

In *Borgia, et al. v. Bird Rides, Inc., et al.*, the plaintiffs allege that e-scooters create a public nuisance.[17] Specifically, the complaint alleges that the e-scooter defendants have a duty to the public to conduct their business in a manner that does not threaten harm or injury to public health, safety, and welfare.[18] It is then alleged that placing the e-scooters on sidewalks and in public places unlawfully obstructs free access to and passage through these public places, and even creates a fire hazard.[19] Allegedly, this conduct harms the general health, safety, and well-being of the public and otherwise creates a nuisance.[20]

There is not any jurisprudence on the nuisance claims yet, but the developments that are likely to come out of *Labowitz* and *Borgia* are almost certainly going to have a major impact on e-scooter litigation in jurisdictions across the United States, including Minnesota.

Riders can decide to stop using their e-scooter whenever and wherever they want. This means that e-scooters can be left haphazardly on a lawn, in front of a building, on a public sidewalk, or in other high-traffic areas.

Legislative developments

Various state and local governments across the United States have enacted laws aimed at addressing the unique safety concerns posed by e-scooters. Most of the legislative developments are happening in warm-weather states, where the scooters pose year-round concerns. In many states and most of the recent markets, e-scooter issues have not been addressed specifically by state legislatures. Instead, local governments try to regulate them under existing statutes that do not address the specific problems that e-scooters create.

Virginia's state statute, for example, requires that e-scooters only be used on roads with speed limits less than 25 mph but allows e-scooters to operate on sidewalks.[21] Texas's state law has similar limitations, allowing e-scooters to operate on roads with speed limits less than 35 mph and on sidewalks.[22] California, the main laboratory for legal developments surrounding e-scooters, has state laws in place stating that e-scooters are not allowed on sidewalks and must be ridden on streets while obeying all traffic laws.[23] If there is a designated bike lane, e-scooter riders must use it.[24]

Currently in Minnesota, e-scooters are governed by Minn. Stat. §169.225, a statute enacted in 2005.[25] This law lays out regulations similar to those adopted in California, where e-scooters must be ridden on the street, or in a bike lane when possible, and cannot be ridden on sidewalks.

Since e-scooters are a relatively new phenomenon, and they typically fall under state statutes that do not specifically address e-scooters and their unique safety concerns, many large cities have begun using ordinances to regulate e-scooter deployment and rider use. Arlington, Virginia does not allow e-scooters to be ridden on sidewalks, Arlington County bike trails, or in Arlington County Parks. They must be ridden in the streets and in bikes lanes where possible.[26]

In Washington D.C., e-scooters are not allowed on sidewalks and must be ridden in the street or a bike lane when a rider is within the Central Business District (downtown area) but are allowed on sidewalks outside of downtown.[27] Dallas has similar rules, permitting e-scooters on sidewalks outside the Central Business District.[28] Chicago requires e-scooters to be ridden in the street or within bike lanes when available.[29] Los Angeles has more restrictive rules that do not allow e-scooters to be ridden on sidewalks at any time and also prohibits them in many heavily trafficked areas of the city, like the Venice Beach Boardwalk/Ocean Front Walk, Santa Monica Pier and Bridge, Beverly Hills, West Hollywood, and other areas.[30]

St. Paul has recently enacted its own "shared mobility vendor" ordinance.[31] The ordinance states all e-scooter companies need to have a license, permit, or contract to operate in the city.[32] It does not add further safety regulations for scooter use or prohibit riding in any areas except sidewalks. When the St. Paul Mayor's Office was contacted for a comment regarding the city's policies on e-scooters, a representative stated that the city defers to the Minnesota statute

governing motorized foot scooters[33] and reiterated that e-scooters are not to be ridden on sidewalks. The mayor's office also stated that although helmets are not required, they are recommended, adding that they strongly encourage each e-scooter company to provide helmets for its riders. The City of St. Paul further requires e-scooter companies to properly re-park an incorrectly parked scooter within two hours of its being reported to the company.[34]

The City of Minneapolis was asked to comment on any internal discussion regarding the regulation of e-scooters but did not respond. Minneapolis has an ordinance similar to St. Paul's, requiring e-scooter companies to obtain a license agreement with the city before deploying their scooters.[35] Via the city's website, it defers to the Minnesota statute that governs e-scooters and does not impose any additional regulations on operating the e-scooters.[36] E-scooters cannot be ridden on sidewalks and must be ridden in bike lanes where available.[37]

Conclusion

E-scooters are likely here to stay. This means Minnesota attorneys need to be on the lookout for fresh legal developments concerning e-scooters, which are likely to be forthcoming over the next few years. One of the best ways Minnesota attorneys can stay abreast of recent developments concerning e-scooters is to keep a close eye on what Minnesota's sister jurisdictions are doing. ▲

KYLE WILLEMS is a litigation attorney with the law firm Tewksbury & Kerfeld, P.A. He primarily handles, tort, construction defect, and commercial litigation matters. He wrote this article with substantial assistance from Nicolette Sorensen and John Christian. Ms. Sorensen is a 3L at the University of St. Thomas School of Law and a law clerk at Tewksbury & Kerfeld, P.A. Mr. Christian is a 2L at the University of St. Thomas School of Law and is also a law clerk at Tewksbury & Kerfeld, P.A.

KWILLEMS@TEWKSBURY-KERFELD.COM

Notes

[1] A prospective rider must simply click to verify they are over the age of 18 to gain access to e-scooters; there is no affirmative verification of a rider's actual age. All scooter providers also require riders to affirm they possess a valid driver's license, but again, there is no verification of this affirmation.

[2] Ethan May, *Here's Everything You Need to Know About Bird and Lime Electric Scooters*, Indianapolis Star (last updated 4/11/2019, 11:21 AM), *https://www.indystar.com/story/news/2018/06/21/bird-electric-scooters-rental-costs-hours-charging-locations/720893002/*.

[3] *Become a Lime Juicer*, Lime, Inc. (last visited 7/22/2019), *https://web.limebike.com/juicer?utm_source=lbw&utm_medium=bannernav&utm_campaign=signup&utm_content=chargeourscooters*; *There is a New Way to Earn*, Bird, Inc. (last visited 7/22/2019), *https://chargers.bird.co/join*.

[4] *Id.*

[5] Josh Edelson & Joshua Brustein, "Bird Scooters Ditches Gig Economy Mechanics in Favor of In-House Repairs," Fortune (3/8/2019), *https://fortune.com/2019/03/08/bird-scooters-in-house-repairs/*.

[6] *Id.* at note iii.

[7] *Careers*, Lime, Inc. (last visited 7/22/2019), *https://www.li.me/careers*.

[8] Plaintiff's Original Petition & Request for Discovery, *Walker v. Neutron Holdings, Inc., et al.*, (Tex. Dist. 2019) No. D-1-GN-19-002433, 2019 WL 1997639; Complaint for Damages, *Duker, et al. v. Bird Rides, Inc., et al.*, (Cal. Super. 2018) No. 19STCV01214, 2018 WL 7150083; Defendant's Brief in Support of its Motion for Summary Judgment, *City of Milwaukee v. Bird Rides, Inc.*, (E.D. Wis. 2019) No. 18-CV-1066-jps, 2019 WL 2648026.

[9] *See Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 731 (Minn. Ct. App. 1986) (holding that although upholding exculpatory clauses can be harsh, they are enforceable). Second, even if the waiver were to be theoretically held to be improper, e-scooter service providers are able to raise an assumption of risk defense. *See Schneider ex rel. Schneider v. Erickson*, 654 N.W.2d 144, 148 (Minn. Ct. App. 2002) (holding that paintball player voluntarily entered a situation where there are well-known, incidental risks and therefore assumed the risk). This is a particularly successful defense raised by defendants in a variety of recreational activities and uses. *Id; see Malecha*, 392 N.W.2d 727.

[10] *See* Complaint for Damages, *supra* note 6; Complaint For:, *Conley v. Bird Rides, Inc., et al.*, (Cal. Super. 2019) No. 19STCV22858, 2019 WL 2994741; Plaintiff's Original Complaint *Phillips ex rel. Stoneking v. Neutron Holdings, Inc.*, (N.D. Tex. 2018), No. 3:18-cv-03382-S; Complaint for Damages, *Matsui v. Lime, Inc., et al.*, (Cal. Super. 2019) No. CGC-19-573730, 2019 WL 859384 (injured rider alleges defective design, negligent testing and maintenance); Plaintiff's Original Petition and Request for Disclosure, *Mahoney v. Neutron Holdings, Inc.*, (Tex. Dist. 2019) No. D-1-GN-19-000893, 2019 WL 825831 (rider injured when thrown from Lime scooter alleges negligent manufacturing; failure to exercise reasonable care; failure to warn; failure to test, inspect, and repair; failure to remove scooters with known malfunctions/defects).

[11] *See* Complaint for Damages, *supra* note 6; Plaintiff's Original Complaint, *supra* note 8; Plaintiff's Original Petition & Request for Discovery, *supra* note 6.

[12] Tarak Trivedi, *Injuries Associated With Standing Electric Scooter Use*, Jama Network Open, 1/25/2019, at 3.

[13] Trivedi, *supra* note 2, 4.

[14] Complaint for: *Labowitz v. Bird Rides, Inc.*, (C.D. Cal. 2018) No. 2:2018-cv-09329, 2018 WL 5775613.

[15] Complaint for Damages, *supra* note 6; Complaint For:, *Labowitz* (No. 2:2018-cv-09329); *Borgia v. Bird Rides, Inc.*, (C.D. Cal. 2018) No. 2:2018-cv-09685.

[16] *Borgia* (No. 2:2018-cv-09685); Class Action Complaint For:, *Montoya, et al. v. City of San Diego, et al.*, (S.D. Cal. 2019) No. 3:19-cv-00054 2019.

[17] *Borgia* (No. 2:2018-cv-09685).

[18] *Id.* at 144.

[19] *Id.* at ¶ 145.

[20] *Id.*

[21] Va. Code Ann. §46.2-904 (1989).

[22] Tex. Transp. Code Ann. §551.352 (2005).

[23] Cal. Veh. Code Ann. §21235 (1999).

[24] *Id.*

[25] Minn. Stat. Ann. §169.225 (2005).

[26] *So You Have Questions About Scooters?:* Lyft, Inc. (last visited 7/18/2019), *https://www.lyft.com/scooters/arlington-va/how-to-ride#follow-traffic-laws*.

[27] *So You Have Questions About Scooters?:* Lyft, Inc. (last visited 7/14/2019), *https://www.lyft.com/scooters/washington-dc/how-to-ride#follow-traffic-laws*.

So You Have Questions About Scooters?: Lyft, Inc. (last visited 7/14/2019), *https://www.lyft.com/scooters/los-angeles-ca/faq*.

[28] *So You Have Questions About Scooters?:* Lyft, Inc. (last visited 7/14/2019), *https://www.lyft.com/scooters/dallas-tx/faq*.

[29] *So You Have Questions About Scooters?:* Lyft, Inc. (last visited 7/14/2019), *https://www.lyft.com/scooters/chicago-il/faq*.

[30] *So You Have Questions About Scooters?:* Lyft, Inc. (last visited 7/14/2019), *https://www.lyft.com/scooters/los-angeles-ca/faq*.

[31] St. Paul, Mn, Codified Ordinances §373.02 (2019).

[32] *Id.*

[33] Minn. Stat. §169.225.

[34] *Shared Bikes and Scooters*, City of St. Paul (last visited 7/18/2019), *https://www.stpaul.gov/departments/public-works/shared-bikes-and-scooters*.

[35] *Motorized Foot Scooters: How to Scoot*, City of Minneapolis (last visited 7/22/2019), *http://www.minneapolismn.gov/publicworks/trans/WCMSP-212816*.

[36] *Id.*

Landmarks in the Law

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CRIMINAL LAW

JUDICIAL LAW

Expungement: Request to waive filing fee is governed by expungement statute. Appellant petitioned to expunge records relating to a prior conviction and requested a waiver of court fees and costs. His request was denied, and the question on appeal is whether the expungement statute or the *in forma pauperis* statute governs the fee waiver request. The expungement statute, Minn. Stat. §609A.03, permits waiver of the expungement filing fee in cases of indigency and mandates waiver in cases in which proceedings were resolved in favor of the petitioner. Appellant, however, sought waiver under section 563.01, which governs authorization of *in forma pauperis* status in civil cases.

The court of appeals holds that the fee waiver provisions in section 609A.03 apply to requests to waive the expungement filing fee. However, because section 609A.03 does not provide a standard for determining whether an individual is financially eligible for fee waiver as section 563.01 does, the court "assume[s] without deciding that an expungement action under chapter 609A is a 'civil action' within the meaning of section 563.01, and that the standards for determining financial eligibility for fee waiver under section 563.01 may be used to determine whether a petitioner is indigent within the meaning of section 609A." While appellant qualifies for section 563.01's fee waiver, a finding of indigency does not mandate a waiver under section 609A.03. In cases of indigency, under section 609A.03, a fee waiver is discretionary.

While these provisions both arguably apply yet seem to conflict, the court holds that section 609A.03 applies, as it is more specific than section 563.01's general fee waiver provision. The court also holds that it is not error for the district court to rely on the financial standards in section 563.01 to determine whether an expungement petitioner is indigent, but the district court must base its ultimate waiver determination on the standards set forth in section 609A.03. ***State v. Scheffler***, 932 N.W.2d 57 (Minn. Ct. App. 7/8/2019).

DWI: Right to counsel prior to BAC test does not apply when asked to submit to a blood test pursuant to a warrant. Appellant was arrested for DWI and the police obtained a search warrant for a sample of appellant's blood. Appellant was presented with the search warrant and read the implied consent advisory, which stated that "refusal to submit to a blood or urine test is a crime." Appellant allowed her blood to be drawn, which later revealed a BAC over the legal limit. When she was charged with fourth-degree DWI, appellant moved to suppress the blood test results based on an alleged violation of her limited constitutional right to counsel before submitting to the test. The district court suppressed the test results. On the state's appeal, the court of appeals reversed.

The Supreme Court addresses whether a driver arrested for DWI, read an implied consent advisory, and presented with a search warrant authorizing the search of her blood has the right to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing. The Court recognizes that limited right to counsel was established in *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828 (Minn. 1991), specifically, when the implied consent advisory is read and a suspected impaired driver is faced with deciding whether to submit to implied consent testing, the driver has a right to counsel to assist in making that decision. *Friedman* was decided when the implied consent law used the same procedure for blood, breath, and urine tests. Since then, the law has changed to require blood and urine tests be conducted only pursuant to a warrant or an exception to the warrant requirement. The implied consent advisory for blood and urine

tests was also changed to inform drivers only that refusal to submit to a blood or urine test is a crime—unlike the breath tests advisory, which continues to require that drivers be informed of the limited right to counsel established in *Friedman*.

As in *Friedman*, appellant had the choice to refuse testing or submit to testing. However, the presence of a search warrant fundamentally changes the encounter here, as the decision whether to comply with a warrant is not a "unique decision"—every person who is the subject of a search warrant has the choice of either complying or being subjected to criminal penalties. The Court has never held that a right to counsel applies before a search warrant may be executed. The existence of a search warrant also protects against many of the concerns noted in *Friedman*—it protects unwarranted intrusions by the state and protects against unchecked legal power of the state by requiring the involvement of a neutral and detached magistrate. Finally, because the penalties for a DWI conviction and a test refusal conviction are "similar," there is less need for counsel to explain "the alternative choices" and "legal ramifications." The court of appeals is affirmed. ***State v. Rosenbush***, 931 N.W.2d 91 (Minn. 7/10/2019).

■ **Restitution: Restitution may be ordered only for losses directly caused by defendant's crime.** Appellant was charged with second-degree burglary and first-degree arson after a cabin was burglarized and destroyed in a fire. The cabin owner's generator was found in appellant's truck, which was pictured by a trail camera at the scene. A jury found appellant guilty of burglary. The district court found the arson was factually related to the burglary and ordered appellant to pay restitution for the destroyed cabin, and the court of appeals affirmed.

The district court considered whether the loss of the cabin shared a "factual relationship" to the burglary offense. Instead of considering whether the fire damage was "directly caused" by appellant's burglary conduct, it considered whether the arson was "related to" the burglary.

Several statutes allow the district court to order restitution for losses that result from a crime (Minn. Stat. §§611A.01(b), .04, subd. 1(a), .045, subds. 1(a)(1), 3(a)). Cases interpreting these statutes established the general rule "that a district court may order restitution only for losses that are directly caused by, or follow naturally as a consequence of, the defendant's crime." Neither the district court nor the court of appeals applied that standard in this case. The case is remanded to the court of appeals for application of the proper standard—that is, the direct-causation standard. ***State v. Boettcher***, 931 N.W.2d 376 (Minn. 7/17/2019).

■ **Homicide: Third-degree murder; state not required to prove defendant lacked an "intent to effect the death of any person."** Respondent was charged with third-degree murder, criminal vehicular homicide, and criminal vehicular operation after she crashed her vehicle into a city maintenance vehicle, killing one occupant and seriously injuring the other. After a stipulated facts trial, the district court found respondent guilty of all counts, finding respondent's conduct was a suicide attempt, but that there was no evidence she intended to kill anyone else. On appeal, respondent argued the district court erred in finding she had not

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established a mental illness defense and that the state did not prove she acted "without intent to effect the death of any person." The court of appeals reversed respondent's conviction because the state failed to prove respondent acted "without intent to effect the death of any person," which it determined to be an element of third-degree murder.

Minn. Stat. §609.195(a) (2018) provides 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 Supreme Court first discusses two lines of precedent: the *State v. Stokely*, 16 Minn. 282 (1871) line of precedent, and the *State v. Brechon*, 352 N.W.2d 745 (Minn. 1984) line of precedent, both of which interpreted the precursor to the current third-degree murder statute. The *Stokely* line establishes that the "without" clause of the statute was not an element of the offense, while the *Brechon* line views the "without" clause as either an element or an affirmative defense. The Court clarifies that the *Stokely* line of precedent applies, and the state need not prove what follows the word "without," when the existence of the fact referenced in the "without" clause constitutes a more serious offense. The *Brechon* line of precedent applies when the existence of the fact referenced in the "without" clause of the statute makes the conduct not criminal.

The Court holds that the *Stokely* line of precedence applies to third-degree murder, as the existence of the fact referenced in the third-degree murder statute's "without" clause (the defendant intended to effect the death of a person) makes the defendant's conduct a more serious offense (second-degree intentional murder). Applying the *Stokely* line of precedent, the Court concludes that the third-degree murder statute does not require the state to prove beyond a reasonable doubt that the defendant lacked an "intent to effect the death of any person." The court of appeals is reversed. ***State v. Hall***, 931 N.W.2d 737 (Minn. 7/31/2019).

■ **Firearms: Person adjudicated delinquent for crime of violence may not possess firearms.** As a minor, appellant was adjudicated delinquent of a fifth-degree drug offense. Three years later, as an adult, he pleaded guilty to possession of a firearm by an ineligible person. He argues his juvenile adjudication did not qualify as a "crime of violence," and, therefore, that he was able to possess a firearm.

Minn. Stat. §624.713, subd. 1(2)'s plain language indicates that juvenile adjudication for crimes of violence falls within the statute's scope. The statute renders ineligible to possess ammunition or firearms "a person who has been convicted of, or adjudicated delinquent or convicted as an extended jurisdiction juvenile for committing, in this state or elsewhere, a crime of violence." The definition of "crime of violence," however, causes tension, as it includes "felony convictions" for listed offenses. But to adopt appellant's argument that "conviction" in the crime of violence definition excludes juvenile adjudications contradicts the plain language of section 624.713, subd. 1(2). The only reasonable interpretation is that "convictions" refers to the elements of the underlying statutory offenses, rather than the ultimate disposition. Thus, the court of appeals holds that "crime of violence" in section 624.712, subd. 5, includes juvenile adjudications for the listed offenses. Section 624.713, subd. 1(2), prohibits persons who have been adjudicated delinquent of a "crime of violence" from possessing firearms. ***Roberts v. State***, A19-0389, 2019 WL 3770841 (Minn. Ct. App. 8/12/2019).

■ **Sentencing: "Offense definitions" refers to element-based definitions of offenses in Minnesota statutes.** Respondent was convicted of fifth-degree possession of a controlled substance in 2012 and first-degree sale of a controlled substance in 2016. The district court assigned one-half felony point for his 2012 conviction in calculating the sentence for his 2016 conviction. The court of appeals agreed with respondent's interpretations of the sentencing guidelines that section 2.B.7.a requires the court to apply the element-based offenses definitions in effect when respondent committed the 2016 offense in order to determine the prior offense's point value. The 2016 Drug Sentencing Reform Act (DSRA) changed the classification of certain fifth-degree drug offenses from felonies to gross misdemeanors. The court of appeals concluded that the state failed to prove the 2012 offense should be classified as a felony for purposes of respondent's criminal history score, because the state did not prove the weight of drugs involved in respondent's 2012 offense, as required under the DSRA-revised elements of the offense.

Section 2.B.7.a provides that, when calculating a criminal history score, "[t]he classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by the current Minnesota offense definitions… and sentencing policies." The Supreme Court notes that "classification" and "offense definitions" are not defined in the guidelines and looks to the dictionary definitions, the uses of the terms in section 2.B.7.a, and their use in the context of section 2.B.7 as a whole. The Court concludes that only one interpretation of section 2.B.7.a is reasonable: The phrase "offense definitions" refers to the element-based definitions of crimes. The court of appeals is affirmed. ***State v. Strobel***, 932 N.W.2d 303 (Minn. 8/14/2019).

■ **4th Amendment: Coerced anoscopy is unreasonable.** At the police station after his arrest following a controlled buy, appellant was observed attempting to insert something in his rectum and a strip search revealed plastic coming from appellant's anus. Police obtained a search warrant authorizing hospital staff to use any medical/physical means necessary to retrieve the item from appellant's anus. Appellant refused a liquid laxative and other less-invasive measures. Appellant was then strapped down and sedated, and an anoscopy was performed, with two officers present, during which a baggie containing crack cocaine was removed. The doctor who performed the anoscopy testified at trial that no medical emergency existed at the time and that they could have waited for the baggie to exit appellant's body through natural processes. Appealing his fifth-degree drug conviction, appellant argues the procedure by which the cocaine was removed violated his right against unreasonable searches and seizures. The district court and the court of appeals agreed that the search was reasonable under the circumstances.

The Supreme Court determines that the proper test to analyze the reasonableness of a forced anoscopy is the balancing test set forth in *Winston v. Lee*, 470 U.S. 753 (1985): (1) "the extent to which the procedure may threaten the safety or health of the individual," (2) "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," and (3) "the community's interest in fairly and accurately determining guilt or innocence."

The Court finds that the first factor weighs slightly in appellant's favor. Although minimal, an anoscopy does pose health and safety risks to the patient.

The Court notes that the focus of this factor is on the risks associated with the procedure itself, not the risks associated with the baggie breaking inside of appellant. The second factor weighs very heavily in appellant's favor. The anal cavity is undoubtedly very private, and the search involved an intrusive and forced, uncomfortable medical procedure, which two police officers witnessed. The final factor favors a conclusion that the procedure was a reasonable search. Police had a clear indication that appellant had a baggie in his rectum that possibly contained controlled substances, and obtaining the drugs from the baggie was necessary to prove the possession charge.

In balancing the three factors, the Court finds that the second factor—"the significant and serious invasion of [appellant's] individual dignitary interests in personal privacy and bodily integrity"—outweighs the state's need to retrieve evidence to support the charge against appellant. The Court specifically points to the invasiveness of the procedure and the availability of far less intrusive options to recover the evidence. The Court ultimately concludes that the coerced anoscopy of appellant was unreasonable and that evidence obtained from the search must be suppressed, and remands to the district court for a new trial. ***State v. Brown***, 932 N.W.2d 283 (Minn. 8/14/2019).

■ **4th Amendment: Compliance with substantive requirements of section 626a.42 for obtaining cell-site location information evidence is sufficient.** Appellant was convicted of premeditated first-degree murder and attempted premeditated first-degree murder for shooting multiple times at O.J., who died from multiple gunshot wounds, and A.A., who survived a gunshot to the head. Police used cell-site location information evidence and Gladiator Autonomous Receiver (GAR) drive-test evidence to confirm that appellant was located near the shootings when O.J. and A.A. were shot.

Appellant argues the state obtained the CSLI evidence in violation of Minn. Stat. §626A.42 and the 4th Amendment, while the state argues it complied with the substantive requirements of section 626A.42 when it obtained the evidence under section 626A.28. Section 626A.28 addresses how the state may obtain some types of cellular data, while section 626A.42 governs how the state may obtain "location information" relating to an electronic device. Except under certain circumstances, inapplicable here, a tracking warrant must be used to obtain location information, and a tracking warrant may be issued only if the state shows probable cause to believe "the person who possesses an electronic device is committing, has committed, or is about to commit a crime." Minn. Stat. §626A.42, subd. 2. Under section 626A.28, the cellular data may be obtained with a warrant or, if prior notice is made to the subscriber or customer, with a court order if the state has shown "reason to believe the contents of a wire or electronic communication, or the records or other information sought, are relevant to a legitimate law enforcement inquiry."

The state applied for and obtained appellant's CSLI evidence under section 626A.28, and did not obtain a warrant for the information under section 626A.42. However, the state complied with the substantive requirements of 626A.42, and the district court concluded there was probable cause. The Supreme Court finds both the state's

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application and the district court's finding of probable cause were valid. Thus, the Court finds the state did not obtain the CSLI evidence in violation of section 626A.42.

In *Carpenter v. United States*, 138 S.Ct. 2206 , 2217, 2221 (2018), the United States Supreme Court held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI," that "location information obtained from [the defendant's] wireless carriers was the product of a search," and "that the Government must generally obtain a warrant supported by probable cause before acquiring such records." In appellant's case, however, the district court did make a probable cause determination. Thus, the Supreme Court holds that the police did not violate the 4th Amendment when they acquired appellant's CSLI evidence.

Appellant also argues the CSLI and GAR drive-test evidence should not have been admitted under Minn. R. Evid. 702. Rule 702 allows for the admission of expert testimony to assist the factfinder in understanding scientific or technical evidence, if it has foundational reliability. The rule also states that "if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community." The threshold question is whether the scientific theory or technique is novel. The Court clarifies that whether a scientific technique is novel is "not determined merely by reference to what Minnesota appellate courts have addressed in the past," but, "[r]ather,… whether the technique is 'new'." The Court confirms that CSLI is not novel. Because the threshold requirement is not met, the Court does not address whether the underlying scientific theory has been generally accepted in the relevant scientific community. Based on the investigating agent's testimony at the *Frye-Mack* hearing, the Court concludes that the district court did not abuse its discretion in determining that the agent's opinion based on the CSLI had foundational reliability.

As to the GAR drive-test evidence, the Court does not decide whether the evidence is novel or generally accepted in the relevant scientific community, finding the admission of the evidence harmless under the circumstances of this case. The investigating agent's testimony based on the CSLI evidence, combined with other admissible evidence, overwhelmingly placed appellant in the vicinity of the shootings when they took place. So there is no reasonable possibility that it substantially affected the jury's decision.

The Court also affirms the district court's denial of appellant's *Batson* challenge and rejects appellant's *pro se* arguments, ultimately affirming appellant's convictions. ***State v. Harvey***, No. 18-0205, 2019 WL 4051638 (Minn. 8/28/2019).

■ **Evidence: Fairness analysis required to determine if entire recorded interview should be introduced.** Appellant went to trial for a charge of second-degree criminal sexual conduct arising from his children's mother's allegation that he sexually abused their children. Prior to being charged, appellant was interviewed by police and appellant repeatedly denied the allegations, asserting his children's mother was planting the allegations in the kids' heads as a "retaliation thing." At trial, the state requested to play a limited portion of the interview, specifically, the portion during which the state alleged appellant lied about the living arrangements with his children. Appellant objected and asked that the entire recording be played. The district court allowed the state to play the short portion of the recorded interview. Appellant testified about his repeated denials of the allegations during his police interview, and he was cross-examined about the interview. The jury found appellant guilty. His postconviction petition was denied, and he appealed, arguing the state should have been required to play the entire recording of his police interview.

Minn. R. Evid. 106 provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Upon an adverse party's demand that an entire recording be played pursuant to this rule, the district court must begin with the presumption that the adverse party has the right to demand that the entire statement be introduced and then conduct a fairness analysis to determine whether introducing the entire statement is appropriate. The court of appeals points to four fairness factors, delineated in federal case law, for a district court to consider: whether the entirety of the recording is necessary to "(1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding."

Here, the district court did not conduct any form of fairness analysis. Thus, it was an abuse of discretion for the court to deny appellant's request under Rule 106. This error was not harmless beyond a reasonable doubt. A key question in this case involved witness credibility, and presenting the entire interview could have given credibility to the testimony appellant presented at trial. Of particular importance is the fact that the state asked appellant a number of questions about the portion of his interview not played for the jury, leaving the jury unable to evaluate the state's questions and appellant's answers within the context of the interview as a whole. Reversed and remanded for a new trial. ***Dolo v. State***, No. A19-0063, 2019 WL 3884276 (Minn. Ct. App. 8/19/2019).

■ **Evidence: Defendant bears burden of proving reasonable possibility that improper opinion testimony significantly affected verdict.** Appellant forcibly raped T.H. multiple times in the presence of his girlfriend and directed his girlfriend to rape T.H., after they all spent the night drinking together. T.H. went to the hospital for an examination following the assault and spoke with police. Police searched appellant's home after obtaining a search warrant. Appellant and his girlfriend were arrested, and, while in custody, appellant was interviewed and denied any sexual contact or intercourse with T.H. Police also analyzed appellant's phone, finding pornographic images showing violence towards women. At trial, appellant testified that he and T.H. had consensual intercourse. The detective testified at trial, among other things, about the photographs found on appellant's phone—which, the detective suggested, showed appellant's general propensity for violence toward women and which, the detective testified, corroborated T.H.'s story about what happened. The detective referenced a report he wrote analyzing the data retrieved from appellant's phone, which the defense never received from the state, although the defense did receive the actual cell phone data itself. The defense moved for a mistrial, but the district court denied the motion. The jury was instructed to ignore the detective's opinions about whether appellant's possession of the pornographic images made him more likely to rape T.H. and the court instructed the state not to refer to the photographs or the detective's opinion testimony. The jury convicted

appellant of two counts of first-degree criminal sexual conduct and false imprisonment. The court of appeals affirmed.

Appellant argues before the Supreme Court that he was deprived of a fair trial because the detective improperly testified and offered opinions about the photographs on appellant's phone. The parties do not dispute that the detective's opinion testimony concerning the pornographic images should not have been admitted and prejudiced appellant. However, the question is whether there is a reasonable possibility the wrongfully admitted evidence significantly affected the verdict, and the burden of proof rests on appellant. The Supreme Court rejects appellant's argument that the state bears the burden of proving the detective's opinion testimony was not prejudicial. The Court distinguishes *State v. Cox*, 322 N.W.2d 255 (Minn. 1982), which held that "[s]tatements of a court official about the merits of a criminal case raise a rebuttable presumption of prejudice," because *Cox* involved the jury's exposure to potentially prejudicial material *outside* of the trial process. In appellant's case, the detective's opinion testimony was given while he was on the stand and subject to cross-examination.

The Court then examines the entire record and determines that appellant did not establish that there is a reasonable probability that the detective's opinion testimony significantly affected the verdict. The Court notes that the prosecutor's conduct in eliciting improper testimony from the detective and not disclosing the detective's report to the defense is troubling. However, there is "strong evidence supporting T.H.'s testimony at trial and pointing to [appellant's] guilt," and the district court instructed the jury twice to disregard the detective's improper testimony. Appellant's conviction is affirmed. ***State v. Jaros***, No. A18-0039, 2019 WL 3940200 (Minn. 8/21/2019).

■ **Predatory offender registration: "Leaves a primary address" means living arrangement at primary address has come to an end.** Appellant was required to register as a predatory offender for a 2014 solicitation of a child conviction, and signed a form acknowledging his duty, if he did not have a primary address, to report to law enforcement where he will be staying within 24 hours of leaving his former primary address. He registered a motel room as his primary address, but after four months the credit card he used to rent the room was declined and he was locked out of the

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room on 4/3/2015. Three days later, on 4/6/2015, appellant was arrested during an unrelated traffic stop and the next morning, the jail updated his registered primary address to the county jail, as of 4/7/2015. Appellant did not contact his probation officer or the motel manager during April 3-6, but he did contact the motel manager sometime after April 6 to arrange to pick up his belongings from the motel. A jury found appellant guilty of failing to register. The court of appeals affirmed his conviction, finding sufficient evidence to support the conviction because appellant knew of the registration requirements and did not make arrangements to continue living at the motel when his credit card was declined.

The registration requirement at issue involves an offender leaving a primary address. When leaving a primary address without a new primary address, the offender is required to register with the law enforcement authority that has jurisdiction in the area where the offender is staying within 24 hours of the time the offender no longer has a primary address. A knowing violation of this requirement is a felony. To decide whether the evidence was sufficient to support appellant's conviction, the Supreme Court determines what it means to "leave[] a primary address" under Minn. Stat. §234.166, subd. 3a(a).

The Court finds that, based on other language in section 243.166, the Legislature intended "leaves" to mean more than a temporary departure. There must be a definitive change in an offender's primary living arrangement. The Court defines "leaves a primary address" to mean "that an offender's living arrangement at the primary address has come to an end."

Finally, the Court concludes that the circumstances proved allow a reasonable inference that appellant did not know his living arrangement at the motel had been terminated during the 3-day period between April 3 and April 6, 2015. It is reasonable to infer appellant was unaware of the declined charge for the room after the card had been used successfully for four months: Appellant was not in his room when he was locked out by the manager; his belongings were in the room, suggesting he intended to stay; and the manager did not speak to appellant until after April 6. Thus, the state presented insufficient evidence to support appellant's conviction for knowingly failing to register within 24 hours. ***State v. Alarcon***, No. A17-1325, 2019 WL 3939858 (Minn. 8/21/2019).

SAMANTHA FOERTSCH
Bruno Law PLLC
samantha@brunolaw.com

STEPHEN FOERTSCH
Bruno Law PLLC
stephen@brunolaw.com

EMPLOYMENT & LABOR LAW

JUDICIAL LAW

Retaliation, discrimination cases falter. The 8th Circuit Court of Appeals recently affirmed dismissal of five retaliation and discrimination cases. An employee who was fired after engaging in a workplace outburst lost her claim of retaliation for terminating her following her exercise of rights under the Family & Medical Leave Act (FMLA). The long time between her return from FMLA leave and the termination "severed" any connection between exercising her FMLA rights and the claimed retaliation. ***Lovelace v. Washington University School of Medicine***, 931 F.3d 698 (8th Cir. 7/25/2019).

Individuals who are not decision makers could not be liable for retaliation against an employee who failed to establish any claimed sexual harassment and also did not show that her employer's non-discriminatory reason for termination was pretextual. ***Mahler v. First Dakota Title Limited Partnership***, 931 F.3d 799 (8th Cir. 7/31/2019).

Claims of age and sex discrimination were dismissed because the evidence showed that the actions of the employee's supervisor were not motivated by age or gender, and they were treated similarly to other available employees. The employee's claim of wrongful denial of promotion was not viable because the employer hired others who were more qualified for the position that the employee sought. ***Heisler v. Nationwide Mutual Insurance Company***, 931 F.3d 786 (8th Cir. 7/30/2019).

A race discrimination claim based on a failure to hire the claimant for a temporary permanent position was dismissed because candidates with better mechanical experience were hired for a chemical equipment repair job. The employee's claim, therefore, lacked merit because the other candidates who were hired for the position were "more qualified." ***Farver v. McCarthy***, 931 F.3d 808 (8th Cir. 7/31/2019).

An employee's discrimination claim was dismissed after she was laid off, pursuant to her company's restructuring. The reorganization was not pretextual, which vitiated the employee's discrimination claim. ***Lacey v. Norac, Inc.,*** 932 F.3d 657 (8th Cir. 7/30/2019).

Workers compensation; statute of limitation bars claim. A former player for the Minnesota Vikings, now suffering from dementia, lost his worker's compensation claim. Reversing the Worker' Compensation Court of Appeals (WCCA), the Minnesota Supreme Court held that the ex-Viking did not know that the medical treatment provided to him by the team constituted an acceptance of responsibility for a later-diagnosed Gillett injury dating back to his last day with the team in 1992, 23 years before he brought his workers compensation claim. The employer's medical treatment did not constitute a "proceeding" in order to satisfy the statute of limitations under Minn. Stat. §176.151. ***Noga v. Minnesota Vikings Football Club,*** 931 F.2d 801 (8th Cir. 7/31/2019).

Whistleblower claim; adverse action established. Conducting an investigation and placing a police officer on leave for nine months, seven months beyond the completion of the investigation, followed by a five-day suspension, constituted adverse action for proceeding under the Minnesota Whistleblower Act, Minn. Stat. §181.932. Reversing the trial court, the court of appeals held that there was a genuine issue of material fact whether the city's action improperly penalized the officer and whether the city's reason for the lengthy leave was pretextual, thus remanding the case for trial. ***Moore v. City of New Brighton***, 2019 WL 3406314 (8th Cir. 7/29/2019) (unpublished).

Unemployment compensation; four employees lose. A quartet of employees lost claims before the Minnesota Court of Appeals for unemployment compensation benefits. A hospitality server was not entitled to unemployment benefits after she was discharged for inaccurate transactions. Entering the wrong amounts into the cash register in violation of the facility's policy constituted disqualifying misconduct. ***Felien v. VFW Richfield Fred Babcock Post 5555***, 2019 WL 3407179 (Minn. Ct. App. 7/29/2019) (unpublished).

Denial of benefits for a charter school employee who quit her job was upheld. The employee was not deprived of due process by the unemployment law judge (ULJ), nor entitled to an additional hearing on the merits. ***Carson v. PACT Charter School***, 2019 WL 3407167 (Minn. Ct. App. 7/29/19) (unpublished).

A truck driver whose negligence caused extensive damage to his company's dump truck was denied benefits due to rejection of his claim that the incident was attributable to a mechanical defect. ***Butler v. Mahkakta Trucking***, 2019 WL 3293795 (Minn. Ct. App. 7/22/2019) (unpublished).

The failure of an applicant to timely file an appeal through the online system barred the claim after the employee did not properly touch the portion of the screen to confirm the filing. ***Kraker v. CentraCare Health Systems,*** 2019 WL 3293799 (Minn. Ct. App. 7/22/2019) (unpublished).

MARSHALL H. TANICK
Meyer, Njus & Tanick
mtanick@meyernjus.com

ENVIRONMENTAL LAW

ADMINISTRATIVE ACTION

■ **EPA issues proposed rule updating CWA 401 certification requirements.** The U.S. Environmental Protection Agency (EPA) published a proposed rule updating and clarifying regulations in 40 C.F.R. §121 regarding substantive and procedural requirements for water quality certification under section 401 of the Clean Water Act (CWA). Section 401 prohibits a federal agency from issuing a permit or license to conduct activity that may result in any discharge into navigable waters unless the state (or authorized tribe) in which the proposed discharge would occur certifies that the discharge complies with applicable state water quality requirements.

Most notably, EPA's proposed regulations would narrow the scope of 401 certifications to focus on the actual "discharge" necessitating the federal permit rather than the overall activity of which the discharge is a part. This would represent a significant departure from the scope advanced in the U.S. Supreme Court's 1994 opinion in *Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology*, which held that the statute "is most reasonably read as authorizing additional conditions and limitations on *the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied" (emphasis added). EPA justifies its proposed change in interpretation of the scope of section 401 certifications because the EPA regulations guiding the high court's decision pre-dated the 1972 CWA. In addition, EPA argues that the court would apply *Chevron* deference to EPA's new proposed interpretation of section 401's scope.

Other proposed changes from EPA's current regulations include clarifying procedures regarding the time period in which a state or tribe must issue or waive certification. The agency has solicited public comments on the proposed rule, which must be submitted to EPA by 10/21/2019. **84 Fed. Reg. 44080** (8/22/2019).

■ **Federal agencies publish key revisions of Endangered Species Act.** On 8/12/2019, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (the Services) published final rules amending three key aspects of the federal regulations that implement the Endangered Species Act (ESA). 16 U.S.C. §1531 *et seq*. The revisions consist of altering the process of the determination of listing species and designating critical habitat under Section 4, removing the blanket prohibition of "take" of threatened species under Section 4(d), and streamlining the consultation process for federal agencies under Section 7.

The final rules modify procedures under ESA Section 4 followed by the Services when listing and delisting species as well as designating critical habitat. First, the new rule removes the prohibition against referencing the economic impacts resulting from a listing decision. The revisions also clarify that the Services would list a species as "threatened" if it is determined to a probable extent that the species is likely to become endangered within the "foreseeable future." Under this definition, the foreseeable future means "only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely." Another proposed change emphasizes that the Services would ensure the standard for delisting potential species shall be the same as the standard for listing species. Finally, during determination of critical habitat, the regulations require the Services to first consider all areas of occupied habitat of the species, then to consider areas of unoccupied habitat *only* if the unoccupied habitat is necessary to ensure the conservation of the species. This represents a change from the current process, in which unoccupied areas

are automatically considered for critical habitat designation.

The FWS issued a separate revision to ESA Section 4(d) that rescinds the "blanket 4(d) rule" of protection for threatened species that had previously given threatened species the same protection as endangered species automatically. The NMFS has never employed the blanket rule, so this new revision aligns the practices of the Services. The FWS will determine on a species-specific basis the protective regulations, including the take prohibition, for newly listed threatened species.

The modifications to ESA Section 7 adjust and streamline how other federal agencies consult with the Services to ensure agency actions do not jeopardize protected species or result in "destruction or adverse modification" of critical habitat. The revisions include: clarifying the definition of "destruction or adverse modification of critical habitat;" creating a "but for" standard to determine the "effects of an [agency] action;" and establishing a clear standard for "environmental baseline" to further improve the consultation process by providing clarity and consistency.

These rules become effective 30 days after publication in the Federal Register. **Docket No. FWS–HQ–ES–2018–0006; Docket No. FWS–HQ–ES–2018–0007; Docket No. FWS–HQ–ES–2018–0009.**

■ **EPA and Corps restore pre-2015 definition of "waters of the United States."** On 9/12/2019, the U.S. Corps of Engineers (Corps) and the EPA announced a final rule repealing the Obama-era 2015 rule that significantly revised the definition of "waters of the United States" (WOTUS) under the CWA. In addition, the rule recodifies the regulatory text that existed prior to the 2015 rule. WOTUS is a key term under the CWA because it establishes the jurisdictional reach of various CWA programs, including the NPDES and Section 404 permit programs. Following an early-2018 decision by the U.S. Supreme Court that held challenges to the 2015 rule must proceed in the federal district courts, not the circuit courts, the applicability of the rule has varied from state to state depending upon whether the state is subject to a district court stay of the rule. Minnesota is among the states where the 2015 rule is not subject to a stay and is thus currently in effect. That will change when the agencies' September 12 final rule becomes effective 60 days after publication in the Federal Register. At that time, *all* states, including Minnesota, will be subject to the pre-2015 rule. Approved jurisdictional determinations (AJDs) made pursuant to the 2015 rule will remain effective through their five-year expiration date; however, possessors of an AJD may request a revised AJD pursuant to the reinstated pre-2015 rule.

EPA and the Corps' rationale for withdrawing the 2015 rule, set forth in the agency's preamble to the final rule, is, in part, that the 2015 rule was overly broad and beyond the agencies' statutory authority and that repealing the 2015 rule avoids interpretations of the CWA that "push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority." On 2/14/2019, the agencies proposed a revised definition of WOTUS to replace the pre-2015 Rule and are in the process of reviewing voluminous public comments on that proposal.

■ **EPA proposes methane regulation changes for oil and natural gas industry.** The EPA announced proposed "reconsideration" amendments to the agency's 2012 and 2016 New Source Performance Standards (NSPS) for the oil and natural gas industry. 40 C.F.R. pt. 60, subp. OOOO (2012 NSPS) and OOOOa (2016 NSPS). EPA is required to set NSPS for categories of industrial facilities that it deems a source of significant air pollution. The original 1979 source category for the oil and gas industry included only the production and processing segments of the industry. However, with the 2012 and 2016 NSPS, the Obama-era EPA interpreted the source category to also include the transmission and storage segment of the industry. With the proposed amendments, EPA plans to restore the agency's original interpretation and remove sources in the transmission and storage segment from the scope of the NSPS, arguing that the EPA erred when it expanded the source category in 2012 and 2016.

By removing transmission and storage sources from the scope of the 2012 and 2016 NSPS, EPA is also rescinding emissions limits that currently apply to those sources, including limits on methane and volatile organic compounds (VOCs) emissions, both of which are significant contributors to climate change. The proposed amendments also rescind methane-specific requirements in the production and processing segments; EPA's rationale is that the controls needed to reduce VOC emissions also reduce methane at the same time, so separate methane limitations for these segments of the industry are redundant. Practically speaking, the amendments would eliminate federal requirements to investigate and address methane leaks from wells, pipelines, and storage facilities.

As an alternative, EPA proposes to rescind all methane requirements from NSPS applicable to new and continuing oil and gas sources without removing any sources from the source category. This alternative would retain VOC standards for both the production and processing segment and the transmission and storage segment, again on the basis of EPA's conclusion that methane regulation is redundant because VOC controls also reduce methane emissions.

EPA will accept public comments for 60 days following publication in the Federal Register and will hold a public hearing in Texas. Details about the public hearing have not yet been released. **Docket No. EPA-HQ-OAR-2017-0757** (8/28/2019).

JEREMY P. GREENHOUSE *The Environmental Law Group, Ltd. jgreenhouse@envirolawgroup.com*
JAKE BECKSTROM *Vermont Law School, 2015*
ERIK ORDAHL *Flaherty & Hood, P.A.*
AUDREY MEYER *University of St. Thomas School of Law, J.D. candidate 2020*

FAMILY LAW

JUDICIAL LAW

■ **Court of appeals questions ongoing viability of conduct-based claims for attorney's fees.** Family law practitioners have long taken for granted that Minn. Stat. §518.14 authorizes courts to award attorney's fees on two bases—first, where one party has need and the other an ability to contribute (need-based); and second, where one party unreasonably contributes to the length and expense of litigation (conduct-based). But in several recent cases, the Minnesota Court of Appeals has raised doubts as to whether Minn. Stat. §518.14 independently authorizes an award of conduct-based fees.

The issue first came to the fore in *Anderson v. Anderson*, in which the Supreme Court granted a litigant fees based on the court's inherent authority after an appellant changed their legal theory at oral argument (No. A16-2006, order (Minn. 8/6/2018)). In its award of fees, the Supreme Court declined to base its award on Minn. Stat. §518.14, and Chief Justice Gildea in dissent expressly rejected arguments that the statute

authorized a grant of conduct-based fees. In two subsequent cases the court of appeals cited *Anderson* but noted that because neither party had raised the issue, the court would assume without deciding that statute authorized an award. What is uncertain is whether such an assumption can withstand scrutiny. ***Tiedke v. Tiedke***, No. A18-1492, 2019 WL 3545816 (Minn. Ct. App. 8/5/2019); ***Madden v. Madden***, 923 N.W.2d 688 (Minn. App. 2019).

■ **Court must grant notice and an opportunity to be heard before appointing a guardian under Minn. R. Civ. P. 17.02.** Husband filed for divorce in October 2017, and after an unsuccessful attempt at mediation the parties began preparing for trial. Throughout the discovery process, wife sought several continuances, and later experienced a medical emergency during husband's deposition. Husband moved to compel discovery, and wife cited "ongoing significant health issues" as the basis for her failure to fully respond. At the hearing on husband's motion to compel, he requested a guardian be appointed for wife. The district court initially denied husband's request, but appointed a guardian three months later after wife requested the trial be continued. Prior to issuing its order, the court held only an off-the-record telephone conference and did not provide wife notice or a hearing on the record.

Wife appealed, and husband moved to dismiss the appeal as moot—offering to stipulate to the removal of the guardian. The court of appeals denied husband's motion, holding that his stipulation was not, in itself, sufficient to ensure the guardian's removal. The appellate court then proceeded to reverse the district court, reasoning that whenever an adverse party seeks appointment of a guardian, notice of a hearing is always required regardless of the familial relationship so long as the party is not a minor and has never been previously adjudicated incompetent. C.*f.* Minn. R. Civ. P. 17.02 (permitting a guardianship application by a spouse to be considered with or without notice). The court of appeals grounded its conclusions in the text, history, and purpose of the rule, as well as wife's liberty interest in maintaining personal control over the dissolution proceeding. ***Wiel v. Wahlgren***, No. A18-1865, ___ N.W.2d ___ (Minn. Ct. App. 9/3/2019).

■ **Intended, non-biological mother is not a "parent" under Minnesota's Parentage Act.** The parties are an unmarried, same-sex couple who conceived three

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children through artificial insemination. As a result, only one partner was biologically related to the children. When their relationship ended, the non-biological mother petitioned to establish a parent-child relationship under Minnesota's Parentage Act (Minn. Stat. ch. 257), arguing she had received the children into her home and held them out as her own. *See* Minn. Stat. §257.55, subd. 1(d) (providing such a presumption for father-child relationships); Minn. Stat. §257.71 (applying the presumptions in Minn. Stat. §257.55 to mother-child relationships "insofar as practicable"). Alternatively, non-biological mother sought custody as an interested third-party (Minn. Stat. 257C). The district court denied both claims for relief, but awarded non-parent visitation under Minn. Stat. §257C.08. Non-biological mother appealed, supported by an amicus brief from the Minnesota Lavender Bar Association.

The Minnesota Court of Appeals affirmed the district court, and rejected non-biological mother's equal protection challenge to the Minnesota Parentage Act. As to the Parentage Act, the court of appeals stressed that it recognizes parent-child relationships only between "biological" or "adoptive" parents. Thus, the holding-out presumption in Minn. Stat. §257.55, subd. 1(d) applies only where a man holds a child out as his "biological child." Here, the court reasoned, non-biological mother had stipulated she was not the children's biological parent, thus rendering application of the paternity presumptions impracticable. In reaching its conclusion, the appellate court distinguished its prior holding in *In re the Welfare of* C.M.G., which seemed to discount the importance of biology in establishing parentage—emphasizing instead that the purpose of the parentage act is to "find the biological father." 516 N.W.2d 555. The appellate court went on to reject non-biological mother's equal protection challenge, arguing the Parentage Act served the important government interest of protecting children, and that its distinction between parents based on sex served that purpose by creating a system in which "those having a legal relationship with the child may be identified and declared the parent of the child." Finally, the court of appeals rejected non-biological mother's claims under Minnesota's third-party custody statute, observing that non-biological mother's intimate and longstanding relationship with the children did not rise to the level of "extraordinary circumstances," which have traditionally required some degree of abuse, danger, or neglect of a child's special needs. ***In re the Custody of N.S.V., L.J.V., and E.T.V.***, No. A18-0990 (Minn. Ct. App. 9/16/2019).

MICHAEL BOULETTE
Barnes & Thornburg LLP
mboulette@btlaw.com

FEDERAL PRACTICE

JUDICIAL LAW

■ **28 U.S.C. §1332(d)(4)(A)(i)(II)(aa)-(bb); CAFA; local controversy exception.** Rejecting the plaintiff's appeal from the district court's denial of his motion to remand a putative class action that had been removed under CAFA, the 8th Circuit found no error in the district court's consideration of extrinsic evidence in determining whether the claims against the local defendants provided a "significant basis" for the plaintiff's claims, and rejected a 9th Circuit decision that held otherwise. ***Atwood v. Peterson***, ___ F.3d ___ (8th Cir. 2019).

■ **Fed R. Evid. 702; *Daubert;* no error in admitting expert testimony absent testing.** The 8th Circuit found no abuse of discretion in a district court's decision to admit expert testimony on ladder design where the expert had not tested the damaged ladder or an exemplar ladder, distinguishing a number of previous decisions where the 8th Circuit had found that "speculative" expert testimony was properly excluded. ***Klingenberg v. Vulcan Ladder USA, LLC***, ___ F.3d ___ (8th Cir. 2019).

■ **Class action; attorney's fees; lodestar multiplier.** The 8th Circuit found no abuse of discretion in a district court's award of attorney's fees to class counsel equal to 28 percent of the common fund, even where the corresponding lodestar multiplier for the award was 5.3. ***Rawa v. Monsanto Co.***, ___ F.3d ___ (8th Cir. 2019).

■ **Alleged failure to attend deposition; sanction reversed.** In an unpublished opinion, the 8th Circuit reversed the dismissal of an action as a sanction for the *pro se* plaintiff's alleged failure to appear at his deposition, where the plaintiff appeared for his deposition as noticed, but left one day at 5 p.m. to go to work, because the plaintiff did not "fail to appear," and because the district court had failed to consider a lesser sanction. ***Akins v. Southern Glazer's Wine and Spirits of Ark. LLC***, ___ F. App'x ___ (8th Cir. 2019).

■ **First-filed rule; "compelling circumstances;" first-filed action transferred.** Judge Brasel found that several "red flags" were present which warranted application of the "compelling circumstances" exception to the first-filed rule, and that the plaintiffs in the second-filed action had given the defendants substantial notice of their intent to file an action if mediation did not resolve the parties' dispute, while the plaintiffs in the first-filed action had won the race to the courthouse (by less than two hours) but had not provided similar notice of their intent to file if the mediation failed. ***Arctic Cat Inc. v. Speed RMG Partners, LLC***, 2019 WL 3858649 (D. Minn. 8/16/2019).

■ **Motion to proceed under a pseudonym granted.** Reversing a decision by Magistrate Judge Brisbois, Judge Wright granted the plaintiff's motion for a protective order allowing her to proceed under a pseudonym where the plaintiff alleged that she was a juvenile victim of

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sexual assault, rejecting the argument that her identification in a Facebook post was "so widely known" that it overrode her "substantial interest" in her privacy. ***Doe v. North Homes, Inc.***, 2019 WL 3766380 (D. Minn. 8/9/2019).

■ **Motion to dismiss for lack of personal jurisdiction denied**. Chief Judge Tunheim denied Wisconsin defendants' motion to dismiss for lack of personal jurisdiction, finding the corporate defendant's solicitation of business and online presence in Minnesota, and the individual defendant's regular correspondence with and acceptance of over $312,000 from Minnesotans, made the defendants subject to jurisdiction. ***Ahlgren v. Link***, 2019 WL 3574598 (D. Minn. 8/6/2019).

■ **Diversity jurisdiction; citizenship; pre-filing versus post-filing conduct.** Where a Minnesota citizen brought a diversity action against a former Minnesota citizen who had established a domicile in Arizona prior to commencement of the action, Judge Schiltz rejected the defendant's challenge to the court's diversity jurisdiction and his post-filing attempts to characterize himself as a Minnesota domiciliary. ***Volk v. Wigen, III***, 2019 WL 3284671 (D. Minn. 7/22/2019).

■ **Indigent plaintiff; motion for protective order regarding location of deposition denied.** Where the deposition of plaintiff who had been previously granted IFP status was noticed for Minneapolis, and she sought a protective order claiming that she could not afford to travel from her home in Arizona for the deposition while offering only "conclusory statements" regarding her finances, Magistrate Judge Wright denied the plaintiff's motion and ordered her to appear for her deposition in Minneapolis. ***Rodriguez v. PJ Hafiz Club Mgmt. Inc.***, 2019 WL 3001631 (D. Minn. 7/10/2019).

■ **Diversity jurisdiction; fraudulent joinder claim rejected; request for attorney's fees denied.** Resolving "all doubts about federal jurisdiction in favor of remand," Judge Wright rejected defendants' claims of fraudulent joinder and remanded the action to the Minnesota courts. However, Judge Wright denied plaintiffs' request for an award of attorney's fees pursuant to 28 U.S.C. §1447(c), finding that defendants' position was not "objectively unreasonable." ***Tenenbaum v. Bialick***, 2019 WL 3822311 (D. Minn. 8/15/2019).

■ **Motion to withdraw admissions granted; calendaring error.** Where the defendants failed to timely respond to the plaintiff's requests for admissions and plaintiff's counsel denied their requests for a brief extension, Magistrate Judge Leung granted defendants' motion to withdraw admissions, expressing his "surprise" that the parties were unable to resolve this issue "without intervention of the Court." ***Metzger v. Seterus, Inc.***, 2019 WL 4166793 (D. Minn. 9/3/2019).

JOSH JACOBSON
Law Office of Josh Jacobson
joshjacobsonlaw@gmail.com

INDIAN LAW

JUDICIAL LAW

■ **Preliminary injunction against tribal-court action against nonmember oil-and-gas companies.** Nonmember companies entered leases with tribal members to mine oil and gas on allotted lands that the United States held in trust for the members. The members sued the companies in tribal court alleging breach of the leases. The companies moved the tribal court to dismiss the proceedings for lack of jurisdiction and appealed denial of that motion. The tribal appellate court held, inter alia, that the tribal court had jurisdiction over the companies under the "consensual relationship" exception to the general *Montana v. United States* rule that tribal courts lack jurisdiction over nonmembers. Following that decision, the companies sued the tribal court plaintiffs, chief judge, and court clerk in federal court for an injunction against further tribal-court proceedings. The district court granted the companies a preliminary injunction, concluding that they had a high likelihood of success on the merits.

The 8th Circuit affirmed, determining first that under *Ex Parte Young*, the chief judge and court clerk were not immune from an official-capacity suit for declaratory relief. It then determined that the companies had satisfied the general rule that parties must exhaust their remedies in tribal court before challenging tribal-court jurisdiction in federal court. On the question of tribal-court jurisdiction, it held that: (1) "tribal courts lack jurisdiction to adjudicate federal causes of action absent congressional authorization," (2) the underlying claims were federal (and to the extent they were rooted in tribal law, that tribal law was preempted by comprehensive federal regulation of oil and gas leases on allotted Indian lands), and (3) the tribal-court exercise of jurisdiction did not meet either of the two exceptions to *Montana*'s general rule blocking tribal-court jurisdiction over nonmembers. In particular, the court held that to meet *Montana*'s first prong, "a consensual relationship alone is not enough," but must be coupled with tribal regulation that "stems from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." ***Kodiak Oil & Gass (USA) Inc. v. Burr***, 932 F.3d 1125 (8th Cir. 2019).

■ **Tribal officer may detain and deliver non-Indian suspected of on-reservation state-law offense to state authorities.** A tribal officer suspected that a non-Indian driver was impaired, detained him, determined that the suspect's license was revoked, and then transported the defendant to the reservation border. Once across the reservation border, a state sheriff's deputy conducted a field sobriety test and arrested the suspect on state-law charges. On appeal from his resulting convictions, the defendant

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argued that the district court should have suppressed the evidence against him because it was obtained through an unlawful arrest by a tribal officer who was not a "peace officer" under state law. The Minnesota Court of Appeals disagreed, applying its recent *State v. Thompson*, 929 N.W.2d 21 (Minn. App. 2019) decision that tribal officers may detain and deliver on-reservation non-Indian suspects to authorities with jurisdiction over a suspected offense. ***State v. Ziegler***, No. A18-1825, 2019 WL 4164893 (Minn. App. 9/3/2019).

■ **Minnesota Department of Human Services' Indian Child Welfare Manual's referral provisions lawful and constitutional.** When Scott County officials received a welfare report concerning tribal-member siblings enrolled in two different tribes, they followed the Minnesota Department of Human Services' Indian Child Welfare Manual and referred the complaint to the Family and Children's Services Department of one of the tribes. The department commenced protective proceedings in that tribe's court, and the tribal court resolved the proceedings over the non-member mother's jurisdictional objection, including ordering guardianship over the child enrolled in that tribe, and transferring the proceedings concerning the sibling to the sibling's tribe's court.

The mother brought a federal suit against both tribal courts, the assigned judges, Scott County, and the Commissioner of the Minnesota DHS, arguing that the manual violated federal law and her constitutional right to due process because following the manual resulted in commencement of tribal-court proceedings without prior state-court proceedings. The 8th Circuit affirmed dismissal of the suit. It found no conflict between the manual and the Indian Child Welfare Act's creation of "concurrent but presumptively tribal jurisdiction in the case of [Indian] children not domiciled on the reservation." It further held that Public Law 280, a statute that affords Minnesota civil jurisdiction over most reservations within the state, does not require state-court adjudication where a tribal court has concurrent jurisdiction. Finally, the court found no due-process violation because the mother was heard in tribal court. The decision settles a string of district court cases that raised similar arguments against tribal-court jurisdiction. ***Watso v. Lourey***, 929 F.3d 1024 (8th Cir. 2019).

■ **The Indian Gaming Regulatory Act preempts some on-reservation state taxes.** The Flandreau Santee Sioux Tribe operates a casino within its reservation, and is renovating and expanding the casino. In addition to gaming services, the casino offers amenities including live entertainment, food, and retail items. Sister cases considered whether South Dakota could impose two different casino-related taxes on nonmembers: (1) use tax on nonmember purchases of the casino-related amenities, and (2) excise tax on the nonmember contractor performing construction services on the casino. The tribe argued that the Indian Gaming Regulatory Act preempted both taxes. In decisions filed the same day by the same panel, the 8th Circuit upheld one tax and disallowed the other.

The court held that IGRA preempted the use tax. Applying the Supreme Court's interests-balancing test for state taxation of nonmembers on Indian lands, it concluded that the combined federal and tribal interests in protecting tribal independence in gaming under IGRA outweighed the state's interest in raising revenue for statewide governmental services. ***Flandreau Santee Sioux Tribe v. Noem***, ___ F.3d ___ (8th Cir. 2019).

In contrast, the court held that IGRA does not preempt the excise tax. Applying the same interest-balancing test, the court concluded that the state's interests in applying its excise tax throughout the state and raising revenue for governmental services outweighed the federal and tribal interests in protecting tribal independence in gaming under IGRA because the impact of the tax on these interests was "too indirect and too insubstantial." ***Flandreau Santee Sioux Tribe v. Haeder***, ___ F.3d ___ (8th Cir. 2019).

JESSICA INTERMILL
Hogen Adams PLLC
jintermill@hogenadams.com

PETER J. RADEMACHER
Hogen Adams PLLC
prademacher@hogenadams.com

TAX LAW

JUDICIAL LAW

■ **Admin; Rev. Proc. invalid; IRS failed to comply with APA.** In a challenge brought by New Jersey and Montana, a federal district court held that Rev. Proc. 2018-38, which purported to eliminate a long-standing IRS requirement that exempt organizations report certain donor information, was invalid because the Service enacted the regulation without complying with the Administrative Procedure Act (APA) requirement to provide a notice to the public and allow public comment. The Service announced in the Rev Proc that it would no longer require most tax-exempt organizations to report the names and addresses of substantial donors (the change did not apply to purely public charities). New Jersey and Montana challenged the change. The states were harmed by the change, the states argued, because the states used the data disclosed to enforce the states' respective charitable and tax policies and laws.

After satisfying itself that it had jurisdiction, the court determined that the change was unlawful. The court rejected the Service's argument that the change was an interpretative rule and thus was not subject to notice and comment. In the Service's view, the Rev Proc addressed solely "IRS's timing and process for collecting information that IRS may use to determine compliance with substantive criteria that remains the same." Instead, the court understood that the Rev Proc "explicitly upends [a] fifty-year practice and effectively amends this existing rule. Revenue Procedure 2018-

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38 directs tax-exempt organizations to forego existing policy and informs these organizations that they are no longer required to report the names and addresses of their contributors as previously required." ***Bullock v. Internal Revenue Serv.***, No. CV-18-103-GF-BMM, 2019 WL 3423485 (D. Mont. 7/30/2019) (internal quotations omitted).

■ **Tax procedure: Seven copies of one frivolous return = one (not seven) penalties.** In 2014, Petitioner Gwendolyn L. Kestin received wages of $155,702 from which federal income tax was withheld. She timely filed in April 2015 an apparently unremarkable tax return for 2014, which reported a tax liability arising principally from those wages. The troubling return followed when, in September 2015, Mr. and Mrs. Kestin submitted to the IRS an amended return—a Form 1040X, in which Mrs. Kestin set forth the baseless argument that since she is a private sector citizen the wages she received were not subject to federal income tax. Shortly thereafter, the Service warned Mrs. Kestin that her position was frivolous and that it subjected her to monetary penalties; the Service wrote to Mrs. Kestin that unless she immediately corrected her return, "the Internal Revenue Service *will assess* a $5,000 penalty against you... for each frivolous tax return or purported tax return that you filed…. If you send us corrected returns, we will disregard the previous documents that you filed and not assess the frivolous return penalty." Instead of correcting her return, Mrs. Kestin sent a letter reiterating her position that she was entitled to a refund. Along with the letter, she sent a copy of the 2015 Form 1040X. The copy was designated as "copy" on the form itself, and was referenced as a "copy" in the attached letter. Eventually, Mr. and Mrs. Kestin sent the original 1040X and six copies of the form to various IRS locations.

When taxpayers file frivolous returns and refuse to correct those returns, the taxpayer is liable for a $5,000 penalty. IRC 6702 (also providing procedural requirements the Service must follow). The Service interpreted each of the letters as a frivolous return, and assessed a separate $5000 penalty for the initial 1040X as well as a penalty for each subsequent copy sent to the Service.

In a division opinion, however, the tax court found that only one penalty was appropriate. The court explained that "each of the photocopies of that Form 1040X... was expressly stated to be a 'copy' of that original Form 1040X. Each was manifestly intended by her to be perceived as a photocopy of the Form 1040X, and the IRS did perceive each as a copy of an original. Mrs. Kestin sought only one refund of the income tax she had reported on her original (non-frivolous) Form 1040 return, not seven refunds of that amount. (The refund she requested on her Form 1040X (and all of its copies) was $27,624, but in some of her letters she stated a lesser amount—$25,986.)." The court therefore held that "Mrs. Kestin's six plainly marked photocopies sent to the IRS with her letters did not purport to be tax returns and are not subject to the penalty under section 6702(a)." ***Kestin v. Comm'r***, No. 18254-17L, 2019 WL 4072309 (T.C. 8/29/2019).

■ **Property tax: Request to vacate judgment denied; parties fail to timely file executed stipulation.** Wal-Mart Real Estate Business Trust contested its 2016 and 2017 real property tax assessment. In a previous order, the tax court dismissed Wal-Mart's petition because Mille Lacs County established that Wal-Mart failed to timely disclose certain required information, including income and expense information.

Following the hearing on the original matter, but before the court's decision was issued, the parties apparently reached a settlement. The parties, however, failed to provide the court with a copy of the executed stipulation before the court dismissed the action. The parties jointly petitioned the court requesting that the court vacate the dismissal.

The only procedural vehicle for vacating judgement is a motion under Minn. R. Civ. P. 60, authorizing the court, in relevant part, to correct clerical mistakes. The decision to dismiss the trust's petition was not a clerical mistake. When a property tax petition has been filed with respect to income-producing property, Minn. Stat. §278.06, subd. 6(a) requires the petitioner to provide specific information to the county assessor by August 1 of the taxes-payable year. Failure to comply results in dismissal of the petition. Because Wal-Mart failed to provide the county with the required information, the court properly granted the county's motion to dismiss and, therefore, denied the parties' subsequent request to vacate judgment. ***Wal-Mart Real Estate Bus. Trust v Co. of Mille Lacs***, 2019 WL 3281167 (Minn. TC 7/15/2019).

■ **Personal liability assessment; summary judgment for commissioner.** Fady Qumseya owned and operated a number of mall kiosks operating under the name "Paris Handbag." Others, including Mr. Qumseya's family members, also worked for Paris Handbag, but Mr. Qumseya was the sole shareholder of the company, and described himself as the "managing person" and the "point person" for the LLC. In previous proceedings, the tax court affirmed an assessment against Paris Handbag for about $60,000 in sales taxes. In the instant dispute, the commissioner sought to hold Mr. Qumseya personally liable for Paris Handbag's assessment. Mr. Qumseya objected, asserting that "[t]his tax liability is being charged to the corporation and Fady Qumseya and both parties cannot be on the hook for the same tax liability." Under Minnesota law, however, both parties can be on the hook, so long as the commissioner seeks to recover the assessment from a "person" with sufficient "control" (both statutorily defined terms). Since the court determined that Mr. Qumseya was a "person" with "control," the court granted summary judgment to the commissioner and explained that Mr. Qumseya is liable for the sales tax payments. The tax court also estopped Mr. Qumseya from relitigating

the amount of unpaid tax for which he is personally liable. ***Qumseya v. Comm'r of Revenue***, No. 9023-R, 2019 WL 3717594 (Minn. TC 8/1/2019).

■ **Court exercises discretion to re-open record.** The tax court issued findings of facts, conclusions of law, and judgment in consolidated matters in which the court determined the market value of Shopko Stores Operating Co., LLC in North Branch as of 2015 through 2017. The court's valuations relied on the cost approach to value, which incorporated a functional obsolescence estimate for the subject property. Chisago County moved to amend the court's findings, positing that the court's functional obsolescence estimate was not supported by record evidence. Shopko opposed the motion.

The tax court's procedural rules provide for additional hearing "if after holding any hearing in any matter, the tax court finds the rights of the parties will be better served by holding a further hearing in the matter." Minn. R. 8610.0120, subp. 2 (2017). The county did not proffer a functional obsolescence estimate during trial because the county's expert concluded that the subject property was not affected by functional obsolescence. Shopko demonstrated the existence of functional obsolescence and offered an estimate, but the court rejected the methodological grounds of Shopko's proffer.

Because the court rejected both parties' functional obsolescence estimates and based its estimates on other evidence in the record, the court exercised its continuing discretion to reopen the record and ordered further proceedings to allow the parties to present additional evidence quantifying functional obsolescence at the subject property, as of the three valuation dates. The court concluded that "the rights of the parties will be better served by the holding of a further hearing in the[se] matter[s]." ***Shopko Stores Operating Co., LLC v. Chisago Co.***, 2019 WL 3311207 (Minn. TC 7/18/2019) (quoting Minn. R. 8610.0120, subp. 2).

■ **County's "highest and best use analysis" overstated.** Hennepin County assessed Medline Industries, Inc.'s 300,000-sq.-ft. distribution warehouse at a market value of $15,912,000 as of January 2014 and January 2015. The court ruled that the assessed value of the property as of January 2014 and January 2015 overstated its market value.

A petitioner may overcome the presumption of validity by introducing evidence that the assessor's estimated market value is excessive. *Minn. Beet Sugar Coop v Renville Co.*, 737 N.W.2d 545, 558 (Minn. 2007). Market value is defined as "the usual selling price at the place where property to which the term is applied shall be at the time of assessment; being the price which could be obtained at a private sale or auction sale...." Minn. Stat. §272.03, subd. 8 (2018). The court concluded in this case that Medline Industries presented sufficient evidence, through the testimony of its expert appraiser, to overcome the *prima facie* validity of the January 2014 and January 2015 assessments.

Appraisers must perform a highest and best use analysis when appraising commercial real estate. A property's highest and best use is "the reasonably probable use of property that results in the highest value." Appraisal Institute, The Appraisal of Real Estate 332 (14th ed. 2013). Here, the parties agree that the subject property is for continued use as a distribution warehouse, but the parties disagree about whether the subject property is a single-tenant or multi-tenant property. The county argues that it is reasonable to consider the property as one that one to two tenants could occupy. Medline maintains that the property is best used as a single tenant distribution warehouse; Medline argues that to be considered for multi-tenant use, the property would need to, among other things, 1) have its own secure office space and storage facilities, and 2) house more tenant vehicle parking.

Relying primarily on a sales comparison approach, which assumes "the value of property tends to be set by the cost of acquiring a substitute or alternative property of similar utility and desirability within a reasonable period of time," the court held that the subject property is properly valued at $13,480,245 as of January 2014 and 15,048,121 as of January 2015. ***Medline Indus. Inc., v. Hennepin Co.***, 2019 WL 3241566 (Minn. TC 7/12/2019) (quoting *The Appraisal of Real Estate* at 379).

■ **Court to hear arguments on whether funds to cover landlord's expenses are subject to sales or use tax.** Minnesota Made Ice Center is owned by Rink SPE, LLC (Rink). Rink leased the entire premises to Eighty Eights Rink, LLC (Eighty Eights). Eighty Eights leased the center to Minnesota Made Hockey, Inc. (MMHI). Eighty Eights' lease with Rink is a triple net lease, but MMHI's lease with Eighty Eights is a gross net lease, in which MMHI is not obligated to pay expenses to operate property.

Eighty Eights' and MMHI's relationship took the form of a triple net lease when Eighty Eights became unable to pay expenses. MMHI assumed all responsibility for operation and maintenance of the center. To keep the center operating, MMHI transferred funds to Eighty Eights to cover bills, including real estate taxes. MMHI recorded the funds transfer as "lease expenses."

The Commissioner of Revenue audited Eighty Eights and assessed use tax on all payments made by MMHI to Eighty Eights in 2012-2014, including lease payments and monies to cover expenses. MMHI appealed the assessment, and moved for summary judgment on the grounds that the payments the commissioner assessed were real estate lease payments and exempt from sales and use tax. The commissioner moved for summary judgment on the grounds that the center is an athletic facility and that payments made by MMHI to Eighty Eights were in return for a "taxable service."

Minnesota imposes a sales tax of 6.5% on gross receipts from retail sales of tangible personal property and certain services. The purchaser of tangible personal property or taxable services is liable for use tax of 6.5% if the vendor does not charge sales tax on the retail sale. Minn. Stat. §297A.61, subd. 3(g)(1) (2018) states, in relevant part, that among the services subject to taxation are athletic facilities.

In a lengthy analysis, the court finds the center to be an athletic facility, but also finds that the payments made by MMHI to Eighty Eights under the parties lease were not in return for a taxable service. The court reversed the commissioner's assessment of use tax, but asserts that those payments account for less than half of the total amount on which the commissioner bases the assessment. MMHI accords that the remainder of the payments are transfers of funds to Eighty Eights to cover its expenses. Because there is a genuine issue of material fact as to whether those payments are subject to sales or use tax, the parties' motions are granted in part and denied in part, and the remaining issue will proceed to trial. ***MN Made Hockey, Inc v. Comm'r of Revenue***, 2019 WL 35499167 (Minn. TC 7/30/2019).

MORGAN HOLCOMB
Mitchell Hamline School of Law
morgan.holcomb@mitchellhamline.edu

SHEENA DENNY
Mitchell Hamline School of Law
Sheena.Denny@mitchellhamline.edu

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BENFIELD


ORCUTT

Julie Benfield and Paige Orcutt have joined Trial Group North, PLLP. Benfield has been practicing in Duluth since 2013, focusing on civil litigation insurance defense. She will continue her litigation practice and will also be working in the workers' compensation field. Orcutt joins the civil and workers' compensation practice, after having clerked in the 6th Judicial District of Minnesota in Duluth. She is a 2016 graduate of the University of Nebraska College of Law.


ORTEGA CONNERS

Aleida Ortega Conners has rejoined Fredrikson & Byron in the mergers & acquisitions, cross-border M&A, and start up & rapid growth enterprises (SURGE) groups.


KIM

Alexander J. Kim has joined Greenberg Traurig, LLP as a shareholder in the firm's intellectual property and technology practice. He was a partner at his previous firm.


EDWARDS

Gov. Walz appointed Dannia Edwards as district court judge in Minnesota's 1st Judicial District. Edwards will be replacing Hon. Thomas W. Pugh and will be chambered at Hastings in Dakota County. Edwards is an assistant public defender for the 1st Judicial District, representing individuals charged with criminal offenses.


SATERBAK

Gov. Walz appointed Melissa Saterbak as district court judge in Minnesota's 10th Judicial District. Saterbak will be filling the vacancy of the late Hon. Tammi Fredrickson and will be chambered in Anoka County. Saterbak has been an assistant Anoka County attorney since 2015, where she specializes in prosecuting felony violent crime.


SULLIVAN

Gov. Walz appointed Rachna Sullivan as district court judge in Minnesota's 4th Judicial District. Sullivan will be replacing Hon. Bruce A. Peterson and will be chambered in Minneapolis. Sullivan is a shareholder at Fredrikson & Byron, PA, where she serves as the lead lawyer in commercial litigation cases.


RIVERA SPALLA

Gov. Walz appointed Darlene Rivera Spalla as district court judge in Minnesota's 9th Judicial District. Rivera Spalla will be replacing Hon. Kurt Marben and will be chambered in Mahnomen County. Rivera Spalla is currently the county attorney for Mahnomen, where she has served since 2011.


HERMANSON-ALBERS

Bobbi Hermanson-Albers has joined Barna, Guzy & Steffen LTD in the estate planning department. She will be practicing in the areas of wills/estates and probate/tax planning law.


REUTER


SANDBERG

Eckland & Blando LLP announced the promotion of Vince C. Reuter to partner and Lara R. Sandberg to special counsel. Reuter's practice focuses primarily on commercial litigation, government contracts, federal and state administrative law, and admiralty and maritime law. Sandberg's practice focuses primarily on litigating and negotiating settlements on claims brought by property owners. She also works with companies on government contract compliance, labor and employment law issues, and commercial litigation matters.

Peter G. Mikhail has joined LeVander, Gillen & Miller PA's municipal practice. Mikhail brings extensive public sector litigation and condemnation experience to the firm and will work closely with municipal clients on all aspects of civil legal matters.

Christy E. Lawrie has been elected as a shareholder at McGrann Shea Carnival Straughn & Lamb, Chartered.

Steven M. Phillips has joined Jackson Lewis P.C. in the firm's Minneapolis office as a principal. Phillips has more than 25 years of trial and arbitration experience in employment and business litigation matters, and deep experience representing clients in the financial services industry.

Fredrikson & Byron has elected eight new shareholders: Nikola L. Datzov, Steven R. Kinsella, Katie A. Perleberg, Christopher D. Pham, Joseph J. Schauer, Benjamin R. Tozer, Emily A. Unger, and Haley Waller Pitts.


SAMPSEL

Aaron D. Sampsel has rejoined the Christensen Law Office PLLC as a senior associate attorney. He advises others lawyers on ethics matters and represents respondent attorneys in disciplinary proceedings. Sampsel also supports the firm's intellectual property practice.


STOKES


TORPEY

Susan E. Stokes and Ryan P. Torpey have joined Lind Jensen Sullivan & Peterson. Stokes joins as a shareholder and has experience in a broad range of practice areas, including employment law, administrative law, and agricultural law. Torpey joins as an associate and practices civil litigation, primarily in the areas of professional liability and insurance defense.

In Memoriam

Augustus Wilson "Bill" Clapp, age 87, of St. Paul passed away on August 18, 2019. He graduated from the U of MN Law School in 1973. He worked with the Weyerhaeuser Company until 1969, then began a second career after law school, joining the Minnesota Attorney General's office, where he specialized in laws protecting wetlands and water.

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