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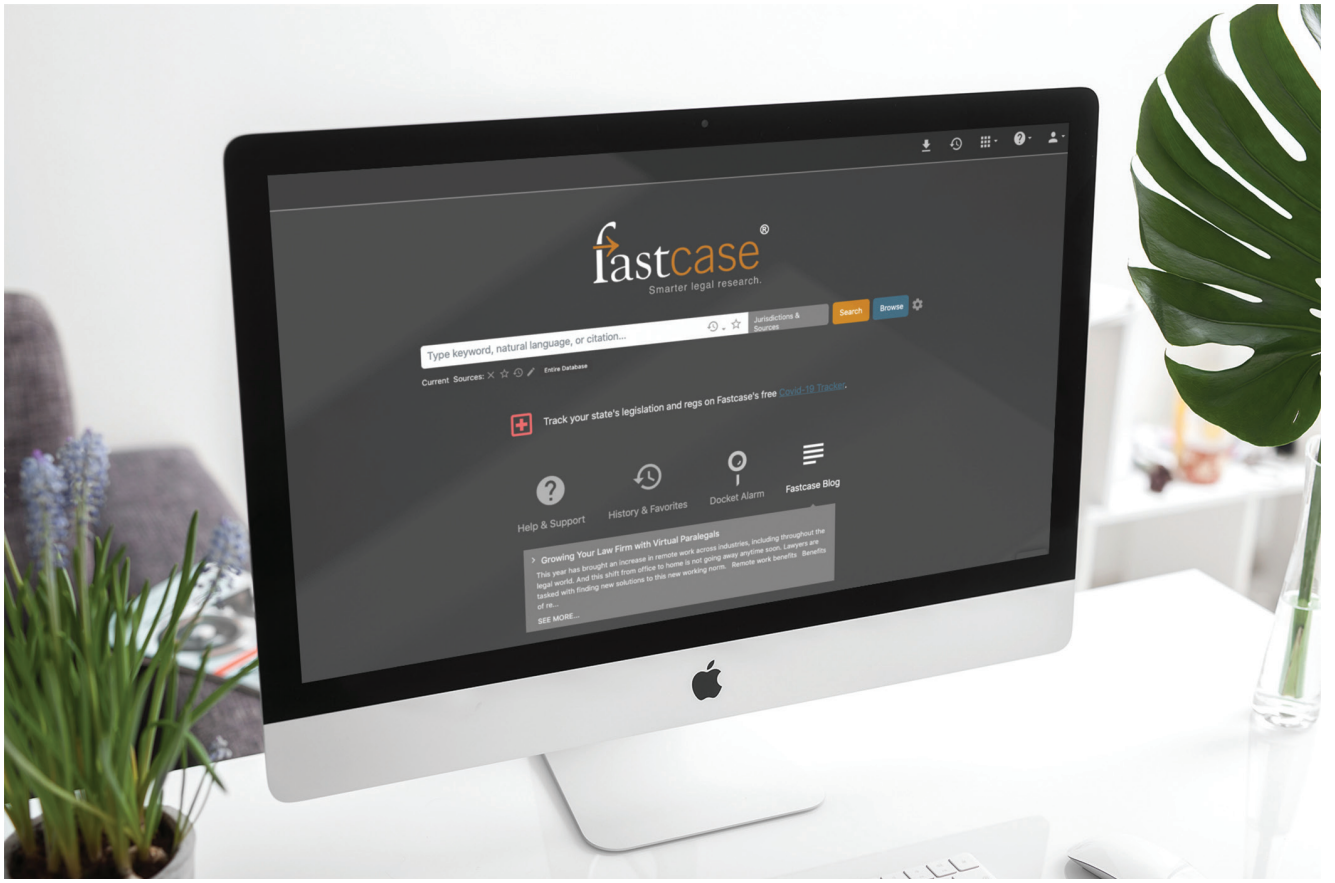

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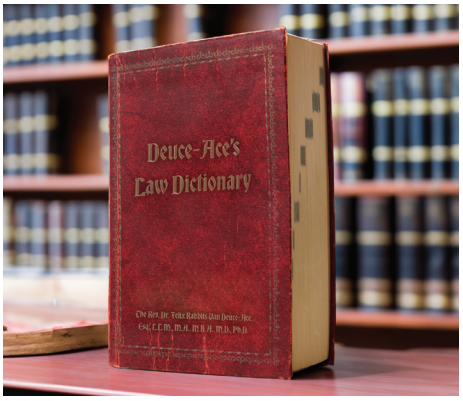

features

Counselor at law:

The privilege and burden of keeping secrets

BY PAUL M. FLOYD

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

Almost from the moment I passed the bar, family and friends began confiding in me regarding their legal problems. Be it a lease dispute, an employment offer, or a noncompete question, they sought me out to provide legal advice and advocacy to help them resolve their legal issues. This is precisely what law school had prepared me to do and over time I became quite good at it. I was an "attorney at law" and knew I had found my calling.

However, as my practice morphed from one of advocacy to more advice and counselling, people entrusted me with more private, personal, and confidential matters. Clients, friends, and family confided in me some of their most personal and heartbreaking secrets. Matters they would not tell another soul. They trusted me as a lawyer to keep their secrets from their spouses, partners, colleagues, etc. Receiving these confidences can be humbling. They can also take an emotional toll on you.

At the outset, I failed to acknowledge the inherent burden that accompanies these disclosures. After all, no one of these confidences by themselves reduced me to tears or caused me sleepless nights. But even if your clients' secrets do not rise to the level of severely affecting your daily life, they may still have a cumulative effect. "Microstresses" are small, difficult moments that embed themselves in our minds and accrue over time. The long-term impact of this buildup can be debilitating: It saps our energy, damages our physical and emotional health, and contributes to a decline in our overall well-being.[1] A microstress can be as minor as getting cut off in traffic, having one's internet connection freeze during a Zoom meeting, or getting a call from the school nurse about your sick child. Most of us can handle one or two of these microstresses daily, but when they quickly accumulate over time (how many demanding or irritating emails did you get today?), they can overwhelm us, which we in turn may reflect back toward those around us.

Microstresses—the contentious call with opposing counsel, the rushed court appearance, providing feedback to an underperforming employee, keeping the troubling confidence of a client, close friend, or colleague—are the hazardous airborne particles of lawyers' lives. We tend not to be as well-versed as mental health professionals in recognizing secondary trauma and the need for self-care. In my case, certainly, the responsibility of preserving client confidentiality, coupled with the burden of their secrets, incrementally impacted my emotional well-being and mood. Perhaps you too have felt similar effects when confronted with unsettling or traumatic client stories.

Encouragingly, there exist several strategies to prevent burnout and emotional decline in our practice, ensuring it doesn't adversely affect our colleagues and loved ones.

First, if you feel triggered or emotionally burdened by a new matter, take a moment to reassess whether you should accept the representation. It may be flattering to be entrusted with the honor of being consulted for advice, especially from your closest ally or peer. But it might be more prudent to direct the individual to a reliable colleague, someone untouched by potential biases or conflicts due to unfamiliarity with the other parties involved. True wisdom lies in discerning when to engage and advise, and when to redirect someone for the mutual benefit of both client and counsel.

Next, learn to identify and acknowledge when the burden of miscrostresses is becoming unhealthy. I have had to remind myself to slow down, to breathe, to take a break, to get regular exercise, and to get a good night's sleep. For more troubling, perhaps triggering, secrets, seek professional help. Sometimes help is as near talking with another lawyer. Other times it involves seeing a therapist.

Being a trusted "counselor at law" carries a significant privilege and responsibility. Every time a client shares a traumatic or troubling secret, they are entrusting you as their lawyer to keep it confidential. Secrets of this nature, even if not overtly disruptive, contribute to cumulative microstress that affects our well-being. Recognizing the toll and seeking support is vital to being the best lawyer and person you can be to all of your clients, family, friends, and colleagues. ▲

NOTE

1 Rob Cross & Karen Dillon, "The Hidden Toll of Microstress," Harvard Business Review (2/7/2023).

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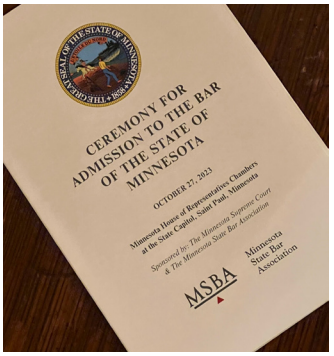
Minnesota's newest attorneys sworn in



The Minnesota Supreme Court and Minnesota State Bar Association welcomed over 300 new lawyers to the Minnesota bar in six admission ceremonies held at the Minnesota State Capitol on October 27. The new lawyers join the ranks of 25,000-plus active licensed attorneys in Minnesota. Chief Justice Natalie Hudson led the proceedings in the House of Representatives chambers, joined by Associate Justices Anderson, McKeig, Thissen, Moore, and Procaccini.

Justice Thissen addressed the new lawyers and guests, talking about the profession's privileges and responsibilities, the importance of protecting their health and well-being, and their duty to support the underrepresented and to use their voices to help others be heard. John Koneck, president of the Minnesota Board of Law Examiners (MBLE), gave the introduction and reported on the results of the summer 2023 bar exam, and MBLE Executive Director Emily Eschweiler read the roll of new candidates' names. Chief Justice Hudson administered the oath; MSBA President Paul Floyd welcomed the newest members of the bar to Minnesota's legal community and the association.

After each ceremony, the new lawyers were invited to sign their names in the Roll of Attorneys, advancing a practice that dates to 1858 and was reinstated in 2018 after a 35-year break. Attorneys admitted between 1983 and 2018 who would like to sign the roll book may do so by appointment at the Minnesota State Law Library. ▲

UM law students meet the market

On November 6 the University of Minnesota Law School hosted a *Meet the Market* event that gave employers an opportunity to connect with and share information about their organizations with Minnesota law students. Members of the Greater Minnesota Practice Section, the Civil Litigation Section, and the Minnesota District Judges Association attended to talk with law students about the benefits of taking a judicial law clerkship in Greater Minnesota as well as to promote the Greater Minnesota Legal Opportunity Network, a mapping tool for legal opportunities outside of the metro area. The network is free for all MSBA members to join, and members can post open legal opportunities for attorneys and law students (including open judicial clerkship positions in Minnesota district courts). Want to find out more? Check it out at *www.mnbar.org/greater-minnesota-practice.* ▲

The LPRB is available every day to answer your trust account questions at 651-296-3952.

Conducting a trust account self-assessment

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

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

Safekeeping client or third-party funds relating to a representation is one of the most important legal and ethical duties lawyers have. Safekeeping is not only an important ethical obligation with potentially serious licensure consequences; it's a fiduciary duty owed to our clients or others whose money we hold. This column has covered common trust account errors as well as examples of serious discipline imposed when the rules are not followed. This month I want to discuss ways that you can proactively conduct a self-assessment of your trust account practices. Whether you handle your own trust account or supervise others who do all the heavy lifting, ensuring that this important task is completed consistently and correctly is always worth your time. As the year ends and 2024 begins, I hope you are inspired to give yourself the gift of peace of mind relating to your trust account responsibilities.

California's new annual self-assessment rule

My inspiration for this topic comes from California. Effective earlier this year, California created a Client Trust Account Protection Program to aid in the detection and deterrence of trust account misconduct.[1] There are several components to this program but one in particular stood out to me—a required annual self-assessment that attorneys must complete as part of their annual license registration. This assessment, the first of its kind in the nation, is just a series of questions that requires the lawyer to affirm in detail compliance with the reporting and recordkeeping ethics rules. It includes provisions that have long been part of the requirements in Minnesota: annual disclosure of account information and certification of compliance with the rules.

Minnesota requires lawyers to confirm annually that they keep compliant books and records for their trust account, and to disclose annually the bank and accounting information for their account(s). If you have a trust account, when you complete Step 2 on your annual registration, you are certifying that "I or my law firm maintains books and records as required by Rule 1.15, MRPC and Appendix 1 to the MRPC."[2] Completing an annual self-assessment helps to ensure that this certification is accurate.

Self-assessment content

California's self-assessment is done online.[3] Although it references the California rules, generally the same inquiries apply for a review of your trust account. Let's walk through some related questions you should ask yourself regarding your Minnesota trust account:

1. Is your trust account with a bank approved by this Office and have you reported its existence through your annual registration? Have you disclosed all trust accounts that you maintain?
2. Do you maintain all funds that should be in trust (client advance attorney's fees, advances for expenses, settlement funds, and third-party funds you have been provided) in a designated trust account separate from any personal or business accounts? How do you know this is true? Do you have a written policy? Have you talked with staff about this requirement?
3. Do you know what the required books and records are for your trust account? Appendix 1 to the Minnesota Rules of Professional Conduct describes the required books and records. Too many people misunderstand this question and think it just means their bank statements. Nope.
4. Do you have for each trust account: a check register; a subsidiary ledger for each client with funds in trust; a separate subsidiary ledger for nominal attorney funds held in the account (not to exceed $200); an interest subsidiary ledger; a trial balance report of the subsidiary ledgers, updated monthly; a completed reconciliation report, prepared monthly; bank statements; cancelled checks (if provided); deposit slips; and memoranda documenting wire or electronic account transfers? All these documents are required to be kept.
5. Do you have a record of the monthly reconciliation of the check register balance, the subsidiary ledger trial balance total, and the adjusted bank statement balance? Three-way reconciliation of the account is the hallmark of trust accounting recordkeeping and is something bookkeepers and accountants are not used to performing unless they have been instructed on the required records. Have you given your team Appendix 1 and made sure

they understand its requirements? Do you periodically review Appendix 1 to make sure you understand its requirements?

6. Do you have a process to ensure that timely notice is made to clients or others of transactions involving deposits and withdrawals related to their money? You should be accounting to clients and third parties no less than monthly any activity relating to their funds.
7. Do you have a process to ensure that attorney's fees are withdrawn timely when earned? You should not be holding earned fees in your trust account as a "cushion" or to avoid overdrafts. Doing so is commingling of attorney and client funds and is ethically prohibited.
8. Do you have more than $200 of your funds or firm funds in your account? You can and should keep nominal sums (up to $200) in the account to cover bank charges and service fees that may arise so that client funds are not used to cover trust account service charges.
9. Do you have a process to ensure that if a dispute arises regarding funds transferred from trust, those funds are returned to trust and not withdrawn until the dispute is resolved?
10. If you have delegated to others the maintenance of your trust account, do you have policies and procedures sufficient to ensure the account is maintained in compliance with Minnesota's ethics rules? Do you make sure that periodic training takes place so that personnel understand the policies and procedures?
11. If not performed by you, do you review on a monthly basis the monthly three-way reconciliation referenced above to ensure that it balances and any open questions are answered? A family member who is in private practice has a policy that he reviews his trust account records on a monthly basis the same day he gets them from his bookkeeper and does not do anything else except work on his trust account if the reconciliation does not match to the penny or if his review shows something out of line. In my view, this is the right approach to such an important fiduciary and ethical obligation. Do you have the same or a similar approach? It really is that important.
12. Do you have procedures in place to ensure that any payments in cash are documented by a receipt signed by both the recipient and the payor, and that copies of such receipts are maintained?
13. Is someone other than a lawyer a signatory on the trust account? If so, does a lawyer also sign every check? Checks must be signed by lawyers. Also, a lawyer must direct every electronic transfer or withdrawal from the trust account and a written record of that direction must be kept. Do you have those records?
14. Do you hold client funds on closed client matters? Have you investigated why this is the case? You have an obligation to timely return unearned and unused client funds upon termination of the representation. You must address those funds to ensure stale checks are accounted for and that former clients are located and their funds returned to them.
15. Do you have a process for periodic review of your policies and procedures and compliance with those procedures to ensure your trust account is being maintained in a manner consistent with the rules?
16. Do you ensure that your trust account and business account records are maintained for six years following the business/tax year to which they apply?
17. Having reviewed these questions, how do you feel about your trust account maintenance?

If you reviewed these questions, and they made sense to you, that is wonderful, and I hope that gives you some peace of mind. If a review of these questions raised questions in your mind, don't panic—but please do turn your attention to your trust account. Note also that this list of questions does not cover every single issue that might occur with a trust account but rather is intended to ensure you understand the main obligations relating to your account. Nothing is a substitute for sitting down with Rule 1.15 and Appendix 1.

Resources

We have a lot of resources on our website, including sample forms that can assist you with your compliance. We are also in the process of creating a trust account school that we hope to launch in 2024 that you and your staff can attend to ensure you have the knowledge you need to comfortably manage your trust account. The state law library has an on-demand free basics training for trust accounting.[4] We are available every day to answer your trust account questions at 651-296-3952. Trust account recordkeeping may seem mysterious and daunting; it is not, and we are here to help. ▲

NOTES

[1] Rule 9.8.5, California Rules of Court.

[2] Blank Minnesota Annual Registration Statement, available at *https://www.lro.mn.gov/for-lawyers/annual-lawyer-registration-fees*.

[3] California's Trust Account Protection Program, including a draft of the self-assessment, is available at *https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Client-Trust-Accounting-IOLTA/Client-Trust-Account-Protection-Program*.

[4] Visit the State Law Library website at *https://mn.gov/law-library/services/index/on-demand-cle-videos.jsp*.

Biden issues ambitious executive order on AI

BY MARK LANTERMAN ✉ mlanterman@compforensics.com

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

On October 30, the Biden administration issued its Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.[1] Coming near the end of what was dubbed by many "the year of AI," the order acknowledges both the risks and manifold benefits of AI technology, as well as the need for governance oversight to manage it as responsibly as possible. The order states:

> "Artificial Intelligence must be safe and secure. Meeting this goal requires robust, reliable, repeatable, and standardized evaluations of AI systems, as well as policies, institutions, and, as appropriate, other mechanisms to test, understand, and mitigate risks from these systems before they are put to use...Testing and evaluations, including post-deployment performance monitoring, will help ensure that AI systems function as intended, are resilient against misuse or dangerous modifications, are ethically developed and operated in a secure manner, and are compliant with applicable Federal laws and policies. Finally, my Administration will help develop effective labeling and content provenance mechanisms, so that Americans are able to determine when content is generated using AI and when it is not."

In the "misinformation" age, marked by deep fakes, vocal cloning, and the unsettling idea that seeing shouldn't always be believing, a labeling system allowing Americans to spot AI-generated content would certainly be a game-changer. Within a year, it is expected that the government will have a better idea of how to best identify and label "synthetic content produced by AI systems, and to establish the authenticity and provenance of digital content, both synthetic and not synthetic, produced by the Federal Government or on its behalf." While these efforts seem to be primarily directed at digital content produced by the United States government, it is less clear how such measures would be applied to AI-produced content more generally.

The idea of an identification system itself is promising in light of current challenges, and the executive order signals progress in the right direction, but it remains to be seen how these objectives will come to fruition. For example, the order describes watermarking as "the act of embedding information, which is typically difficult to remove, into outputs created by AI." However, as noted by MIT Technology Review, "The trouble is that technologies such as watermarks are still very much works in progress. There currently are no fully reliable ways to label text or investigate whether a piece of content was machine generated. AI detection tools are still easy to fool. The executive order also falls shorts of requiring industry players or government agencies to use these technologies."[2] At this point in time, enabling Americans to distinguish AI-generated content from authentic content will still require a substantial amount of time and effort on several different fronts.

Furthermore, the order's call for AI applications to be made resilient against misuse or dangerous modifications will be similarly difficult. As is common with rapidly evolving technology, the methods needed to use or adapt it for nefarious purposes tend to develop at the same rate. Though the objectives of the order are welcome, and likely reflect the wishes of the American people when it comes to navigating a world infiltrated by "fake news," they will be challenging to achieve. In the meantime, especially in the courtroom, policies and procedures should be considered for the here and now. From the deepfake defense ("That's not me, prove it is") to fake content being submitted as evidence, methodologies should be established for managing AI in the courtroom in the absence of widescale, standard technological detection methods.

The executive order indicates that AI's inherently dual-sided nature is being acknowledged within government. However, legislation is still required to effectively combat its risks and maximize benefits. Some of the proposed objectives are still elusive, and it is unclear when individuals can be expected to consistently spot a deepfake in daily life or at the very least be assured that the government communications they receive are real. That being said, improved governance, safety protocols, transparency, and a commitment to testing are all positive goals that would assist in making better protections for consumers a reality. ▲

NOTES

[1] *https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/*

[2] *https://www.technologyreview.com/2023/10/30/1082678/three-things-to-know-about-the-white-houses-executive-order-on-ai/*

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Put plain language in Minnesota's court rules

BY IAN LEWENSTEIN

ian@capyourpenconsulting.com

omit ~~all~~ needless words

Minnesota's plain-language requirements predominantly lean on its executive-branch agencies and private sector. For example, the Minnesota Legislature—and two Minnesota governors—have required agencies to write regulations and other public-facing documents in plain language.[1] The Legislature also requires the private sector to prepare plain-language documents and forms in areas such as insurance, health care, and workers' rights.[2] Because of legislative and gubernatorial directives, Minnesota consumers and workers are entitled—at least on paper—to the clarity and knowledge that plain language has been proven to provide.

But the focus on executive-branch agencies and the private sector—while needed and beneficial—should have long ago been expanded to the Legislature itself and to court rules. While the Legislature has witnessed plain-language progress in some areas, albeit still limited, court rules seem ripe for improvement to ensure public understanding of and compliance with the court system.

Even the sclerotic federal government has slowly shuffled ahead of Minnesota in its dedication to washing court rules of legalese.[3] I think that it's time for Minnesota to follow suit.

Starting with court rules: Rule 114 on Alternative Dispute Resolution

Examining the benefits of embedding plain language in Minnesota court rules should start with Rule 114. The nearly six-year effort to update Rule 114 on alternative dispute resolution "dramatically [altered] the face of ADR...."[4] Given that the new rule is meant to "offer guidance and order regarding an increasingly popular process,"[5] the rule should have been drafted with plain-language precision in mind because a law, policy, or procedure is meaningless if it can't be easily understood by all affected parties, or if it's written so vaguely or ambiguously as to invite frequent disputes over meaning.

First, kudos to those who worked on the new Rule 114, for it adheres to many plain-language precepts; for example, the rule limits legalese, restrains its abbreviation use, and rests on a solid structure with good use of headnotes, vertical lists, and short paragraphs. But despite this improvement, there are both little tweaks and larger revisions that could make the rule more easily understandable and heap even more plain-language benefits on all affected parties.

Slight but important tweaks

Timeless advice for improving your writing is to eliminate clutter—that is, omit needless words.[6] Clutter distracts, hinders flow, slows reading, and occasionally introduces ambiguity. Because of these pernicious effects, excising clutter is important, and at times critical, to the legal drafter. The following examples and explanations demonstrate how we can cut the clutter in the new rule:

CLUTTER CUTTER	EXPLANATION
In rare circumstances where the court ~~in its discretion~~ finds ADR to be inappropriate or to operate as a sanction...	The court is already operating with discretion, so the additional "in its discretion" just adds extra words. A similar issue occurs with language such as "the court *may*, under its discretion." But *may* means that the court has discretion.
The following terms ~~shall~~ have the meanings ~~set forth in construing these rules~~ given them.	A couple of issues here. First, note the commonly incorrect use of *shall*.[7] The sentence isn't establishing a duty—rather, it is stating an operative fact—and both facts and law are written in the present tense. Second, it's clear that the definitions aren't for decorative purposes but to give meaning to the terms used in the rule, so extraneous language on "construing these rules" can be cut. And third, what does "these rules" refer to exactly? If absolutely necessary, cite to a range and avoid the vague phrasing.
The Neutral~~(s)~~ then issue~~(s)~~ a ~~non-binding~~ nonbinding advisory opinion ~~regarding~~ on liability~~;~~ or damages ~~or both~~.	The (s) construction is unnecessary because it's commonly understood that the singular includes the plural and the plural the singular. Prefer the singular; draft in the plural if you must, but avoid the misguided (s) temptation. Also, ensure proper prefix etiquette by closing up prefixes (*nonbinding*), and prefer the simple word (*on* as opposed to *regarding*). Last, you can safely assume that *or* includes one or both options. But if you are uneasy, draft these constructions in parallel form: "on liability or damages or both."
The Neutral may ~~give an assessment of~~ assess the strengths and weaknesses a claim, case, or defense...	For the most part, spurn nominalizations, or zombie nouns.[8] Readers want to see action (*assess*), not concepts (*assessment*). Also notice how one word replaces four words. Plain-language bonus.
A "Qualified Neutral" is an individual or Community Dispute Resolution Program ~~(CDRP)~~ listed ...	The letters are nice, but why abbreviate when the program is mentioned only once in this paragraph and the entirety of rule 114.02?
... low-cost ADR services are ~~not~~ unavailable. ADR sessions are ~~not open~~ closed to the public ...	Prefer the positive to the negative, which effectively means avoid using *not*. The positive is more direct and usually shortens the phrase.
of-phrases such as "the agreement of the parties."	Almost all of these constructions can be replaced by using the genitive and removing the preposition (*of*) and article (*the*). So "agreement of the parties" becomes the "parties' agreement."

Lingering legalese

While the new Rule 114 is mostly devoid of legalese, a few common lawyer favorites remain:

> **Prior to** issuing the decision, the Neutral will mediate. **In the event of** impasse, the Neutral discloses the decision which may be binding or nonbinding, **pursuant to** the agreement of the parties.

This example has a triple whammy of *prior to*, *in the event of*, and *pursuant to*. All function like noxious weeds, so consider a revision with a few hearty snips:

> **Before** issuing the decision, the Neutral will mediate. **If there is** an impasse, the Neutral discloses the decision—which may be binding or nonbinding—**according to** the parties' agreement.

Why people are fascinated with *prior to*—not strictly limited to the legal profession—could be the basis of an insightful psychological study. Try *before*, and you'll never go back. Replacing *in the event of* with the more direct *if* establishes a more visual connection. And the lawyer's security blanket, *pursuant to* serves as the poster child for legalese and has three main meanings: *in accordance with* (also, *according to*), *in carrying out*, and *under*.[9]

If you harbor doubts, look to the guidance of the Uniform Law Commission,[10] which not only eschews *pursuant to*, but also *prior to* and *in the event of*, not to mention other common examples of legalese. Also look to Rule 114 itself, which sometimes—maddeningly—alternates between *according to* and *pursuant to*.

Slippery sentence construction

In addition to clutter and legalese, legal drafting really devolves into mass confusion with shoddy sentence construction. For example, Rule 114 contains several "good" examples of left-branching, or when a sentence starts with complex conditions before we reach the sentence's subject and verb. In contrast, right-branching is when we start with the subject and the verb at the beginning, or close to the beginning, and then cascade into the complex information. Our brains crave right-branching; left-branching, not so much. Here are some examples and revisions:

> If a party qualifies for waiver of filing fees under Minnesota Statutes, section 563.01, or if the court determines on other grounds that the party is unable to pay for ADR services, and free or low-cost ADR services are not available, **the court shall** not require that party to participate in ADR.

In boldface is the sentence's main subject and verb, but notice how it takes 41 words until we get there. The sentence starts with two conditions, one with a separate condition. This makes us work too hard. But see what a revision could do, with some other fixes:

ORIGINAL	REVISION
If a party qualifies for waiver of filing fees under Minnesota Statutes, section 563.01, or if the court determines on other grounds that the party is unable to pay for ADR services, and free or low-cost ADR services are not available, **the court shall not** require that party to participate in ADR.	**The court may not** require a party to participate in ADR if free or low-cost ADR services are unavailable and if: (1) the party qualifies for a waiver of filing fees under Minnesota Statutes, section 563.01; or (2) the court otherwise determines that the party is unable to pay for ADR services.

Reorganizing the sentence into a vertical list helps to reveal the problems. First, I moved the subject and verb to the beginning of the sentence and excised the nebulous *shall*. Second, I made good use of a vertical list to show and structure the two conditions. Third, I pruned clutter (*on other grounds* and *not available*). And fourth, I fixed an ambiguity from comma placement—does "free or low-cost ADR services are not available" apply to the entire list or just the second item?

Another example of slippery sentence construction occurs when the subject is separated from the verb; the intervening words, if more than a couple, can wreak havoc on the sentence flow and reader comprehension. Take this sentence, for example:

> **The parties**, after service of the complaint, petition, or motion, **shall** promptly confer regarding selection and timing of the ADR process and selection of a Neutral.

Here, the intervening phrase should start the sentence. Even better would be to name the actor and remove the nominalization (*service*). Who is serving the complaint, petition, or motion? Even if the actor is unimportant or unknown, the nominalization can still be removed and replaced with a verb (*served*):

ORIGINAL	REVISION
The parties, after service of the complaint, petition, or motion, **shall promptly confer** regarding selection and timing of the ADR process and selection of a Neutral.	After a complaint, petition, or motion has been served, **the parties must promptly confer** on selecting and scheduling an ADR process, including selecting a Neutral.

I moved the sentence to keep the subject and verb close together. The prepositional phrase at the beginning of the sentence is short enough so as not to bend too far to the left. Additionally, we can take out the rest of the nominalizations and tweak the sentence a bit more to make it more cohesive (by using *including*, for example).

Two other examples demonstrate the insidious nature of left-branching. The first example is particularly nettlesome because it starts with a prepositional phrase with an exception and then two subjects before we reach the verb:

ORIGINAL	REVISION
Without the consent of all parties and an order of the court, except as provided in paragraph (c), no evidence from an ADR process **or any fact** concerning the ADR process **may be** admitted in any later proceeding involving any of the issues or parties.	Except as provided in paragraph (c), **evidence** from an ADR process—or **any fact** on the ADR process—**must not** be admitted in a later proceeding involving any of the issues or parties **without:** **(1) the consent of all parties; and** **(2) a court order.**
Evidence in consensual special magistrate proceedings, binding arbitration, or in non-binding arbitration after the period for a demand for trial expires, **may be used** in later proceedings for any purpose for which it is admissible under the rules of evidence.	**Evidence may be used** in the **following** later proceedings for any purpose for which it is admissible under the rules of evidence: (1) consensual special magistrate proceedings; (2) binding arbitration; and (3) nonbinding arbitration after the period for a demand for trial expires.

Remaining issues

Rule 114 contains other common drafting errors in word placement that bedevil most writers, not just legal drafters.

1. Which/that. Both are relative pronouns. Generally, *which* introduces a nonrestrictive clause, and *that* a restrictive clause—though this differs across English-speaking countries.[11] A nonrestrictive clause adds extra information, while a restrictive clause limits the information. *Which* is preceded by a comma, and *that* isn't.

For example: "The jury issues a verdict[,] **which may be binding or non-binding**, according to the agreement of the parties." Here, the phrase is nonrestrictive, meaning that the bolded phrase isn't essential to the sentence's meaning and could be taken out to read "The jury issues a verdict according to the agreement of the parties." The agreement will specify whether the verdict must be binding or nonbinding, something that isn't essential to the sentence.

In another example, the *which* should be changed to *that*: "The State Court Administrator shall certify training programs ~~which~~ that meet the training criteria of this rule." The clause after *programs* is essential to the sentence's meaning.

2. Misplaced modifier. Sometimes, legal drafters misplace important information: "If a filed action is settled through an ADR process, the attorneys shall promptly notify the court and, **whether filed or not**, complete the appropriate documents to bring the case to a final disposition."

According to this sentence, the attorneys are being filed. Though many may wish this, attorneys shouldn't be getting filed. Rather, it's the action that should be getting filed, so a missing word must be added: "whether the action is filed or not."

Or here: "Within 90 days after **its entry**, **a party** against whom a judgment ..." *Its* refers to the judgment, not the party: "Within 90 days after the judgment's entry, a party ..."

3. Misplacing *only*. Misplacing *only* is common, but for legal drafters, being loose with *only* can drastically change meaning. "The Neutral may **only** disclose to the court information permitted to be disclosed under Rules 114.10-11."

This sentence means that the neutral can do **only** one thing: disclose to the court information. What the sentence means to say, however, is that the Neutral may disclose only certain information: "The Neutral may ~~only~~ disclose to the court only information permitted to be disclosed under Rules 114.10-11." Watch your *only* placement; when in doubt, move it as close to your modifying phrase as possible.

4. Using *above* and *below*. In legal drafting, these words amplify ambiguity. For instance, "The written statement of any other witness, including written reports of expert witnesses not enumerated **above** ..." Does *above* mean the sentence, paragraph, etc.? Cross-references are your friend, so use them.

Larger revisions

The new rule does a decent job of using headnotes and small paragraphs—this structure is just as important as the words on the page. Without proper structure that breaks up the language into readable and easily identifiable chunks, well-written plain language is only half-complete. But once the rule runs into the ethics section, 114.13, we encounter the deadly great walls of text.

Great walls of text are nefarious because they signal, "Don't Read Me!" But text should be inviting, especially when "public confidence in the integrity and the fairness of the ADR process is essential."[12] To first understand important ethical guidelines, we need to not be repelled by walls of text:

> On glancing at your pages, readers should get the feeling that your work will be easy to read. You'll therefore want to avoid a series of long, forbidding paragraphs. A profusion of bulky paragraphs suggests either indiscriminate lumping or unnecessary padding. Think how often you've been repelled from a book by whole solid pages without paragraph breaks; and think, by contrast, how often you've yielded to the attraction of an open, easy-looking page.[13]

The introduction to the ethics section flouts this well-accepted advice. For example, we have 365 words without clean headnote breaks. True, the paragraphs are short, but without headnotes, the text is uninviting. Or take subdivision 2, which is two paragraphs (199 words), with the first paragraph horrifically cluttered. And why no headnotes as in subdivision 7? And speaking of subdivision 7, why not combine like sentences into friendly vertical lists? The original reads like a school outline or someone's notes:

Without proper structure that breaks up the language into readable and easily identifiable chunks, well-written plain language is only half-complete.

> **(a) Fees.** A Neutral shall fully disclose and explain the basis of compensation, fees and charges to the parties. The parties shall be provided sufficient information about fees at the outset to determine if they wish to retain the services of a Neutral. A Neutral shall not enter into a fee agreement that is contingent upon the outcome of the alternative dispute resolution process. The fee agreement shall be included in the written agreement and shall be consistent with a court order appointing the Neutral. A Neutral shall establish a protocol for regularly advising parties on the status of their account and requesting payment of fees. If one party does not pay the fee, and another party declines to cover the fee, the Neutral may withdraw, proceed, or suspend services for both parties until payment is made. If proceeding with services, the Neutral shall not refuse participation by any party based on payment status. A Neutral who withdraws from a case shall return any unearned fee to the parties. A Neutral shall not give or receive any commission, rebate, or similar remuneration for referring a person for alternative dispute resolution services.

Now try breaking up the long paragraph into vertical lists and shorter paragraphs with headnotes:

> **(a) Fees Disclosing fees.** A Neutral ~~shall~~ must:
>
> (1) fully disclose and explain the basis of compensation, fees, and charges to the parties~~. The parties shall be provided~~; and
>
> (2) provide the parties with sufficient information about fees at the outset to determine if they wish to retain the services of a Neutral.
>
> **(b) Fee agreement.** A Neutral ~~shall~~ may not enter into a fee agreement that is contingent ~~upon~~ on the outcome of the alternative dispute resolution process~~.~~, and the fee agreement ~~shall~~ must be:
>
> (1) included in the written agreement; and ~~shall be~~
>
> (2) consistent with a court order appointing the Neutral.
>
> **(c) Fee protocol.** A Neutral ~~shall~~ must establish a protocol for regularly advising parties on the status of their account and requesting payment of fees. If one party does not pay the fee, and another party declines to cover the fee, the Neutral may withdraw, proceed, or suspend services for both parties until payment is made. If proceeding with services, the Neutral ~~shall~~ may not refuse participation by any party based on payment status.
>
> **(d) Fee restrictions.** A Neutral ~~who~~:
>
> (1) must return any unearned fee to the parties if the Neutral withdraws from a case ~~shall return any unearned fee to the parties. A Neutral shall~~; and
>
> (2) may not give or receive any commission, rebate, or similar remuneration for referring a person for alternative dispute resolution services.

Even without substantively amending the language, adding structure greatly improves readability and clarity.

The new rule goes in the right direction if you look at part (B), subdivision 3, which uses good paragraphing, headnotes, and vertical lists. It isn't perfect, but it's a striking comparison to the previous example.

For consequential law, add plain language

I'm sure that the new ADR Rule 114 is as good as promised. I'm no expert, but I trust that the extensive effort that went into the rule will pay great dividends. Yet we shouldn't stop with innovative law. Instead, we must pair innovation with a strong commitment to plain language to ensure that people can easily track, follow, and comply with law that affects them. ▲

NOTES

[1] Minn. Stat. §14.07, subd. 3(3) (2022); Exec. Order No. 14-07, 38 Minn. Reg. 1191 (3/10/2014); Exec. Order No. 19-29, 43 Minn. Reg. 1235 (4/15/2019).

[2] Minn. Stat. §§72C.02 (insurance policies and contracts), 144A.44 (home-care bill of rights), 176.235 (workers' compensation).

[3] *See, e.g.,* Joseph Kimble, *Seeing Through Legalese: More Essays on Plain Language* 21-22 (2017). Our cold-weather neighbor to the north is also beating us in plain language. *See* Paul Aterman, *Tribunal Rules in Plain Language ... Why Bother?*, Slaw, 3/28/2023, *https://www.slaw.ca/2023/03/28/tribunal-rules-in-plain-languagewhy-bother/*.

[4] Kristi Paulson, *Inside ADR's Minnesota Rules Reset: Understanding the New Rule 114*, Bench & Bar of Minnesota, January/February 2023, at 33.

[5] *Id.*, at 36.

[6] William Strunk Jr. & E.B. White, *The Elements of Style* 23-24 (4th ed. 2000).

[7] Even worse: "Neutrals serving under this rule **shall be deemed to** consent to ..." (emphasis added). The bolded phrase can be eliminated with no loss in meaning.

[8] Ian Lewenstein, *Bring your Writing to Life: Use Recognizable Characters and Action Verbs*, 102 Mich. Bar J. 26, 26-28 (Feb. 2023).

[9] *Pursuant to*, Black's Law Dictionary (10th ed. 2014).

[10] Uniform Law Commission, *Drafting Rules and Style Manual* 62 (2022).

[11] Bryan A. Garner, *Garner's Modern English Usage* 1086-88 (5th ed. 2022).

[12] Kristi Paulson, *ADR: Understanding the New Code of Ethics for Court-Annexed Neutrals*, Bench & Bar of Minnesota, March 2023, at 20.

[13] Bryan A. Garner, LawProse Lesson #400: So what's a paragraph?, 3/8/2023, *https://lawprose.org/lawprose-lesson-400-so-whats-a-paragraph/*.

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BRACE YOURSELF.

Here are seven legal tech trends that are transforming the practice of law.

BY TODD C. SCOTT

"Your old road is rapidly agin'
Please get out of the new one
If you can't lend your hand
For the times they are a-changin'"
— Bob Dylan

"Turn and face the strange changes."
— David Bowie

Loosely characterized, we are now practicing law in the post-pandemic era. For members of a profession that for a century was notoriously unvarying in its systems and methodologies, post-pandemic times have brought such rapid and consequential change to the processes used by attorneys that the results have been nothing short of transformational.

Imagine a year where, in the law office, audio-visual tools like Microsoft Teams and Zoom were practically nonexistent, receiving a recipient's signature on a document took at least a day, paying bills required check signers, and it was likely you had to be at work—onsite, that is—to have any access to your firm's data network.

That was 2020.

Now, barely three years later, technology and tools that allow attorneys to practice law while working from anywhere are ubiquitous. Forever gone are the days when clients and lawyers were required to gather in common areas for all meetings, endorsing and notarizing documents, mediations, and judicial hearings.

But the changes keep coming. On November 30, 2022, artificial intelligence (AI) was released to the public in the form of OpenAI's ChatGPT. AI chatbots will likely prove to be one of the most disruptive technologies in how we practice law since the emergence of email and MIME (a technology that allowed a lawyer to attach documents and send them to any computer user in the world, which was seen as niche or downright frivolous in 1992). In less than 60 days after its launch, ChatGPT 3.0 reached 100 million monthly active users, making it the fastest-growing consumer application ever.[1]

The popularity of ChatGPT has startled even the most veteran industry observers. Brad Smith, an American attorney and business executive who became vice chair of Microsoft in 2021, confirmed the tech industry's transformational view of AI at the time of ChatGPT's launch. "We're going to see advances in 2023 that people two years ago would have expected in 2033. It's going to be extremely important, not just for Microsoft's future, but for everyone's future," said Smith.[2]

But lawyers don't generally make tech decisions based on something they read in Forbes, Reuters, or Wired. Or a tweet from Brad Smith.

Instead, a cringe-inducing headline in the New York Times did more to influence lawyers' perception of ChatGPT 3.0 than the fact it had 100 million users. On June 8, 2023, the New York Times published an article titled, "The ChatGPT Lawyer Explains Himself," and attorneys everywhere read about Manhattan attorney Steven A. Schwartz, who began a hearing "nervously upbeat" while explaining to Judge P. Kevin Castel, senior judge of the United States District Court for the Southern District of New York, why the lawyer's brief for a case in federal district court was filled with fake judicial opinions and legal citations, all generated by ChatGPT.[3] For any lawyer with a pulse, reading the description of the two-hour hearing is tortuous.

According to the Times, Judge Castel "gesticulated often in exasperation, his voice rising as he asked pointed questions. Repeatedly, the judge lifted both arms in the air, palms up, while asking Mr. Schwartz why he did not better check his work?"

The attorney was more than contrite. "God, I wish I did that, and I didn't do it," Schwartz said, adding that he felt embarrassed, humiliated, and deeply remorseful. But it was his words regarding the reliability of the groundbreaking application that obliterated the legal research reputation of ChatGPT for lawyers everywhere.

"I did not comprehend that ChatGPT could fabricate cases," Schwartz told Judge Castel.

Almost overnight, developers at OpenAI erected guardrails in ChatGPT that prevented the application from ever muttering anything that resembled legal analysis or a Blue Book citation again. ChatGPT, a genius application that passed the Uniform Bar Examination[4] and will explain the Rule Against Perpetuities like you are a 5th grader, is, in its infancy, a writing and research tool with immeasurable promise for attorneys. But don't ask it for a citation to *Brown v. Board of Education*. Because after the Schwartz debacle, it won't give it to you.

Amid these recent developments, lawyers have also been participating in the so-called "Great Resignation" as they sought new opportunities—not just for more pay, but for improved well-being. A new generation of lawyers who achieved their bar-licensure dreams despite debilitating law school debt came onto the scene and said, "Enough." When balancing the institution of working onsite for five, sometimes six, long days per week with the desire to be with their families and spend quality time taking care of themselves, many chose their well-being. That meant replacing old institutions that sucked away their billable time—such as sending invoices exclusively by mail—and discovering solutions that bring genuine work-life balance and outsource the mundane.

So where might we be going from here? And what does 2024 have in store for attorneys trying to stay windward of the tidal change happening with law office workflows? Humbly, we have identified seven legal tech trends that will bring transformational change to lawyers and law firm processes everywhere.

1 Virtual financial solutions mean less work, more savings

A decade ago, it was science fiction to suppose that financial management for law firms could be accomplished entirely though electronic means, with e-solutions that include bill paying, remote expense oversight, and client invoices distributed with reminders automatically, without involving a postage machine. But the pandemic era of remote work placed the last vestiges of manual law office systems in the line of fire, and e-solutions for spending and recovering money in a law practice became a high priority for firms wishing to end the relationship with resource-consuming invoicing processes.

In its recently published 2023 Legal Trends Report, Clio (*www.goclio.com*) reported that law firms using online payments get paid twice as fast.[5] When looking at the number of days it takes to get bills paid, those using online payments have a median waiting period of seven days compared to 15 days for those not using online payments. Law firms using online payments collect, on average, 50 percent of their bills within seven days of issuing them and 80 percent of their bills within 49 days. Law firms not using online payments take more than twice as long—15 days—to collect 50 percent of their bills and it takes 70 days—over two months—to reach 80 percent collected. An e-billing system with electronic bill-pay reminders can save a firm hours of staff time, often resulting in payment within days rather than weeks.

On the expense side, firms struggling with time-consuming check-writing processes, often involving multiple accounts and signers, can achieve efficient and reliable expense management with e-payment services such as *www.bill.com*. By replacing checks and manual check request processes with e-payment solutions, employees waiting for checks to pay for supplies or legal expenses can drastically reduce the time it takes to manage firm expenses.

Most banking institutions have e-payment services that will eliminate the need for writing checks altogether, along with the hassle of putting payments in an envelope and mailing them. E-payment services will make available physical or virtual payment cards that can be used by attorneys and staff for routine expenses, while expense management and oversight is maintained using the service platform. Finally, one of the most resource-intensive workflows in the firm—bill-paying and expense management—can be achieved virtually from start to finish, with the potential for significant savings for the firm.

2 Collaborate and supervise virtually

In 2020 web-based tools like Microsoft Teams (*www.microsoft/teams.com*) and Zoom (*www.zoom.com*) were embraced by law firms, quickly becoming the go-to choice for organizations desperate for solutions at the start of the covid-19 pandemic. But those tools weren't developed for the purposes for which they were being used: internal and external collaboration, as well as video conferencing. Although Zoom is primarily a video conferencing tool, it has almost no work-collaboration features. Alternatively, Teams was a well-developed tool for internal group collaboration, but with a poor set of features for external communications.

If you're counting app users, 2023 may likely be the year that Teams dethrones Zoom as the most popular conferencing platform. And for good reason. Microsoft Teams is far better for maximizing meeting productivity. For example, there's a Teams chat feature called loop components that allows you to create meeting action item lists in the chat window while you're in a meeting. Also, while both Zoom and Teams offer video recording and transcripts, Teams emails the recording to all invitees and saves it in the meeting chat window—making it easily traceable without your having to do anything.

As a tool for remote management and supervision, Teams must be the first choice for firms already using Microsoft productivity platforms such as Outlook, Word, Excel, and SharePoint. Training employees remotely allows users to record the session and save the video file in an employee's calendar or online file so learning generally happens faster, and the training can be refreshed by the user at any time.

3 Perfecting how we look and sound online

While we are talking about remote communications, let's get to the heart of a matter many attorneys are reluctant to acknowledge: How we look and sound online is critical for our clients' success. We'd like to think that matters of cosmetics are trivial and it is solely the words of the attorney that carry the day when advocating for our clients. That delusion ends now. By implementing a few simple and affordable tools for your next online meeting, you are guaranteed to be seen as clearly as Taylor Swift in Imax format, and heard like Ari Shapiro on NPR's All Things Considered:

- **Lights**: A good light source, directly in front of your face, is the difference between looking spectacular or looking like you are in the witness protection program when participating in an online video-conferencing session. Natural sunlight is best, but you can find many ring lights at *www.amazon.com* at affordable prices.
- **Camera:** If you have a newer MacBook or Surface Pro tablet laptop, the built-in camera on the device may provide a high-quality video image. Just make sure the camera is at eye level, so the video-conferencing participants don't lose track of your words while observing a regrettable hair in your nose. Logitech's C922 Pro HD Stream Webcam (*www.logitec.com*) is a highly rated remote webcam for under $100 that will vastly improve your screen image.
- **Audio:** Relying on your PC's built-in microphone is a guaranteed way to ensure meeting participants hear all the garbage trucks, barking dogs, and leaf blowers during your online session. A professional multi-pattern condenser USB microphone like Yeti Blue sells for about $100 and offers incredible flexibility, allowing you to record in ways that would normally require multiple microphones. (*www.logitechg.com*)

4 Virtual help is virtually everywhere

Lori Gonzalez has helped lawyers bill their clients for nearly two decades. Her company, The RayNa Corporation (*www.raynacorp.com*), began as a single-person startup, and in the last decade it's grown into a top industry partner for midsize and large law groups, handling tens of millions of dollars in legal transactions annually. Gonzalez's success for her clients has kept her in demand among lawyers who would like to outsource their financial recoveries and see immediate improvement in their bottom line.

RayNa's growth is just one example of the many partnerships now available to lawyers who wish to outsource key systems and workflows in their law practice. Attorneys would be hard-pressed to identify any process in their law practice that couldn't be outsourced by proven, competent service providers through virtual and remote connectivity.

Some advice when shopping for virtual legal services: Try to find local service providers with a virtual presence. Not all virtual services are alike, and it may be important for your law practice to identify an outsourcing partner that has experience with the jurisdiction where you are practicing law.

Virtual service providers for lawyers: A far-from-exhaustive list
Here are just a few examples:

BRIEF WRITING:
www.lawclerk.legal

COURT REPORTING:
www.veritext.com

COMPLIANCE TRAINING:
compliancetrainingonline.com

CYBER-SECURITY:
www.compforensics.com

DEPOSITION SERVICES:
www.engencourtreporting.com

DOCUMENT RECOVERY:
www.raynacorp.com

DOCUMENT MANAGEMENT & RETENTION:
www.raynacorp.com

E-DISCOVERY:
www.logickull.com

INTERPRETATION:
luna360.com

INVOICING & ACCOUNTING:
www.freshbooks.com

IT SUPPORT:
www.slicecore.com

JURY SELECTION & CONSULTING:
www.juryscope.com

LAW CLERKS:
www.lawclerk.legal

LAW LIBRARIES:
www.thompsonreuters.com

LEGAL COMPLIANCE AUDITS:
www.ey.com

LEGAL MARKETING:
www.onlinelegalmedia.com

LEGAL RESEARCH:
www.lawclerk.legal

LEGAL WRITING & BRIEFING:
www.lawclerk.legal

MEDITATION & ADR:
www.jamsadr.com;
powerhousemediation.com

MAILING:
www.mailform.io

NOTARY SERVICES:
notarize.com/states/minnesota

PARALEGALS:
www.virtualparalegalservices.com

PERSONAL ASSISTANTS:
www.time.etc

PROCESS SERVICES:
www.onelegal.com

RECEPTIONISTS:
www.receptionhq.com

TRANSCRIPTION SERVICES:
www.scribie.com

WORK-LIFE BALANCE & WELL-BEING:
www.abalancedpracticellc.com

5 Protecting your online brand

Gordon Cheng is a barrister in Adelaide, South Australia's cosmopolitan coastal capital, who logged online one day to discover someone had posted three negative Google reviews of his law practice, despite never having been Cheng's client. In October 2018, Isabel Lok posted a one-star Google review of Cheng's legal services, and later followed-up by posting two more under false names. To Cheng, the negative reviews were devastating. The barrister claimed to have lost about 80 per cent of his clients, predominantly from Adelaide's Chinese community, because of the bad reviews. Cheng estimated the total loss of his income over a 15-month period to be more than $630,000 AU, and in February 2020, he won a defamation claim and secured an award of $750,000 AU plus legal fees as well as a written apology from Lok.

When Cheng first identified the negative review, he turned to Google's customer review services and the damaging statements were removed after the barrister followed Google's embedded dispute resolution process. But for Cheng, the damage was done, and his activities highlight the importance of vigilantly protecting the online reputation of an attorney's legal services.

Research shows that 89 percent of consumers read online reviews before purchasing a product or service and 93 percent of users have made buying decisions based on an online review.[6] Clio, the web-based attorney solutions provider, reports that more than one in three people looking for an attorney will turn to the internet before asking a friend or family member for a referral.[7] The data makes it clear that you cannot ignore web-based marketing, including online reviews, if you wish to grow your law practice.

Minnesota attorney Jess Birken, widely recognized as an authority on online legal marketing, has been teaching lawyers how to manage their online reputation with precision. One of Birken's first principles for managing online reviews is to identify the clients who love you and gently urge them to post a positive review. And—no surprise—there are virtual marketing tools to help you do this.

Obtaining positive Google reviews starts with a simple link to a feedback form that asks customers, "How are we doing?" Birken uses a Jotform (*www.jotform.com*) that asks clients who click on the link, "Would you recommend Birken Law Office to a friend or colleague?" Clients who rate the firm's services highly are thanked by Birken for their kind words, and asked if they would post a Google review about the firm's services. Happy clients will usually reward the firm with a Google review, sharing their positive experiences with others. Reputation management tools like Podium (*www.podium.com*) will automatically remind happy customers to leave a review and will follow up via automated email or text. But Birken suggests that the best results come from personal (and not intrusive) contact with the firm's clients at a time when the attorney senses they are most satisfied with the legal services they received.

6 Hack-proofing your law firm

The year just past has achieved another, more dubious title from industry experts who track data theft—2023 has been dubbed "the year of ransomware" by data security specialists, who note that ransomware attacks continued at a record-breaking pace, with third-quarter global ransomware attack frequency up 11 percent over the second quarter, and up 95 percent overall compared to 2022.[8] This is only surprising to risk management professionals in that 2021 was also declared "the year of ransomware."[9]

More attorney nightmare fuel: In June, reports emerged that some of the nation's top law firms had been breached, including three top-50 firms—Kirkland & Ellis, K&L Gates, and Proskauer Rose. Law firm breaches have spawned five class action lawsuits by plaintiffs alleging that the elite firms did not have adequate security to protect their data from cyberattacks. All were breached by the ransomware group Clop.[10] If the nation's top law firms can't keep the bad actors out, does a typical lawyer stand a chance fighting off hackers and other invertebrates of the online multiverse?

For those who fight for truth, justice, and secure network servers, something else happened in 2022 that finally gave the cyberprotection industry some insight into who is stealing data for ransom. Shortly after Russia invaded Ukraine for the second time on February 24, 2022, a disgruntled hacker working for Russian-based Conti opened the Twitter account @ContiLeaks and uploaded copies of emails, documents, and internal memos, exposing the detailed inner workings of a large-scale ransomware operation.

Finally, experts could peer into the workings of a large, online criminal enterprise and what they found was disturbing. Conti, with up to 750 employees, acquired over $1.7B in ransom revenues in the previous 24 months. The group was also well-organized, with clear management, finance, human resources, and R&D functions, existing solely for the purpose of stealing money. It even was found to have an "employee of the month" bonus equal to half of earned salary.[11]

What this means for those who run law firms is that the industry whose mission statement includes theft of client data and holding it for millions in ransom is well-organized, profitable, and presumably will only grow more formidable in the coming years.

Securing a law firm from a ransomware nightmare involves basic preventative measures that we have known for some time: Use strong passwords, keep your Microsoft and IOS operating systems up to date, and back up your data regularly using a reliable cloud-based service. But perhaps one of the most critical measures for keeping a firm safe from ransomware attack involves employee education. The breached servers at Kirkland & Ellis may have been infiltrated as part of a phishing scheme that duped a network user into clicking on a link, exposing the network to a costly payload. That's how a significant percentage of data breaches occur.

Training the firm's employees to spot email phishing schemes is critical for protecting the firm's data. See how good you are at spotting phishing schemes by trying out the free online quiz at *https://phishingquiz.withgoogle.com/* and then encourage your staff to do the same. Phishing Quiz presents a series of sample emails that include a variety of requests to click on a link or open a file that purports to be a legitimate document from a trusted colleague. In each sample the user must decide if it is "phishing" or "legitimate," and the user's Phishing Quiz score is revealed at the end. A hint for successfully achieving a passing Phishing Quiz score: proceed through the email samples with a healthy dose of paranoia.

7 Get ready for the AI revolution

When examining AI software and its potential impact on the future of the legal industry, we must remember that ChatGPT is just one tree in a forest. There are numerous software tools made for attorneys that employ artificial intelligence to help formulate documents and other work products quickly and accurately. Unfortunately for Steven A. Schwartz, the Manhattan attorney may always be remembered as the guy who turned in a brief full of false citations, conjured in a fit of hallucination by a beta-version of an AI application gone haywire. But there's a reason many attorneys immediately embraced the promise of ChatGPT: Its results are jaw-dropping.

ChatGPT uses a large language model combined with warp-speed processing to generate words, sentences, and paragraphs that shock the user. To learn how AI chatbots work, sign up for a free ChatGPT 3.5 account at *www.openai.com* and start a conversation using the most popular productivity tool since Microsoft Excel. Don't worry, it won't close your bank account or steal your soul. What it will do is answer questions, generate written content, provide topics and ideas for inspiration, translate 82 languages, construct lists, organize planning, explain concepts, proof-read, edit, and even write poetry. All without a typo or grammatical error.

Now imagine combining the power of ChatGPT with a database that includes all cases and citations ever published, and every legal document your firm has ever produced. Do you see where this is going?

Jacqueline Schafer is a Seattle, Washington attorney who recognized the power of AI while writing a law review article for the purpose of inspiring government, private sector, and nonprofit leaders to recognize the need for a coordinated investment in technologies that reflect the urgency of child welfare. She is now the founder and CEO of Clearbrief, a legal tech startup that is quickly transforming the legal writing process. Schafer's Clearbrief (*www.clearbrief.com*) has caught the attention of the legal tech industry, winning recognition as the 2023 Litigation Product of the Year at Legalweek, ALM's industry leader conference where thousands of legal professionals gather to network and learn about cutting-edge technology for attorneys. Clearbrief is designed to assist attorneys in creating accurate pleadings by reading a firm's documents and quickly constructing a draft, using AI for cite-checking and to generate exhibits, a table of authorities, and a hyperlinked final draft.

Another breakthrough AI legal-tech solution is rapidly gaining attention through the work of Minnesota attorney Damien Riehl, VP and solutions champion at vLex. Vincent AI (*https://vlex.com/products/vincent-ai*) is vLex's award-winning legal research assistant, designed to help lawyers build better arguments with unprecedented user control. The AI-powered tool accepts questions in natural language, conducts research in primary and secondary sources, presents a customizable source list as well as summaries of research and verifiable hyperlinks, and then creates research memos or arguments from the results in different formats.

There are many more examples of AI-powered tools for lawyers, but the technology that is poised to transform how every firm operates and functions is built on a common principle: creating a tool that will not only collect firm documents and preserve them, but read them, process them, and quickly assist attorneys in creating practical and accurate first drafts of legal pleadings and forms. It is in this tech space that you will likely see rapid advances, year-over-year, that fulfill the promise of artificial intelligence valued by all lawyers. ▲

NOTES

[1] *https://www.reuters.com/technology/chatgpt-traffic-slips-again-third-month-row-2023-09-07/*

[2] *https://the-decoder.com/openai-chatgpt-start-up-reportedly-worth-29-billion/*

[3] *https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html*

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

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[10] *https://www.msba.org/law-firm-data-breaches-surge-in-2023/*

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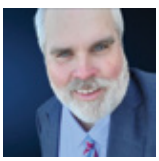

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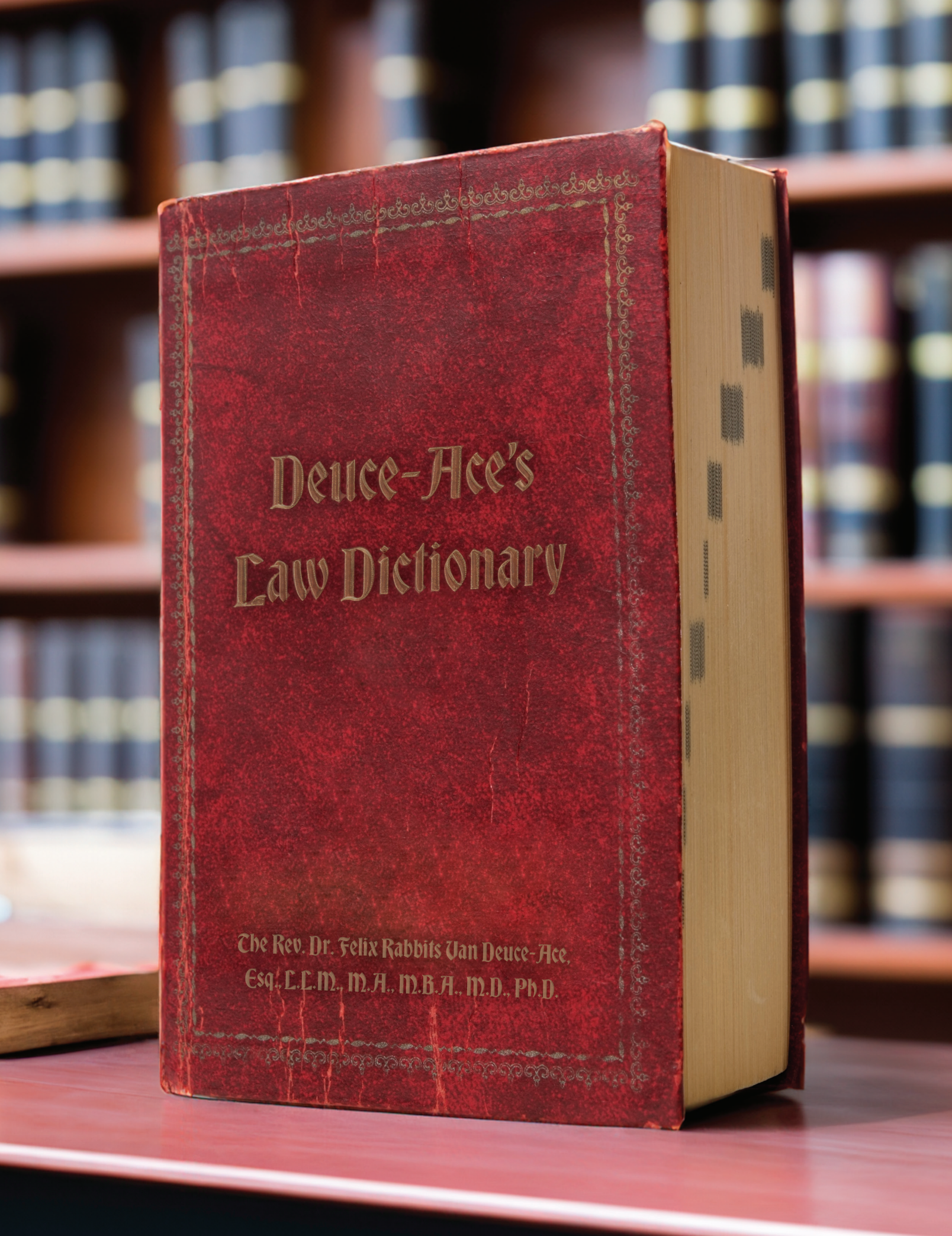
Deuce-Ace's
Law Dictionary
The Rev. Dr. Felix Rabbits Van Deuce-Ace,
Esq., L.L.M., M.A., M.B.A., M.D., Ph.D.

EXCERPTED AND INTRODUCED BY ADAM JOHNSON

When one contemplates the idea of a legal dictionary—which one probably is not in the habit of doing of a quiet evening, but whatever—*Black's* invariably comes to mind. That profuse work by Henry Campbell Black continues to dominate the legal lexicographical field. It is a seminal work, and this humble writer would not deny Professor Garner that claim. *Black's* achievement is magnificent and its dominance beyond contest. It is relied on by the Alaskan judge, the weary Floridian student of law, and the hack divorce lawyer in Billings. Thousands of copies fall from shelves yearly in all the blessed states of the union. We should rejoice in such an authoritative voice.

Yet there is a certain natural gloominess in the amalgamation of lexical authority in a single source: an almost inorganic limitation, if one may be so proud as to make such an unclear claim. At times it is necessary to invoke the mutterings of another, if only to second or oppose a motion. Language is a thing argued over interminably by lawyers, and it is unfortunate that no Burrill, Kinney, Wharton, Bouvier, or Mouldycastle has arisen in this century to add their say about words. True, there is Ballentine's and Oran's, both capable and extensive works, and Webster's has made a go of it. But the field is wanting of something more.

I have had the good fortune of being asked to write the foreword to Professor Deuce-Ace's maiden lexical work—this chiefly because I know of a great secret of his that I've offered to keep in the instance he puts my name in print. He has done so. I thank him handsomely. And while I do not care for the man personally, his dictionary, I own, is a thing of some merit. It is a trite work, true, but a pleasing work no less. It adduces truth through farce—in a way, I suppose, perhaps, maybe. There are on the one hand mockeries and simple jests while on the other serious revelations of latent truth, or something.

A successful lexicographical work is sometimes that which arises from frank observation. It may just be *candor*. It is the unfiltered examination of words by conventional understanding. It is stuff. I reckon there are those pedants who won't suffer Dr. Deuce-Ace's work *ab ante*, but it is not for them he wrote.

Scholarly square-toes will find much objectionable about the dictionary, as will the somber office drudge. This because the bloody thing wasn't written for the serious, but for your average mouth-breather. It is a thing to be chuckled at over toilet-rites, not cited in a paper. It should sit on a ceramic tank; it should not rest on a cherry shelf. It is unconcerned with being authoritative simply because it is anti-authority and altogether brief. It needs no defenders because it is so patently in the wrong. It is a twaddling little bit of burlesque fit for the easy eyes of a man or woman at their leisure. It is, in fine, a bit of butter fat, nothing more. It is what it is, and it doesn't pretend to be what it is not. And even if it were what it is not, it would still be what it is. At the very least, we may comfort ourselves with these final aspects of it. Herein, I have chosen the choicest bits of morsels as representative of the whole. The full dictionary, which includes the longest definition of "lawyer" in the English language, is accessible at *www.deuce-ace.com.*

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ab initio. 1. from the beginning. **2.** an appropriate term at the start of a dictionary.

acquittal. 1. the result of a jury spellbound by the witchcraft of a defense lawyer. **2.** the result of a jury treating "reasonable doubt" as "beyond all doubt." **3.** justice some of the time.

affiant. 1. the name of a person in an affidavit. **2.** a person who talks of oneself in the third person. **3.** a person who swears to a statement drafted by a lawyer.

agreement. 1. a thing wont to disintegrate. **2.** the seed of discord. **3.** a handshake as recalled by one person.

alibi. 1. a defense available to one who was in the house of a liar during the occurrence of a crime.

ancient document. 1. a document unearthed from the antiquity of 20 years ago. **2.** a lie or farce made reliable by the passing of two decades. **3.** a mean lie perpetrated a generation hence.

arbitration. 1. a method of dispute resolution outside a court. **2.** a casual brawl. **3.** an avenue leading invariably to formal litigation.

attorney-client privilege. 1. a lawyer's sacred duty to hold a client's communications in strict confidence. **2.** a duty of a lawyer to keep a thing secret to the ends of the earth. **3.** an obligation abandoned by a lawyer in liquor among other lawyers.

bailiff. 1. an armed tipstaff in brown liveries who hates cell-phones and hats. **2.** a shoosher. **3.** a judge's muscle. **4.** a beadle of a courtroom.

bastard. 1. a superannuated term for illegitimate issue. **2.** slang for opposing counsel.

billable hours. 1. minutes of labor depicted as hours. **2.** the fraudulent plunder of an honest client's purse. **3.** the aggregate of six-minute telephone calls stretched to 100.

chambers. 1. a locus for scare or tea depending on the judge. **2.** the lair of a powerful person. **3.** a frightful den of manners, gavel trophies, and family artifacts.

chattels. 1. property apart from real property. **2.** personalty. **3.** things converted.

class action. **1.** a loose group of strangers discovered by tireless lawyers chasing distant lucre.

client. 1. a person immune from this dictionary due to the future pecuniary interest of its lexicographer.

Commerce Clause. 1. a constitutional provision allowing Congress to regulate non-commercial activity. **2.** a "do anything" license.

Constitution, United States. 1. a federal charter revised by centuries of capricious meddling. **2.** a collection of ambiguous clauses. **3.** a dead or breathing thing depending on the scholar. **4.** the lawyer's plaything.

copyright. 1. a property right in an original work of authorship. **2.** an intangible guardian of this dictionary. **3.** a C in a circle.

counterclaim. 1. the averment of a cause without supportive fact introduced by a party in the wrong. **2.** an eye for an eye. **3.** a blind charge.

court. 1. a place where justice is sought. **2.** a gambling-shop. **3.** a tower of Babel. **4.** a Mock-beggar Hall.

curriculum vitae. 1. an arrogant resume. **2.** a CeeVee. **3.** a document containing a list of accomplishments from one's prime.

deliberation. 1. a closed proceeding where jurors attempt to clarify the confusion created by a judge's instructions.

deposition. 1. an exchange of questions and objections without rulings. **2.** a wrecker of whole weeks.

dicta. 1. superfluous words transformed into precedent over time. **2.** a word applied to precedent by a judge laboring against *stare decisis*.

discovery. 1. a process of seeking and withholding information and material. **2.** a means of burdening and being burdened by opposing counsel. **3.** a monstrosity.

dissent. 1. to grumble about. **2.** to cause a fuss in an academic manner.

eloign. 1. to remove a person or property from a court's jurisdiction. **2.** to save a person or thing from destruction by a court.

en banc. 1. all of the judges of an appellate court sitting together to unanimously repudiate a party.

escheat. 1. a doctrine containing the word "cheat" and pronounced "is cheat" that involves the government acceding to a dead person's property.

esquire. 1. traditionally a title of respect accorded to men of higher social status. **2.** a title of mocking respect accorded to lawyers by lawyers. **3.** an honorific title that unaware lawyers boldly apply after their own names.

fact. 1. a thing currently or previously in existence. **2.** an alleged aspect of the world proven in a courtroom without regard for truth. **3.** an aspect of reality controlled by lawyers.

Fifth Amendment. 1. eminent domain. **2.** the right to just compensation for land taken by the government and sold to a drug company. **3.** some due process generally. **4.** a right to stay mum. **5.** an amendment in a constant state of alteration.

filing fee. 1. an obscene premium. **2.** a schmear, kind of.

hearsay. 1. a rule of evidence with interminable exceptions. **2.** he said-she said prohibited as evidence. **3.** a rule that does not exclude hearsay so long as it is excited and uttered.

in chambers conference. 1. a judge suffering fools. **2.** a casual exchange inside the lamp of a genie.

inmate. 1. a man or woman but mostly a man incarcerated in a jail or a prison.

interrogatory. 1. a written question calling for an objection. **2.** a written query meant to harass or confound.

judge. 1. a lawyer in a chamber. **2.** no longer a bewigged person.

jurisprudence. 1. the study of the law or legal systems. **2.** a pedantic, mistaken synonym for judicial precedent.

jury lenity. 1. jury nullification. **2.** the power of a jury to act like a jury. **3.** the power of a jury to act legally and illegally in one. **4.** a curious paradox.

justice system. 1. a bewildering network of mystical deceptions and ambuscades. **2.** a darksome labyrinth of corruption and treachery. **3.** a philosophical amusement. **4.** a thing written about and criticized.

landlord. 1. a man or woman opposed to habitability. **2.** a rent collector. **3.** a felon.

laptop. 1. a device central to the learning of stenography by law students. **2.** a machine responsible for whole semesters of lectures missed.

law clerk. 1. a toiling slavey. **2.** a lawyer's major-domo. **3.** often a person who does the work of a lawyer in a chamber. **4.** a patient aide-de-camp.

law library. 1. a library filled with first-year law students. **2.** a courthouse library filled with ancient texts and no living being.

lawyer. 1. the name given a professional knave... **33.** a prevaricating scavenger who would shame the Devil... **50.** a gamecock who tilts at windmills and dies in harness... **79.** an abominable swine that condescends while picking a purse... **90.** a darksome bandit who blenches at garlic and feeds on scandal... **120.** a master of any mathematical equation involving one-third... **150.** a wizard of the black arts with a soul as dark as a wolf's mouth... **165.** an unpleasant apparition manifested at any scene of misfortune... **181.** a person who would brag about a case at a funeral... **226.** a wicked desperado who would defenestrate Mother Teresa to win a gentleman's bet... **275.** a calculated hypocrite who will cry "cave" only after a few have fallen in... **309.** an old Dogberry who is capable of deciding when doctors disagree... **335.** a sunburnt omega in weekend clothes who harasses the entire service industry... **361.** a double-clocking clock watcher... **373.** a glazed-over tramp who brags about Europe trips and cabins... **384.** a cunning charmer who commingles accounts and doctors reality... **440.** a horned goblin who looks down on government holidays... **477.** a gold-starred ace-deuce-three with fake reviews... **505.** a perfumed exquisite who dines on delicacies and feeds his staff bow wow mutton....

lawyer's board. 1. a board entrusted with maintaining the competent and ethical practice of law by lawyers in a state. **2.** a gotcha group. **3.** ideally a body forgiving of a farcical dictionary.

lewdness. 1. public indecency. **2.** a brown belt worn with black wingtips.

liability. 1. the quality or state of being responsible for something without explanation. **2.** the quality of being at fault because a group of lawyers have deemed it so.

majority. 1. a tyrannical greater part. **2.** a group in the wrong but considered right due to their number.

meeting, office. 1. an event that unfolds in an office conference room. **2.** a strange place talked of by Dante. **3.** a waste of time.

moot court. 1. a court of no consequence utilized by an off-the-rack newbie who gets a kick out of offering exhibits.

notary. 1. a person with a stamp. **2.** a guard without a guard.

objection. 1. a knee-jerk excited utterance. **2.** an inarticulable opposition to a thing. **3.** to bawl during a pause in another's speech.

testimony. 1. a sworn oral description of time-warped facts. ▲

Mitchell Hamline scores its highest Minnesota first-time bar passage rate since our combination

BY TOM WEBER

Mitchell Hamline's first-time bar passage rate for the July 2023 exam was 86.44%—the highest first-time rate we've had since the combination of William Mitchell and Hamline Law in 2015. For our first-time takers who actively worked one-on-one with our Academic Excellence team, the pass rate was significantly higher at 93.33%.

The first-time rate in Minnesota for all test-takers was 85.53%; we were the only Minnesota law school with an increased first-time rate over last July.

In all, 113 Mitchell Hamline graduates passed the July bar exam in Minnesota. Many of them were at the Minnesota Capitol on Oct. 27 to be sworn into the bar. Congratulations to all our state's newest licensed attorneys!

We love being Minnesota's law school of choice.

LANDMARKS IN THE LAW

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

***MORE ONLINE**
The online version of this section contains additional case notes:
www.mnbar.org/bench-bar

Criminal Law
JUDICIAL LAW

Authorized use of force: No duty to retreat when acting in defense of another. Appellant and his stepbrother were socializing in their garage when the victim drove by. Appellant's stepbrother made a gesture at the victim. Later that evening, the victim entered the garage and was sweating, angry, and breathing heavily. At one point, the victim thought the other two were talking about him and threatened to take appellant's gun and shoot him. The victim then choked the stepbrother, tackled him, and began either smothering him or choking him again while on top of him. Appellant's stepbrother was pleading for his life and for appellant to shoot the victim. Appellant fired one round at the victim, who died from the gunshot. Appellant was charged with second-degree intentional and unintentional murder. During his jury trial, the district court instructed the jury that appellant had a duty to retreat or avoid the danger if reasonably possible. Appellant was found guilty of unintentional murder.

The Minnesota Court of Appeals holds the district court's duty to retreat instruction was erroneous and was not harmless, entitling appellant to a new trial. The authorized use of force statute, Minn. Stat. §609.06, subd. 1, includes the right to use reasonable force "in resisting or aiding another to resist an offense against the person." *Id.* at subd. 1(3). The statute does not explicitly include a duty to retreat before using reasonable force, but case law is clear that such a duty exists in self-defense situations but not in when one is defending their dwelling. The Minnesota Supreme Court has not yet determined whether the duty to retreat applies to the right to defend others.

The court notes that requiring a duty to retreat in a defense-of-others situation would negate appellant's statutory right to defend another being threatened with bodily harm. The court cites reasoning from other states, including that the position of the third person with respect the ability to retreat should be the focus, as opposed to the person acting in defense of the third person, and that requiring retreat would prevent the defender from using the reasonable force statutorily permitted. The court holds that there is no duty to retreat when acting in defense of another.

Here, the state argued to the jury that appellant did not retreat, so it cannot be determined whether the jury found appellant guilty because he used unreasonable force or because he failed to retreat. Thus, the district court's erroneous instruction was not harmless. Reversed and remanded for a new trial. ***State v. Valdez***, A22-1424, 2033 WL 6799150 (Minn. Ct. App. 10/16/2023).

Possession by an ineligible person: State is not required to prove defendant knew ammunition was operable. Appellant was arrested for violating a no-alcohol probationary condition. During a search of his person, police found a magazine with seven bullets in appellant's pant pocket. The magazine was rusty, and the bullets were tarnished. Appellant argued he did not think he was prohibited from possessing the ammunition because he did not believe it to be operable. The district court prohibited the defense from arguing the state was required to prove appellant knew the ammunition was operable. A jury found appellant guilty of being an ineligible person in possession of ammunition. On appeal, appellant argues the district court violated his constitutional right to present a complete defense by erroneously interpreting the *mens rea* requirement.

Minn. Stat. §609.165, subd. 1b(a), makes it felony for a person convicted of a crime of violence to, among other things, possess ammunition. The definition of ammunition includes "ammunition components that are not operable as ammunition." Minn. Stat. §609.02, subd. 17. The ineligible possession statute is silent as to *mens rea*, but the Supreme Court has previously held that the statute requires the state to prove that a defendant knowingly possessed a firearm and that a defendant may be convicted of possessing a firearm where the firearm is inoperable. The court find this same *mens rea* requirement applies to possession of ammunition.

The court rejects appellant's argument that the *mens rea* required under section 609.165, subdivision 1b(a), includes both that the state has to prove appellant knowingly possessed ammunition, and that he knew the ammunition was operable. Appellant did not face a strict liability offense, because the state was required to prove he knew he possessed ammunition. The district court did not err in declining to add a second *mens rea* requirement, and the court declines to add a second requirement, as inserting *mens rea* into a statute that does not otherwise impose strict liability is generally frowned upon by the courts.

Appellant admitted at trial he knowingly possessed ammunition. This was sufficient to satisfy the *mens rea* element of MS 609.165, subdivision 1b(a). Appellant's conviction is affirmed. ***State v. Lyons***, A22-1744, 2023 WL 6965041 (Minn. Ct. App. 10/23/2023).

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Employment & Labor Law

JUDICIAL LAW

Firefighter disability; health coverage required. A White Bear Lake firefighter who was injured on duty is entitled to continuing health insurance coverage. Affirming a decision of the Office of Administrative Hearings, the Minnesota Court of Appeals held that the determination of the Public Employees Retirement Association (PERA) that the injured claimant qualified for duty disability coverage under Minn. Stat. §135.01, subd. 41, was a "reasonable" interpretation of the statutory provision. ***City of White Bear Lake v. Kriegshauser,*** 2023 WL 5838798 (Minn. Ct. App. 9/11/2023) (unpublished).

Arbitral authority; award upheld. An arbitrator's decision that a hospital's use of non-union contract workers violated its collective bargaining agreement with a union was upheld. On remand from the Minnesota Supreme Court, the court of appeals held that the arbitrator's award "drew its essence" from the contract and rejected the employer's claim of "inherent managerial rights." ***Hennepin Health Systems, Inc. v. AFSCME Minn. Counsel 5***, 2023 WL 6967666 (Minn. Ct. App. 10/23/2023) (unpublished).

ADMINISTRATIVE ACTION

DOL weighs overtime proposal. A proposal by the U.S. Department of Labor to expand overtime coverage for white-collar employees is pending before the agency. The measure, initiated under the Fair Labor Standards Act, 29 U.S.C. 820a, 8201. *et seq.,* would increase the standard statutory threshold and the highly compensated employee total annual compensation eligibility entry level for workers who are exempt under the "white collar" provision as well as provide automatic annual adjustments every same year.

Under the proposed rule, the standard five-day pay level would be substantially raised from $684 to $1,059 weekly, which equates with $57,096 annually. This would be an increase of more than 50% from the current rate of $35,868 per hour. The proposal also would extend the total compensation level for high-end employees from $107,432 to $143,988.

The DOL states that the two regulatory changes would result in an additional 3.6 million employees being eligible for 1.5x pay for overtime work. Business groups oppose the proposal on grounds that it will increase costs and lead to higher consumer pricing to absorb these greater expenses.

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Environmental Law

JUDICIAL LAW

Minnesota district court stays challenge to Minnesota's vehicle emissions standards. In August a District of Minnesota court issued an opinion granting a portion of a motion to dismiss arising from a challenge to Minnesota's vehicle emissions standards for greenhouse gases by staying the case pending resolution of a similar challenge before the D.C. Circuit.

Plaintiffs, composed of the Cean Fuels Development Coalition, Minnesota Soybean Growers Association, ICM, Inc., Minnesota Service Station & Convenience Store Association, and National Association of Convenience Stores, challenged emissions rules instituted by the Minnesota Pollution Control Agency (MPCA) that govern greenhouse gas emissions for motor vehicles. Plaintiffs asserted that the MPCA's rules were preempted by two federal statutes: (1) the Clean Air Act (CAA), which requires the Environmental Protection Agency (EPA) to set national vehicle emissions standards; and (2) the Energy Policy and Conservation Act of 1975 (EPCA), which directs the National Highway Traffic Safety Administration to set national fuel-economy standards.

Under the CAA, states are expressly preempted from creating their own emission standards. However, the state of California is allowed to apply for a waiver of preemption from the EPA because it had its own emissions program in place when Congress enacted the CAA. The CAA allows other states to adopt California's standards as long as their standards are identical to California's and provide at minimum two years of lead time to automakers. This exception is often referred to as the "California Waiver." Minnesota is one of 17 states to adopt some or all of California's emission standards for vehicles.

Similar to the CAA, the EPCA contains an express preemption provision, prohibiting any state from adopting or enforcing their own fuel economy standards. However, unlike the CAA, the EPCA does not provide an exception to its express preemption clause for California or states that adopt California's standards.

In December 2020, the MPCA published proposed rules that incorporated by reference California's low-emission vehicle (LEV) and zero-emission vehicle (ZEV) standards. These rules were adopted by the agency in July 2021 and are set to take effect on 1/1/2024 for vehicle model year 2025. Plaintiffs sued in March 2023, seeking to enjoin the enforcement of Minnesota's LEV and ZEV rules. Count I of their complaint alleged that the Minnesota rules are preempted by EPCA, and Count II alleged that the California Waiver is unconstitutional per the equal sovereignty doctrine, and as a result the Minnesota rules are preempted by the CAA.

In response to the two preemption arguments, the MPCA filed a motion to dismiss the complaint with the argument that the plaintiffs' injuries were not traceable to the Minnesota rules, the injuries were not capable of redress by the district court, and the district court lacked jurisdiction over Count II because Section 307 of the CAA requires that challenges to final EPA actions be filed in a United States Court of Appeals. In the alternative, the defendants moved for the court to stay the case until a similar case before the D.C. Circuit was resolved.

The court agreed with the MPCA that a stay of proceedings was appropriate for a few reasons: (1) there are comparable constitutional issues and questions of law before the D.C. Circuit in *Ohio v. EPA*, No. 22-1081 (D.C. Cir. 5/12/2022) and there is potential for the decision from the D.C. Circuit to "narrow and simplify" the issues before the court in this case; (2) the stay of proceedings would conserve judicial resources because the issues would be more extensively briefed by the 35 states participating in *Ohio v. EPA*; (3) there would be little impact on the length of the case because it is in its early stages, discovery has not started, and a trial date has not been set; (4) any prejudice to plaintiffs is minimal because the federal emissions standards, which also affect plaintiffs, are similarly as stringent as the Minnesota rules at issue in this case, and (5) a temporary stay is unlikely to cause incremental injury to plaintiffs because automakers have already finalized their plans for their model year 2025 vehicles. ***Clean Fuels Development Coalition v. Kessler***, D. Minn. (8/24/2023) Slip Copy 2023, WL 5487498.

Minnesota Court of Appeals affirms approval of lake drainage tile project in Stevens and Grant counties. In a case primarily turning on county ordinance interpretation, the Minnesota Court of Appeals affirmed Grant County's grant of a conditional use permit (CUP) to neighboring Stevens County. The CUP approved a subsurface drainage tile project to control lake water levels and mitigate flooding impacts.

The proposed project stemmed from concern about the high-water conditions of Silver Lake, which would frequently cause flooding and service interruptions and threatened damage to surrounding farmland. Silver Lake sits in both Stevens and Grant Counties, Minnesota. Stevens County proposed to construct a subsurface tile outlet that would increase the flow of water out of Silver Lake and into a neighboring lake located entirely in Grant County. Stevens County submitted a CUP application, pursuant to the direction of Grant County officials, to the Grant County Board of Commissioners seeking approval of the project. Stevens County's CUP was approved with myriad conditions. Following the grant of the CUP, Stevens County appealed via a writ of *certiorari*, contending that (1) it never needed a CUP for the project; (2) the application was not properly reviewed by the Grant County Planning Advisory Commission before approval; and (3) alternatively, conditions on the CUP were unreasonable, arbitrary, and capricious.

The court rejected Stevens County's first argument. It reasoned that the project required a CUP because it was classified as a conditional use pursuant to the Grant County Shoreland Management Ordinance. The court found some credence in Stevens County's position that Grant County

was unclear in identifying which ordinance provision necessitated a CUP for the project. However, the court held that multiple provisions of the Grant County ordinance nonetheless required a CUP for the project.

The court also rejected Stevens County's second argument that a lack of review by the Grant County Planning Advisory Commission rendered the CUP void. All parties agreed that the commission did not review the CUP application. The court found that a Grant County ordinance provision regarding commission review was directory, which meant that Stevens County needed to show that bypassing commission review resulted in prejudice. Stevens County failed to make this showing, leading the court to conclude that even though the Grant County board "did not follow the process outlined in the ordinance,... the board's failure to follow this process, which did not prejudice Stevens County, did not invalidate the CUP."

Finally, the court found that the CUP conditions were reasonable, supported by the record, and related to the project—except for condition two, which required Stevens County to commit to a road construction project. Specifically, condition two required that "[b]oth Stevens and Grant County will coordinate and commit to a road project to be constructed within the 5 year road program..." The court explained that while the purpose of the CUP application was to preserve road use, the application was for a subsurface tile project, not a road project. The court agreed with Stevens County that condition two was unreasonable, arbitrary, and capricious and remanded the case with instructions for the Grant County board to reissue the CUP without condition two. ***In the Matter of Stevens County for a Conditional Use Permit***, No. A23-0159, 2023 WL 5696623 (Minn. Ct. App. 9/5/2023).

ADMINISTRATIVE ACTION

EPA removes "emergency" affirmative defense provisions from Title V operating permit program regulations. In July the U.S. EPA published a final rule removing the "emergency" affirmative defense provisions from the federal Title V operating permit program regulations. EPA has directed state permitting programs with emergency affirmative defense provisions to submit revisions to their rules consistent with the final rule or request an extension by 8/21/2024.

The Clean Air Act (CAA), codified at 42 U.S.C. 7401 et seq., is the comprehensive federal law that regulates air emissions from stationary and mobile sources and seeks to protect human health and the environment from emissions that pollute ambient, or outdoor, air.

In 1990, Congress amended the CAA, adding Title V of the Act, set forth at 42 U.S.C. §§7661 to 7661f, which established a national operating permit program for certain stationary sources of air pollution. The first set of regulations, finalized in 1992 and codified at 40 CFR part 70, governed state operating permit programs and directed states to develop and submit to the EPA programs for issuing operating permits for major and certain other stationary sources of air pollution. In 1996, the EPA promulgated a second set of regulations, codified at 40 CFR part 71, which outlined the federal operating permit program. Every source regulated under the Act must have an operating permit, and each permit must contain emissions limitations and standards that set forth how

much of which air pollutants a source is allowed to emit.

The EPA first promulgated the emergency affirmative defense provisions when it finalized its Title V regulations for state operating permit programs in 1992 and in the regulations for the federal operating permit program in 1996. The emergency affirmative defense provisions, located in 40 CFR 70.6(g) and 71.6(g), protected facilities from liability for Title V air permit violations that occurred during emergency situations.

These provisions allowed stationary sources to assert an affirmative defense in enforcement actions brought for noncompliance with technology-based emission limits in their Title V permits by demonstrating, among other things, that any excess emissions occurred because of an "emergency," as defined in the regulations. EPA defined an emergency as "any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency."

The emergency affirmative defense provisions are not required program elements. States have never been obligated to include the §70.6(g) affirmative defense provision in their part 70 operating permit programs. Similarly, although the emergency affirmative defense provision is located within the "Permit Content" section of the part 70 and part 71 regulations, the EPA does not consider the provision to be a required permit term. Thus, the EPA considers the emergency provision to be a discretionary element of both state permitting programs as well as individual operating permits.

The EPA previously proposed repealing the affirmative defense in 2016 but did not finalize the removal. The Biden administration renewed the proposal to repeal the defense in March 2022. In its final rule, the EPA explained that the emergency affirmative defense provisions, which are a discretionary element of both state permitting programs as well as individual operating permits, "are inconsistent with the EPA's interpretation of the enforcement structure of the [Act] in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit." The EPA also stated that removal of the provisions is consistent with other recent EPA actions involving affirmative defenses and would harmonize the EPA's treatment of affirmative defenses across different programs under the Act.

According to the EPA, the removal of emergency affirmative defense provisions will not restrict a source's ability to defend itself in an enforcement action, since sources can instead assert affirmative defenses based on malfunctions, which were not addressed in this final rule.

EPA's final rule took effect on 8/21/2023. Shortly afterward, on 9/19/2023, SSM Litigation Group, whose members include the American Petroleum Institute, the Corn Refiners Association, and the Council of Industrial Boiler Owners, filed a lawsuit challenging the rule in the U.S. Court of Appeals for the District of Columbia Circuit. "Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program," **88 Fed. Reg. 47029** (2023).

■ **EPA publishes final Section 401 Water Quality Certification Improvement Rule.** In late September, the EPA published the final 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule (2023 rule), to replace and update regulations outlining procedural requirements for water quality certifications under Section 401 of the Clean Water Act (CWA). 40 C.F.R. §121. The 2023 rule replaces a 2020 rule on Section 401 certification, issued by EPA under the Trump administration, which generally narrowed the scope of section 401 certifications.

Section 401, 33 U.S.C. §1341, requires an applicant for a federal permit of a project that "may result in a discharge" into waters of the United States to first obtain a certification from the state or tribe where the discharge will occur that verifies the proposed discharge will comply with applicable state or tribal water quality requirements. Section 401 also requires the certifying authority to grant or deny the water quality certification within one year or waive its certification rights. Furthermore, Section 401 allows the certifying authority to impose conditions upon the certification of the project necessary to ensure compliance with applicable state/tribal water quality requirements.

The 2023 rule includes several changes from the 2020 rule. For example, the new rule requires an applicant to request a pre-filing meeting with the certifying authority before filing the certification request. In addition, the 2023 rule specifies that certification requests must include a copy of the federal permit application submitted to the agency, or a copy of a draft permit, and any readily available water quality-related materials that informed the development of the application or the draft federal permit. Certifying authorities may also define other necessary elements for a proper request for certification. If the certifying authority does not do so, the 2023 rule lists seven default elements that must be included in the certification request, elements that EPA intended to result in an efficient, predictable, and transparent certification process.

Regarding the scope of review that may be undertaken by the certifying authority, the 2023 rule removes language from the 2020 rule that had limited states' or tribes' oversight to "discharges" associated with federally approved projects. In its place, the 2023 rule allows certifying states or tribes to more broadly consider issues related to "water quality-related impacts." However, the rule clarifies that the certifying authority may only consider the adverse water quality-related impacts from the activity subject to certification that may prevent compliance with the state's water quality requirements. Thus, certifying authorities cannot deny certification or impose conditions to address impacts from the activity that do not adversely affect water quality, or conditions to protect waters that are not impacted by the activity.

Regarding the statute's requirement that a certification must be granted "within a reasonable period of time (which shall not exceed one year)," the 2023 rule allows the certifying authority to collaborate with the federal agency to establish categorical reasonable periods of time for certification requests. If the state and agency cannot reach an agreement, the length of a "reasonable period of time" will default to six months.

Once a certifying authority issues its decision, the 2023 rule limits federal review of the decision to determining whether the certifying authority conformed with public notice procedures and acted within a reasonable period of time.

The final 2023 rule became effective on 11/27/2023. 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule, **88 Fed. Reg. 66558** (9/27/2023).

Jeremy P. Greenhouse, Cody Bauer, Ryan Cox (not pictured), Vanessa Johnson, and Molly Leise - Fredrikson & Byron P.A.
Jake Beckstrom - Vermont Law School 2015

Family Law

JUDICIAL LAW

Even in the absence of a motion to dismiss, a court must dismiss a grandparent's petition for visitation if the grandparent cannot establish the factors for visitation under Minn. Stat. §257C.08. After Ronald Smith's (grandfather) daughter died, the daughter's husband, Brian, remarried to Katherine, and Katherine adopted Brian's children. In 2020, grandfather filed for grandparent visitation under Minn. Stat. §257C.08, subd. 1 with Brian and Katherine's children. The district court denied grandfather's petition for visitation, determining that awarding visitation with the children would interfere with the parent-child relationship. Four months later, grandfather moved for grandparent visitation under Minn. Stat. §257C.08, subd. 1 for a second time. The district court again denied grandfather's petition. Grandfather then moved a third time for grandparent visitation under Minn. Stat. §257C.08, subd. 1. Grandfather served discovery related to his motion. The parents moved for a protective order prohibiting grandfather from taking depositions and moved to quash grandfather's subpoenas. Grandfather moved to compel discovery and enforce his subpoenas. The district court dismissed grandfather's petition for visitation and denied grandfather's motion to compel and enforce subpoenas since there was no longer a pending action.

On review, the Minnesota Court of Appeals affirmed, holding that the district court must dismiss a grandparent's petition for visitation if the grandparent cannot establish the factors for visitation under Minn. Stat. §257C.08. The court of appeals analyzed the language of Minn. Stat. § 257C.08, subd. 8(b) and found that the statute used mandatory language and did not require a motion. Accordingly, the court of appeals refused to read a requirement for a motion into the language of subdivision 8(b). Since the district court found that grandfather did not establish the factors for visitation under Minn. Stat. §257C.08, subd. 1, the court of appeals affirmed the district court's dismissal of the grandfather's petition under subdivision 8(b). Because the district court dismissed the petition, the court of appeals held that the district court did not abuse its discretion in denying grandfather's motion for discovery since no claims or defenses remained in the case. ***Smith v. Kessen***, ___ N.W.2d ___, A23-0151, 2023 WL 6545267 (Minn. Ct. App. 10/9/2023).

Minn. R. Civ. App. P. 103.01, sub. 1 does not require service of a notice of appeal on a guardian *ad litem* who was discharged after the district court issued the order. In 2017, Javonda Jones and Andrew Alexander had a child named K.J. In 2020, K.J.'s paternal great aunt and uncle, the Blakeys, filed an *ex parte* petition for temporary third-party custody of K.J, which the district court granted. The Blakeys then filed for permanent third-party custody of K.J. Alexander and his parents intervened in the case. The district court appointed a guardian *ad litem*, ordering that the guardian *ad litem* "shall" be a party for six months, but that the appointment order could be extended. After a hearing, the district court granted Jones sole legal and physical custody of K.J. In 2021, the referee approved a stipulation between Jones and Alexander for the two of them to share joint and physical custody. After an evidentiary hearing, the district court dismissed the Blakeys' petition for third-party custody and later discharged the guardian *ad litem*. The Blakeys filed an appeal of their dismissal of their custody petition in January 2022. In September 2022, the Blakeys served the guardian *ad litem* program and the guardian *ad litem* formerly assigned to the case with a notice of appeal. The Alexanders moved to dismiss the appeal on the ground that they failed to timely serve the guardian *ad litem* with notice of appeal within the 60-day appeal period. The court of appeals dismissed the Blakeys' appeal, holding that the guardian *ad litem* was a party to the case because her appointment was mandatory. The court of appeals concluded that the guardian *ad litem* was an adverse party, so the appealing party was required to serve the guardian *ad litem* to maintain jurisdiction.

On review, the Minnesota Supreme Court reversed. The Supreme Court first held that after the district court ordered the dismissal of the guardian *ad litem*, the guardian *ad litem* no longer was a party to the matter. The Supreme Court reasoned that since the guardian *ad litem* had fulfilled the duties and obligations assigned by the court and the district court did not preserve any rights or duties to participate in the litigation, the guardian *ad litem* no longer had a right to control the proceedings or make a defense and thus was no longer a party. Then, the Supreme Court held that Minn. R. Civ. App. P. 103.01, subd. 1 only requires service of the notice on parties that remain in the action on appeal. Accordingly, the Supreme Court held that the Blakeys were not required to serve the notice of appeal on the discharged guardian *ad litem*.

Two justices dissented, noting that guardians *ad litem* fulfill an integral role in our court systems—protecting children's best interests and speaking to the court on behalf of children. The dissent distinguished between a discharge of the guardian *ad litem*'s duty to continue investigating and providing reports on the child's best interests, and a discharge of the guardian *ad litem* as a party to the case. ***Blakey v. Jones***, ___ N.W.2d ___, A22-0098, 2023 WL 7173545 (Minn. 11/1/2023).

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Federal Practice

JUDICIAL LAW

Waiver of right to arbitration; inconsistent actions. Where the plaintiff filed a complaint seeking a preliminary injunction, permanent injunction, and declaratory relief; lost its motion for a preliminary injunction; participated in mediation and discovery proceedings and only filed a demand for arbitration and sought to stay all proceedings pending arbitration; the district court denied the motion to stay; and the plaintiff appealed, the 8th Circuit found that even if the claims were arbitrable, the right to

arbitration was waived when the plaintiff sought permanent injunctive relief and did not seek to arbitrate its claims as soon as its motion for a preliminary injunction was denied. ***Breadeaux's Pisa, LLC v. Breckman Bros,, Ltd.***, 83 F.4th 1113 (8th Cir. 2023).

■ **Denial of "ultimate relief" via preliminary injunction denied.** In an appeal arising out of the seizure of Mike Lindell's cell phone relating to the January 6 investigation, the 8th Circuit affirmed Judge Tostrud's denial of Lindell's request for a preliminary injunction that would have required the return of the phone, finding that he was not entitled to obtain the "ultimate relief" he sought under the guise of a preliminary injunction. ***Lindell v. United States***, 82 F.4th 614 (8th Cir. 2023).

■ **FDCPA; reduced award of attorney's fees.** Affording "substantial deference" to Judge Wright's finding that requested attorneys' fees were excessive, the 8th Circuit affirmed an order that had reduced a request for an award of attorney's fees following an early settlement of an FDCPA action, and described as "absurd" the appellant's argument that ascertaining the "reasonable" fees in this case by reference to fees awarded in similar FDCPA cases ran afoul of the lodestar method. ***Beckler v. Rent Recovery Sols., LLC***, 83 F.4th 693 (8th Cir. 2023).

■ **Limited depositions of attorneys permitted.** In a case arising out of the murder of a child who had been the subject of a CHIPS proceeding, Magistrate Judge Docherty denied the defendants' motion to preclude the deposition of an assistant Dakota County attorney, but limited the scope of the deposition and indicated that he would "preside over the deposition and... rule on any objections in real time." ***Hart ex. rel. Hart v. Cnty. of Dakota***, 2023 WL 5899127 (D. Minn. 9/11/2023).

Magistrate Judge Foster denied a third-party law firm's motion for a protective order to prevent the deposition of one of its attorneys who had conducted an investigation relating to an employment discrimination case, finding that the *Shelton* standard (*Shelton v. Am. Motors Corp.*, 805 F.3d 1323 (8th Cir. 1996)) did not apply where the attorney was not litigation counsel, the attorney's investigation was not work product, and the defendants had waived any privilege by disclosing the attorney's report and relying on the report as part of their defense, but found that the privilege had not been waived regarding the "legal opinions" the attorney provided to the defendants. ***Thomas v. Marshall Pub. Schs.***, ___ F. Supp. 3d ___ (D. Minn. 2023).

■ **Order requiring foreign defendant to be deposed in Minneapolis affirmed.** Applying a "very deferential" standard of review, Judge Tunheim affirmed an order by Magistrate Judge Leung that required the designees of the German corporate defendant to appear for their depositions in Minneapolis, also finding that the Hague Convention was "not the exclusive and mandatory procedure for obtaining foreign discovery." ***Hazelden Betty Ford Found. v. My Way Betty Ford Klinik GmbH***, 2023 WL 6318164 (D. Minn. 9/28/2023).

■ **Fed. R. Civ. P. 62.1; no indicative ruling absent motion.** Where the defendants filed a letter request for leave to file a motion for reconsideration of an order denying their motion to compel arbitration, and then filed a notice of appeal from that order, Judge Frank found that he lacked jurisdiction over the letter request because of the pending appeal, and that no motion was pending that might allow him to make an indicative ruling under Fed. R. Civ. P. 62.1. ***Famuyide v. Chipotle Mexican Grill, Inc.***, 2023 WL 6513558 (D. Minn. 10/5/2023).

■ **First-filed doctrine; stay issued pending resolution of pending action.** Where the defendant in this case had commenced an action in the Kentucky courts that was removed to the Eastern District of Kentucky, and the defendant in the Kentucky case subsequently commenced an action in Hennepin County that was removed to the District of Minnesota, Judge Wright, relying on the first-filed doctrine, granted the Minnesota defendant's motion to stay the Minnesota action pending resolution of the Kentucky action, finding that a stay was "a legally sound way" to defer to the Eastern District of Kentucky "without abdicating" her "responsibility to the parties." ***Midwest Eng'g Components, Inc. v. Bonfiglioli USA, Inc.***, 2023 WL 6163970 (D. Minn. 9/21/2023).

■ **Fed. R. Civ. P. 26(a)(1); failure to identify persons with knowledge was "harmless."** Granting in part and denying in part defendants' motions for summary judgment, Judge Wright found that the plaintiffs' failure to identify certain witnesses in their Fed. R. Civ. P. 26(a)(1) disclosures was "harmless" where the witnesses and "the information they provided" was "partially disclosed" in discovery and in a related lawsuit. ***Goyette v. City of Minneapolis***, 2023 WL 6279370 (D. Minn. 9/26/2023).

■ **Attorney's fees; hourly rates.** While reducing the overall request for fees, Judge Tostrud found that an hourly rate of $600 in an FDCPA action was "reasonable" for a local attorney with 27 years of experience. ***Kelly v. United Payment Ctr. Inc.***, 2023 WL 6285184 (D. Minn. 9/27/2023).

While approving a $500 per hour rate for an associate with seven years of experience at a large firm, Judge Tunheim found that the law firm partner's hourly rate of $880 (recently increased from $740 an hour) was "slightly unreasonable" and awarded fees at the "original" $740 per hour rate. ***Brands Int'l Corp. v. Reach Cos.***, 2023 WL 6391830 (D. Minn. 10/2/2023).

■ **Fed. R. Civ. P. 11; motion for sanctions denied; request for attorney's fees also denied.** Judge Menendez denied a motion for sanctions under Fed. R. Civ. P. 11, finding that no sanctionable conduct arose out of a "straightforward disagreement" between counsel. While describing the movant's conduct as "troubling," Judge Menendez also denied a request that the movant be required to pay fees and expenses related to opposing the motion pursuant to Fed. R. Civ. P. 11(c)(2). ***Am. Family Mut. Ins. Co. v. Pecron, LLC***, 2023 WL 6389116 (D. Minn. 10/2/2023).

■ **Fed. R. Civ. P. 8(a)(2); group pleading doctrine.** Judge Tostrud found that *pro se* plaintiffs' amended complaint, which included 32 counts, 234 pages, and 1,113 paragraphs and lumped together claims against all 41 defendants, violated Fed. R. Civ. P. 8(a)(2). ***Dorosh v. Minn. Dep't of Human Servs.***, 2023 WL 6279374 (D. Minn. 9/26/2023).

■ **Fed. R. Civ. P. 15(b)(1); post-trial motion to amend answer granted.** Judge Frank granted the defendant's post-trial motion to amend its answer to assert a statute of limitations defense, finding that the plaintiffs would not be prejudiced by the amendment where the defendant had previously asserted a laches defense and

had given notice that it would rely on a limitations defense. ***Wilson v. Corning, Inc.***, 2023 WL 6218160 (D. Minn. 9/25/2023).

D. Minn. L.R. 7.1(c); requirement that documents be filed "simultaneously." As part of an order canceling a motion hearing, and while acknowledging that "some Judges may follow a practice that differs from the Local Rules," Judge Menendez emphasized the need for litigants to comply with D. Minn. L.R. 7.1(c)(1) and file all motion documents "simultaneously." ***Clifford v. Fast Track Transfer, Inc.***, 2023 WL 5759281 (D. Minn. 9/6/2023).

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Immigration Law

JUDICIAL LAW

No "pattern or practice" of harm against lesbian, gay, bisexual, and transgender (LGBT) Guatemalans found. In November the 8th Circuit Court of Appeals upheld the denial of the petitioner's application for asylum, finding his claim of past persecution ("repeated sexual harassment by classmates and coworkers over more than 10 years") deficient and finding he had not established a well-founded fear of persecution given his failure to show a "pattern or practice" of harm against lesbian, gay, bisexual, and transgender (LGBT) Guatemalans rising to the level of persecution. Finally, the petitioner failed to show the Guatemalan government is unwilling or unable to protect him. ***Juarez-Vicente v. Garland***, No. 22-3318, *slip op.* (8th Circuit, 11/7/2023). *https://ecf.ca8.uscourts.gov/opndir/23/11/223318P.pdf*

"Guatemalan children who witness gang crime" not a cognizable particular social group for asylum or withholding of removal purposes. The 8th Circuit Court of Appeals upheld the denial of the petitioner's request for asylum and withholding of removal. It concurred with the Board of Immigration Appeals' (BIA) determination that the Guatemalan petitioner was not a member of a cognizable particular social group. His proposed social group—Guatemalan children who witness gang crime—lacked both particularity and social distinction. The term "children" is "vague and amorphous." Furthermore, the court observes while citing *Ngugi v. Lynch*, 826 F.3d 1132, 1138 (8th Cir. 2016), "merely having seen or experienced crime" is an insufficient basis for establishing membership in a particular social group. ***Pacheco-Mota v. Garland***, No. 22-3651, *slip op.* (8th Circuit, 10/18/2023). *https://ecf.ca8.uscourts.gov/opndir/23/10/223651P.pdf*

Petitioner failed to show "exceptional and extremely unusual hardship" with new evidence of emotional and mental health issues. On 8/30/2023, the 8th Circuit Court of Appeals upheld the denial of the petitioner's motion to reopen his case involving an application for cancellation of removal, finding the Board of Immigration Appeals (BIA) rationally determined that his newly submitted evidence of emotional and mental health issues failed to show "exceptional and extremely unusual hardship." "The evidence demonstrated neither that the health issues were severe nor that treatment would be unavailable in Mexico." ***Trejo-Gamez v. Garland***, No. 21-3329, *slip op.* (8th Circuit, 8/30/2023). *https://ecf.ca8.uscourts.gov/opndir/23/08/213329P.pdf*

No CAT relief for former child soldier with claim he'd be tortured if returned to South Sudan. On 8/25/2023, the 8th Circuit Court of Appeals upheld the denial of the petitioner's request for relief under the Convention Against Torture (CAT). It found the Board of Immigration Appeals (BIA) did not err when it concluded the petitioner, a former child soldier with serious mental health issues arising from his horrific childhood, failed to show it was more likely than not that the South Sudanese government would torture him upon his return. The BIA's conclusion that the petitioner's generalized country conditions evidence did not show his status as a former child soldier would create a particularized likelihood of future torture by the government of South Sudan was found to be without error. According to the court, the petitioner's evidence did not show he would be incarcerated and tortured on account of his specific mental health symptoms. ***Deng v. Garland***, No. 22-3621, *slip op.* (8th Circuit, 8/25/2023). *https://ecf.ca8.uscourts.gov/opndir/23/08/223621P.pdf*

Petitioner convicted of aggravated identity theft found removable under INA §237(a)(2)(A)(iii). In August the 8th Circuit Court of Appeals affirmed the Board of Immigration Appeals' (BIA) finding of removability under INA §237(a)(2)(A)(iii) for the South African petitioner, who had been convicted of aggravated identity theft predicated on wire fraud for participating in an identity theft scheme defrauding the California Employment Development Department of approximately $475,000. The court found no error in the agency's denial of the petitioner's request for withholding of removal given that she was found to have committed a "particularly serious crime," thus making her ineligible for that form of relief. Nor was any error found in the denial of Convention Against Torture (CAT) relief given the inadequate evidence submitted by the petitioner in support of her CAT claim. ***Robbertse v. Garland***, No. 22-1739, *slip op.* (8th Circuit, 8/21/2023). *https://ecf.ca8.uscourts.gov/opndir/23/08/221739P.pdf*

ADMINISTRATIVE ACTION

Additional H-2B visas to be made available in FY2024. In November the Department of Homeland Security (DHS), in consultation with the Department of Labor (DOL), announced its intention to make an additional 64,716 H-2B temporary nonagricultural worker visas available for Fiscal Year (FY) 2024. According to DHS, "[t]he supplemental visa allocation [beyond the congressionally mandated 66,000 H-2B visas made available each year] will help address the need for seasonal or other temporary workers in areas where too few U.S. workers are available, helping contribute to the American economy. The H-2B visa expansion advances the Biden Administration's pledge, under the Los Angeles Declaration for Migration and Protection, to expand lawful pathways as an alternative to irregular migration." Of those 64,716 H-2B supplemental visas, 20,000 will be made available to workers from Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, and Honduras. Further details will be published in the *Federal Register*. U.S. Department of Homeland Security, *News Release* (11/3/2023). *https://www.*

dhs.gov/news/2023/11/03/dhs-supplement-h-2b-cap-nearly-65000-additional-visas-fiscal-year-2024

On 11/8/2023, the Department of Homeland Security (DHS), in consultation with the Department of Labor (DOL), announced the countries eligible to participate in the H-2A and H-2B visa programs for the coming year. U.S. Department of Homeland Security, *News Release* (11/8/2023). *https://www.uscis.gov/newsroom/alerts/dhs-announces-countries-eligible-for-h-2a-and-h-2b-visa-programs-1*

DHS notices extending and redesignating TPS. *Venezuela:* On 10/3/2023, the U.S. Department of Homeland Security (DHS) announced the extension of the designation of Venezuela for temporary protected status (TPS) for 18 months from 3/11/2024 through 9/10/2025. Those wishing to extend their TPS must re-register during the 60-day period running from 1/10/2024 through 3/10/2024. The secretary also redesignated Venezuela for TPS for an 18-month period, allowing Venezuelans to apply who have continuously resided in the United States since 7/31/2023 and have been continuously physically present in the United States since 10/3/2023. The registration period for these new applicants, under the redesignation, runs from 10/3/2023 through 4/2/2025. **88 Fed. Reg. 68130-39** (2023). *https://www.govinfo.gov/content/pkg/FR-2023-10-03/pdf/2023-21865.pdf*

Afghanistan: On 9/25/2023, the U.S. Department of Homeland Security (DHS) announced the extension of the designation of Afghanistan for temporary protected status (TPS) for 18 months from 11/21/2023 through 5/20/2025. Those wishing to extend their TPS must re-register during the 60-day period running from 9/25/2023 through 11/24/2023. The secretary also redesignated Afghanistan for TPS for an 18-month period, allowing Afghan nationals to apply who have continuously resided in the United States since 9/20/2023 and have been continuously physically present in the United States since 11/21/2023. The registration period for these new applicants, under the redesignation, runs from 9/25/2023 through 5/20/2025. **88 Fed. Reg. 65728-37** (2023). *https://www.govinfo.gov/content/pkg/FR-2023-09-25/pdf/2023-20791.pdf*

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Intellectual Property

JUDICIAL LAW

Trademark: Statutory damages for infringement limited to claims of counterfeit marks. Judge Schiltz recently denied in part a claim for statutory damages when entering a default judgment. Plaintiff Misfit Coffee Company, LLC sued Defendant Tony Donatell for breach of contract related to a prior settlement agreement and for trademark infringement and cybersquatting related to the use of the domain name <themisfitcollective.co>. The parties stipulated to a permanent injunction, but Donatell did not respond to the complaint or amended complaint. Default was entered by the clerk of court. Seeking a default judgment, Misfit sought statutory damages on its infringement claim pursuant to 15 U.S.C. §1117(c), which states in relevant part: "In a case involving the use of a counterfeit mark (as defined in section 1116(d) of this title) in connection with the sale, offering for sale, or distribution of goods or services, the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits under subsection (a), an award of statutory damages for any such use in connection with the sale, offering for sale, or distribution of goods or services..." Misfit also sought statutory damages on its cybersquatting claim pursuant to Section 1127(d), which awards statutory damages for violations of Section 1125(d)(1). The court rejected the claim for statutory damages on Misfit's infringement claims, finding Misfit's infringement claims were not under the necessary statutes to qualify for statutory damages. Misfit alleged trademark infringement under 15 U.S.C. §1114. Section 1117(c) applies only to use of a counterfeit mark as defined by Section 1127. Misfit's complaint did not allege claims under Section 1127 or even contain the word "counterfeit." Misfit, however, was permitted to recover statutory damages under Section 1117(d) based on its cybersquatting claim under Section 1125(d). ***Misfit Coffee Co., LLC v. Donatell***, No. 23-cv-0252 (PJS/JFD), 2023 U.S. Dist. LEXIS 187554 (D. Minn. 10/19/2023).

Patent: Claim construction ruling forecloses infringement claim. Judge Frank recently granted declaratory judgment to plaintiff Corning, Inc.'s motion for partial summary judgment of noninfringement. Corning sued defendants Wilson Wolf Manufacturing Corporation and John R. Wilson seeking a declaration that the use of Corning's HYPERStack cell-culture device by its customers does not infringe the patents-in-suit, that the patents-in-suit are invalid, and that Wilson Wolf tortiously interfered with Corning's existing and prospective customers. The court previously entered a claim construction on the contested terms "media height" and "scaffolds." Wilson Wolf moved for reconsideration, and Corning moved for partial summary judgment of noninfringement. Corning argued that under the court's claim constructions, Wilson Wolf could not provide evidence to establish that the use of Corning's HYPERStack device by Corning's customers infringed the patents-in-suit. Wilson Wolf conceded that it could not establish infringement under the current constructions. The court concluded that there was no genuine issue of material fact that Corning's HYPERStack device did not infringe the patents-in-suit. ***Corning, Inc. v. Wilson Wolf Mfg. Corp.***, No. 20-700 (DWF/TNL), 2023 U.S. Dist. LEXIS 189507 (D. Minn. 10/23/2023).

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Probate & Trust Law

JUDICIAL LAW

Authority to remove trustee is subject to fiduciary standard. A husband and wife were co-trustees of a trust. On the wife's death, the trust named the couple's two sons as successor trustees. The trust required that, after the wife's death, there always be one independent trustee. The independent trustee was to be appointed by the couple's sons within 60 days of the wife's death. Ultimately, the husband petitioned to remove the sons as trustees in order to replace them with "a hand-selected independent trustee." The husband argued that the trust specifically gave him the power to remove any trustee. The district court denied

the petition. In affirming, the court of appeals determined that even if a power is conferred upon a trustee, "he cannot properly exercise the power if it constitutes a violation of any of his duties to the beneficiary." The court of appeals then agreed that the husband did not have authority to select an independent trustee and affirmed the district court's decision to award attorneys' fees against the husband for his bad faith. ***Matter of Trust Agreement of Genevieve M. Rossow,*** No. A23-0473, 2023 WL 7293812 (Minn. Ct. App. 11/6/2023).

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State Appellate Practice

JUDICIAL LAW

Notable decisions: A discharged guardian *ad litem* is not a "party" on whom a notice of appeal must be served to perfect an appeal of the denial of a custody petition. The Supreme Court reversed the court of appeals' dismissal of an appeal for the failure to serve a former party to the underlying litigation with a notice of appeal within the notice period. The matter arose from a third-party custody petition, in which the district court appointed a guardian *ad litem*. The district court denied the petition in November 2021, and discharged the guardian *ad litem* a month later. The petitioners filed a timely appeal in January 2022, but did not serve the guardian *ad litem* with a notice of appeal until September—well beyond the 60-day notice period prescribed in Minn. R. Civ. App. P. 104.01. The court of appeals dismissed the appeal for the failure to serve the notice on the guardian *ad litem*, which it determined to be an "adverse party or parties" pursuant to Minn. R. Civ. App. P. 103.01. The Supreme Court disagreed, concluding that the district court's wholesale discharge of the guardian *ad litem* subsequent to the order being appealed removed the guardian *ad litem* as a "party" with an ongoing interest in the litigation at the time of the appeal. Because the guardian *ad litem* "had no further rights or duties" in the litigation, it "was no longer a party to the litigation after discharge." The Supreme Court therefore reversed the court of appeals and reinstated the appeal. Justice McKeig dissented, joined by Justice Moore, on the grounds that the unique role a guardian *ad litem* plays as the advocate for the best interests of the child in a custody proceeding, combined with the subject of the appeal centering on the guardian *ad litem*'s recommendations, rendered the guardian *ad litem* a necessary and adverse party to the appeal. ***Blakey v. Jones***, A22-0098 (Minn. 11/1/2023).

Notable petitions granted: RLUIPA dispute over septic tanks headed to the Minnesota Supreme Court. The Minnesota Supreme Court accepted review of a long-running dispute over the religious rights of the Swartzentruber Amish and Fillmore County's regulations requiring the use of a septic tank to dispose of "gray water" (water discharged after dishwashing or other non-toilet-related uses). The case previously reached the US Supreme Court, which remanded the matter for proceedings consistent with the strict scrutiny analysis articulated in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021). On remand, the district court determined that Fillmore County met its burden to prove the septic-tank requirement was narrowly tailored to further a compelling state interest. The court of appeals reversed, finding that while the septic-tank requirement furthers a compelling state interest specific to appellants, RLUIPA precludes the government from enforcing the challenged regulations. Fillmore County successfully petitioned for review of that decision. Issues granted: (1) Whether the court of appeals failed to apply the "clearly erroneous" standard of review to the district court's findings of fact and erred by substituting its own judgment. (2) Whether the court of appeals incorrectly interpreted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) and *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021) when it concluded that there is not a compelling public health interest in treating harmful contaminants in respondents' gray water. (3) Whether the court of appeals erred in concluding that the SSTS ordinance provides a mechanism of individualized exemptions and failed to defer to the district court's determination that no such exceptions exist. (4) Whether the court of appeals erred by imposing a new evidentiary standard in cases involving strict scrutiny review that contradicts federal jurisprudence. (5) Whether the court of appeals erred by substituting its judgment for the trier of fact's under a "clearly erroneous" standard of review.

Notable petitions denied: Summary judgment of negligence claims warranted for county, city, and school district in wrongful death action. The Minnesota Supreme Court declined to review the court of appeals' rare reversal of a district court's order denying summary judgment. In July 2023, the court of appeals determined that dismissal of negligence claims resulting from a car-bicycle collision against Dakota County, the City of Eagan, and Independent School District 196 was required by the evidence. The court determined that because the decedent was struck and killed by a vehicle driven by a nonparty driver, plaintiff was required to establish either (1) that a special relationship between the parties existed or (2) that the city or school district's "own conduct" or "misfeasance" rendered the accident foreseeable. The

panel determined that neither the city nor the school district engaged in misfeasance and therefore they were entitled to summary judgment. The panel further determined that the county was immune from negligence claims regarding the setting or reduction of the speed limits on county roads. The court found that the "county official or officials tasked with speed-limit decisions engaged in discretionary decision-making without evidence of malice, entitling the county to immunity." ***Vitek as Tr. for Vitek v. City of Eagan***, No. A22-1536, (Minn. Ct. App. 7/3/2023), *rev. denied* (10/17/2023).

MN COURT OF APPEALS

Notable precedential decision: District court abused its discretion by compelling discovery of privileged information. In the context of a defamation action arising from the publicity surrounding competing domestic assault allegations involving former Minnesota Vikings running back Dalvin Cook, the court of appeals granted a writ of prohibition precluding enforcement of a district court order to compel discovery of information protected by the attorney-client privilege and the work-product doctrine. In doing so, the court determined that the disclosure of a complete and final complaint to a journalist prior to its service or filing did not constitute a waiver of either the attorney-client privilege or work-product doctrine protecting the process by which that final complaint was prepared. The court further determined that the district court abused its discretion by compelling counsel to disclose information regarding the factual bases of the allegations which was not publicly available as well as the substance of confidential communications regarding litigation strategy, counsel's mental impressions, or counsel's legal analysis of the allegations made in the complaint. ***In re Daniel Cragg***, A23-0309 (Minn. App. 11/6/2023).

Notable nonprecedential decision: A trustee is subject to a fiduciary duty of care in all actions related to the administration of the trust, and the bad-faith breach of that duty is sufficient grounds to hold the trustee personally liable for attorneys' fees. A father and his two sons were made co-trustees of their wife and mother's trust upon her death. The trust document also required the sons or a court to appoint an independent trustee, and provided that her "spouse shall have power to remove any trustee." The district court determined that the father, as a trustee, could not exercise the power to appoint an independent trustee and could not unilaterally remove his sons as trustees. The court of appeals affirmed, determining that the father was subject to the fiduciary duties of a trustee in exercising all powers he was granted under the trust document. The court also affirmed the district court's subsequent award of attorney's fees to the sons, which rendered the father personally liable (as opposed to awarding fees from the body of the trust). In doing so, the court observed that a trustee may be held personally liable for attorneys' fees upon a finding that the trustee acted in bad faith pursuant to Minn. Stat. §549.14. ***In re Trust Agreement of Genevieve M. Rossow***, A23-0473 (Minn. App. 11/6/2023).

Notable orders: Choice-of-law decision immediately appealable under collateral order doctrine. The court of appeals determined that jurisdiction was proper over an appeal from an order determining that Minnesota law instead of Colorado law applied to defamation and infliction of emotional distress claims, specifically declining to apply Colorado's anti-SLAPP statute, Colo. Rev. Stat. §13-20-1101. The court determined that the collateral order doctrine applied because the district court's choice-of-law decision conclusively determined whether Minnesota or Colorado law should apply regarding anti-SLAPP statutes, that its decision was unreviewable on appeal from final judgment, and that the protection offered by Colorado law "would be lost if an order denying a special motion to dismiss were only reviewable in an appeal from a final judgment on the merits." ***Quest v. Nicholas Robert Rekieta et al.***, A23-1337, (Minn. App. 10/11/2023).

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PEOPLE + PRACTICE

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

Gov. Walz appointed **Steve Hanke** to a district court judgeship in Minnesota's 6th Judicial District. Hanke will be replacing Hon. Michael J. Cuzzo and will be chambered in Two Harbors in Lake County and Grand Marais in Cook County. Hanke is an attorney for the City of Duluth, where he practices civil law and prosecutes criminal matters.

Corey Bronczyk of the law firm Arthur Chapman Kettering Smetak & Pikala, PA, was selected as an associate fellow of the Construction Lawyers Society of America. Bronczyk is a partner and practice group leader in the firm's construction litigation group and president of the Minnesota Construction Association.

Jason M. Zucchi has joined Barnes & Thornburg as a partner in the firm's Minneapolis office. Zucchi has nearly 17 years of experience representing clients ranging from Fortune 100 companies to startups in dozens of high-stakes IP cases.

Trial Group North announced that longtime employee **Nicole Simonson** was admitted to the practice of law. Simonson has worked for the firm for 10 years and was encouraged by the firm to pursue a law degree. Simonson continued working fulltime but attended law school on nights and weekends to obtain her JD from Mitchell Hamline School of Law.

Adrian E. Kipp joined Eckland & Blando as an associate attorney. Kipp's practice areas include commercial litigation, patent & intellectual property law, government contracts, administrative & regulatory law, and hemp/cannabis.

Fredrikson announced the addition of nine new attorneys to the firm's Minneapolis office: **Max G. Aufderheide, Kelly A. Carlson, Henry J. Killen, Aramis J. Mendez, Ayesha Mitha, Robert L. Rohloff, Dylan B. Saul, Levi A. Seidel,** and **Riley Truax.**

Rainey C. Muth has joined Moss & Barnett's business law team, assisting clients with various corporate, business, and financial matters.

Saarah Berenjian and **Shannon Rue** joined Honsa Mara & Kanne in the firm's family law practice.

Alex Christians joined Fafinski Mark & Johnson, PA as an associate in the corporate and business practice groups and will focus on commercial real estate.

RICHARD "RICH" MILLER died on October 11, 2023, at the age of 85. Miller was admitted to the Minnesota bar in 1967. In 1985 he was a founding partner of Miller O'Brien (now Miller O'Brien Jensen, PA), which is Minnesota's longest-standing labor and employment law firm.

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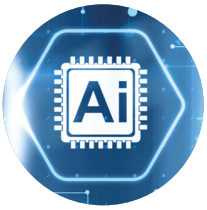

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