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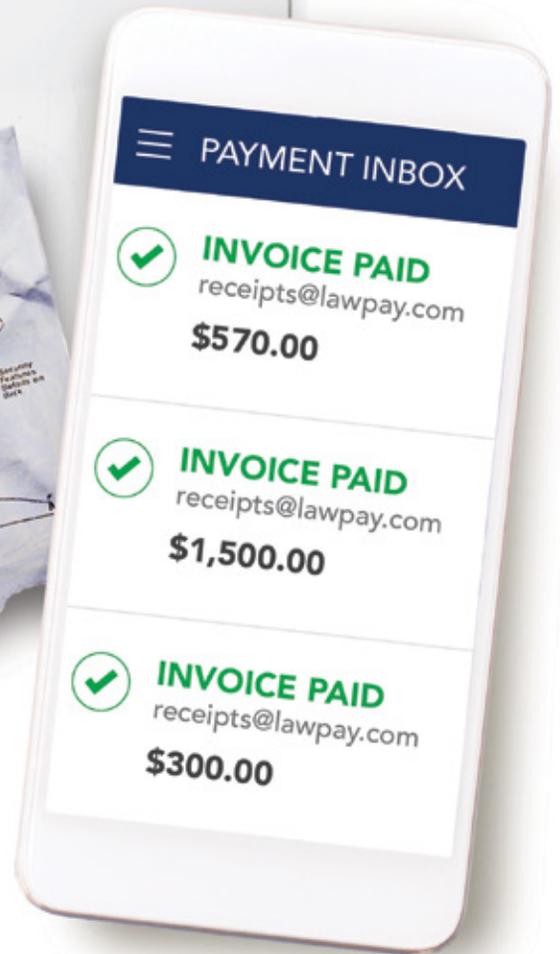
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# Our Duluth Lynchings

**O**n June 15, 1920—in less than a day's time—three young Black men (Elias Clayton, Elmer Jackson, and Isaac McGhie) were wrongly arrested; ripped out of their jail cell by a vicious mob; taunted, tortured and dragged to a lamppost; and mercilessly murdered. Lynched. It didn't happen "Down South;" it happened here, in Duluth. Thousands of White Minnesotans were involved. This coming June 15—100 years later to the day—in a deliberate act of remembrance and with a community-wide commitment to learning and hope, we will gather in Duluth to mark those murders and to move forward together. We will do so again the next day in Minneapolis. Please join us. Here is some background.

The basic facts are lawless and brutal. For some unknown reason, Irene Tusken claimed that six young Black circus workers raped her on June 14. Her doctor examined her, and later testified that she had not been raped or otherwise assaulted. The next morning, June 15, thirteen Black men were apprehended by the police as the circus was leaving town; seven were released; six were jailed. That evening, the Duluth Herald

headline read: "West Duluth Girl Victim of Six Negroes." A mob of thousands gathered outside the jail (having been urged to "join the necktie party"); overcame the police; broke into the jail; conducted a "trial" on the spot; dragged three of them up the street to



their ghastly deaths; posed for souvenir photographs; and left their victims dead at the lamppost. "Strange fruit," as Billie Holiday would later sing. Judges Cant and Fesler tried to stop the slaughter; as did Attorneys McClearn and McDevitt, and Fathers Powers and Maloney—only to be told: "To hell with the law!" and "We don't care if they are innocent or not." The bodies were removed the next day, and taken to Crawford Mortuary (after another mortuary declined to help). They were buried in unmarked graves—a wrong only recently righted.

Three men were convicted of "rioting," but served light sentences. No murderers were ever convicted of the murders, despite thousands of eye witnesses. Some members of the media were outraged; others excused, justified, or even tried to explain the "benefits" of the lynchings.

There was and is no excuse, of course. The throng of Minnesotans that night in Duluth did not lose their minds or misplace their consciences. They knew what they were doing and they intended to do it. The pictures show their individual faces—some somber and others smiling, seemingly proud of what they had done. Individuals don't get to blame, or hide in, some sort of "mob mentality." We lawyers know that. Mob Rule is, after all, the exact opposite of the Rule of Law.

Between the 1870's and 1950's, there were more than 4,500 terror lynchings in America. Those lynchings were intended to create fear. They were spectacles meant to be seen and to convey a message—with children on parents' shoulders for a better view; sometimes with the local Black population forced to watch. They were performed in the presence of the purported Rule of Law, and sometimes with its permission—often in the public

square; sometimes on a courthouse lawn. The killings took place while statues were being built (purportedly to honor those who fought for "the lost cause," largely during the 1890's to the 1920's, and notably again during the Civil Rights Era of the 50's and 60's), and while federal anti-lynching statutes were being resisted (filibustered in the U.S. Senate, citing the canard of "racial favoritism" or promising enforcement under states' rights). The lynchings could only have happened by viewing people of color as some sort of unworthy "Other," not as fellow human beings. A reminder of the need for vigilance, even today, when incidents and policies seem afoot to "otherize" still others.

As the Duluth killers proudly sought a photographic trophy of their treachery (suitable for postcards, which promptly flew off the shelves of Duluth merchants at 50 cents each), one of the lynchers yelled out, ironically and aptly: "Throw a little light on the subject!" Headlights illuminated the scene for those preening to be seen. That photograph cannot be un-seen; nor should it be. As Ida B. Wells said so well: "The way to right wrongs is to turn the light of truth upon them." History can be a light in its own right, helping us face forward into our future together. That's what the coming months hold: not just noting history, but making history.



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

This is all such a sobering part of our history; sickening, really; but also strengthening—if we learn from it. As it turns out, Duluth was the very first community in our nation to build a monument to honor its lynching victims. The Clayton-Jackson-McGhie Memorial is a dignified and moving plaza—taking back the corner of First Street and Second Avenue South (one block up from Superior Street), across the street from the site of the 1920 murders. Engraved into the walls, in bold letters, it says: “An Event Happened Here Upon Which It Is Difficult To Speak And Impossible To Remain Silent.” Sculpted into the walls are images of Mr. Clayton, Mr. Jackson, and Mr. McGhie—not as they were in that photograph, but instead standing tall and strong. That memorial calls for you to visit. [www.claytonjacksonmcghie.org](http://www.claytonjacksonmcghie.org)

These coming months (and June 15 and 16, in particular) will include unique, important, moving, and motivating moments.

■ On June 15 in Duluth, Bryan Stevenson will speak at the site of the lynchings. He is the author of “Just Mercy” and the founder of the Equal Justice Initiative in Montgomery, Alabama—site of the national lynching memorial. A sacred place. [www.eji.org](http://www.eji.org)

■ Earlier that Monday, there will be an extended public program at Duluth’s courthouse plaza. Minnesota federal courts will be closed that day, in honor of the commemoration proceedings. Judge Richard Gergel, author of “Unexamined Courage,” will join us.

■ On Tuesday, June 16, at the Minneapolis Hilton, Bryan Stevenson and Judge Gergel will speak to us again.

Please mark your calendars to join us as we mark these moments—and as we move forward together. ▲

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## The MSBA's 2020 lobbying agenda

The MSBA Council has named the association's lobbying priorities for the 2020 Minnesota legislative session that begins February 11. The MSBA will advocate for the repeal of Minn. Stat. §480A.08 subd. 3(c), which establishes criteria for publication of Court of Appeals opinions. This legislative position, adopted in December based on separation-of-powers concerns, was recommended by an *ad hoc* committee that included Court of Appeals judges and practitioners. When the statute is repealed, the committee recommends that the Court of Appeals develop its own criteria for publication, soliciting input from the bar on proposed rules.

The Council also identified two priorities that protect the rights and interests of those often unable to protect themselves. The MSBA will engage in custody and parenting time issues that are expected to arise in the session based on existing MSBA positions that emphasize the best interests of children. The Council also committed lobbying resources for an informational hearing on HF2593, which would establish a right to counsel for tenants in public housing eviction actions alleging breach of lease.

Finally, the MSBA will pursue amendment of the Minnesota Uniform Transfer to Minors Act to unify all accounts to terminate at age 21, allow transfers to qualified minor's trusts, modify the custodian's investment standard, and streamline account termination and distribution when no custodian is acting. In addition to its affirmative agenda, the MSBA provides technical assistance on numerous bills and ensures that members' voices are heard on changes that would affect the practice of law or substantive areas of law.

## Nominations open for Bernard P. Becker Awards

Bernard P. Becker was a champion of the rights of the disadvantaged. During his legal career, he worked with the Legal Aid Society of Minneapolis and served as a U.S. Magistrate and a professor at William Mitchell College of Law, where he inspired students with a passion for justice.

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

The deadline for nominations is February 24, 2020. Visit [www.mnbar.org/becker-awards](http://www.mnbar.org/becker-awards) for more details.



**The MSBA New Lawyers Section celebrated the holiday season at the Minneapolis Club with gambling, food, and beverages. Guests at the December 18 event mingled with other new lawyers and had the opportunity to win prizes by playing blackjack, Texas Hold'em, Three Way Action poker, and participating in a wine toss.**

## Pro bono: Malpractice concerns?

Pro bono service is a great way for new lawyers and lawyers who are not actively practicing full-time to gain experience, sharpen their practice skills, and provide critically needed legal assistance to a low-income Minnesotan. One of the concerns often raised, however, is how to handle potential claims of malpractice that arise out of pro bono representation. This is particularly troubling for lawyers who don't currently have malpractice insurance policies. No need to worry: Every legal aid program that works with pro bono volunteers carries malpractice insurance to cover that representation. They do so for a number of reasons—to make sure their clients receive quality representation from their own staff lawyers and to make sure their volunteers will provide representation without fear of uncovered malpractice claims. While the likelihood of a malpractice claim arising out of pro bono representation is extremely low, it's good to know that legal aid programs have their volunteers covered. For lawyers without any malpractice coverage, the legal aid program's coverage would be primary, since the pro bono client's claim would be covered as a client of the legal aid program. (For those attorneys who already have coverage, it is likely the legal policy would be secondary, but be sure to contact the referring program to make sure.)

So please don't let concerns about malpractice coverage and potential claims stop you from volunteering. If you are looking for ways to get started, please contact MSBA Public Service Director Steve Marchese ([smarchese@mnbars.org](mailto:smarchese@mnbars.org) or 612-278-6308).



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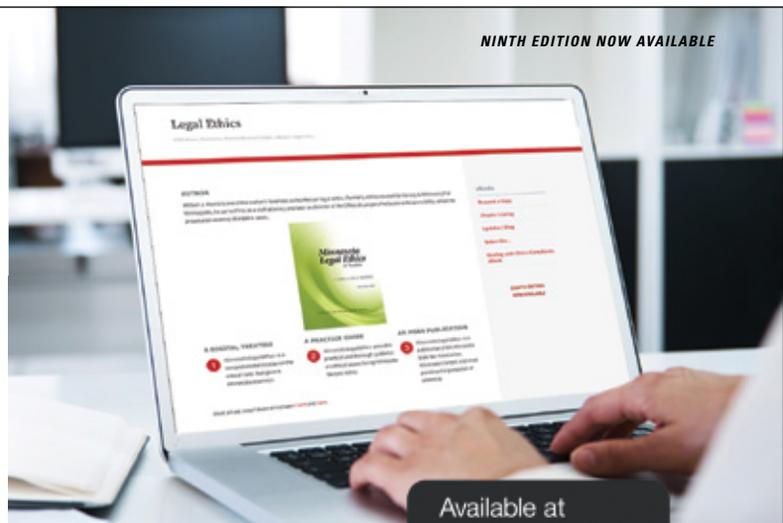


# Minnesota Legal Ethics

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## WHAT'S NEW

**Updates.** The treatise describes all important changes in Minnesota legal ethics in relation to the relevant ethics rules.

**New Rules.** Highlights important changes to multi-jurisdictional practice rule 5.5 (May 2019).

**New Opinions.** Summarizes and analyzes each new ABA ethics opinion.

**Minnesota Supreme Court Cases.** Describes and analyzes all important Court discipline cases.

**Private Disciplines.** Critically reviews recent private disciplines on contact with a represented party, former client conflicts, "knowingly" violating a court rule, and due process in discipline cases.

# Public discipline in 2019

Since we have entered a new decade, I thought it would be interesting to start the annual review of public discipline with a look back at discipline numbers by decade. From 2010-2019, a total of 403 attorneys were publicly disciplined, an average of approximately 40 per year. During this decade, the yearly number of publicly disciplined lawyers ranged from a low of 26 (in 2010 and 2011) to a high of 65 in 2015.

For reasons that remain unclear, this number is significantly higher than numbers for the prior decade. From 2000-2009, 327 lawyers were publicly disciplined, an average of 33 a year (from a low of 19 in 2004 to a high of 48 in 2006). The '90s saw more discipline than the '00s, but still produced numbers notably lower than the most recent decade. From 1990-1999, 365 attorneys were publicly disciplined—from a high of 55 in 1990 to a low of 20 in 2004. One thing to note about the '90s, however, is the total number of disbarments compared to the other decades. In the '90s, 74 lawyers were disbarred, compared to 52 in the '00s, and 62 in the '10s. To date, the '90s have been the high point for disbarments, but the most recent decade saw the highest volume of public discipline overall. It will be interesting to see where the next decade trends—if it yields a trend at all. Due to the vagaries of human nature, I'm never sure what to expect.

## Discipline in 2019

Thirty-five attorneys received discipline in 2019. Public discipline is imposed not to punish the attorney, but to protect the public, the profession, and the judicial system, and to deter misconduct by the attorney and others. As I wrote in last year's column on this subject, the most notable trends

in 2018 involved the high number of disbarments and a higher than usual number of disability transfers. This past year saw a year-over-year decrease in disbarments (down from eight to five), as well as a significant decrease in disability transfers. In 2019, only one attorney was transferred to disability inactive status, compared to six in 2018—a welcome change, although we still see wellbeing issues playing a prominent role in discipline cases.

The most visible trend in 2019 was reciprocal discipline. If an attorney licensed in Minnesota is disciplined in another jurisdiction, Minnesota will impose reciprocal discipline to ensure that the lawyer is not able to avoid the consequences of misconduct in another state by simply moving their practice. In 2019, eight reciprocal disciplines were imposed, as compared to the typical one or two annually. The discipline imposed spanned the gamut from disbarment to reprimands. The basis for this significant

year-over-year increase is unknown, but perhaps it speaks to the increased mobility and multijurisdictional practice of lawyers. It's too soon to see what 2020 will bring for reciprocal discipline, although once again we have several such cases in the office as I write.

Five attorneys were disbarred in 2019:

■ Craighton Boates was disbarred based upon his felony bank fraud conviction in Arizona (one of the reciprocal discipline cases mentioned above);

■ Boris Gorshteyn was disbarred for abandoning his practice, settling client claims without authorization, and misappropriating hundreds of thousands of dollars in client funds;

■ Thomas Laughlin was disbarred for misappropriating client funds, a misappropriation that came to light during a trust account audit by the Director's office;

■ Murad Mohammad was disbarred for misconduct in 11 client cases, including misappropriation of client funds, failing to return unearned fees, lack of communication and diligence in multiple client matters, and making false statements to the Director; and

■ Israel Villanueva, a lawyer licensed in Mexico who was licensed in Minnesota as a foreign legal consultant—authorized to provide advice in Minnesota regarding the laws of Mexico—was disbarred from practice in Minnesota for abandoning several client matters, misappropriating client funds, and failing to cooperate with the Director's investigation.

Misappropriation is the common thread through the disbarments. Two lawyers—Gorshteyn and Mohammad—also accounted for more than 45 complaints between them, illustrating the widespread impact some lawyers have on clients.

## Suspensions

Twenty-two attorneys were suspended in 2019, very similar to 2018. In reviewing the 22 cases, there is no particularly noteworthy trend. The misconduct ranged from filing frivolous claims or arguments (Wendy Nora and Lori Sklar) and failing to diligently handle client matters (Daniel Westerman) to more serious conduct, such as the two lawyers who received lengthy suspensions for criminal felony convictions involving solicitation of sex with minors (Mark Lichtenwalter and Mark Lorentzen). In contrast to 2018, when an additional five cases involving misappropriation also resulted in suspensions, only one additional misappropriation case was decided in 2019 that resulted in a suspension, not disbarment (Christine Middleton). Accordingly, year over year, instances of misappropriation were down significantly.

As in 2018, we continue to see misconduct involving serious lack of candor issues. For example, Bobby Onyemeh Sea received a four-month suspension for lack of candor to the court regarding the reason for his absence at trial. Matthew McCollister received a 90-day suspension for making false statements to his client and opposing counsel regarding a settlement, in addition to additional misconduct, with evidence of mitigation.



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.

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David Izek received a lengthy suspension for misconduct that included making a false statement to a prosecutor in a matter. Daniel Miller received a lengthy suspension for misconduct that included lying to a client and the court. I know it is human nature to lie, and that it is also human nature to attempt to protect yourself when things go wrong, but it goes without saying that honesty is fundamental for lawyers, as attested by the discipline involving such misconduct.

### Public reprimands

Eight attorneys received public reprimands in 2019 (four reprimands only, four reprimands and probation), down from 14 reprimands in 2018. A public reprimand is the least severe public sanction the court generally imposes. In 2018, the majority of public reprimands related to trust account errors that resulted in shortages and negligent misappropriation. I'm pleased to report that only one of the public reprimands in 2019 was for trust account books and records violations, a significant year-over-year decline. Please continue to

focus on your trust account books and records if you are in private practice. You cannot just assume a trusted employee has it under control. Our website contains a lot of relevant information, including a link to a free CLE on trust accounting at the state law library's website.

### Conclusion

The OLPR maintains on its website ([lprb.mncourts.gov](http://lprb.mncourts.gov)) a list of disbarred and currently suspended attorneys. You can also check the public disciplinary history of any Minnesota attorney by using the "Lawyer Search" function on the first page of the OLPR website. Fortunately, very few of the more than 25,000 active lawyers in Minnesota have disciplinary records.

As they say, "there but for the grace of God go I." May these public discipline cases remind you of the importance of maintaining an ethical practice, and may these cases also motivate you to take care of yourself, so that you are in the best position possible to handle our very challenging jobs; much is expected of us. Call if you need us—651-296-3952. ▲



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# Taking responsibility for your cybersecurity

Cyberthreats continue to be a huge source of risk for public and private organizations alike. On December 4, the Senate's bipartisan cybersecurity caucus learned about the threat that ransomware poses and discussed learning, mitigation, widespread education, and the importance of information sharing in

constructing realistic protection measures.<sup>1</sup> While the hearing emphasized the need for public and private interplay to best face the difficult-to-manage nature of evolving cyberthreats, U.S. Sen. Angus King (I-Maine) pointed out, "The federal government can't provide support for every institution in America that's subject to ransomware." And while that may sound bleak,

I think it is simply an acknowledgement of our current reality. When it comes to our digital age and its expansive impact on the way we conduct our lives, it is ultimately the responsibility of each entity (really, each individual) to protect themselves and take a proactive approach to their security.

The risk of falling victim to a ransomware attack is one of many possible cyberthreats that organizations face. Law firms are at particular risk given the sorts of sensitive client data they collect and store. In previous articles, I have expounded upon the dangers of social engineering attacks, and more particularly, the risks associated with phishing attacks. Social engineering takes advantage of human vulnerabilities rather than technological weaknesses. Cybercriminals often do their best to make a phishing email appear legitimate, attempting to make an employee carry out some action and to do so quickly. They often capitalize on urgency to cloud an employee's sense of something seeming out of place.

Ransomware attacks are often introduced via social engineering methods, particularly by email, and will block access to or threaten dissemination of an organization's data until a ransom is paid. Public and private organizations, including law firms, have been made victims

of ransomware. Breaches of this kind are costly in more than one way, and as discussed recently by the cybersecurity caucus, could have devastating future effects on government entities.

Given the methods by which cyberattacks are introduced and the fact that cybercrime is constantly evolving to match new technologies and security measures, it only makes sense that the ultimate responsibility for cybersecurity postures rests within organizations. No framework, guidance, or amount of federal support could account for the multitude of ways in which a cyber event can transpire. While such support systems may be helpful in providing some sort of guidance, as I discussed in my last article, pursuing compliance with a standard set of best practices does not automatically ensure that an entity is secure. Federal support may aid in compliance, but the day-to-day requirements and cultures of security needed to combat cyberthreats can only be developed and maintained in-house. Resisting internal security protocols and failing to provide adequate budgeting for these measures will undercut any degree of compliance that an organization may believe that it has achieved with respect to federal guidelines. For the legal community, prioritizing cybersecurity means prioritizing clients, their sensitive information and privacy, and the reputation and future of the firm.

So with respect to Sen. King's comment, it's probably true that the federal government cannot reasonably assist each and every organization that is subject to the sort of cyberthreats we face today, especially when each and every organization is at risk. When it comes to security, compliance is no guarantee. But it is nonetheless within these organizations that security cultures can flourish and thrive. Information sharing, proactive strategies, education, and the sorts of countermeasures that the cybersecurity caucus proposed all rely on individuals for their widespread implementation and support.

As we start the year 2020, a good resolution for all of us may be to take heed of our personal responsibility in bringing about the sort of security awareness for which our organizations and firms aim. ▲

<sup>1</sup> <https://www.fifthdomain.com/congress/capitol-hill/2019/12/04/heres-what-senators-learned-about-the-ransomware-threat/>



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



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# 'A career in the law seemed perfect'

## Why did you go to law school?

The inciting moment for law school came in late 2015, when I was fired from a job for “coming out” to my boss. What followed was a period of intense self-doubt and confusion. I was unsure whether the termination was legal or illegal, whether I had done something wrong, or whether there was any recourse. After a few weeks, I had an epiphany—if I, with all my privilege, could be so lost and helpless, there must be many more who would benefit from someone on their side.

There’s a saying that your career should be the confluence of your passion, your skillset, the needs of the world, and earning enough to live. When I contemplated my options, a career in the law seemed perfect. It was a chance to help people and attend to those in periods of transition. Thanks to the encouragement of family and friends and the generosity of St. Thomas’s faculty, staff, and administration, I can now proudly say I’m an attorney.



*NORA HUXTABLE attended the University of St. Thomas School of Law (J.D., 2019) and Northern Michigan University (B.S. Electronic Journalism, B.S. Theatre, 2013). Bar involvement (past and present) includes: board member, Minnesota Lavender Bar Association; Elder Law Diversity Committee, Elder Law Section; and Jerry G. Dygert Clerk, Probate Section. She is a former on-air host for Classical MPR.*

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I also want to take this opportunity to address an issue facing Greater Minnesota—access to justice. There is a significant shortage of legal representation in rural areas, so I encourage any attorney, law student, or legal professional seeking a change of pace and a more balanced life to consider small-town practice.

## What’s the best advice you ever received?

That’s a tough question! I have had many wonderful mentors over the years, and each of them has offered their own advice.

Some of my favorites include the

importance of relaxing and being confident in yourself (from a judge after a memorably dismal interview), using scrutiny to your advantage (a UST mentor commenting on being a minority), and learning to pay attention to the canary in your emotional and ethical coal mine (a St. Thomas professor).

But my best advice on how to live a decent life comes from my parents. My mom is fond of the saying, “Eyes forward.” It is a reminder to learn from mistakes without being consumed by them. My father is a pastor, and his favorite benediction, one which I take to heart, reads:

*Go out into the world in peace.*

*Have courage.*

*Hold on to that which is good.*

*Give to no person evil for evil.*

*Strengthen the fainthearted.*

*Support the weak.*

*Help those who are suffering.*

*Honor and serve all people.*

*Rejoicing in the presence and the power of the Holy Spirit.*

## After you got your JD, you embraced a chance to move to Grand Marais to start your career. Why did you choose Greater Minnesota?

The Twin Cities is an incredible place, filled with unique, brilliant legal professionals doing exciting work. I truly enjoyed my time living and working there, the relationships I made, and the many amenities of a larger city. Practicing in Greater Minnesota, though, offers several advantages, among them a slower pace of life, greater work-life balance, and a chance to be an attorney for the community.

People need to do what they find fulfilling, whether that’s intensely complex legal puzzles, high-stakes litigation, or policy work. For me, it’s relationships. I love nothing more than meeting a new client, shaking their hand, looking them in the eye, and asking how I can help them with their life goals. The sense of community is strong in a small town, and it has been a pleasure to join this one.

## You’re doing two distinct jobs. Can you describe them?

I work half-time as an associate at Smith Law, PLLC, a three-attorney general practice firm in Grand Marais, and half-time as an assistant public defender for the State of Minnesota. My private practice predominantly focuses on transactional work, with an emphasis on real estate. The public defender position allows me to help the people of Cook County in another capacity. It’s been a pleasure serving in both positions, and I admire the work done by my colleagues at the firm and the 6th Judicial District Public Defenders.

## What do you like to do in your spare time?

I enjoy everything Minnesota’s beautiful north shore has to offer, from mountain biking to hiking, trail running to skiing, snowshoeing to rock climbing, and spending an afternoon in a hammock with a good book. I also enjoy making, consuming, viewing, and listening to art, and I volunteer with the Cook County Search and Rescue team. ▲

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\* Based on median hourly rate; Blue Hill Research study "Building a Case for Law Practice Management"

# Third child. First real parental leave.

## WHAT'S WRONG WITH THIS PICTURE?

### Why Minnesota should join the ranks of states making it easier for lawyers to take parental leave

By MICHAEL P. BOULETTE

Sometime not long before you are reading this, I became a father for the third time. And though sleepless nights with an infant are, by now, nothing new, this birth and this baby will be different. It will mark the first time—after 10 years of practice and two children—that I will be taking an actual parental leave.

To be clear, I don't mean that as a boast. It's embarrassing. When my first daughter, Harriet, was born, I left her and my wife to attend a mediation during my "leave," only to return to the office when Harriet was a few weeks old to work deep into the wee morning hours to meet a motion deadline. I'm no prouder that when my daughter Frances arrived four years later, I spent more time wading through an appellate brief than with her. These are my regrets, and they stem from wrongheaded attitudes I internalized far too early in my professional life: I must be a lawyer first and everything else second. It's taken me a decade to unlearn those lessons, or at least to put them into their proper context. Thankfully, I did. Just in time for one last try.

Sadly, I suspect I'm far from the only lawyer who has returned to practice too quickly out of a sense of professional obligation, or, more troubling, has had no choice but to return to a small or solo practice that could not manage without them.

But change could be on the horizon.

Let's be clear that the United States lags woefully behind other developed countries when it comes to supporting new parents.<sup>1</sup> Worse yet, the law is a remarkably unfriendly career when it comes to any kind of balance, let alone the demands that come with raising children.<sup>2</sup> But as the legal professional continues to come to grips with issues of equity and

wellbeing, large law firms have been falling over themselves trying to offer more generous leave packages.

Just this year, Minnesota's own Dorsey & Whitney expanded its paid parental leave program policy from 10 to 15 weeks,<sup>3</sup> and even this generous policy is no longer market-leading. My own firm, Barnes & Thornburg, launched a 16-week leave policy in 2019, and other large firms rolled out gender-neutral paid leave policies extending up to 16,<sup>4</sup> 18,<sup>5</sup> and even 20 weeks.<sup>6</sup>

Still, as parental leave becomes the new normal at many law firms, courts have been much slower to take notice, leading to reports of one attorney being forced to bring her newborn to court after being denied a continuance, only to be accused of being a bad mother.<sup>7</sup>

### Making leave possible

Despite parental leave becoming increasingly commonplace, legal practice poses significant challenges to lawyers welcoming a new child. Even where individual firms commit to policies that support new-parent attorneys, other professional demands make taking advantage of these policies daunting.

In my own practice, I have had to strike a delicate balance as I approached leave. Initially, there was the question of *when* to tell my partners, colleagues, clients, and the court. The timing of those discussions wasn't always obvious. It feels odd to tell one's managing partner about a pregnancy before your own mother—but re-staffing dozens of cases takes much longer than painting a nursery. Conversations with clients were even more delicate. If a trial could likely fall during my leave, should the client know before or after a key settlement conference? Certainly, clients need to know who will be trying their cases, but it could also exacerbate their anxiety and affect negotiations. And of course, each conversation increases the likelihood the news could spread in problematic ways. I might notify the court of parental leave in a scheduling conference, only to find out the news was shared with opposing counsel in another matter, who is already telling her client I'll soon be off the case.

But notice is just the beginning.

Even after talking with everyone who needs to know (a process that, by itself, leaves one a bit self-conscious), it's time to transition files to colleagues; determine staffing and strategy for the next several months; reassure wary clients; and of course, refer out the new cases and clients coming in the door. And this isn't just my experience. An examination of attorney parental leave in Florida put it this way:

The attorney preparing to take leave must determine the best time to discuss the issue with partners, staff, and clients, and the timing of these discussions is impacted by many factors, including trial strategy, discovery conferences, deadlines, extensions, and continuances. Attorneys often must consider when to stop taking on new matters and may be forced to seek substitute counsel to monitor their caseload. In a profession in which success relies heavily on client service and caseload, attorneys forced to seek substitute counsel due to parental leave are put at a professional disadvantage that can hinder careers. Workers face tensions when trying to balance their roles as professionals and parents, especially when there are adverse professional consequences to prioritizing family over work.<sup>8</sup>

Facing all these hurdles, it's no wonder that so many parents, particularly mothers, choose to leave traditional legal practice, while many male attorneys simply forgo much of the leave they're offered.<sup>9</sup> Frankly, it's a miracle lawyers have children at all.

### Parental leave... of the court

In answer to these challenges, courts in some states have stepped up to enshrine parental relief into their rules of practice. In fact, 2019 didn't just witness large law firms one-upping each other to support the new parents in their ranks. State Supreme Courts in both North Carolina<sup>10</sup> and Florida<sup>11</sup> explicitly amended their rules of practice to accommodate parental leave.



“It feels odd to tell one’s managing partner about a pregnancy before your own mother— but re-staffing dozens of cases takes much longer than painting a nursery.”

**80%**  
of professional  
fathers in the U.S.  
take less than two  
weeks of leave

**5%**  
take no leave at all

North Carolina's newly revised Rule 26 of General Practice rules permit attorneys to designate themselves as unavailable for at least 12 weeks after the birth or adoption of a child, and the court "may not hold a proceeding in any case in which that attorney is an attorney of record."<sup>12</sup> A related amendment to the rules of appellate procedure provides a similar process to prevent oral arguments from being scheduled while an attorney is on leave.<sup>13</sup> And lest any particularly hard-nosed opposing counsel consider using abusive discovery tactics to thwart the new rules, parties are also prohibited from noticing depositions during the leave period.<sup>14</sup> To take advantage of the new rule, an attorney need only designate their proposed leave dates with the court, and attest that "adequate measures [have been taken] to protect the interests of the attorney's clients" during the leave and that the leave "is not being designated for the purpose of interfering with the timely disposition of the proceeding."<sup>15</sup> In rolling out the new rules, Chief Justice Cheri Beasley touted the Court's commitment to "strengthening families and supporting children."<sup>16</sup>

Just a few months after North Carolina, Florida's Supreme Court adopted its own parental leave rule after nearly four years of discussion and debate.<sup>17</sup> Under the new Rule 2.570, courts are required to grant continuances of up to three months based on parental leave by a "lead attorney."<sup>18</sup>

Florida's rule does have its limitations. Unlike North Carolina's rule, Florida's rule requires the leave-taking attorney to seek a continuance, which has a presumptive *maximum* of three months—and no presumptive minimum.<sup>19</sup> District courts retain discretion to deny the continuance for substantial prejudice or unreasonable delay of an emergency proceeding.<sup>20</sup> And unlike the North Carolina parental leave rule, Florida's does not apply at all in criminal, juvenile, or civil commitment proceedings that involve sexually violent predators.<sup>21</sup> Like I said, it has its limitations.

But compared to Minnesota's rule on trial continuances—which requires either an emergency or a stipulation reached shortly after trial is set—these new rules are positively progressive.<sup>22</sup>

### **Why Minnesota needs a parental leave rule**

A rule governing parental leave is an idea whose time has come. As the bench and bar continue to focus on initiatives to advance equity and wellbeing within the profession, designated rules on professional leave speak to both.

First, clear parental leave rules address longstanding gender disparities in the practice of law. Submissions by the Florida Bar's Board of Governors and the Florida Association of Women Lawyers detailed a long and troubling history of leave being denied to attorneys, and particularly female attorneys, with harsh results. One example included a female attorney forced to leave her seven-week-old infant to travel 200 miles to a trial after her continuance request was denied. The court was even "reluctant to allow her breaks to pump in order to feed her child and maintain her supply."<sup>23</sup> But while female attorneys may have no choice but to take some amount of leave, lingering assumptions about gender roles may discourage male attorneys from doing the same. In fact, numerous studies document the stigma faced by men taking parental leave, leading 80 percent of professional fathers in the U.S. to take less than two weeks of leave, while 5 percent take no leave at all.<sup>24</sup> A survey of professional fathers identified workplace pressure as a significant factor.<sup>25</sup> Formalizing court rules to account for parental leave can help minimize the adverse consequences for female attorneys taking leave, while encouraging more male attorneys to follow suit—increasing opportunities for female attorneys, with potential "positive effect[s] on female labor force participation, professional careers, and women's wages."<sup>26</sup>



Second, allowing lawyer-parents to take leave from their court obligations helps advance our professional commitment to wellbeing. Lawyers are people too; so are their children. And like all parents, new lawyer moms and dads must juggle personal and professional commitments, perhaps none so life-changing as caring for a new infant. And the benefits of leave are myriad, including decreased rates of post-partum depression and increased levels of parent involvement.<sup>27</sup> Providing new parents some small amount of time away from professional commitments is simply humane. It is, quite frankly, the right thing to do.

But don't take my word for it. Just last year, the American Bar Associations House of Delegates approved Resolution 101B urging all states to provide specific continuance procedures for parental leave:

Resolved, that the American Bar Association urges the enactment of a rule by all state, local, territorial, and tribal legislative bodies or their highest courts charged with the regulation of the legal profession, as well as by all federal courts, providing that a motion for continuance based on parental leave of either the lead attorney or another integrally involved attorney in the matter be granted if:

- a) Consented to by all parties
- b) Or if not consented to by all parties and the movant demonstrates:

1. the motion is made within a reasonable time after the reason for the continuance has been discovered;
2. there is no substantial prejudice to another party;
3. the criminal defendant's speedy trial rights are not prejudiced; and
4. the judge finds that the request was not made in bad faith, including for purposes of undue delay.<sup>28</sup>

Minnesota could be next. As I write this, the Minnesota State Bar Association is convening a working group on parental leave and court rules to address this issue. I'd encourage all interested members to write the MSBA to express your interest or support. No need to write to me, though—I'll be on leave. ▲

## Notes

- <sup>1</sup> Gretchen Livingston & Deja Thomas, *Among 41 Countries, only U.S. Lacks Paid Parental Leave*, Pew Research Center: Fact Tank (12/16/2019). <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/>
- <sup>2</sup> Leigh McMullan Abramson, "Parents in the Law: Is it Possible to be both an Attorney and a Committed Mom or Dad?" *The Atlantic* (9/17/2015). <https://www.theatlantic.com/business/archive/2015/09/mom-dad-parent-lawyer/405742/>
- <sup>3</sup> Kathryn Rubino, "Biglaw Firm Announces Generous Expansion of Parental Leave Benefits for Lawyers," *Above the Law* (1/8/2020). <https://abovethelaw.com/2020/01/dorsey-parental-leave/>
- <sup>4</sup> Staci Zaretsky, "Biglaw Firm Wows All Employees with Brand New Family-Friendly Benefits," *Above the Law* (8/8/2019). <https://abovethelaw.com/2019/08/biglaw-firm-wows-all-employees-with-brand-new-family-friendly-benefits/>
- <sup>5</sup> Kathryn Rubino, "Trend Alert: Another Biglaw Firm Expands Gender-Neutral Parental Leave," *Above the Law* (7/29/2019). <https://abovethelaw.com/2019/07/munger-tolles-expands-gender-neutral-parental-leave/>
- <sup>6</sup> Staci Zaretsky, "Biglaw Firm Announces 'Industry-Leading' Parental Leave Policy," *Above the Law* (8/6/2019); Kathryn Rubino, "Another Biglaw Firm Gets In the Improved Parental Leave Game," *Above the Law* (7/8/2019). <https://abovethelaw.com/2019/07/kelley-drye-gets-in-the-improved-parental-leave-game/>
- <sup>7</sup> Staci Zaretsky, "Should Judges Delay Trials for Pregnant Lawyers," *Above the Law* (7/21/2016). <https://abovethelaw.com/2016/07/should-judges-delay-trials-for-pregnant-lawyers/>
- <sup>8</sup> *In re Amendments to the Florida Rules of Judicial Administration-Parental Leave*, SC15-1554, Petition at 9 (9/14/2018).
- <sup>9</sup> *Supra* note 2; see also Vivian Chen, "Rate of Men Taking Paternity Leave Falls Again," *American Lawyer* (7/24/2019). <https://www.law.com/americanlawyer/2019/07/24/rate-of-men-taking-paternity-leave-falls-again/>
- <sup>10</sup> Order Amending Rules of Appellate Procedure, (N.C. Sept. 2019); N.C. R. of Gen. Prac. 26; N.C. R. App. Pro. 33.1.
- <sup>11</sup> *In re Amendments to the Florida Rules of Judicial Administration-Parental Leave*, No. SC18-1554 (Fla. 12/19/2019).
- <sup>12</sup> N.C. R. Gen. P. 26(a), (b).
- <sup>13</sup> N.C. R. App. Proc. 33.1(a), (b).
- <sup>14</sup> N.C. R. Gen. P. 26(g).
- <sup>15</sup> N.C. R. Gen. P. 26(c), (d), (e).
- <sup>16</sup> North Carolina Judicial Branch, "Chief Justice Beasley Announces Rule Change to Strengthen Families and Support Children," 9/10/2019.
- <sup>17</sup> *In re Amendments to the Florida Rules of Judicial Administration-Parental Leave*, No. SC18-1554 (Fla. 12/19/2019).
- <sup>18</sup> Fla. R. Jud. Admin. 2.570.
- <sup>19</sup> Fla. R. Jud. Admin. 2.570 (a), (b), (c).
- <sup>20</sup> Fla. R. Jud. Admin. 2.570 (e).
- <sup>21</sup> Fla. R. Jud. Admin. 2.570 (f).
- <sup>22</sup> Minn. R. Gen. Prac. 122.
- <sup>23</sup> *In re Amendments to the Florida Rules of Judicial Administration-Parental Leave*, No. SC18-1554, Cmts. from Florida Association of Women Lawyers at 2 (11/15/2018).
- <sup>24</sup> Brad Harrington, et al. 2014. *The New Dad: Take Your Leave*. Boston College Center for Work and Family (2014).
- <sup>25</sup> DOL Policy Brief, *Paternity Leave: Why Parental Leave for Fathers Is So Important for Working Families*. <https://www.dol.gov/asp/policy-development/paternityBrief.pdf>
- <sup>26</sup> *In re Amendments to the Florida Rules of Judicial Administration-Parental Leave*, No. SC18-1554, Cmts. from Florida Bar Board of Governors at 12 (Nov. 15, 2018); Joanne Lipman, "Want Equality? Make New Dads Stay Home," *Wall Street Journal* (9/28/2018). <https://www.wsj.com/articles/want-equality-make-new-dads-stay-home-1538151219>
- <sup>27</sup> Elana Lyn Gross, "How Paid Paternity Leave Can Help Close the Gender Pay Gap," *Forbes.com* (5/14/2019). <https://www.forbes.com/sites/elanagross/2019/05/14/how-paid-paternity-leave-can-help-close-the-gender-pay-gap/#3517ebdb50c1>
- <sup>28</sup> ABA House of Delegates Resolution 101B (1/29/2019). <https://www.americanbar.org/content/dam/aba/images/news/2019mymhdres/101b.pdf>

**MICHAEL P. BOULETTE** is an attorney at Barnes & Thornburg LLP. He litigates high-stakes divorce and child custody cases, regularly handling multi-million dollar divorces involving closely held businesses, commercial real estate valuation, fraud and concealed assets, executive benefits, trusts, and inherited wealth, in addition to high-conflict custody cases with allegations of abuse, alienation, or mental health complications. His clients include business owners, public figures, entrepreneurs, C-suite executives, high-net-worth families, medical and legal professionals, and their spouses.

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# ***eDiscovery Without the Endless Battles***

**What you need to know about electronic documents  
to keep your client and yourself out of trouble**

**BY TOM TINKHAM AND KATE JOHNSON**

**I**f your lawsuit involves documents, many of those documents are likely to be in electronic form. Whether your client is an individual or a large corporation, the evidence for your case is likely to reside in an electronic device—or many electronic devices—controlled by your opponent, your client, or a third party. Recently, a group of larger corporations reported that 31 percent of them found it difficult to retrieve all documents subject to discovery.<sup>1</sup> This was true despite the fact that 36 percent of them spent over \$1 million per year and 15 percent of them spent more than \$10 million locating electronic documents for litigation.<sup>2</sup>

If these sophisticated companies have trouble handling electronic documents in litigation, how are we—persons trained as lawyers but rarely in computer science—to fulfill our discovery obligations and protect our clients from the risks inherent in the preservation, collection, and production of electronic documents in discovery? First, we must appreciate our obligations in the discovery of electronic documents. Second, we must appreciate the risks to ourselves and our clients, and we must develop or maintain a modest level of competence regarding the available techniques for electronic discovery.

### **The duty of tech competency**

In August 2012, the American Bar Association amended the Model Rules of Professional Conduct to provide that a lawyer should keep abreast of the “benefits and risks associated with relevant technology.”<sup>3</sup> Many states have amended their rules to specifically provide for competence in technology.<sup>4</sup> Minnesota Rules of Professional Conduct do not specifically refer to technology but provide:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.<sup>5</sup>

With respect to electronic records, competence includes:

1. the ability to understand the client’s electronic communication, storage, and backup system;
2. the knowledge to implement an electronic records preservation program;
3. understanding of the viable alternatives for collecting a client’s electronic records;
4. awareness of the options to search for responsive documents in an effective and efficient manner; and
5. the ability to cooperate with an opponent to provide and receive relevant electronic information while minimizing expenses.<sup>6</sup>

### **Understanding e-discovery risks**

Competence in these areas can avoid many of the risks associated with discovery of electronic documents. The risks begin when the client fails to preserve relevant electronic records. Rule 37(e) of the Federal Rules of Civil Procedure provides for sanctions where a party unintentionally fails to preserve relevant documents, resulting in prejudice to the other party.<sup>7</sup> Monetary sanctions are typical for this behavior, and the injured party may be allowed to offer evidence of the spoliation.<sup>8</sup> Where the court finds that the client intentionally destroyed the documents, Rule 37(e) allows the court to employ more severe sanctions—including an adverse inference instruction, entry of default judgment, or dismissal of the case.<sup>9</sup> Significant monetary fines often accompany the finding that spoliation was intentional.

The attorney whose client fails to produce relevant electronic documents is also at risk for sanctions by the court. It is the attorney who signs responses to document requests and is responsible for their veracity.<sup>10</sup> Primary counsel may certainly hire discovery experts, including knowledgeable counsel, but it is the primary attorney who remains responsible for the actions of the team. Failure to adequately supervise, due either to lack of knowledge or lack of attention, can result in liability for the attorney.<sup>11</sup> The attorney has a duty to the court to disclose document spoliation and the failure to make the disclosure can result

in disciplinary action.<sup>12</sup> An attorney who fails to properly advise a client on document retention, fails to supervise others, or fails to protect attorney/client privileged documents can face malpractice claims from the client.<sup>13</sup>

To avoid these risks we do not need to be perfect—perfection is unlikely in managing any significant volume of electronic documents. Our efforts do not need to be heroic, but they do need to be reasonable, in good faith, and guided by a general understanding of the technology.<sup>14</sup> Now that you are attuned to the need for knowledge and attention to this subject, the remainder of this article will discuss specific e-discovery pitfalls and best practices to avoid them.

### **Cooperation with opposing counsel is required and can benefit your client**

Rule 26(f) requires that the parties discuss and report to the court on the method of preserving documents, the method for locating relevant documents, and the form of document production.<sup>15</sup> These requirements provide an opportunity for parties to save expenses and time in the discovery process and establish a framework for the production of relevant documents in a useable format. All too often parties do not discuss these issues, let alone reach agreement. They then engage in expensive and time-consuming discovery battles with one or both parties ordered to conduct costly additional document recovery, review additional documents, sort documents in more effective ways, re-produce documents in a different format, or suffer the penalty of a spoliation jury instruction.

To have meaningful discussions with opposing counsel, a reasonable degree of transparency is necessary.<sup>16</sup> It is hard to have a meaningful discussion if neither party knows how the other will approach discovery. The first step in having a meaningful discussion is understanding your client’s own documents, including the kinds of documents available, how they are stored, the potential volume for collection and review, the existence of barriers to collection, and whether data has been lost. Exploring these issues early in the life of a case—and before you commit to an approach to discovery—is critical to ensuring that you do not make commitments you cannot keep.

To frame the discussion, it is helpful for the parties to exchange early document requests before the Rule 26 conference. The time to respond won’t start to run until the actual Rule 26 conference, but it will give each party more insight into the scope of possibly relevant documents. Disputes regarding discoverable information can be identified early and perhaps resolved. At the least, each party will be forewarned about what the other regards as relevant information. Parties would do well to provide each other with details regarding the litigation hold provisions and the custodians who will receive it.<sup>17</sup> If there are objections, a party can be forewarned and will have an opportunity to consider whether to amend its procedures. The lack of objection will make it difficult for the opponent to raise an objection after the party has gone through the collection process. The parties are also required to discuss the form of document production. If a party will accept paper production delivered by PDF, unnecessary time and expense can be saved by letting the producing party know as much in advance. Agreeing to one form that all parties can use will save processing costs for both.

Courts generally find that producing parties are best suited to determine the appropriate method to locate and produce relevant information.<sup>18</sup> A party normally will not be required to disclose its methodology in the absence of a showing of some deficiency.<sup>19</sup> However, going it alone without consultation and



**To have meaningful discussions with opposing counsel, a reasonable degree of transparency is necessary. It is hard to have a meaningful discussion if neither party knows how the other will approach discovery.**

cooperation may result in expensive motion practice and redundant discovery efforts that a more measured and cooperative approach can avoid. Perhaps the most difficult area of cooperation is on search methodology. The requesting party often wants very broad search parameters while the producing party tries to keep the parameters tight to avoid having to review massive numbers of documents. An exchange of information on search methodology may avoid some disputes, and understanding your client's documents early in the case can help guide discussions and provide a foundation for proportionality arguments, should the parties be unable to reach agreement.<sup>20</sup> As a practical matter, a party may consider it necessary to disclose its methodology—and face scrutiny regarding that methodology—when responding to a discovery motion.

#### ***E-document retention can be a challenge***

There has long been a common law obligation to preserve evidence for likely or actual litigation. This duty clearly extends to electronic data.<sup>21</sup> The duty arises or is triggered when litigation is reasonably foreseeable.<sup>22</sup> Where there is a reasonable and credible anticipation of litigation, the obligation to preserve data attaches.<sup>23</sup> For a plaintiff the obligation will attach no later than the filing of a complaint and may attach when an attorney is first consulted regarding the claim or even earlier (e.g., at the time of a loss) if a claim was obvious.<sup>24</sup> For a defendant the obligation to preserve electronic documents will arise no later than the date a complaint is served and may arise with the receipt of a demand letter, when counsel is consulted regarding a likely claim, or when facts make a claim reasonably likely.<sup>25</sup> It is counsel's obligation to inform a client that the preservation obligation is triggered.

The next immediate question is what information must be preserved. In general, information that is likely relevant to the claims or defenses in the anticipated litigation must be preserved.

The likely probative value of the information and the burden of preserving the information are considerations. The difficult issues often involve determining where the information resides and whether it is likely to be deleted if appropriate preservation steps are not taken. First, counsel has to weigh the likely complexity of the task and decide whether more e-discovery expertise will be needed to manage the process. Next, arrange an early meeting with the client. For individual clients, check the use of computers, cellphones, and social media. For a company, ask for identification of all of the types of devices that the company's employees used for business communication (including personal mobile devices used for business purposes).

Also, ask for internal memos that describe the client's electronic systems and policies. For a client with multiple players, identify the persons (custodians) who dealt with the issues in the case and identify their methods of electronic communication.<sup>26</sup> Consider whether any of these custodians have an incentive to destroy evidence so that immediate preservation efforts, such as device imaging, should be employed. In many settings, including social media use and complex company systems, it is necessary to understand where electronic documents of different types are stored and what automatic purging systems are in place for each system. Are there photos, diagrams, or spreadsheets that are created, stored, or deleted differently than messaging systems? Are there backup or archived tapes that contain relevant information and can be preserved? Are there legacy systems that may contain relevant data? Is there an ability to shut off certain auto-destruct systems? Is it more cost-effective to preserve data in other ways, such as immediate imaging?<sup>27</sup>

After learning the essentials of the client's systems and identifying the likely custodians, counsel has an obligation to advise the client on how to properly preserve electronic information.<sup>28</sup> Typically, the instruction from counsel or the company to preserve information is in writing. This is good practice in case there is a later dispute about whether appropriate preservation steps were taken. The hold letter should be directed to the custodians who are likely to have relevant information. It should describe the claims or potential claims, the types of relevant information, and the timeframe. It should describe how the information should be preserved and who to contact regarding questions.<sup>29</sup> Custodians to whom the hold letter is distributed should acknowledge receipt of the hold letter in writing.

Be aware that aspects of this process must be discussed with the opponent. The Federal Rules require that parties discuss issues about preserving information at the mandated Rule 26 meet-and-confer. The position of the parties on preservation is to be included in the discovery plan presented to the court.<sup>30</sup> With the emphasis in the Rules on cooperation and transparency in discovery, consideration should be given to seeking agreement on the terms of a preservation notice to avoid later disputes. Alternatively, the completed hold letter could be shared with opposing counsel as part of the Rule 26 conference. At the least, the preservation letter should be written with the understanding that it may have to be provided to the court in the event of a later dispute: While the hold notice may be attorney-client privileged and work product, defending against a claim of spoliation may require its use.

Conducting interviews with potential custodians is important to understanding what data must be preserved, including how the custodians typically communicated regarding the issues in dispute, and whether there are other individuals with potentially relevant information that you have not yet identified. If custodians used personal mobile devices or social media, you will need to take immediate steps to preserve this

information so that auto-delete functions don't destroy it.<sup>31</sup> Personal mobile devices are also particularly susceptible to being lost or damaged, potentially resulting in data loss. Interviewing a few key custodians allows you to personally reinforce the preservation requirements and make sure that the requirements are understood by the most central custodians. With individual clients, checking for text messages and the use of social media like Facebook is vital.

Counsel has a continuing obligation to work with the client to ensure that relevant information is being preserved.<sup>32</sup> It is well known that simply sending a hold letter is not enough, because custodians may neglect or forget the obligation.<sup>33</sup> In addition to personal visits with key custodians, consider periodically reissuing the hold notice.<sup>34</sup> With amended pleadings and new discovery requests, review the preservation notice to make sure it covers any newly raised fact issues.

### **How the electronic documents are gathered matters**

Gathering the documents properly can avoid spoliation claims. Simply asking custodians to keep or print relevant electronic documents can lead to disaster when individuals don't follow through or your opponent insists on the production of metadata that will not be fully present in hard copies.<sup>35</sup> Where electronic information will be collected manually, it is appropriate to have someone with technology expertise assist the custodians in locating and transmitting responsive data to a depository.<sup>36</sup>

Where the volume of data is very substantial, automated systems can be used to collect information that may be relevant. Key words, date ranges, folder types, and other broad descriptors can be used to reduce volume but collect much of the responsive information. Some types of documents, such as spreadsheets and diagrams, may not be easily located with key words and will need to be located separately. Whatever the process, it is necessary that counsel be involved to understand the process and conclude that it is adequate. Typically, one attorney with an adequate understanding of collection, processing, and production techniques should be responsible for all three phases so that responsibility is clear and decisions are consistent.

It is important to collect the data in a form that will be acceptable to the opponent and useable by your side in sorting and then displaying helpful information. Collecting data in one form only to learn that another form is required will multiply costs. To do this correctly, it is necessary to reach an early understanding with your opponent regarding its expectations for production format. At the same time, you will need to understand the system your side will use to sort and display the electronic data.

### **Technology can limit the cost of manual review—with considerable risk**

Once a party has collected a set of documents that may be relevant to the dispute and responsive to the opposing party's document requests, there are two difficult steps remaining before production. First, it is necessary to separate the relevant documents from the great bulk of irrelevant material. Second, it is necessary to identify, and set aside from production, the attorney-client and work product material. No method of review is perfect; whether an attorney looks at every document to determine whether it is relevant or privileged, or whether you use technology-assisted review, it is likely that some irrelevant documents will be produced, and relevant documents will be left behind. However, you can—and must—identify a defensible process to complete these steps.

These tasks can be performed by attorneys manually reviewing all the documents. Where the number of documents is modest, this is the appropriate procedure. But where the volume of documents is large, the cost of manual review becomes excessive and the time required for manual review becomes a hindrance to completion of discovery.

Keyword searches have often been used to identify relevant documents or cull the universe of documents for manual review. Use of proximity searching (one term within a certain number of words of another) can improve the reliability of search terms. Nevertheless, keyword-searching techniques have often led to unnecessarily costly reviews, disputes, and both over- and under-production of documents.<sup>37</sup> While it is certain that keyword searches will both miss relevant documents and include many irrelevant documents, there are appropriate means to determine and improve the accuracy of keyword searches. Select a random sample of documents and run them through the keyword search and a manual screening process. The results will indicate the level of accuracy of the keyword search and suggest measures for improvement.<sup>38</sup>

Various forms of technology-assisted review are accepted by the courts, and recognized as more effective than keyword searches.<sup>39</sup> There are a number of variations on this methodology, including passive learning, simple active learning, and continuous active learning; these methodologies can be used either in place of, or in conjunction with, keyword searches. Essentially, a set of relevant documents is identified, typically through manual review of a statistically valid random sample, and the computer is programmed to identify similar documents within the document collection. What is done with those similar documents depends on the type of technology-assisted review protocol being used.

In a traditional predictive coding model, sample sets of documents are reviewed until acceptable rates of recall (the percentage of relevant documents identified) and precision (the percentage of irrelevant documents identified as relevant) are achieved. Then, the documents identified as responsive are produced, usually following review for privilege. Keep in mind that, to the extent that you use a traditional predictive coding approach, you may be required to disclose your sample sets and how you coded the documents—which will necessarily include non-responsive documents.

Technology-assisted review is increasingly being used to prioritize documents that are likely to be responsive for purposes of a more traditional, manual review, often using continuous active learning. Typically, as with a traditional predictive coding review, a statistically valid random sample is reviewed, and documents are rated by how likely they are to be responsive. As the name suggests, a continuous active learning protocol is continuously updated and refined as additional responsive and/or privileged documents are identified.<sup>40</sup> Ultimately, you may reach a point where the model indicates that very few responsive documents remain, and elect to cease reviewing at that point, with the remaining documents deemed non-responsive.

If it isn't obvious from this description, let's be clear: Few of us will ever develop the knowledge to design such programs. We will need assistance from experts—discovery vendors or counsel who specialize in electronic discovery. It is important, however, to have at least a basic understanding of the available options so that you can identify a cost-effective and defensible review protocol. It is further necessary that you understand the review protocol well enough to provide oversight to ensure that the protocol used to sort documents is producing reasonable results and is defensible should a dispute arise.

### **Reasonable steps parties can take to deal with privileged information collected during discovery**

Each of us has an obligation to protect attorney-client and work product materials.<sup>41</sup> However, when we claim privilege and do not produce those documents during discovery, we are required by the Rules to identify and describe the documents withheld—the well-known privilege log.<sup>42</sup> The process of manually reviewing all responsive documents and creating the privilege log often contributes substantially to the cost of discovery.<sup>43</sup> One way to limit this cost is the “quick peek” approach: Parties enter into a clawback agreement coupled with a Rule 502 order, and agree that they will produce all documents, including privileged information, which the producing party can “claw back” when the privilege nature becomes apparent. Rule 502 will then protect the party from a claim of waiver in the current case and any subsequent federal or state proceeding.<sup>44</sup> The problem with this approach is that once the opponent has seen the privileged communication, they possess and can exploit the information it contains, even though they must return the documents. For this reason, this approach is rarely used.

Even if you are conducting a privilege review and withholding privileged documents, a Rule 502(d) agreement and order is crucial to minimize the risks of inadvertent disclosure and having to make the difficult argument to retrieve privileged documents.<sup>45</sup> The parties can agree that any inadvertently produced privileged material will be returned without argument and that Rule 502(d) will apply to prevent that disclosure from being considered a waiver of the privilege. To avoid further disputes, the agreement should specify how and in what timeframe the privileged material will be returned, and the procedure for disputing the claimed privilege.

Another method to limit privilege review costs is to use technology to sort out privileged material. The names of attorneys and keywords typifying legal advice can be used and a list with brief descriptors can be automatically generated. Counsel for both parties can agree to a Rule 502(d) clawback order and that certain documents on the log selected by the opponent as questionable will be manually reviewed and additional explanation of privilege provided. This procedure will save costs, but some hard-to-identify privileged documents are likely to be produced, subject to clawback.

Even when all documents being produced will be subject to manual review, modest agreements between counsel can limit some costs of the privilege log. Counsel can agree to grouping of privileged documents by type with general descriptions. If opposing counsel decides that the information provided may be a basis to contest some of those privilege assertions, they can request a detailed description of certain documents. Counsel can agree to waive the requirement of logging communications with trial counsel or eliminate documents created before or after a certain date from the privilege log requirements. These agreements can demonstrate a cooperative attitude and save discovery costs. Whatever the plan for dealing with privileged material in discovery, the client should be fully informed of the risks and costs of viable alternatives and consent to the procedure that will be used.

### **Enhanced manual review procedure can reduce cost**

Regardless of the degree of machine document sorting, there will be some form of manual review, at the least to identify documents for your own use at depositions or trial. The expenses of review will escalate the more times documents have to be manually reviewed. If possible, manually review all documents once for both production and your own use. Do your best to under-

stand all of the electronic information that may be relevant to any party. Review that material for production, attorney-client privilege, and your own use all at once.

A well-trained review team will be efficient and produce the best results. Provide the team with complete instructions, including a written review protocol describing the legal issues, the relevant documents, privileged information types, confidentiality issues, if any, and coding instructions.<sup>46</sup> For more cost effective and thoughtful review, emails can be de-duplicated so the endless string to multiple people doesn't get reviewed numerous times. Email threading can be used to ensure that all emails in a single conversation are reviewed together. Finally, emails can be grouped by subject matter to allow more thoughtful review. An attorney with authority to make decisions should be available to supervise the review team and make decisions as questions arise. The methodology used for review should be recorded and decisions made on important points should be noted so that any later challenge to the procedure can be fully answered.

### **Careful review of electronic information before production can reduce costs and prevent embarrassing mistakes**

Hopefully, the form of production has long since been agreed upon and there is no risk of arguments over form once the documents are produced. By Rule, electronic documents are to be produced in the form in which they are ordinarily maintained or in a form that is reasonably useable.<sup>47</sup> The Federal Rules provide that the requesting party is to specify the form of production.<sup>48</sup> There are generally four possible forms of production: paper, native, PDF, or TIFF with attached load (metadata) files. Paper may be entirely appropriate where all pertinent information will be shown on the paper and there is no need to electronically manage the documents. Native files can be easy to produce but very difficult to manage. It is difficult to redact native files, document identification of native files through Bates numbers is not practical, and native files cannot be branded with confidentiality designations. However, more types of documents, such as spreadsheets and diagrams, may only be effectively used in native form. The PDF format is limited, because documents in that format are difficult to electronically sort without metadata. TIFF files with relevant metadata in associated load files are considered reasonably useable and generally appropriate for document production.<sup>49</sup>

Before sending the production out the door, check to make sure it is what you want to send. Nothing creates more problems, for example, than to mistakenly send the privilege files or to send only a portion of the production files. As the responsible attorney, you should do a final check of the production files to make sure it is what you wish to produce. As your opponent may check your production, you can do the same with electronic programs to ensure the production is complete. Are there likely custodians with no or few documents in the production? Are there emails exchanged between the parties that are present in your opponent's production but absent from yours? Are there few documents associated with key concepts or words? Are there documents identified as privileged that involve third parties who break the privilege? These checks will help ensure your peace of mind about the integrity of the produced documents.

### **Conclusion**

You may be bothered by the technical aspects of electronic document collection and production, and this article only touches the technical surface. Take heart. We are not required to be competent to handle the technical aspects of this subject

and perfection is never demanded. We must understand the legal issues in our case, as well as the available methods to locate, preserve, and produce electronic documents. We should ensure that we have competent assistance to manage the technical aspects of the work and then direct the work be done in an honest and reasonable manner. There are always glitches in any extensive electronic document production. Perfection is not expected but reason and honesty are required.<sup>50</sup> Serious problems arise when the lawyer supervising the work fails to supervise; fails to recognize or deal with the glitches that arise; or sends the wrong message to the client or associates regarding honesty.

All of us and our clients will benefit from recognizing that we advocate for our clients on the facts as they exist. We can do this effectively while cooperating with our opponents to produce to them and obtain from them the facts that do exist, including those present in electronically stored information. ▲

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## Notes

<sup>1</sup> KPMG, *Managing Electronic Data for Litigation and Regulatory Readiness*, [kpmg.com/content/dam/kpmg/pdf/2016/02/litigation-survey-2016.pdf](http://kpmg.com/content/dam/kpmg/pdf/2016/02/litigation-survey-2016.pdf), 6.

<sup>2</sup> *Id.* at 7.

<sup>3</sup> ABA Model Rule 1.1, cmt.

<sup>4</sup> Brady, *Legal Malpractice and e-Discovery*, 32 Law, Man. Prof. Conduct 484 at 3 (Aug. 2016).

<sup>5</sup> Minn. Rules of Prof. Cond. 1.1.

<sup>6</sup> See Brady, *supra* note 4 at 4.

<sup>7</sup> Fed. R. Civ. Pro. 37(e).

<sup>8</sup> E.g., *Drive Time Car Sales Co., LLC v. Pettigrew*, 2019 U.S. Dist. LEXIS 66339 (S.D. Ohio 2019).

<sup>9</sup> *GN Netcom v. Plantronics*, 2017 U.S. Dist. LEXIS 205433 (D. Del. 2017); see *Paisley Park Ent., Inc. v. Boxill*, 330 F.R.D. 226 (D. Minn. 2019).

<sup>10</sup> *Dammer v. State Farm Fire & Cas. Co.*, 2019 U.S. Dist. LEXIS 185862, \*3, (D. Minn., 2019). Fed. R. Civ. Pro. 26(g) (response must be correct to the best of the person's knowledge after a reasonable inquiry).

<sup>11</sup> Brady, *supra* note 4 at 7-8.

<sup>12</sup> *Candor Toward Tribunals*, 33 Law, Man. Prof. Conduct 368 (June 2017).

<sup>13</sup> Brady, *supra* note 4 at 2.

<sup>14</sup> See *The Sedona Conference, Principles*, Third Edition, 2017 at 108.

<sup>15</sup> Fed. R. Civ. Pro. 26(a)(3)(C).

<sup>16</sup> *United States v. Boston Sci. Corp.*, 2018 U.S. Dist. LEXIS 185273, \*2, (D. Minn., 2019); *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 127 (S.D.N.Y. 2015); Griffith, *Processing Electronically Stored Information*, *Practical Law/Litigation* 22 (Oct./Nov. 2017).

<sup>17</sup> *Sedona Principles*, *supra* note 14 at 69-84.

<sup>18</sup> *Id.* 118-124.

<sup>19</sup> *Sedona Principles*, *supra* note 14 at 127, but see *Rio Tinto*, *supra* note 16 at 127.

<sup>20</sup> See Minn. R. Civ. P. 26.02(b); Fed. R. Civ. P. 26(b)(1).

<sup>21</sup> See *The Sedona Conference, Commentary on Legal Holds*, 11 *Sedona Conf. J.* 265 (2010); see also, Fed. R. Civ. Pro. 37(e).

<sup>22</sup> *Paisley Park*, *supra* note 9 at 4; Fed. R. Civ. Pro. 3(e), 2015 note.

<sup>23</sup> *Sedona Principles*, *supra* note 14 at 93.

<sup>24</sup> Ettari, *Reasonable Anticipation of Litigation*, *The Journal Litigation* (June/July 2017) at 30-31.

<sup>25</sup> *Id.* at 31-32.

<sup>26</sup> *Sedona Principles*, *supra*, note 14 at 101-102; see also, Todler *et al.*, *The Sedona Conference Jumpstart Outline* (2016).

<sup>27</sup> For a more complete list of questions about the client's electronic systems

see *The Sedona Conference Jumpstart Outline* (March 2016). Courts regard the Sedona publications as authoritative on electronic document preservation and production. *Matrix Partners VIII, LLP v. Natural Research Recover, Inc.*, 2009 WL 10677430 at 5 n. 3 (E.D. Tex. 2009).

<sup>28</sup> *EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc.*, 2018 U.S. Dist. LEXIS 53360 (M.D. Term 2019) at 11.

<sup>29</sup> *Sedona Principles*, *supra* note 14 at 104-105.

<sup>30</sup> Fed. R. Civ. Pro. 26(f)(2), 26(f)(3)(c).

<sup>31</sup> *Paisley Park*, *supra* note 9 at 8-9; see also *Hinostrroza v. Denny's Inc.*, 2018 U.S. Dist. LEXIS 109602 (D. Nev. 2018).

<sup>32</sup> *Browder v. City of Albuquerque*, 187 F. Supp. 3d 1288 (D. N. Mex. 2016).

<sup>33</sup> *Id.*

<sup>34</sup> Homid and Sherno, *E-Discovery in Employment Cases*, *The Journal/Litigation*, 26, 29 (Feb./March 2017).

<sup>35</sup> See *Jones v. Breman High School Dist.* 288, 2010 WL 2106648 (N.D. Ill. 2016).

<sup>36</sup> *Sedona Principles*, *supra* note 14 at 168.

<sup>37</sup> *Da Silva Moore v. Publicis Groupe*, 287 F.R.D.182, 190 (S.D.N.Y. 2012).

<sup>38</sup> *City of Rockford v. Mallinckrodt ARD, Inc.*, 326 F.R.D. 489 (N.D. Ill.).

<sup>39</sup> *Hyles v. N.Y. City*, 2016 U.S. Dist. LEXIS 100390 (S.D.N.Y. 2016).

<sup>40</sup> *Rio Tinto* *supra* note 16 at 128.

<sup>41</sup> Minn. R. of Prof. Cond. 1.6.

<sup>42</sup> Fed. R. Civ. Pro. 26(b)(5).

<sup>43</sup> *Sedona Principles*, *supra* note 14 at 147.

<sup>44</sup> Fed. R. of Evid. 502(d); see *Sedona Principles*, *supra* note 14 at 148-152.

<sup>45</sup> *Ranger Constr. Indus. V. Allied World Nat'l Assn. Co.*, 2019 U.S. Dist. LEXIS 18617 (S.D. FL. 2019). In the absence of a Rule 502(d) agreement, a party is subject to a multipart reasonableness test to determine if a court will order the return of inadvertently produced documents. *Bombardier Rec. Prods. v. Arctic Cat Inc.*, 2017 U.S. Dist. LEXIS 192528 (Minn. 2017).

<sup>46</sup> Bloomberg BNA, Rainey & Gaunt, *Best Practices for Supervising*, *U.S. Law Week* (7/7/2015); see also Thomson Reuters, *Document Review Quality Control*, *Practical Law Litigation*.

<sup>47</sup> *Sedona Principles*, *supra* note 14 at 169.

<sup>48</sup> Fed. R. Civ. Pro. 34(b)(1)(C).

<sup>49</sup> PDF (Adobe Portable Document); TIFF (Tagged Image File Format); Metadata (Numerous forms of data are attached to each document. For example, they tell a computer how to display the document and what changes have been made to a document. Some metadata is very useable and relevant but much of it is not significant to most litigation).

<sup>50</sup> *Sedona Principles*, *supra* note 14 at 169-175.



Minnesota is a restrictive jurisdiction for foreign-trained lawyers.

# ***Minnesota needs more foreign-trained lawyers***

*The business case for making it easier to license attorneys trained outside the U.S. in Minnesota*

BY INTI MARTÍNEZ-ALEMÁN



**I**magine deciding to resettle in a foreign country and having to quit your job as an attorney in Minnesota. You got a great job offer in England. Or your spouse is relocated to Brazil. Or you want to return to your home country of Japan. You want to continue being a lawyer and practicing law, but it's a new country with new laws and new licensing requirements. What do you do?

Good news! These jurisdictions—like most jurisdictions around the world—will allow Minnesota lawyers to get credit for their U.S. Juris Doctor degree before allowing the applicant to get admitted to the practice of law in that jurisdiction. Many jurisdictions also establish additional requirements like a bar exam, an apprenticeship, a few courses in that jurisdiction's domestic law, a specific immigration status, and the like.

Now imagine that your new home has *no* viable path for you to become a lawyer there. Your education and experience working in Minnesota have little to no value. There are some restrictive nations out there, but they are few and far between.

What if I told you that progressive Minnesota is a restrictive jurisdiction for foreign-trained lawyers? It's true: Foreign-trained lawyers like myself were required to go to law school all over again. Our legal education, training, and experience abroad are worth very little according to the current Minnesota bar admission rules. Per ABA rules, you get no more than one year of credit from your foreign legal education.

Other states are friendlier to foreign-trained lawyers. In fact, over a dozen states will allow a foreign-trained lawyer to sit for the bar exam after completing a 1-year LL.M. (Master of Laws) degree from an ABA-accredited law school. Sadly, Minnesota has resisted joining the ranks of these more modern states.

There is a strong business case for Minnesota's adoption of more welcoming admission rules, while still protecting the public and honoring our profession. It is in the interest of our great state to change its bar admission rules.

There are four sectors of our legal profession that would greatly benefit by changing the rules: (1) multinational corporations; (2) law firms with an international presence; (3) law schools; and (4) underrepresented immigrant communities. Let me tackle each of these.

### **Multinational corporations**

At the 2019 MSBA Corporate Counsel Institute, I had the honor to share about this topic. A show of hands revealed that an overwhelming majority of corporate counsel deal with foreign jurisdictions on a regular basis. In the last five years, Minnesota has boasted of being home to 17-21 Fortune 500 companies—a figure that does not include private equity companies with comparable revenues! I don't need to go to great lengths to explain our state's privileged position.

All these companies have an international presence. They deal with foreign jurisdictions regularly. It comes as no surprise, then, that a Minnesota multinational corporation would benefit tremendously from having legal counsel licensed to practice both in a targeted foreign jurisdiction and in Minnesota.

Multinational corporations retain local counsel when they explore expanding or developing contacts in an international market. For instance, wouldn't it be easier for 3M's general counsel to call

up a Minnesota-licensed attorney from Brazil, than to go through the hurdles of talking to a Brazilian attorney who may or may not understand U.S. law? You bet!

Certainly, many Minnesota multinational corporations already retain law firms abroad that employ attorneys familiar with U.S. law, many of whom have LL.M. degrees. But wouldn't it be better if an increasing number of these attorneys were *also* licensed in Minnesota? You bet!

Navigating the differences between U.S. common law and foreign civil law is hard enough. Having a foreign-trained lawyer complete an LL.M. degree and then sit for the Minnesota bar exam would make work much easier for multinational corporations.

### **Law firms with international presence**

In line with national trends, Minnesota is seeing more mega-law firms establish a presence here. Competition is cutthroat. Longstanding Minnesota law firms like Briggs and Morgan and Gray Plant Mooty have merged with even larger national or regional firms. One measure that would help local Minnesota law firms with an international presence reach the cutting edge in competitiveness is hiring more foreign-trained lawyers.

Imagine Dorsey & Whitney or Fredrikson & Byron employing a cadre of foreign-trained lawyers licensed in Minnesota. Such an arsenal of talent would place these BigLaw firms in the vanguard of innovation for multijurisdictional and international practice. If an international client needs help in a foreign jurisdiction, these firms wouldn't need to scramble to find local counsel in that jurisdiction with the hopes that they're also versed in US law. These firms would simply tap into their own foreign-trained lawyers and get the ball rolling.

Frankly, this is true not only for BigLaw. It also applies to solo and small law firms. I have witnessed it myself in my own solo practice. A European corporation retained me for a matter involving Minnesota law. They decided to hire me because, among other things, I speak their language, I understand how civil law in their jurisdiction works, and I am licensed in Minnesota. Had I only offered them the first two without a law license in Minnesota, they would have hired a competitor—obviously.

I know of boutique law firms that routinely serve international clients. In this competitive market, they would stand out and remain competitive if they hired foreign-trained lawyers licensed in Minnesota.

## MINNESOTA DESERVES BAR ADMISSION RULES MORE IN TUNE WITH THE TIMES.

### Law schools

Law school admissions staff have a hard time explaining to prospective international students that they can come to Minnesota for an LL.M. but remain unable to sit for the bar exam. That's a tough sell.

Nevertheless, the law schools at University of St. Thomas and the University of Minnesota have very robust LL.M. programs (my alma mater, Mitchell Hamline, is MIA). It is impressive how UST and the U of M are able to attract so many talented foreign-trained lawyers from all over the world to come to frigid Minnesota to complete a Master of Laws in one year. When they are done, these colleagues move back to their home country without the opportunity to sit for the bar exam in Minnesota even if they want to. What do they do instead? They study and sit for the bar exam in another U.S. jurisdiction—New York is a popular choice.

Allowing foreign-trained lawyers to sit for the Minnesota bar exam after completing an LL.M. from an ABA-accredited school would make Minnesota law schools even more attractive and competitive among international students.

### Underrepresented immigrant communities

Think back to the most complicated case you ever handled. Now imagine that same case with an extra layer of linguistic and cultural differences between you and the client or the other parties.

Any case can grow more difficult when the lawyer is not on the same page with their client. Language and cultural differences are two big obstacles. One of the best ways to address the need for legal representation in immigrant communities is by allowing foreign-trained lawyers licensed in Minnesota to serve these communities.

The unauthorized practice of law (UPL) is rampant in Minnesota immigrant communities. Tax preparers, real estate agents, insurance agents, and the like are all giving legal advice, providing legal assistance, drafting legal documents, and completing legal forms without a law license. (UPL is a crime under Minn. Stat. §481.02.)

It feels like every week I meet with a client who has been “helped” by one of these people. On a recent case, my Spanish-speaking client believed he was signing a loan and security agreement over his home, when in reality he was signing a quit claim deed written in English. Big difference. The client had to spend thousands of dollars to undo this mess in court, all of it caused by someone who offered to help him and appeared to know what he was doing.

The Minnesota Attorney General and local law enforcement are not doing anything about UPL. The MSBA and local bars are mum. Meanwhile, immigrants are blindly entrusting their homes, businesses, cars, and other assets to unlicensed individuals.

What does this have to do with foreign-trained lawyers? Well, many of those tax preparers, real estate agents, insurance agents, and the like who are engaged in UPL are foreign-trained lawyers. In our exchanges, nearly every single one of them tells me they would like to be a lawyer in Minnesota. What prevents them? Cost is one factor, for sure. The other is time. Doing law school all over again is not feasible.

Going back to my first illustration, imagine having to do law school all over again just because the bar admission rules haven't caught up with the times. Nonsense. There should be a viable path. If many other states have created one without reported regrets, why can't Minnesota?

Let's rein in these unlicensed individuals and take them out of the shadows. They should be regulated like the rest of us. If this doesn't happen, they will continue to engage in UPL with no end in sight, further imperiling the rule of law.

### Signs of hope

The Board of Law Examiners has been receptive on this issue. They are considering taking steps in the right direction. However, we faced two initial reactions that left us awestruck: (1) this topic is too complex; and (2) how are we going to pay for it with our limited resources?

To the first point, we responded by stating that the first thing they tell us in

law school is that lawyers are problem solvers. That's it. Full stop. Let's figure this out. Regarding the second, our proposal is not that different from conventional JD admissions. You hire staff with the application fees you collect. And if you want to charge a premium to LL.M. applicants, so be it.

Once we got through these hurdles, two others came up: (1) why would Minnesota make it easier for others to sit for the bar? And (2) what are other jurisdictions (foreign or domestic) doing about foreign-trained lawyers? We addressed these two issues in a report you can see here: <http://j.mp/2DsJnaw>

### Conclusion

No matter how you look at it, Minnesota would benefit by allowing foreign-trained lawyers to sit for the bar exam after completing an LL.M. program from an ABA-accredited law school. In turn, our law licenses would become more internationally recognized and validated because we would have more colleagues worldwide. We would join the ranks of more cosmopolitan jurisdictions like New York, California, or Texas.

Minnesota deserves bar admission rules more in tune with the times. Otherwise, we'll continue losing business to more welcoming states. ▲

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is licensed to practice law in Minnesota, New York, and the Republic of Honduras. He is married to his high school sweetheart, Ofelia Ponce, and they love living in Little Canada, Minnesota. The author thanks Marcos Ramírez, Esq. for co-leading with him the foreign-trained admission movement.

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**V**iewed historically, the case law in the area of harassment in general, and sexual harassment in particular, has seemed to trend from pro-employee to pro-employer. The developments in the past several years show that the pendulum has swung quite emphatically toward the employer. In particular, many courts have found reasons to dismiss sexual harassment cases on the basis that the harassment was just not bad enough—not sufficiently severe or pervasive—to be actionable in court. As a result, courts continue to dismiss cases on summary judgment because the harassment that plaintiffs endured was not sufficiently severe or pervasive to merit judicial intervention. Over the years, the courts have steadily escalated the severe or pervasive standard. And the severity or pervasiveness question is not considered to be a question of fact for a jury.

After #MeToo, the gulf between social standards and the severe or pervasive legal standard has become undeniable. Although society considers forcing an employee to look at pornography, rubbing an employee's shoulders in a sexual manner, or touching an employee's breasts to be sexual harassment, the courts continue to dismiss cases involving similar behavior. Minnesota statutes do not explicitly include the severe or pervasive standard, which has grown up through case law. Despite lobbying efforts by the employment law bar and victims' rights activists, the Minnesota Legislature has yet to address this issue. But the prevailing legal precedent may change very soon. On November 12, 2019, the Minnesota Supreme Court heard oral arguments in *Kenneh v. Homeward Bound*. In that case, the district court granted summary judgment to an employer even though the plaintiff's case included allegations of sexual talk, licking of the lips, a proposition for oral sex, and being followed by a co-worker after work. The court ruled that this behavior was not sufficiently severe or pervasive to allow the case to go to a jury. The *Kenneh* decision will be groundbreaking if the Minnesota Supreme Court decides to reverse the swing of the pendulum toward employers by reversing and remanding the case. But the Court could decide to concur with past precedent regarding the standard, leaving the issue to the Legislature to resolve. The Court's decision is expected in February 2020.

## THE LAW OF WORKPLACE SEXUAL HARASSMENT: BASICS AND BACKGROUND

Title VII of the Federal Civil Rights Act of 1964 makes it an unlawful employment practice for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>1</sup>

Although not provided for in Title VII itself, courts have articulated through case law a rough distinction between two types of sexual harassment claims. On one hand, a plaintiff bringing a “quid pro quo” harassment claim seeks to prove that he or she was offered some sort of advancement or threatened with some sort of adverse action in exchange for acquiescing to unwanted sexual advances. In the classic quid pro quo case, an employee is told that they must perform sexual favors for a supervisor in order to keep their job. On the other hand, a plain-

tiff bringing a “hostile work environment” claim seeks to prove that the general environment or climate of the workplace was so hostile and offensive that the conditions amounted to sex-based harassment.

### The standard

To prove a hostile environment claim the plaintiff must prove that (1) he or she belongs to a protected group; (2) he or she was subject to unwelcome sexual harassment; (3) the harassment was based on sex;<sup>2</sup> (4) the harassment affected a “term, condition, or privilege” of employment; and (5) the employer knew or should have known of the harassment in question and failed to take proper remedial action. *Moylan v. Maries Cnty.*, 792 F.2d 746, 749 (8th Cir. 1986) (citation omitted). *Moylan* is evaluated pre *Ellerth* and *Faragher*,<sup>3</sup> when the *prima facie* case for supervisor harassment changed; the above standard is still used for peer-on-peer or customer/vendor harassment. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2291 (1998). In *Ellerth* and *Faragher*, the United States Supreme Court ruled that employers can be “vicariously liable” for harassment by supervisors.<sup>4</sup> However, if the harassment did not result in a tangible job action—such as discharge, demotion or undesirable reassignment—the employer can raise an affirmative defense that it exercised “reasonable care” to prevent and correct the harassment, and that the employee unreasonably failed to use its complaint procedure.<sup>5</sup>

To prove the fourth factor—that the harassment affected a “term, condition, or privilege” of employment—a certain threshold must be reached. Behavior that is inappropriate, rude, and/or offensive is not always actionable under Title VII, even when it is based on sex, and the Supreme Court has cautioned that Title VII is not meant to provide a “general civility code.” *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). So just how bad does it have to be before courts will allow a claim to proceed? According to the United States Supreme Court, in order to be redressable by a court, the harassment must be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” (Emphasis added.) *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (U.S. 1986). To meet this standard, the plaintiff must prove that the harassment was both objectively and subjectively unreasonable, meaning that a reasonable person would find the conduct offensive, and that the plaintiff actually did so. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

### Subordinate harassment

Situations can arise in which subordinate employees are accused of harassing a supervisor. *Stewart v. Rise* was the first 8th Circuit case to recognize a claim of subordinate harassment of a supervisor. Stewart, an American-born African American woman, alleged that a group of her subordinates, consisting of largely male, Somali-born immigrants, created a hostile work environment. *Stewart v. Rise, Inc.*, 791 F.3d 849, 852 (8th Cir. 2015). Stewart served as supervisor of a branch office for a welfare services nonprofit entity known as Rise in the Twin Cities. She claimed several male, Somali-born subordinates created a

**Developments in sexual harassment case law in the past several years show that the pendulum has swung quite emphatically toward the employer.**

hostile work environment through sexist, racist, and nationalist comments and through physical violence and intimidation, all due to the fact that Stewart was an American-born African-American woman. They were insubordinate, screamed at her, slammed doors in her face, and said things like “African American women have no value” and “American women were disrespectful because they were not beaten enough,” among other things.

The district court granted summary judgment on the hostile-work-environment claim, finding that the alleged incidents were not sufficiently severe or pervasive, characterizing the incidents as isolated, and that employer Rise was entitled to rely on the *Ellerth/Faragher* defense. The 8th Circuit Court of Appeals reversed, rejecting the district court’s application of the *Ellerth/Faragher* defense and finding that Stewart’s annual certifications and her failure to pursue a formal written system of grievances are not determinative as a matter of law. The 8th Circuit stated that the record provides adequate support that Stewart belongs to a protected group, was subjected to unwelcome harassment based on her membership in that group, and that the employer failed to take reasonable action. The severity of the harassment and whether Rise knew or should have known of the severe harassment are closer calls, but the court felt there were enough questions of fact to reverse.

### A historical perspective

The requirement that harassment be “severe” or “pervasive” sprang from early cases. This appellation may have originated in *Henson v. Dundee*, a 1982 sexual harassment case out of Florida, which held:

For sexual harassment to state a claim under Title VII, it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether sexual harassment at the workplace is *sufficiently severe and persistent* to affect seriously the psychological well-being of employees is a question to be determined with regard to the totality of the circumstances.

*Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. Fla. 1982) (emphasis added) (citations omitted).

This passage was quoted by the United States Supreme Court just a few years later, which changed the wording, as follows:

Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as “harassment” affects a “term, condition, or privilege” of employment within the meaning of Title VII. See *Rogers v. EEOC*, *supra*, at 238 (“mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee” would not affect the conditions of employment to a sufficiently significant degree to violate Title VII); *Henson*, 682 F.2d, at 904 (quoting same). For sexual harassment to be actionable, it must be sufficiently *severe or pervasive* “to alter the conditions of [the victim’s] employment and create an abusive working environment.”

*Meritor*, 477 U.S. at 67. (emphasis added).

Even the highest courts have struggled to articulate what this standard means. In *Harris v. Forklift Sys., Inc.*, the Supreme Court affirmed *Meritor* and attempted to clarify the severe or pervasive rule which, the Court admitted, “is not, and by its nature cannot be, a mathematically precise test.” 510 U.S. 17, 22 (1993). “[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances,” the Court continued, in a unanimous decision written by Justice Sandra Day O’Connor. “These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”

In a concurrence, Justice Antonin Scalia lamented that the words “Abusive” (or ‘hostile,’ which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb ‘objectively’ or by appealing to a ‘reasonable person[’s]’ notion of what the vague word means.” Scalia voiced approval for the majority’s list of factors, but added that, “since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude.” “As a practical matter,” Justice Scalia continued, “today’s holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages.”

Nonetheless, he wrote, “I know of no alternative to the course the Court today has taken... I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts.” Therefore, Justice Scalia joined the majority opinion.

To this day, courts still struggle with interpreting this standard. Justice Scalia’s concerns in his *Harris* concurrence proved prescient, with one significant exception. Today, it is not “virtually unguided” juries that are deciding cases—instead they are being decided by judges, as a matter of law, often reaching irreconcilably disparate results.

### Duncan and Eich: Two points on a wide spectrum

In the span of just a year, the 8th Circuit Court of Appeals decided two hostile work environment sexual harassment cases that are extremely difficult to reconcile with each other. First, in *Duncan v. General Motors Corp.*, a female employee alleged several instances where a male employee engaged in “boorish” behavior she found offensive. 300 F.3d 928 (8th Cir. 2002). She claimed the male employee propositioned her during an offsite meeting at a local restaurant. She also claimed that the male employee made her work on his computer, which had a screen saver of a naked woman. The male employee unnecessarily touched her hand and kept a child’s pacifier that was shaped like a penis in his office. The male employee also asked the female employee to type a document entitled “He-Men Women Hater’s Club” that included statements such as “sperm has a right to live” and “all great chiefs of the world are men.”

Nonetheless, the 8th Circuit Court of Appeals overturned

After #MeToo, the gulf between social standards and the severe or pervasive legal standard has become undeniable.

her seven-figure jury verdict, held that the female employee failed to prove a *prima facie* case of sexual harassment, and overturned the district court's entry of judgment in favor of the female employee.<sup>6</sup> The court concluded that the female employee failed to show the alleged harassment was so severe or pervasive as to alter a term, condition, or privilege of her employment. The court explained employees have a "high" threshold to meet in order to prove an actionable harm; courts will evaluate the "frequency of the conduct, its severity and whether it is physically threatening or humiliating." The court held that the female employee failed to show that the workplace occurrences were objectively severe and extreme.

Just a year later, the 8th Circuit Court of Appeals distinguished *Duncan* in a similar case. In *Eich v. Board of Regents*, a female employee alleged continuous sexual harassment over a period of seven years. 350 F.3d 752, 755 (8th Cir. 2003). She specifically claimed that two male employees, one of whom was her supervisor, instigated the acts of harassment. She said one of the male employees brushed up against her breasts, frequently ran his fingers through her hair, rubbed her shoulders, ran his finger up her spine, told her how pretty she was, and asked her to run off with him. He also stood behind her and simulated a sexual act, grabbed her leg, and attempted to look down her blouse. She said that the other male employee made comments about her body, hair, and face, commented on her chest size, rubbed his hand up and down her legs and rubbed or pressed up against her when they talked. The female employee reported these acts numerous times throughout the seven years and had documented at least 16 such reports. She reported the conduct to the male employee's supervisor, the employer's director of human resources, and the employer's affirmative action/equal employment opportunity officer. In the last year of the seven-year period, there was some form of harassing behavior occurring on an almost daily basis.

The district court had relied on *Duncan* in its decision in favor of the employer. But the 8th Circuit Court of Appeals found that the facts alleged by the female plaintiff were sufficient to show that the harassment was severe or pervasive, as well as objectively hostile. The court of appeals distinguished *Duncan* and said that if the court is to rely on *Duncan*, it must "rely solely upon what the *Duncan* majority's opinion reflects as being the facts of the case." The facts in the *Eich* case were different because the plaintiff "experienced more than the mere touching of the hand." The plaintiff in *Eich* was "subjected to a long series of incidents of sexual harassment in her workplace which went far beyond 'gender related jokes and occasional teasing.'"

**"Boorish" behavior does not necessarily support a successful hostile work environment sexual harassment claim, even in the 9th Circuit**

Although some of the most egregious and shocking cases come from outside of the 9th Circuit, the 9th Circuit is not wholly unfamiliar with the "boorish" distinction. However, the majority of cases within the jurisdiction of the 9th Circuit do not use the term "boorish" to describe conduct which does not amount to actionable sexual harassment.<sup>7</sup> Nevertheless, the word is still used along with other characterizations such as, "horseplay," "teasing," and "flirting." As one court put it, "[t]he requirement that actionable conduct be severe or pervasive is 'crucial' in that it prevents ordinary socializing in the workplace, horseplay, simple teasing, or flirtation from becoming prohibited sexual discrimination... Title VII does not provide a

remedy for boorish behavior or bad taste." *Torres v. Borrego*, No. Civ. 04-248 \*15 (D.N.M. 2005) (citation omitted).

While the focus of this piece is primarily on the federal courts, and the 8th Circuit in particular, we also address what is severe or pervasive enough to state a claim for hostile environment sexual harassment in Washington State Court. As is true in many jurisdictions (including Minnesota), success in Washington State Court for plaintiff-employees is much higher in claims for sexual harassment than in pursuing such a claim in federal court. While the federal courts appear to be quick to dismiss a case on summary judgment, that is, Washington State Court case law suggests that they are more reluctant to award summary judgment in favor of defendant-employers.<sup>8</sup> In fact, in one case, the Washington Court of Appeals actually used evidence of conduct described as "boorish" as its basis to reverse the district court's grant of summary judgment in favor of the defendant-employer.<sup>9</sup> As such, it is important for employers to keep in mind that the safety net that federal case law has provided them for cases brought in federal court may not be there to protect them in state courts, including in Washington.

**SEVERE OR PERVASIVE: ONE STANDARD, TWO PARTS, MANY INTERPRETATIONS**

Comparing *Duncan* to *Eich*, the only thing that is clear is that results may vary wildly. But a modicum of certainty begins to emerge if one thinks of this standard—severe and/or pervasive<sup>10</sup>—as a sliding scale test containing two parts, severity and pervasiveness. The severity test looks at how offensive, threatening, or inappropriate the acts were (whether subjectively, objectively, or both). The pervasiveness test looks at how many incidents occurred compared to a given length of time. Because the two components are effectively treated as elements of a sliding scale, a strong showing on one aspect may make up for a weak showing on the other.

However, this general observation is subject to a caveat: In many cases, pervasiveness is much more important than severity. Put another way, and as demonstrated in the cases described below, a plaintiff who alleges a larger number of harassing incidents is generally more likely to survive summary judgment than one who alleges a relatively smaller number of specific instances, even if those specific acts are severe.

**Severity cases**

Here we examine cases in which a plaintiff alleged a comparatively small number of very serious incidents in bringing their sexual harassment claim. In theory, even a single incident of extremely severe conduct is enough to support a hostile environment claim. To state a claim based on a single incident (or relatively few incidents), the conduct must generally involve violence or a serious threat of violence; even then, however, few cases resolve in favor of the employee. Cases that "only" involve offensive touching are even less likely to succeed.

**Sexual assault**

An employee who is sexually assaulted in the course of their employment may be able to bring a viable sexual harassment claim. For example, in *Little v. Windermere Relocation, Inc.*, a 9th Circuit case, an employer was found liable for a hostile work environment claim based on their response, or lack thereof, to a female employee's rape by a male client. 301 F.3d 958 (9th Cir. 2002). In this case, a female employee was raped by a client whose account she managed. She reported the rape to a coworker, but the coworker told her not to tell anyone in man-

agement. However, within nine days, the female employee did report the rape to the vice-president designated in the company's harassment policy as a complaint-receiving manager. The vice-president told her that she should try to put it behind her and stop working on the client's account. The female employee reported the rape to her own immediate supervisor as well, who advised her to tell the president. The president said that he didn't want to hear about the rape, that the female employee would have to respond to his attorneys, and immediately restructured her salary in a way that resulted in an immediate pay reduction. When the female employee protested, she was terminated.

The female employee filed suit, alleging that the employer's response to the rape created a hostile work environment. The 9th Circuit Court of Appeals overturned the district court's grant of summary judgment for the employer. The 9th Circuit Court of Appeals explained that "rape is unquestionably among the most severe forms of sexual harassment" and that "being raped is, at minimum, an act of discrimination based on sex." The court also found that having out-of-office meetings with potential clients was a required part of the job and thus the rape occurred while in the course and scope of employment. Additionally, the company's "failure to take immediate and effective corrective action allowed the effects of the rape to permeate [the female employee's] work environment and alter it irrevocably."

Yet a claim based on sexual assault may fail if the assault took place in a context that a court finds not to be work-related. In *Paugh v. P.J. Snappers*, an Ohio case, a male employee raped a female job applicant. *Paugh v. P.J. Snappers*, No. 2004-T-0029, 2005 WL 407592 (Ohio App. 2/18/2005). The female applicant went to a restaurant and bar to apply for a job. She consumed alcohol with the male manager and discussed possible employment. The male manager made advances on the applicant and rubbed her shoulders. The female job applicant went to the restroom and returned to the bar and continued drinking her drink. The female applicant's next memory is waking up the following morning in the male manager's bedroom. A rape kit later revealed that more than one man's semen was found in her.

The court presumed the female job applicant was an employee for purposes of the summary judgment motion, but held that the plaintiff failed to establish that the male manager's "conduct of making advances and rubbing her shoulders at the restaurant qualifies as sufficiently severe or pervasive to affect the terms, conditions, or privileges of her employment." Drugging and raping the employee were actions "outside the scope of his employment" and therefore the court excluded them from its analysis. The court based its conclusion on the fact that the rape took place off-premises and outside of work hours; further, the court declared that there was "no evidence" that the manager's actions "were intended to facilitate or promote the business purposes of appellee." Thus, the court concluded the employer could not be held liable for either hostile

environment or quid pro quo sexual harassment.

The 2nd Circuit has taken a different approach to the issue of off-premises rape. In *Ferris v. Delta Airlines*, a male flight attendant on a layover between flights raped a female flight attendant. 277 F.3d 128 (2nd Cir. 2001) cert. denied. The district court granted summary judgment to Delta Airlines because the male flight attendant had no supervisory authority over the female flight attendant and because there was no evidence that Delta had encouraged flight attendants to visit each other's rooms. Thus, the district court held, the rape did not occur in the work environment.

The Court of Appeals for the 2nd Circuit reversed. The court of appeals found that "the circumstances that surround the lodging of an airline's flight crew during a brief layover in a foreign country in a block of hotel rooms booked and paid for by the employer are very different from those that arise when stationary employees go home at the close of their normal workday." The court explained that most flight attendants do not have family or friends, or their own residences, in places where they have brief layovers in foreign countries. Most flight attendants stay in a block of hotel rooms reserved and paid for by the airline. The airline also provides ground transportation from the airport to the hotel. Even though the airline might not directly tell its employees what to do during the layover, "the circumstances of the employment" tend to result in flight attendants socializing in each other's hotel rooms as a matter of course. Off-premises rape could form the basis of a sexual harassment claim, where the rape took place in a hotel booked by the company for employee use.

**If harassment did not result in a tangible job action—such as discharge, demotion or undesirable reassignment—the employer can raise an affirmative defense that it exercised "reasonable care" to prevent and correct the harassment.**

stay in a block of hotel rooms reserved and paid for by the airline. The airline also provides ground transportation from the airport to the hotel. Even though the airline might not directly tell its employees what to do during the layover, "the circumstances of the employment" tend to result in flight attendants socializing in each other's hotel rooms as a matter of course. Off-premises rape could form the basis of a sexual harassment claim, where the rape took place in a hotel booked by the company for employee use.

#### **Physical assault**

A claim involving physical assault may survive a motion to dismiss or summary judgment. For example, in *Brown v. City of Cleveland*, a case from the Northern District of Ohio, a male employee's threatening behavior was presented in support of a hostile environment sexual harassment claim and a retaliation claim. No. 1:03CV2600, 2005 WL 1705761 (N.D. Ohio 7/21/2005). A female employee complained that a male employee was making comments such as "I am sick of working with this f—ing bitch" and that she complained to her supervisor. The female employee also alleged that the male employee called her a "piece of sh—" and a "psycho" during a meeting, and she filed an incident report with the city, alleging workplace violence after the meeting. The female employee also claimed that the male employee stated, "[W]hy don't you wear lipstick? Why don't you wear makeup? Why don't you dress like a lady?" The city discharged the female employee after the same male employee that the plaintiff claimed was acting in a threatening manner claimed that she almost hit him with a truck. The female employee later filed suit alleging sexual harassment based on a hostile work environment theory and retaliatory discharge.

The court held that the female employee had successfully set forth a *prima facie* case of retaliation by alleging she was fired after complaining of sexual harassment. The city tried to claim

that there was no connection between the plaintiff's discharge and her complaints of sexual harassment because she complained of workplace violence in her last complaint, not sexual harassment. The court found that while the plaintiff's last complaint before her discharge was of workplace violence, she had complained about sexual harassment "at a time both near to, and intertwined with" the workplace violence complaints.

In *Griffin v. Delage Landen Fin. Servs.*, a case from the Eastern District of Pennsylvania, evidence of a physical assault was part of the plaintiff's claim of sexual harassment. No. 04 CV 5352, 2005 WL 3307535 (E.D. Pa. 12/5/2005). A female employee made a claim of hostile work environment in violation of Title VII and retaliation. Her claim stemmed from a romantic relationship she had with a coworker. The relationship ended and the male employee was later promoted. The female employee was concerned about working with the male employee and informed company officials about those concerns. She met the male employee for dinner, where he became angry after learning she contacted company officials. The female employee alleges that the male employee followed her home, verbally abused her, warned her to find another job, and physically assaulted her. The female employee claims she complained about the off-premises assault and her employer took no action. She also alleged that the male employee subsequently created a hostile work environment that the company refused to address.

The female employee wanted to admit evidence of the physical assault at trial as part of her sexual harassment and retaliation claim. She claimed that her pre-assault notice to the company of her concerns about the male employee gave them notice to prevent the threat from the male employee. The court held that the physical assault evidence was relevant, and thus admissible, but *only* for purposes of establishing a factual context for the plaintiff's meetings with company officials. The court explained that evidence of the assault would help the jury to understand the relationship between the female and male employee, the nature of the break-up, and how those events might have led to a hostile work environment or retaliation. However, the court limited testimony about the graphic aspects of the assault. The plaintiff was not allowed to give a "blow-by-blow" description of the assault. She also was not allowed to show color photographs of her bruises from the assault since the parties stipulated that she received medical treatment for her injuries. The Eastern District of Pennsylvania Court concluded that evidence of the assault could only be used to explain how the plaintiff believes her break-up with the male employee and subsequent assault led to retaliation by the employer. It was not allowed as part of the evidence supporting the sexual harassment claim.

In a case out of the 9th Circuit, *EEOC v. NEA-Alaska*, a number of female employees complained of threatening behavior by a male employee. 422 F.3d 840 (9th Cir. 2005). The female employees specifically alleged numerous episodes in which the male employee would shout in a loud and hostile manner at female employees. The female employees alleged that the shouting was frequent, profane, public, and occurred with little or no provocation. The female employees alleged that the verbally threatening behavior was accompanied by a hostile physical element as well. The female employees said that the male employee regularly came up behind them silently, stood over them, and watched for no apparent reason. The female employees also alleged that the male employee lunged at one of them and shook his fist at her. The district court granted summary judgment, finding that no reasonable jury could conclude

that the physically threatening acts could be sexual harassment because they were not "because of sex."

The 9th Circuit Court of Appeals reversed the district court's grant of summary judgment to the employer, holding that there was sufficient evidence to conclude that the alleged harassment was both because of sex and sufficiently severe to support a hostile work environment claim. The court found that physically hostile acts do not need to be overtly sexual or gender-specific in content to constitute sexual harassment. The court explained that one way of claiming sexual harassment is to compare how the alleged harasser treated members of both sexes. If the male employee sought to drive women out of the organization so that men could fill their positions, the harassment would be "because of sex." For example, if "an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men," his motive could be "because of sex" just as much as if his motive involved sexual frustration, desire, or simply a motive to exclude women from the workplace."

#### **Physical assault or threats used in conjunction with a sexual harassment claim in order to extend time limits**

Physical assault or threats can extend time limits in a sexual harassment case. For example, in a case out of Iowa, *Bunda v. Potter*, a female employee complained of sexual harassment and unwanted physical sexual contact over a period of three years. 369 F. Supp. 2d 1039 (N.D. Iowa 2005). The female employee specifically complained of her male supervisor grabbing her buttocks, rubbing up against her, and pinching her buttock. The female employee complained to supervisors at work in late 1998, early 1999 and 2000. The female employee alleged the male employee's behavior was all part of a "continuing violation" of harassment and thus her timely administrative complaint as to the 2000 incidents encompasses all of the incidents of the "continuing violation" including the earlier incidents.<sup>11</sup>

The court found that a lengthy hiatus between the incidents of harassment does not prevent a successful sexual harassment claim if the harassing acts are part of the same unlawful employment practice. The Court specifically found, in this instance, the harasser was the same male employee and the harassment was generally of the same "nature" even though only some of the harassment involved physical contact. The court added that it could not "imagine that continuous sexual harassment by the same harasser could be construed *not to be* part of the same unlawful practice, simply because the harasser might be wise enough to change the nature of his harassment periodically from physical to verbal harassment." The court denied the defendant's summary judgment motion on the plaintiff's claims of hostile environment sexual harassment and retaliation.

#### **Physical confinement & limited options for avoidance**

A case involving relatively few incidents may be more likely to succeed where the facts involve physical confinement or a situation in which the plaintiff cannot avoid the harassing conduct. For example, in *Nichols v. Tri-Nat'l Logistics, Inc.*, the female plaintiff was a long-haul truck driver who worked with a driving partner. 809 F.3d 981, 984 (8th Cir. 2016). On their first ride together, the male partner asked if she was interested in a romantic relationship, and then exposed himself to her while she was driving. The plaintiff immediately reported the incident. Nonetheless, the defendant company told her to "endure it" at least until another driver could be found. Therefore, the plaintiff was forced to spend the next several days with the

harasser, who continued to proposition her, leaned over her unnecessarily, and exposed himself to her again. The plaintiff continued to complain to the company, telling them his actions made her feel “abused, scared and degraded.”

After she was fired, purportedly for performance issues, the plaintiff sued, but the trial court granted summary judgment in favor of the company. The 8th Circuit Court of Appeals reversed, finding that genuine issues of material fact existed as to whether the plaintiff found the driver’s actions subjectively offensive. In particular, the 8th Circuit focused on the plaintiff’s allegations that she had immediately reported the exposure incident and remained in the truck only because she had no other choice while driving long-distance.

However, in an Iowa case, *Pirie v. The Conley Group, Inc.*, the plaintiff’s claim failed despite an allegation that she was confined in a room by a male coworker who exposed himself to her. No. 4:02-CV-40578, 2004 WL 180259 (S.D. Iowa 1/7/2004). In that case, the plaintiff female employee complained of one incident where she was alone with a male coworker during a shift together as security officers. The female employee said that the male employee engaged in inappropriate sexual banter, discussed his sex life, and asked about her intimate relations. The female plaintiff said that this inappropriate banter lasted for one hour. During this time, the male employee’s banter focused on the size of his penis and he repeatedly offered to display it for her. The female plaintiff declined many times, but the male employee turned out the lights and unzipped his pants and displayed his penis to her.

The district court found that this incident was not severe or pervasive enough to alter the terms or conditions of the plaintiff’s employment. The court explained that there is no bright-line test to determine whether an environment is sufficiently hostile, but said some of the factors that ought to be considered are the frequency and severity of the conduct, whether it was physically threatening, and whether it unreasonably interfered with an employee’s work performance. The court also said, “The standards for judging hostility of the work environment are demanding,” in order to make sure Title VII does not become a “general civility code.”

The court found that the behavior of the male employee went beyond sexual banter and innuendos. However, in order for behavior to be sexual harassment, there usually needs to be more than one incident. A single incident can be sufficient for a sexual harassment claim, but generally it must include either violence or the serious threat of violence. The court concluded the incident was not sexual harassment, as it lasted approximately one hour and “consisted of inappropriate sexual banter, and, ultimately, in the three-minute penis display.” The court noted that the male employee did not demand the female employee perform any sexual act or any sexual favors.

Contrarily, in *Jenkins v. University of Minnesota*, a female graduate student was subject to sexual harassment by her male colleague<sup>12</sup> (a scientist from the U.S. Fish and Wildlife Service), who was working with the plaintiff on a research project as effectively her mentor and supervisor. 838 F.3d 938 (8th Cir. 10/3/2016). In June and July 2011, Jenkins and her male colleague, Swem, embarked on two 17-day research trips to the isolated Colville River, a remote field location in arctic Alaska

almost completely uninhabited by humans. Almost immediately, Swem began telling sexually explicit jokes, asking Jenkins personal questions about her dating life, and telling stories of prior sexual encounters and relationships with previous graduate students. He took pictures of her buttocks, bathed in the river, and encouraged her to do the same. Additionally, during a break in the trip while in Fairbanks, Swem invited Jenkins to lunch under the pretense of discussing logistics of returning to the Colville River, even though it quickly became apparent that the trip was already planned. He complimented her physical appearance and told her he was interested in a romantic relationship with her. He joked that they should bring only one tent for the next trip and that she was welcome in his tent anytime. He also told her that she could just sit in his lap and kiss him if she ever wanted a relationship with him. The court found that the behavior was “severe or pervasive enough to create an objectively hostile or abusive work environment” when the totality of the circumstances are taken into consideration. The court explained:

The geographic isolation of the conduct is of paramount importance. Actions that might not rise to the level of severe or pervasive in an office setting take on a different character when the two people involved are stuck together for twenty-four hours a day with no other people—or means of escape—for miles around.

Nevertheless, in this rare instance (at least for federal courts in the 8th Circuit) where the court ruled in favor of the plaintiff and asserted that her male colleague’s behavior was severe or pervasive enough to be considered sexual harassment, Jenkins was only awarded \$1 in damages by the jury.

### Offensive touching

Likewise, cases that “only” involve one or a few instances of offensive touching are not likely to succeed. For example, the plaintiff in *Jones v. U.S. Gypsum* was a male supervisor who worked at a plant that manufactured drywall. 2002 WL 32125501 (Iowa Workers Comp Com’n 5/16/2002). In his sex discrimination complaint, the plaintiff alleged that a female coworker struck him in the groin on a single occasion. The defendant employer brought a motion to dismiss for failure to state a claim on the basis that the plaintiff’s allegation was neither sufficiently severe nor pervasive to amount to actionable sexual harassment. The district court disagreed, reasoning that the allegations in the complaint amounted to sexual assault—which, the court noted, had been found to be actionable on the basis of a single incident by other courts.

However, the same court dismissed the case on a motion for summary judgment. *Jones v. U.S. Gypsum*, 126 F. Supp. 2d 1172 (N.D. Iowa 2000). Discovery had revealed more of the context surrounding the incident; after the male plaintiff was heard to complain that the company was trying to get rid of older employees, the female coworker, with whom he had previously been on congenial terms, told him that she “would show him what she would do with a fifty year-old man” and then grabbed his left testicle and penis. Immediately after the plaintiff complained about the incident, the company investi-

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gated his allegation, disciplined the female employee by putting her on a four-day unpaid leave, and transferred her to another shift where she would not work with the plaintiff. Because the employer's response to the plaintiff's complaint was reasonable, the district court granted summary judgment, leaving unanswered the question of whether or not the bad actor's behavior sufficed for a hostile work environment claim.

Similarly, the plaintiff in *Musolf v. J.C. Penney Co.* saw her hostile work environment claim dismissed at summary judgment where she alleged only three incidents of unwanted hugs from a coworker. 2013 WL 5596421 (D. Minn. 10/11/2013), *aff'd*, 773 F.3d 916 (8th Cir. 2014). The plaintiff in that case was a "loss prevention" manager at a retail store. After a series of upsetting confrontations with customers, a coworker attempted to comfort the plaintiff by touching her shoulder, rubbing her back, and giving her a hug. The plaintiff informed a superior that she found the coworker's actions offensive and he was subsequently disciplined. Granting summary judgment to the employer, the district court found that the three incidents were not actionable, in part because they occurred "in connection with stressful events and in the absence of any overt sexual or vulgar undertones."

#### Verbal harassment

Some cases only involve verbal harassment. In *LaMont v. Ind. Sch. Dist. #728*, a female custodian sued the school district claiming that she had been subjected to a hostile work environment based on sex. 814 N.W.2d 14 (Minn. 2012). The Minnesota Court of Appeals affirmed the district court, holding that the Minnesota Human Rights Act (MHRA) does not protect individuals from a hostile work environment based on sex unless the conduct falls within the definition of "sexual harassment" in the MHRA. The Minnesota Supreme Court concluded that a cause of action for hostile work environment based on sex is actionable under the MHRA, but affirmed the grant of summary judgment to the employer because LaMont's allegations were insufficient to state a claim of hostile work environment.

The head custodian, a man named Miner, told a male employee that he did not want any women on his crew. Miner told LaMont, "I have no intention of ever asking you anything," and described a coworker's wife as "not bad," stating that, "[women] have their place. You've got to keep them in their place," and said that the only place for women is in the "kitchen and bedroom." On one occasion, LaMont warned Miner not to "screw up" his back while lifting a heavy object, in response, Miner stated, "The only screwing I do is with my wife." Miner also said, "There is a time and a place for women and Elk River High School is not the time or the place." Additionally, Miner treated female custodians differently in regard to how and when they could take their breaks and how female custodians could communicate (not allowing them to speak to the men or each other). The district court concluded that the conduct was not sufficiently severe or pervasive to support LaMont's claim; the Minnesota Court of Appeals and Supreme Court agreed, concluding that Miner's statements and conduct were not sufficiently hostile or abusive.

In *Rasmussen v. Two Harbors Fish Co.*, however, there was a different result for female employees alleging mostly verbal harassment. 832 N.W.2d 790, 791 (Minn. 2013). Rasmussen, Moyer, and Reinhold alleged that Two Harbors Fish Company and BWZ Enterprises violated the MHRA based on sexual harassment perpetrated by Zapolski, the sole owner of both entities. Zapolski asked Rasmussen about her sexual preferences, told her about his sexual preferences and dreams, called her pet names, used very explicit language in the workplace, told sexual stories at work, made sexual comments about female customers, made a joke about his penis size, showed her pornographic pictures (including comparing the pictures to Rasmussen), and asked her to watch a pornographic DVD. Zapolski also touched Rasmussen on the posterior on at least two occasions. Moyer and Reinhold were subjected to similar verbal harassment, and Moyer was touched at least once when Zapolski grabbed her by the waist.

The district court dismissed the employees' claims, finding the conduct did not rise to a sufficiently severe or pervasive level to be actionable under the MHRA. The employees appealed and the Minnesota Court of Appeals reversed, concluding that the district court erred in its finding. The Minnesota Court of Appeals ruled in favor of the employees and directed the district court on remand to enter judgment in favor of each of the employees and address the question of damages. The employer appealed the Minnesota Court of Appeals' decision on the merits to the Minnesota Supreme Court. The employees cross-appealed, challenging a ruling that Zapolski is not liable as an aider and abettor under the

MHRA.<sup>13</sup> The Minnesota Supreme Court agreed that Zapolski is not individually liable, but determined that the district court erred in (1) its reliance on the fact that Zapolski's inappropriate behavior was also directed at men, and (2) its reliance on the fact that the employees did not suffer adverse employment actions. The case was remanded for further proceedings.

#### "Pervasiveness" cases

Next, we will examine cases where courts seem to have focused more on the number or frequency of events than their severity in examining whether the claimed harassment is actionable.

#### How many times to be "pervasive"?

As an initial matter, how many times must an employee endure harassing conduct before it becomes sufficiently "pervasive" to be actionable? Again, courts have stayed away from bright-line rules and results are all over the map.

As described above, in *Duncan*, 10 incidents of lewd behavior over a three-year period were not enough. *Duncan*, 300 F.3d at 933. In *LeGrand v. Arch*, the 8th Circuit Court of Appeals held that three incidents did not meet the threshold, even though they were arguably more severe than the conduct alleged in *Duncan*. 394 F.3d 1098 (8th Cir. 2005). In *LeGrand*, the male plaintiff alleged that a board member of the organiza-

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tion he worked for (who was also a priest) had harassed him on three separate occasions when he (1) asked the plaintiff to watch pornographic movies and “jerk off” with him; (2) told the plaintiff that he would move up in the organization if he performed sex acts on him, then grabbed the plaintiff’s buttocks, reached for his genitals and kissed him on the mouth; and (3) grabbed the plaintiff’s thigh. Nonetheless, citing *Duncan*, the court held that the severe or pervasive standard had not been met because the conduct amounted to “three isolated incidents... over a nine-month period.” The court also held that none of the incidents were “physically violent or overtly threatening.” Therefore, summary judgment in favor of the employer was upheld.

On the other end of the spectrum, in the South Dakota case *Kopman v. City of Centerville*, an employee who endured two to three sexually inappropriate comments every week for 14 months did meet the threshold. 871 F. Supp. 2d 875, Fn. 5 (D.S.D. 2012).

But the manner in which a court chooses to conceptualize the number of incidents can be decisive. In *Anderson v. Family Dollar Stores of Ark., Inc.*, the plaintiff alleged that over the course of a five-week training period, her supervisor would rub her shoulders, back, or hands; cupped her chin in his hand; tried to flirt with her; and on one occasion told her, “I can make or break you.” 579 F.3d 858, 860 (8th Cir. 2009). After the training period was over, he continued to harass her; when she called him to discuss a workplace issue the supervisor told her she ought to be with him where he was, in a Florida motel room, “in bed with me with a Mai Tai and kicking up.” During another work-related call he told her, “I’ll deal with it, baby doll,” and on another occasion referred to her as “honey.” Finally, when the employee complained to him about a workplace injury, the supervisor “grabbed her arm, pulled her back to the storeroom, pushed her once, and in a mean tone asked, ‘Are you going to work with me? Are you going to be nice? Are you going to fit into my group?... [N]ow you’re telling me your back is hurt?... [Y]ou’re just nothing but trouble... You’re just not going to be one of my girls, are you?’” and then fired her.

Nonetheless, the 8th Circuit Court of Appeals held that the supervisor’s conduct, while “ungentlemanly,” was not severe or pervasive enough to survive summary judgment. In reaching this decision, the court summarized the plaintiff’s allegations in a way that arguably downplayed both the frequency of the harassment as well as its severity, as follows:

[The supervisor’s] conduct of rubbing Anderson’s shoulders or back at times during her training session, calling [the plaintiff] “baby doll” during a telephone conversation (J.A. at 217), accusing her of not wanting to be “one of my girls” (*id.* at 234), his one-time, long-distance suggestion that she should be in bed with him and a Mai Tai in Florida, and the insinuation that she could go farther in the company if she got along with him, simply were not severe, pervasive or demeaning enough to have altered a term, condition, or privilege of her employment.

Similarly, in *McMiller v. Metro*, an employee who “only” alleged three incidents saw her hostile environment claim dismissed on summary judgment even though those three incidents involved unwelcome kissing, confinement, and assault by a supervisor. 738 F.3d 185 (8th Cir. 2013). In the first incident, the plaintiff’s supervisor put his arm around her shoulders and kissed her; the plaintiff immediately told him his conduct

was offensive. Second, a month later, the supervisor entered the plaintiff’s office and again tried to put his arm around her. Third, a few months later, the supervisor called the plaintiff into his office, then locked the door behind her. The supervisor then ordered her to come to him and remove an ingrown hair from his chin; the plaintiff refused. The supervisor then became irate and told her, “You know I can terminate you.” The following then transpired:

[The plaintiff] became upset and moved toward the office door. As [she] touched the doorknob, [the supervisor] placed his hand on her right wrist, removed her hand from the door, turned her toward him, put his arms on her shoulders and neck, and kissed her on the side of her face and forehead. [The plaintiff] attempted to remove [the supervisor’s] arms, but found that [he] had placed her “in a locked position.” [The supervisor] told [the plaintiff] that he was “not going to let anything happen to you while you are on this job.” [The plaintiff] replied that she was “not worried” because she felt she was learning and following instructions. The encounter ended.

Nonetheless, because the plaintiff had “only” alleged three incidents, the 8th Circuit Court of Appeals held that her hostile work environment claim<sup>14</sup> failed the “severe or pervasive” test.

#### Counting to zero: what counts as an “incident” and does it matter?

As demonstrated in several of the cases above, courts may downplay an employee’s claim by contextualizing allegations that are described as happening in a particular time and place as mere isolated incidents rather than examples of larger patterns of conduct. Arguably, this is precisely what the 8th Circuit Court of Appeals warned courts not to do in *Hathaway v. Runyon*, 132 F.3d 1214, 1222 (8th Cir. 1997). In that case, the female plaintiff alleged that a male coworker struck her buttocks on two occasions. After the second incident he never touched her again, but instead switched to snickering at her, and making suggestive noises when in her presence. Another coworker joined in with the verbal harassment, which occurred off and on over a period of eight months. A jury awarded the plaintiff \$75,000 in compensatory damages, but the trial court threw the verdict out on a motion for judgment as a matter of law. The trial court reasoned that only the two acts of unwanted conduct amounted to harassment based on sex—but that, even assuming that the verbal harassment was part of the same course of conduct, the harassment was not objectively offensive.

The 8th Circuit reversed, noting that while the jury could have reasonably concluded the verbal harassment was not related to the unwanted contact, its verdict in the plaintiff’s favor was adequately supported. Further, the court reasoned that “A work environment is shaped by the accumulation of abusive conduct, and the resulting harm cannot be measured by carving it into a series of discrete incidents.” “Although the District Court correctly stated that the inference had to be drawn that the pattern of conduct presented in this case was all related,” the court continued, “it did not proceed to review the sufficiency of the evidence in that light.” Therefore, reversal was warranted because these questions had been properly considered by the jury.

The reasoning used in *Hathaway* has been applied infrequently. For example, in *Houck v. ESA, Inc.*, the plaintiff al-

leged that her supervisor sent her two sexually inappropriate text messages and a pornographic email. 2014 BL 163808, \*1 (D.S.D. 6/12/2014). He stopped once she asked him to, but he continued to make sexually suggestive remarks in her presence such as “Mmm, nice breasts” as well as sexual comments about his girlfriend, who also worked for the company. The court denied summary judgment on her hostile work environment claim, even though it was undisputed that the harasser had only sent her three sexual images and even though the record was “unclear” as to how frequently he made sexually charged remarks. The trial court ruled that the ambiguity created a question of fact that had to be decided by a jury.

### **The time elapsed between incidents and the plaintiff's reaction may affect the analysis.**

In a case out of Alabama, *Simmons v. Mobile Infirmary Medical Center*, a male employee touched a female employee's breasts four to five times, put his hands on her hips and pressed her body against his once, and pulled his chair up next to hers and touched her leg with his leg. 391 F. Supp. 2d 1124, 1128 (S.D. Ala. 2005). A federal district court in Alabama found that the conduct alleged was not objectively severe or pervasive enough to alter the terms or conditions of the plaintiff's employment, in part because the incidents that the plaintiff complained about occurred over five years of working with the male employee. Additionally, the court noted that the plaintiff failed to complain or protest the alleged harassment when it was occurring. The court reasoned that since she did not complain or protest at the time of the harassment, it suggested she did not perceive the conduct as offensive at the time.

In the 6th Circuit case *Clark v. UPS, Inc.*, two female plaintiffs complained about the sexually harassing behavior of a supervisor at work. 400 F.3d 341 (6th Cir. 2005). The first female employee, Knoop, alleged that the male supervisor told sexual jokes in front of her, twice placed his vibrating pager on her upper thigh, and asked what she was wearing under her overalls. The second female employee, Clark, claimed that the male supervisor asked if she wanted chips and then placed the bag in front of his crotch, told her she did a good job in his dream, showed her an email depicting two cartoon characters in a sexual act, and placed his vibrating pager on her waist/thigh as he passed her in the hall.

On review of the grant of the employer's motion for summary judgment, the 6th Circuit Court of Appeals found that Knoop's allegations were isolated instances and not enough to amount to an “ongoing” situation and the employer was entitled to summary judgment. But the court held that the employer was not entitled to summary judgment with respect to the second plaintiff because she presented more of an “ongoing pattern of unwanted conduct and attention” by the male supervisor. The court specifically noted that the second plaintiff alleged 17 incidents of harassment in total and that it was a “closer case” with respect to her claim. The court overturned the district court's grant of summary judgment for the employer with respect to only the second plaintiff's claim.

### **Severity and pervasiveness may be weighed against each other.**

In the Illinois case *Lara v. Diamond Detective Agency*, a male employee made comments such as “look at the tits on her” and told a female employee that her “tits looked nice in that sweater.” *Lara v. Diamond Detective Agency*, No. 04 C 4822, 2006 WL 87592, \*1 (N.D. Ill. 1/9/2006). The male employee attempted to peer down the same female employee's shirt to see her breasts, asked her out on a date, and made comments about how she smelled on a daily basis. The court found that the female employee had not alleged any behavior that rose to the level of an objectively hostile work environment. The court said that in order for a plaintiff to succeed on a hostile work environment claim the plaintiff had to show that the workplace is “hellish.” The Court then held that no reasonable jury could find that the behavior of the male employee was objectively hostile “such that it rose to the level of being hostile or offensive, let alone being ‘hellish.’”

The court specifically analyzed the three incidents alleged by the plaintiff, finding that the male employee's attempt to look down the female employee's shirt was no worse than a poke to the buttocks or unwanted touches or attempted kisses—conduct that is not actionable in the 7th Circuit. The male employee's comments about another female's breasts were considered a second-hand comment because it was not directed at the plaintiff; rather, it was merely said in the plaintiff's presence.<sup>15</sup> Finally, the male employee's daily comments about how the plaintiff smelled might have been frequent, but the court found that it was not severe, physically threatening, did not interfere with the plaintiff's work performance, and was not of a sexual nature.

By contrast, in *Reeves v. C.H. Robinson Worldwide, Inc.*, the 11th Circuit Court of Appeals held that a plaintiff *can* bring a claim for hostile work environment based on “sex specific” language even when the language is not directed at the plaintiff. No. 07-10270, 2008 WL 184882 (11th Cir. 4/28/2008). In *Reeves*, the plaintiff, a transportation sales representative, brought a sexual harassment claim based on a hostile work environment against her employer, C.H. Robinson Worldwide. The plaintiff alleged that throughout the course of her employment she was subjected to a sexually derogatory environment. Specifically, she alleged that her coworkers used words like “bitch,” “cunt,” and “whore,” albeit in reference to other women, on a daily basis. The district court entered summary judgment in favor of the defendant-employer on the grounds that, because the allegations were not directed at plaintiff, the harassment was not “based on” the plaintiff's sex.

In reversing the district court, the 11th Circuit Court of Appeals reasoned that “sex specific” language can be considered to be “based on” sex so as to support a claim for sex harassment hostile work environment even when the language does not target the plaintiff. In its reasoning, the court stated that the sex specific words such as “bitch,” “whore,” and “cunt,” may be more degrading to women than men. In addition to holding that words not directed at the plaintiff herself can support a sex

**A plaintiff who alleges a larger number of harassing incidents is generally more likely to survive summary judgment than one who alleges a relatively smaller number of specific instances, even if those specific acts are severe.**

harassment hostile work environment claim, the court further held that although such terms may not be sufficiently “severe,” the conduct may be pervasive, or frequent, enough to have unreasonably interfered with her job performance.

### **The rub: A very high standard**

#### **The 8th Circuit’s extremely high bar**

In February 2018, United States District Judge Patrick J. Schiltz issued his opinion in a case in which three women alleged that they experienced a hostile work environment, among other claims, on account of their sex and sexual orientation while employed as coaches at the University of Minnesota Duluth (UMD). *Miller v. Bd. of Regents of the Univ. of Minn.*, No. 15-CV-3740 (PJS/LIB), 2018 WL 659851 (D. Minn. 2/1/2018). Schiltz’ opinion is short on factual detail:

The Court will not attempt to summarize the facts. As noted, the parties’ briefs are voluminous, and they describe dozens of emails, phone calls, conversations, meetings, actions, and decisions. The parties have already waited a long time for UMD’s motions to be decided, and a detailed recitation of the facts would serve little purpose. The acts are described in the briefs and are largely undisputed. The Court will assume familiarity with those facts and will mention particular facts only as necessary to explain the basis of its rulings.

The Court held that plaintiffs Miller, Banford, and Wiles did not have sufficient evidence to avoid summary judgment on their claims of hostile work environment because they could not meet the “high threshold” of the 8th Circuit.<sup>16</sup> They could not meet the requirement that the conduct was so severe or pervasive as to create an objectively hostile work environment. Summary judgment was granted in favor of UMD on all three plaintiffs’ claims except for Miller’s claim that UMD discriminated against her on the basis of sex and retaliated against her for raising Title IX complaints when UMD decided not to renew her contract.<sup>17</sup>

In support of Miller’s hostile work environment claim, she stated that she was excluded from a strategic planning committee by Athletics Director Josh Berlo, yet it was undisputed that several women were asked to join the committee, including Banford. The court determined that while Miller’s exclusion from the committee may be evidence that Berlo was hostile to Miller, it is not evidence that Berlo was hostile to her on account of her sex. Miller also complained generally that she was treated coldly or completely ignored by Berlo, and cited various disputes with Berlo and others, including the removal of an article about her from UMD’s website. The court held that the evidence in the record does not enable Miller to clear the high threshold of proving that she experienced misconduct that was so severe or pervasive that it affected a term, condition, or privilege of her employment. The court also noted that there is no evidence that the various “slights” suffered by Miller interfered with her ability to perform her job, considering that Miller wanted to remain at UMD and contends she was performing admirably at the time her contract was not renewed.

The court referred to Banford’s complaints regarding an alleged hostile work environment as bordering on “petty.” Banford complained about fights over budgets, equipment, field usage, the location of her office, and how to address certain issues involving certain student athletes. The most serious con-

duct alleged by Banford is a statement Bob Nygaard, assistant athletics director for communications, made to Kelly Wheeler, the hockey team’s Sports Information Director. Nygaard told Wheeler that he would have punched Banford in the face if he had seen her after certain media reports. The court held that this isolated threat made outside of Banford’s presence “falls far short” of the bad behavior experienced by the plaintiffs in prior cases who had their hostile-environment claims dismissed and granted UMD’s motion for summary judgment on her hostile work environment claim.

Wiles, in support of her claim for hostile work environment, stated that disputes over her budget, exclusion from meetings and committees, the imposition of charges for wear and tear on her UMD-leased car, being “treated coldly by Berlo,” and Berlo’s declining of Wiles’s invitation to a coming-out day luncheon were hostile actions. District Court Judge Schiltz noted that Berlo gave Wiles an extremely positive performance review in 2014 and that this was difficult to square with her claim. The court held that the conduct she cited fell short of the type of conduct needed to support a hostile-environment.

#### **Minnesota state law cases are invaded by the 8th Circuit’s standard. All states should consider whether their standards are also invaded by federal jurisprudence.**

In December 2017, Judge Mel I. Dickstein surmised that “[o]ur courts need to revisit the issue of what facts constitute those ‘sufficiently severe or pervasive [acts] to alter the conditions of the victim’s employment and create an abusive working environment.’ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).” *Kenneh v. Homeward Bound, Inc.*, No. 27-CV-17-391, at 8 (Dist. Ct. Minn. 12/5/2017). A woman named Asata Kenneh was employed as a program resource coordinator at defendant’s nonprofit organization, which operates homes for the disabled. Kenneh alleged that a maintenance worker employed by defendant, Mr. Johnson, committed the following acts which created a hostile work environment:

1. Johnson offered to cut Kenneh’s hair at his or her apartment;
2. While fixing a stuck drawer in Kenneh’s desk, Johnson told her to remain seated because he likes “beautiful women and beautiful legs”;
3. Johnson accompanied Kenneh to a vending machine, where he told her that he would “eat her” because he likes to “eat women” (implicitly proposing oral sex);
4. Johnson pulled up next to Kenneh at a gas station and asked what she did in her spare time and where she was headed; and
5. Johnson repeatedly referred to plaintiff as “beautiful” or “sexy.”

Kenneh requested a transfer to a flex position to avoid further interactions with Johnson. Kenneh maintains that she was then terminated, and defendant maintains that it accepted plaintiff’s resignation. Defendant moved the court for summary judgment, asserting that plaintiff’s allegations, even if true, do not meet the legal standards for sexual harassment and reprisal under the Minnesota Human Rights Act (MHRA).

The district court decided that Kenneh’s allegations do not constitute an objectively hostile work environment because the facts taken in the light most favorable to the

plaintiff were neither so pervasive nor so egregious as to alter the terms of her employment. Kenneh's facts do not satisfy the legal requisite to an action for a violation of the MHRA based on sexual harassment. Judge Dickstein wrote, "[T]he facts in the present case, however obnoxious and unacceptable, do not expose the employer to liability under the high bar set by current case law... until our courts articulate a different standard under which workplace conduct may be evaluated, the conduct alleged in the present case, however objectionable, does not constitute pervasive, hostile conduct that changes the terms of employment and expose an employer to liability under the Minnesota Human Rights Act."

Kenneh appealed the district court's decision, arguing that the court erred by applying the incorrect legal standard and failing to make inferences in her favor, and that the court should abandon the "severe or pervasive" standard for hostile-work environment claims. *Kenneh v. Homeward Bound, Inc.*, No. A18-0174, 2019 WL 178153 (1/14/2019). The Minnesota Court of Appeals disagreed with Kenneh, affirming the district court's decision. The appellate court noted that in order to establish that the harassment affected a term, condition, or privilege of employment, Kenneh must show that the harassment was "so severe or pervasive" as to alter the conditions of employment and create a hostile work environment. *Goins v. W. Grp.*, 635 N.W.2d 717, 725 (Minn. 2001). The court quoted the Minnesota Supreme Court in *Goins*:

The objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so. In ascertaining whether an environment is sufficiently hostile or abusive, and one that the victim did in fact perceive to be so. In ascertaining whether an environment is sufficiently hostile or abusive to support a claim, courts look at the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. (Quotations and citations omitted).

Kenneh argued on appeal that the district court failed to consider the totality of the circumstances and impermissibly relied on comparing the alleged conduct to prior cases.

The court noted that it addressed what conduct constitutes actionable harm in *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 203 (Minn. App. 2010). In *Geist-Miller*, an employee's allegations primarily involved "inappropriate sexual banter and [the] unsuccessful pursuit of a relationship," which the court does not consider to be severe or pervasive harassment. The employer's attempt to kiss Geist-Miller and instances in which he touched her hair and leg were "more severe than the inappropriate remarks, but still did not amount to actionable harm." An appellant's assertions that conduct makes her uncomfortable, embarrassed, and upset are insufficient to establish that

harassment was severe or pervasive.

The court held that Kenneh's allegations against Johnson related primarily to inappropriate remarks and gestures, which is not actionable sexual harassment. In regard to Kenneh's argument that the court should abandon the severe or pervasive standard for sexual harassment, the court acknowledges it is correct that the statutory definition of "sexual harassment" does not include the "severe or pervasive" standard, but wrote that "this court is bound by supreme court precedent and does not have the authority to abandon a standard established by the supreme court. See *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but does not fall to this court."), *review denied* (Minn. 12/18/1987). Accordingly we decline to abandon the severe-or-pervasive standard."

### **Claims against state government bodies**

A February 2, 2019 Associated Press article reported that since 2017, at least 90 state lawmakers have been accused of sexual misconduct and at least 24 have resigned, been removed from office, or faced discipline or other repercussions because of the allegations of sexual misconduct against them.<sup>18</sup> When

considering how to draft sexual harassment policies or how to strengthen existing sexual harassment policies for statehouses, and when drafting new legislation, it is important to consider how the courts apply the severe or pervasive standard.

On June 18, 2019, an Indiana state representative, Mara Candelaria Reardon, filed a civil lawsuit in federal court against Indiana Attorney General Curtis Hill Jr. and the State of Indiana along with three other female General Assembly employees.<sup>19</sup>

The women claim Hill touched their backs and/or buttocks without consent during an event last year at an Indianapolis bar. The

women allege they were subject to sexual harassment, gender discrimination and retaliation by the state and Hill, as well as battery, sexual battery, defamation and invasion of privacy by the attorney general alone.

Based on the body of precedent discussed in this article, depending on the frequency and severity of the alleged behavior, this case may or may not survive summary judgment. (The Indiana Supreme Court's Disciplinary Commission has recommended that Attorney General Hill's law license be suspended for two years, although the Indiana Supreme Court is the final arbiter of that pending issue.) If these plaintiffs were subjected to Hill's bad behavior only one time at that event, their case is not likely to survive summary judgment based on those facts. If it does, and the plaintiffs prevail, the taxpayers of Indiana could be indirectly responsible for monetary damages. The plaintiffs moved forward with a civil lawsuit, hoping that it will deter any future conduct of a similar nature.

In February 2019, two legislative interns from Oregon filed a lawsuit alleging that former state Sen. Jeff Kruse "routinely sexually harassed women at the Capitol and created a sexually hostile work environment for many years, beginning well

**In the span of just a year,  
the 8th Circuit Court of  
Appeals decided two hostile  
work environment sexual  
harassment cases that  
are extremely difficult to  
reconcile with each other.**

before the time period when he sexually harassed plaintiffs... Not a single member of legislative leadership, human resource management, or a single senator can likely claim ignorance to that history.”<sup>20</sup> As such, the plaintiffs named Senate President Peter Courtney, Legislative Counsel Dexter Johnson, Legislative HR Director Lore Christopher, and the state of Oregon in addition to Sen. Kruse.

Both interns were law students, and their combined allegations included that: Kruse allegedly called one intern “little girl,” “[his] baby lawyer” and “sexy;” he told her that her husband was lucky and asked about her sex life; he placed his hands on her thighs and his head on top of hers while she sat at her desk; he subjected her to sexual banter, frequent hugs, and lingering touches; Kruse hugged and squeezed the other intern so tight that she could not move; he put his hand on her shoulders, talked to her nose-to-nose, subjected her to sexual banter, massaged her shoulders, and shared private inappropriate details about her. In the #MeToo era, this type of behavior has been declared inappropriate by society and as a matter of public policy. But is this behavior severe or pervasive enough to constitute a hostile work environment in the courts? Would the courts consider it to be “hellish”? Based on the case law discussed herein, perhaps not.

Fortunately for the plaintiffs, however, the Oregon Bureau of Labor and Industries (BOLI) conducted an investigation into their allegations as well as the allegations of six other women.<sup>21</sup> BOLI found the harassment was severe and pervasive due to the numerous reports from 2013 – 2015, that the leadership knew or should have known, and leadership accepted the culture and failed to take meaningful and appropriate corrective action. The Oregon Legislature (read: the taxpayers of Oregon) agreed to pay \$1.32 million to the eight women who were sexually harassed while they worked at the Legislature. Additionally, the Legislature is required to establish an Equity Office to receive and investigate complaints; in exchange, the two former interns will drop their lawsuit.

In a July 2017 case out of Iowa, Kirsten Anderson was awarded \$2.2 million by a jury after filing a complaint alleging a toxic work environment caused by sexual harassment.<sup>22</sup> The Senate Republican Caucus terminated Anderson the same day she submitted a memo accusing her male supervisors of ignoring a “boys’ club” culture that fostered rampant sexual harassment and expressing concerns about the work environment. The jury determined that the Senate Republican Caucus and the state violated workplace harassment, discrimination, and retaliation laws after hearing testimony about a “locker room” environment where women endured taunts and quips about their sex lives, Anderson was shown a nude picture of Kim Kardashian, summoned for a “hot chick report” when an attractive woman walked by outside, and use of the “c-word” when talking about women. The jury award was subsequently reduced to \$1.75 million as part of a settlement: \$1.045 million went to Anderson, and \$705,000 went to her lawyer’s law firm. Once again, Iowa taxpayers were on the hook for the payment. Additionally, the Iowa Senate will now have mandatory training sessions to address sexual harassment and hostile work environment.

In an effort to relieve the burden of the cost of these cases on taxpayers, the U.S. Congress decided in December 2018 to make members pay out of pocket for some settlements and court judgments related to sexual harassment.<sup>23</sup> The new rule, in part, shifts liability from the taxpayer to the member while maintaining a cap of \$300,000 on liability for that member when a court assesses damages, but no cap when cases end in settlements. The Treasury Department will still make the initial payments to victims and members are required to repay the government. Additionally, all settlements and awards will be made public at the time of the settlement, and an annual review will be released to the public.

Also in 2018, the State of New York updated its sexual harassment law. The law went into effect October 9, 2018, and applies to all employers regardless of how many employees are employed, and to all employees whether they are paid or unpaid as well as non-employees, and the law applies regardless of immigration status.<sup>24</sup> New York’s new sex harassment law includes, in part, the following: prohibition of nondisclosure provisions in any employment or settlement agreements that

in any way relate to sexual harassment; prohibition of the use of mandatory arbitration provisions related to claims of sexual harassment in employment or related agreements; all employers must provide a sexual harassment prevention policy to all of its employees, and must continue to do so on an annual basis; all employers must provide sexual harassment prevention training on an annual basis to all of its employees; and the new law expands the protection of the employee against sexual harassment by “non-employees” and makes the employer liable for acts of sexual harassment by contractors, subcontractors, vendors, consultants, and other persons providing services if the employer is aware of the behavior and

does nothing to address it.

Then, in June 2019, New York State passed legislation (bill NY A7083 (19R)/NY S3817 (19R) amending its anti-discrimination and anti-harassment laws.<sup>25</sup> The amended law eliminates the severe or pervasive standard altogether. Now, harassment on the basis of any protected characteristic is unlawful “regardless of whether such harassment would be considered severe or pervasive.” New York City eliminated the “severe and pervasive” standard in 2005, and New York State used that as guidance in its decision to lower the burden of proof for state law discrimination, harassment and retaliation claims. The law will prospectively require only that an employee show that alleged harassment or retaliation rises above the level of “petty slights and trivial inconveniences.” Among other changes, the amended law also eliminates the availability of the *Faragher/Elleerth* defense to employers—so the fact that an employee “did not make a complaint about the harassment to such employer shall not be determinative of whether such employer shall be liable.”

One of the authors of this article has worked for the past few years on Minnesota’s effort to pass a bipartisan reworking of its sexual harassment law. The goal is to clarify the definition of sexual harassment in the law to specify that sexually offensive behavior need not be outrageously “severe or pervasive” in order for it to be subject to litigation. Most recently, Rep.

**How many times must an employee endure harassing conduct before it becomes sufficiently “pervasive”? Courts have stayed away from bright-line rules, and results are all over the map.**

Kelly Moller (DFL-Shoreview) sponsored a bill, HF10, that was passed by the House on March 21, 2019 by a vote of 113-10.<sup>26</sup> HF10 was not taken to the floor of the Minnesota State Senate.

**Conclusion**

Sexual harassment law appears to have swung way too far, trending toward an incredibly high standard to prove that statements and conduct are severe or pervasive enough to warrant actionable harassment. This is contrary to public policy.

In Minnesota, for example, “it is public policy to secure for persons in this state, freedom from discrimination... in employment... because of sex.” Minn. Stat. §363A.02, subd. 1(a) (2010). Justice Page dissented from the majority opinion in *LaMont*, finding Miner’s statements and conduct to be sufficiently severe or pervasive to survive summary judgment because they would affect LaMont’s terms, conditions, or privileges of employment; they occurred over a period of months; and they were directed at LaMont because she was a woman. In his dissenting opinion, Justice Page reminded us that the majority opinion relies on conclusions of several other courts, including federal courts, that set a very high standard for setting out a claim of hostile work environment and sex discrimination. However, he reminded us that the relevant law in *LaMont* is Minnesota law, and the conclusion of the court is inconsistent with Minnesota’s stated public policy.

Justice Wright seems to agree with Justice Page; she dissented as to the majority’s decision in *Rasmussen* in regard to remanding the employees’ hostile work environment claims to the district court. The remand was based on errors in law, but Justice Wright pointed out that when the record permits only one resolution of factual issue, a remand to the district court is unwarranted.<sup>27</sup> Justice Wright opined that the employees were entitled to prevail on their claims, noting, “If the conduct at issue in this case does not unmistakably violate the MHRA, I shudder to consider both the degrading conduct that any employee must endure in a Minnesota workplace and the unreasonably burdensome actions she must take to prove that her workplace was hostile so as to vindicate her legal right to be free from a hostile work environment.” State legislators should seriously consider addressing this federal case law trend toward a higher standard in order to uphold each states public policy against harassment. ▲

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Many thanks to our former colleague, Colin K. Thomsen, Esq., whose work on the piece was central to keeping it up to date and well-written.

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## NOTES

<sup>1</sup> *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986) (citing 42 U.S.C. § 2000e-2(a)(1)).

<sup>2</sup> In states like Minnesota, where harassment is statutorily defined (Minn. Stat. 363A.03, subd. 43), “because of/based on sex” may not be an element of the *prima facie* case, as it is under Title VII (which has no statutory definition of harassment).

<sup>3</sup> The Court adopted the following holding in both *Ellerth and Faragher*: “An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. . . . The defense necessarily comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct 2257, 2270 (1998). While employers typically must prove both prongs of the *Faragher/Ellerth* defense, it should be noted that the 8th Circuit departed from this rule in *McCurdy v. Ark. State Police*. Though, the *McCurdy* precedent is limited to cases of a single instance of sexual assault by a supervisor where the employee promptly reports the assault, and the employer then immediately fires the supervisor. *McCurdy v. Ark. State Police*, 375 F.3d 762, 774 (8th Cir. 2004). Finally, while the employer liability for supervisor harassment standard in *Ellerth and Faragher* is significant, this article is primarily focused on what conduct is enough to constitute severe or pervasive harassment.

<sup>4</sup> See also *Frieler v. Carlson Marketing Group, Inc.*, 751 N.W.2d 558 (Minn. 2008), adopting the *Faragher-Ellerth* employer liability for supervisor standard to apply to claims brought in Minnesota state courts under the Minnesota Human Rights Act [MHRA].

<sup>5</sup> In *Stewart v. Rise, Inc.* the court reversed summary judgment of a hostile work environment

claim based on application of the *Ellerth/Faragher* affirmative defense. Although significant in that it recognized a claim of subordinate harassment of a supervisor, the court warned, “When the plaintiff is a supervisor, and the objected-to conduct originates among her subordinates, a jury may look with great suspicion upon claims that the plaintiff adequately presented her concerns up the chain of command.” *Stewart v. Rise, Inc.*, 791 F.3d 849 (8th Cir. 2015).

<sup>6</sup> *Certiorari* was denied by the United States Supreme Court.

<sup>7</sup> This is evidenced by our original electronic case law search for the term “boorish” in the 9th Circuit, which only turned up seven cases.

<sup>8</sup> See *Stolt v. Annie Wright School*, 138 Wash. App. 1028 (2007) (holding that intimidating telephone calls and public ridicule was sufficient to raise a genuine issue of material of fact that the plaintiff was harassed); *Campbell v. State*, 118 P.3d 888 (Wash. Ct. App. 2005) (holding that offensive emails singling out the plaintiff and evidence that the plaintiff being yelled at and mocked in front of others was sufficient evidence to create a genuine issue of material fact that the plaintiff was harassed).

<sup>9</sup> *Adams v. Able Building Supply Inc.*, 57 P.3d 280 (Wash. Ct. App. 2002) (holding that evidence of a supervisor’s uncontrollable temper, random and unpredictable episodes of verbal abuse, and public humiliation toward all employees was sufficient evidence for a jury to decide whether the exhibitions merely reflected a gruff management style or were sufficiently severe and pervasive to alter the conditions of employment).

<sup>10</sup> These authors intentionally used the word “and” here, even though the legal standard is severe or pervasive. As a practical matter, as the case law set forth herein demonstrates, courts are effectively, at times, requiring *both* severe *and* pervasive.

<sup>11</sup> Allegations of physical threats and assaults will undoubtedly be used in the future by employees to try to extend the period during which evidence of a “continuous” pattern of harassment is admissible.

<sup>12</sup> “Swen’s actions took place while he was cloaked with authority provided to him by the University . . . as a mentor and supervisor

for Jenkins.” *Jenkins v. University of Minnesota*, 131 F. Supp. 3d 860, 875 (D. Minn. 2015).

- <sup>13</sup> There is no individual liability for sexual harassment under Title VII.
- <sup>14</sup> Perhaps ironically, the court found that the plaintiff *had* raised a triable issue in regards to her quid pro quo claim, in part because of the supervisor’s comment that he could prevent the plaintiff from being terminated, which he made while assaulting her in his locked office. *Id.* at 189.
- <sup>15</sup> The logic in *Lara* may be inconsistent with the United States Supreme Court’s 2/28/2008 decision in *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008) (finding “me-too” evidence is admissible, depending on the circumstances). According to the Supreme Court, the question whether evidence of discrimination by other supervisors is relevant in an individual [discrimination] case is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.
- <sup>16</sup> The 8th Circuit has often described this as a “high threshold,” *Duncan v. County of Dakota*, 687 F.3d 955, 959 (8th Cir. 2012), and, as Judge Schiltz notes, “the Eighth Circuit has meant it.” For example, the 8th Circuit affirmed the dismissal of a hostile-environment claim in *Rickard v. Swedish Match North America, Inc.*, 773 F.3d 181, 183 (8th Cir. 2014), even though the supervisor grabbed and squeezed the employee’s nipple while stating “this is a form of sexual harassment,” and even though the supervisor took a towel from the employee, rubbed it on his crotch, and gave it back to the employee. The 8th Circuit also affirmed the dismissal of a hostile-environment claim in *McMiller v. Metro*, 738 F.3d 185, 186-87 (8th Cir. 2013), even though the supervisor put his arms around the employee’s shoulders and kissed the side of her face and then later called the employee into his office, locked the door, and, when the employee tried to escape, “placed his hand on her right wrist, removed her hand from the door, turned her toward him, put his arms on her shoulders and neck, and kissed her on the side of her face and forehead.” The *McMiller* court found that the employee did not have a viable hostile-environment claim in light of the high bar set by prior 8th Circuit decisions,

some of which it described as follows:

In *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002), the court determined that a plaintiff had not proved a hostile work environment with evidence that a supervisor sexually propositioned her, repeatedly touched her hand, requested that she draw an image of a phallic object to demonstrate her qualification for a position, displayed a poster portraying the plaintiff as “the president and CEO of the Man Hater’s Club of America,” and asked her to type a copy of a “He-Men Women Hater’s Club” manifesto. *Id.* at 931-35. In *Anderson v. Family Dollar Stores of Arkansas, Inc.*, 579 F.3d 858 (8th Cir. 2009), where a supervisor had rubbed an employee’s back and shoulders, called her “baby doll,” “accus[ed] her of not wanting to be ‘one of [his] girls,’” suggested once in a long-distance phone call “that she should be in bed with him,” and “insinuat[ed] that she could go farther in the company if she got along with him,” this court ruled that the evidence was insufficient to establish a hostile work environment. *Id.* at 862. And in *LeGrand v. Area Resources for Community and Human Services*, 394 F.3d 1098 (8th Cir. 2005), the court ruled that a plaintiff who asserted that a harasser asked him to watch pornographic movies and to masturbate together, suggested that the plaintiff would advance professionally if the plaintiff caused the harasser to orgasm, kissed the plaintiff on the mouth, “grabbed” the plaintiff’s buttocks, “brush[ed]” the plaintiff’s groin, “reached for” the plaintiff’s genitals, and “briefly gripped” the plaintiff’s thigh, had not established actionable harassment. *Id.* at 1100-03. *McMiller*, 738 F.3d at 188-89.

- <sup>17</sup> Overall, the jury did not find Miller’s complaints about mistreatment to be petty, after hearing all of the evidence about her surviving claims at an eight-day jury trial in March 2018. The jury awarded Miller \$3.74 million.
- <sup>18</sup> The Associated Press, 90 *State Lawmakers Accused of Sexual Misconduct Since 2017*, ASSOCIATED PRESS NEWS (2/2/2019), <https://www.apnews.com/a3377d14856e4f4f-b584509963a7a223>.
- <sup>19</sup> Tribune News Service, *In Sexual Harassment Case, 4 Women Sue Indiana AG and the State*, GOVERNING THE STATES AND LOCALITIES (6/19/2019, 8:12 AM), <https://www.governing.com/topics/mgmt/tns-indiana-ag-sexual-harassment.html>.

[www.governing.com/topics/mgmt/tns-indiana-ag-sexual-harassment.html](https://www.governing.com/topics/mgmt/tns-indiana-ag-sexual-harassment.html).

- <sup>20</sup> Lauren Dake, *Former Oregon Legislative Interns File Suit Alleging Sexual Harassment*, OREGON PUBLIC BROADCASTING (Feb. 19, 2019, 10:30 AM, Updated 2/19/2019 3:53 PM), <https://www.opb.org/news/article/former-oregon-legislative-interns-file-suit-alleging-sexual-harassment/>.
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- <sup>22</sup> William Petroski, *\$1.75 million settlement reached in Iowa Senate sex harassment lawsuit*, DES MOINES REGISTER (9/28/2017, 9:11 AM), <https://www.desmoinesregister.com/story/news/2017/09/28/1-75-million-settlement-reached-iowa-senate-sex-harassment-lawsuit/709098001/>.
- <sup>23</sup> Kelsey Snell, *Congress to Make Members Pay Out of Pocket for Sexual Harassment Settlements*, NATIONAL PUBLIC RADIO (12/12/2018, 5:50 PM), <https://www.npr.org/2018/12/12/676209258/congress-to-make-members-pay-out-of-pocket-for-sexual-harassment-settlements>.
- <sup>24</sup> John Dolgetta, Esq., *The New NYS Sexual Harassment Law Requirements Take Effect on Oct. 9, 2018*, REAL ESTATE IN DEPTH (Sept. 2018), <http://www.realestateindepth.com/legal-advocacy/the-new-nys-sexual-harassment-law-requirements-take-effect-on-oct-9/>.
- <sup>25</sup> Devjani Mishra and Emily Haigh, *New York State Significantly Expands its Workplace Harassment Laws (Again)*, LITTLER (6/20/2019), <https://www.littler.com/publication-press/publication/new-york-state-significantly-expands-its-workplace-harassment-laws>.
- <sup>26</sup> Tim Walker, *House passes bill that would change legal definition of sexual harassment*, MINNESOTA HOUSE OF REPRESENTATIVES (3/21/2019 5:43 PM), <https://www.house.leg.state.mn.us/SessionDaily/Story/13812>.
- <sup>27</sup> Citing *Pullman Standard v. Swint*, 456 U.S. 273, 292, 102 S. Ct. 781, 72 L.Ed.2d 66 (1982); see also *Williams v. New Orleans S.S. Ass’n*, 688 F.2d 412, 416 (5th Cir. 1982).

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**ADMINISTRATIVE LAW**

## JUDICIAL LAW

■ **MORA not a private cause of action.** The court of appeals has held that the Minnesota Official Records Act (MORA) does not provide a private cause of action for enforcement separate from the Minnesota Government Data Practices Act (MGDPA).

The dispute involved bids on a request for proposals by Minnesota State Colleges and Universities (MnSCU) to develop a new online registration system. During an online meeting of MnSCU's selection committee, officials used Adobe Acrobat Reader software to electronically highlight portions of Halva's bid. After Halva's bid was rejected, Halva sought a copy of his highlighted bid as well as information about the other bidding vendors. But MnSCU officials were unable to supply a highlighted copy of the document because their highlighting had not been saved when the electronic document used during the meeting was closed.

Halva then sought damages under the MGDPA and injunctive relief under MORA. The latter requires government officials to "make and preserve all records necessary to a full and accurate knowledge of their official activities" and "carefully protect and preserve government records from deterioration, mutilation, loss, or destruction." Minn. Stat. §15.17, subd. 1-2. Halva sought injunctive relief based on the theory that the failure to preserve the electronic highlighting of his bid materials violated MORA. The district court granted MnSCU judgment on the pleadings and Halva appealed.

After determining that Halva's damages claim under the MGDPA was not adequately pleaded, the court turned to Halva's claim for separate, injunctive relief under MORA. The court noted that under Minnesota precedent, courts are reluctant to find a private statutory cause of action unless expressly stated or

clearly implied by the statutory language. In this case, the court found no express or implied private cause of action for injunctive relief in MORA. Instead, the court noted, MORA provides access to government data as defined by MGDPA, which in turn contains its own cause of action. "Therefore," the court concluded, "the district court did not err in determining that the MORA does not provide for a separate private cause of action and did not err in granting MnSCU judgment on the pleadings." *Halva v. Minnesota State Colleges and Universities*, No. A19-0481, 2019 WL 6834659 (Minn. Ct. App. 12/16/2019).

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**CRIMINAL LAW**

## JUDICIAL LAW

■ **Conditional release: Simultaneous convictions of multiple sex offenses does not result in a "prior sex offense conviction" subjecting offender to lifetime conditional release.** After appellant was convicted of one count of first-degree and one count of second-degree criminal sexual conduct, the district court sentenced him to concurrent 216-month and 140-month prison terms and a lifetime conditional release term. The Minnesota Court of Appeals agrees with appellant that a 10-year, rather than lifetime, conditional release term should have been imposed.

A 10-year conditional release term is mandatory for criminal sexual conduct convictions, unless the offender has a "prior sex offense conviction." Appellant had no criminal sexual conduct convictions other than those at issue here, and those two convictions were adjudicated simultaneously. The court interprets Minn. Stat. §609.3455, subd. 1(g) (definition of "prior sex offense conviction") to determine whether convictions that are adjudicated simultaneously can result

in a prior conviction and a present offense. An offender has a prior sex offense conviction “if the offender was convicted of committing a sex offense before the offender has been convicted of the present offense...”

The Supreme Court held in *State v. Nodes*, 863 N.W.2d 77 (Minn. 2015), that the definition of “prior sex offense conviction” is unambiguous and that “convicted” means the district court accepts and records a verdict of guilty, “before” means “earlier than” (the first conviction must be adjudicated at an earlier time than the second), and “present offense” means “now existing or in progress.”

Under these plain meanings, the court here concludes that simultaneous adjudication of convictions does not result in lifetime conditional release. No conviction is entered “before” the other and no conviction can be prior to the other when there is no temporal gap between a district court’s adjudication of offenses. Therefore, the district court improperly imposed a lifetime conditional release term upon appellant. *State v. Brown*, A18-1880, 2019 WL 6460852 (Minn. Ct. App. 12/2/2019).

■ **1st Amendment: Stalking by telephone statute violates 1st Amendment.**

Appellant was charged with two counts of stalking by repeatedly making phone calls to various Rice County employees, during which he swore, yelled, and threatened the sheriff and other employees. A jury found appellant guilty on both counts. On appeal, appellant argues the stalking by telephone statute, Minn. Stat. §609.749, subd. 2(4), violates the 1st Amendment.

The court of appeals applies the four-step overbreadth analysis clarified by the Supreme Court in *In re Welfare of A.J.B.*, 929 N.W.2d 840 (Minn. 2019): (1) interpret the challenged statute; (2) determine whether the statute’s reach is limited to unprotected categories of speech or expressive conduct; (3) if the statute is not limited to unprotected speech or expressive conduct, determine if a “substantial amount” of protected speech is criminalized; and (4) evaluate whether the statute’s construction may be narrowed or specific language severed to cure constitutional defects.

Combining the plain language of Minn. Stat. §609.749, subd. 2(4), with the common meaning of its terms in context, the court concludes that the stalking-by-telephone statute requires the state to prove beyond a reasonable doubt that the defendant repeatedly

made telephone calls or sent text messages to the victim or induced the victim to call the defendant, and by doing so (1) the defendant knew or had reason to know his conduct would cause the victim to feel fear, loss of power, worry, or ill-treated; and (2) the defendant’s conduct caused this reaction in the victim. The court finds the stalking-by-telephone statute similar to the stalking-by-mail statute held unconstitutional in *A.J.B.*, in that both proscribe similar conduct, require conduct to occur “repeatedly,” have the same broad *mens rea* element, and require the state to prove the victim’s reaction, which limits the statute.

The court also finds the stalking-by-telephone statute contains broad language that restricts protected speech. The statute criminalizes repeated telephone calls and text messages regardless of the content of the telephone call or text message. It also criminalizes both intentional and unintentional speech by including a *mens rea* element that is satisfied by proof of negligence. Also, the requirement of proof of the victim’s reaction is only an ancillary requirement, given that the types of reaction that must be proved are described with undefined and broad terms, which does not restrict the protected communications the statute reaches. Moreover, the subjective harm element is troubling because it need not be objectively reasonable.

Next, quoting *A.J.B.*, the court finds the stalking-by-telephone statute overbroad “due to the substantial ways” in which the statute “can prohibit and chill protected expression.” *A.J.B.* 929 N.W.2d at 856. As in *A.J.B.*, and drawing on the reasoning in *State v. Hensel*, 901 N.W.2d 166 (Minn. 2017), the court is unable to remedy the statute to render it constitutional.

In so holding, and based on the Supreme Court’s analysis in *A.J.B.*, the court expressly overrules *State v. Hall*, 887 N.W.2d 847 (Minn. Ct. App. 2016), which held section 609.749, subd. 2(4), was not unconstitutionally overbroad on its face or as applied, for reasons rejected by the Supreme Court in *A.J.B.* *State v. Peterson*, A18-2105, 2019 WL 6691516 (Minn. Ct. App. 12/9/2019).

■ **1st Amendment: Nonconsensual dissemination of private sexual images statute violates 1st Amendment.** Appellant was charged with felony nonconsensual dissemination of private sexual images. He logged into his ex-girlfriend’s wireless and television provider accounts



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and obtained photos and videos containing sexual images of his ex-girlfriend. He threatened to, and later did, disseminate one of the images online. The district court denied appellant's motion to dismiss, finding the relevant statute, Minn. Stat. §617.261, did not violate the 1st Amendment. After a stipulated facts trial, appellant was convicted as charged.

The court of appeals applies the same overbreadth analysis outlined in *A.J.B.* and summarized by the court in *Peterson*, *supra*. First, the court finds that section 617.261 has a broad sweep. The statute makes it a crime "to intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed..., when: (1) the person is identifiable...; (2) the actors knows or reasonably should know that the person depicted in the image does not consent to the dissemination; and (3) the image was obtained or created under circumstances in which the actor knows or reasonably should have known the person depicted had a reasonable expectation of privacy." Minn. Stat. §617.261, subd. 1. A violation of the statute is generally a gross misdemeanor, unless certain circumstances listed in subdivision 2(b) apply.

The court points to the broad *mens rea* requirement, contained in numbers (2) and (3) above, noting it creates a negligence *mens rea* that allows for a conviction under section 617.261 even if he did not actually know that the person depicted in the image did not consent to the dissemination or that the image was obtained or created under circumstances in which the person depicted had a reasonable expectation of privacy. The court also notes that the statute does not require proof of any actual or intended harm, only allowing for enhancement to a felony if harm or intent to harm is shown. See Minn. Stat. §617.261, subd. 2(b)(1), (5).

Next, the court rejects the state's argument that section 617.267 regulates only unprotected expressive conduct, specifically, content that appeals to the prurient interest, or obscene material. The court points out that the definition of obscenity requires, in part, that the material "portray sexual conduct in a patently offensive way." While nonconsensual dissemination of another's private sexual image is offensive, the focus of this inquiry is not on the circumstances surrounding an image's dissemination. Not every image subject to regulation under section 617.261 portrays sexual conduct in a patently offensive way, so the statute's sweep is not limited to

expressive conduct that is categorically excluded from 1st Amendment protection.

The court then finds that the statute does serve a legitimate harm-preventing interest by proscribing disseminations that knowingly cause or are intended to cause a specified harm. However, the statute reaches much further by requiring only a negligence *mens rea* and lacking an intent-to-harm element, the combination of which allows the statute to reach protected 1st Amendment expression that neither causes nor is intended to cause specified harm.

The court holds that section 617.261 prohibits a substantial amount of constitutionally protected speech, and, as such, is overbroad in violation of the 1st Amendment. Images can be disseminated, received, and observed with ease "[i]n this age of expansive internet communication." This makes the statute's negligence *mens rea* particularly problematic, as the statute does not "define or explain the circumstances that should cause someone who observes an image described in [the statute] to reasonably know that the person depicted in the image did not consent to its dissemination or that the image was obtained or created under circumstances in which the person depicted had a reasonable expectation of privacy." This makes the statute's "reasonable knowledge" standard highly subjective. There are too many circumstances under "which impermissible disseminations under the statute may be further disseminated without the intent to harm necessary to proscribe expressive conduct without violating the First Amendment."

Finally, the court determines section 617.261 cannot be narrowly construed or problematic language severed to remedy its constitutional defect, as doing so would be inconsistent with the statute's plain language or require the court to rewrite the statute. Minn. Stat. §617.261 is declared facially invalid under the 1st Amendment, and appellant's conviction is reversed. *State v. Casillas*, A19-0576, 2019 WL 7042804 (Minn. Ct. App. 12/23/2019).

■ **Giving a fictitious name: "Fictitious name" includes any name or variant that would tend to mislead officer from true identity.** To avoid revealing an arrest warrant during a traffic stop, appellant Dakota James-Burcham Thompson identified himself to police as Dakota James Burcham. The officer was able to determine appellant had withheld his last name and found the outstanding

arrest warrant. Appellant was arrested under the warrant and charged with giving a "fictitious name" to a peace officer. At trial, appellant testified that "Dakota James Burcham" was his name prior to being adopted at nine or ten years of age, and that he used that name for tribal matters because the tribe allegedly lacked his adoption records. He also testified that he has gone by "Dakota James-Burcham Thompson," his actual and legal name, for 11 to 13 years. The jury found appellant guilty, and on appeal appellant argues there was insufficient evidence to prove he gave a fabricated or concocted name to the deputy, as he had merely given a shortened version of his actual name.

Minn. Stat. §609.506, subd. 1, criminalizes giving a "fictitious name other than a nickname" to a peace officer "with intent to obstruct justice." "Fictitious" is not defined. The statute evidences the Legislature's awareness that an officer is authorized to ask a person of interest his name during a stop or arrest to inquire in police databases. So, the person's "name" refers to his full and actual name to determine his actual identity. Thus, it follows that a "fictitious" name is one that would tend to mislead in the investigatory context.

The court of appeals rejects appellant's argument that shortening his name did not result in a concocted or fabricated name, as misidentification can certainly result from adding to or omitting one's last name. Moreover, appellant admitted he identified himself as he did to prevent the deputy from identifying who he really was, and by doing so, he provided a fiction. The court ultimately concludes "that the term 'fictitious name'... is not limited to a name consisting entirely of made-up components; it includes any name or name variant that would tend to mislead an inquiring police officer away from one's true identity." *State v. Thompson*, A19-0253, 2019 WL 7042803 (Minn. Ct. App. 12/23/2019).

■ **Criminal procedure: Each final judgment on severed criminal charges is appealable.** Appellant was charged with two counts of first-degree and three counts of second-degree criminal sexual conduct, which related to his abuse of four victims. One count was dismissed prior to trial and the counts relating to the remaining three victims were severed. He was first found guilty of two counts of first-degree criminal sexual conduct toward one victim (J.R.) and sentenced to concurrent terms of 86 months and 110 months. Two weeks

later, he was tried for one count of second-degree criminal sexual conduct against C.S., and a jury found him guilty. Appellant was sentenced to 21 months, to be served consecutively to his previous sentence. On appeal, appellant argues the court improperly admitted evidence of his other bad acts, and the state argues the appeal of his first-degree convictions is untimely.

First, the court of appeals holds that the appeal of appellant's first-degree criminal sexual conduct convictions is untimely. For a felony, an appeal of a final judgment must be made within 90 days under Minn. R. Crim. P. 28.02, subd. 4(3)(a). Appellant was sentenced for the first-degree convictions on 4/11/2018, but did not appeal them until 9/14/2018. Thus, his claims regarding his first-degree convictions are untimely.

Next, the court finds the district court did not abuse its discretion when it permitted appellant's other victims to testify at the trial relating to his abuse of C.S. The district court made thorough findings and conclusions that satisfied each element of the five-step *Spreigl* test. *State v. Tomlinson*, A18-1522, 2019 WL 7042800 (Minn. Ct. App. 12/23/2019).



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## EMPLOYMENT & LABOR LAW

### JUDICIAL LAW

■ **Age discrimination; law firm partner not covered.** An equity partner in a law firm is not covered by the Federal Age Discrimination Employment Act (ADEA). The 8th Circuit Court of Appeals held that the firm could implement and enforce a mandatory 70-year-old retirement plan because the partners are not considered "employees" under the Act. *von Kaenel v. Armstrong Teasdale*, 943 F.3d 1139 (8th Cir. 12/3/2019).

■ **Gender discrimination; not similarly situated.** A man's claim of gender discrimination by his employer failed because of the absence of direct evidence of discrimination. The 8th Circuit affirmed summary judgment because an unsupported allegation of disparate treatment of a similarly situated female employee did not create a triable issue of fact. *Rinhuso v. Brookshire Grocery*, 944 F.3d 725 (8th Cir. 12/9/2019).

■ **Sex discrimination; fee award for employer.** An employer who prevailed in sex discrimination litigation brought by the Equal Employment Opportunity Commission (EEOC) was entitled to its attorney's fees and costs. The 8th Circuit upheld a lower court award on grounds that the lawsuit was frivolous or groundless. *EEOC v. CRST Van Expedited*, 944 F.3d 750 (8th Cir. 12/10/2019).

■ **ERISA benefits; exhaustion required.** An employer's challenge to termination of disability benefits under the Employees' Retirement & Income Security Act (ERISA) was rejected by the 8th Circuit. The employee's claim of breach of fiduciary duty failed because the employee did not first exhaust his administrative remedies. *Jones v. Aetna Life Insurance Co.*, 943 F.3d 1167 (8th Cir. 12/6/2019).

■ **Workplace injury; not several liability.** Because an employer and a third party are not severally liable for workplace injury to an employee, the tortfeasor's liability is not reduced by the share or percentage of fault ascribed to the employer. The state Supreme Court, applying its decision in *Lambertson v. Cincinnati Welding Corp.*, 257 N.W.2d 679 (Minn. 1977), held that the "plain language" of the joint and several statutory language of Minn. Stat. §604.02 bars a reduction. *Fish v. Ramler Trucking*, 935 N.W.2d 738 (Minn. 11/27/2019).

### ADMINISTRATIVE LAW

■ **Fast food industry; wage violations.** The Trump Administration is curbing lawsuits by franchise workers, mainly applicable to low-wage earners in the fast food industry. The U.S. Department of Labor's new regulation imposes a four-part test for determining when employees may sue a franchisor for wage violations and other wrongdoing by a franchise that employs others. The standard takes into account who makes hiring and firing decisions; supervisor decisions and scheduling matters; determines pay; and manages employment records. The upshot will roll back a more employee-friendly standard in place under the Obama administration, which the DOL justified "to promote economic strength," while a previous franchise industry spokesperson calls it a "much needed clarity for the 739,880 franchise establishments across America." But opponents counter that it will make it more difficult for workers to pursue claims or collect damages.

### LOOKING AHEAD

■ **SCOTUS workplace litigation cases.** The U.S. Supreme Court has taken on its second multiple case workplace litigation during the current 2019-20 term. Before the end of the year, the Court agreed that it would review a pair of cases to determine how broadly federal employment discrimination laws applied to schools run by religious organizations. The two cases, *Our Lady of Guadalupe School v. Morrissey-Berru*, No. 19-267 and *St. James School v. Darryl Biel*, No. 19-348, will address the provision under federal law known as a "ministerial exception" to employment discrimination laws, which allow educational institutions to discriminate against school employees who perform religious-related work in the schools.

The term began with the high court hearing a trio of consolidated cases raising the issue of whether LGBT status is covered by Title VII and federal anti-discrimination law. Both cases are pending and probably will be decided before the end of this term in June.



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## ENVIRONMENTAL LAW

### JUDICIAL LAW

■ **Minnesota Court of Appeals orders contested case for PolyMet's mining permit.** The Minnesota Court of Appeals issued a decision on consolidated *certiorari* appeals brought by environmental groups and tribes challenging decisions by the Minnesota Department of Natural Resources (DNR) to deny petitions for a contested-case hearing (CCH) and to issue two (and transferring a third) dam-safety permits as well as a permit to mine (PTM) to PolyMet Mining for the NorthMet project, a proposed copper-nickel mine near Babbitt, Minnesota. Following a lengthy environment review process that commenced in 2004, the DNR in March 2016 issued a decision determining the final environmental impact statement for the project was adequate. Subsequently, in November 2018, the DNR issued the PTM and dam safety permits. Appellants submitted comments on the permits and requested a CCH on the PTM pursuant to Minn. Stat. §93.483. DNR denied the CCH request and issued the permits.

Key to the court's decision was the interpretation of statutory provisions governing CCHs for mining permits.

Minn. Stat. §93.483, subd. 1, provides that a petition for a CCH concerning a PTM may be brought by any person owning property that will be “affected by” a proposed mining operation; it also provides that the DNR commissioner “may, on the commissioner’s own motion,” order a CCH on a PTM application. In addition, subdivision 3 of section 93.483 provides that the commissioner “must” grant a CCH petition if the commissioner finds three statutory criteria are satisfied: (1) there is “a material issue of fact in dispute concerning the completed application”; (2) the commissioner has “jurisdiction to make a determination on the disputed material issue of fact”; and (3) “there is a reasonable basis underlying a disputed material issue of fact so that a contested case hearing would allow the introduction of information that would aid the commissioner in resolving the disputed facts in order to make a final decision on the completed application.”

The court first rejected DNR’s position that the only property that will be “affected by” the NorthMet project is property directly adjacent to the project. Looking to the broad common meaning of “affected” as “influenced or changed,” the court held that members of appellant organizations had sufficiently demonstrated their properties—which were located between 8.6 and 66 miles from the project area—would be “affected” by the NorthMet project. Accordingly, appellants met the threshold requirement for requesting a CCH in Minn. Stat. §93.483, subd. 1, triggering a duty for DNR to evaluate whether a CCH was required under statutory criteria in subd. 3. DNR’s denial of the CCH petitions, the court therefore held, was based upon an erroneous legal interpretation. The court further held that even if appellants had not requested a CCH, under the language of subd. 3 (i.e., that DNR “must” grant a CCH petition if the statutory criteria are satisfied), DNR had an independent duty to determine whether the statutory criteria were met.

Regarding the three statutory criteria, the DNR argued that the court should defer to the commissioner’s determination of whether, under the third criterion, the introduction of information in a CCH would “aid the commissioner in resolving the disputed facts.” The court rejected DNR’s arguments, citing case law interpreting almost identical criteria evaluated by the Minnesota Pollution Control Agency when considering CCH requests. Minn. R. 7000.1900. The statutory phrase in the third criteria “so

that,” the court concluded, “reflects legislative judgment that a contested-case hearing *will* be helpful in cases where there are genuine, material disputes of fact” (emphasis added). Where there exists “probative, competent, conflicting evidence on material fact issues,” the court held, the DNR must hold a CCH before the DNR makes its final permit decisions. The court reviewed the evidence of material fact issues provided by appellants—including evidence concerning construction of the project’s tailings basin dam, alternatives to wet closure of the tailings basin, financial assurance, and the role of a major shareholder in PolyMet, the Swiss company Glencore—and concluded it met this standard, notwithstanding the fact that the evidence identified by appellants was not new and had already been considered by DNR during the environmental review process.

For these reasons, the court reversed DNR’s decisions granting the PTM and dam-safety permits and remanded for the DNR to hold a CCH. The court made two additional holdings of note. First, the court held that DNR erred by issuing a PTM without a set term. Second, the court upheld DNR’s approval of a transfer of the one preexisting dam-safety permit to PolyMet. *In the Matter of the NorthMet Project Permit to Mine Application*, No. A18-1952, No. A18-1953, No. A18-1958, No. A18-1959, No. A18-1960, No. A18-1961 (Minn. App. 1/13/2020).

#### ADMINISTRATIVE ACTION

■ **CEQ proposes revisions to NEPA regulations.** The Council on Environmental Quality (CEQ) published proposed revisions to its regulations implementing the National Environmental Policy Act (NEPA). 85 Fed. Reg. 1684 (1/10/2020). Signed into law in 1970, NEPA is a procedural statute that requires federal agencies to assess the environmental impacts of proposed major federal actions. The CEQ regulations, which govern preparation of environmental assessments and impact statements, have not been substantially updated for over 40 years. The CEQ’s impetus for the revisions was President Trump’s 2017 Executive Order 13807 establishing a “One Federal Decision” policy, which set a two-year goal for completion of environmental reviews for major infrastructure projects.

Citing the often-lengthy process of conducting environmental impact statements, the CEQ proposed revisions

aiming to simplify and streamline federal environmental review requirements. Among other things, CEQ’s proposed rule would:

- establish time limits to complete environmental reviews;
- streamline communication between state, tribal, and local agencies;
- simplify the definition of environmental “effects,” clarifying that they must be reasonably foreseeable and have a reasonably close causal relationship to the proposed action;
- remove any requirement to analyze cumulative effects;
- define “major federal action” to exclude non-discretionary decisions and non-federal—or minimally federal-funded—projects; and
- provide that “reasonable alternatives” to a proposed project must be technically and economically feasible.

The result of these changes, the CEQ asserts in the rulemaking documents, would be to limit the number of projects subject to rigorous review, expand the number of projects that would not require any review, and limit the scope of environmental effects requiring review.

Notably, CEQ declined commenters’ requests to include in the proposal specific regulations addressing the analysis of greenhouse gas emissions (GHGs) and potential climate change impacts in environmental reviews. Focusing on a single category of impacts in the regulations would be “inappropriate,” CEQ concluded, noting that the agency has published proposed NEPA guidance on consideration of GHGs. Nonetheless, the CEQ, in the proposal, “invites comments on whether it should codify any aspects of its proposed GHG guidance in the regulation, and if so, how CEQ should address them in the regulations.”

The public comment period will remain open until 3/10/2020. To submit a comment, visit [www.regulations.gov](http://www.regulations.gov), Docket ID No. CEQ-2019-003. *85 Fed. Reg. 1684* (1/10/2020).



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## FEDERAL PRACTICE

## JUDICIAL LAW

■ **Attempted deposition of counsel; Shelton rule.** Affirming an order by Judge Magnuson, the 8th Circuit rejected the plaintiff's attempt to avoid the rule established in *Shelton v. American Motors Corp.* (805 F.2d 1323 (8th Cir. 1986)) and found no abuse of discretion in Judge Magnuson's grant of the defendant's request for a protective order to prevent the deposition of its counsel. *Smith-Bunge v. Wisconsin Central Ltd.*, \_\_\_ F.3d \_\_\_ (8th Cir. 2019).

■ **Personal jurisdiction; multiple decisions.** Reversing a dismissal for lack of personal jurisdiction, the 8th Circuit held that the defendants' contacts with Arkansas were sufficient to establish personal jurisdiction where the individual defendant twice traveled to the state in connection with his alleged fraudulent scheme, and where all parties anticipated doing business with Walmart, which is headquartered in Arkansas. *Whaley v. Esebag*, \_\_\_ F.3d \_\_\_ (8th Cir. 2020).

Judge Brasel granted defendants' motion to dismiss for lack of personal jurisdiction in an action arising out of the sale of cattle, which was brought by a Minnesota corporation against residents of Texas and South Dakota, finding that while the defendants knew that the plaintiff was headquartered in Minnesota, any contact with the state was "random, fortuitous, or attenuated." *Fredin Bros., Inc. v. Anderson*, 2019 WL 7037674 (D. Minn. 12/20/2019).

■ **Forum selection clause enforced; venue proper in any event.** Finding that the defendants had the burden to establish that venue was improper, Magistrate Judge Thorson recommended the denial of their motion to dismiss for improper venue or transfer the action to the District of New Jersey, finding that a forum selection clause in an agreement between the plaintiff and the individual defendant was valid and enforceable against both defendants, and that venue was proper in the District of Minnesota even absent that clause.

No objection was made to the report and recommendation, and Judge Davis denied the motion in a brief order. *C.H.*

*Robinson Worldwide, Inc. v. Tu*, 2019 WL 7494686 (D. Minn. Dec. 20, 2019), Report and Recommendation adopted by, 2020 WL 85183 (D. Minn. 1/7/2020).

■ **Attorney's fees; lodestar; hourly rates; duplicative work; vague entries.** Where the prevailing plaintiff in an ERISA action sought an award of more than \$206,000 in attorneys' fees, Judge Frank reduced hourly rates requested by each of the attorneys, and further reduced the fees sought by two of the attorneys for "duplicative, work, unsuccessful or abandoned work, vague entries, and clerical or administrative work performed by an attorney," and awarded the plaintiff just over \$98,000 in attorney's fees. *Christoff v. Unum Life Ins. Co. of Am.*, 2019 WL 6715067 (D. Minn. 12/10/2019).

■ **Motion to modify permanent injunction pending appeal denied.** Chief Judge Tunheim denied defendants' motion to modify a permanent injunction during the pendency of their appeal, finding that none of the four elements of the controlling test favored the defendants. *Portz v. St. Cloud State Univ.*, 2019 WL 6727122 (D. Minn. 12/11/2019).

■ **Motion to vacate arbitration award denied; award not affirmed.** Where the plaintiff moved to vacate an arbitration award, the defendant did not cross-move to affirm the award, and Magistrate Judge Menendez issued a report and recommendation in which she recommended the denial of the plaintiff's motion and that the award be affirmed, Judge Wright denied the plaintiff's motion to vacate but declined to affirm the award because no motion to affirm had been filed. *Zean v. Comcast Broadband Security, LLC*, 2019 WL 6873983 (D. Minn. 12/17/2019).

■ **28 U.S.C. §1292(b); motion to certify interlocutory appeal denied.** Judge Frank denied the defendant's "extraordinary" request for interlocutory review, finding that it had "failed to demonstrate the existence of a controlling legal question suitable for interlocutory review," and that interlocutory review would "actually delay the litigation." *Beseke v. Equifax Information Services LLC*, 2020 WL 133289 (D. Minn. 1/13/2020).



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## INDIAN LAW

## JUDICIAL LAW

■ **Indian Child Welfare Act is constitutional.** In an adoption dispute concerning a non-enrolled child, the district court applied ICWA and MIFPA, and decided to place the child with the maternal grandmother instead of the child's foster placement, and the foster placements appealed. The Minnesota Court of Appeals rejected the appellants' challenge to the application of ICWA and MIFPA to the case, explaining that it could not inquire into an Indian tribe's internal eligibility determinations as a matter of tribal sovereignty, and that the White Earth Band met the statutory definition of an Indian tribe.

The court also rejected each of the appellants' three constitutional challenges to ICWA. It first rejected an equal-protection challenge, reaffirming that ICWA's classifications based on tribal membership are not racial, but are instead based on the unique legal status of tribal members, and the law is thus subject to rational-basis review. Because "ICWA's placement preferences favoring Indian homes for adoptive placement of Indian children are rationally tied to Congress's unique obligation to the Indians," appellants' equal-protection challenge to ICWA failed. The court next rejected appellants' argument that ICWA exceeds Congress's legislative authority to regulate commerce with Indian tribes, explaining that "Congress's power to legislate in the field of Indian Affairs is plenary." Finally, the court rejected appellants' anti-commandeering-doctrine argument regarding ICWA's placement preferences because Minnesota had specifically enacted those preferences into state law. *In re Child of S.B.*, No. A19-0225, 2019 WL 6698079 (Minn. Ct. App. 12/9/2019).

■ **Cross-deputized tribal police officer had authority to cite outside reservation boundaries.** A driver passed a school bus with its four-way lights activated and stop-arm deployed while children were exiting the bus in Becker County, outside the White Earth Reservation. A White Earth tribal police officer responded to the dispatcher's report, found the driver in a nearby parking lot outside the reservation's boundaries, and talked with the driver, who admitted he failed to stop for

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the bus. The tribal officer, who was also licensed by the state of Minnesota as a police officer, issued the driver a citation for three misdemeanor offenses. The driver was later charged with two gross-misdemeanor offenses for passing on the right side and passing while a child is outside the bus.

The driver moved to suppress the statements he made to the White Earth tribal police officer, but the district court denied the motion, finding that the officer was within the course and scope of his employment as a licensed peace officer when he seized the driver, as permitted by statute. A split Minnesota Court of Appeals rejected the driver's argument that the "Cooperative Law Enforcement Agreement" between Becker County and the White Earth Reservation limited the course and scope of the officer's employment only to the geographic limits of the White Earth reservation because the applicable statute does not speak to tribal agreements regarding the enforcement of state criminal laws outside the reservation. Without textual limits in the cooperative law-enforcement agreement, the court found that the officer was within the course and scope of his employment when he seized and cited the driver, in part because he was within his employer's jurisdiction when he received the dispatch call and he intended to be outside the reservation only briefly. *State v. Bellcourt*, No. A19-0100, \_\_\_ N.W.2d \_\_\_ (Minn. Ct. App. 12/16/2019).

■ **No treaty-rights defense to gill-net fishing on Gull Lake.** When a Fond du Lac tribal member was charged with state law violations relating to netting fish without a license on Gull Lake, the member argued that he had treaty rights protecting his right to fish on the lake. The district court found that uncontradicted expert testimony did establish the usufructuary rights of members of the Mississippi, Leech Lake, and Lake Winnebigoishish bands, but not the Fond du Lac Band, to the lake. The tribal member appealed, arguing the state lacked subject matter jurisdiction over him because he is an "Indian," that his actions occurred within "Indian country," and that he has individual usufructuary rights to fish on Gull Lake.

In a divided, unpublished opinion, the Minnesota Court of Appeals found that because Gull Lake had been reserved under the treaty of 1855, but then later ceded to the United States in 1864 in exchange for the establishment of the Leech Lake reservation, Gull Lake was no longer "Indian country," and the ju-

isdictional limitations of Public Law 280 were inapplicable to the lake. The court of appeals also rejected the tribal member's argument that he held usufructuary rights to Gull Lake under earlier treaties in 1795, 1825, and 1826. It determined these earlier treaties merely recognized an aboriginal right to occupancy of the lands, with an incidental right to hunt, fish, and gather, rather than reserving individual usufructuary rights that would extend beyond the extinguishment of Indian title. *State v. Northrup*, No. A19-0130, 2019 WL 6838485 (Minn. Ct. App. 12/16/2019).



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## INTELLECTUAL PROPERTY

### JUDICIAL LAW

■ **Trademark: Dismissal of counterclaims.** Judge Wright recently granted in part plaintiff My Pillow, Inc.'s motion to dismiss counterclaims. My Pillow sued LMP Worldwide, Inc. in 2012 in the Eastern District of Michigan for trademark infringement and unfair competition. The parties reached a settlement agreement dismissing the case. My Pillow commenced the instant action alleging LMP violated the settlement agreement and infringed the MYPILLOW mark. LMP filed nine counterclaims. My Pillow moved to dismiss counterclaims III through VIII. In counterclaim IV, LMP sought to cancel the registration for MYPILLOW as generic or merely descriptive, a claim previously made in the Michigan litigation. My Pillow argued the claim was barred by claim preclusion. Claim preclusion applies where a prior judgment rendered by a court of competent jurisdiction was final and on the merits and involved the same cause of action and the same parties. Finding LMP's counterclaim to cancel the MYPILLOW registration in the Michigan litigation was dismissed with prejudice, the court found counterclaim IV was barred by claim preclusion. The court also granted My Pillow's motion to dismiss LMP's unfair competition counterclaim. While unfair competition under Minnesota law is a tort without specific elements, the underlying tort may not duplicate another claim. Here, LMP alleged that My Pillow disparaged LMP's products and business, allegations

duplicative of LMP's false advertising claim. Accordingly, the court dismissed counterclaims IV and VII. *My Pillow, Inc. v. LMP Worldwide, Inc.*, No. 18-cv-0196-WMW/DTS, 2019 U.S. Dist. LEXIS 213557 (D. Minn. 12/11/2019).

■ **Patent: Refusal to strike infringement contentions as insufficient.** Judge Wright recently denied defendant St. Jude Medical S.C., Inc.'s motion to strike plaintiff Niazi Licensing Corp.'s infringement contentions. Niazi Licensing sued Boston Scientific Corp. and St. Jude for patent infringement related to U.S. Patent No. 6,638,268, titled "Catheter to Cannulate the Coronary Sinus." Pursuant to the court's scheduling order, Niazi Licensing submitted infringement contentions prior to the claim-construction hearing. St. Jude moved to strike the infringement contentions, arguing Niazi Licensing failed to identify an act of direct or indirect infringement. A motion to strike is generally brought under Fed. R. Civ. P. 12(f), which provides that a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." St. Jude, however, sought to strike infringement contentions, not a pleading. St. Jude argued Niazi Licensing's infringement contentions were substantively deficient, in violation of the scheduling order. St. Jude provided no authority in support of the proposition that a deficient response was a violation of the scheduling order. At most, St. Jude's authority indicated that a court had the discretion to impose sanctions for such deficiencies. Accordingly, the court denied St. Jude's motion to strike Niazi Licensing's infringement claims. *Niazi Licensing Corp. v. Boston Sci. Corp.*, Nos. 17-cv-5094 (WMW/BRT); 17-cv-5096 (WMW/BRT), 2019 U.S. Dist. LEXIS 181611 (D. Minn. 10/21/2019).



**JOE DUBIS**  
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## TAX LAW

### JUDICIAL LAW

■ **Property tax: Court decides to hear petitioner's arguments on contract interpretation with the county board.** Rockstep Willmar, LLC, purchased Kandi Mall, a regional shopping center located in Willmar, Minnesota, in October 2015. In July 2016, Rockstep submitted a formal application for tax abatements to

the County of Kandiyohi. On 9/6/2016, the Kandiyohi Board of Commissioners held a public hearing and adopted a resolution, and ultimately an abatement agreement, approving Rockstep's application for an abatement of county taxes. The primary issue of the agreement provides that Rockstep will not take certain actions with respect to tax assessments for the duration of the agreement. The agreement was signed by a Rockstep official, by the chair of the County Board, and the county auditor. On 4/26/2018, Rockstep filed a Real Property Tax Petition under chapter 278 (2018) in Kandiyohi County District Court challenging the Kandi Mall's 1/2/2017 property tax assessment for taxes payable in 2018. The county subsequently filed a summary judgment motion asserting that the abatement agreement contractually bars Rockstep's chapter 278 petition. Rockstep argued, among other things: (1) that the county's abatement agreement was invalid because the county did not properly approve it; (2) that the county was statutorily prohibited from pleading any affirmative defense to a chapter 278 petition; and (3) that even if the county were authorized to plead waiver, its failure to do so barred it from now asserting that defense by means of a summary judgment motion.

Minn. Stat. §373.02 (2018) allows county boards power to exercise their delegated powers in accordance with the law. Written agreements made by the county, such as resolutions, shall be executed by the chair of the board and the clerk of the board. Counties are authorized to abate property taxes only after holding a properly noticed hearing and adopting an abatement resolution stating specific terms. Minn. Stat. §469.1813 (2018). The court disagreed with Rockstep's argument that the abatement agreement was improperly executed and is therefore invalid and unenforceable. Rockstep argued that the county never adopted a separate resolution approving the abatement agreement to authorize a county official to execute the agreement on the board's behalf. The court concluded that execution of the agreement by the board's chair and the county clerk were sufficient to approve the agreement.

Minnesota statute establishes the exclusive procedure for challenging a local property tax assessment. By statute, the Minnesota Rules of Civil Procedure "shall govern the procedures in the Tax Court, where practicable." Minn. Stat. §271.06, subd. 7 (2018). The Minnesota Supreme Court recently reiterated that

civil rules apply to tax court proceedings, so long as no conflict exists between the rules and the tax statutes. *Court Park Co. v. Cty. of Hennepin*, 907 N.W.2d 641, 645 n.4 (Minn. 2018). "Where a conflict exists, the tax statutes control." *Id.* Section 278.05 specifically contemplates that no answer or other responsive pleading will be filed in response to a chapter 278 petition. Minnesota Rules of Civil Procedure 8.02 and 8.03 require that defenses and affirmative defenses must be asserted by responsive pleading. Because there is a direct and unavoidable conflict, the statute controls, and 8.02 and 8.03 cannot practicably govern in chapter 278 proceedings in tax court. Rockstep argued that "if § 278.05, subd. 1 relieves the County of the obligation to plead in response to Rockstep's petition, it likewise precludes the County from raising any affirmative defense to the petition." Section 278.05 entails only that counties may not *plead* defenses in chapter 278 proceedings. It does not provide that counties may not *assert* defenses. The court rejected Rockstep's contention that the Legislature intended to prohibit counties from defending chapter 278 actions.

Rockstep argued that "the County waived its waiver defense by failing to timely assert it." Since Civil Rules 8.02 and 8.03 cannot practicably apply in chapter 278 tax court proceedings, and because the counties are statutorily prohibited from pleading defenses, the court rejected Rockstep's argument. The county argued that the abatement agreement contractually bars Rockstep's chapter 278 petition. Rockstep responded that the agreement does not clearly waive its statutory right to appeal the county's assessment or, in the alternative, that the cited provision is ambiguous and, thus, that its meaning cannot be resolved on summary judgment. This dispute presents a question of contract interpretation.

The goal of contract interpretation is "to ascertain and enforce the intent of the parties." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). In so doing, a court looks to the contract as a whole. *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). The meaning of a contract is a question of law unless there is ambiguity. *Id.* at 515. A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation." *Id.* "It is generally recognized that summary judgment is not appropriate where the terms of a contract are at issue and any of its

provisions are ambiguous or uncertain." *Donnay v. Boulware*, 275 Minn. 37, 45, 144 N.W.2d 711, 716 (1966).

The court agreed with Rockstep that the language of the contract is ambiguous, and therefore denied the county's motion for summary judgment. ***Rockstep Willmar, LLC v. Kandiyohi Cty.***, 2019 WL 7176719 (Minn. Tax. Court 12/11/19).

### ■ Multi-tenant retail property understated and subject to equalization relief.

This property tax case concerns the market value of three multi-tenant retail properties on three separate tax parcels all located in Mankato, Minnesota, as of 1/2/2016. The property comprises three multi-tenant retail facilities on three separate tax parcels, all located in Mankato Heights Plaza, and referred to as the North Parcel, the West Parcel, and the Shopping Center. The North Parcel has a land area of 34,682 square feet. The parcel's principal improvement is a one-story, five-tenant retail building constructed in 2002, with a gross building area (GBA) of 8,040 square feet and a gross leasable area (GLA) of 7,830 square feet. Its five retail suites range in size from 1,333 to 1,667 square feet. The West Parcel has a land area of 38,997 square feet. The parcel's principal improvement is a one-story, two-tenant retail building constructed in 2002, with a GBA of 6,450 square feet and a GLA of 6,390 square feet. Its two suites are 1,390 and 5,000 square feet, respectively. The Shopping Center constitutes a majority of the Mankato Heights Plaza, and has a land area of 520,916 square feet. Its principal improvement is a community shopping center constructed in 2001-02 with a GBA of 137,968 square feet and a GLA of 136,128 square feet. The center's 16 retail suites ranged in size from 1,500 to 28,000 square feet. Each subject parcel has adequate parking. Nearby major retailers include Sam's Club, Wal-Mart, Kohl's, Cub, and Hy-Vee.

In a lengthy analysis, the court found that the IRC submitted sufficient credible evidence and found that the aggregate assessed value of the property's three constituent parcels understated its market value as of the assessment date. The court ordered that the market value of the North Parcel as of 1/2/2016 shall be increased from \$923,100 to \$1,209,010, but the parcel's taxable value shall be reduced as a result of equalization to \$1,122,000. The market value of the West Parcel as of 1/2/2016 shall be increased from \$912,100 to \$936,056, but the parcel's taxable value

shall be reduced as a result of equalization to \$869,000. The market value of the Shopping Center as of 1/2/2016 shall be increased from \$13,663,100 to \$14,640,428, but the parcel's taxable value shall be reduced as a result of equalization to \$13,586,000. **IRC Mankato Heights v. Blue Earth Cty**, 2019 WL 7176733 (Minn. Tax Court 12/17/19).

■ **UK Company's income not exempt from U.S. taxation under statute or treaty.** Adams Challenge (UK) Limited is a company incorporated under the laws of the United Kingdom; the company's only income-producing asset was a multi-purpose support vessel. A multi-purpose support vessel, as the name suggests, can be used for multiple purposes, and in this case, Adams's vessel was used by a U.S. company to perform work decommissioning oil and gas wells and removing hurricane-related debris on portions of the U.S. outer continental shelf (OCS) in the Gulf of Mexico. Although Adams had only one income-producing asset, the asset produced a lot of income and Adams earned about \$45 million during the tax years at issue. Adams treated most of the \$45 million as exempt from federal income tax.

Adams, like other foreign corporations, is subject to federal income tax on income "effectively connected with the conduct of a trade or business within the United States." I.R.C. sec. 882(a)(1). Generally, the term "United States" does not include the OCS. See I.R.C. sec. 7701(a)(9). However, I.R.C. sec. 638 provides that, for purposes of applying federal income tax provisions "with respect to mines, oil and gas wells, and other natural deposits," the term "United States" includes "the seabed and subsoil of those submarine areas" within the OCS.

In addition to the Code, a tax treaty between the United States and the U.K. provides that a U.K. enterprise shall not be subject to federal income tax unless it conducts business in this country through a U.S. "permanent establishment." Treaty art. 7(1). An enterprise is deemed to have a U.S. permanent establishment "where activities are carried on offshore... in connection with the exploration... or exploitation... of the seabed and sub-soil and their natural resources." Treaty art. 21(1).

Applying the plain language of the statute to resolve this summary judgment motion, the court reasoned that all of the projects Adams's vessel worked on involved decommissioning of oil and gas wells or pipelines connected to oil and gas rigs. Although some time was spent

in transit between project sites, performing maintenance and repairs in port, or idle at sea awaiting better weather, these latter activities were indispensable components of its central purpose under the charter—to assist in decommissioning oil and gas facilities. "In sum," the court concluded, "because the decommissioning activities in which the Challenge Vessel engaged were integral to, and legally required to be undertaken in connection with, the exploitation of oil and gas resources on the OCS, those activities were 'related to the... exploitation of... oil and gas wells' within the meaning of section 1.638-1(c)(4), Income Tax Regs. Section 638(1) accordingly expanded the 'United States' to include the OCS." The court then addressed the taxability of the income under the treaty, and concluded that the income was also taxable under the treaty. Therefore the \$45 million was taxable in the United States and summary judgment to the Commissioner was proper. **Adams Challenge (UK) Ltd., v. Comm'r**, No. 4816-15., 2020 WL 95692 (T.C. 1/8/2020).

■ **Individual income tax: Deduction for mortgage interest not available for substitutes for rent or personal living expenses.** A taxpaying couple that has had nearly continuous litigation with the Service was once again before the court with several issues, including underreporting gross receipts and failure to substantiate Schedule C deductions. One issue the court took up was whether the couple was entitled to substantiated itemized deductions for mortgage interest expenses on a property in which they lived and from which they operated their businesses, but which they did not own. They leased the property from a landlord who charged them a discounted monthly rent. The discount was offered in exchange for improvements the couple made to the property. The couple claimed deductions totaling about \$47,000 for mortgage interest expense in 2013 and 2014. Since the couple did not own the property, they were not entitled to the mortgage interest deduction despite the leasehold improvements they made and despite their payment of utilities and insurance on the property. The couple had an option to acquire the property, but they never exercised that option. The court reminded the taxpayers that "[t]hey cannot deduct rent, substitutes for rent, or personal living expenses as 'mortgage interest.'" All remaining issues were resolved in favor of the Commissioner. **McRae v. Comm'r**, T.C.M. (RIA) 2019-163 (T.C. 2019).

■ **Individual income tax: Establishing that he was "far along the path to ruin" did not exempt taxpayer from income tax.** Taxpayer Jason Hommel operated a series of coin and precious-metal related businesses. He started the businesses with his father—they operated the business out of their homes and garages, and Mr. Hommel continued after his father died. Eventually, Mr. Hommel moved his business out of the garage and into an existing business. In a detailed opinion that doubles as a fascinating cautionary tale, Judge Holmes sets forth how the taxpayer went from fortune to "ruin"—a tale that includes Mr. Hommel's being charged with false imprisonment and ends with a notice of deficiency for more than \$1 million. In addition to arguing that financial ruin ought to exempt him from paying taxes due, Mr. Hommel argued that he ought not be liable for the deficiency because the ownership of the store (the coin business) was in dispute and because the coin shop's managers stole inventory during the year.

The court first addressed the underreported income and noted a procedural quirk: Since this case is appealable to the 9th Circuit, the presumption that the Commissioner's notices of deficiency are correct is modified. Instead, "the Commissioner [must] first show 'some evidence... which would support an inference' of the taxpayer's involvement in the activity during the year at issue." The Commissioner easily cleared this threshold procedural issue, and the court turned to the substantive question of whether the Commissioner correctly attributed Mr. Hommel's unreported income to his businesses.

Approving the Commissioner's use of a bank deposits analysis, the court found that Mr. Hommel "underreported his 2009 Schedule C gross receipts by \$6,810,339—as the Commissioner determined." The court similarly upheld the Commissioner's findings on cost of goods sold (COGS) and theft loss. Mr. Hommel was successful, however, in arguing that he was not liable for an accuracy-related penalty because the Commissioner was unable to establish compliance with Section 6751(b)(1) (requiring certain procedural safeguards when imposing penalties). **Jason Hommel v. Comm'r**, T.C.M. (RIA) 2020-004 (T.C. 2020).



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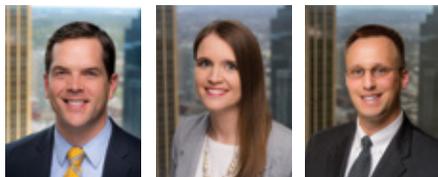
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**BRAUN      JOHNSON      SCHURLE**

THOMAS BRAUN, JENNIFER JOHNSON, and ADAM SCHURLE became new partners of Stoel Rives LLP. Braun is an environmental and energy attorney, Johnson is an attorney in the corporate practice group, and Schurle is a tax attorney.

Gov. Walz appointed JANE BOWMAN (formerly Holzer), as the next judge at the Minnesota Tax Court. She will be replacing Hon. Tamar Gronvall. Bowman was previously an assistant Hennepin County attorney.



**ROEDER**

SARAH ROEDER joined Wunderlich-Malec as corporate counsel. She will be leading the legal department in support of 400+ engineers and other professionals.



**ROCHEFORD**

LARRY ROCHEFORD joined Lommen Abdo as a shareholder to the firm's trial team. For 25 years Rocheford has been a board-certified civil trial advocate by the National Board of Trial Advocacy and is certified as a civil trial specialist by the Minnesota State Bar Association.



**TUNIS**

BRENTON (BRENT) TUNIS has brought his litigation practice to Lommen Abdo. He concentrates his practice on insurance defense, personal injury, corporate litigation, and appellate practice in Wisconsin, Minnesota, and Iowa.



**MILLS**

AMANDA M. MILLS has joined Fredrikson & Byron as an associate in the firm's litigation group. Mills (formerly Sicoli) works with clients to navigate through a range of business disputes.

Eckberg Lammers, PC announced the election of two new shareholders: JOE VAN THOMME and LIDA BANNINK. Van Thomme is a lead attorney in the criminal prosecution group. Bannink is the lead attorney in the labor and employment group as well as a litigator in the business and individual law groups.

O'Meara, Leer, Wagner & Kohl, PA announced that MICHAEL M. SKRAM has been elected as the firm's managing shareholder. He succeeds Christopher E. Celichowski, who recently completed his fourth term as the firm's managing shareholder. Skram maintains a diverse litigation practice.



**SKRAM**

STEPHANIE CRISTEL has become a partner at Livgard & Lloyd. Cristel practices in the areas of Social Security disability and long-term disability insurance denial appeals.

ERIC BEYER was named partner at SiebenCarey. Beyer's legal practice focuses on car accident, workers' compensation, serious personal injury, and wrongful death claims. He manages the Duluth office.



**BEYER**

LAURA NELSON and TRICIA KAUFMAN were elected as partners at Stinson LLP. Nelson



**NELSON**



**KAUFMAN**

focuses her practice on health care and life sciences. Kaufman works in the medical device industry.



**BRONCZYK**



**PROUTY**

Arthur, Chapman, Kettering, Smetak & Pikala, PA announced the election of COREY S. BRONCZYK and BETH A. PROUTY as shareholders. Bronczyk focuses in the area of construction law and Prouty focuses her practice on insurance coverage.



**PETERS**



**NEWMAN**



**NADEEM**

Bassford Remele announced that JEFFREY R. PETERS and PATRICK D. NEWMAN have been elected shareholders and KHANSAA NADEEM has become an associate of the firm. Peters focuses on commercial and product liability disputes. Newman defends members of the financial services industry. Nadeem focuses in the areas of employment litigation and liability.

Robins Kaplan LLP announced that civil rights and personal injury attorneys ROBERT BENNETT, KATIE BENNETT, ANDREW NOEL, and MARC BETINSKY have joined the firm's Minneapolis office.

JACK W. HICKS and CHRISTOPHER J. KRADLE have joined Baker Vicchiollo



**HICKS**



**KRADLE**

Law LLC as associate attorneys. Hicks will focus in the family law practice area. Kradle will be leading the estate planning and probate practice area.

ATTICUS FAMILY LAW, SC has expanded to Duluth to serve Northeastern Minnesota. ALEXANDRA REYNOLDS will be the lead attorney, assisting clients in their family law needs.



**REYNOLDS**

DAVID JOYSLIN and LIBBY DAVYDOV were elected as partners at Best & Flanagan.



**JOYSLIN**



**DAVYDOV**

Joyslin focuses his practice on estate planning and Davydov focuses her practice on business law.

MITCHELL D. SULLIVAN has joined Moss & Barnett in the business law and real estate teams.



**SULLIVAN**

**Kyle Jason Hegna** age 56, of Chaska, died unexpectedly January 18, 2020. Hegna was a founding partner of Wilkerson and Hegna Attorneys at Law in Edina, MN.

**James A. Jorgensen** of St. Paul, MN passed away unexpectedly on January 3, 2020. He worked for the Minnesota Attorney General's office until opening a law firm with Gordon Glendenning and finally retiring a few years ago.

**Paul John Bakke**, age 80, of Anoka, passed away on December 5, 2019. He received his JD from the University of Minnesota Law School in 1965. He practiced law in Brooklyn Center and Anoka until his retirement in 2008.

**Paul G. Zerby** died on January 5, 2020. He attended Harvard Law School, graduating in 1958 and practicing at Dorsey, Whitney, West, Owen and Halliday until 1972. Zerby taught tax law at William Mitchell School of Law and the University of Minnesota Law School. He worked as an assistant attorney general of the State of Minnesota from 1973 to 1998.

**Edward Hellekson**, of Baxter, MN, died on January 7, 2020 at age 52. He owned and operated several businesses including: Hellekson Law, Wealth Retirement Group, and Ascent Investment Advisory, LLC.

**John Ellefson**, age 77, of Burnsville, passed away on December 16, 2019. He was a workers' comp judge for over 20 years.

**Kris Wittwer**, age 61 of New Brighton, passed away December 15, 2019. He attended UW-Madison & University of Toledo College of Law and established his own law firm.

**Sam T. Courey** of Golden Valley died December 24, 2019. He graduated from the University of Minnesota Law School in 1959. He practiced law until shortly before his death and was a founding partner of Courey, Kosanda and Zimmer, PA.

**David T. Magnuson**, age 78, of Stillwater, passed away peacefully December 25, 2019. For 40 years he served the residents of his hometown, Stillwater, as a highly respected and trusted city attorney. It is believed that he was the longest serving city attorney in Minnesota.

**Paul R. Kempainen**, age 72, of Minneapolis passed away on December 13, 2019. He was an assistant attorney general for the State of Minnesota.

**Raebern B. Hitchcock, Sr.**, age 86, of Saint Paul, passed away December 12, 2019. Raebern practiced law for 57 years. He joined forces with his father and stepmother, Edward and Marie, in the law firm of Hitchcock, Hitchcock and Hitchcock in Saint Paul. From there, Raebern was a sole practitioner for many years before forming the Hitchcock Law Firm with his son, Edward.

**John Borger** died on December 16, 2019. In 2017, Borger retired from the Faegre Baker Daniels law firm, where he represented the Star Tribune and other media organizations for four decades.

**Hon. Bernard Edward Borene**, age 74, formerly of Northfield, MN, passed away November 26, 2019. In 1984, he was appointed as a judge by then-Gov. Rudy Perpich, and he served for 26 years as a district judge in the 3rd Judicial District of Minnesota.

**Louis M. Ohly** passed away on August 6, 2019. He was a graduate of William Mitchell School of Law. Ohly practiced Law in Rochester from 1971 until his retirement.

**Hon. James William Hoolihan**, 76, passed away on June 27, 2019. He graduated from William Mitchell Law School in 1968. He became a district judge for Benton County in 1997, and he enjoyed that career until he retired in 2012.

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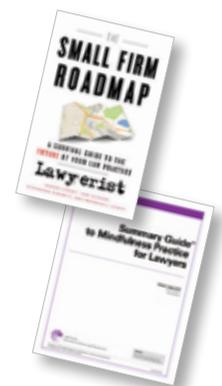
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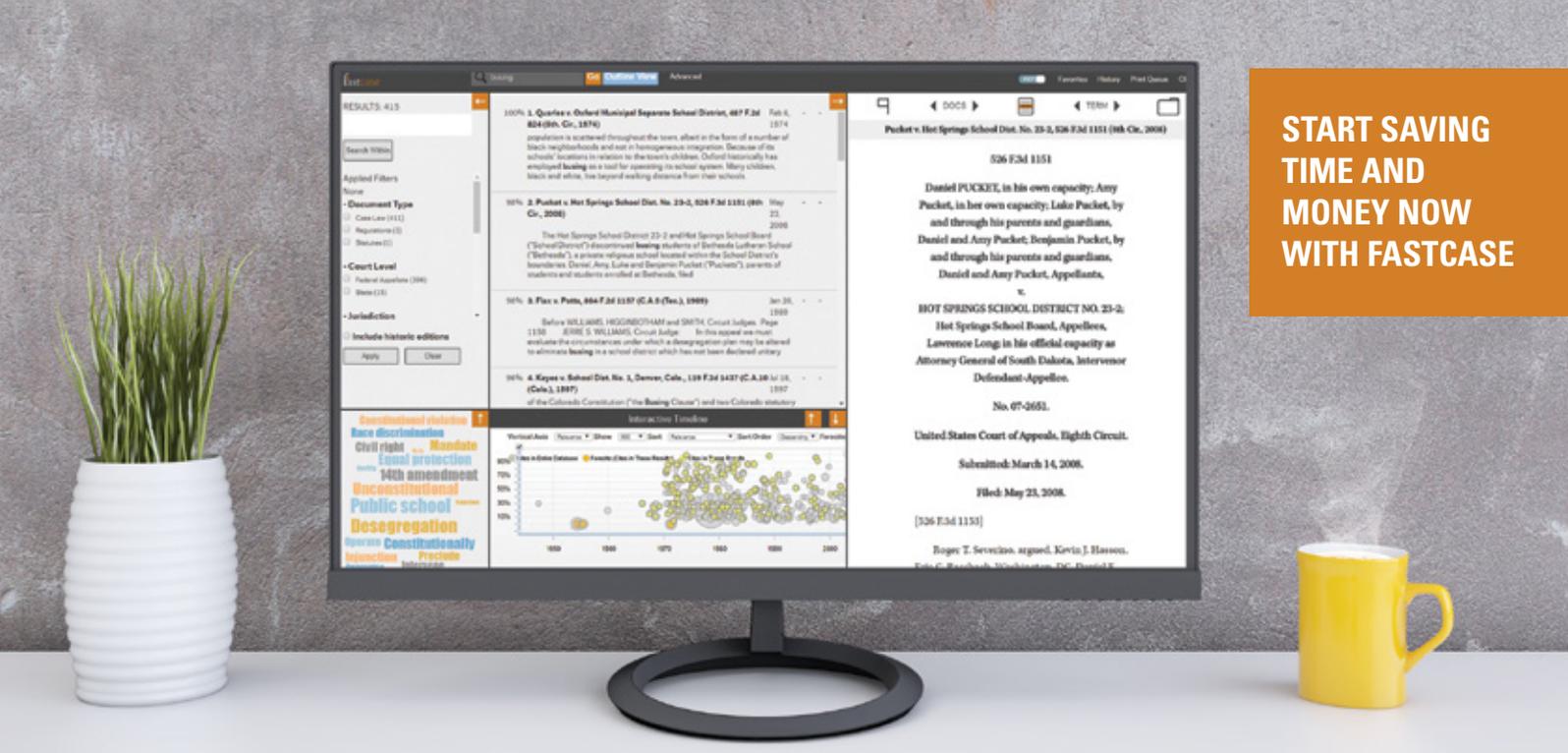
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