OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

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SEPTEMBER 2021
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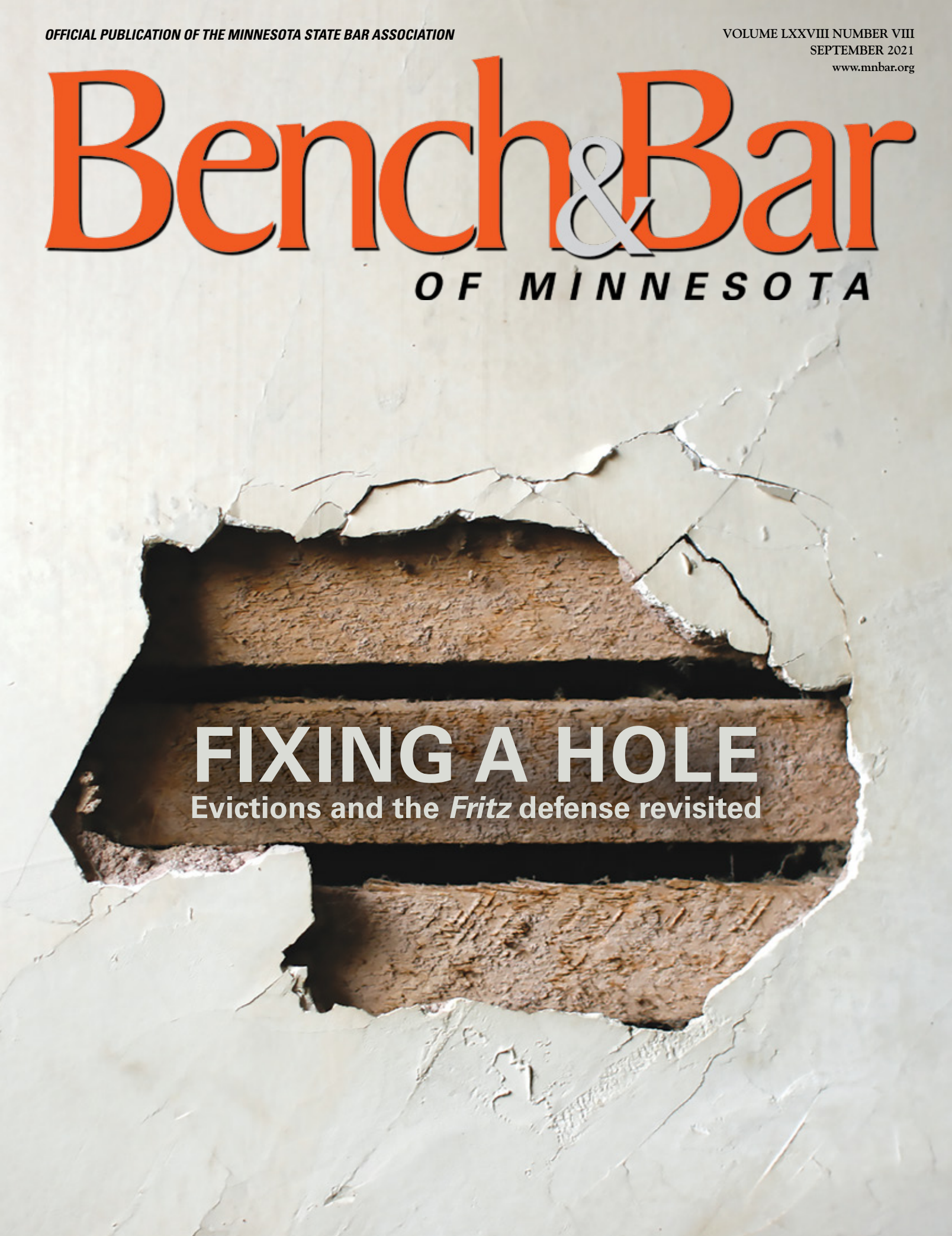
Bench&Bar OF MINNESOTA



FIXING A HOLE

Evictions and the *Fritz* defense revisited

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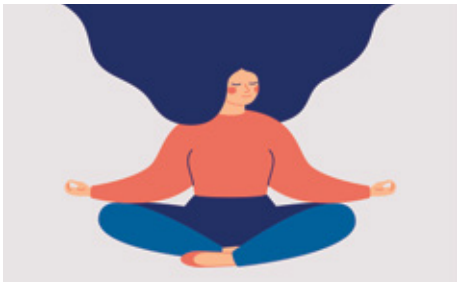

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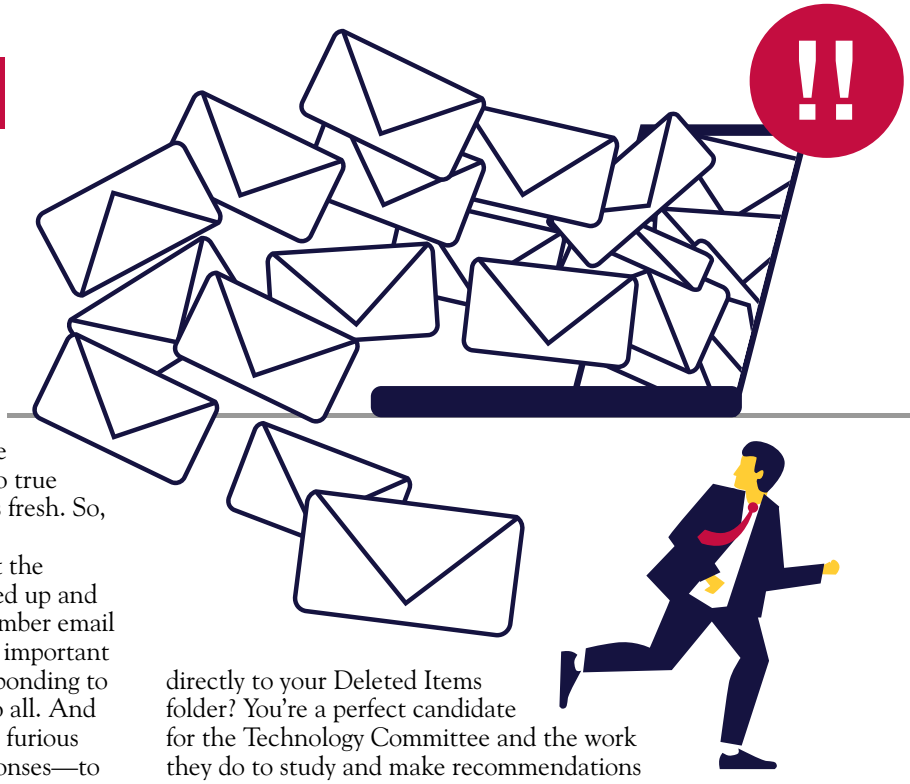
WE'D LIKE TO HEAR FROM YOU: To query potential articles for Bench & Bar, or to pass along your comments on matters related to the profession, the MSBA, or this magazine, write to editor Steve Perry at sperry@mnbars.org or at the postal address above.

TRIGGER WARNING

Reply all email chains

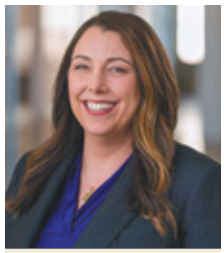


Can we talk about July 29, 2021? It's been a few weeks now, and while the afternoon (and the early evening, and the night) were certainly, um, prolific, it's also true that time heals and by now the wound isn't quite as fresh. So, let's unpack the day.

You remember July 29, right? That's the day that the MSBA Members News & Notes Community clogged up and bogged down some large portion of over 13,000 member email inboxes. It started as a note to members advising of important job postings, which was followed by a comment responding to the post that was (probably unintentionally) sent to all. And then, slowly, but eventually coming on at a fast and furious pace, hundreds, maybe thousands of follow up responses—to EVERYONE! There were lots of emotions expressed and "tips" offered. It was entertaining and exasperating at the same time. It happened because of a mistake (similar to ones that we have all made) and sincere apologies were given. I hope you extended grace, as well. Goodness knows we can all use some of that—these days especially.

Now that #replyallgate is in our collective rearview mirror, are there any insights to be gained? Yes, most surely there are. Here's what the responses to the never-ending email chain say about member relationships with the MSBA.

■ Are you a former MSBA president who used your top-secret access to staff cell phones and personal email addresses to plead for the flurry of emails to stop? You're still a mover and a shaker helping the MSBA serve as a connector and convener. This episode will let you regale all your colleagues with evidence of the (very, very) many touchpoints that MSBA membership provides!



JENNIFER THOMPSON is a founding partner of the Edina construction law firm Thompson Tarasek Lee-O'Halloran PLLC. She has also served on the Minnesota Lawyer Mutual Insurance Company board of directors since 2019.

■ Did you reply all to ask to be removed from the email exchange? You might enjoy the on-your-own-schedule and at-your-own-pace MSBA On-Demand CLE library. MSBA offers hundreds of hours of On Demand CLE programming each year, covering over 25 practice areas. You get the critical updates and developments in the law on your schedule… and without anyone interfering with your inbox.

■ Did you take to social media to alert your network of the situation? Did you add pictures of the size of your inbox? Or did you quickly set up a rule to route all messages on the thread directly to your Deleted Items folder? You're a perfect candidate for the Technology Committee and the work they do to study and make recommendations relating to the use of technology in the practice of law.

■ Did you offer assistance to your fellow members on how to stop the continuing emails, possibly even inserting screenshot snips for all the visual learners? Sounds like you're a problem-solver, looking to do good and help others. The Access to Justice Committee is for you!

■ Did you use all CAPS or the phrase "for the love of…" and plead for everyone to stop replying all (while you replied all)? Sounds like you might have a knack for coaching. The MSBA's renowned Mock Trial program could be a great fit for you.

■ Did you reply all just to watch how others replied, to jokingly register your choice of the fish entrée *sans* dessert, or because your inbox hadn't seen that much activity in a while? You appreciate comedy and connection, two important components of lawyer wellness. Make sure to check out the MSBA Lawyer Well-Being Committee.

■ Did you have no idea that #replyallgate was even happening? You are under-utilizing your membership! You should schedule a one-on-one meeting with MSBA staff about member services and resources, including specifically the MSBA communities. In the communities, you may chat, share and build documents, and access other resources (like the practicelaw library). There's a community for every MSBA section. If you're a member of a section, you're already a member of that section's community. Plus, there are dozens of other working groups and committees already operating online.

The MSBA has much to offer all its members. Even in the wake of a frustrating professional moment, hopefully, with time passed and a lens of humor, we can all see that perhaps the best part of what the MSBA offers its members is community—a community that shared a wild afternoon one Thursday in July and now, together, can laugh about it. ▲

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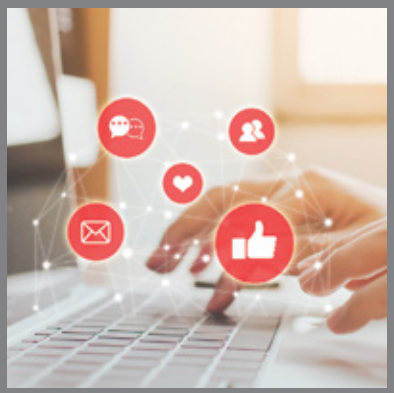

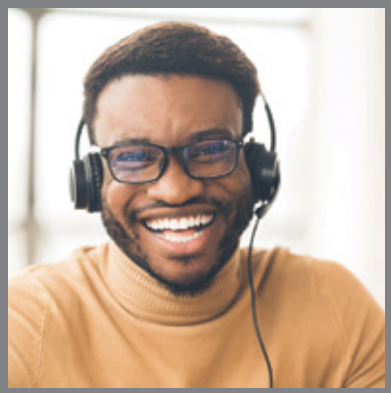

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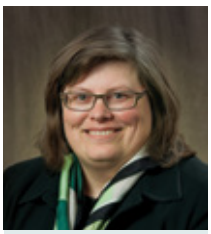
Pandemic legal ethics, part 2

In the May/June 2020 issue of this publication, I wrote about legal ethics in a pandemic.* More than a year later, we remain in a pandemic that not only presents continuing personal safety and well-being challenges; professional challenges also remain. Lots of guidance has been issued from various sources and I want to make sure you have information to help you continue to navigate these issues in our new normal.

First, remember: All ethics rules remain in full force and effect. The rules, particularly those that are nondiscretionary, generally do not have exigent circumstance exceptions. Even those rules that incorporate the word "reasonable" refer to "a reasonably prudent and competent lawyer." The rules do not expect you to simply do your best under difficult and challenging circumstances, but rather set minimum standards of conduct for lawyers irrespective of the circumstances. As attorneys, we must embrace the challenge of ensuring that our legal practice remains ethically compliant—notwithstanding the changes to our practice made necessary by the seemingly never-ending spread of covid-19. The good news is that the rules provide a framework to help you navigate changing circumstances and the application of those rules to your practice can help you competently handle many pandemic-related situations. As an example, let's consider the issue of vaccinations.

Implications of vaccination status

Vaccination status has become a contentious and emotional subject. A client's vaccination status can have implications for how you approach a representation. For example, how comfortable are you meeting with a client in person? Can you refuse to meet in person with an unvaccinated client? What about hearings? Say your unvaccinated client wants an in-person hearing but you think the remote hearing option the court is also offering is better since you don't want to sit next to your unvaccinated client even with required masks. The ethics rules of course do not mention vaccination status, but they can help you answer such questions ethically.



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

SUSAN.HUMISTON@COURTS.STATE.MN.US

You may or may not know if your client is vaccinated. Can you ethically ask? Sure. Can they decline to tell you? Sure. What you do with the answer or lack thereof is then up to you. Lawyers make determinations all the time regarding whether they are comfortable or available to meet in person with a client or prospective client, whether it's a question of physical safety, cost savings, competing schedules, or something else. Vaccination status is no different. Can you competently represent the client using available alternatives, such as the many secure communication technology options we have been required to learn? Most likely the answer is yes. Of course this can be complicated, because not all clients have access to a lot of technology. This just means we must think about how to communicate effectively with clients or prospective clients given the particulars of their circumstances and what we need to know to represent them.

The ethics rules do not tell you specifically how to do this, but again provide the framework. Can you competently represent the client with the information you have under Rule 1.1, Minnesota Rules of Professional Conduct (MRPC)? Can you keep the client reasonably informed about the status of the matter under Rule 1.4(a)(3), MRPC? Can you promptly comply with reasonable requests for information under Rule 1.4(a)(4), MRPC? Can you explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation under Rule 1.4(b), MRPC? Chances are pretty good that no matter what type of law you practice, you can find a way to do most if not all of these things (short of a criminal jury trial) without physically being in the same room with your client if you are comfortable with technology—an essential requirement of modern practice.

Similarly, regarding the question of in-person versus remote hearings, remember as a starting point that the rules address allocation of authority between client and lawyer. Rule 1.2(a), MRPC, provides "a lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they [the objectives] are to be pursued." What is the purpose of the hearing that you want to attend remotely? Have you discussed with your client the available options as they relate to your client's objectives? Is the court offering a remote option and can you effectively present your case through that means? Through consultation, can you find a mutually available resolution if there is a disagreement between you and your client? If not, is withdrawal warranted and can you do so ethically under Rule 1.16, MRPC?

Lawyers call our hotline hoping the ethics rules will afford them specific and unambiguous answers to the problem at hand. While the rules provide several prohibitions—for example, don't lie—what I find most rewarding about working with the ethics rules is they give you the tools to address a lot of challenging and dynamic situations. They are logical and client-centered, and through their interplay, help you effectively and ethically navigate all kinds of difficult and unprecedented situations. As usual, this statement comes with the caution that there may be other substantive laws or court rules that also bear on a particular topic, so do not forget those considerations.

Resources

As lawyers, we know the answer is often "it depends." But we also know that knowledge is power. And that asking the right questions often provides the necessary clarity to navigate difficult times. In addition to my prior article, we have prepared a list of frequently asked questions related to covid. That list can be found on our website, *www.lprb.mncourts.gov*. The American Bar Association has also published two opinions you might find relevant: ABA Formal Opinion 495, "Lawyers Working Remotely" (December 2020) and Formal Opinion 498, "Virtual Practice" (March 2021). The first looks at working remotely through the lens of the unauthorized practice of law; the second examines ethics rules typically implicated by remote or virtual practice. Even if you are not a member of the American Bar Association, the ABA makes its copyrighted ethics opinions available free of charge for one year following issuance, so download them now if this is a topic of interest to you.

Conclusion

I'm pleased to report that we have not seen a spike in discipline due to pandemic-related ethics mistakes. The complaints we see now are the same ones we have always seen, although it's fair to say that the pandemic has exacerbated already challenging situations for some lawyers, especially those related to substance use and mental health issues. The pandemic has also taken its toll on civility, from anecdotal reports I have received. The practice of law has always been challenging, and the profession continues to be challenged by this pandemic. Taking time to review your practices against the ethics rules is always time well spent, and that remains true as we continue to navigate day-to-day changes in the world necessitated by the pandemic. Please call our ethics hotline (651-296-3952) if you have a question about how to ethically handle a particular client situation or let us know if there is something else the Office can do to help you in the ethical practice of law. Take care. ▲

* Susan Humiston, *Legal Ethics in a Pandemic*, Bench & Bar (May/June 2020). *https://www.mnbar.org/resources/publications/bench-bar/columns/2020/05/27/legal-ethics-in-a-pandemic*

The NSA advisory on brute force attacks

In July the National Security Agency (NSA), in partnership with the CISA, FBI, and NCSC, issued a cybersecurity advisory regarding global brute force campaigns titled, "Russian GRU Conducting Global Brute Force Campaign to Compromise Enterprise and Cloud Environments." Though it's difficult to assign a specific timeline (or start date) to the activities of the GRU, Russia's military intelligence agency, the report explains that these activities likely have been going on at least since the middle of 2019 and up until the start of 2021.

A variety of organizations, companies, and businesses in both the private and public sectors have been targeted; these incursions are largely successful in part because they use a number of different methods of attack in tandem. The nature of the cyberattacks is described in the July 1 release:

> This brute force capability allows the [] actors to access protected data, including email, and identify valid account credentials. Those credentials may then be used for a variety of purposes, including initial access, persistence, privilege escalation, and defense evasion. The actors have used identified account credentials in conjunction with exploiting publicly known vulnerabilities, such as exploiting Microsoft Exchange servers.… After gaining remote access, many well-known tactics, techniques, and procedures (TTPs) are combined to move laterally, evade defenses, and collect additional information within target networks.[1]

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.

The United States is among a number of countries that have been working recently to curb the damage brought about by nation-state threats, including this Russian campaign. Following several large-scale breaches, and the issuing of an executive order on improving the nation's cybersecurity, President Biden will be meeting with several private sector cybersecurity experts to discuss the future of combatting cyber risk in an increasingly aggressive cyber landscape.[2]

With vigilance in mind, the NSA report concludes by providing recommendations and mitigation strategies for organizations to employ. Given the scope and nature of the attacks, both the private and public sectors need to combine their efforts to address global cyber threats and alleviate the potential for catastrophic damage.

The NSA recommendations

In a recent interview on the Compliance & Ethics podcast, I discussed the importance of organizations carefully reviewing and assessing their compliance with the list of recommendations put forth by the NSA in its report.[3] In addition to addressing how the nation-state threat actors are conducting their attacks, the report provides straightforward guidelines for improving cybersecurity posture and counteracting the preferred methodologies of attackers. Multifactor authentication, time-out and lock-out features, network segmentation, and careful access control monitoring are all effective strategies in staying as secure as possible.

Toward the end of the interview, I was asked a very important question that's often brushed aside. "I often see people working in public places—at the coffee shop, on airplanes. How should these low-tech issues be addressed?" It's a great question, not only for the logistical and security issues that often come about as a result of careless remote work policies, but also because it gets to the heart of a very easy to ignore security issue—the human element. We all know that cybercriminals are always going to seek the easiest route. In many cases, hacking the human element of security is much easier than looking for technological vulnerabilities. To put it another way, strong technological controls alone are never enough, as they can always be defeated by one sticky note with a username and password stuck to a laptop in a public place. In our current age of remote work, known vulnerabilities, and rampant spear-phishing campaigns, we must strive to balance investment in security technologies with strong training and threat awareness programs.

Finally, let's also remember that verification is just as important as documentation. Time and again, organizations point to documentation as evidence of their current cybersecurity posture. Unfortunately, there is often a substantial gap between written documentation (which is ultimately a record of how things are supposed to be) and the reality. When your organization is reviewing the NSA's report and assessing its recommendations, the temptation might be to check off items based on written procedures and protocols. But it's vital to make sure that the right questions are being asked. How are these procedures actually being implemented, and are they being applied across the organization? Where is our data stored, and how does our organization monitor its cloud usage and third-party vendor relationships? Are employees using multi-factor authentication, and how is compliance assessed? Documentation is essential, but frequent verification is also necessary to manage cybersecurity posture and efficiently counteract risk. ▲

Notes

[1] *https://media.defense.gov/2021/Jul/01/2002753896/-1/-1/1/CSA_GRU_GLOBAL_BRUTE_FORCE_CAMPAIGN_UOO158036-21.PDF*

[2] *https://abcnews.go.com/Politics/wireStory/biden-meet-month-private-sector-cyber-issues-78966697*

[3] *https://complianceandethics.org/mark-lanterman-on-brute-force-attacks-and-corporate-cyber-defenses-podcast/*

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DISCOVERY

Reinventing the request for admissions

By Eliot T. Tracz

Written discovery can elicit different reactions from different people. Some may find it tedious, others interesting. Regardless, it is an inevitable part of the litigation process. Often, the process for written discovery—interrogatories, requests for productions, and requests for admissions (RFAs)—follows a predictable pattern: All of the written discovery is bundled together and served on the opposing party; the responses contain some documentation, routine objections, and denials of some facts that will later prove true. While this process is commonly followed, and is mandatory in cases assigned to Expedited Litigation Track, there are alternatives that allow a more strategic use of discovery tools.

Nearly every young litigator knows that RFAs are a tool used to narrow the number of disputed issues in a case. While that can certainly be done when bundled with other written discovery, the inherent versatility of RFAs really comes through when they are unbundled and allowed to stand on their own. To that end, I suggest that RFAs work best when reserved until after depositions. There are three reasons for this approach: (1) the way the rules of civil procedure—state and federal—structure RFAs; (2) the ability to fill holes from depositions; and (3) the opportunity to set your case up for summary judgment.

Federal Rule of Civil Procedure 36 and Minnesota Rule of Civil Procedure 36 govern RFAs in federal and state court respectively. In some ways they are similar: Neither limits the number of RFAs that may be propounded during the course of discovery; both require an answer within 30 days or the matter of which an admission is requested is deemed admitted; and both limit the use of the admissions solely to the matter at issue.[1] Another benefit is that, in both state and federal court, the party upon whom the RFAs have been propounded may only assert lack of knowledge if that party asserts that a reasonable inquiry has been made and the information available or readily obtainable by the party is insufficient to enable the party to admit or deny.

It is here that service of RFAs after depositions really yields fruit. Where an RFA served early in discovery may result in a denial or a statement that the party upon whom the request was served lacks information, RFAs tailored to deposition testimony can set up a strong motion for summary judgment. Once you've built your story, and put the story to the opposing party one piece at a time, you can nail down specific facts that help your case one at a time—and under oath!

Imagine, for example, that you are deposing the CEO for a company alleged to have violated a commercial lease which included a personal guaranty. Naturally, your questions would seek to elicit testimony that there was a lease, that the lease was breached, that there was a personal guaranty, and that the CEO understood what the personal guaranty was.

Once the deposition is completed, it is time to tailor those RFAs to the substance of the deposition. The specific material facts that you have managed to nail down are ripe for admissions because the

answering party must admit to items that are true, or face sanctions if they deny claims that are proved true.[2] Every question of material fact that is admitted is conclusively established unless the court permits withdrawal or amendment, something that is less likely to happen when the admission is supported by deposition testimony.

From there, the path to summary judgment is clear. The standard for summary judgment is the same both in Minnesota and in federal court: There are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law.[3] It is easier to show the court that there are no genuine issues of material fact when you can argue that the opposing party agrees with your position and then cite the applicable admission. But that's not all; RFAs can also be used to elicit admissions as to opinions regarding the application of law to fact.[4] Well-crafted RFAs can also place you in a strong position to argue that the opposing party even agrees with your application of the law.

The second reason to reserve RFAs until after depositions are over is to address possible deficiencies in discovery. Using RFAs to addresses these mistakes is particularly effective for two reasons: first, by asking a question in the form of a request for admission, you not only get to ask the question that you might have missed earlier—you also get to frame the answer through the wording of the request. If you know the answer you want, the language of the RFA can prompt the admission that you are looking for. Second, in the event that you have discovered a hole in your discovery, an RFA could be coupled with interrogatories so that if the RFA is denied, the interrogatories may help direct you to the information that you need.

Because a party may issue an unlimited number of RFAs, a submission of RFAs may serve multiple purposes without limiting the opportunity of the party propounding the RFAs to pursue answers. Waiting until depositions are finished to serve RFAs allows them to be used to eliminate issues, follow up on or addresses issues with discovery, and ultimately, to tee up a summary judgment motion that is airtight. Since RFAs can be wielded broadly (to capture information) or surgically (to eliminate specific issues and move a case towards resolution), perhaps when the opportunity arises you will consider unbundling them, and using them to their full potential. ▲

Notes

[1] Fed. R. Civ. P. 36; Minn. R. Civ. P. 36.01.
[2] Minn. R. Civ. P. 37.03(b); Fed. R. Civ. P. 37(c)(2).
[3] Minn. R. Civ. P. 56; Fed. R. Civ. P.56.
[4] Minn. R. Civ. P. 36.01; Fed. R. Civ. P. 36(a)(1)(A).

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FIXING A HOLE

The *Fritz* defense revisited

Eliminating the unconstitutional "pay-to-defend" barrier in Minnesota eviction actions

By James Poradek and Luke Grundman

With state and federal moratoriums on evictions for nonpayment of rent coming to an end, it will be essential that those Minnesota tenants who have been forced to live in poorly maintained rental housing during the pandemic be allowed to exercise their legal rights to defend themselves before they are evicted from their homes by Minnesota courts. But Minnesota courts have erected a draconian procedural barrier that makes it impossible for many tenants to have their day in court: a "pay to defend" requirement that forces eviction defendants to deposit unpaid back rent with the court as a precondition for trial on the defense that the landlord has violated its legal obligation to maintain the property in habitable condition.

This article addresses why Minnesota's "pay-to-defend" requirement is a fundamental violation of procedural due process. The U.S. Supreme Court has made it clear that such procedures are antithetical to the due process rights of low-income litigants: "Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to... defend themselves in court... Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor."[1]

Likewise, the Minnesota Supreme Court recently declared in *Central Housing Associates v. Olson* that "[a] lease is not a one-way street that entitles only the landlord to the aid of the law."[2] But that is exactly what has happened in Minnesota housing courts. The pay-to-defend requirement has turned Minnesota eviction actions into a one-way street flowing straight toward eviction; due process has become a meaningless promise to the poor.

Minnesota's unconstitutional "pay to defend" requirement

In theory, Minnesota law is among the most robust in the United States at protecting tenants from being evicted from their homes for nonpayment when landlords have breached their side of the rental bargain. In the early 1970s, the Minnesota Legislature passed remedial legislation—now set forth at Minn. Stat. §504B.161—that implies into every residential lease "covenants of habitability" in which the landlord promises "to maintain the premises in compliance with the applicable health and safety laws."

In 1973, the Minnesota Supreme Court issued the landmark decision *Fritz v. Warthen*,[3] in which it held that the covenants of habitability were a "statutory right" and "statutory mandate" that impose on landlords the affirmative duty to "maintain the premises in compliance with applicable health and safety laws." In *Fritz*, the Court recognized an affirmative defense to eviction, now commonly known as the "*Fritz* defense":

The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. Moreover, defendants are deprived of their money at the exact moment their lives are being disrupted by court proceedings and they face the possibility of having to find new housing that requires a security deposit.

"The legislative objective in enacting the implied covenants of habitability is clearly to assure adequate and tenantable housing within the state. That objective is promoted by permitting breach of the statutory covenants to be asserted as a defense in unlawful detainer actions."[4] Thus, *Fritz* created a powerful eviction defense for tenants who have been forced to live in poorly maintained buildings by a landlord who now seeks to remove them from their homes for nonpayment of rent.

In practice, however, most Minnesota courts have set up in eviction actions exactly the "one-way street" condemned by the Minnesota Supreme Court in *Central Housing*, imposing a "pay to defend" requirement before an eviction defendant can raise a *Fritz* defense. Because most low-income tenants sued for eviction based on nonpayment of rent do not have the money to prepay back rent, their *Fritz* defenses are never heard. Instead, regardless of the merits of their *Fritz* defenses, these tenants are either promptly evicted under a court-ordered writ of recovery or forced to settle their cases unfavorably. This due process crisis will only expand in the wake of the vast economic disruptions of the pandemic.

Alarmingly, statements contained in the *Minnesota Housing Court Benchbook* (2d. ed 2020) suggest that Minnesota courts are knowingly putting expediency ahead of due process in conditioning *Fritz* defenses on back rent prepayment. The *Benchbook*'s back cover describes itself as "a guide to help Judges in Minnesota work through Housing Court cases that come before them," and it has been widely circulated among judicial officers in Minnesota. The *Benchbook* explicitly instructs at page 59 that "If Tenant alleges a FRITZ defense, then *you need to have Tenant deposit rent owed into court* and schedule a hearing." (Emphasis added.) The *Benchbook* makes clear at page 57 that the consequence of failing to prepay back rent into court is eviction without trial: "The order setting the hearing states that if Tenant does not deposit the money ordered into escrow that the hearing shall be cancelled and a Writ to be issued."

The *Benchbook* then provides commentary that raises an obvious constitutional red flag at page 57: "Sometimes, the real problem is that Tenant simply does not have the money to pay the rent owed, and the deposit requirement will resolve the issue. Often, when Tenants understand this will happen, they are more willing to settle out the case and work either on a payment agreement or they will agree to move out at some agreed date." In other words, the *Benchbook* embraces the use of back rent prepayment orders to "resolve" eviction actions before trial by forcing poor tenants who cannot prepay back rent to either "settle out the case" or be evicted from their apartments—no matter what the merits of their *Fritz* defenses.

Failing the procedural due process test

Obviously, this is not how the Minnesota court system is supposed to work. "Due process requires that there be an opportunity to present every available defense."[5] In *Olson v. One 1999 Lexus MN License Plate*,[6] the Minnesota Supreme Court set forth in detail the legal test for analyzing procedural due process under "[b]oth the United States and Minnesota Constitutions," relying on the three-factor analysis in *Mathews v. Eldridge*:[7]

- "[f]irst, the private interest that will be affected by the official action";
- "second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and
- "finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[8]

Here, application of the three *Mathews* factors leaves no question that the pay-to-defend procedure violates procedural due process.

First, automatic back rent posting has a devastating effect on the private interests of Minnesota renters. Eviction defendants who cannot pay the back rent into court are deprived of their ability to assert their statutory habitability rights as a *Fritz* defense at the exact moment they need them most. The U.S. Supreme Court has made clear that "a cause of action [and a defense] is a species of property protected by the due process clause of the Fourteenth Amendment."[9] "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"[10] Accordingly, the U.S. Supreme Court has long held that the concept of "property" imposes "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."[11]

Even worse, the resulting eviction "deprive[s] [defendants] of a significant interest in property: indeed, of *the right to continued residence in their homes*."[12] (Emphasis added.) "These constitutionally based interests are further threatened when the limitation that forces a person to leave a [] home renders him homeless."[13] And a court-ordered eviction greatly increases both the short-term and long-term risks of homelessness, because it becomes places a black mark on the defendant's rental history that often leads to a future of shelters and encampments for the defendant and defendant's family. The Minnesota Supreme Court itself has recognized that "[e]viction of tenants" can "result[] in homelessness" that is "inimical to public health, safety, and welfare."[14] "Not only are [defendants'] property interests involved, but the courts have also recognized that if a person's good name, reputation, honor, or integrity is at stake because of governmental action, the person is entitled to procedural due process."[15]

Further, even when eviction defendants are able to deposit back rent before trial, the property deprivations are significant. Money is a core property interest.[16] And the fact that the defendants may lose their money "only temporarily [does] not put the seizure beyond scrutiny under the Due Process Clause. The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause."[17] Moreover, defendants are deprived of their money at the exact moment their lives are being disrupted by court proceedings and they face the possibility of having to find new housing that requires a security deposit.

Second, erroneous deprivation of private interests is inevitable here because there is no pre-deprivation hearing at all before back rent has to be paid into court—much less the constitutionally mandated "opportunity to be heard at a meaningful time and in a meaningful way" on their *Fritz* defenses. As *Mathews* itself made clear, the "right to be heard *before* being condemned to suffer grievous loss of any kind... is a principle basic to our society."[18] (Emphasis added.) At the heart of the due process clause is the "root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."[19] (Emphasis added.) Such a pre-deprivation hearing does not take place here. Worse still, there is no post-deprivation hearing on the *Fritz* defenses of those tenants who do not post back rent.

Third, any procedure that impedes tenants in asserting their habitability rights is contrary to the government's interest to

"assure adequate and tenantable housing within the state," as explained in *Fritz*: "The legislative objective in enacting the implied covenants of habitability is clearly to assure adequate and tenantable housing within the state.... If a landlord is entitled to regain possession of the premises in spite of his failure to fulfill the covenants, this purpose would be frustrated."[20]

It is for this reason that the Minnesota Supreme Court recently rejected the argument that the 14-day notice requirement in the rent escrow statute applies to the tenant's ability to assert a *Fritz* defense during eviction proceedings: "[R]equiring written notice before a tenant can raise a common-law habitability defense would frustrate the Legislature's goals and impose a procedural barrier for tenants defending against improper evictions."[21] It is also for this reason that the Minnesota Supreme Court last year provided a common law defense when a landlord retaliates against a tenant for raising habitability concerns: "There is a compelling reason to recognize this defense: the protection of the health, safety, and welfare of tenants and their families."[22]

In sum, the back rent prepayment requirement plainly fails all three of the *Mathews* factors and thus violates procedural due process under both the U.S. and Minnesota Constitutions.

The misguided assumptions behind prepayment requirements

How did we get to this point? Ironically, it appears that *Fritz* itself has been misinterpreted to justify the pay-to-defend deposit of back rent in nonpayment cases. The confusion springs from the statements toward the end of the *Fritz* opinion endorsing *limited* rent escrow during eviction proceedings when there is a risk that "the landlord may prevail and may not then be able to collect the rents due and yet would have been unable to dispossess the tenant during the delays occasioned by court proceedings."[23] But *Fritz* does not approve the draconian back rent prepayment system that has become standard practice in Minnesota courts. Just the opposite: *Fritz* discusses the idea of depositing "*future* rent" and "rent *to be withheld*" or some other "adequate *security* therefor if such a procedure is more suitable under the circumstances" (emphases added)—*not* the prepayment of total back rent. Moreover, *Fritz* emphasizes that "[i]n the majority of cases, the final determination of the action will be made quickly and this procedure will not have to be used." Finally, *Fritz* cautions that "[w]e also expect that, as experience dictates, additional rules may be adopted to meet any problems encountered."[24] Obviously, the procedural due process violation that has become standard practice in Minnesota housing courts qualifies as a problem that needs to be addressed with additional rules.

Likewise, Minnesota General Rule of Practice 608 does not authorize automatic back-rent prepayment.[25] Rule 608

provides only that "[i]n any eviction action case where a tenant withholds rent in reliance on a defense, the defendant shall deposit forthwith into court an amount in cash, money order or certified check payable to the District Court equal to the *rent due as the same accrues or such other amount as determined by the court to be appropriate as security for the plaintiff, given the circumstances of the case*." (Emphasis added.) As in *Fritz*, Rule 608 refers to the deposit of ongoing "rent as the same accrues" or "other" "appropriate security"—*not* the deposit of back rent. And as in *Fritz*, Rule 608 requires the court to make this determination "given the circumstances of the case," which directly indicates that the court must have a meaningful hearing to evaluate those circumstances.

The constitutionally permissible alternative

Under the *Mathews* due process test, the court must evaluate the "probable value, if any, of additional or substitute procedural safeguards."[26] Fortunately, a constitutionally permissible substitute procedure already exists, and was specifically praised by Justice Douglas in *Lindsey v. Normet*[27] as "an excellent protective procedure": the process established by the D.C. Circuit in *Bell v. Tsintolas Realty Co.*[28] The *Bell* court set forth the following criteria for ordering limited rent escrow when a tenant asserts a habitability defense like the one recognized by *Fritz*:

- **Pre-deprivation hearing:** Such a rent prepayment order would happen "only upon motion of the landlord and after notice and opportunity for oral argument by both parties."
- **Ongoing rent payments deposited:** Prepayment orders would "requir[e] only future payments falling due after the date the order is issued to be paid into the court registry."
- **Back rent payments not deposited:** "Any inclusion of back rent alleged to be due would depart from this protective purpose, since the landlord cannot recover back rent in a suit for possession, and would be in the nature of a penalty on the tenant."
- **Burden on landlord to demonstrate need for prepayment:** "[I]t may issue only when the landlord has demonstrated an obvious need for such protection."[29]

Bell provides a clear blueprint for Minnesota courts to fix their pay-to-defend due process problems. The *Bell* procedures align closely with the procedures indicated by *Fritz* and Rule 608. They conform to the procedural due process requirements of *Mathews*. And they begin to transform eviction proceedings into the "two-way streets" that the Minnesota Supreme Court has declared they must be. ▲

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Notes

[1] *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).
[2] 929 N.W.2d 398, 409 (Minn. 2019).
[3] 213 N.W.2d 339, 342-43 (Minn. 1973).
[4] *Id.; see also id.* at 342. ("[T]he rent, or at least part of it, is not due under the terms of the lease when the landlord has breached the statutory covenants.").
[5] *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (citations omitted).
[6] 924 N.W.2d 594, 601 (Minn. 2019).
[7] 424 U.S. 319 (1976).
[8] *Supra note 7* at 602 (quoting *Mathews*, 424 U.S. at 335).
[9] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).
[10] *Id.* at 430.
[11] *Id.* at 429 (citing *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958)).
[12] *Greene v. Lindsey*, 456 U.S. 444, 450-51 (1982).
[13] *Doe v. Police Comm'r of Boston*, 951 N.E.2d 337, 342 (Mass. 2011).
[14] *Central Housing*, 929 N.W.2d at 409.
[15] *Fosselman v. Commissioner of Human Servs.*, 612 N.W.2d 456, 461 (Minn. Ct. App. 2000) (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).
[16] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572-73 (1972) (stating that "property interests protected by procedural due process" include ownership of "money").
[17] *N. Ga. Finishing v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); *see also Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972) ("[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.' ").
[18] 424 U.S. at 333 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (Frankfurter, J., concurring)).
[19] *Boddie v. Connecticut*, 401 U.S. 371, 377-80 (1971).
[20] 213 N.W.2d at 342.
[21] *Ellis v. Doe*, 924 N.W.2d 258, 265 (Minn. 2019).
[22] *Central Housing*, 929 N.W.2d at 409 (citations omitted).
[23] 213 N.W.2d at 343.
[24] *Id.* at 343 n.5.
[25] The 600 series in the General Rules of Practice formally applies only to the Housing Courts in Ramsey and Hennepin Counties.
[26] 424 U.S. at 335.
[27] 405 U.S. at 88 (concurrence/dissent).
[28] 430 F.2d 474, 483-84 (D.C. Cir. 1970).
[29] *Id.* at 483-84.

MARITIME LAW? IN MINNESOTA? YES.

Why it pays to know maritime law in cases involving water-related accidents

By Vince C. Reuter

Few Minnesota litigators would be surprised to field a call involving an accident on one of our state's lakes or rivers. In doing so, the attorney undoubtedly begins internally checking the legal boxes: Cause of action? Causation? Damages? Statute of limitations? But one important box may unfortunately get ignored: jurisdiction. This is a mistake.

Accidents involving millions of acres of waterway in and around Minnesota are not subject to Minnesota law. And the importance of this fact is not merely academic. The impact of federal admiralty jurisdiction can, for example, create a cause of action where one does not exist under Minnesota law, or allow for contributory negligence that Minnesota law precludes; it can also arbitrarily limit potential damages to the value of the vessel involved. Admiralty jurisdiction matters in Minnesota.

This article will explain the origins and confines of federal admiralty and maritime jurisdiction and look at how these rules pertain to the waterways in and around Minnesota. Second, the article will address federal maritime law itself, explaining some key features that may exclusively apply and that would potentially affect a typical personal injury case.

Admiralty and maritime jurisdiction: An overview

The Constitution grants the federal judiciary with power over "all Cases of admiralty and maritime Jurisdiction."[1] Congress implemented this power by statute, providing that "district courts shall have original jurisdiction, exclusive of the courts of the States," in "any civil

Boats on the St. Croix River

case of admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."[2] Neither the Constitution nor Congress specifically defined the parameters of admiralty and maritime jurisdiction. That task has been left largely to courts, who interpret its limits in the context of historical meaning, U.S. geography, and (more recently) technological changes involving maritime commerce.

Admiralty jurisdiction for torts presents a two-part "locus" and "nexus" test. First, for locus, it applies to accidents occurring upon the "navigable waters of the United States," a designation that generally means waterways that act as interstate or international "highways for commerce."[3] A key component is that it must be "navigable in fact," which means that the waterway could support such commerce in its "ordinary condition."[4] Navigability is susceptible to change. For example, a dam may prevent boats from passing beyond a certain point, thus stripping admiralty jurisdiction for a portion (or all) of that waterway.[5] Conversely, admiralty jurisdiction can be expanded through artificial bodies of water like canals or other man-made reservoirs.[6]

Congress expanded the locus analysis in 1948 through a causation test. The Extension of Admiralty Act provides that admiralty jurisdiction "extends to and includes cases of injury or damages, to a person or property, caused by a vessel on navigable waters, even though the injury or damages is done or consummated on land."[7] This statute may lead to interesting scenarios for litigants. For example, a car accident may fall within admiralty jurisdiction if that accident resulted from a drunk driver who has left a "booze cruise" on Lake Superior.[8]

Second, with the "nexus" test, admiralty jurisdiction applies to torts that have a "potentially disruptive impact on maritime commerce" and where the tort had a "substantial relationship to traditional maritime activity."[9] The test is interpreted broadly. For example, accidents on pleasure boats often trigger admiralty jurisdiction because they can affect other boats engaged in maritime commerce.[10] And importantly, this potential impact is examined through "its general character," and not on any actual effects to maritime commerce.[11] Likewise, "traditional maritime activity" is usually associated with a vessel on applicable waters. Accidents involving airplanes on navigable waterways, for example, would not likely fall within admiralty jurisdiction.[12]

Admiralty and maritime jurisdiction: Minnesota's lakes and rivers

The locus analysis may bring a few of Minnesota's lakes or rivers immediately to mind. The two big ones are of course Lake Superior and the Mississippi River—two of the largest and most significant bodies of water in the United States. But there are many more. Regarding lakes, two that most likely fall within admiralty jurisdiction are Lake of the Woods and Rainy Lake, along with hundreds of smaller lakes that also border Canada or even a neighboring state. Many of these lakes have established maritime commerce—through, for example, the renting of boats for fishing or other pleasure cruises. With respect to rivers, the St. Croix River, the Minnesota River, and the Red River (either independently or through the Mississippi) all have interstate and international access. Hundreds of other smaller rivers and streams also flow into these four major rivers (or a navigable lake) and thus may also be subject to maritime jurisdiction.

In the end, because navigability depends on the potential for actual maritime commerce, admiralty jurisdiction in Minnesota may depend on *where* in each river or lake an accident occurred. This analysis may also apply to the Mississippi itself. In 2015, the Army Corps of Engineers, through an act of Congress, closed the Upper St. Anthony Falls Lock & Dam (the lock by the Stone Arch Bridge in Minneapolis), which means that boats can no longer travel from, say, St. Cloud to St. Paul.[13] Thus, an accident occurring near Elk River—unlike one near Red Wing on the Mississippi River—may now fall entirely within Minnesota's law and jurisdiction.

The nexus analysis should also suggest the importance of recognizing admiralty jurisdiction in Minnesota. A core aspect of maritime commerce is the leasing of vessels. Thus, any time a resort or other establishment rents a boat for temporary use, they are engaging in maritime commerce. Maritime commerce is similarly implicated when a business operates its own vessel for fishing or pleasure cruises. These types of vessels may also include a crew, which itself triggers distinct maritime rights and obligations. And in the end, the operation of a pleasure boat, "no matter what its size or activity, is traditional maritime activity to which the admiralty jurisdiction of the federal courts may extend."[14]

Maritime law: Why it matters

Admiralty jurisdiction brings with it "the application of substantive maritime law."[15] This body of law has two sources: first, federal statutes like the Jones Act[16] or the Longshore and Harbor Workers Compensation Act,[17] both of which apply to injured employees engaged in maritime commerce; second, general maritime law, which consists of court-fashioned rules and remedies similar to the common law adopted and maintained by state courts.[18]

Examples of general maritime law claims include unseaworthiness and maintenance and cure, both of which also apply to injured employees.[19] Where there is no applicable federal statute or general maritime law rule, state law can supplement any claim or defense.[20] But state law can never "defeat or narrow any substantial admiralty rights of recovery," whether from federal statute or general maritime law.[21]

In personal injury cases, the imposition of maritime law matters because it is often fundamentally different from Minnesota law. An employee injured while serving food in a restaurant, for example, is limited to bringing a workers' compensation claim against his employer.[22] But if that same person is instead injured serving drinks on a vessel during a dinner cruise, he is entitled to bring a negligence claim against his employer, and unseaworthiness and maintenance-and-cure claims against the boat owner, who might also be his employer.[23] The latter is particularly important, because an unseaworthiness claim is based on strict liability, which provides an historically strong remedy for injured seafarers.[24]

Injured passengers also have increased rights under general maritime law. For example, a restaurant patron who is injured in Minnesota can only recover damages for negligence if a jury finds that her own fault is not proportionally greater than 50 percent.[25] But if that same passenger is instead injured aboard a vessel on navigable waters, general maritime law allows for damages if the jury finds that she is anything less than 100 percent at fault.[26] This distinction may significantly impact the risk analysis for Minnesota litigators assessing high-value claims.

A third example highlights a particularly strong defense that is unique to admiralty jurisdiction and its underlying substantive law. Over 200 years ago, Congress passed the Limitation of Liability Act—which, despite strong criticism, remains in effect today.[27] The thrust of the law provides that a vessel owner can limit its liability against any claim up to "the value of the vessel and pending freight."[28] This is as meaningful at it sounds. If a severely injured passenger sues a vessel owner in a multi-million-dollar negligence claim, the owner could limit its potential liability, regardless of fault, to the arbitrary amount the boat is worth on the open market—and there is no freight on a pleasure craft. The draconian nature of this defense is lessened by a significant exception. The act only applies if the loss or damage occurred "without the privity or knowledge of the owner."[29] In summary, any time the defense is raised, it presents at least (a) significant procedure obstacles before any opportunity to litigate the merits, and (b) a preliminary hurdle regarding the vessel owner's fault.[30]

In conclusion, every Minnesota litigator should recognize the potential application and impact of admiralty jurisdiction in and around Minnesota's lakes and rivers. Indeed, upon receiving any water-related personal injury call, the first thoughts in any attorney's mind should be (1) where is this lake or river located, and (2) what are its full and final boundaries? The attorney's next thoughts should be how the injury relates to this waterway and maritime commerce. This initial analysis can be the most significant in the entire case. ▲

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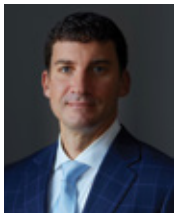

Notes

[1] U.S. Const. Art III, Sec. 2, ¶ 1.
[2] 28 U.S.C. §1333(a).
[3] *The Daniel Ball*, 77 U.S. 557, 563, 19 L. Ed. 999 (1870). *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).
[4] *Id.*
[5] *Livingston v. United States*, 627 F.2d 165, 170 (8th Cir. 1980).
[6] *In re Boyer*, 109 U.S. 629, 632 (1884).
[7] *Jerome B. Grubart*, 513 U.S. at 532; U.S.C. §30101.
[8] *Duluth Superior Excursions, Inc. v. Makela*, 623 F.2d 1251, 1254 (8th Cir. 1980).
[9] *Blake Marine Group v. CarVal Investors LLC*, 829 F.3d 592, 597 (8th Cir. 2016) (quoting *Jerome B. Grubart*, 513 U.S. at 534).
[10] *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675 (1982); *see also Sisson v. Ruby*, 497 U.S. 358, 363 (1990).
[11] *Id.*
[12] *Exec. Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 271 (1972).
[13] Public Law No. 113-121, §2010 (6/10/2014) ("No Later than 1 year after the date of enactment of this Act, the Secretary shall close the Upper St. Anthony Falls Lock and Dam").
[14] *St. Hilaire Moye v. Henderson*, 496 F.2d 973, 979 (8th Cir. 1974).
[15] *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996).
[16] 46 U.S.C. §30104.
[17] 33 U.S.C. §901 *et seq.*
[18] *The Dutra Grp. v. Batterton*, 139 S. Ct. 2275, 2278 (2019) ("Thus, where Congress has not prescribed specific rules, federal courts must develop the amalgam of traditional common-law rules, modifications of those rules, and newly created rules that forms the general maritime law.") (cleaned up).
[19] *Britton v. U.S.S. Great Lakes Fleet, Inc.*, 302 F.3d 812, 815-18 (8th Cir. 2002).
[20] *St. Hilaire Moye*, 496 F.2d at 980.
[21] *Id.*
[22] Minn. Stat. §176.001 *et seq.*
[23] *Britton*, 302 F.3d at 815-18.
[24] *The Dutra Grp.*, 139 S. Ct. at 2281.
[25] Minn. Stat. § 604.01, subd. 1.
[26] *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953).
[27] 46 U.S.C. §30501-30512.
[28] 46 U.S.C. §30505.
[29] *Id.*
[30] While ultimately unsuccessful because of issues related to privity or knowledge, a vessel owner sought to limit its liability in a tragic wrongful death action involving an accident on Rainy Lake. *In re Complaint of Rainy Lake Houseboats, Inc., ex rel. Exoneration from, or Limitation of, Liab.*, 14-cv-1373, 2015 WL 3795786 (D. Minn. 6/18/2015).

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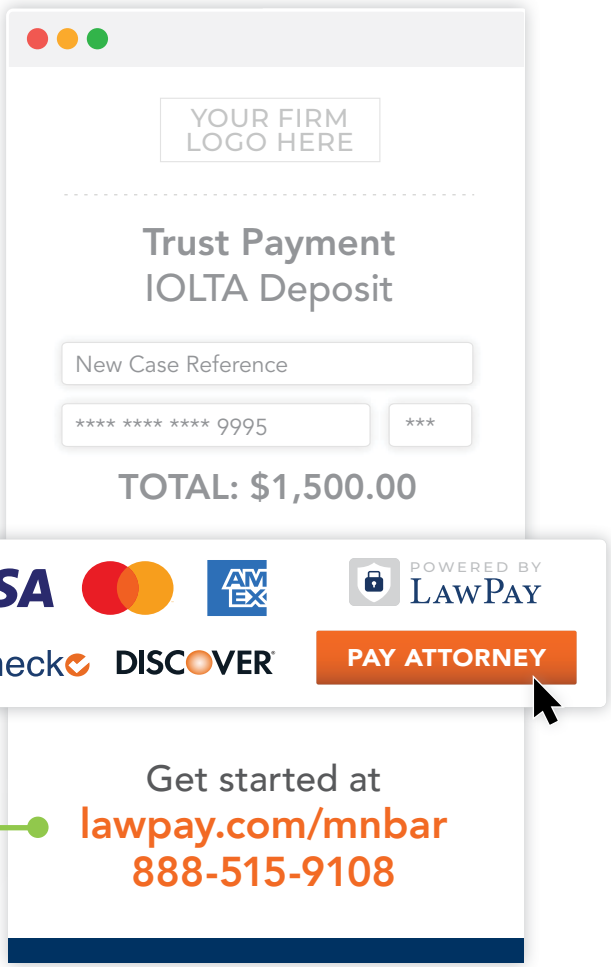

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Journey to the center of my mind

Notes on meditation practice and wellness

By Senior Judge Susan R. Miles

Whatever the task at hand, a meditation practice builds your capacity to clear your mind of detritus collected and recycled over a lifetime.

On its surface, you might regard the practice of meditation as mysterious at best, and utterly boring at worst. But what appears to be doing nothing is not that at all.

The title of *Don't Just Do Something—Sit There*, a book by Sylvia Boorstein, at first blush may suggest that meditation is a practice of disengaging and doing nothing. Far from it. As Dr. Boorstein explains, the emphasis is on the word "just," meaning that "sitting there" is an *active* practice yielding specific benefits, most notably a greater capacity for resiliency. Whatever the task at hand, be it fighting for racial justice and police reform, getting the kids back in school, or preparing for trial, a meditation practice builds your capacity to clear your mind of detritus collected and recycled over a lifetime, through the act of bringing awareness to your ingrained thoughts, emotions, and physical sensations.

Awareness is another name for mindfulness. Not any kind of generalized awareness, but an intention to pay attention to what is arising in your mind in real time. Development of mindful awareness is, like riding a bike, a skill that looks deceptively simple but doesn't just happen overnight. It takes practice. Following a daily formal meditation practice will, in a few short weeks, build your capacity to recognize and harness thoughts and emotions before you react to your personal triggers in anger or avoidance. Who wouldn't want to reason with our spouse, child, opposing counsel, or even a judge instead of blowing up at them and having to repair the damage afterward?

To a casual observer, meditation may look about as fun as watching paint dry. If you tend to be impatient, watching someone meditate for more than a moment may be agony, and imagining yourself sitting with your own eyes closed a fate worse than being stuck in rush hour traffic when there are a thousand things demanding your immediate attention. "After all," you might think to yourself, "I've got more pressing needs than to waste my time doing nothing." But that would be based on the erroneous assumption that the meditator is just checked out.

Let me invite you to journey into my mind, for better or for worse, on a reality-based meditation session, with all its twists and turns, moments of being lost, and, on a good day, an occasional insight.

My practice

I begin by finding a quiet spot—my home office, or in nice weather, my deck. My phone, which doubles as a meditation timer, is set to Do Not Disturb. My preferred posture is kneeling on the floor, supported by a small wooden bench. Lacking a younger person's capacity to sit cross-legged atop a little cushion, I find kneeling to be my ticket to comfort. If my bench is not at hand, then a straight-backed chair or stool suffices as long as my feet can reach the floor or a rung. Physical torture is to be avoided.

Once seated, I close my eyes and align my posture: creating a small hollow in my back, chest slightly lifted, shoulders relaxed, chin lowered enough to allow the vertebrae in the cervical spine to open and relax. Hands resting in my lap, fingers lightly touching.

As I begin, I form an intention, such as noticing whether my thoughts, feelings, or bodily sensations are pleasant, unpleasant, or neutral. Settling in, I purposely travel to each of my sense doors, observing if any sight sensations are happening (a little difficult with your eyes closed, but you would be surprised), sounds (quite common if you are within earshot of an HVAC system), smell (lingering odors from breakfast), taste, or touch (fabric contacting the skin on my shoulders). The final sense door, my mind, I save for later.

Next I select an anchor for my awareness, usually my breath, and I hone in on the belly, chest, or nostrils as a locus to observe it. In my early days of meditation, I often switched affinities between these three focal points, unable to decide which I preferred. With the benefit of experience I have settled into a monogamous relationship with my belly. Its up and down movement, the empty spaces between inhalations and exhalations, differences in length and temperature, smoothness and roughness, are all fodder for my concentration.

A minute passes and I'm still with my breath. Minute number two arrives and my mind has wandered off into plans for the day ahead, and by minute number three, I am aware that I'm working on a shopping list and trying to fit a grocery run between the end of court and a date with a friend. That's just what minds do. I note "thinking; neutral," then let go of the thought and, without punishing myself, gently guide my awareness back to my breath. Three or four breaths pass by before the next thought comes galloping into view. I have an opinion due next week in an acrimonious divorce and I still haven't decided who gets the Elvis lamp. Unlike the banal planning thought I had moments ago, this one is cloaked in a veil of anxiety, which I detect by feeling a quiver in the area just below my sternum. I label the feeling unpleasant. So I note "worry," let go of the thought, and gently redirect my attention to my breath. So far, so good.

Eons ago, I took to heart some advice given by Sharon Salzberg, a founder of the Insight Meditation Society in Barre, Massachusetts. She counsels, "The heart of skillful meditation is the ability to let go and begin again, over and over again. Even if you have to do that thousands of times during a session, it does not matter."

Learn more

MEDITATION RESOURCES

NY Times Wellness Guide: How to Meditate *(www.nytimes.com/guides/well/how-to-meditate):* Simple and comprehensive, with guided meditations and lots of tips on establishing a practice. I love the tips on how to deal with the wandering mind. The Times also has a separate guide on applying mindfulness at work: **How to be More Mindful at Work** *(www.nytimes.com/guides/well/be-more-mindful-at-work)*

Insight Timer app (Insight Network, Inc.) (for Apple and Android devices): "Learn How to Meditate in Seven Days" is a free introductory course taught in 12-minute increments. Thousands of courses, guided meditations, music and networking opportunities; easy-to-use filters. Particularly helpful: talks and music for falling asleep.

Mindfulness in Law Society *(www.mindfulnessinlawsociety.org):* Holds 30-minute on-line meditation sessions every Monday and Wednesday afternoon; no experience necessary. Also sponsors retreats and conferences for lawyers, judges, and law students.

University of Minnesota Center for Spirituality and Healing *(www.csh.umn.edu):* Offers eight-week Mindfulness Based Stress Reduction course online and on campus; also a six-week online Mindfulness at Work program. Free online guided sessions in meditation and mindful movement offered at noon on Mondays. Just click the For the Community link on the CSH home page to reach a calendar that includes the Mindful Monday link.

The Anxious Lawyer, Cho, Jeena and Gifford, Karen (ABA Publishing, 2016). Very clear advice on starting a meditation practice and the benefits of sustaining that practice, plus tips on applying mindfulness to professional tasks.

Wherever You Go, There You Are, Kabat-Zinn, Jon (Hyperion, 1994). A comprehensive, concise primer on applying mindfulness meditation in everyday life, by the creator of the Mindfulness Based Stress Reduction program taught throughout the West. A YouTube search of the author yields hundreds of videos of his guided meditations.

With patience, I await the next event. It could be a sensation in my body or a noise from outside. Noting whatever has happened as, say, itching or hearing, and without getting lost in a story, I might even decide to shift temporarily to the new sound or sensation as an object of awareness in place of my breath. Other times I may decide to devote the entire session to concentrating only on my breath, guiding myself through distractions by counting the length of each inhalation and exhalation, or whispering to myself "inhaling" and "exhaling." Even a meteor shower of thoughts can be tempered by softly repeating "one, two, three, four."

On days when I am less distracted by everyday thoughts, I practice "choiceless awareness." Sitting quietly, a vivid thought about a person or event in my distant past might show up without warning, much like a dream. These complex thoughts often are accompanied by emotions and physical sensations, warranting further investigation with a gentle curiosity. Does this thought of my mother make me feel sad? Where am I feeling the emotion in my body? Is this a familiar feeling?

The power of this deeper practice is the discovery of long-held, latent perceptions affecting my self-view and resulting behavior. For example, anger over my spouse's failure to put out the garbage bins leads to an insight that I have a deep insecurity that no one ever takes care of me. And that insecurity can be triggered by the person who pushes my patience a bit too far, causing an angry rebuke. The trick, however, is that after realizing a particular thought or emotion is profound, I remind myself to set it aside to reflect upon after the end of the session. Don't get wrapped up in identifying with your thoughts, my teachers advise.

Nor is every day a struggle. Sometimes my mind has the airiness of a fluffy cotton blanket hanging from the clothesline and waving in the breeze. My upper body feels porous, my arms almost weightless, vivid splotches of lapis and army green floating inside my eyelids. No thoughts arising, other than regret when the bell signals an end to my session and my momentary sense of peace.

Coda

Remember Forrest Gump sitting on a park bench offering to share with a stranger a piece of chocolate? "My momma always said, life was like a box of chocolates. You never know what you gonna get." That's what meditation is like. When I sit down to meditate, I have no idea what is going to show up. The point is watching each event arrive, observing its qualities, and bidding it farewell, building neural pathways to exercise throughout the rest of my day. I can observe thoughts and emotions with greater discernment rather than being sucked into old conditioned stories. And the next time I feel angry with my husband for not taking out the garbage, I can take a deep breath and realize that it's just not a big deal. ▲

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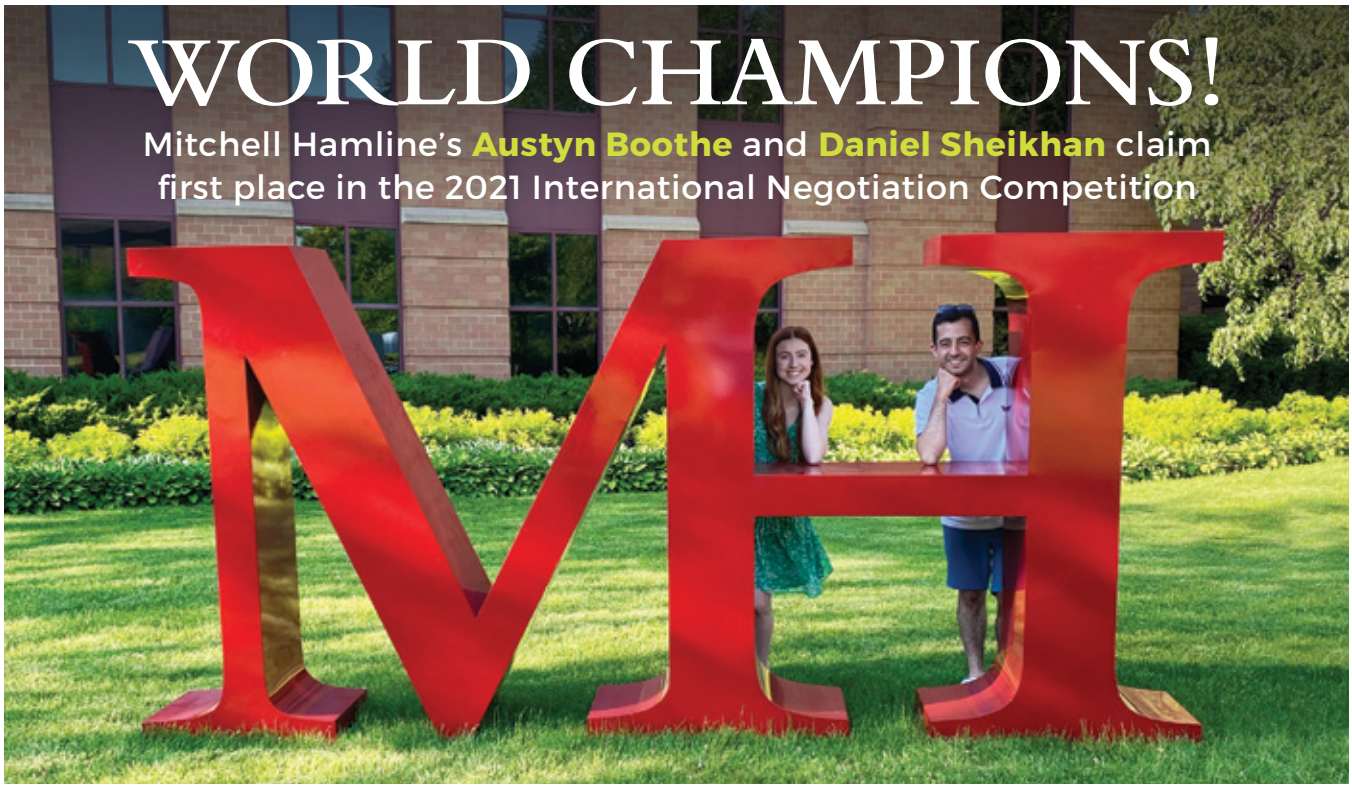
WORLD CHAMPIONS!

Mitchell Hamline's **Austyn Boothe** and **Daniel Sheikhan** claim first place in the 2021 International Negotiation Competition



BY TOM WEBER

After prepping for and competing in an international competition for more than a week without much sleep, Mitchell Hamline School of Law students Austyn Boothe and Daniel Sheikhan decided to stay up until 4 am in early July to watch the results. It was the right call.

The duo won first place in the 2021 International Negotiation Competition. It's the second time in Mitchell Hamline's six-year history one of its teams has won top prize.

Boothe and Sheikhan represented the United States as one of 28 teams from around the world taking part in a series of negotiation sessions over five days. Each day featured simulated international negotiation sessions judged by a panel of legal experts from across the globe. This year's sessions related to space law.

They admit the wee-hours announcement didn't fully register at first. "We just saw team USA flash across the screen and started cheering," said Boothe. "Given the sheer talent of the other teams, I was genuinely shocked."

"Austyn and Daniel deserve so much credit for this accomplishment, especially having competed online during a pandemic," said President and Dean Anthony Niedwiecki. "And we're thrilled this world championship is back at Mitchell Hamline."

In 2017, Mitchell Hamline students Brian Kennedy and Briana Al Taqatqa took first at the same competition, which was held in Norway that year.

This year's competition was hosted remotely by the National University of Singapore and Singapore International Mediation Institute.

"Although the competition was virtual, it was one of the most enjoyable and best learning experiences of law school," added Sheikhan. "I am extremely grateful for the amazing training and support of our coaches and the dedication and skills that my negotiation partner brought to our team."

The team was coached by Mitchell Hamline Dean of Students Lynn LeMoine '11, and Adjunct Professor Patrick Zitek '10, and Hamline University Professor Ken Fox.

A native of Toronto, Canada, Sheikhan '21 is one of Mitchell Hamline's newest alums, graduating this spring with a certificate from the school's Dispute Resolution Institute along with his J.D. He works with Reece Law and also holds positions at Donate Northern, The Northern Express Minnesota, and the real estate and investment firm he started in Toronto, Danmar Empire Group.

Boothe, who is in her final months at Mitchell Hamline, is the first person in her family to earn a college degree. She's also an AmeriCorps alum and has been active in Mitchell Hamline's Student Bar Association as cohort representative and parliamentarian. She is student liaison for the New Lawyers Section of the Hennepin County Bar Association.

The International Negotiation Competition is a competition for law students to engage in the resolution of international disputes or transactions. The Mitchell Hamline team was invited to the international contest after placing second in a national negotiation competition sponsored by the American Bar Association earlier this year.

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CRIMINAL LAW

JUDICIAL LAW

■ **Controlled substances: Chemical test of marijuana not required to establish probable cause.** After police found nearly 60 grams of suspected marijuana in appellant's vehicle, he was charged with fifth-degree possession. He moved to dismiss the charge for lack of probable cause, arguing the field test performed on the suspected marijuana merely detected the presence of THC, but did not test the THC concentration to determine if the substance was illegal marijuana or legal hemp. The district court granted appellant's motion, finding that, as a matter of law, chemical testing to establish that the THC concentration in plant material exceeds the legal limit is required to establish probable cause. The state appealed.

The court of appeals reverses, rejecting a bright-line rule that a chemical test of a suspected controlled substance is required to establish the substance's identity. Certainly, proof of the actual identity of the substance is required, but circumstantial evidence and officer testimony may be used to prove the identity of the substance at trial and to show probable cause exists to believe the substance is what the state claims it to be. The record here showed police stopped appellant for a traffic violation, smelled marijuana in his vehicle, discovered appellant's multiple prior controlled substance convictions, recovered substances they suspected to be marijuana after field testing, and obtained a post-*Miranda* admission from appellant that he possessed marijuana in the vehicle. If proven at trial, a jury could reasonably infer from these facts that the plant material in appellant's vehicle was marijuana. As such, these facts are sufficient to support a finding of probable cause. ***State v. Dixon***, A21-0205, 2021 WL 2908645 (Minn. Ct. App. 7/12/2021).

■ **6th Amendment: Failure to have jury determine dates of sex offenses was a *Blakely* violation, but harmless error.** A jury found appellant guilty of two counts of criminal sexual conduct against two of his girlfriend's minor daughters, between January 2004 and March 2018, and between January 2006 and June 2018. The jury was not asked to determine the dates or date ranges for the offenses. The district court sentenced appellant in accordance with the sentencing guidelines in effect after 8/1/2006, finding no evidence that the offenses occurred in 2006 or earlier. The court of appeals agreed with appellant that the district court violated *Blakely v. Washington*, 542 U.S. 296 (2004), by finding the earliest offense occurred after 8/1/2006, but found the error harmless.

Blakely protects a criminal defendant's 6th Amendment right to be sentenced solely upon factual findings made by a jury. A *Blakely* violation "occurs when a court determines any disputed fact essential to increase the ceiling of a potential sentence, including factual findings related to offense dates, without the defendant waiving the right to a jury's determination of that issue." The parties here agree that the district court's determination that the offenses occurred after 8/1/2006 violated *Blakely*. Because a *Blakely* violation does not rise to the level of a structural error, it is subject to the harmless error standard.

Despite the date ranges alleged in the complaint, no evidence was presented at trial of any criminal sexual conduct acts against either victim before 2009. Appellant also did not argue that he would present evidence relating to the timing of the offenses. Thus, there is no reasonable doubt that the result would have been different if the *Blakely* violation had not occurred, and the error was harmless. ***State v. Reimer***, A19-1801, 962 N.W.2d 196 (Minn. 2021).

■ **Right to a public trial applies to *Schwartz* hearings.** After a jury trial, appellant was found guilty of second-degree intentional murder for shooting a man at a gas station. After trial, the district court received evaluation forms from the jurors, on which one juror reported sharing with other jurors during deliberations information on what is taught during conceal and

carry permit classes, information that was not presented as evidence at trial. The district court granted appellant's motion for a *Schwartz* hearing to determine if the juror's conduct in presenting extraneous information during deliberations affected appellant's right to a fair trial. After a prehearing conference, a newspaper published the reason for the upcoming *Schwartz* hearing. The district court bifurcated the *Schwartz* hearing to allow two jurors who had travel plans to attend early. To prevent the newspaper from "contaminating" the second hearing, the district court closed the first hearing to the public. After both sessions of the hearing, the court concluded the extraneous information did not affect the jury's verdict.

Among other arguments, appellant argued on appeal that the closure of the courtroom during the first *Schwartz* hearing session violated his 6th Amendment right to a public trial. The public trial right applies to all phases of trial, including pretrial suppression hearings and *voir dire*, but not including the court's tending to administrative matters. A *Schwartz* hearing is not merely administrative, as it involves questioning jurors under oath to obtain information to determine whether a party was denied a fair trial. Such a hearing could result in a legal determination that undermines the result of an entire trial and, the court of appeals concludes, is a substantive phase of the criminal trial, implicating the right to a public trial.

In this case, the closure of the first *Schwartz* hearing to the public was improper, as the district court did not consider alternatives to closure or narrowly tailor the closure to address its concern over media "contamination." An improper closure is a structural error, but a new trial is not automatically required. Here, a limited remand is deemed the appropriate remedy, given that the improper closure was of only a small segment of the post-trial *Schwartz* hearing. The matter is remanded for the district court to conduct a new, public *Schwartz* hearing involving the first two jurors. ***State v. Jackson***, A20-0779, 2021 WL 3027204 (Minn. Ct. App. 7/19/2021).

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ENVIRONMENTAL LAW

JUDICIAL LAW

MN Court of Appeals remands PolyMet air permit to MPCA. In July the Minnesota Court of Appeals remanded to the Minnesota Pollution Control Agency (MPCA) an air emissions permit MPCA issued to Poly Met Mining Inc. for its NorthMet mine. If built, NorthMet would be the first copper-nickel-platinum mine in Minnesota.

This dispute arose in December 2018, when several environmental groups and the Fond du Lac Band of Lake Superior Chippewa raised concerns that the production capacity of the existing facilities at the NorthMet mine site were higher than the rate stipulated in the company's application for a minor air permit. When this issue first reached the court of appeals, the court concluded MPCA had failed to take a "hard look" into the evidence of the possible "sham" permitting. *In re Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining Inc.*, 943 N.W.2d 399, 409 (Minn. App. 2020). In February of this year, the Minnesota Supreme Court reversed, holding that while a permitting agency may investigate sham permitting at the synthetic minor source permit application stage, it is not required to do so. *In re Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining Inc.*, Nos. A19-0115 and A19-0134, 2021 WL 710490 (Minn. 2/24/2021). However, the Supreme Court remanded to the court of appeals two other arguments asserted by the environmental groups that the court of appeals had not addressed. These included assertions that the permit should have been denied because (a) evidence in the record did not support MPCA's conclusion that PolyMet "will... comply with all conditions of the permit," Minn. R. 7007.1000, subp. 1(G), and (b) PolyMet allegedly "failed to disclose fully all facts relevant" to the permit and "knowingly submitted false or misleading information to the agency." *Id.*, subp. 2(C).

Under the Clean Air Act, a source must seek permitting based on its tonnage per year of pollution. A facility that emits over 250 tons per year (tpy) of any regulated pollutant constitutes a major stationary source, triggering various requirements under the Clean Air Act, including the requirement to implement best available control technology measures. 40 C.F.R. §52.21(b)(12). The review process and permit requirements for major source permits are more rigorous than for minor source permits. MPCA concluded NorthMet would emit fewer than 250 tpy of any regulated pollutant and thus issued a minor air emissions permit. The permit challengers argued that MPCA's conclusion was belied by, among other things, an investor report PolyMet's Canadian parent company filed with Canadian regulatory authorities 10 days after the comment period closed on the proposed NorthMet air permit. The report provided a preliminary economic analysis of scenarios where NorthMet would increase its ore-processing rates to levels that would result in major-level air emissions. This, the challengers alleged, constituted evidence that NorthMet was likely to exceed the emissions threshold such that MPCA wrongly issued the permit as a minor permit.

Addressing these issues on remand, the court of appeals concluded MPCA had failed to meet its obligation to consider pertinent documents and make reflective findings on whether NorthMet was likely to comply with the minor permit or had knowingly submitted false or misleading information. MPCA's limited efforts to address the Canadian report and related evidence, the court held, amounted to conclusory statements that inadequately explained the reasons for MPCA's decisions on these issues. In remanding to MPCA for additional findings and a revised decision on the permit, the court emphasized that its holding was not that the record *couldn't* support a reasoned decision by MPCA to issue a permit, but that the agency so far had failed to make such a reasoned decision. ***In re Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining Inc.***, Nos. A19-0115 and A19-0134, 2021 WL 710490 (Minn. 7/19/2021).

ADMINISTRATIVE ACTION

MPCA adopts Clean Cars Minnesota rule. In late July, the Minnesota Pollution Control Agency (MPCA) published notice of its final adoption of amended air rules to reduce the state's vehicle greenhouse gas emission standards, known as "Clean Cars Minnesota." The MPCA published its notice of intent to adopt the Clean Cars Minnesota rule in December 2020. 45 Minn. Reg. 663 (12/21/2020).

The Clean Air Act (CAA) authorizes the Environmental Protection Agency to set federal vehicle emission standards that states must follow. 42 U.S.C. §7521. However, Section 177 of the CAA grants states the power to adopt vehicle emission standards that are more stringent than the federal standard, so long as the standards are identical to California's standards, and the emission standards are adopted at least two years before

commencement of such vehicle model year. 42 U.S.C. §7507. Section 116.07, subdivision 2, of the Minnesota Statutes authorizes MPCA to adopt standards of air quality, including the maximum allowable standards of emission of air contaminants from motor vehicles; and subdivision 4 of the same section authorizes MPCA to adopt, amend, and rescind rules for the prevention, abatement, or control of air pollution. Minn. Stat. §116.07 subd. 2, 4 (2020).

The Clean Cars Minnesota standards implement two components of reduced vehicle emissions standards for light-duty and medium-duty vehicles. First, the low emission vehicle standard requires vehicle manufacturers to deliver for sale within Minnesota only vehicles that meet California's more stringent tailpipe emission standards for greenhouse gases (GHGs) and other air pollutants. Second, the zero-emission vehicle standard requires auto manufacturers to provide for sale within Minnesota a certain percentage of vehicles with zero tailpipe emissions, such as battery electric vehicles, plug-in hybrid electric vehicles, and hydrogen-fueled vehicles.

The Clean Cars Minnesota standards do not apply to off-road vehicles or heavy-duty equipment like farm machinery. The standards do not require anyone to give up their current vehicle or to purchase an electric vehicle, and they do not apply to existing vehicles or used vehicles up for sale.

As required under the CAA, two full vehicle model years must occur before Clean Cars Minnesota may be enforced, so the earliest date the Clean Cars Minnesota rule could take effect is 1/1/2024, for vehicles built under the model year 2025. However, the rule also includes an incentive system to encourage manufacturers to bring electric vehicles to the state sooner, beginning with model year 2022.

Minnesota is the 15th state to adopt California's more stringent vehicle omission standards, and the first state in the Midwest. **Adopted Permanent Rules Relating to Clean Cars**, 46 Minn. Reg. 66 (7/26/2021).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **Fed. R. Civ. P. 54; preliminary injunction; attorney's fees; timing of application.** In a decision that is likely to have major implications when plaintiffs prevail on a request for a preliminary injunction and when attorney's fees are available to prevailing parties, the 8th Circuit held that the entry of an order granting a preliminary injunction constitutes the "entry of judgment" that triggers a 14-day deadline to move for attorney's fees under Fed. R. Civ. P. 54. The court recognized that the advisory committee notes indicated that the deadline for motions for attorney's fees should be 14 days after entry of the *final* judgment, but found that it was bound by the plain language of the rule.

Acknowledging the absence of controlling authority directly on point, the 8th Circuit found no abuse of discretion in the district court's alternative holding that the plaintiffs had established excusable neglect for their failure to seek attorney's fees within Rule 54's deadline. However, in light of this decision, future litigants who obtain preliminary injunctions may find courts far less understanding if they fail to seek attorney's fees within 14 days of entry of a preliminary injunction. ***Spirit Lake Tribe v. Jaeger***, ___ F.4th ___ (8th Cir. 2021).

■ **Subject matter jurisdiction on appeal; standing.** After the defendant appealed the district court's rulings on the parties' motions for judgment as a matter of law and its partial award of attorney's fees to the plaintiff, and briefing in the 8th Circuit had been completed, the defendant moved to dismiss the appeal for lack of subject matter jurisdiction, arguing that the district court's determination that the plaintiff had failed to establish his right to damages or equitable relief meant that he lacked standing. The 8th Circuit rejected that argument and denied the motion to dismiss, finding that it was "not appropriate for the [defendant] to work backward in seeking to disrupt subject matter jurisdiction based on the district court's post trial order on the merits of this case." ***Quiles v. Union Pac. R.R. Co.***, ___ F.4th ___ (8th Cir. 2021).

■ **CAFA; local controversy exception; remand; appealable order.** Reaffirming that a remand order relying on the local controversy exception to CAFA is a final order appealable under 28 U.S.C. §1291 even where the 8th Circuit had previously denied permission to appeal under 28 U.S.C. §1453(c), the 8th Circuit determined that the local controversy exception did not apply and reversed the district court's remand order. ***Kitchin v. Bridgeton Landfill, LLC***, 3 F.4th 1089 (8th Cir. 2021).

■ **Forum selection clause; removal; remand.** Where a forum selection clause in a contract required litigation in a county where no federal court was located and that clause contained an anti-removal provision, the 8th Circuit affirmed the district court's dismissal of a federal court action. ***Smart Commc'ns Collier Inc. v. Pope Cty. Sheriff's Office***, ___ F.4th ___ (8th Cir. 2021).

■ **Appeal from striking of expert witness under *Daubert*; waiver of argument.** Affirming a district court's striking of the plaintiff's witness under *Daubert*, the 8th Circuit found that the plaintiff had waived one of his design defect arguments when he argued that his expert "cited other numerous alternative designs," but did not "meaningfully advance his argument." ***McMahon v. Robert Bosch Tool Corp.***, ___ F.4th ___ (8th Cir. 2021).

■ **Attorney's fee award of over $1.1 million affirmed.** Rejecting the defendants' contention that the district court had abused its discretion by failing to specifically address each of their objections to the plaintiffs' attorney's fees application, the 8th Circuit found that the district court had "closely scrutinized Plaintiffs' billing records" and affirmed an award of more than $1.1 million in attorney's fees. ***League of Women Voters of Mo. v. Ashcroft***, ___ F.4th ___ (8th Cir. 2021).

■ **Trial witness barred due to untimely disclosure.** Where the plaintiff filed an amended witness list that attempted to add a witness more than two months after the deadline for disclosing trial witnesses, and the defendants requested that the witness be barred from testifying, Judge Nelson found that the plaintiff had not established the "good cause" required to support the amended witness list. Judge Nelson also found that the plaintiff's offer to produce its new witness for a deposition on the eve of trial "would not cure the prejudice to Defendants" caused the by late addition. ***Asset Mktg. Servs., LLC v. JAM Prods., Inc.***, 2021 WL 3137497 (D. Minn. 7/23/2021).

■ **Motions to intervene denied due to untimeliness.** Where proposed intervenors did not seek to intervene until after Judge Ericksen had entered summary judgment, and the parties opposed the motions to intervene, Judge Ericksen found that all four of the relevant factors weighed against intervention and denied the motions. ***United Food & Commercial Workers Union v. United State Dept. of Ag.***, 2021 WL 2010779 (D. Minn. 5/20/2021).

■ **Patent litigation; motions for summary judgment and sanctions denied as "premature."** Where the defendant moved for summary judgment and Fed. R. Civ. P. 11 sanctions prior to substantial discovery and claim construction, Chief Judge Tunheim denied both motions without prejudice as "premature." ***Halverson Wood Prods., Inc. v. Classified Sys. LLC***, 2021 WL 3036883 (D. Minn. 7/19/2021).

■ **Motion to strike deposition errata sheet granted in part.** Where the plaintiff's Fed. R. Civ. P. 30(b)(6) designee listed a number of substantive changes to her deposition testimony on her errata sheet and the defendant moved to strike the errata sheet, Magistrate Judge Thorson applied the prevailing "flexible" approach, found that a few of the proposed

changes to the transcript were sufficiently justified, but struck the majority of the proposed changes, finding no "sufficient justification." ***Willoughby II Homeowners Assoc. v. Hiscox Ins. Co.***, 2021 WL 3077070 (D. Minn. 7/21/2021).

■ **Fed. R. Civ. P. 41(a)(1); request for conditions on dismissal denied.** Where the plaintiffs moved to dismiss their claims with prejudice, and the defendants opposed that motion unless the plaintiffs were also ordered to pay the defendants' attorney's fees, costs, and disbursements, Judge Frank denied the defendants' request and granted the plaintiffs' motion to dismiss "without condition." ***Iglesias de Castro v. Castro***, 2021 WL 1600482 (D. Minn. 4/23/2021).

■ **Fed. R. Civ. P. 15(d); supplemental complaint; applicable standard.** Granting the plaintiffs' motion pursuant to Fed. R. Civ. P. 15(d) to supplement their complaint, Magistrate Judge Leung applied the same "liberality" that applies to motions to amend under Fed. R. Civ. P. 15(a). ***Dekker v. Cenlar FSB***, 2021 WL 2950143 (D. Minn. 7/14/2021).

■ **Request for expedited discovery granted in part and denied in part following grant of motion for preliminary injunction.** Granting the plaintiff's motion for a preliminary injunction, Judge Wright found that the plaintiff could not establish "good cause" for its "extremely broad" discovery requests, but did grant its motion for expedited discovery, limited to "communications that may self-destruct." ***Powerlift Door Consultants, Inc. v. Shepard***, 2021 WL 2911177 (D. Minn. 7/12/2021).

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INDIAN LAW

JUDICIAL LAW

■ **Tribal police officer has authority to temporarily detain and search non-Indian individuals traveling on public right-of-way on Indian reservation for possible violations of state or federal law.** An officer working for the Crow Tribal Police Department approached a vehicle parked on a public right-of-way within the boundaries of the Crow Reservation, and saw an individual who appeared to be non-Indian with indicia of drug use and firearms in the vehicle. Fearing violence, the tribal officer conducted a

pat-down search and called for additional officers before seizing the contraband. The Supreme Court held that the tribal officer's temporary detention and search of the non-Indian was allowable under the Crow Tribe's inherent sovereign authority over the conduct of non-Indians on the reservation where that conduct threatens the health or welfare of the tribe. In doing so, it rejected the 9th Circuit's restrictive standards that a tribal officer be required to attempt to ascertain the Indian status of the stopped individual, and if non-Indian, only be allowed to temporarily detain the individual if the violation of state or federal law was "apparent." ***United States v. Cooley***, 141 S.Ct. 1638 (2021).

■ **Tribal activities and lands exemption in Gov. Walz's emergency executive order restricting on-premises consumption of food and beverages not an equal protection violation.** The Minnesota Commissioner of Health filed a civil complaint, motion for temporary restraining order, and temporary injunction against Havens Garden restaurant for violation of Emergency Executive Order No. 20-99, which restricted on-premises consumption of food and drink from 11/20/2020 – 12/18/2020. In response, the restaurant argued that the executive order's exemption for tribal restaurants violated the equal protection clauses of the Minnesota and United States Constitutions. The Minnesota Court of Appeals rejected this argument, finding that rational-basis security applied to this question of classification based on tribal membership in state laws that promote the congressional policy of tribal self-governance; and, the executive order met this standard by furthering the ability of sovereign tribal authorities to self-govern their members on public health issues. ***Minnesota v. Sw. Sch. of Dance, LLC.***, No. A20-1612, 2021 WL 2794654 (Minn. Ct. App. 7/6/2021).

■ **Tribal member per capita payments received from Indian tribe not subject to turnover in Chapter 7 bankruptcy.** Following her Chapter 7 bankruptcy filing, debtor and enrolled member of the Pokagon Band of Potawatomi Indians continued to receive an apportioned monthly payment of the band's net gaming revenues on a per capita basis. The bankruptcy court rejected the trustee's motion to turn over those payments as property of the estate, holding that because the band's revenue allocation plan complied with all federal law requirements, its language that no vested property rights or interest in payments are created by the plan controls. ***In re Musel***, No. 20-42761, 2021 WL 2843847 (Bkr. Ct. D. Minn. 7/7/2021).

■ **6th Amendment fair representation claim fails where defendant did not establish underrepresentation of Native Americans in jury pool.** Following his convictions for several firearms and drug distribution offenses, Native American defendant who was tried in the Central Division of South Dakota moved for a new trial due to the absence of Native Americans on his jury panel. The 8th Circuit Court of Appeals held that the use of voter registration rolls to compile the master jury pool withstands constitutional scrutiny, absent a showing of systematic exclusion of Native Americans from the jury selection process, and that the 6th Amendment's fair cross-section requirement applies only to the composition of the jury pool, not the jury ultimately chosen. ***United States v. Erickson***, 999 F.3d 622 (8th Cir. 2021).

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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Copyright: No presumption of validity when registered more than five years after first publication.** Judge Magnuson recently denied plaintiff MPAY Inc.'s motion for summary judgment of copyright infringement. MPAY sued defendants Erie Custom Computer Applications, Inc., Payroll World, Inc., PayDay USA, Inc., Proliant, Inc., Proliant Technologies, Inc., and Kevin Clayton over disputes involving software code for payroll systems. MPAY asserted that defendants' providing of source code and allegedly improper sublicensing breached the parties' contracts and constituted copyright infringement. To prove a claim of copyright infringement, a plaintiff must prove ownership of a valid copyright. Despite owning the source code at issue for more than 20 years, MPAY did not register any copyrights in the code until weeks or days before filing the lawsuit. The Copyright Act creates a presumption of validity where works are registered within five years of first publication. 17 U.S.C. §401(c). Because MPAY did not register the source code within five years of first publication, no presumption of validity attached. The court further found that at the summary

judgment stage, MPAY had not established the validity of its copyrights. The court concluded that merely establishing that the parties acted as if the copyrights were valid is insufficient to establish the validity of copyrights. ***MPAY Inc. v. Erie Custom Comput. Applications, Inc.***, No. 19-704 (PAM/BRT), 2021 U.S. Dist. Lexis 116634 (D. Minn. 6/22/2021).

■ **Trademark: Likelihood of confusion when licensee continues use of trademark after termination of license.** Judge Wright recently granted Powerlift Door Consultants, Inc.'s motion for preliminary injunction against defendants Lynn Shepard, Rearden Steel Manufacturing LLC, Rearden Steel Inc., and ABC Corporation. Powerlift sued defendants alleging breach of contract and trademark infringement related to the parties' distribution agreement for Powerlift's hydraulic lift doors. Powerlift moved for a temporary restraining order, preliminary injunctive relief, and expedited discovery seeking to enjoin defendants from using Powerlift's trademarks and confidential information. To establish a claim for federal trademark infringement, Powerlift is required to show (1) it has a valid, protectable trademark and (2) the unauthorized use of that trademark creates a likelihood of confusion. Powerlift established a five-year period of continuous use of its registered trademarks rendering the marks incontestable and establishing a likelihood that Powerlift would prove valid and protectable trademarks. The court found that continued trademark use by one whose trademark license has been cancelled satisfies the likelihood of confusion test and constitutes trademark infringement. As defendants did not contest Powerlift's assertions of continued use of Powerlift's trademarks after termination of the distribution agreement, a likelihood of confusion exists. The court then found irreparable harm, that the balance of factors favored Powerlift, and that the public was not disserved by injunctive relief. Thus, the court enjoined defendants from using Powerlift's registered trademarks. ***Powerlift Door Consultants, Inc. v. Shepard***, No. 21-cv-1316, 2021 U.S. Dist. LEXIS 129189 (D. Minn. 7/12/2021).

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REAL PROPERTY

JUDICIAL LAW

■ **Attorney fee recovery in watershed district actions and appealing on separate and distinct issues after accepting a *remittitur*.** One issue before the Minnesota Supreme Court in a case spanning over 15 years was the interpretation of Minn. Stat. §103D.545, subd. 3, a provision governing watershed districts. The subdivision read: "In any civil action arising from or related to a rule, order, or stipulation agreement made or a permit issued or denied by the managers under this chapter, the court may award the prevailing party reasonable attorney fees and costs." The Court determined that the statute was susceptible to two reasonable interpretations: (1) fees are authorized in any civil action with any connection, association, or logical relationship to a watershed rule; and (2) fees are authorized only in those types of civil enforcement actions outlined in the other subdivisions of Section 103D.545: criminal prosecution, injunction, action to compel performance, restoration, abatement, or other appropriate action.

After reviewing the legislative history, consequences of each interpretation, and interpreting the statute as a whole, it concluded that the second interpretation was more reasonable: The subdivision applies only to those types of civil actions seeking to enforce or challenge watershed district actions. Applying that interpretation and reviewing the pleadings, motions, and district court orders throughout the case's 15-year history, the Court concluded that the plaintiffs did not seek to enforce the watershed rule at issue; instead, they sought only to enforce the relevant county ordinances. A "stray" assertion of a watershed district violation is not sufficient to fall within the scope of Minn. Stat. §103D.545, subd. 3. The Court, however, declined to establish a bright line rule as to whether a private party may recover fees under this statute. The other issue before the Court was whether the plaintiffs were barred from appealing from the final judgment after accepting a *remittitur* of a jury's future damages award in lieu of a new trial. The Minnesota Supreme Court adopted the "separate and distinct rule" permitting a party who accepts a *remittitur* to appeal from the final judgment on issues unrelated to the *remittitur*. The Court did not define the scope of this rule, but clarified that legal determinations made by the district court that were never presented to or considered by the jury are issues separate and distinct from a *remittitur*, including awards of statutory interest and attorney fees. ***Roach v. County of Becker***, No. A19-2083, ___ N.W.2d. ___, 2021 WL 3073286 (Minn. 7/21/2021).

■ **Conditional use permit for solar installation on agricultural land wrongfully denied by county.** The McLeod County Board acted arbitrarily and capriciously when it denied a conditional use permit to build solar panels on leased agricultural property in the county. The board rejected the permit for two rea-

sons: (1) "concern for the preservation and protection of land values," and (2) the "property is considered prime agricultural soil." In support of the underlying application, the relators submitted two reports—one from Chisago County and another from an expert appraiser—indicating that such an installation would not impact neighboring property values. Additionally, McLeod County's director of environmental services testified that no public data suggested that installing a solar array decreases neighboring property values. The only evidence in the record supporting the conclusion that property values could be diminished was neighbor statements opposed to the solar installation, but those statements were not buttressed by expert opinion or other "concrete information." On this record, the Minnesota Court of Appeals held that the record did not support the first reason for the county board's denial. Moreover, after reviewing the county's zoning ordinance, the court of appeals concluded that the second rationale for denying the permit application was not a valid rationale under the county's zoning ordinances. The court further concluded that the second rationale was not supported by the record either, as the owner of the land to be leased testified that the parcel of property was off the main tillable area, near a gas regulator that created problems for farming, and was not prime farming land. The court of appeals reversed and remanded with instructions to approve the conditional use permit. ***Matter of United States Solar Corp.***, No. A20-1043, 2021 WL 2909044 (Minn. Ct. App. 7/12/2021).

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TAX LAW

JUDICIAL LAW

■ **Holistic inquiry required to decide if commissioner's position was substantially justified for purpose of awarding costs to prevailing party.** Mr. Morreale operated hotels and restaurants in the Denver area. He was in a tax dispute with the Service, and simultaneously was involved in bankruptcy proceedings. One of the issues in the tax dispute was whether Mr. Morreale's pass-through entity was a cash or accrual method taxpayer. Ultimately, Mr. Morreale prevailed on the cash versus accrual question and the commissioner conceded that Morreale was the prevailing party. Prevailing parties are entitled to costs in certain situations. IRC §7430. However, costs are not awarded if the commissioner's position was "substantially justified." *See* Section 7430.

A recent 10th Circuit opinion changed how the court approached the substantial justification question. The tax court has in the past applied an item-by-item analysis, whereby "[t]he justification for each of U.S.'s positions must be independently determined." However, the 10th Circuit called this item-by-item analysis "erroneous" and instead held that the proper inquiry is a singular, holistic inquiry to determine the government's position rather than multiple itemized contentions. *United States v. Johnson*, 920 F.3d 639 (10th Cir. 2019). The tax court discussed how it would apply the holistic *Johnson* standard. Construing the *Johnson* standard to permit an inquiry into whether the government acted reasonably in causing the litigation, the court found that the IRS's position was not substantially justified.

Despite clearing both of these hurdles, Morreale recovered only a small fraction of the amount he requested, because the court limited the award to costs associated with the tax dispute, and not the bankruptcy proceeding. ***Morreale v. Comm'r***, T.C.M. (RIA) 2021-090 (T.C. 2021).

■ **Joint challenge permissible in "passport case."** Taxpayers with seriously delinquent tax debt are at risk of having their passports revoked (or not issued). Section 7345 gives the commissioner the authority to certify to the Secretary of State that an individual has a "seriously delinquent tax debt," which then prompts the Secretary of State to revoke the delinquent's passport. That same section also gives taxpayers a right to petition the tax court if the taxpayer believes the certification was erroneous and/or when the commissioner has failed to reverse the certification.

In this case, the married taxpayers owed more than half a million dollars in unpaid tax liability. The taxpayers challenged the IRS's certifications in a joint petition in which they claimed that the IRS failed to consider an offer-in-compromise (OIC) they had previously submitted. Acknowledging the outstanding OIC, the IRS subsequently reversed the taxpayers' certification and notified the State Department that the taxpayers were certified in error.

The court first took up the issue of whether a joint challenge is permissible when taxpayers receive individual notices under Section 7345. Noting that this was a threshold question and one of first impression, the court reasoned by analogy to other instances in which joint filing is permitted and held it to be likewise appropriate here. In addition to the analogous reasoning, the court noted that a contrary decision would waste judicial resources and could create hardship for taxpayers.

Although the joint petition was permissible, no relief was appropriate because the case was moot since the IRS reversed its certification and informed the State Department. (Mr. Garcia died before the tax court heard the case. It was not Mr. Garcia's death, but the IRS's reversal, that rendered the case moot as to Mr. Garcia.) The tax court rejected the invitation to reach the merits of the Garcia's offer-in-compromise because the court "lack[s] authority in a passport case such as this to afford the relief petitioners seek." ***Garcia v. Comm'r***, No. 7612-20P, 2021 WL 3029555 (T.C. 7/19/2021).

■ **Small clientele, big tax problems.** A family-owned Oklahoma childcare center with several centers ran afoul of numerous tax provisions over a number of

years. In separate opinions, the tax court addressed the various transgressions. In the first opinion, ***Blossom Day Care Centers, Inc. v. Comm'r***, T.C.M. (RIA) 2021-086 (T.C. 2021), the court agreed with the commissioner's determination that the daycare center had misclassified its corporate officers and agreed with the commissioner's determination that the center was liable for employment taxes, penalties under section 6656 for failure to deposit tax, and accuracy-related penalties under section 6662(a) for negligence. In a second, and more extensive opinion, ***Blossom Day Care Centers, Inc. v. Comm'r***, T.C.M. (RIA) 2021-087 (T.C. 2021), the court addressed 14 issues, including failure to report various items of income, mischaracterization, improper deductions for personal expenses, and others. The opinion provides a roadmap of what can go wrong when the taxpayer is, as the court characterized, "sloppy." Despite the errors, the court did not allow penalties for fraud, concluding that "respondent has not met the burden to show that petitioner had the fraudulent intent necessary for the imposition of penalties under section 6663(a)." Accuracy-related penalties, however, were sustained.

No theft-loss deduction for imprisoned Petters Ponzi scheme promoter. Tom Petters masterminded a large and complex Ponzi scheme. In 2009, Petters was convicted in federal court in St. Paul and sentenced to 50 years in prison. Frank Vennes Jr. "had a close relationship with Petters that spanned decades." Mr. Vennes is currently incarcerated after he pled guilty to "aiding and abetting misrepresentations and omissions to investors regarding [Petters Co., Inc.] note transactions." Mr. Vennes and his spouse claimed a theft loss deduction of approximately $57 million on their 2008 tax returns. The claimed losses were associated with investments involved in the Petters crimes. The tax court denied the losses. Although Section 165 permits deductions for theft losses, such losses must be substantiated, and there must be no reasonable prospect of recovery of the loss. Here, the tax court determined that the taxpayers failed to establish the fair market value of their investments in the scheme during the time in question. The court also concluded that the taxpayers "could not have known in 2008 whether [Petters Co., Inc.] had sufficient assets to allow them to recover their investments" since the prospect of recovery for investors in the Petters scheme was unknowable at the close of 2008. Because a theft loss is not permitted if there is a reasonable prospect of recovery, the tax court held that the taxpayers were not entitled to the claimed theft loss deduction. The court also upheld the section 6662(a) accuracy-related penalty. ***Vennes v. Comm'r***, T.C.M. (RIA) 2021-093 (T.C. 2021).

"Traditional rules" of summary judgment not appropriate in CDP nonliability cases. The tax court held that in a collection due process nonliability case, the court's decision turns on whether the administrative record shows an abuse of discretion. As such, the traditional rules of summary judgment are not appropriate. "Instead, summary judgment serves as a mechanism for deciding, as a matter of law, whether Appeals' determination is supported by the administrative record and is not arbitrary, capricious, or without sound basis in fact or law." ***Belair v. Comm'r***, No. 22133-19L, 2021 WL 3284908 (T.C. 8/2/2021).

County attempts to mask case-in-chief evidence as rebuttal testimony. This matter involves Allina Health System's property tax petition as of January 2017 on the basis that Allina is a public hospital and purely public charity. The tax court previously denied a consolidation and deadline extension motion from Washington County, stating that the county lacked good cause to extend the deadlines. *See Allina Health Sys. v. Cnty of Washington*, No. 82-CV-19-905, 2021 WL 1288267, at *2 (Minn. T.C. 4/2/2021). Nearly two months after the court's denial and long past any pretrial deadlines, the county filed an amended witness list noting that it planned to call Gary Cavett as an expert witness. Allina filed a motion to exclude Cavett's testimony, arguing that the notice was far beyond the deadline set forth in the court's scheduling order. The county maintained that Cavett's testimony would serve as rebuttal testimony, which was not subject to the deadlines of the scheduling order. The county further stated that Cavett's testimony should not be excluded under the standard set in *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401 (Minn. 1986). Allina rebuts that allowing late-noticed expert testimony would be highly prejudicial and that the "exclusion is warranted under pertinent *Dennie* factors."

The court began its analysis by determining that Cavett's anticipated testimony was characterized as part of the county's case-in-chief. As such, it is not rebuttal evidence, and was subject to the deadlines outlined in the scheduling order. The court further analyzed whether the evidence should be excluded and noted that "expert testimony should be suppressed for failure to make a timely disclosure" of the expert's identity only where "counsel's dereliction is inexcusable and results in disadvantage to the opponent." *Id.*, at 405. The tax court noted that the Minnesota Supreme Court previously stated that some factors of the *Dennie* standard are context-specific and may warrant tailoring its use to the matter presented. *See Macy's Retail Holdings, Inc. v. Cnty of Hennepin*, 899 N.W.2d 451, 459 (Minn. 2017).

After further examination of the *Dennie* factors, the tax court concluded that the county sought to introduce expert evidence after failing to secure an extension on the pretrial deadlines. Allowing the testimony of Cavett would either severely prejudice Allina or would warrant a continuance, causing a significant break in trial. As such, the court denied the inclusion of Cavett's expert testimony. ***Allina Health Sys. v. Washington Co.***, 2021 WL 3040976 (Minn T.C. 7/13/2021).

■ **Highest and best use analysis not necessary under Rule 8100.** Minnegasco is petitioning the market value of its natural gas distribution pipeline as of 1/2/2018 and 1/2/2019. The parties exchanged expert appraisal reports and were given the opportunity to object to the other's report. Minnegasco filed a motion to exclude the appraisal report of Dr. J.B. Heaton, arguing that the report contains no analysis and determination of the pipeline's highest and best use, and is therefore unreliable and inadmissible. The commissioner argues that Minn. R. 8100 does not require a highest and best use determination.

Minnesota Rules of Evidence applies to the tax court. Rule 702 provides that specialized knowledge in the form of an opinion must have foundational reliability and the proponent must establish that the "evidence is generally accepted in the relevant scientific community." Minn. R. 8100 governs pipeline valuation in Minnesota and indeed does not require an analysis of the highest and best use determination of a pipeline. However, 8100's silence does not conflict with any statute because "no such statute mandates a highest and best use determination." The tax court is both bound by Rule 8100 and has discretion on how to apply the rule in numerous respects.

In its analysis, the court states that Minnegasco's emphasis on the importance of a highest and best use analysis all pertain to the valuation of real property. Here, the assets being valued are tangible personal property. The Minnesota Supreme Court recently rejected "an argument that pipeline valuation must parallel real property" in *Minn. Energy Res. Corp. v. Comm'r of Revenue (MERC I)*, 886 N.W.2d 786, 801 (Minn. 2016). In *MERC I*, the Minnesota Supreme Court stated that the "Commissioner's [of Revenue] administrative regulations reflect the differences between valuing tangible personal property of utilities and other types of property." The tax court stated here that Minnegasco has not demonstrated that the highest and best use analysis is critical to the pipeline valuation, only that its absence renders the entire report unreliable and inadmissible. The court did not find reason that justifies excluding the entire report, and therefore, denied Minnegasco's motion *in limine* to exclude the report of Dr. Heaton. ***CenterPoint Energy Resources Corp., dba CenterPoint Energy Minnesota Gas, aka CenterPoint Energy Minnegasco, Appellant, v. Comm'r of Revenue, Appellee***, 2021 WL 3477527 (MN Tax Court 8/4/21).


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TORTS & INSURANCE

JUDICIAL LAW

■ **Exculpatory clauses signed by parents enforceable.** Plaintiff attended a birthday party when he was seven years old at a business that provided inflatable equipment on which children were allowed to play. Before entering the party, plaintiff's mother signed a form agreement that included an exculpatory clause that released the business "from and against any and all claims, injuries, liabilities or damages arising out of or related to our participation in... the use of the play area and/or inflatable equipment." During the party, plaintiff fell off an inflatable obstacle course and hit his head on the floor, which caused a head injury. When plaintiff was 18 years old, he sued the business that hosted the birthday party alleging it had "negligently failed to cover the landing surface of the fall zone surrounding the inflatable." The district court granted the defendant's motion for summary judgment on the ground that the exculpatory clause signed by plaintiff's mother is valid and enforceable.

The Minnesota Court of Appeals affirmed. On appeal, plaintiff argued that his parent lacked the authority to execute the exculpatory clause on his behalf. The court rejected this argument, holding that "in the absence of any law that either forbids parents from entering into contracts on behalf of their minor children or limits their ability to do so, it is clear that a parent generally has authority, on behalf of a minor child, to enter into an agreement that includes an exculpatory clause." The court also rejected the argument that Minn. Stat. §184B.20, which provides that exculpatory clauses entered into on behalf of a minor for injuries arising from the use of inflatable devices, applied because that statute was enacted in 2010, three years after the exculpatory clause at issue was signed. Finally, the court rejected plaintiff's argument that the exculpatory clause was overly broad, and, therefore, unenforceable. While the court agreed it was overly broad as it was not limited to claims for ordinary negligence, it was enforceable in this case because the claims at issue only involved ordinary negligence. ***Justice v. Marvel, LLC***, A20-1318 (Minn. Ct. App. 7/19/2021). *https://mn.gov/law-library-stat/archive/ctappub/2021/OPa201318-071921.pdf*


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HUGHEY


ROUTEL

Gov. Walz appointed RACHEL HUGHEY and COLETTE ROUTEL as district court judges in Minnesota's 4th Judicial District. These seats will be chambered in Minneapolis in Hennepin County. Hughey is a partner and shareholder at Merchant & Gould, where she litigates commercial disputes. Routel is a professor of law and co-director of the Native American Law & Sovereignty Institute at Mitchell Hamline School of Law.


GORDON

Gov. Walz appointed ANDREW GORDON as district court judge in Minnesota's 2nd Judicial District. Gordon will be replacing Hon. Lezlie O. Marek and will be chambered in St. Paul in Ramsey County. Gordon is the deputy director of community legal services at the Legal Rights Center.


TARKOW

HOWARD TARKOW was elected to the board of directors of MAZON: A Jewish Response to Hunger. Tarkow is an of counsel attorney at Maslon LLP, focusing his law practice on representing employers on their workplace issues and concerns.


MAECHLER

Maslon LLP announced that partner KATIE MAECHLER has been appointed to serve as co-chair of the law firm's litigation practice group. Maechler specializes in product liability litigation.


YEVZELMAN

MASHA M. YEVZELMAN has been awarded the Friend of the Profession Award by the board of directors of the Minnesota Society of CPAs. Yevzelman was recognized at the MNCPA annual meeting on August 11. Yevzelman is a tax attorney at Fredrikson & Byron.


BRANDT

HKM law firm announced its name change to HAWS-KM. With a firm-wide focus on evolution, the culture of continuous improvement is exemplified in its new firm name, new office design, and new energy. The firm also announced the addition of senior attorney CHRISTIAN BRANDT, who will lead the firm's business practice.


BOTTRELL


SALSBURY

JOSEPH P. BOTTRELL and VERONICA B. SALSBURY have joined Fredrikson & Byron. Bottrell joins as an associate in the mergers & acquisitions group. Salsbury joins as an officer in the mergers & acquisitions and private equity groups.


THORELLI

ROXANNE N. THORELLI is being awarded the Volunteer of the Year Award by Volunteer Lawyers Network at its Riverfront Celebration event on September 9, 2021. Thorelli is an attorney in Fredrikson & Byron's mergers & acquisitions group.


DELGER

Aafedt, Forde, Gray, Monson & Hager, PA announced that BRAD DELGER has been elected to the firm's board of directors. Delger represents employers and insurers in workers' compensation litigation.


ZUEHLKE

SAMANTHA ZUEHLKE has joined Meagher + Geer as an associate in the firm's commercial litigation, construction, insurance coverage, and products liability practice groups.

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In Memoriam

William Alexander "Bill" Bierman Jr., age 70 of Eagan, died July 16, 2021. After law school Bierman worked as minority counsel for the Minnesota Legislature, eventually going into private practice with a colleague. He worked for most of his career at the Minnesota Department of Labor and Industry, Office of General Counsel, retiring in 2016.

Hon. M. Michael Baxter passed away April 18, 2020. He worked as an associate at the law firm of Robin, Kaplan, Miller & Ciresi for several years, prior to moving into solo private practice and eventually working as a partner at the firm of Baxter & Engen. In the fall of 2008, he was selected to serve as a Minnesota district court judge, serving in both La Sueur and Hastings. Judge Baxter retired, as required by Minnesota law, in the month of his 70th birthday, December 2018.

Dawn Christine Van Tassel, age 46 of St. Louis Park, died unexpectedly on April 7, 2021. She received her JD from the University of California, Berkeley in 1999. After a long career as a business litigator, she formed her own law practice in 2014. She also served as an adjunct professor at the William Mitchell College of Law.

Jane Ellen Else Smith passed away on May 1, 2021. She put herself through law school at William Mitchell College of Law after 22 years of marriage. After graduating from law school she worked at West Publishing Group, where she was able to tie together her fluency in Spanish with her passion for law and cross-cultural work by leading the teams that helped publish the law for Puerto Rico and Mexico.

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PUBLIC FINANCE Attorney. AV-rated mid-sized Minneapolis law firm is seeking a highly motivated partner-level attorney to practice in the area of public finance and municipal bonds. Ideal candidates will possess excellent critical thinking, analytical and writing skills and sophisticated transactional experience, with some portable business. A background in public finance and municipal bond law, including relevant federal tax, securities, nonprofit and municipal law, would be highly desirable but not required. The successful candidate will work with the head of our public finance and municipal bond practice to transition that practice, while augmenting the firm's other transactional work. The firm was established over 30 years ago and provides a full range of legal services, with the personal attention and adaptability that are the hallmarks of smaller firms. In our public finance and municipal bond work we represent state and municipal governments and special authorities, underwriters, banks and nonprofits in complex financing transactions, as well as more traditional redevelopment and infrastructure projects. The work is challenging, and impactful in local communities, the Twin Cities region and the state. We offer a collegial atmosphere, competitive compensation and an excellent benefits program. Compensation is negotiable based upon qualifications, experience and portable business. Please send resume and cover letter to Office Manager, McGrann Shea Carnival Straughn & Lamb, Chartered, 800 Nicollet Mall, Suite 2600, Minneapolis, MN 55402 or employment@mcgrannshea.com.

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MEDICAL MALPRACTICE Lateral Associate Attorney / Junior Partner. Arthur, Chapman, Kettering, Smetak & Pikala, PA is a mid-sized defense law firm located in downtown Minneapolis. This is an opportunity for a hard-working attorney to complement a growing medical malpractice team and integrate into a solid book of existing medical malpractice business. This is a great opportunity to ultimately assume a book of business. We seek a highly motivated lateral associate or junior level partner with at least three years of medical malpractice, products liability, and/or professional liability law related experience to join our growing litigation practice group. Preferred experience includes deposition and trial experience. Candidates should have excellent writing skills and possess a strong attention to detail. A strong work ethic and the ability to thrive in a team-oriented atmosphere are essential. We are motivated to attract and recruit talented and diverse attorneys. Salary is commensurate with experience. If you are interested in joining our team, please send your resume, cover letter, writing sample(s), and salary expectation in confidence to: Arthur, Chapman, Kettering, Smetak & Pikala PA, Human Resources recruiting@arthurchapman.com. www.arthurchapman.com, Equal Opportunity Employer

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ASSOCIATE ATTORNEY – Construction Litigation. Arthur, Chapman, Kettering, Smetak & Pikala, PA is a mid-sized law firm located in downtown Minneapolis. We seek a highly motivated associate attorney with at least one plus years of construction law related experience to join our growing construction practice group. Preferred experience in lien law, bond disputes, property development, and contract review. Candidates should have excellent writing skills

and possess a strong attention to detail. A strong work ethic and the ability to thrive in a team-oriented atmosphere are necessary. We are motivated to attract and recruit talented and diverse attorneys. Salary is commensurate with experience. If you are interested in joining our team, please send your resume, cover letter, writing sample(s), and salary expectation in confidence to: Arthur, Chapman, Kettering, Smetak & Pikala PA Human Resources Manager: recruiting@arthurchapman.com, www.arthurchapman.com. Equal Opportunity Employer.

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ATTORNEY POSITIONS and offices available to rent from established Golden Valley Minnesota law firm. Our firm was established in 1993 and has an opportunity for attorneys who want to build their own practice, as well as being part of an experienced law firm. Practice areas currently include general business, real estate, employment, bankruptcy, general corporate, civil litigation, tax, transportation and other general matters. This is a unique opportunity for one or more attorneys who may be looking for office space and wish to expand their own practices. We have some referral work available on a contract basis and will consider attorneys with at least two or more years of experience. Located in unique office space near intersection of Highway 100 and Highway 55. Large offices with great views of pond and nature area. If interested, please send resume and inquiries to: info@huscglaw.com.

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BUSINESS LITIGATION Attorney. Anthony Ostlund Baer & Louwagie PA is looking for an exceptional associate to join its fast-paced business litigation practice in Minneapolis, Minnesota. Applicants must have one to six years law firm experience in business litigation, excellent academic credentials, and superior writing and communication skills. The position offers a competitive compensation and benefits package. Visit the firm website at anthonyostlund.com. Send resume and relevant writing sample in confidence to Janel Dressen at: jdressen@anthonyostlund.com. An equal opportunity employer.

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FAMILY LAW / CIVIL LITIGATION Lawyer. Minneapolis law firm (mid-sized & AV rated) seeking one or more lawyers to make a lateral move to assist with Family Law and Civil Litigation matters. The ideal candidates will possess excellent written and oral communication skills, initiative, writing ability, and trial experience. The Firm is looking for candidates who will continue to build their practice while acting in a support role for existing clients of the firm. Portable business is welcomed and preferred. The Firm offers a collegial atmosphere, competitive compensation, and an excellent benefits program. Compensation and Shareholder status negotiable based upon qualifications, experience, and portable business. Please send resume and cover letter to Office Manager, McGrann Shea Carnival Straughn & Lamb, Chartered, 800 Nicollet Mall, Ste 2600, Minneapolis, MN 55402 or employment@mcgrannshea.com. Equal Employment/Affirmative Action Employer.

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

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PROSECUTING ATTORNEY in Winona, Minnesota. Flaherty & Hood, PA is seeking a prosecuting attorney to join its practice in Winona, Minnesota. The position will primarily prosecute criminal misdemeanors and gross misdemeanors for the City of Winona. Education or some experience in criminal procedure and prosecuting criminal matters is preferred. Flaherty & Hood offers competitive salary and a full range of benefits. Please submit your resume by email to Chris Hood at: cmhood@flaherty-hood.com. More information about the firm is available at: www.flaherty-hood.com.

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HUNEGS, LENEAVE & KVAS, PA is seeking a trial attorney. We specialize in representing railroad employees asserting claims under the Federal Employers Liability Act, or FELA, for life-changing or even career-ending injuries. We like the courtroom and are looking for an attorney who wants to try cases and is energized by being in the courtroom. Qualified candidates will have: 5-10 years of litigation experience. Some 1st or 2nd chair trial experience. Experience taking and defending fact and expert depositions. Experience writing and arguing dispositive motions. The best candidate will have a passion to become an exceptional trial lawyer and have a thorough knowledge of the rules of civil procedure and evidence. Please send your cover letter and resume to: jobs@hlklaw.com.

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ASSOCIATE ATTORNEY Rajkowski Hansmeier Ltd., a regional litigation firm with offices in St. Cloud, MN and Bismarck, ND, has an opening for an associate attorney with two to four years' experience to join its team of trial attorneys. Our firm has a regional practice that specializes in the handling of civil lawsuits throughout the State of Minnesota, North Dakota and Wisconsin, including a significant volume of work in the Twin Cities. We offer a collegial work place with experienced trial attorneys who are recognized leaders in their field of practice. We are seeking an associate who has relevant experience, strong motivation and work ethic along with excellent communication skills. Our lawyers obtain significant litigation experience including written discovery, motion

practice, depositions coverage, trial and appellate work. We try cases and are committed to training our younger attorneys to provide them with the skills to develop a successful litigation practice. Competitive salary and benefits. Please submit resume, transcript, and writing sample to: Human Resources Rajkowski Hansmeier Ltd. 11 Seventh Avenue North St. Cloud, MN 56302 320-251-1055 humanresources@rajhan.com EOE

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STAFF COUNSEL – Home Office Claims. As a staff counsel in Home Office Claims, you will provide legal advice, direction, and strategy on property and casualty claims, including lawsuits against policyholders and against Federated Insurance. This role requires an individual with strong communication and relationship-building skills, serving as a consultant offering strategies and recommendations in a fast-paced, customer-focused environment. Additional job duties include: Provide direction and support to outside counsel and Claims personnel, who are evaluating, litigating and resolving property and casualty claims and lawsuits. Serve as a resource to all Federated Claims personnel on a wide variety of claims-related issues. Manage responses to subpoenas and litigation discovery directed to Federated. Evaluate new legislation, case law and legal issues regarding Claims, and to use this knowledge to update and recommend procedural changes. Provide guidance, counsel, and training for Claims personnel to develop and/or maintain technical competence and skills regarding claims litigation. Provide legal review of and assist in preparing training materials, manuals, interpretations, bulletins, policy forms and endorsements, and various other documents for Claims and other functions within the Company. Qualifications Required: Juris Doctorate. Minimum of five years' work experience demonstrating the ability to successfully defend claims against policyholders and insurance companies in coverage-related litigation. Private practice experience strongly preferred. About Us: At Federated Insurance, we do life-changing work, focused on our clients' success. For our employees, we provide tremendous opportunities for growth. Over 95% of them believe our company has an outstanding future. We make lives better, and we're looking for employees who want to make a difference in others' lives, all while enhancing their own. You will have opportunities to grow in your career. Our employees are encouraged to ask questions and learn on the job, and we are committed to promoting from within. We recognize your contributions with an exceptional rewards package that includes competitive pay and bonus programs, incredibly affordable health insurance, generous pension and 401(k) benefits, and gift matching and paid volunteer time to support your involvement in the community. Learn more about our Benefits. If California Resident, please review Federated's enhanced Privacy Policy. Apply at: www.Federatedinsurance.com/careers.

FOR SALE

PRACTICE FOR SALE—The partners in a general practice with an emphasis in family law and estate planning are retiring after a combined 70 plus years of practice. Anyone interested in stepping into the existing operation and office space with equipment and furnishings in a north suburban area is invited to call 763-780-8262. Serious inquiries only please.

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PRACTICE FOR SALE in Duluth. Enjoyable active solo practice specializing in the areas of small business, estate planning and real estate. Owner retiring. Nice office and furnishings. All files scanned and stored online. 218-348-1935.

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PRACTICE FOR SALE: Active estate planning, real estate, and probate practice located just north of downtown Saint Paul in Maplewood. Attorney with forty-year practice retiring. Will assist with smooth transition. Existing office available for rent. Call Ed at 651-631-0616.

OFFICE SPACE

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

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OFFICE AVAILABLE: $650/month Western Midway in St. Paul, on light rail, equal distance between courthouses. Furnished office, conference room. Copy service, fax, telephone (including long distance), utilities, storage space, on-site parking all provided. Call: 651-645-0511.

OFFICE SPACE FOR SALE. Office space located in north metro for sale (3700 square feet). Building contains one large executive office, eight private offices, two conference rooms, and kitchen / lunchroom. Equipped with state-of-the-art security system, custom furniture and other amenities that may be included for purchase. Questions or more information contact: NorthMetroLawyers@gmail.com.

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WHITE BEAR LAKE Offices – All Inclusive. Office space located at 4525 Allendale Drive. Rent ($700 – $950/month) includes telephone system, internet, color copier, scanner, fax, conference room, receptionist, kitchen, utilities and parking. Contact Nichole at 651-426-9980 or nichole@espelaw.com.

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FLOUR EXCHANGE BUILDING office in Minneapolis for rent with six other lawyers. On skyway with phone, internet, copier, fax, reception area, conference room and kitchen. Good source of referrals. Ideal for younger lawyer. Contact Rod Hale: rod121451@yahoo.com.

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

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Monday, September 27

Oak Ridge Country Club
700 Oak Ridge Road, Hopkins

Proceeds benefit the Hennepin County Bar Foundation—the charitable giving arm of the Hennepin County Bar Association. Since 1968, HCBF has made a positive impact on the community by funding over $3 million in grants to nonprofit legal organizations that support our mission "Promoting Access to Justice for the People of Hennepin County."

Register at www.mnbar.org/hcbf-golf

Call Sheila Johnson at 612-752-6615 regarding sponsorship opportunities or to register/pay by phone.

GOLF REGISTRATION: $250 PER GOLFER

Includes green fees, golf cart and lunch

11:00 AM: REGISTRATION & BOX LUNCH
12:00 PM: SHOTGUN START

Please note: This tournament is scramble format.
Golf registration above $190 is a tax deductible contribution to HCBF.

PLAYERS CARD *Includes All*

- ☑ 2 Mulligans
- ☑ Closer shot at one hole
- ☑ One toss out of bunker
- ☑ Putting Contest

Add-ons:

< +$25 Players Card Per Person

+$40 per team Bernie Zimpfer Memorial Cup Challenge

BIKE OR TENNIS REGISTRATION: $75 PER PERSON

1:30 PM: REGISTRATION & SNACK
2:00 PM: BIKE RIDE

2:30 PM: REGISTRATION & SNACK
3:00 PM: TENNIS MIXER

5:00 PM: DINNER & PRIZES

ALL TICKETS INCLUDE BEER TASTING, COOKOUT DINNER AND PRIZES

Register at www.mnbar.org/hcbf-golf

NOT A GOLFER, BIKER OR TENNIS PLAYER?

Join us for the beer tasting, cookout dinner and prizes!
$50 PER PERSON

In 2021 your Hennepin Bar Foundation granted $259,500 to justice related nonprofits. Your support provided grants to the following:

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Cancer Legal Care
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Children's Law Center of Minnesota
Civil Society
Conflict Resolution Center
CornerHouse
Discapacitados Abriendose Caminos
HOME Line
Immigrant Law Center
Lawyers Concerned for Lawyers
LegalCORPS
Legal Rights Center
Loan Repayment Assistance Program
Mid-Minnesota Legal Aid
Minnesota Assistance Council for Veterans
Minnesota Justice Foundation
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