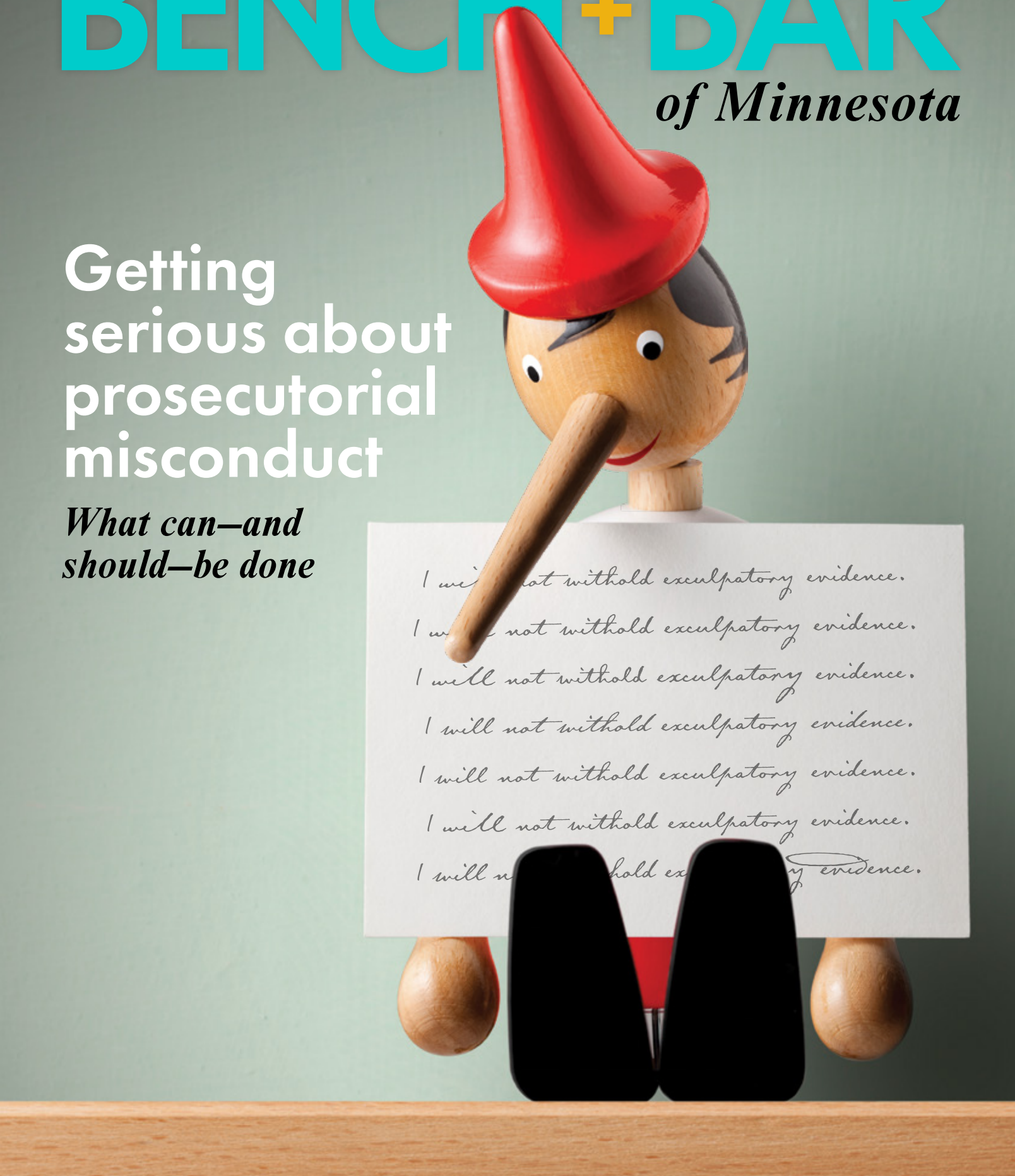
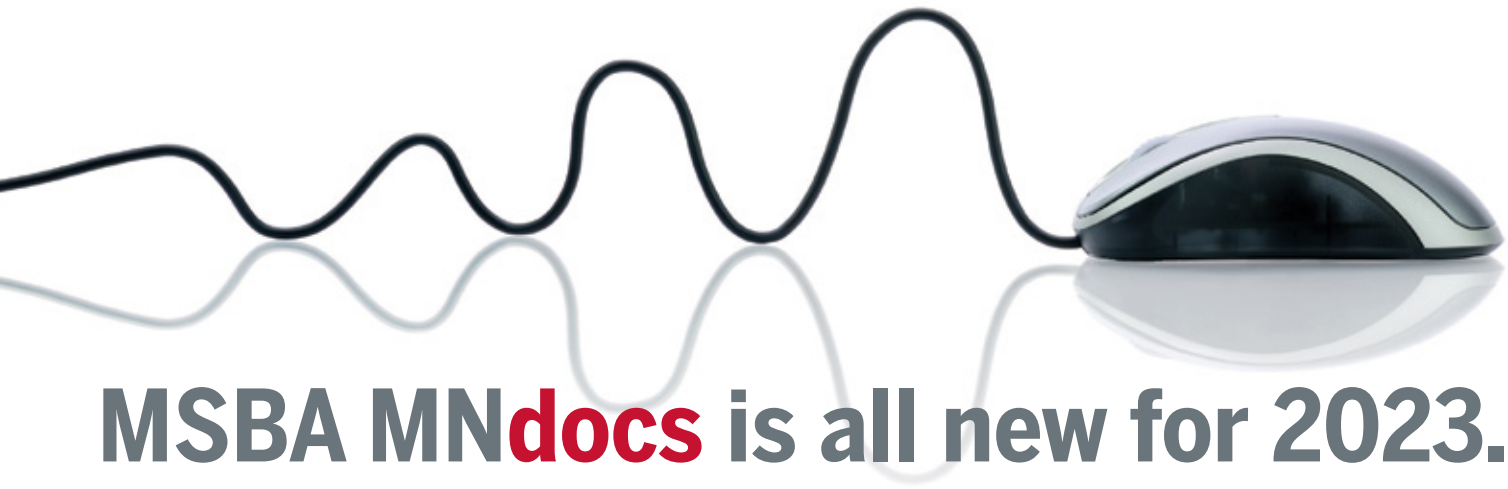
MINNESOTA STATE BAR ASSOCIATION MARCH 2023

BENCH+BAR of Minnesota

Getting serious about prosecutorial misconduct

What can—and should—be done





MSBA MNdocs is all new for 2023.

The legal documents you need are here. **MNdocs** is a collection of 250+ Minnesota-specific forms covering a range of practice areas—from family law to business law to estate planning. We're combining the power of the XpressDox document-assembly platform with the convenience of the cloud. Its intuitive Q&A process allows you to create documents faster and make editing easier.

Minimize your time creating and manipulating documents. Use **MNdocs** for a single client ... or as templates for a variety of clients throughout the year. **MNdocs** generates custom PDF or editable Microsoft Word documents.

Increase productivity and grow your practice in 2023. **MNdocs** gives you the tools you need.

MNdocs subscribers get full access to these form-sets:

- Business Law
- Real Property Law
- Family Law
- Probate and Estate Law
- Criminal Law

Create, manage, edit, and share documents. MNdocs gives Minnesota lawyers everything they need.

MNdocs

$50
per month.
$100 non-MSBA member.

$275
12-month subscription.
$600 non-MSBA member.

$300+ savings for MSBA members on annual subscriptions.

Volume discounts for multiple licenses at the same firm.

NEW FORMS, NEW PLATFORM, NEW FEATURES.

New and enhanced:

- Larger library of documents
- Regular updates reflect changes in the law
- Streamlined interface: Prompts make it easy to enter just the info needed
- Designed with attorney workflows in mind
- Cloud-based access and desktop downloads: Your forms are always available
- Microsoft Word or PDF file formats
- Attorney-tested to ensure content accuracy, relevancy, and ease of use

MSBA

Learn more at: www.mnbar.org/mndocs

MINNESOTA STATE BAR ASSOCIATION MARCH 2023

BENCH + BAR of Minnesota

VOLUME 80, NO. 2

columns

features

ONLY AT BENCH & BAR ONLINE

Felons Can't Vote: Civil Death in the US

The United States is the only democracy in the world in which most convicted offenders who have served their prison sentences are denied the right to vote for many years, and in some cases for the rest of their lives. We examine this phenomenon globally, in the US, and in Minnesota, where the 2023 Legislature was poised to act as this issue went to press.

By Ellen J. Kennedy and Judge Tara Kalar

www.mnbar.org/bench-bar

BENCH+BAR of Minnesota

Official publication of the
MINNESOTA STATE BAR ASSOCIATION
www.mnbar.org | (800) 882-6722

EDITOR
Steve Perry
sperry@mnbars.org

ART DIRECTOR
Jennifer Wallace

ADVERTISING SALES
Pierre Production & Promotions, Inc.
(763) 497-1778

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

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

STEP IN, STEP UP, STAND OUT

Introducing the MSBA Ambassador Program

BY PAUL D. PETERSON

PAUL PETERSON represents families in personal injury and wrongful death cases. His office is in Woodbury and he is licensed in both Minnesota and Wisconsin. He is the proud papa of four above-average children and one outstanding dog.

In a previous writing I shared with you my belief that the leaders of the MSBA are found throughout the organization. It is in the work of the MSBA sections, committees, district bar associations, and our affinity bar associations. In addition, the MSBA appoints members to various boards and committees responsible for various tasks and duties within our justice system. There is another important resource at the MSBA: our staff.

The MSBA does so much daily, weekly, and monthly to move our profession and our justice system forward. Much of the heavy lifting is performed by our wonderful staff. They are an important resource; we are lucky to have them and we invest in their work. These folks are professional and talented. They can be a great starting point if you are looking to get more involved. Our staff supports all the operations within the MSBA.

Over the years I have had many interesting conversations with both members and nonmembers about the organization. Quite often, the person I am conversing with comes up with a great idea: The MSBA should do this; the MSBA should do that. Often, I have had a ready response, pointing the listener to various committees, sections, etc., where I know that type of work is being done. Otherwise I report back on the conversation to MSBA officers and staff—and I almost always find we are already in the process of doing that which my fellow attorney had wisely suggested.

So my first request to the members of our profession: Please give us another look. If you are a current member, even if you are active in other areas of the MSBA, the information we'll be providing through the Ambassador Program is designed to make navigating the MSBA and all that it does easy and accessible. My prediction is you will be pleasantly surprised.

> Find out how the MSBA enhances your practice, helps you engage with the profession, and provides professional support: www.mnbar.org/guide

The Ambassador Program is summed up by the following: Use your voice. Share your vision. Help shape the future of the Minnesota legal profession.

Through the MSBA, you can support and shape the culture of the bar, serve the profession, and promote the role and work of attorneys in Minnesota.

Step in to MSBA leadership and showcase your expertise on a wider stage, beyond your daily practice. Influencers, thought-leaders, and decision-makers come together at the MSBA to work on issues of policy, practice, and professionalism. Step up to find a spot that matches your interests. Stand out by taking your talents and showcasing them before the members throughout our profession.

The MSBA is the voice of the profession. It is the best place for us all to join from our different practices, our different public service-related activity, our different backgrounds and viewpoints. Now more than ever the future of our profession is being made, and we are on the brink of many potential changes in how our profession works. The future direction of the MSBA will be determined by its members and their leadership. Now, more than ever, we need your voice and your vision. ▲

Call if you need us—651-296-3952—and remember to take care of yourself.

PUBLIC DISCIPLINE SUMMARY FOR 2022

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

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

Public discipline is imposed by the Minnesota Supreme Court for a lawyer's serious professional misconduct. It provides notice to the public and legal profession that a lawyer has not discharged their professional duties as the Court expects. In 2022, 36 lawyers were publicly sanctioned, an increase from the 28 lawyers publicly disciplined in 2021.

Discipline in 2022

Public discipline is imposed not to punish the attorney, but to protect the public, the profession, and the judicial system, and to deter further misconduct by the attorney and others. Besides the 36 attorneys who received discipline in 2022, three additional attorneys were transferred to disability status in lieu of public discipline proceedings.

Five attorneys were disbarred in 2022: Gregory Anderson, Geoffrey Colosi, Peter Lennington, Matthew McCollister, and Jesse Powell. Two of the five lawyers disbarred in 2022 were disbarred based largely upon criminal convictions. Mr. Anderson pleaded guilty to conspiracy to commit bankruptcy fraud by helping a client to hide assets. Mr. Powell pleaded guilty to several felony counts of fourth-degree criminal sexual conduct involving clients. Mr. McCollister pleaded guilty to health care fraud relating to participation in chiropractor "runner" cases, but his disbarment was based upon his misappropriation of client funds. Mr. McCollister very sadly died by suicide just before his sentencing.

Mr. Colosi was disbarred for breaching his fiduciary duties to a vulnerable adult through the draining of her estate to enrich himself. Mr. Colosi's matter was interesting in part because his was an atypical case of disbarment in which the attorney had no prior discipline. Mr. Lennington was disbarred after abandoning his practice and numerous clients, including misappropriation of client funds by taking money, doing no work, and making no refunds.

The intentional misappropriation of client funds remains the most common cause of disbarment, but commission of serious criminal misconduct—particularly when related to the practice of law—also generally warrants disbarment.

Suspensions

Twenty-one lawyers were suspended in 2022, including one stayed suspension. The lawyers who were suspended in 2022 engaged in a wide variety of misconduct. Some involved the commission of felony-level criminal conduct outside of the practice of law (which, unlike crimes related to the practice of law, may lead to a lengthy suspension rather than disbarment). For example, John Huberty was suspended for five years for his conviction for attempted criminal sexual conduct in the third degree, where the victim was 13-15 years old and the actor was greater than 24 months older than the victim. Mr. Huberty's criminal conviction resulted in a stay of imposition and five years of probation. However, his lengthy suspension shows the Court's determination that, no matter how the criminal justice system may choose to handle an underlying crime, felony convictions of lawyers represent serious misconduct warranting serious sanctions.

Other lawyers engaged in dishonest conduct. For example, Lillian Ballard's misconduct involved multiple acts of dishonesty relating to her legal and academic background, including making false statements on a resume, forging a transcript, and making knowingly false statements to human resource personnel and the Director. (At the time the Court's decision was issued, I happened to be working with my high school senior on his resume for college applications, and took the opportunity to reiterate to him the importance of honesty in how one presents oneself to others, whether or not you are a lawyer.)

An example of dishonest conduct that also led to a suspension involved Dennis Smith. Mr. Smith failed to meet his communication and diligence obligations to a client, but also combined this misconduct with making false statements regarding his progress on a matter and communication with the client. While it might be tempting to dissemble when you find yourself behind on a matter, do not do so. Just offer an apology. All too often, we see lawyers elevate the level of discipline by engaging in dishonest conduct in an attempt to cover up lack of diligence or communication.

Sometimes suspensions are warranted due to the variety of rule violations involved and prior discipline of the lawyer. Kevin Duffy is an example. Mr. Duffy generally failed to act with competence and neglected communication in representing a client in a bankruptcy matter, and then engaged in additional misconduct including mishandling client costs and failing to refund unearned costs in a number of matters. Mr. Duffy's prior discipline included five admonitions that had occurred from 1991-2015.

Public reprimands

Ten attorneys received public reprimands in 2022 (four reprimands-only, six reprimands and probation). A public reprimand is the least severe public sanction the Court generally imposes. One of the most common reasons for public reprimands is failure to maintain trust account books and records, leading to negligent misappropriate of client funds. In 2022, however, only one lawyer was publicly disciplined for failing to maintain compliant trust account books and records.

The lawyers who received public reprimands in 2022 engaged in other misconduct. For example, Ronald Bradley failed to act with diligence and competence, allowing a statute of limitations to run on a client's claim. Thomas Harmon engaged in the unauthorized practice of law for 20 months after his provisional authorization to practice in South Dakota expired. Joseph Roach provided incompetent advice, failed to communicate with his client, charged fees not agreed to by his client, and threatened to withhold a client's file until his fees were paid.

Two other cases may be of interest. Albert Usumanu received a public reprimand based on a stipulation with the Director's Office and upon the agreement of a majority of the Court for his misconduct in two immigration matters. However, two members of the Court, Justices Moore and McKeig, dissented, based upon the vulnerable status of Mr. Usumanu's immigration clients and his prior discipline. Justices Moore and McKeig did not believe that a public reprimand, even considering mitigating factors present, adequately addressed the misconduct present. In another matter, the Director dismissed a petition for disciplinary action after failing to convince a referee that an attorney engaged in misconduct by failing to adequately supervise trust account staff in his firm. This is a rare case of misconduct where, even though probable cause was received from a Lawyers Board panel, misconduct was not ultimately proven under the Director's clear-and-convincing burden.

Conclusion

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

2022 public discipline covered a wide variety of misconduct. I hope this review motivates you to be ever vigilant in your practice. While most attorneys do not see themselves as engaging in dishonest or criminal conduct, so many other fact patterns can lead to discipline. Call if you need us—651-296-3952—and remember to take care of yourself. We are in a challenging profession that expects much of us. ▲

GLOVES OFF

The upcoming national cybersecurity strategy

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

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

As we have all learned by now, no organization can ever be assured that it is immune to cyber threats and their associated risks. The best technological defenses, the best education programs, and even the best leadership cannot perfectly account for every contingency; as our digital world changes, so too do the possible vulnerabilities and attack methods. These realities are no less pressing on a national level, prompting past presidential administrations to address cybersecurity issues with varying degrees of success. But a new strategy may exemplify a modern approach that improves upon past policies and takes the current technological landscape into account.

At the time of this writing, President Biden appears likely to soon approve "a policy that goes much farther than any previous effort to protect private companies from malicious hackers—and to retaliate against those hackers with our own cyberattacks."[1] In response to the astronomical degree of risk facing U.S. organizations, particularly critical infrastructure sectors, this policy contains mandatory regulations and "authorizes U.S. defense, intelligence, and law enforcement agencies to go on the offensive, hacking into the computer networks of criminals and foreign governments, in retaliation to—or preempting—their attacks on American networks."[2]

In contrast to older strategies—which were regarded by companies as being guidelines, suggestions, or were purely defensive—this document proposes a much more proactive approach, granting unprecedented leeway to U.S. agencies. The failures of past strategies, particularly measures that were presented as strongly encouraged but ultimately voluntary, have helped to shape the Biden administration's viewpoint on what is required to truly have a positive impact. This take-charge outlook, which will likely form the basis of the soon-to-be-released policy, was already on display in a recent undertaking by the FBI.

At the end of January, it was announced that the FBI "had secretly hacked and disrupted a prolific ransomware gang called Hive, a maneuver that allowed the bureau to thwart the group from collecting more than $130 million in ransomware demands from more than 300 victims."[3] Rather than work to seize payments that had already been made by victims to the attackers, the FBI preemptively intervened to keep payments from being made in the first place. At a news conference to announce the operation, Deputy U.S. Attorney General Lisa Monaco stated, "Using lawful means, we hacked the hackers."[4] She explained that the strategy was focused on combatting cybercrime by any means possible, prioritizing prevention and the defense of victims. The success of this investigation is surely a win against the ever-present threat of ransomware, with the Hive variant being one of the most dangerous and prolific.[5] Perhaps most importantly, it signals a new, empowering attitude toward cybersecurity.

The National Cybersecurity Strategy is also set to strengthen the security of the nation's critical infrastructure by making mandatory regulations that have previously been voluntary. The expense of improved cybersecurity policies alone has been a significant deterrent for many companies, and problems with creating a uniform set of rules for each industry to follow have hampered successful implementation.[6] But from what we know at the time that this article is being written, it would seem that these issues are not only being addressed in the upcoming document; they are helping to shape the administration's hardline stance and its plans for moving forward from past problems and ambiguities.

We need only look to the headlines from recent years to understand why this strategy was formulated. From fears of a nation-state-sponsored attack campaign amid the war in Ukraine, to the Colonial Pipeline hack that affected travel[7] and caused a national panic, to the ransomware attacks that have cost organizations millions, it is no wonder we need a fresh perspective. Within our own organizations, we can also (figuratively, of course!) "hack the hackers"—staying apprised of cyber threats, working to be good reporters and documenters of cyber incidents, and striving for a security posture that goes beyond compliance. ▲

NOTES

https://slate.com/news-and-politics/2023/01/biden-cybersecurity-inglis-neuberger.html

[2] *Id.*

[3] *https://www.reuters.com/world/us/announcement-posted-hive-ransomware-groups-site-says-it-has-been-seized-by-fbi-2023-01-26/*

[4] *https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-disruption-hive-ransomware-variant*

[5] *https://www.cisa.gov/uscert/ncas/alerts/aa22-321a*

[6] Supra note 1.

[7] *https://www.cnn.com/2021/05/11/business/american-airlines-fuel-stop-colonial-pipeline-shutdown/index.html*

LawPay®

AN AFFINIPAY SOLUTION

+

MSBA

Proud Member Benefit

> **I love LawPay!** I'm not sure why I waited so long to get it set up.
>
> *– Law Firm in Ohio*

Trusted by 50,000 law firms, LawPay is a simple, secure solution that allows you to easily accept credit and eCheck payments online, in person, or through your favorite practice management tools.

- **22% increase in cash flow with online payments**
- **Vetted and approved by all 50 state bars, 70+ local and specialty bars, the ABA, and the ALA**
- **62% of bills sent online are paid in 24 hours**

YOUR FIRM LOGO HERE

Trust Payment
IOLTA Deposit

New Case Reference

**** **** **** 9995 ***

TOTAL: $1,500.00

VISA MasterCard AMEX POWERED BY LawPay

eCheck DISCOVER PAY ATTORNEY

Get started at
lawpay.com/mnbar
866-730-4140

Data based on an average of firm accounts receivables increases using online billing solutions.

LawPay is a registered agent of Synovus Bank, Columbus, GA., and Fifth Third Bank, N.A., Cincinnati, OH.

Q: What is the most useful professional advice/feedback you ever got from a non-lawyer?

ERICA HOLZER

Erica Holzer represents clients in complex commercial disputes primarily in the areas of tort and product liability, business torts, insurance coverage, and breach-of-contract actions. She is also an experienced appellate attorney.

Many years ago, a good friend related the following quote from Maya Angelou: "I've learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel."

This quote really resonated with me when I heard it because it is so true. I try to remember this wise advice when I am interacting with people in life—whether it is with my colleagues at work, opposing counsel, my spouse, my kids, the store clerk, or a person walking in the skyway.

I especially try to practice this when I am feeling stressed or tired, and thus might otherwise be inclined to use a curt tone or say an unkind word out of frustration. I believe most people are doing the best they can, that life can be hard at times, and I might not know what burdens another person is carrying on any given day. At a minimum, I try to move through the world in a manner that doesn't cause any additional suffering to others. But when I am at my best, I try to make others feel valued by being fully present, generous with my time, and genuine in my words.

BETHANY HURD

Bethany Hurd is a solo family law practitioner and an adjunct professor at Mitchell Hamline School of Law.

A friend who works in the mental health field once made an astute observation about me: I advocate for a living, but I rarely advocate for myself. My first instinct was to argue all the reasons why that statement was not true, but of course, they were right. This led to a conversation about the unique challenges of being a "professional helper" and culminated in a question that I will extend to you. What do you need in order to enjoy your work and excel at it in a sustainable way?

We know that work/life balance is important, but it's not as simple as achieving an ideal ratio of working versus non-working hours. Everything is interconnected—our work, our health, our families, our hobbies. In order to be the most effective advocates for our clients, we need to advocate for ourselves first.

I, like many others, find it difficult to ask for help or assert a need. It takes a certain amount of humility to state a need, because doing so inherently admits that you are lacking in some respect or unable to cope on your own. Perhaps you are struggling to manage your caseload. Option 1: Stay late at the office every night and order DoorDash instead of having dinner with your family. This is likely detrimental to your health and your relationships in the long term. Option 2: Identify the issue and propose a workable solution. This might mean speaking with your employer (which could be an honest conversation with yourself!) and saying, "I'm having trouble keeping up with my workload. It would be helpful to have a dedicated paralegal so that I can focus on client meetings and court. Here is a proposal showing how hiring a paralegal would add value to clients, benefit the firm, and enable me to continue doing top-notch work."

A FRIEND WHO WORKS IN THE MENTAL HEALTH FIELD ONCE MADE AN ASTUTE OBSERVATION ABOUT ME: I ADVOCATE FOR A LIVING, BUT I RARELY ADVOCATE FOR MYSELF. MY FIRST INSTINCT WAS TO ARGUE ALL THE REASONS WHY THAT STATEMENT WAS NOT TRUE, BUT OF COURSE, THEY WERE RIGHT.

The temptation to sweep our own needs under the rug in service of others is strong, but ultimately this leads to burnout, not martyrdom. I challenge you to identify what you need in order to be the best version of yourself at work, and then to ask for it with the same respectful assertiveness you would use on behalf of a client.

STEVEN MESSICK

B. Steven Messick is the founding attorney at Messick Law, PLLC. Steve started his practice as a solo attorney in June 2020 and has grown the firm to six attorneys, one law clerk, and two support staff. The firm provides family law, elder law, and civil litigation services.

I have been fortunate to surround myself with wonderful mental health professionals throughout my career. The work we do is stressful. If we have a bad day and miss a deadline, blunder in oral argument, or miscite a case, there are serious ramifications for our clients and our practices. Add the pressures of demanding clients, frequent interactions with difficult people, and the loneliness of managing a practice—you have the recipe for burnout (or worse).

It is hard for me to pin down all the great advice I have received from my providers, as they provided many. The best I can recall is being told: My value does not come from my job; I will not be perfect at all times; and that I must give myself grace. Following this advice (which is easier said than done) has allowed me to extend grace to others, expand my capacity for empathy, and be confident in my work. When I approach cases in this manner, I am better able to understand the needs of the parties, think of creative solutions, and reduce unnecessary conflict. When conflict is unavoidable, I am better able to focus on the specific elements necessary to prosecute or defend my client's case.

I cannot recommend enough having a professional in your life. You don't need to wait until you "need" it. A wise and available therapist/counselor can serve as your life coach. We go to the gym to take care of our bodies—to make them better, to be heathy. We should be doing the same with our minds. If you are unsure where to start, please contact Lawyers Concerned for Lawyers. They are not just there for times of crisis. They have a multitude of resources to get you in touch with someone who can take you and your practice to the next level.

I THOUGHT I LOVED FAMILY LAW. PRACTICING IT ALMOST WRECKED MY LIFE.

BY CARRIE OSOWSKI ✉ *carrie.osowski@olmstedcounty.gov*

For as long as I can remember, I have wanted to practice family law. My parents separated when I was four years old, and it was not until three months before my 18th birthday that my mother agreed to share joint legal custody with my father. After 14 years of being exposed to every detail of my parents' divorce and subsequent custody battles, practicing family law seemed to be the obvious choice, since I knew I wanted to be an attorney. When asked "why family law?", I would say it was so that I could "use my trauma for good." In theory, it was a great idea; in practice, it nearly destroyed my mental health.

At first, I thrived in family law. I believed I had found my professional calling, as I was able to empathize with clients as they or their children experienced various situations that I knew all too well. Then, approximately two years after I passed the bar, I handled a case that was eerily similar to my parents' divorce. My client was the husband, and the parties had two small children. My client first came to me to discuss requesting a protective order for him and his children. The order was granted for him but not his children. The parties later attended a social early neutral evaluation[1] for their pending divorce.

During this evaluation, my client cried while he described the abuse he suffered, the abuse their children had suffered, and the abuse he worried would continue in their mother's care. The opposing party denied all my client's claims and insisted the children were thriving in her care. After the two evaluators discussed the parties' positions, they informed us that because "mom says everything is going well in her care," they believed equal parenting time was in the children's best interests. My client was dumbfounded; *of course* mom would say everything was okay in her home! He did not understand why her lies were so readily believed. As we discussed the recommendations, I explained to my client that without tangible proof of ongoing abuse, a court would likely also order equal parenting time. If his soon-to-be-ex-wife could lie convincingly to the evaluators, she could also lie convincingly to a judge. Unfortunately for my client's children, that tangible proof would later emerge, but on that day all my client could do was ask for more time to consider whether he wanted to agree to the evaluators' recommendations.

Circumstances like this became, if not common, then at least not as rare as I would have liked. Clients would ask me, in varying levels of distress, "How can they get away with lying? I thought it was a crime!" Every time I was asked this question, I was thrust back to my childhood, wondering when the court would see through the false persona my mother presented in the courtroom. I am sure when she was in front of a judge, my mother was kind and considerate, and she possibly even cried in order to present herself as a loving mother who cared for her two young daughters. But when she was at home with us, she was the woman who lifted me by the hair until I was eye level with her to ask me if I wanted her to put toothpaste in my hair too (I was seven or eight years old at the time and got toothpaste in my sister's hair during a fight before school); the woman who screamed at me at our local library for not entering her email address correctly when she was submitting online job applications (I was 11 or 12 at the time, and the other library patrons avoided eye contact with me as I cried); the woman who brought an affidavit she claims was written by my sister to court after I refused to return to her house the summer I turned 15 (nearly 18 years later, I still have a soft spot for court deputies after two of them brought me tissues as I read the affidavit). But I pressed on with practicing family law, because I believed I was using my trauma for good.

While I have spoken openly about my mother's impact on my childhood, practicing family law made me realize my father also played a role in traumatizing me. One day, a potential client came to my office for an initial consultation. He brought with him his teenaged daughter, convinced that Minnesota permitted children to choose where they want to live once they turned 14. His daughter sat in the office waiting area while I met with her father and listened to him tell me all about how his daughter wanted to live with him, and how it was so unfair to her that the judge refused to speak with her. I advised this potential client of the best interest factors and explained how he could request that his daughter be allowed to give her reasonable preference, if the court deemed her to be of sufficient ability, age, and maturity to express an independent, reliable preference.[2] When the client walked out of our office, I thought of my father and knew he would be proud of me for how I handled this situation. Yet the longer I practiced, the more I began to wonder whether his pride in me was misplaced.

To be clear, my father was not abusive. But when I was I nine years old or so, he encouraged my sister and me to remove several serving spoons from our mother's home. He had been awarded their silverware in the divorce, but my mother never gave him those spoons. We were thrilled to be included in "getting back" at our mother; we were less thrilled when she punished us after realizing the spoons were gone. When I was 10, he talked us into walking to the police station a mile from our mother's home and asking them to help us because we no longer wanted to live with our mother. As I got older, my father encouraged us to refuse to return to our mother's care. One summer I listened, but less than six months later a judge later forced me to return to my mother's care. My father was ordered not to have contact with me for months. The next summer, I again refused to return to my mother's care, and this time I finally was allowed to stay with my father.

At the time, I was grateful to my father for pushing so hard for us to act on our own behalf. I am still grateful today that I escaped my mother's home before my 18th birthday, but I also resent my father for putting so many adult burdens on my sister and me. Throughout my childhood, he drew a line in the sand between my mother and him, and he did everything in his power to make sure we stayed on his side of the line to fight against her. For years I justified my father's actions because my mother was so abusive. But when I spoke at a high-conflict divorce CLE in 2019, I spent most of it wondering to myself if I should also be

holding my father responsible for the damage that my childhood caused my psyche. Thankfully my therapist was in the room as I spoke on the panel, and she was able to help me process my thoughts in a healthy way at our next session after the CLE.

I used to reassure clients by telling them, "Someday your child will grow up, and they will look back and realize what was happening during their childhood." As time went on, I wanted to add, "and they will probably hate *you* too." I wanted to scream at clients that their children just wanted to be kids, not miniature extensions of themselves to be pressed into battle against their exes.

Looking back now, I realize I was viewing my clients through the lens of my childhood. While I might have been externally advocating for my clients at mediations and in the courtroom, subconsciously I was viewing cases as echoes of the 14-year-long custody battle that defined my childhood. I was trying to find a way to redo my parents' divorce, but with a different outcome. Now that I have been out of that area of practice for almost a year, I can see that I was destroying my mental health in a desperate effort to save a version of myself that no longer existed. In doing so, I spent six years embracing my trauma, not healing from it. But I still clung to this area of law, having convinced myself that if I could save one child from an abusive home, my own childhood trauma would be worth it.

The almost-final straw came when I was walking into Target on a lunch break in the summer of 2021. Like most recent college graduates, I have an excessive student loan balance. And like many college graduates with student loans and a cynical sense of humor, I frequently make statements on the order of "if I die, then at least I don't have to pay my student loans!"

For context, I qualified for every need-based grant available to me while in I was completing my bachelor's degree, including some grants that have since been discontinued. I also received numerous scholarships and worked for most of the time I was in school. Despite these efforts, I left law school owing $104,146 in student loans. When my deferment period ended, the $10,121 in unsubsidized interest that accrued while I was in school was added to my balance. Between November 2015, when my loan deferment period ended, and April 2020, when student loan interest accrual was paused due to the covid-19 pandemic, I accrued an additional $20,296 in interest. My current total student loan balance is $134,563.

In the years after I graduated and before payments were paused, I often lost sleep while calculating how much I would have to save to pay the tax bill that would be due when my student loans were forgiven after I made 20-25 years' worth of income-based payments. I would lie in bed, staying awake for hours frantically switching between my banking app, a calculator, and the IRS webpage that shows income tax brackets, increasingly panicking as I realized I was going to fall short. I would then switch to calculating the future loan I would need to take out to pay the taxes dues when my student loans were forgiven.

By summer 2021, I had been approved for life insurance with my wife as my beneficiary, and as I was walking into Target, a car flew through the parking lot. This was not the first time I've had a near-miss while walking in a parking lot, but for the first time that day, I realized that I just did not care if it hit me. Not only did I not care, but I almost felt relieved at the thought of what would happen if it did hit me and kill me. I had life insurance, so my wife would be able to afford our home without me, and then I would no longer have to pay my student loans. I was completely and utterly at peace with the idea of my death.[3] As I walked through Target, I realized this relief was neither normal nor healthy.

While I was experiencing this personal crisis, my wife was starting a new job working for the federal government (after leaving a job in which she used her own trauma "for good"). She submitted her public service student loan application, and suddenly she was in a position to be student-loan free in 10 years, with no taxes due on the forgiven balance. At that time, I still had 14 years left to pay my undergraduate loans and 19 years left to pay my law school loans. Over the next several months, I waged an internal battle. I loved practicing family law—or thought I did—but was it really fair to my family for me to insist on being saddled with student loan debt, plus a pending tax bill, for nearly two more decades?

The answer came to me from an unusual source. As a graduate of the University of St. Thomas School of Law, I volunteer as a mentor to current law students. In early January 2022, I was participating in a mentor activity with my then-mentee, a 2L who had requested a second mentor earlier that school year. As we were debriefing after the experience, she made comments to me about the role of a county attorney. I knew a position had opened with the county attorney's office, but until that debriefing I had convinced myself not to apply, partially because I was afraid and partially because my wife would tease me by telling me she couldn't be married to a prosecutor. That night, I went home, looked at my wife, and without so much as a "hello" or "how was your day?" said, "I'm applying for the county attorney job." Without hesitation, she responded, "I'll support you no matter what you do."

I started practicing criminal law as a senior assistant Olmsted County attorney on March 14, 2022. I was absolutely terrified to switch practice areas six years into my career, but I am happy to report my fears have so far been unfounded. While I miss my old coworkers, and occasionally miss building client relationships, I am much more relaxed now that I am not constantly reopening old childhood wounds. I take my work responsibilities seriously, but I do not take work home with me like I used to, and I no longer take home to work, unless it is in the form of a baked good. I also sleep better now that I am not lying awake at night fretting over student loan payments.

I cannot say with certainty how my future legal career will play out, but I am okay with that, because my identity and my self-worth are no longer tied to what I do at work. ▲

NOTES

[1] A social early neutral evaluation (SENE) is a form of alternative dispute resolution that is similar to mediation. Two evaluators listen to both parties describe their desired custody and parenting time outcomes and then make recommendations based upon the best interest factors.

[2] Minn. Stat. §518.17, subd. 1(a)(3).

[3] If you are experiencing thoughts of suicide or hopelessness, please seek help. Resources can be found through the Lawyers Concerned for Lawyers services page at *https://www.mnlcl.org/services/*

CARRIE OSOWSKI is a senior assistant attorney for Olmsted County and is on the adult criminal prosecution team. She is also a co-chair of the MSBA Well-Being Committee for the 2022-23 bar year.

Retrieve Case-Critical Evidence, Defensibly.

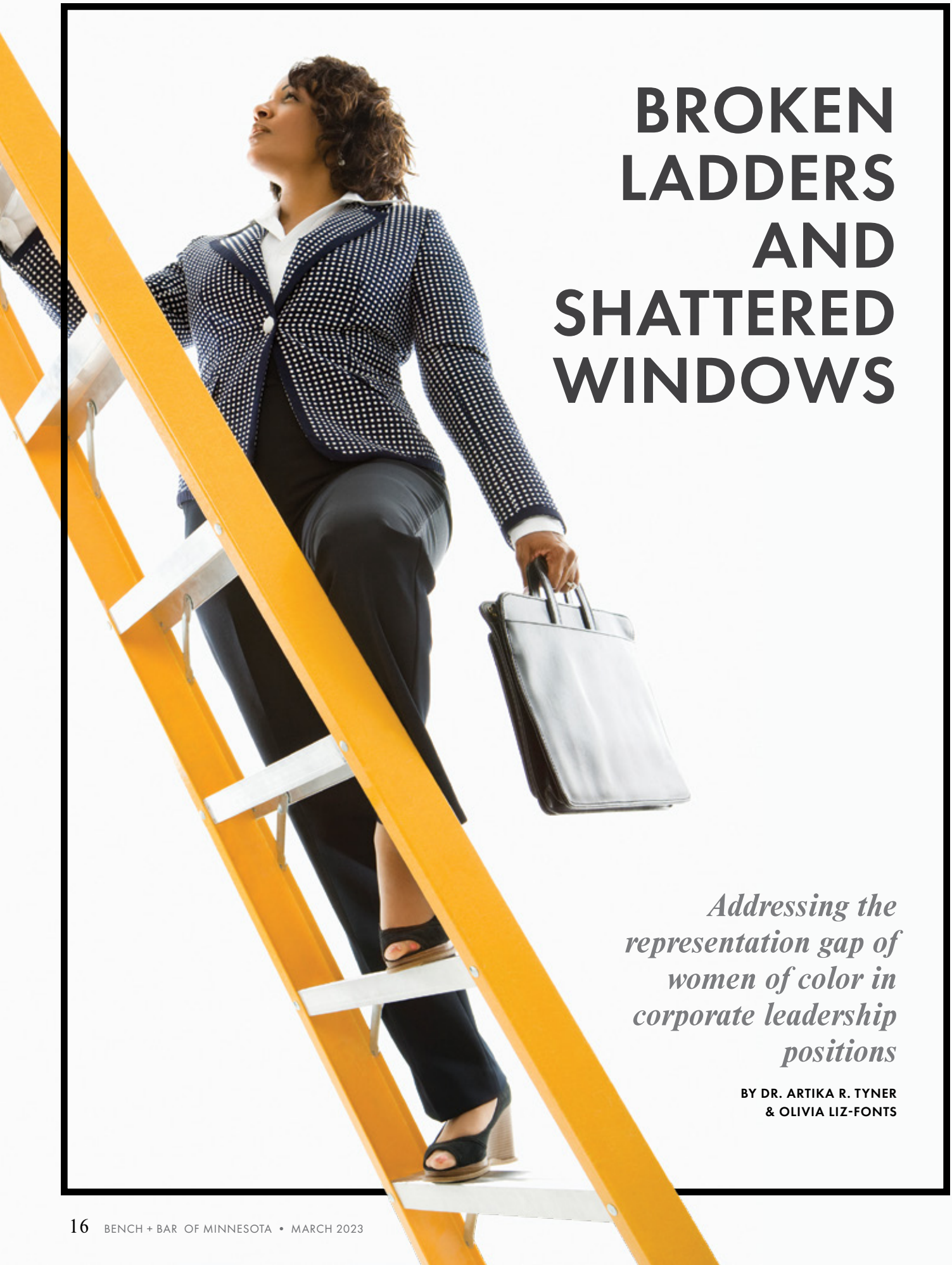
eDiscovery with no loose ends. Don't let important evidence slip through an unguarded process. Protect your eDiscovery edge with Shepherd Data Services.

As your end-to-end eDiscovery partner, Shepherd seamlessly integrates all aspects of the EDRM cycle to deliver a defensible, superior quality product, secured by the power of RelativityOne®.

Bring relevant facts forward without controversy. Choose Shepherd's eDiscovery expertise and tight hold on the process.

Shepherd Data Services®
20
Leading The Pack Since 2002

612.659.1234 | shepherddata.com



BROKEN LADDERS AND SHATTERED WINDOWS

Addressing the representation gap of women of color in corporate leadership positions

BY DR. ARTIKA R. TYNER
& OLIVIA LIZ-FONTS

The racial reckoning of recent years has ushered in a critical examination of organizational structures, cultures, and policies. Corporate boards have been re-aligned to create access to leadership roles for women and people of color. McKinsey reports that $200 billion has been committed to racial equity efforts since the murder of George Floyd. New philanthropic efforts have focused on community revitalization and economic development. Yet there have been only incremental gains in promoting diversity, equity, and inclusion within corporate settings.

Building an inclusive workplace

Women of color are still waiting to realize the promise of ladders to success and windows of opportunity. Currently women of color make up 17 percent of corporate entry-level positions, yet only 4 percent are represented at the c-suite level.[1] The same study also revealed that white men make up 35 percent of corporate entry-level positions and 62 percent of c-suite positions.[2] This significant difference in representation is the result of passive DEI initiatives.

The issue of diversity in the workplace has been around since the 1960s as a result of the antidiscrimination legislation of that decade. The initial focus centered on fair hiring practices and affirmative action. But the concept of diversity has evolved over the years to encompass "inclusion," "equity," and "justice." The idea of inclusion focuses on creating an environment in which employees feel supported and valued. It is a place where leaders cultivate human talent and potential. Caroline Wanga, CEO of Essence Communications, shares, "Be the place that puts the best of talent out in the world."

In turn, this creates an atmosphere where everyone can thrive and unveil their limitless potential. Equity has been tied to diversity efforts that address the gaps in equality. This is acknowledging that each person has a different set of life circumstances that limit access to resources and opportunities. A commitment to equity focuses on how to create equal outcomes through resource allocation and intentional action. Justice focuses on dismantling systemic barriers and historical exclusionary practices. It not only shifts mindsets but also transforms policies and practices while removing roadblocks and impasses.

The shift in focus to incorporate inclusion and equity was driven in part by the invisible barriers that women and other minority groups face. Though organizations have implemented antidiscrimination policies and pipeline initiatives, women and minorities continue to face invisible barriers at various points in their careers. The "glass ceiling," "glass cliff," and "broken rung" are metaphors developed to conceptualize the different points at which women and minorities face barriers that contribute to their underrepresentation in corporate leadership positions.

Though most organizations recognize the presence of these barriers, few have been successful in eliminating them. The approach tends to be limited in scope and to lack coordination and accountability measures—thus failing to address the systemic nature of inequities. One organization may host unconscious bias training (addressing the intrapersonal level) while another may conduct a racial equity assessment (exploring organizational culture). Organizations also show their commitment to diversity by implementing anti-discrimination policies. However, these strategies are one-dimensional and tend to yield minimal results. Instead, organizations must also engage senior leaders to promote inclusion and professional advancement for women of color. This is a call to inclusive leadership.

Inclusive leadership

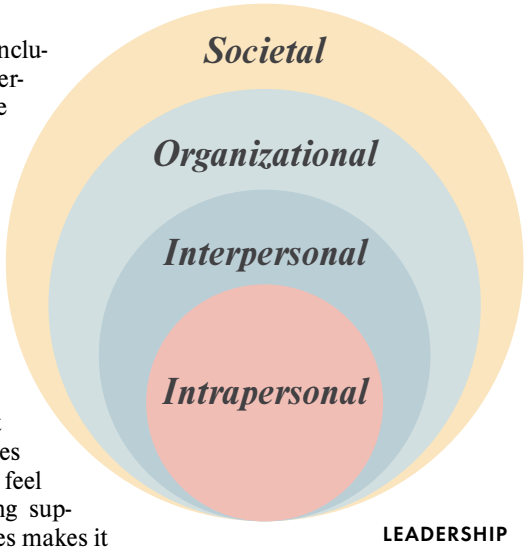
The Leadership Framework for Action developed by Dr. Artika Tyner provides a comprehensive approach for building the essential leadership competencies rooted in the principles of DEI, which manifests in healthy workplace relations, peak optimized performance, positive morale, and betterment of society. It provides four stages of learning: intrapersonal (engaging in self-discovery), interpersonal (building an authentic relationship with others), organizational (establishing strategic outcomes and promoting equity), and societal (developing sustainable, durable solutions).

This article focuses on leadership strategies for advancing change at the interpersonal and organizational levels.

Taking action

An employee's sense of inclusion considers the daily interactions experienced in the workplace. Among those interactions is access to leaders by way of informal exchanges and sponsorship. Sponsorship differs from mentorship in that it entails external-facing support such as advocacy, visibility, promotion, and professional connections. Employees who have at least one sponsor are 1.6 times more likely than others to feel included.[3] The external-facing support that sponsorship provides makes it more likely for an employee to access senior leaders. One 2018 study found that employees with sponsors are 1.4 times more likely to say they have had a meaningful interaction with a senior leader.[4]

The same study found that 60 percent of Black women reported they never had an informal interaction with a senior leader, while only 40 percent of all men reported such a response.[5]



LEADERSHIP FRAMEWORK FOR ACTION

DR. ARTIKA R. TYNER is a passionate educator, author, sought-after speaker, and advocate for justice. Dr. Tyner is a law professor at the University of St. Thomas School of Law. She is committed to training students to serve as social engineers who create new inroads to justice and freedom.

OLIVIA LIZ-FONTS is currently a third-year student at the University of St. Thomas School of Law. With a background in human resources, Olivia hopes to leverage her legal career to create policies and practices that promote equitable workplace advancement.

Although sponsorship can be rare, with only one of four employees having had a sponsor, access to leaders through formal or informal interactions can also create opportunities.[6] Additionally, access to leaders is among the factors that contribute to an employee's sense of inclusion as employees recognize that exposure to leadership is beneficial to their career advancement.[7]

Sponsorship programs can be a tool for organizations to support employees with networking and career advancement opportunities. However, it is important for organizations to be more strategic with sponsorship to support women of color in the workplace. Although studies suggest that diverse leaders create a sense of inclusion, organizations often make the mistake of relying on diverse leaders to take on various diversity initiatives, such as sponsorship. Instead, organizations should focus on their leadership as a whole to develop strategies for allyship.

With the majority of leadership positions consisting of men, organizations need to engage with male leaders to nurture an inclusive environment that supports the career advancement of women of color.[8] In creating a strategy, organizations need to consider how individuals interpret "allyship" and the action that is required to support women of color in the workplace. Unfortunately, there is a notable disconnect between the allyship actions that women of color say are most meaningful and the actions that white men prioritize. While women of color value advocacy for new opportunities, white men consider the most meaningful allyship action to be the ability to confront discrimination against women of color.[9] This disconnect demonstrates the misconception that racial allyship and professional support are mutually exclusive.

While it is important for leadership to advocate for an inclusive workplace by addressing discrimination against women of color, it is arguably more important to advocate for women of color by supporting them in reaching professional milestones—as this would also imply an inclusive and equitable working environment.

In addition to the opportunities for sponsorship and allyship, inclusive leaders can support women of color in other ways.

■ **Focus on addressing pay parity**. Access to equal pay is a persistent challenge for women generally. Once gender and race are analyzed together, however, the results are even more alarming. For African American women to achieve equal pay, they would need to work until August 7 (Black Women's Equal Pay Day) of the following year to catch up with white men. This is because, on average, Black women are paid 38 percent less than white men and 21 percent less than white women. Latina Equal Pay Day is November 1. This date reflects the 46 percent pay gap Latinas face.

■ **Develop mentorship programs for women of color**. Informal and formal mentorship opportunities will provide women with the key tools and professional training for career advancement. This should include career development resources and corporate board opportunities provided by programs like HOPE Corporate Inclusion Project. This process should also be accompanied by efforts to cultivate relationships with champions and sponsors.

Organizations can reap the benefits of an inclusive workplace by implementing strategies they can measure, track, and adjust over time. This ultimately leads to a more profitable and successful organization. This process centers on the core inclusivity values of belongingness, team cohesion, and equitable outcomes.

Bayard Rustin encouraged each of us to take intentional action for justice and equity when he stated, "the proof one truly believes is in action." The time is now to take action to build an inclusive workplace, not just for women of color but for everyone to reap the benefits derived from inclusion, equity, and justice. Broken ladders and shattered glass windows will be replaced with ladders to success and windows of opportunity. ▲

NOTES

[1] Tiffany Burns, Jess Huang, Alexis Krivkovich, Lareina Yee, Ishanaa Rambachan, Tijana Trkulja, Women in the Workplace 2021 (McKinsey & Co.), 9/27/2021. *https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace#nga_section_header_main_0_universal_5.*

[2] Women in the Workplace 2021, McKinsey & Co., supra note 1.

[3] Peter Bailinson, William Decherd, Diana Ellsworth, Maital Guttman, Understanding Organizational Barriers to a more Inclusive Workplace, (Mckinsey & Co.), 6/28/2021, *https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/understanding-organizational-barriers-to-a-more-inclusive-workplace.*

[4] Rachel Thomas, Marianne Cooper, Ellen Konar, Megan Rooney, Mary Noble-Tolla, Ali Bohrer, Lareina Yee, Alexis Krivkovich, Irina Starkova, Kelsey Robinson, Marie Claude Nadeau, Nicole Robinson, Women in the Workplace 2018 (McKinsey & Co.), *https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2018.pdf* (last visited 4/28/2022). [hereinafter Women in the Workplace 2018, McKinsey & Co.]. The study was conducted across 270 organization employing more than 13 million people.

[5] Women in the Workplace 2018, McKinsey & Co., supra note 4.

[6] Women in the Workplace 2018, McKinsey & Co., supra note 4.

[7] Women in the Workplace 2018, McKinsey & Co., supra note 4.

[8] The 2021 Women in the Workplace study reported that men hold 65% of senior manager/director, 69% of vice president, 73% of senior vice president, and 75% of c-suite positions; while women of color hold 9% of senior manager/director, 7%, of vice president, 5% of senior vice president, and 4% of c-suite level positions.

[9] Women in the Workplace 2018, McKinsey & Co., supra note 4.

Not all firms are the same, so why should they use the same practice management system?

With this in mind, MSBA Advantage brings you discounts from seven practice management partners, each with a different set of practice tools and resources.

Whether it's Clio, CosmoLex, MyCase, PracticePanther, SimpleLaw, Smokeball, or TimeSolv, find the option that's the best fit for your firm...and SAVE!

Learn more at: www.mnbar.org/Advantage

Clio®

CosmoLex

mycase

PRACTICEPANTHER

SimpleLaw.com®
Simple for Lawyers. Simple for Clients.

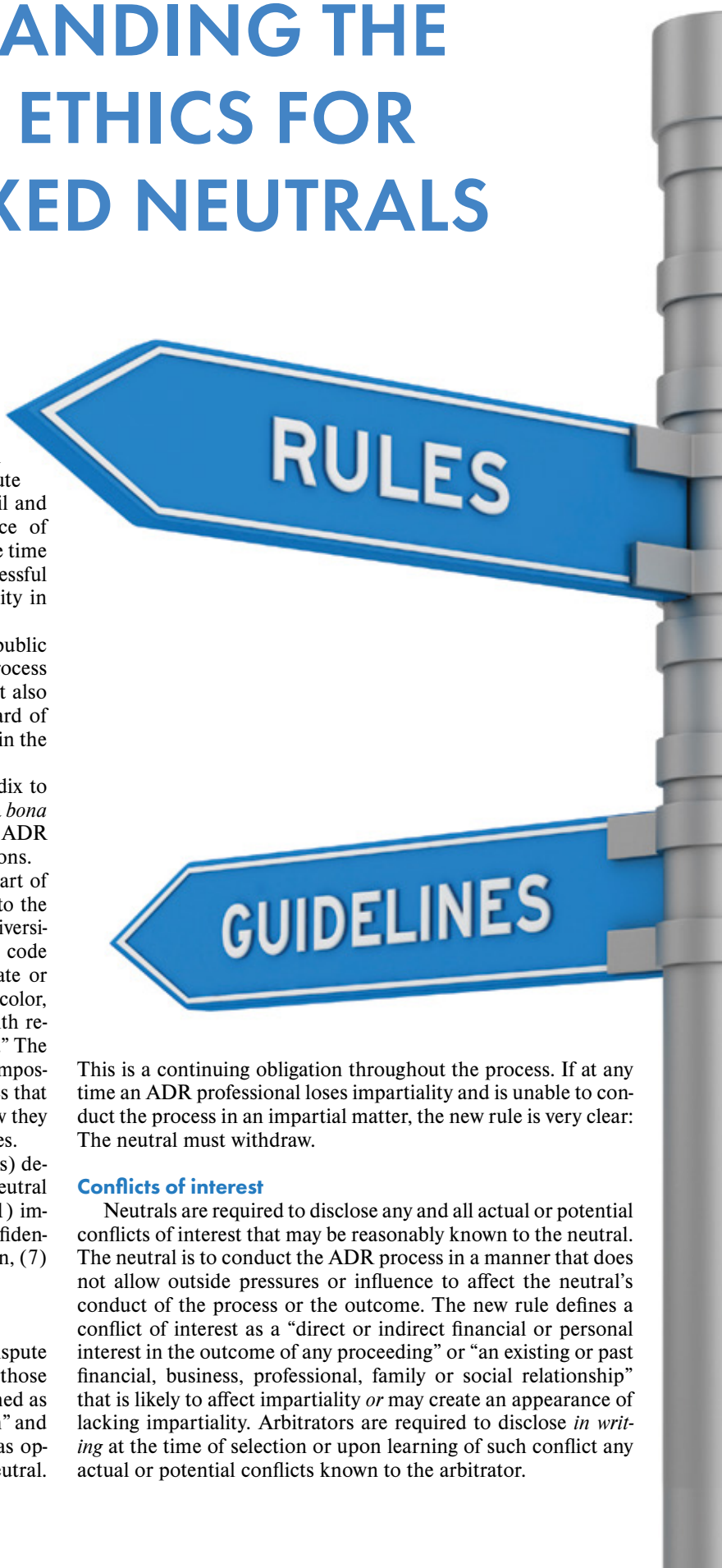
SMOKEBALL

TIMESOLV

ADR: UNDERSTANDING THE NEW CODE OF ETHICS FOR COURT-ANNEXED NEUTRALS

INSIDE ADR'S MINNESOTA RULES RESET, PART TWO

BY KRISTI PAULSON



The new Rule 114 of the Minnesota General Rules of Practice stipulates that alternative dispute resolution (ADR) is required in almost all civil and family-court-annexed matters. The importance of establishing trust and rapport while at the same time protecting confidentiality has long been an attribute of successful ADR. The new rule attempts to create statewide uniformity in the rules and procedures that govern ADR.

In formulating the new rule, the Court recognized that public confidence in the integrity and the fairness of the ADR process is essential. Neutrals have an obligation to the process, but also to the parties that engage in the processes. A high standard of ethical conduct is essential to advancing the goals set forth in the ADR Code of Ethics for Court-Annexed Neutrals.

In the past a code of ethics was attached as an Appendix to Rule 114 to offer a suggested list of best practices. It is now a *bona fide* code of conduct. Violations are now enforceable by the ADR Ethics Board and violators are subject to a variety of sanctions.

The new rules impose requirements on neutrals at the start of any ADR process, and they include explaining the process to the parties at the outset of a proceeding. The importance of diversity, equity, and inclusion is also formally recognized in this code of conduct. Neutrals are not to "practice, condone, facilitate or promote" any form of discrimination on "the basis of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age." The importance of cultural competency is also emphasized and imposes a requirement that neutrals be aware of cultural differences that might affect how a party engages in a resolution process, how they negotiate, or the emphasis they may place on particular values.

Rule 114.13 (Code of Ethics & Enforcement Procedures) defines and sets forth eight ethical requirements an ADR neutral must comply with at all times during the ADR process: (1) impartiality, (2) conflicts of interest, (3) competence, (4) confidentiality, (5) quality of process, (6) advertising and solicitation, (7) fees, and (8) self-determination.

Impartiality

Neutrals shall be fair and impartial in any alternative dispute resolution process they engage in and shall only serve in those matters in which they can be impartial. Impartiality is defined as the "freedom from favoritism or bias either by word or action" and is further noted to be a "commitment to serve all parties as opposed to a single party." It is important that a neutral be neutral. This is a continuing obligation throughout the process. If at any time an ADR professional loses impartiality and is unable to conduct the process in an impartial matter, the new rule is very clear: The neutral must withdraw.

Conflicts of interest

Neutrals are required to disclose any and all actual or potential conflicts of interest that may be reasonably known to the neutral. The neutral is to conduct the ADR process in a manner that does not allow outside pressures or influence to affect the neutral's conduct of the process or the outcome. The new rule defines a conflict of interest as a "direct or indirect financial or personal interest in the outcome of any proceeding" or "an existing or past financial, business, professional, family or social relationship" that is likely to affect impartiality *or* may create an appearance of lacking impartiality. Arbitrators are required to disclose *in writing* at the time of selection or upon learning of such conflict any actual or potential conflicts known to the arbitrator.

The new rule does allow that following disclosure, a neutral may serve with the consent of the parties. Despite this, however, neutrals are to strive not to allow any conflicts to influence the process. If, at any time, a neutral's impartiality is impaired or the conflict creates undue influence, the neutral is required to withdraw. Individuals serving as neutrals are not allowed to create other professional relationships with parties to the ADR proceedings without either the consent of the parties or the passage of a reasonable amount of time.

(Practice pointer: It is important that a neutral make certain that the attorneys in a matter have informed their respective clients of any conflict-of-interest disclosures. Best practice tip: Have the attorneys confirm in writing or the parties confirm in the ADR agreement or a separate writing.)

Competence

Neutrals must have the ability to understand the ADR process and in some cases may be required to be familiar with the subject matter at hand. The new rule requires that "no person shall serve as a Neutral unless they possess the qualifications and ability to fulfill the role."

ADR providers are required under the new rules to offer a written statement of qualifications prior to beginning any ADR services. The rules further require that this written statement "shall describe the Neutral's educational background and relevant training and experience in the field." In practice, this is often known as an "ADR resume."

(Practice pointer: The advance of technology makes it easy to include the ADR resume on a website or to provide it by email. It is a good idea to be as inclusive as possible to identify any potential conflicts. There is nothing wrong with passing along the ADR resume several times in the process—for example, when contacted about the process and again when providing the ADR agreement.)

Confidentiality

Neutrals need to know how to keep secrets. Trust and rapport are essential to the dispute resolution process; parties need to know that information they are disclosing is going to be kept confidential. The new rule now imposes a requirement on the neutral to discuss confidentiality before an ADR process, and that discussion must include "limitations on the scope of confidentiality and the extent of confidentiality provided in private sessions that a Neutral holds with a party." The requirement of confidentiality is so important it is discussed multiple times in the new Rule 114 (See Rule 114.08, 114.10 and 114.11). The requirement of confidentiality is also controlled by any agreements made with or between the parties to the ADR process.

(Practice pointer: ADR professionals in facilitative processes will often identify confidentiality assumptions they make, such as "you need to tell me I can share the information" or "I am going to assume you are allowing me to share unless you tell me *not* to share." Make sure that the approach you are using is clear to the parties. It's always a best practice to secure consent to that approach in writing.)

Quality of process

A quality ADR process is required. Toward that end, the new rule explains, the neutral must be committed to (1) diligence and (2) procedural fairness. A neutral is to ensure that the reasonable expectations of parties are met concerning the timing of the process and shall take steps to reasonably expedite the process. Neutrals are to promptly issue any required written reports, awards, or agreements.

The new rule defines instances in which a neutral shall postpone (or may have to withdraw) and those are instances in which (1) the process is used to further illegal conduct or (2) a party is unable to participate due to drug or alcohol use or to other physical or mental incapacity.

Neutrals are to be honest and accurate in any statements of fact or law they make. The new rule dictates that a neutral shall not "knowingly make false statement of fact or law."

Advertising and solicitation

Neutrals are to be accurate and truthful in any advertising or solicitation for work in a desired ADR field. They must accurately describe any given specific ADR process, its costs and benefits, and the role and qualifications of the neutral. Neutrals are not to promise specific results or make guarantees.

(Practice pointer: As we noted last month in part 1 of this feature, courses that allow one to become a qualified neutral are *certified* by the State Court Administrator's Office. But there is no such thing as a "certified" neutral in the state of Minnesota: Neutrals are *qualified*. It is never appropriate to refer to oneself as a certified neutral. The actual phrase one should use in identifying themselves is "qualified neutral under Rule 114 of the General Rules of Practice.")

Fees, requirements of written agreement for ADR services

There are significant changes to the requirements under this section. Although it's located near the end of the new rules, it should be the starting point for many neutrals in identifying the changes necessary to the conduct of ADR processes going forward. The section identifies specific written requirements for fees, for the written agreement for ADR services, and prohibited actions by facilitative and evaluative neutrals.

The new rule requires that a neutral "fully disclose and explain the basis for compensation, fees, and charges to parties." Prior to being hired, a prospective neutral must provide enough information about fees to ensure that a party can decide whether to hire them. The neutral, in his or her written agreement, shall set forth the agreement for fees—which must be consistent with the court order. Neutrals need to have consistent practices for advising parties about the status of their accounts and for requesting payments. (This is especially important with respect to some of the new rosters in which continuing relationships and provision of services are intended.)

Neutrals have the right to be paid for ADR services and have the right to withdraw, proceed, or suspend services until paid. The new rule notes, however, that if an ADR provider chooses to proceed, participation by a party cannot be precluded based on nonpayment of fees. Retainers for services are permitted, but any unearned fees must be returned the parties.

The new rule identifies two prohibitions for ADR professionals relative to fees: First, no contingent fees are permitted in any ADR proceeding. Second, no referral fees are permitted (including gifts, commissions, rebates, or any kind of remuneration).

The new rules also require that ADR neutrals must have detailed written agreements with any of the parties entering into an ADR process with them. This applies to any civil or family court matter. The written agreement is to be consistent with any court orders and is to be signed before or promptly at the start of any ADR process.

NOT THE SAME OLD ADR ETHICS BOARD

The ADR Ethics Board—made up of judges, ADR professionals, and court administration staff members—has been in existence for years, charged with promoting the ethical use of ADR in the system. The new rules elevate and clarify the roles of the ADR Ethics Board. The ADR Ethics Board, along with the State Court Administrator's Office, is the entity now charged by the Minnesota Supreme Court with enforcing the Code of Ethics contained in Rule 114.

The Minnesota Supreme Court notes in the new Rule 114 that inclusion on the qualified neutral rosters constitutes a privilege, not a right. The new rules are meant to protect the public, provide guidance for ADR professionals, and improve the quality of court-annexed ADR processes. Violations of the rules do not create claims for legal relief. But sanctions are set forth, as is the process to be followed. To the extent possible, the remedies prescribed are intended to be rehabilitative in nature.

The ADR Ethics Board has jurisdiction over any individual or community dispute resolution group subject to Rules 114 and 310 of the Minnesota Rules of General Practice, the Code of Ethics for Court-Annexed ADR Neutrals, or the Rules of the Minnesota Supreme Court for ADR Rosters and Training. The Court exempts (1) collaborative attorneys or other professionals as defined in Rule 111.05(a) while they are acting in a collaborative process, (2) court-appointed special masters under Rule 53 of the Rules of Civil Procedure, and (3) court-appointed experts appointed under Rule 706 of the Rules of Evidence.

The procedure for making a complaint against an individual or a community dispute resolution program is outlined below.

- **Filing a complaint.** A complaint must be in writing, signed by the complainant, and submitted electronically or by mail to the ADR Ethics Board. It must identify the neutral and state the basis for the complaint. If there is no basis for finding a violation of the Code of Ethics for Court-Annexed Neutrals, the complaint—even if factually accurate—will be dismissed and the neutral notified in writing. The decision of the ADR Ethics Board is final in this case.
- **Investigation.** If a complaint is not dismissed, the ADR Ethics Board will "review, investigate and act" as the board deems appropriate. The rules specify the requirements for notifying the neutral and the time frames for responses to requests.
- **Response and decision.** A member of the ADR Ethics board will lead the investigation and issue a report and recommendation following its completion. The clear-and-convincing standard will be used to determine violations and whether there should be remedies or sanctions. The board's power to impose sanctions includes but is not limited to private reprimands, corrective actions, notification of licensing authorities, public reprimands, and removal from the roster of qualified neutrals.

There is a process for requesting reconsideration in cases where the ADR Ethics Board finds a violation. There is also a detailed process to request a review hearing in appropriate cases before an appointed referee. Referees may impose a wider range of sanctions, including private reprimands, public discipline, and removal from the roster—as well as fees and sanctions when there is a finding of bad faith.

ADR Ethics Board files, records, and proceedings are confidential until such time as final sanctions are imposed. The rule specifies exceptions to this general rule, identifying what is accessible to the public and what is within the discretion of the board to release. Disclosure of the deliberations, as well as of thought processes and communications between board and staff, is not permitted.

Statements made in proceedings are privileged as an absolute right. The new rules specifically prohibit such statements from being made the basis for civil liability claims. Board members and staff are granted immunity for their official duties under the rule.

Detailed information about the ADR Ethics Board, identification of current members, and information regarding the process is available on the official Minnesota Judicial Branch website (*www.mncourts.gov*).

WHAT ADR AGREEMENTS MUST ADDRESS

The new rules provide a detailed description of what is to be provided in the written ADR agreement (Minn. Rule 114.13 (A)(7)(b)). Those requirements are summarized here:

1. A description of the role of the neutral.
2. If the neutral is a decisionmaker, the agreement must indicate whether a decision is binding or non-binding.
3. An explanation of the role of confidentiality and the admissibility of evidence.
4. Terms of the fee agreement and detailed arrangements if a neutral is to be paid (including the rate of compensation, how the neutral is to be paid, and stating that a neutral has the right to seek remedies from the court for non-payment under Rule 114.11(b)).
5. If the proceeding is adjudicative, the agreement must explain the rules of process.
6. Indication that the neutral is required to follow, and shall follow, the Code of Ethics for Court-Annexed Professionals. The agreement must also indicate that the neutral is subject to the jurisdiction of the ADR Ethics Board.
7. Neutrals in facilitative and evaluative settings *must* include the following language:

   (A) The neutral has no duty to protect the interests of the parties or provide them with information about their legal rights;

   (B) No agreement reached in this process is binding unless it is put in writing, states that it is binding, and is signed by the parties (and their legal counsel, if they are represented) or put on the record and acknowledged under oath by the parties;

   (C) Signing a settlement agreement may adversely affect the parties' legal rights;

   (D) The parties should consult an attorney before signing a settlement agreement if they are uncertain of their rights; and

   (E) In a family court matter, the agreement is subject to the approval of the court.

   (See Minn. Rule 114.13 (A)(7)(b)(7).)

WHAT NEUTRALS ARE PROHIBITED FROM DOING

The new rule sets forth some prohibitions regarding any neutral engaging in a facilitative or evaluative process.

1. Neutrals are not to draft legal documents to be submitted to a court as an order for a judge or judicial officer to sign.
2. Regardless of other licenses or qualifications, neutrals are not to: (1) provide therapy; (2) provide legal representation; or (3) advise any party to engage in the unauthorized practice of law in any matter during the ADR process.
3. Neutrals are not to require a party to stay in an ADR process or attempt to coerce an agreement between the parties. See Minn. Rule. 114.13 (A)(7)(c).

Self-determination

An ADR professional is required under the new rules to "act in a manner that recognizes that mediation is based on the principle of self-determination by the parties." Mediators are always to keep in mind that the mediation in which they are participating is the parties' process. They are the neutral who was asked to participate; they are not a party, this is not their case, and the outcome does not directly affect the neutral. ▲

THE NEW ROSTER WAIVER PROCESS

The ADR Ethics Board was charged by the Minnesota Supreme Court with (1) establishing waiver requirements and deadlines relative to the new rosters and (2) establishing a deadline for individuals to submit applications to be listed on the Rule 114 rosters.

The ADR Ethics Board recognizes that some current, active qualified neutrals may have already complied with training requirements set forth in the new Rule 114, qualifying them for inclusion on the new ADR Rosters: Parenting Time Expeditor, Parenting Consultant, Social Early Neutral Evaluation, Financial Early Neutral Evaluation, and Moderated Settlement Conference.

But the waiver process is time-limited: In effect until December 31, 2023, it permits individuals to bypass the standard application process and application fee if they demonstrate meeting the training and exceptional competence requirements.

The ADR Ethics Board may grant waivers when "an individual's training and experience clearly demonstrate exceptional competence to serve as a Neutral." (Rule 114.12 (4)(m).) Individuals should carefully review the requirements of the rule to make sure they have met the general requirements, have completed the same or similar trainings or their equivalent, and have experience that meets or exceeds the requirements set forth in Rule 114.

In cases where a waiver is denied, the individual can still complete the necessary trainings or ride-alongs and apply for roster placement in the future. Where no waiver is being sought, neutrals can complete the required trainings and ride-alongs and complete the standard application process at any time. (But note that the ADR Ethics Board has established a deadline of one year following the completion of a Rule 114 training to submit an application to be listed on the roster of qualified neutrals. Failing to meet that deadline will mean having to re-take the training.)

Practitioners should bear in mind that the waiver process is not a pro forma sign-up that will automatically place you on one of the new rosters. Review the basic requirements before applying for a waiver to make sure your qualifications meet the Rule 114 requirements. Be detailed and specific in providing information about your trainings and experience. Include information regarding any roster-specific trainings you have done—and attach certificates of completion or verification when possible. Detail experience and demonstrate why your experience uniquely and exceptionally qualifies you. The ADR Ethics Board won't know what you do not tell them.

KRISTI PAULSON is a professional mediator and an accomplished trial lawyer. She serves on both the Lawyers Professional Responsibility Board and the ADR Ethics Board. Kristi owns PowerHouse Legal, a national training and education center focusing on mediation and trial advocacy skills trainings and CLE programs with a focus on #How2Skills.


I will not withhold exculpatory evidence.
I will not withhold exculpatory evidence.
I will not withhold exculpatory evidence.
I will not withhold exculpatory evidence.
I will not withhold exculpatory evidence.
I will not withhold exculpatory evidence.

GETTING SERIOUS ABOUT PROSECUTORIAL MISCONDUCT

WHAT CAN—AND SHOULD—BE DONE

BY BARRY S. EDWARDS AND STACY L. BETTISON

A few years ago American Public Media (APM) produced an 11-part podcast investigating a quadruple murder in Winona, Mississippi, the arrest of a man named Curtis Flowers for the crime, and the six trials that followed. Four of the six trials resulted in guilty verdicts, but the Mississippi Supreme Court overturned three of those for prosecutorial misconduct. Two of the trials resulted in hung juries. The last trial resulted in a guilty verdict that was appealed to and reversed by the U.S. Supreme Court.

Two different Supreme Courts (State of Mississippi and United States) have found that the prosecutor in that case, Doug Evans, not only engaged in prosecutorial misconduct, specifically racial bias in jury selection, but that the misconduct was so egregious as to amount to "clear error."[1] In spite of his hometown Supreme Court and the United States Supreme Court finding four separate times that he engaged in egregious misconduct—as a result of which Curtis Flowers has been in prison for over two decades—Mr. Evans wanders the streets freely, never having spent a day in jail for his behavior. In fact, he still works as a licensed attorney, currently as chief prosecutor for seven counties in central Mississippi, a position to which he was recently re-elected without opposition.[2]

"LIKE THE HYDRA SLAIN BY HERCULES, PROSECUTORIAL MISCONDUCT HAS MANY HEADS."

U.S. v. Williams, 504 U.S. 36, 60 (1992) (Stevens, J., dissenting).

Over the past several years, increased attention has come to those wrongfully convicted because of prosecutorial misconduct, particularly with such high-profile cases as those of Curtis Flowers, Walter "Johnny D." McMillian (the subject of the Hollywood-produced feature film *Just Mercy*), the Netflix documentary *Making a Murderer*, and the podcast *Serial,* featuring the case of the recently released Adnan Sayed. In the context of these stories, the public has called for holding these prosecutors accountable and expressed widespread frustration that doing so is difficult and rare. The Black Lives Matter movement, generally, calls for criminal justice reform, and the election of "reform-minded" prosecutors from San Francisco to Philadelphia has resulted, at least in part, from this awakening to the phenomenon of prosecutorial misconduct.[3]

In this article we endeavor to answer three questions: 1) what is prosecutorial misconduct; 2) why do prosecutors engage in it; 3) and what can—and should—be done about this problem?

What is prosecutorial misconduct?

The prosecutor holds a special role in our criminal justice system that renders prosecutorial misconduct especially problematic. The United States Supreme Court has explained that the prosecutor:

> "... is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[4]

Minnesota courts have likewise recognized that the overarching concern with prosecutorial misconduct is that it risks depriving the defendant of a fair trial,[5] and prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial, no matter how strong the evidence of guilt.[6] Echoing the United States Supreme Court, Minnesota has acknowledged the special power that a prosecutor holds with respect to both the accused and the public: The prosecutor "is a minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public."[7]

Prosecutors engage in misconduct when they "violate[] clear or established standards of conduct, e.g. rules, laws, orders by a district court, or clear commands in this state's case law."[8]

In 1935, Justice Sutherland of the U.S. Supreme Court outlined some types of misconduct:

> "That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said, and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner.... The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury."[9]

Other types of misconduct by "overzealous" or "misguided" prosecutors, as outlined by Justice Stevens:

- knowingly using perjured testimony;
- suppression of evidence favorable to the accused; and
- misstatements of law in argument to the jury.[10]

Minnesota courts have specifically identified misconduct in the following categories:

- The prosecutor must avoid inflaming the jury's passions and prejudices against the defendant,[11] and courts "pay special attention to statements that may inflame or prejudice the jury where credibility is a central issue."[12]
- The prosecutor may not interject personal opinions about the veracity of witnesses.[13]
- The prosecutor may not disparage the defendant's defense to the charges.[14]

Minnesota courts have held that when misconduct occurs and is prejudicial, reversing a conviction is the proper remedy.[15] And while prejudice must be shown, the Minnesota Supreme Court has "made it clear to prosecutors who persist in employing such tactics that [courts] retain the option of reversing prophylactically."[16] This power to "reverse prophylactically or in the interests of justice" arises from the appellate courts' supervision of the trial courts.[17]

Why do prosecutors engage in misconduct?

Prosecutors engage in misconduct because they can gain an unfair advantage with almost no risk to their case or to themselves, personally or professionally. First, they enjoy absolute immunity from civil lawsuits. Second, if there are sanctions against a prosecutor for misconduct, there is little public visibility regarding those sanctions. Third, appellate court treatment of misconduct has created a high bar for reversing convictions for prosecutorial misconduct—making such reversals, or any consequences, rare. When a prosecutor's professional success rides on conviction rates, engaging in prohibited and unethical conduct to increase the chance of conviction would naturally become enticing.

Absolute immunity from civil lawsuits

While police have "qualified immunity," prosecutors have "absolute immunity." This means that while a police officer cannot be prosecuted or sued for damages for *almost any* conduct he or she engages in while in the course of employment, prosecutors (and judges) cannot be prosecuted or sued for *any* conduct they engage in while in the course of employment. They are absolutely immune from suit for wrong actions, even if their misconduct is reckless or willful.

In *Imbler v. Pachtman*,[18] the U.S. Supreme Court set forth an extensive rationale for absolute immunity from civil liability under 42 U.S.C §1983. To begin, the threat of lawsuits would undermine performance of their duties, and the "public trust of the prosecutor's office would suffer" if prosecuting decisions were made against the possible consequences of the prosecutor's own personal liability in a suit for damages.[19] Being in a position of having to defend prosecuting decisions, and often many years after those decisions were made, would impose unacceptable burdens for a prosecutor who was responsible for hundreds of indictments and trials annually.[20]

Further, the "functioning of the criminal justice system" would be impaired.[21] This proper functioning requires that both the prosecution and defense have "wide discretion" in their "conduct at trial and presentation of evidence."[22] Because the "veracity of witnesses is subject to doubt before and after they testify," if prosecutors were limited in using their judgment about which witnesses to present because of risk of personal liability, juries would be denied potentially critical evidence.[23]

Finally, the Court expressed confidence that misconduct would not simply go unchecked because of absolute immunity from civil suit because of "various post-trial procedures" available to determine whether the accused received a fair trial (including remedial measures).[24] What's more, the Court reasoned, the public has tremendous power to guard against misconduct:

> "We emphasize that the immunity of prosecutors from liability in suits under §1983 does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. §242, the criminal analog of §1983.... The prosecutor would fare no better for his willful acts. Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime."[25]

MINNESOTA HAS ACKNOWLEDGED THE SPECIAL POWER THAT A PROSECUTOR HOLDS WITH RESPECT TO BOTH THE ACCUSED AND THE PUBLIC: THE PROSECUTOR "IS A MINISTER OF JUSTICE WHOSE OBLIGATION IS TO GUARD THE RIGHTS OF THE ACCUSED AS WELL AS TO ENFORCE THE RIGHTS OF THE PUBLIC."

Professional discipline rare, public visibility low

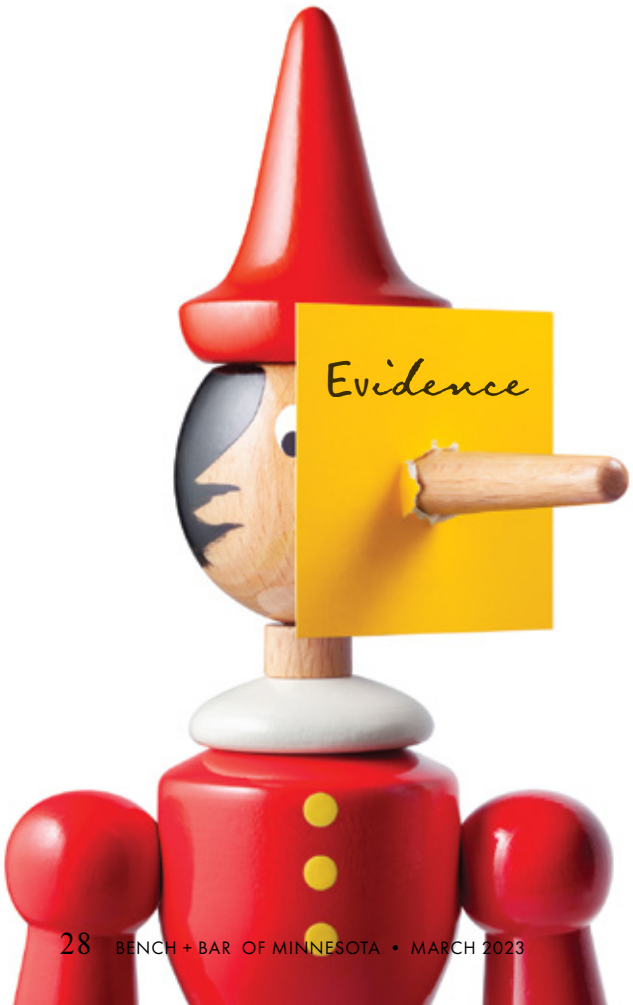
While the *Imbler* Court expressed faith in 1976 that prosecutors were "not beyond the reach" of criminal law and that "professional discipline" would also serve as a check against misconduct, this envisioned accountability has never materialized.

Federal prosecutors benefit from "the black hole"—whence complaints, once filed, never come out.[26] And habeas reform included in the Antiterrorism and Effective Death Penalty Act passed after the Oklahoma City bombing has provided further inoculation for "cutthroat prosecutors" because, among other things, it limits consideration of new evidence (including exculpatory evidence withheld by prosecutors) until it has first been raised in the state courts.[27]

And in many states, including Minnesota, getting a court to review new evidence requires that the appellant first surpass a number of burdensome obstacles.[28] Even obtaining new evidence is a substantial hurdle in itself. While the laws vary by state, generally the convicted have no right—and seldom even an opportunity—to see or test potentially exculpatory forensic evidence.[29]

The National Registry of Exonerations documents over 2,600 cases so egregious—because the proof of innocence was so overwhelming or the misconduct so severe—that exoneration was the only remedy. Of those rare instances in which misconduct resulted in the extraordinary remedy of an exoneration, only 4 percent of the culpable prosecutors were disciplined in any way.[30]

According to the Innocence Project, only one prosecutor has ever gone to jail for misconduct, even though there are hundreds of known cases of prosecutors withholding exculpatory evidence that resulted in innocent people going to prison, even spending decades on death row. Ken Anderson is one. A judge when his misconduct was discovered, as a prosecutor he withheld exculpatory evidence, as a direct result of which an innocent man spent 25 years in prison. For conduct that put that innocent man in prison for a quarter century (while the man who actually murdered his wife was free), Mr. Anderson spent five days in jail.[31]



In Minnesota, there are 87 elected county attorneys, the top prosecutor in a county (Minnesota's equivalent to what most states call a district attorney), and approximately 700-800 assistant county attorneys or front-line prosecutors.[32] In 2020, for the first time in the state's history, a prosecutor was disbarred for practice-related misconduct, specifically "failing to discuss discipline information relating to a police officer found to have engaged in dishonest work-related conduct."[33] The prosecutor's violations of professional rules and constitutional protections resulted in the dismissal of several cases and the reversal of a conviction.[34]

Appellate review rarely results in reversals

Minnesota courts employ a sort of "harmless error" test when reviewing claims of prosecutorial misconduct. When a prosecutor's remarks during closing argument are not objected to, for example, the court reviews the alleged prosecutorial misconduct under the modified plain error test.[35] The defendant has the burden to demonstrate that the misconduct constituted error and that the error was plain.[36] If plain error is established, the burden then shifts to the state to demonstrate that the error did not affect the defendant's "substantial rights."[37] To meet its burden, the state must show that there is no "reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict."[38]

Thirty-five years ago, the Minnesota Supreme Court in *State v. Merrill* appeared to reach its wit's end when it gave, for the "last time," a stern warning to prosecutors who engage in misconduct: "[W]e will no longer tolerate the tactics used by the prosecution in closing arguments in this case. The prosecution can expect a reversal if such tactics are used again."[39] In *Merrill*, the appellant argued that the prosecutor engaged in numerous instances of misconduct during closing arguments, for example, by referring to the appellant as "an animal."[40] The Court agreed:

> "We agree that the comments of the prosecutor referred to above were unfortunate, inexplicable, and, even worse, totally unnecessary. The prosecution had overwhelming evidence of defendant's guilt. It did not have to stoop to such tactics to get a conviction. We feel compelled to say that this court has seen with increasing frequency tactics being used such as those exhibited in this case.... We have on occasion warned the prosecution in our opinions that it has used improper tactics. However, these warnings appear to have been to no avail."[41]

Recent case law shows how, despite the "warnings" that have been offered "to no avail," misconduct continues unabated. What's more, even the most obvious misconduct does not result in convictions being reversed because the appellate court finds that the defendants' "substantial rights" are not violated. As Professor Sonja Starr of the University of Chicago Law School notes, "if the remedy for a rights violation is undesirable, courts will find ways to avoid granting it, such as narrowing the underlying right."[42]

Prosecutors can misstate law regarding defendants' basic constitutional protections

A Minnesota Court of Appeals decision from 2020 demonstrates how the court of appeals is currently applying the rules for evaluating prosecutorial misconduct. In *Moore v. State*, the court assessed a prosecutor's closing statement, in which she informed the jury that the defendant was "no longer entitled to the presumption of innocence."[43] The prosecutor stated, "[t]he defendant started this trial the way every criminal defendant starts every trial, with a complete presumption of innocence. But at the end of the State's case, now that all of the evidence is in, and as you begin deliberations, he's no longer entitled to that presumption."[44]

The court of appeals acknowledged that "'the presumption of innocence is a basic component of the fundamental right to a fair trial"[45] and it is "'improper for a prosecutor to misstate the presumption of innocence in a criminal case.'"[46] Based on this, the court concluded that misstatements about the presumption were plain error:

> "The statements made by the prosecutor are troublesome. They were not only unartful, but constitute a misstatement of the law. A defendant is presumed innocent 'unless and until the defendant has been proven guilty beyond a reasonable doubt.'... The prosecutor stated that [the defendant] lost the presumption 'as [the jury] begin[s] deliberations.' But, only once the jury reaches the conclusion that a defendant is guilty beyond a reasonable doubt has the presumption been lost. Because the prosecutor's statement, 'at the end of the State's case, now that all of the evidence is in, and as you begin deliberations, he's no longer entitled to that presumption,' was a misstatement of the law, we hold that the prosecutor's statement constitutes plain error."[47]

RECENT CASE LAW SHOWS HOW, DESPITE THE "WARNINGS" THAT HAVE BEEN OFFERED "TO NO AVAIL," MISCONDUCT CONTINUES UNABATED.... AS PROFESSOR SONJA STARR OF THE UNIVERSITY OF CHICAGO LAW SCHOOL NOTES, "IF THE REMEDY FOR A RIGHTS VIOLATION IS UNDESIRABLE, COURTS WILL FIND WAYS TO AVOID GRANTING IT, SUCH AS NARROWING THE UNDERLYING RIGHT."

But although the prosecutor leveraged her authority as "the state" to revoke the defendant's presumption of innocence in violation of the law and the state and federal constitutions, the court of appeals proceeded to shrug off the "plain error" as "harmless" and allowed the conviction to stand because "the prosecutor's statement likely did not play a substantial part in influencing the jury to convict."[48]

No discipline or other consequences (such as remand) were meted out. The court reasoned that other factors mitigated any impact to the defendant's substantial rights:

1. The district court properly instructed the jury on the presumption of innocence;
2. after the prosecutor misstated the legal standard, the prosecutor's "next statement discussed the state's high burden of proof"; and
3. the prosecutor's misstatement of the law was only one statement included in 57 pages of the entire closing argument.[49]

In essence, because the court gave the jury instruction it was required to give, the prosecutor acknowledged its own burden of proof and only made one misstatement of about the presumption of innocence, the prosecutor's conduct had no impact on the defendant's substantial rights.

Why would the prosecutor so clearly misstate "a basic component of the fundamental right to a fair trial"? Because of results like this. They can do it and might be found to have committed "plain error," but the conviction will stand. A prosecutor can bias the jury and the court will acknowledge the misconduct as egregious, but then conclude there was no harm. Why would she not do it again? Why wouldn't every prosecutor misstate the defendant's presumption innocence if they could? This case establishes that, in fact, they can—without consequence other than increasing their likelihood of the conviction they seek.

In 1946, a frustrated Judge Jerome Frank of the 2nd Circuit Court of Appeals wrote,

> "This court has several times used vigorous language in denouncing government counsel for such conduct as that of the United States Attorney here. But, each time, it has said, that nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable.... If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it.... Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking."[50]

What can—and should—be done about it

Mapp v. Ohio calls for suppression of evidence gathered by police in violation of a suspect's constitutional rights, since to "hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."[51] However, there is no analog, state or federal, when that violation of due process is perpetrated by a prosecutor—and, as we have shown, no other consequences accrue to the prosecutors themselves, either. Furthermore, "the existing remedies for prosecutorial misconduct are ineffective, largely because they are rarely invoked."[52]

As Judge Richard Posner has lamented, courts repeatedly "rebuke prosecutors" for violating the constitutional rights of defendants:

> "Ten years ago we were commenting on a 'sense of futility from persistent disregard of prior admonitions.' These rebukes seem to have little effect, no doubt because of the harmless error rule, which in this as in many other cases precludes an effective remedy for prosecutorial misconduct. The expansive code of constitutional criminal procedure that the Supreme Court has created in the name of the Constitution is like the grapes of Tantalus, since the equally expansive harmless error rule in most cases prevents a criminal defendant from obtaining any benefit from the code."[53]

BARRY S. EDWARDS is a criminal justice attorney with the Keller Law Offices.
barry@kellerlawoffices.com

STACY BETTISON is an attorney and crisis communications expert (www.bettison.com).
stacybettison@gmail.com

One approach could be to address the problem as certain academics have begun doing on both the east and west coasts. In New York, after three men were exonerated in March 2021 of crimes they did not commit, professors filed complaints with New York's court-appointed grievance committee responsible for investigating complaints of attorney wrongdoing.[54] After filing the complaints against 21 Queens prosecutors for misconduct (which were based on judicial findings of misconduct), the professors published the complaints on a website they created specifically for the purpose of publicizing the complaints.[55] In some of the judicial findings, courts found that the prosecutors withheld evidence that was favorable to the defense or failed to correct false testimony at trial.[56] Lara Bazelon, a law professor from University of San Francisco, has also filed eight complaints against prosecutors in cases where an appeals court found significant misconduct that required convictions be reversed.[57]

Another remedy to end this phenomenon is the reversal of convictions so obtained. As the U.S. Supreme Court wrote in *Brady*, reversal of convictions achieved by misconduct "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'"[58]

Minnesota's courts of appeal are no different from those lamented by the federal judges cited above. They often find "plain error" but never reverse or even remand because they set the bar for "harmless error" so low.

"Ritualistic verbal spankings" do not prevent misconduct. And, frankly, despite the *Brady* Court's paean to justice as a social good, there is little appetite for releasing wrongdoers, especially violent ones. So why not do as the criminal justice system itself does, by focusing the remedy on punishing those who commit the misconduct rather than the cases in which that misconduct occurred? Prosecutorial misconduct is professional misconduct. No other attorney could be found by an appellate court to have engaged in dishonest behavior without consequences. Yet prosecutors in the same office can do so repeatedly and neither they nor their office suffer any professional rebuke.

Minnesota courts have held that failure to disclose exculpatory information that is not "material" does not violate *Brady v Maryland*.[59] "Accordingly, a new trial is not required simply because a defendant uncovers previously undisclosed evidence that would have been possibly useful to the defendant but unlikely to have changed the verdict."[60] But that does not mean that the same conduct does not violate the Rules of Professional Conduct. Rule 3.8 states that a prosecutor must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor."[61] It says nothing about materiality.

This point was made in these pages when Susan Humiston of the Office of Lawyers Professional Responsibility (OLPR) noted that, "Rule 3.8(d) is not co-extensive with constitutional case law regarding disclosure, but rather is separate and broader."[62] According to Ms. Humiston, failure to disclose evidence that tends to negate the guilt or mitigate liability should be required under the Rules of Conduct even if such disclosure is not mandated under *Brady*. While reversing a conviction for car-jacking due to misconduct by a prosecutor—thereby allowing a violent criminal to go free—may be an unpalatable remedy, surely reprimanding, suspending, or after multiple offenses, disbarring that prosecutor would make for second thoughts.

ONE REMEDY FOR MISCONDUCT COULD BE TO ADDRESS THE PROBLEM AS CERTAIN ACADEMICS HAVE BEGUN DOING ON BOTH THE EAST AND WEST COASTS. IN NEW YORK, AFTER THREE MEN WERE EXONERATED IN MARCH 2021 OF CRIMES THEY DID NOT COMMIT, PROFESSORS FILED COMPLAINTS WITH THE COURT-APPOINTED GRIEVANCE COMMITTEE RESPONSIBLE FOR INVESTIGATING COMPLAINTS OF ATTORNEY WRONGDOING.

Finally, the Rules of Professional Conduct state that a "lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer's conduct conforms to the Rules of Professional Conduct."[63] This rule makes those 87 elected county attorneys responsible and maybe liable for the misconduct of their 700-800 subordinates. Beyond quasi-*Brady* violations, "misconduct" as defined above could well violate the "minister of justice" language in the comments to Rule 3.8.

If the OLPR wants to begin disciplinary proceedings against prosecutors who violate the rules, they need look no further than the court of appeals rulings published every Monday and search for "misconduct." The court will have already done the analysis and called it "harmless." ▲

NOTES

[1] *Flowers v. Mississippi*, No. 17-9572, 588 U.S. ___ (2019), slip op. at 31.

[2] *https://www.apmreports.org/story/2020/10/14/will-doug-evans-face-accountability*

[3] The recent election of Mary Moriarty to the office of Hennepin County Attorney had nothing to do, explicitly, with misconduct in that office.

[4] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[5] *See, e.g., State v. Powers,* 654 N.W.2d 667, 678 (Minn. 2003); *State v. Wahlberg,* 296 N.W.2d 408, 420 (Minn. 1980).

[6] *See State v. Henderson,* 620 N.W.2d 688, 701-02 (Minn. 2001); *State v. Sha,* 193 N.W.2d 829, 831 (Minn. 1972).

[7] *State v. Salitros,* 499 N.W.2d 815, 817 (Minn. 1993) (citing *ABA Standards for Criminal Justice: Prosecution Function & Defense Function,* Standard 3-1.2(c) (3d ed. 1993)); *see also* Nat'l Dist. Attys. Ass'n, *National Prosecution Standards,* Standard 1.1 (2d ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished.").

[8] *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quotation omitted).

[9] *Berger*, 295 U.S. at 84; *see also U.S. v. Williams*, 504 U.S. 36, 60-61 (1992) (J. Stevens, dissenting) (*citing Berger* discussing the "improper tactics that overzealous or misguided prosecutors," including knowing use of perjured testimony, suppression of evidence favorable to the accused, misstatements of law to the jury).

[10] *Id.*

[11] *State v. Morgan,* 51 N.W.2d 61, 63 (Minn. 1952).

[12] *See State v. Turnbull,* 127 N.W.2d 157, 162 (Minn. 1964).

[13] *State v. Ture,* 353 N.W.2d 502, 516 (Minn. 1984).

[14] *See State v. Griese,* 565 N.W.2d 419, 427 (Minn. 1997).

[15] *State v. Steward*, 645 N.W.2d 115 (Minn. 2002).

[16] *Salitros*, 499 N.W.2d at 820.

[17] *Id.*

[18] 424 U.S. 409 (1976).

[19] *Id.* at 424.

[20] *Id.* at 426.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 427.

[25] *Id.* at 428-29 (citations omitted).

[26] Radley Balko, "Why prosecutors get away with misconduct," *The Washington Post* (11/18/2021).

[27] Radley Balko, "The rogue prosecutor who helped pass a law enabling rogue prosecutors," *The Washington Post* (3/17/2021).

[28] *See State v. Rainer*, 502 N.W.2d 784 (1993) (four-part test must be met for appellant to get new trial based on newly discovered evidence).

[29] *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 73 (2009).

[30] *https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf*

[31] Daniele Selby, "Innocence Project News," 11/11/2020. Available at *https://innocenceproject.org/ken-anderson-michael-morton-prosecutorial-misconduct-jail/*

[32] Minnesota County Attorney's Association (as of 11/1/2022).

[33] Annual Report of the Office of Lawyers Professional Responsibility (July 2021) at 7.

[34] *Id.*

[35] *See State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006).

[36] *See State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010).

[37] *Id.*

[38] *Ramey*, 721 N.W.2d at 302 (citations omitted).

[39] *State v. Merrill*, 428 N.W.2d 361, 373 (Minn. 1988).

[40] *Id.* at 372.

[41] *Id.* at 372-73.

[42] Starr, Sonja B. "Sentence Reduction as a Remedy for Prosecutorial Misconduct." Geo. L. J. 97, no. 6 (2009): 1509-66.

[43] *Moore v. State*, 945 N.W.2d 421, 434 (Minn. Ct. App. 5/18/2020).

[44] *Id.*

[45] *Id.* at 433 (citing *State v. Bowles*, 530 N.W.2d 521 (Minn. 1995)).

[46] *Id.* (citing *Finnegan v. State*, 764 N.W.2d 856, 863 (Minn. App. 2009)).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 434.

[50] *State v. Mayhorn*, 720 N.W.2d 776, 791–92 (Minn. 2006) (citing *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir.1946) (Frank, J., dissenting)).

[51] *Mapp v. Ohio*, 367 U.S. 643, 656, 81 S. Ct. 1684, 1692, 6 L. Ed. 2d 1081 (1961).

[52] Supra note 42.

[53] *United States v. Pallais,* 921 F.2d 684, 691–92 (7th Cir. 1990).

[54] "*Prosecutors wrongfully convicted three men who spent 24 years behind bars. Will they be disbarred?*" Gothamist (New York Public Radio) (3/6/2021).

[55] *"They publicized prosecutors' misconduct. The blowback was swift,"* New York Times (11/10/2021).

[56] *Id.*

[57] Opinion: *"Why prosecutors get away with misconduct,"* The Washington Post (11/18/2021).

[58] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[59] *Id.*

[60] *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010).

[61] Minn. R. Pro. Conduct 3.8(d).

[62] Bench & Bar of Minnesota, October 2020.

[63] Minn. R. Pro. Conduct 5.1(b).

LANDMARKS IN THE LAW

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

Criminal Law
JUDICIAL LAW

Conditional release: Lifetime conditional release is not a punishment of life imprisonment requiring prosecution by indictment. Appellant was charged by complaint with third- and fourth-degree criminal sexual conduct. A jury found him guilty, and the court imposed a lifetime conditional release term, due to appellant's prior third-degree criminal sexual conduct conviction. Appellant argues the lifetime conditional release term is improper, because the state charged him by complaint, rather than by indictment.

Minn. R. Crim. P. 17.01, subd. 1, requires that offenses punishable by life imprisonment be prosecuted by indictment. The court of appeals considers whether a lifetime period of conditional release constitutes "life imprisonment" under this rule. There is a legal distinction between supervised release, conditional release, and life imprisonment. Unlike supervised and conditional release, where a sentence of life imprisonment is imposed, a defendant's release from incarceration is not guaranteed. "'[L]ife imprisonment' contemplates a sentence of incarceration from which there is no requirement or assurance of release."

Here, appellant was not sentenced to "life imprisonment." He was sentenced to 140 months in prison and would be released after serving a minimum of two-thirds of that time. He would then be on conditional release within the community. Because his release from incarceration was certain under this sentence, appellant was not sentenced to "life imprisonment." For the rest of his life, appellant does face the potential for reincarceration should he violate the conditions of his release, but any reincarceration would not be due to the original underlying offense; rather, it would be due to the conditional release term violation(s). Thus, the state was not required to prosecute appellant by indictment. ***State v. Snyder***, A22-0318, 2023 WL 192907 (Minn. Ct. App. 1/17/2023).

RICO: An "enterprise" can exist within a corporation that does not participate in and is unaware of criminal activity. Respondent was charged with racketeering and aiding and abetting theft by swindle. The district court granted respondent's motion to dismiss the racketeering charge, finding there was no "enterprise." The state appealed.

Respondent was a district manager for a corporation that sold cell phones in retail stores. Seven employees, including respondent, were arrested for their involvement in a scheme that involved credit mules purchasing expensive phones on installment plans, making only the first payment, and selling the phone for a large profit. The sales representatives, team leaders, and respondent all financially benefited from the fraudulent sales. Evidence showed respondent encouraged sales to the credit mules.

Under the RICO Act, it is a crime for a person to be employed by or associated with an enterprise and to participate in a pattern of criminal activity relating to that enterprise. *See* Minn. Stat. §609.903, subd. 1. "Enterprise" is defined as "a sole proprietorship, partnership, corporation, trust, or other legal entity, or a union, government entity, association, or group of persons, associated in fact although not a legal entity, and includes illicit as well legitimate enterprises." Minn. Stat. §609.02, subd. 3.

Here, the defendants all worked with a common purpose, to make money from fraudulent cell phone sales. Their organization extended from credit mules to team leaders to respondent. The activities of the defendants who were employees of the corporation extended beyond making money from the fraudulent sales (the underlying criminal act) to other activities, fulfilling their job responsibilities as employees of the corporation. Thus, the criteria set forth for a RICO enterprise in *State v. Huynh*, 519 N.W.2d 191, 196 (Minn. 1994), are met.

There is no requirement that the corporation was aware of, involved with, or engaged in the criminal activity. The district court erred when it concluded otherwise. The dismissal of the RICO charge is reversed and the case is remanded. ***State v. Paulson***, A22-1243, 2023 WL 351217 (Minn. Ct. App. 1/23/2023).

Controlled substances: Knowingly permitting a child to ingest meth does not require knowledge of the child's age. Appellant, who lived next door to K.F., asked K.F. and her friend A.D., both 14 years old, to come to his home to smoke marijuana with him. They all smoked marijuana and methamphetamine provided by appellant. After a jury trial, appellant was convicted of knowingly permitting A.D. to ingest methamphetamine. On appeal, appellant argues there was insufficient evidence to prove he knew A.D. was a "child."

Minn. Stat. §152.137, subd. 2(b), prohibits a person from "knowingly caus[ing] or permit[ting] a child... to inhale, be exposed to, have contact with, or ingest methamphetamine." A "child" is "any person under the age of 18 years." Minn. Stat. §152.137, subd. 1(c). The court of appeals points to Minn. Stat. §609.02, subd. 9(6), which provides that "[c]riminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question."

Thus, the only reasonable interpretation of section 152.137, subd. 2(b), is that "knowingly" refers to the volitional act of providing a substance the actor knows to be methamphetamine, not the age of the child. Thus, the state was not required to prove appellant knew A.D. was under the age of 18. Appellant's conviction is affirmed. ***State v. Lehman***, A22-0200, 2023 WL 1094416 (Minn. Ct. App. 1/30/2023).

Samantha Foertsch
Bruno Law PLLC
samantha@brunolaw.com

Stephen Foertsch
Bruno Law PLLC
stephen@brunolaw.com

Environmental Law
JUDICIAL LAW

Court in PolyMet mining case partially grants motion to dismiss claims under the ESA. A District of Minnesota court recently issued an opinion granting and denying portions of a motion to dismiss stemming from a proposed mining project. PolyMet Mining, Inc. proposes to build an open-pit copper-nickel mine in northeastern Minnesota. Pursuant to the Endangered Species Act (ESA) (16 U.S.C. §1531 *et seq.*), the United States Fish and Wildlife Service (FWS) conducted a study and issued a biological opinion discussing whether the proposed action was "likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." FWS examined three species—the Canada lynx, the gray wolf, and the northern long-eared bat—and concluded that the mine would not jeopardize their continued existence or adversely modify critical habitat.

Plaintiffs, a group of environmental advocacy organizations, challenged the FWS's opinion and alleged that subsequent permitting approvals violated the ESA. First, plaintiffs alleged that the FWS failed to reinitiate consultation of endangered species under the ESA. Reinitiation is required under four scenarios, two of which plaintiffs contended applied here—that new information revealed effects of the mine that were not previously considered, and that the proposed mine was subsequently modified in a manner that would cause an effect that was not originally considered. Plaintiffs alleged three types of "new information" arose: (1) Disease devastated the population of northern long-eared bats in the area; (2) the extent and magnitude of other mining activity in northeastern Minnesota has significantly increased; and (3) the Forest Service gained a better understanding of the potential adverse impacts of a copper mine in the region.

Regarding plaintiffs' first contention, PolyMet responded that the population decrease of the northern long-eared bat was due to disease and not an effect of the operation of the mine. The court recognized that this was true; however, the specific bat population was now much lower than when the opinion was initially prepared. The opinion, therefore, used inapplicable population statistics and was insufficient in this regard. The court denied the motion to dismiss on this claim.

The court rejected plaintiffs' second claim requesting reinitiation due to an increase of mining activity in northeastern Minnesota. The court held that it was difficult to understand how the "new information" of two companies exploring the area revealed that the impact of the mine on listed species may affect species in a manner not previously considered by FWS in its opinion. The court dismissed this aspect of plaintiffs' ESA claim.

Regarding plaintiffs' third contention, the court determined that plaintiffs failed to identify any alleged new scientific developments or to explain how they revealed anything about the mine that was not previously considered. The court determined that these allegations were too conclusory.

Finally, plaintiffs contended that a change in PolyMet's wetland mitigation plan should also trigger reinitiation. The opinion indicated that the wetland mitigation plan played no role in FWS's conclusion that the mine would not

jeopardize the listed species. The court found the opinion adequately discussed and examined the wetland mitigation plan, and since FWS did not rely on the plan in issuing its opinion, the alleged changes were insufficient to trigger reinitiation under the ESA. ***Center for Biological Diversity et al. v. Haaland et al.***, D. Minn. (2/1/2023) Slip Copy2023, WL 1451581.

ADMINISTRATIVE LAW

EPA rejects Minnesota's and 20 other states' SIPs for 2015 ozone NAAQS; "Good Neighbor Plan" FIP forthcoming. On 1/31/2023, the U.S. Environmental Protection Agency (EPA) disapproved the implementation plans of Minnesota and 20 other states addressing interstate transport for the 2015 ozone National Ambient Air Quality Standards (NAAQS).

EPA's disapproval arose under section 110 of the Clean Air Act. 42 USC §7410. Within three years after the agency has promulgated a new or revised NAAQS, each state is required to submit to EPA a plan for implementing, maintaining, and enforcing the NAAQS within the state. Section 110(a)(2)(D)(i) requires these "state implementation plans" (SIPs) to include, among other things, provisions adequate to prevent in-state emissions from causing adverse impacts to downwind states' ability to meet the NAAQS. This so-called "good neighbor" or "interstate transport" regulation contains two prongs, which EPA and states must evaluate independently: (1) For downwind states that have not yet attained the NAAQS, the SIP must prohibit any source or other emission activity from contributing to the nonattainment; and (2) for states that are in attainment with the NAAQS, the SIP must prohibit any source or other emission activity from interfering with the state's maintenance of the NAAQS. Under section 110(c), if EPA disapproves a SIP, the agency must promulgate a federal implementation plan instead (FIP) within two years, unless the state corrects the deficiency (and EPA approves the revised SIP) before EPA issues the FIP.

On 10/1/2015, EPA promulgated a revised NAAQS for ozone, setting both the primary and secondary standards to 0.070 parts per million (ppm). The Minnesota Pollution Control Agency (MPCA) submitted its SIP for the 2015 ozone NAAQS on 10/1/2018. MPCA concluded that the state's emissions of volatile organic compounds (VOCs) and nitrogen oxide (NOx) (ozone precursor chemicals) were not projected to contribute above 1 percent of the NAAQS to any downwind state, a threshold EPA has established to determine whether a state is linked to a downwind air quality problem. In addition, MPCA pointed to steadily decreasing emissions of NOx and VOCs in Minnesota between 2002 and 2015, particularly in the power sector. Accordingly, MPCA concluded that Minnesota would not contribute significantly to nonattainment (prong 1) or interference with maintenance in downwind states (prong 2) and that therefore no additional emission reductions were required to comply with the Good Neighbor rule for the 2015 ozone NAAQS. In February and May 2022, EPA proposed to disapprove the SIP submissions for 21 states, including Minnesota. Meanwhile, in April 2022, EPA issued a proposed FIP—the "Good Neighbor Plan" for the 2015 ozone NAAQS—to replace all of the state SIPs. EPA intends to finalize the FIP by 3/15/2023.

EPA has developed and used the following 4-step interstate transport framework to evaluate a state's obligations to eliminate interstate transport emissions under the interstate transport provision for the ozone NAAQS: (1) Identify monitoring sites that are projected to have problems attaining and/or maintaining the NAAQS (i.e., nonattainment and/or maintenance receptors); (2) identify states that impact those air quality problems in downwind states sufficiently such that the states are considered "linked" and therefore warrant further review and analysis; (3) identify the emissions reductions necessary (if any), applying a multifactor analysis, to eliminate each linked upwind state's significant contribution to nonattainment or interference with maintenance of the NAAQS at the locations identified in Step 1; and (4) adopt permanent and enforceable measures needed to achieve those emissions reductions.

Applying this framework to Minnesota's SIP, EPA concluded that updated air modeling indicated Minnesota was linked to a downwind attainment/maintenance area (Cook County, Illinois) under step 2 of the interstate transport framework and that the SIP thus failed to identify and adopt enforceable emission reduction measures (steps 2 and 3). However, EPA only partially disapproved Minnesota's SIP because it agreed with MPCA that Minnesota is not linked to any nonattainment receptors.

EPA's forthcoming FIP is expected to jointly address all 21 of the disapproved SIPs. According to EPA's proposed rule, the FIP will establish NOx emissions budgets requiring fossil fuel-fired power plants in 25 states to participate in an allowance-based ozone season trading program beginning in 2023. In addition, the agency for the first time is proposing to establish NOx limitations applicable to certain other industrial stationary sources with an earliest possible compliance date of 2026. These industrial source types are:

- reciprocating internal combustion engines in pipeline transportation of natural gas;
- kilns in cement and cement product manufacturing;
- boilers and furnaces in iron and steel mills and ferroalloy manufacturing;
- furnaces in glass and glass product manufacturing; and
- high-emitting equipment and large boilers in basic chemical manufacturing, petroleum, and coal products.

EPA, *Final Disapprovals: "Good Neighbor" State Implementation Plans Addressing Interstate Transport Obligations for the 2015 Ozone National Ambient Air Quality Standard* (1/31/2023), **88 Fed. Reg. 9336** (2/13/2023).

EPA takes several actions on PFAS. EPA recently doubled down on the commitment it made in the 2021-2024 PFAS Strategic Roadmap. PFAS (per- and poly-fluoroalkyl substances) are a large group of chemicals historically used in consumer products and industrial processes. EPA has targeted PFAS due to their accumulation and persistence in the environment and the associated risks of human and animal health problems. Recent EPA activity includes the following:

Guidance on addressing PFAS in NPDES permits: On 12/6/2022, EPA issued a guidance memo for state environmental agencies that issue wastewater and stormwater discharge permits under the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) and manage CWA pretreatment programs. The memo

advises use of the most current sampling and analysis methods to identify sources of PFAS. The memo also identifies various means under the NPDES permitting program to regulate PFAS discharges from publicly owned treatment works (POTWs), industrial facilities, and stormwater discharges, e.g., by imposing technology-based effluent limits or establishing PFAS best management practices in an NPDES permit. **Memorandum from Radhika Fox**, EPA assistant administrator, to EPA Regional Water Division Directors, Regions 1-10, "Addressing PFAS Discharges in NPDES Permits and Through the Pretreatment Program and Monitoring Programs" (12/5/2022).

TSCA significant new use rule for inactive PFAS: On 1/26/2023, EPA published in the Federal Register a significant new use rule (SNUR) under the Toxic Substances Control Act (TSCA) for those per- and poly-fluoroalkyl substances (PFAS) that have not been manufactured (including imported) or processed for many years and are consequently designated as inactive on the TSCA Chemical Substance Inventory. Persons subject to the SNUR would be required to notify EPA at least 90 days before commencing any manufacture (including import) or processing of the chemical substance for a significant new use. Once EPA receives a notification, EPA would require a demonstration that the proposed use does not pose an unreasonable risk to human health and the environment. The public comment period for this rule extends through 3/27/2023. **88 Fed. Reg. 4937** (1/26/2023).

Updated CERCLA AAI standard referencing PFAS: In addition to this proposed rule, EPA published a final rule relating to PFAS. This rule affects the ability to seek liability protection under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) by conducting "all appropriate inquiries" into the environmental condition of a property prior to purchase. (The rule adopts the updated American Society for Testing and Materials (ASTM) International's "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." The new standard (E1527-21) replaces the old standard (E1527-13) that has been used since 2013. **87 Federal Register 76578** (12/15/2022).

EPA's new all-appropriate-inquiries rule recognizes that emerging contaminants such as PFAS may be addressed in a Phase I. For now, PFAS are not required to be considered under the ASTM standard but may be included in a Phase I report as a "non-scope consideration." Once EPA classifies one of the PFAS as a hazardous substance under CERCLA, it will become subject to review in Phase I assessments. It is expected that EPA will classify certain PFAS (PFOA and PFOS) as hazardous substances later this year when a rule proposed on 8/25/2022 is finalized.

PFAS proposed as EPA enforcement & compliance initiative: Finally, EPA proposed addressing PFAS contamination as one of the National Enforcement and Compliance Initiatives (NECI) for the 2024-2027 cycle. NECI are selected every four years to determine where to focus EPA's resources. With PFAS as a NECI, EPA would focus on identifying the extent of existing PFAS contamination in the environment. When the need for cleanup is identified, EPA would use its enforcement authority to hold companies responsible for the costs. In particular, EPA identified an intent to pursue liability under CERCLA for PFAS manufacturers. EPA is seeking comments on this proposal until 3/13/2023. 88 Fed. Reg. 2093 (1/12/2023).



Jeremy P. Greenhouse
Cody Bauer
Vanessa Johnson
Fredrikson & Byron P.A.

Jake Beckstrom
Vermont Law School, 2015

Erik Ordahl
Barna, Guzy & Steffen

Federal Practice
JUDICIAL LAW

Attorney-client privilege; *certiorari* dismissed as improvidently granted. Last month this column noted the Supreme Court argument in *In Re Grand Jury*, which involved the issue of "whether a communication involving both legal and non-legal advice is protected by attorney-client privilege when obtaining or providing legal advice was one of the significant purposes behind the communication."

Two weeks after that argument, the writ of *certiorari* was dismissed as improvidently granted. ***In Re Grand Jury***, 23 F.4th 1088 (9th Cir.), *cert. granted*, 143 S. Ct. 80 (2022), *cert. dismissed*, 143 S. Ct. 543 (2023).

Appellate review of denial of summary judgment; circuit split; grant of *certiorari*. The Supreme Court recently granted *certiorari* to consider the question of "whether to preserve the issue for appellate review a party must reassert in a post-trial motion a purely legal issue rejected at summary judgment."

The circuits are badly divided on this issue, with eight circuits answering "no," four circuits answering "yes," and the 8th Circuit answering "sometimes yes and sometimes no." ***Younger v. Dupree***, 2022 WL 738610 (4th Cir. 3/11/2022) (unpublished), *cert. granted*, ___ S. Ct. ___ (2023).

28 U.S.C. §1447(d); order for remand; reconsideration not permitted. Relying on 28 U.S.C. §1447(d)'s restriction on review of remand orders "on appeal or otherwise," the 8th Circuit held that once a district court remanded a case for lack of subject matter jurisdiction, it lacked any authority to reconsider that order. ***Stone v. J & M Secs., LLC***, 55 F.4th 1150 (8th Cir. 2022).

■ **CAFA; 28 U.S.C. 1453(c)(1); remand reversed; no presumption in favor of remand; notable footnote.** In an opinion authored by Judge Stras, the 8th Circuit reversed a district court's remand of an action for lack of the required amount in controversy that had been removed under CAFA, finding that the usual "resolve all doubts in favor of remand" presumption does not apply in CAFA cases, that a removing defendant need only establish that the amount in controversy *might* exceed $5 million, and that the district court had erred in failing to consider a post-removal declaration that established the amount in controversy.

The panel commented in *dicta* in a footnote that the anti-removal presumption may no longer apply in "ordinary" diversity cases, but noted that it need not decide that question. ***Leflar v. Target Corp.***, 57 F.4th 600 (8th Cir. 2023).

■ ***Younger* abstention and Rule 11 sanctions both affirmed.** The 8th Circuit affirmed an order by now-Chief Judge Schiltz, which had abstained under *Younger*, and also affirmed Judge Schiltz's imposition of $50,000 in Rule 11 sanctions against the plaintiff. ***Igbanugo v. Minn. Office of Lawyers Prof. Responsibility***, 56 F.4th 561 (8th Cir. 2022).

■ **Sanctions and contempt order affirmed; no abuse of discretion.** The 8th Circuit found no abuse of discretion in a district court's finding of contempt and award of attorney's fees against a plaintiff that failed to comply with a deadline imposed by a district court to supplement its discovery responses. ***Cincinnati Ins. Co. v. Jacob Rieger & Co.***, ___ F.4th ___ (8th Cir. 2023).

■ **Common interest doctrine claim rejected; intra-district split.** Acknowledging an intra-district split as to whether the common interest doctrine applies only to "legal" interests or extends to "legal, factual, or strategic" interests, Judge Menendez found that Magistrate Judge Schultz had not clearly erred when he found that it was limited to legal interests and affirmed his order requiring the defendant to disclose communications with a third party. ***Williams v. BHI Energy I Power Servs. LLC***, 2022 WL 1748550 (D. Minn. 12/7/2022).

■ **Fed. R. Civ. P. 45(d)(2)(B)(ii); subpoena; request for cost-shifting rejected.** Magistrate Judge Docherty denied a request by an "interested non-party" to shift an estimated $150,000 in subpoena compliance costs pursuant to Fed. R. Civ. P. 45(d)(2)(B)(ii), relying on the fact that the subpoena recipient was "interested" in the outcome of the case and that it failed to show that the party that issued the subpoena was "better able to bear the burden of their production costs." ***Prime Therapeutics LLC v. CVS Pharm., Inc.***, 2022 WL 17414478 (D. Minn. 12/5/2022).

■ **Trial subpoena; "undue burden" on witness; motion to quash denied.** Rejecting a physician's arguments that he would suffer "undue burden" if forced to testify at trial and that his deposition testimony was an adequate substitute for his live testimony, Judge Wright denied the witness's motion to quash a trial subpoena. ***United States ex rel. Fesenmaier v. Cameron-Ehlen Group, Inc.***, 2022 WL 18012008 (D. Minn. 12/30/2022).

■ **Fraudulent joinder; motion to remand denied.** Judge Wright denied the plaintiff's motion to remand an action that had been removed on the basis of diversity jurisdiction, finding that the one non-diverse defendant had been fraudulently joined where there was "no factual support" for either of the claims against that defendant. ***Lane v. Century Int'l Arms, Inc.***, 2022 WL 17721508 (12/15/2022).

■ **Motion to compel; no opposition; L.R. 7.1(g); attorney's fees awarded.** Where the plaintiffs failed to respond to the defendant's discovery requests, the defendant moved to compel discovery, and the plaintiffs failed to oppose the motion, Magistrate Judge Leung canceled the motion hearing, granted the motion, and awarded the defendant its reasonable attorney's fees for the motion in an amount to be determined. ***Rose v. Qdoba Restaurant Corp.***, 2023 WL 34349 (D. Minn. 1/4/2023).

■ **FDCPA; Fed. R. Civ. P. 12(b)(1); motion to dismiss based on lack of standing denied.** Where FDCPA defendants made a facial attack on the plaintiff's standing, Judge Tunheim found that the plaintiff's allegations of physical harms, including headaches, digestive disorders, and chronic pain, were sufficiently "concrete" to confer standing, and that defendants' argument that the plaintiff's allegations "defie[d] credulity" could not be considered in the context of a facial attack. ***Drechen v. Rodenburg, LLP***, 2022 WL 17543056 (D. Minn. 12/8/2022).

■ **Awards of attorney's fees; hourly rates; multiple cases.** Finding that hourly rates as high as $775 per hour were "reasonable," Judge Tostrud awarded the prevailing plaintiff more than $1.1 million in attorney's fees under the FRSA even after disallowing the fees and costs associated with a mock trial. ***Sanders v. BNSF Rwy. Co.***, 2022 WL 17414504 (D. Minn. 12/5/2022).

Awarding certain prevailing defendants fees under the Copyright Act, Judge Tostrud reduced national counsel's hourly rates by 30 percent to account for prevailing rates in the Twin Cities, rejected the plaintiff's challenge to alleged "block billing," and awarded these defendants almost $833,000 in attorney's fees. ***MPAY Inc. v. Erie Custom Computer Applications, Inc.***, 2022 WL 17829712 (D. Minn. 12/21/2022).

■ **Fed. R. Civ. P. 42(b); consolidation; multiple cases.** Judge Frank denied a motion to consolidate related actions, finding that the issues in the two actions were "legally and factually distinct," and that consolidation of the actions "would not further judicial economy." ***Select Comfort Corp. v. Baxter***, 2022 WL 17555484 (D. Minn. 12/9/2022).

In contrast, Judge Frank granted a motion to consolidate two personal injury actions involving the same defendant and the same allegedly defective product. ***Sprafka v. DePuy Ortho., Inc.***, 2022 WL 17414477 (D. Minn. 12/5/2022).

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

Immigration Law
JUDICIAL LAW

■ **Insufficient justification for reversing IJ's grant of CAT relief.** On 12/28/2022, the 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) did not provide sufficient justification for reversing the immigration judge's decision to grant the Salvadoran petitioner relief under the Convention Against Torture (CAT). The BIA failed to provide reasons "grounded in the record" that the immigration judge clearly erred when finding the petitioner would more likely

than not suffer torture in El Salvador. "Here, we conclude that the BIA's explanation for rejecting the IJ's factual findings to support a finding of past torture or the likelihood of future torture was insufficient to 'satisfy a reasonable mind that there was clear error.' See *Abdi Omar*, 962 F.3d at 1064." ***Alvarez-Gomez v. Garland,*** No. 21-2279, *slip op.* (8th Circuit, 12/28/2022). *https://ecf.ca8.uscourts.gov/opndir/22/12/212279P.pdf*

■ **Burden of proving "alienage" satisfied.** On 12/15/2022, the 8th Circuit Court of Appeals held that substantial evidence supported the immigration judge's conclusion, affirmed and adopted by the BIA, that the Department of Homeland Security had satisfied its burden of proving the Honduran petitioner's "alienage" by clear and convincing evidence. The court also affirmed the denials of Convention Against Torture (CAT) relief by both the immigration judge and Board of Immigration Appeals, finding that substantial evidence supported the conclusion that the petitioner failed to show he would more likely than not be subject to torture in Honduras. ***Escobar v. Garland***, No. 22-1249, *slip op.* (8th Circuit, 12/15/2022). *https://ecf.ca8.uscourts.gov/opndir/22/12/221249P.pdf*

■ **Credible but weak testimony lacked sufficient corroboration.** On 11/21/2022, while applying a highly deferential standard of review, the 8th Circuit Court of Appeals upheld the Board of Immigration Appeals' determination that the Cameroonian petitioner's credible but weak testimony supporting her asylum claim was insufficiently corroborated. "The absence of medical records supporting hospitalization and treatment of those injuries was an important issue" in relation to allegations of detention, beatings, and rape at the hands of Cameroonian military officers. The petition for review was consequently denied. ***Adongafac v. Garland***, No. 21-1800, *slip op.* (8th Circuit, 11/21/2022). *https://ecf.ca8.uscourts.gov/opndir/22/11/211800P.pdf*

■ **Multiple DUI convictions; presumption of lack of good moral character.** On 11/16/2022, the 8th Circuit Court of Appeals held that the Board of Immigration Appeals did not err when it determined that the petitioner failed to make a *prima facie* showing of good moral character in his motion to reopen his cancellation of removal proceedings for the purpose of presenting new evidence of "exceptional and extremely unusual hardship" to his U.S. citizen children. With multiple DUI convictions, the petitioner was found to have failed to overcome the presumption that such an applicant lacks good moral character. ***Llanas-Trejo v. Garland***, No. 21-3770, *slip op.* (8th Circuit, 11/16/2022). *https://ecf.ca8.uscourts.gov/opndir/22/11/213770P.pdf*

ADMINISTRATIVE LAW

■ **TPS litigation: El Salvador, Nicaragua, Honduras, Nepal, Haiti, and Sudan.** On 11/16/2012, the U.S. Department of Homeland Security (DHS) announced plans to continue its compliance with the preliminary injunction issued by the U.S. District Court for the Northern District of California in *Ramos, et al. v. Nielsen, et al.*, No. 18-cv-01554 (N.D. Cal. 10/3/2018) and with the order of the U.S. District Court of the Northern District of California to stay proceedings in *Bhattarai v. Nielsen*, No. 19-cv-00731 (N.D. Cal. 3/12/2019). Beneficiaries under the existing temporary protected

status (TPS) designations for El Salvador, Nicaragua, Honduras, and Nepal, the 2011 designation of Haiti, and the 2013 designation of Sudan will retain their TPS as long as the preliminary injunction in *Ramos* and the *Bhattarai* orders remain in effect, provided their TPS is not withdrawn because of individual ineligibility. The validity of certain TPS-related documentation for beneficiaries under the TPS designations has been automatically extended to 6/30/2024 from the 12/31/2022 expiration date. **87 Fed. Reg. 68717-25** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-11-16/pdf/2022-24984.pdf*

TPS designation: Ethiopia. On 12/12/2022, the U.S. Department of Homeland Security (DHS) announced the designation of Ethiopia for temporary protected status (TPS) for 18 months, effective 12/12/2022 through 6/12/2024. The Secretary of DHS has determined that TPS is warranted in view of "ongoing armed conflict and extraordinary and temporary conditions." Those Ethiopian nationals who have continuously resided in the United States since 10/20/2022 and been continuously physically present in the United States since 12/12/2022 may apply for TPS. The registration period for TPS runs from 12/12/2022 through 6/12/2024. **87 Fed. Reg. 76074-81** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-12-12/pdf/2022-26880.pdf*

TPS extension and redesignation: Yemen. On 1/3/2023, the Department of Homeland Security (DHS) announced the extension of the designation of Yemen for temporary protected status (TPS) for 18 months, from 3/4/2023 through 9/3/2024. Those wishing to extend their TPS must re-register during the 60-day period running from 1/3/2023 through 3/6/2023. The secretary also redesignated Yemen for TPS, allowing additional Yemeni nationals to apply for the first time, provided they have been continuously residing in the United States since 12/29/2022 and were continuously physically present in the United States since 3/24/2023. The registration period for these new applicants runs from 1/3/2023 through 9/3/2024. **88 Fed. Reg. 94-103** (2023). *https://www.govinfo.gov/content/pkg/FR-2023-01-03/pdf/2022-28283.pdf*

TPS extension and redesignation: Somalia. On 1/12/2023, the Secretary of the Department of Homeland Security, Alejandro N. Mayorkas, announced the extension of temporary protected status (TPS) for Somalia for an additional 18 months, from 3/18/2023 through 9/17/2024. He also redesignated Somalia for TPS, allowing Somali nationals continuously residing in the United States since 1/11/2023 to apply for TPS for the first time, provided they meet all eligibility requirements. Secretary Mayorkas's decision was based on the continued "armed conflict and extraordinary and temporary conditions that prevent Somali nationals from safely returning." Publication of a *Federal Register* notice is expected in the coming weeks. ***News Release*** (1/12/2023). *https://www.uscis.gov/newsroom/news-releases/secretary-mayorkas-extends-and-redesignates-somalia-for-temporary-protected-status-for-18-months*

TPS extension and redesignation: Haiti. On 12/26/2023, the Department of Homeland Security (DHS) announced the extension of the designation of Haiti for temporary protected status (TPS) for 18 months, from 2/4/2023 through 8/3/2024. Those Haitian nationals seeking to extend their TPS must re-register during the 60-day period running from 1/26/2023 through 3/27/2023. At the same time, DHS redesignated Haiti for TPS, beginning 2/4/2023 and running 18 months through 8/3/2024. The redesignation allows Haitian nationals who have continuously resided in the U.S. since 11/6/2022 and were continuously physically present in the United States since 2/4/2023 to apply for TPS for the first time. The registration period for first-time applicants runs from 1/26/2023 through 8/3/2024. **88 Fed. Reg. 5022-32** (2023). *https://www.govinfo.gov/content/pkg/FR-2023-01-26/pdf/2023-01586.pdf*

DED extension and expansion: Hong Kong. On 1/26/2023, President Biden issued a memorandum extending and expanding eligibility for deferred enforced departure (DED) for certain Hong Kong residents, in light of the People's Republic of China's (PRC) continued erosion of those residents' "human rights and fundamental freedoms." According to the memo, removal of any Hong Kong resident shall be deferred for 24 months for anyone present in the United States on 1/26/2023, except those who 1) voluntarily returned to Hong Kong or the PRC after 1/26/2023; 2) have not continuously resided in the United States since 1/26/2023; 3) are inadmissible under section 212(a)(3)of the Immigration and Nationality Act (INA) or deportable under section 237(a)(4) of the (INA); 4) have been convicted of any felony or two misdemeanors committed in the United States or meet any of the criteria in section 208(b)(2)(A) of the INA; 5) are subject to extradition; 6) whose presence in the United States is determined, by the Secretary of Homeland Security, as not in the interest of the United States or presents a danger to public safety; or 7) whose presence in the United States has been determined by the U.S. Secretary of State to have serious adverse foreign policy consequences for the United States. **88 Fed. Reg. 6143-44** (2023). *https://www.govinfo.gov/content/pkg/FR-2023-01-31/pdf/2023-02093.pdf*

Parole process for Haitians, Nicaraguans, Cubans, and Venezuelans. On 1/9/2023, the Department of Homeland Security (DHS) published notice of the implementation of a new parole process for nationals of Haiti, Nicaragua, and Cuba. For the most part, this new process reflects an effort modeled on the earlier Uniting for Ukraine (U4U) and process for Venezuelans implemented to allow nationals of those countries to "lawfully enter the United States in a safe and orderly manner and be considered for a case-by-case determination of parole." Eligibility requirements: 1) Applicants must have a supporter in the United States who agrees to provide financial support for the duration of their parole period; 2) applicants must pass national security and public safety vetting; and 3) applicants must fly at their own expense to an interior port of entry rather than a land port of entry.

- *Haiti*. **88 Fed. Reg. 1243-54** (2023). *https://www.govinfo.gov/content/pkg/FR-2023-01-09/pdf/2023-00255.pdf*
- *Nicaragua*. **88 Fed. Reg. 1255-66** (2023). *https://www.govinfo.gov/content/pkg/FR-2023-01-09/pdf/2023-00254.pdf*
- *Cuba*. **88 Fed. Reg. 1266-79** (2023). *https://www.govinfo.gov/content/pkg/FR-2023-01-09/pdf/2023-00252.pdf*

On 1/9/2023, the Department of Homeland Security (DHS) published notice updating the parole process for Venezuelans that commenced in 10/2022. The program provides, according to DHS, "a safe and orderly pathway for certain individuals to seek authorization to travel to the United States to be considered for parole at an interior Port of Entry." The limit of 24,000 travel authorizations has been replaced by a new monthly limit of 30,000 travel authorizations spread across this process as well as the separate and independent parole processes for Cubans, Haitians, and Nicaraguans. **88 Fed. Reg. 1279-82** (2023). *https://www.govinfo.gov/content/pkg/FR-2023-01-09/pdf/2023-00253.pdf*

R. Mark Frey
Frey Law Office
rmfrey@cs.com

Probate & Trust Law

JUDICIAL LAW

Trustee removal: No *de minimis* defense to duty of loyalty. A trustee of a charitable trust admittedly used trust assets for non-trust purposes and misappropriated $1,875, causing tax liability under the IRS code. The trustee also displayed a hostile attitude and animosity toward his co-trustees, made disparaging statements about a co-trustee, and treated a longtime beneficiary in an abusive manner, causing a rift between the beneficiary and the trust. The district court exercised its discretion to remove the trustee. On appeal, the removed trustee argued that the district court improperly weighed his self-dealing and that the district court erred in determining that his contentious behavior and treatment of beneficiaries violated the duty of loyalty. The Minnesota Court of Appeals noted that if a trustee appropriates trust property for his own use, the trustee should be removed. Further, "even assuming that [the trustee's] personal use of the Trust's assets was '*de minimis*,' there is no '*de minimis* defense' to whether self-dealing violates the duty of loyalty." The court of appeals further noted that the district court did not abuse its discretion in concluding that the removed trustee's other behaviors violated the duty of loyalty, and found that the series of breaches, when viewed collectively, constituted a serious breach of trust. ***In the Matter of the Otto Bremer Trust***, A22-0906, 2023 WL 193144 (Minn. Ct. App. 1/17/2023).

Trustee removal: Court does not have *in rem* jurisdiction. The Minnesota Court of Appeals recently held that Minn. Stat. §501C.0204 "dictates that a district court *cannot* remove a trustee in an *in rem* proceeding. Rather, the district court must act in an *in personam* proceeding to remove a trustee." In coming to its decision, the court considered the language of the statute, which distinguishes between *in rem* jurisdiction and *in personam* jurisdiction. Specifically, the court noted that the statute provides that an order in an *in rem* proceeding "is binding *in rem* upon the trust estate and upon the interests of all beneficiaries" (i.e., property) while an order in an *in personam* proceeding is binding on various *individuals*. Because an order can only bind a party if the court has jurisdiction over the party, the court found that "the language of the statute unambiguously indicates that a district court must have *in personam* jurisdiction to remove a trustee." ***Swanson v. Wolf***, A22-0688, 2023 WL 1094140 (Minn. Ct. App. 1/30/2023).

Trust amendment: The method articulated by the trust controls. A settlor executed a statutory short-form power of attorney naming her daughter as her attorney-in-fact. The power of attorney provided "all powers" to the attorney-in-fact. Years later, the settlor's daughter, acting as her attorney-in-fact, amended the settlor's trust to change the distribution scheme. The trust contained language that indicated that the right to amend the trust was personal to the settlor. Two individuals contested the change. The district court concluded that, while the trust expressly limited the power to amend the trust, the statutory short-form power of attorney expressly gave the attorney-in-fact the authority to amend the trust. Therefore, the district court concluded that the trust amendment was valid. The court of appeals reversed the district court's decision and held that when an unambiguous trust instrument provides an exclusive method to amend a trust, Minn. Stat. §501C.0602 "prohibits consideration of any other method of amending the trust found in another writing, such as a power of attorney." The court of appeals declined to consider whether a statutory short-form power of attorney could ever convey the power to amend a trust. ***In re Eva Maria Hanson Living Trust dated December 11, 1995***, A22-0826, 2023 WL 1095034 (Minn. Ct. App. 1/30/2023).

Capacity and undue influence. A decedent, at the age of 95 and eight months before her death, changed the beneficiaries on her annuities. The decedent's nephew, and the trustee of her trust, brought suit against the financial company holding the annuities and the new beneficiaries to invalidate the beneficiary designation on the grounds of lack of capacity and undue influence. The financial company moved for summary judgment, which was granted by the district court. The court of appeals found that—despite the fact that the decedent's nephew produced evidence of cognitive decline from two hospitalizations prior to the change, and there were medical records evidencing confusion, memory impairment, and lack of orientation, as well as expert testimony indicating that the decedent likely suffered from moderate vascular dementia—the evidence was not enough to raise a genuine issue of material fact as to the decedent's cognition on the day she changed her beneficiary designation. Additionally, the court of appeals found that, although the decedent had a confidential relationship with the alleged influencer, the alleged influencer met with her alone regarding her finances; that the alleged influencer suggested that the decedent do her "homework" and identify charities to leave money to; and that the alleged influencer assisted the decedent in executing the beneficiary change, there was not enough evidence to find that a genuine issue of material fact existed. ***Davis v. Ameriprise Financial Inc.,*** A22-0555, 2023 WL 1093863 (Minn. Ct. App. 1/30/2023).

Special administrator: Non-probated will properly considered. A decedent granted a power-of-attorney to his sister. Shortly thereafter, the decedent's sister, acting as attorney-in-fact, transferred ownership or sold several pieces of the decedent's real estate. The decedent had executed a will that devised all of his property to his sister. Twelve years after the decedent died, the decedent's brother petitioned the district court to appoint a special administrator to investigate

the attorney-in-fact's actions. The district court concluded that it was unnecessary to appoint a special administrator for two primary reasons: (1) The decedent's will devised everything to the attorney-in-fact; and (2) any causes of action that a special administrator could assert against the attorney-in-fact were time-barred. The decedent's brother appealed, arguing, among other things, that the district court erred in considering the decedent's will as it had never been probated. The court of appeals disagreed, finding that the district court properly relied on the exception delineated in Minn. Stat. §524.3-102, which allows a non-probated, duly executed, unrevoked will to be admitted as evidence of a devise. The court of appeals further held that the circumstances of the case "provide ample justification" for the district court's decision to decline to appoint a special administrator. ***In re Estate of Carlson***, A22-0957, 2023 WL 1771649 (Minn. Ct. App. 2/6/2023).

Jessica L. Kometz
Bassford Remele
jkometz@bassford.com

Tax Law
JUDICIAL LAW

Otto Bremer trustee's removal affirmed. A trustee of the Otto Bremer Trust was removed by the district court on a petition by the Attorney General's Office. The trustee challenged his removal, and the Minnesota Court of Appeals affirmed.

Trustees can be removed for committing a serious breach of trust or if the court determines that the trustee's removal serves the best interest of the beneficiaries. Minn. Stat. §501C.0706(b)(1), (3). In this case, the district court removed the trustee to best serve the interests of the beneficiaries following the trustee's "serious breach of trust" under Minn. Stat. §501C.0706(b)(1). The appeals court affirmed. The reviewing court agreed with the district court's conclusion that the trustee's actions "breached his duties of loyalty and information and violated the Minnesota Charitable Trust Act." No single action constituted a "serious breach of trust," but the series of events viewed collectively constituted a breach. The series of actions included self-dealing, abuse of power in trust relations, and the trustee's behavior during the sale of Bremer Financial Corporation.

While the trustee admitted to self-dealing "probably from the day [he] arrived at Otto Bremer Trust," in violation of the Charitable Trust Act and the trustee incurred a tax on self-dealing under the IRS code, he nonetheless challenged the court's position that those self-dealings, which he refunded, constituted a serious breach of the trust. While the amount of assets misused was small compared to the value of the trust, the district court did not abuse its discretion in determining a breach when the trustee's self-dealings were considered in series with the trustee's other actions.

During the sale of Bremer Financial Corporation, the trustee "allowed his own personal interest, animosity, enmity, or vindictiveness to impact his decisions and behavior as a trust of one of the region's most important charitable institutions." This personal interest, coupled with "crude, vulgar[,] and otherwise offensive brashness [which] has no place in the charitable world," constituted a violation of loyalty to the trust.

The trustee also challenged the district court's determination that his removal best served the interest of the trust and its beneficiaries. A district court can remove a trustee "because of unfitness, unwillingness or persistent failure of the trustee to administer the trust effectively." Minn. Stat. §501C.0706(b)(3). A finding that the trustee "continually breached his duties to the Trust's beneficiaries, [Trustee] caused the Trust to incur unnecessary expenses, injured the Trust's charitable reputation, refused to disclose information to the AGO [about his successor], and eliminated a relationship with at least one beneficiary" supported the determination that the trustee was unfit and persistently failed to administer the trust.

In sum, the district court did not abuse its discretion because the trustee's actions constituted a "serious breach of trust" and demonstrated that his removal was in "the best interest" of the trust and its beneficiaries. Minn. Stat. §501C.0706(b)(3). ***Matter of Otto Bremer Tr.***, No. A22-0906, 2023 WL 193144 (Minn. Ct. App. 1/17/2023).

Successful CPA/businessperson's claim "beggars belief"; taxpayer who could not substantiate loss not entitled to NOL carryover. Taxpayer Betty Amos enjoyed decades of success in the business world. Among other accomplishments, she had owned her own CPA practice, served as a trustee for the University of Miami, and owned several Fuddruckers restaurants with former Miami Dolphins football star Nick Buoniconti. Ms. Amos's business fortunes took a turn for the worse in the late '90s, and it was around that time when Ms. Amos's tax problem took root. In 1999 Amos, along with her since-deceased spouse, claimed a net operating loss (NOL) of about $1.5 million. Fast-forward to 2014 and 2015, when she reported about $100,000 of IRA income against which she claimed over $4 million of NOLs that dated back to the 1999 return.

The Service disallowed the net operating loss deductions claimed on Amos's 2014 and 2015 tax returns and determined accuracy-related penalties under section 6662(a). Ms. Amos countered that the NOLs from 1999 and 2000 were properly carried forward to 2014 and 2015. The court sustained the deficiency because Ms. Amos was not able to establish the underlying NOLs and she was not able to establish that any portions of those NOLs remained available for use in 2014 and 2015. Although Ms. Amos produced her 1999 tax returns showing the NOLs, she could not produce the underlying records substantiating what she had then reported. The court chastised, "It beggars belief that she would be unaware...[of] her responsibility to demonstrate her entitlement to the deductions she claimed." Prof. Bryan Camp (Texas Tech) excerpted Ms. Amos's case in the popular TaxProf blog, where he described the case as "an object lesson for all of us" about maintenance of records. ***Amos v. Comm'r***, 124 T.C.M. (CCH) 289 (T.C. 2022). *https://taxprof.typepad.com/taxprof_blog/2022/11/lesson-from-the-tax-court-an-object-lesson-for-tax-professionals-.html*

Extensive order and memorandum in long-running discovery dispute. In a property tax dispute concerning the market value of a retail building currently leased and occupied by a Kohl's retail store in Anoka County, the tax court granted aspects of the taxpayer's motion to compel as well as portions of the taxpayer's request for a protective order. ***KIN, Inc. v. Cnty. of Anoka***, No. 02-CV-20-3741, 2022 WL 17972092 (Minn. Tax 12/23/2022).

Property tax: Minnesota estate tax scheme not unconstitutional. The estate of a deceased taxpayer sought a refund of Minnesota estate taxes paid on property with a South Dakota situs. The taxpayer established a trust, which included property in Minnesota and South Dakota, and upon the taxpayer's death, the trustees filed both a Minnesota estate tax return and a federal estate tax return. After amending the Minnesota return and paying the Minnesota estate taxes, the return was amended a second time requesting a refund due to improperly imposed taxes on the property in South Dakota. The commissioner denied the estate's refund request and the estate appealed, arguing that "the Commissioner seeks to enforce an estate tax law which purports to impose a tax on the value of real property located entirely within South Dakota, and thus with a situs outside of Minnesota and that such an estate tax should be invalidated as a violation of the Due Process Clause." The estate contended that the Minnesota taxable estate amount would have equaled zero if the South Dakota property was excluded. The commissioner contended that to determine the imposed tax amount, first Minnesota law computes MTE, without non-Minnesota situs property, then the apportionment ratio is applied, which leads to the non-Minnesota situs property not being taxed. Because the parties did not dispute the material facts, the court agreed that summary judgment was appropriate. The court considered "whether either the determination of MTE based on FTE, or the apportionment ratio set forth in Minnesota Statutes section 291.03, violates the Due Process Clause or, in the alternative, the dormant Commerce Clause, of the United States Constitution, as applied to the Estate" and concluded that the "Minnesota estate tax scheme does not violate either due process or the dormant Commerce Clause." The court affirmed the tax order, denied appellants' motion for summary judgment, and granted the commissioner's motion for summary judgment. ***Est. of Anderson v. Commr. of Revenue***, 9489-R, 2022 WL 17588033 (Minn. Tax 12/12/2022).

Income tax: Income generated from the sale of goodwill is business income subject to apportionment. A non-Minnesota resident taxpayer founded a Minnesota corporation in 1988. The corporation mostly engaged in managing community associations in Wisconsin and Minnesota. The company handled contract negotiations, collections, communications, and financial reporting. The taxpayers of the original corporation incorporated another company to handle the maintenance of the community associations the original corporation managed. On 9/1/2015, the taxpayer sold her 80% stock in both companies to a third party for $8,763,041; the third party acquired the remaining 20% interest from another owner. The taxpayer consulted with a public accounting firm regarding the impact of a §338(h)(10) election and to get assistance with IRS filings in relation to the 2015 stock sale.

The accounting firm provided the taxpayer with advice that relied on the Minnesota Tax Court's 2006 decision in *Nadler v. Comm'r of Revenue*, No. 7736-R, 2006 WL 1084260 (Minn. T.C. 4/21/2006). Based on the advice she received from the accounting firm, the taxpayer informed the third party that the sale should be treated as a "sale of assets" under Internal Revenue Code §338(h)(10) instead of as a "sale of stock." The proceeds from the sale were not held or received by either company but were directly paid to the taxpayer. The 2015 Form M8 Minnesota S Corporation Return was timely filed by the companies and included two Schedule KS forms, one for each taxpayer, and "reported $333,844 in net Minnesota long-term capital gain from the Transaction." "The companies reported gain from the deemed sale of assets in the Transaction, including goodwill, as income *not* derived from the conduct of a trade or business pursuant to Minn. Stat. §290.17, subd. 2" for the taxpayer. The taxpayer also filed a 2015 individual income tax return, which included a Schedule M1NR form where she reported "$333,844 in capital gain from Minnesota sources."

In 2007, the Department of Revenue advised taxpayers not to follow *Nadler* and issued Revenue Notice 17-02 in 2017 specifically stating that the commissioner did not agree with *Nadler* and "advises non-resident individuals that the department does *not* administer the income allocation provisions in Chapter 290 of the *Minnesota Statutes*... using the Minnesota Tax Court's reasoning in *Nadler v. Commissioner*...." Though the company had already made its §338(h)(10) election, an audit was conducted and a tax order was issued "determining that gain from the Transaction was 'business income' subject to apportionment under Minnesota Statutes section 290.17, subdivision 3." The company was assessed $433,017 in nonresident withholding tax and a $86,603 substantial understatement of tax payable penalty. The commissioner removed the penalty after the company filed an administrative appeal but affirmed the nonresident withholding tax.

The company appealed the matter to tax court, where both parties filed cross-motions for summary judgment. The case turned on "whether gain on the sale of goodwill from the Transaction is business or nonbusiness income." The company argued that the "gain from the sale of goodwill attributed to a nonresident individual should be considered income not derived from the conduct of a trade or business and allocated accordingly." The commissioner argued that the "gain should be considered

income of a unitary business and apportioned to Minnesota." The court concluded that "the supreme court's reasoning in *YAM Special Holdings, Inc. v. Comm'r of Revenue*, 947 N.W.2d 438, 442 (Minn. 2020) is directly applicable" and that "there is no dispute that the goodwill at issue was an integral asset of the company's unitary business." The court denied the taxpayer's motion for summary judgment and granted the commissioner's motion for summary judgment, reasoning that the "income stemming from the goodwill generated by the sale of the taxpayer's stock ownership interests in the company constitutes income of a unitary business and is thus subject to apportionment under Minn. Stat. §290.17, subds. 3-4." ***Cities Mgt., Inc. v. Commr. of Revenue***, 9484-R, 2022 WL 17825925 (Minn. T.C. 12/20/2022).

Property tax: No residential homestead designation when there is a lack of water usage. A taxpayer contested the assessed value, special assessment, and classification of her property in Lester Prairie, Minnesota. The taxpayer's property previously held a residential homestead classification, but the designation was removed beginning 1/2/2019, and the assessed value for 2020 was $110,100. The taxpayer challenged the assessor's revocation of the homestead classification, a special assessment added to the property's tax bill, and the estimated market value.

While assessments are presumptively valid, taxpayers have an opportunity to offer evidence and arguments to dispute the assessed value of the property. Minn. Stat. §271.06, subd. 6(a) (2020). The burden of proof falls to the taxpayer "to show that [the assessment] does not reflect the true market value of the property" to invalidate the assessment. *S. Minn. Beet Sugar Coop (SMBSC) v. Cnty. Of Renville*, 737 N.W.2d 545, 557-58 (Minn. 2007). The court must review the authorizing statute's plain language to determine that a property be classified as a residential homestead.

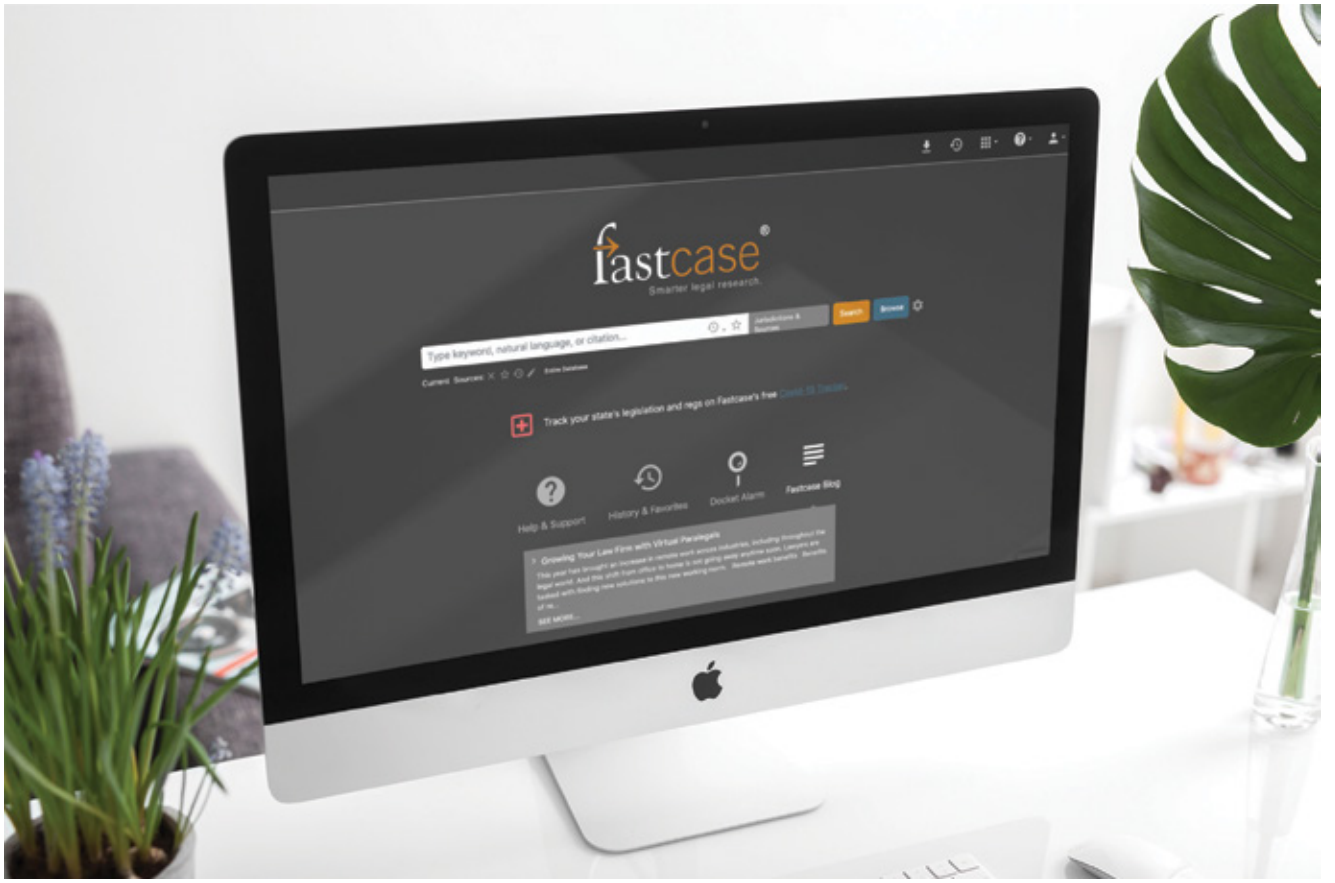
The plain language of Minn. Stat. §273.124, subd. 1(a) (2022) states, "[r]esidential real estate that is occupied and used for the purposes of a homestead by its owner, who must be a Minnesota resident, is a residential homestead." Further, *Sayles v. Cnty. of Cottonwood* (No. 17-CV-08-282, 2009 WL 4035666, at *5 (Minn. T.C. 11/20/2009)) states, "It is the use, not the number of days present that matters." While the taxpayer overcame *prima facie* validity, the parties disagreed that the taxpayer "occupied and used" the subject property "for the purposes of a homestead." Minn. Stat. §273.124, subd. 1(a). The county argued that the taxpayer did not occupy the property. Specifically, while the taxpayer's garbage, water, and sewer services were operational, "the water meter at the subject property has not detected any water usage since 2016." The taxpayer responded by stating that "she and her son brought in water in order to live in the house." The court held that the taxpayer's testimony was directly contradicted by the county's evidence and that the taxpayer failed to show through a preponderance of the evidence that she or her son actually resided in the house. Further, the taxpayer failed to overcome *prima facie* validity regarding the estimated market value of the property. As such, the court concluded that while the taxpayer "submitted sufficient credible evidence to rebut the *prima facie* validity of the County's classification," the assessor's classification of the taxpayer's property as residential non-homestead was correct; the taxpayer "did not successfully challenge the County's estimated market value assessment;" and that the court "did not have subject matter jurisdiction to adjudicate challenges to special assessments." ***Vasko v. County of McLeod***, 43-CV-20-723, 2022 WL 17747905 (Minn. Tax 12/15/2022).

To timely petition for review of an APO, the party seeking review must both serve and file the petition within 30 days of receiving the APO. The Minnesota Pollution Control Agency (MPCA) commissioner issued nine administrative penalty orders (APO) against a taxpayer. The taxpayer filed and mailed a petition seeking judicial review on 12/10/2021, along with an affidavit stating, "I served the Joint Petition to Review Administrative Penalty Orders by placing a true and correct copy of the document in an envelope." The petition was received by the Attorney General's Office (AGO) on 12/14/2021, after which the AGO informed the taxpayer that "the MPCA had not been served but would accept service without waiving jurisdictional defenses or objections." On 12/17/2021, the taxpayer prepared form 22B and a summons and sent them to the AGO.

The AGO executed a waiver of service of summons, saying "I received your request that I waive service of a summons in th[is] lawsuit.... I understand that I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.... A party who waives service of the summons... may later object to the jurisdiction of the court or to the place where the action has been brought" the same day. The waiver of service of summons was filed by the AGO on 12/20/2021, and the summons was filed with the district by the taxpayer on 12/22/2021. MPCA "moved to dismiss the petition pursuant to Minn. Stat. §586.07 (2022) and Minn. R. Civ. P. 12.02(a),2 (e) based on untimely service" three weeks later. The district court granted MPCA's motion to dismiss, reasoning that the taxpayer's "failure to personally service or file a waiver of personal service within 30 days as provided by statute deprived [the district court] of subject matter jurisdiction." "The relevant statute authorizing a petition for review, or appeal, of an APO reads 'Within 30 days after the receipt of an order from the commissioner... the person subject to an order under this section may file a petition in district court for review of the order in lieu of requesting an administrative hearing under subdivision 6. The petition *shall be filed with the court administrator with proof of service on the commissioner....*' Minn. Stat §116.072, subd.7(a) (emphasis added)." The court concluded that "In order to timely petition for review of an APO under Minn. Stat. §116.072, subd. 7(a), the party seeking review must both serve and file the petition within 30 days of receiving the APO. Because statutory deadlines for judicial review of administrative decisions are strictly construed, and because the taxpayer failed to serve timely its petition for review, the district court did not err by dismissing the petition." ***Twin City Petroleum and Properties, LLC v. Kessler***, A22-0918, 2023 WL 193143 (Minn. App. 1/17/2023).

Morgan Holcomb
Mitchell Hamline School of Law
morgan.holcomb@mitchellhamline.edu

Brandy Johnson
Mitchell Hamline School of Law
brandy.johnson2@mitchellhamline.edu



Smarter Legal Research. Free for MSBA Members.

Fastcase is the leading next-generation legal research service that puts a comprehensive national law library and powerful searching, sorting, and data visualization tools at your fingertips.

fastcase®
Smarter legal research.

As a member of the MSBA
you have free access to fastcase.
Login at: www.mnbar.org/fastcase

LEARN MORE ABOUT FASTCASE

Live Webinars: fastcase.com/webinars

Topics include:

Introduction to Legal Research on Fastcase

The Docket Sheet: A Primer on Docket Research

Introduction to Boolean on Fastcase

MSBA

Questions? Contact helpdesk@mnbars.org

Remembering longtime professor, former dean, Doug Heidenreich

BY TOM WEBER

Doug Heidenreich, an instrumental leader and professor at William Mitchell College of Law and Mitchell Hamline School of Law for more than 60 years, died in January at age 90.

"Few people have had more of an impact on our law school than Doug did," said President and Dean Anthony Niedwiecki. "He leaves a great legacy."

Heidenreich grew up in St. Paul and attended the University of Minnesota, where he became interested in the work lawyers do to help people. He enrolled at William Mitchell and was first in his class in 1961.

After two years at the Minneapolis firm Erickson, Popham, Haik and Schnobrich, Heidenreich joined the William Mitchell faculty and quickly rose in school leadership, becoming dean in 1964 and leading the school for 11 years. That time saw great enrollment growth and a need for new space. Heidenreich oversaw that effort and stepped down just before the school moved to the current Mitchell Hamline campus on Summit Avenue.

After his deanship, he returned to teaching.

"Doug had little patience for things done in slipshod fashion, and a willingness to speak his mind," said Professor and former interim Dean Peter Knapp. "Those were qualities that made him a wonderful, though occasionally intimidating, colleague."

"He was the heart and soul of that place for so many years," said Heidenreich's best friend, Professor Emerita Phebe Haugen '72. "I can't think of Mitchell Hamline without thinking of him."

Heidenreich often described himself as curmudgeonly, but his many acts of generosity and respect to students and colleagues belied such a reputation.

A notoriously hard grader, Heidenreich's classroom ethos was rooted in challenging his students to be the best "because he knew their clients would rely on their expertise when they graduated," according to former Professor Colette Routel, now a Hennepin County judge.

"When he was nearing retirement, he kept teaching without a salary. After he retired, he continued to come to the office to tutor students."

Heidenreich once gave three pieces of advice to a graduating class: "One, be proud of your law school. Be proud of this school; it is a very fine school and does wonderful things for society.

"Second, be honest.

"Third, 'to thine own self be true.'"

The family of Doug Heidenreich has asked those wishing to honor him to support the Douglas Heidenreich Scholarship at Mitchell Hamline. To make a gift in support of the scholarship, please scan the QR code.

PEOPLE + PRACTICE

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

Anu Chudasama was elected to shareholder at Bassford Remele. Chudasama focuses her practice in medical malpractice, legal malpractice, personal injury, insurance coverage disputes, general liability, and fire/explosions.

Ryan Cox joined Fredrikson in its energy & natural resources, energy regulation & permitting, and commercial law groups. Cox brings industry intelligence to clients pursuing cutting-edge energy development.

Gov. Walz appointed **Kristi Stanislawski** as district court judge in Minnesota's 10th Judicial District. Stanislawski will be replacing the Hon. Mary A. Yunker and will be chambered in Elk River in Sherburne County. Stanislawski is an attorney at Jovanovich, Dege & Athmann, PA.

Mitchel C. Chargo joined Hinshaw & Culbertson LLP's commercial transactions practice group as a partner in the Minneapolis office. With more than 25 years of experience in commercial real estate matters, Chargo was also previously in-house general counsel for a Minnesota-based medical cannabis manufacturer and will expand the firm's capabilities in the industry.

Sanford, Pierson, Thone & Strean, PLC announced two new partners: **Kirby C. Graff** and **Matthew W. Simenstad**. Graff practices estate planning and real estate law. Simenstad's practice focuses on estate planning, real estate, and corporate law.

Eckberg Lammers, PC announced the election of three new shareholders: **Patrick Boley, Thomas Loonan,** and **Andrew LeFevour**. Boley is the lead attorney in the estate planning, trust, and probate group. Loonan serves as a lead contractual and civil municipal attorney. LeFevour provides educational programs with the firm's Law Enforcement Training Academy & Education team.

Laurie Huotari was named office managing partner of Stoel Rives LLP's Minneapolis office. Huotari is responsible for the day-to-day management of the office, supporting its business and community activities and recruiting efforts.

Gov. Walz reappointed Hon. **Patricia J. Milun** as a judge of the Minnesota Workers' Compensation Court of Appeals for a six-year term. She was also redesignated chief judge.

Tia Erickson joined Meagher + Geer in the family law practice group. Erickson previously practiced family law and civil litigation at a firm in Shakopee.

Beth LaCanne was appointed to the Commission on Judicial Selection for the 10th Judicial District by the Minnesota Supreme Court. LaCanne is an attorney at Bassford Remele, where she focuses her practice in the areas of employment litigation/advice, professional liability, and general liability.

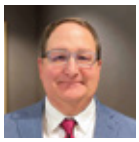
In memoriam

ROGER PAUL BROSNAHAN
of San Miguel de Allende, Mexico died January 20, 2023. He was 87. He was elected the youngest president of the Minnesota State Bar Association in 1974. He also served for many years as Minnesota's delegate to the American Bar Association's House of Delegates. During his 50-year career, Brosnahan represented a sovereign government halfway around the world, corporations, African royalty, famous athletes, and regular people.

DAYLE NOLAN
died on February 4, 2023 at age 76. As an attorney for more than 40 years, most of them spent at the Larkin Hoffman law firm in Bloomington, she made employment law history; shattered glass ceilings; mentored many; championed equity and inclusion; and earned the trust, respect, and admiration of peers, adversaries, colleagues, and clients alike.

JOHN MARK SHERAN
age 72, passed on December 20, 2022. He previously worked at the Farrish Law firm, where his father and uncle had previously practiced, and at Leonard Street Deinard. He retired in 2016.

DAVID LEO BOEHNEN
died on January 27, 2023. Boehnen served as executive vice president of Supervalu from 1991 through 2011, overseeing legal, real estate, corporate development, and government affairs.



Joseph Wetch joined Lommen Abdo and has focused on litigation in multiple areas including injury, commercial, construction law, contract disputes, and oil, gas, and mineral cases.

Brent Kettelkamp was promoted to shareholder at Ogletree Deakins in the firm's Minneapolis office. His practice focuses on labor and employment law.

Terzich & Ort, LLP, announced that **Kaitlyn J. Andren** is a partner effective January 1, 2023, joining founding partners Jodi M. Terzich and Shannon L. Ort.

Nicolet Law announced the addition of three attorneys: **Nicholas Angel, Selma Demirovic,** and **Lindsay Lien**. All three join the firm with a focus on personal injury, and Lien will be expanding the firm practice areas to include food safety.

Maslon LLP elected new members of its board of directors: Chair **Keiko Sugisaka**, Vice Chair **David Suchar**, and board members **Brian Klein** and **Julian Zebot**. **Susan Link** remains on the board.

Gov. Walz appointed **Debra Groehler** as district court judge in Minnesota's 3rd Judicial District. Groehler will be replacing the Hon. Jodi L. Williamson and will be chambered in Mantorville in Dodge County. Groehler is a managing attorney in the civil division of the Olmsted County Attorney's Office, where she supervises a team of attorneys who handle child protection, adult protection, and juvenile delinquency cases.

Bench & Bar accepts press releases and announcements regarding current members of the MSBA for publication, without charge. Email: bb@mnbars.org

CLASSIFIED ADS

For more information about placing classified ads visit: www.mnbar.org/classifieds

ATTORNEY WANTED

FIDUCIARY TRUST COUNSEL - BREMER BANK

Fiduciary/Trust Counsel. The successful candidate will primarily support the organization's Trust and Estate areas, with a focus on the support and maintenance of existing products and services as well as enhancement of internal processes, guidelines, and activities. Responsibilities include: Advise and at times decision on matters relating to the financial institution's role in providing fiduciary related services in compliance with applicable laws and regulations. Work collaboratively with department business partners, compliance, operations, and other areas of the bank on fiduciary related matters. Review and interpret fiduciary agreements and other related documents. Review and advise on Trust policies, procedures, processes, and training materials. Establish and implement processes for Trust Counsel advice and guidance, including protocols for engagement of outside counsel. Identify legal risks associated with fiduciary products and services and collaborate with business partners and other internal parties to develop plans to mitigate such risks within the risk appetite of the organization. Monitor legal and regulatory developments that may impact trust, estate and fiduciary products, services, and operations. Provide legal analysis of new business opportunities and new offerings in connection with fiduciary products, services, and operations. Advise strategic development and management teams on legal issues that may impact strategic initiatives relevant thereto. Required Qualifications: JD with active license to practice law in Minnesota plus minimum 10 years practice experience, including bank in-house experience. Strong substantive background with laws and regulations regarding trusts and estates. Ability to identify, evaluate and escalate legal risk issues Ability to understand and integrate details of business and operational policies, guidelines, procedures and systems in applying legal and policy requirements. Ability to handle multiple tasks, prioritize work in a deadline-intensive environment. Exceptional written and verbal communications skills; ability to effectively communicate at all levels of the organization, including senior business leaders, as well as with external constituencies, including external counsel and regulatory officials. Preferred Qualifications: Trust litigation experience preferred. Apply at: Bremerbank.com/careers

ASSOCIATE ATTORNEY

Reichert Wenner, PA a general practice law firm in St. Cloud, MN has an immediate opening for an associate attorney with at least two years of experience in civil litigation, family law, real estate, or corporate law. The candidate should have strong research, writing and client communication skills. Submit cover letter, resume and writing sample to: lmiller@reichertwennerlaw.com.

LITIGATION ATTORNEY

Tewksbury & Kerfeld is growing and seeks an attorney with seven plus years of experience to join its civil litigation practice. We offer a varied practice including both complex defense cases as well as plaintiff's personal injury litigation, a cooperative atmosphere, and many benefits. The ideal candidate will be an excellent communicator and writer with the experience to take the lead on his or her own caseload. Salary commensurate with experience. To apply, please send your resume and cover letter to Liz Kerfeld at: lkerfeld@tkz.com.

BUSINESS ATTORNEY

Gurstel Law Firm, PC ("Gurstel") is looking for entrepreneurial business attorneys looking for an alternative to a solo or big firm practice. Are you tired of administrative hassles, internal politics, absurd and stale billable hourly requirement expectations, and/or lack of collaboration? If so, Gurstel is the home for you! We value creative thinkers, offer a generous draw and revenue split on originations, subsidized benefits including a 401k match, business development assistance, sharing of firm clients and opportunities, and office space (or support for your remote work needs-should the beach be your preferred office setting). Portable book of business required. Please contact Creig Andreasen at: Hourly@Gurstel.com for more information.

ASSOCIATE ATTORNEY

Hvistendahl, Moersch, Dorsey & Hahn, PA, is a six-attorney general practice law firm in historic downtown Northfield, Minnesota. We invite applications for an associate attorney to practice primarily in family law, but general practice also. Mentoring is available. This is a partner-track position, and opportunity to develop and refine your own practice areas. Salary commensurate with experience. Two years of experience or more is preferred, but not required. Please submit a resume and writing sample to: lawinfo@hvmd.com.

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 zero to five years' experience to join its team of trial attorneys. Our firm has a regional practice that specializes in the handling of civil lawsuits throughout the State of Minnesota, North Dakota, and Wisconsin, including a significant volume of work in the Twin Cities. We offer a collegial workplace with experienced trial attorneys who are recognized leaders in their field of practice. We are seeking an associate who has 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., 4140 Thielman Lane, Suite 110, PO Box 7456, Saint Cloud, MN 56302-7456, 320-251-1055, humanresources@rajhan.com, EOE.

BUSINESS LAW ASSOCIATE ATTORNEY

Experienced full-time business law attorney with five plus years of experience is sought by Henningson & Snoxell, Ltd. We are expanding and seeking an attorney, licensed in the state of Minnesota, who is passionate about providing advice and counsel to clients on business and corporate matters. Join our experienced team of dedicated attorneys, educating and guiding businesses, business owners, and families in all aspects of Business Law, including startups, contracts, and business succession. High interest in employment law issues, as well as non-profit law issues, is desired. A book of business and a referral network are required. Founded on the principles of honesty and integrity, Henningson & Snoxell, Ltd. attorneys are dedicated to understanding the needs of our clients, protecting their rights, and working with them to grow and expand their businesses. Submit your cover letter, resume, transcript, and references to: officemanager@hennsnoxlaw.com.

LITIGATION ASSOCIATE ATTORNEY

Meagher + Geer has an immediate opening in the Minneapolis office for a litigation Associate Attorney with one to three years of experience. Applicants should have excellent academic credentials, strong writing skills, persuasive speaking and analytical skills, and be admitted to the Minnesota bar. Litigation experience, court of appeals or judicial clerkship experience preferred. Applicants are asked to submit a cover letter, resume, law school transcript and two writing samples to: recruitment@meagher.com. We are committed to diversity within the legal profession and strongly encourage diverse applicants to apply for positions. Visit our website for more information about Meagher + Geer, one of the leading civil litigation and insurance coverage firms in the country.

TAX PROFESSIONAL

Moss & Barnett, A Professional Association, seeks a licensed attorney or certified public accountant with 7-15 years of experience in general and transactional tax work. Desired candidates will have experience in mergers, acquisitions and divestitures; partnerships, LLC and joint ventures; and Federal and state income, sales and use, and employment tax matters. Responsibilities will include designing transaction structures for desired tax impact, reviewing tax-related transaction terms and representations, overseeing tax due diligence, providing guidance related to multistate tax issues, communicating key tax matters to stakeholders, and serving as an office resource on various tax matters. Open to applicants seeking less than 40 hours per week schedule. Salary commensurate with experience and qualifications. Interested candidates should email a cover letter, resume and law school transcript (if licensed attorney) or undergrad transcript (if certified public accountant) to Carin Del Fiacco, HR Director: carin.delfiacco@lawmoss.com. Moss & Barnett is an affirmative action/EEO employer.

SENIOR OR ASSISTANT COUNTY ATTORNEY

The Carlton County Attorney's Office is seeking a candidate to join our team. Our office offers a collaborative, friendly environment that supports and challenges both new and practiced attorneys alike. Our office emphasizes public service and is committed to bettering our communities both inside and outside of the criminal justice system. The Carlton County Attorney's Office currently consists of six attorneys, all with varying levels of experience and expertise. Our practice format allows each attorney to have balanced, engaging, and diverse caseloads. Our team prides itself on lending support to one another in our individual caseloads, daily work lives, and career development. Along with well-balanced work, our office also offers a competitive salary and incredible benefits. If you are interested in representing your community and joining a team of dedicated attorneys and staff, the Carlton County Attorney's Office welcomes any interested candidates. https://www.co.carlton.mn.us/Jobs.aspx

LITIGATION ASSOCIATE WITH WORK-LIFE BALANCE

Wonder whether it's possible to be a litigator with work-life balance? The answer is "Yes." Vacations and time with family are important and expected. If you share those values, then you might be a good fit. We're looking for a litigation associate with excellent research and writing skills and experience with discovery and motion practice. Mediation, arbitration and trial experience are a plus, but not essential. You'll primarily work remotely. You should live and be licensed in Minnesota. Please send resume and writing sample to: rob@capstonelaw.com.

FOR SALE

LAW PRACTICE AVAILABLE

Long-term attorney's General Practice available in Lake City, Minnesota, the "Birthplace of Waterskiing". Attorney in business since 1966. Building available to purchase or lease. Large, equipped, 5-room office with two rental apartments above. Stored files and index in full basement area. Contact Gartner Law Office: 1-651-345-3308. Email: phil.gartner@embarqmail.com.

LAW PRACTICE FOR SALE

Law practice for sale in Southwest Minnesota. General practice with emphasis on estate planning, probate, and real estate. Owner intending to retire and would be available for a transition period. Turnkey practice with building, fully furnished office, client files and existing clientele. Email: johndmoritz@newulmtel.net.

OFFICE SPACE

EDINA OFFICE SPACE AVAILABLE

Flexible office space available in Edina. If you are looking for an affordable private. co-working or virtual office in a stylish, locally owned Executive Suites with full amenities, we'd love to share our space. Learn more at www.collaborativeallianceinc.com or email ron@ousky.com.

SHARED OFFICE SPACE

Private office (12ft x 14ft) in a suite shared with an estate planning attorney, with rent of $675 per month. Monthly rent includes utilities, business internet service and janitorial service. Free use of break room with refrigerator and microwave, and water cooler for hot and cold RO water and coffee pods. Sitting/waiting area for clients and part-time receptionist to greet clients. Free ample parking and easy access off of I-35E, near Hwy 36. Available immediately on a month-to-month lease. Please contact Virginia at: 651-631-0616.

PRIVATE OFFICE SPACE FOR ATTORNEYS

The Flour Exchange Building in downtown Minneapolis, which is conveniently skyway connected to the Federal Building, is offering private office space in an attorney dedicated environment with staffed reception, conferencing, phone/internet, and copying. Flexible lease terms and rates are available. phughes@r2.me, 612-552-7300.

POSITION AVAILABLE

ASSISTANT PROFESSOR OF BUSINESS LAW

Minnesota State University Mankato is hiring a tenure track ("probationary") assistant professor of Business Law. Please see: https://minnesotastate.peopleadmin.com/postings/2322 for complete job posting. Minnesota State University, Mankato is an Affirmative Action/Equal Opportunity University and a member of the Minnesota State System.

ADMINISTRATIVE/LEGAL ASSISTANT WANTED

Client-focused legal administrative assistant wanted for small law office. Must have excellent typing skills, be a team player, be very organized and flexible. Experienced in telephone etiquette and present professional image. Knowledge of office equipment, computer processing, Microsoft Word, Excel, QuickBooks required. Legal experience and e-filing knowledge preferred. Good communication skills a must. Compensation dependent upon experience. Email: lhacklander@eastlundhutchinson.com.

GENERAL COUNSEL

Saint Paul Port Authority is seeking an in-house general counsel to oversee and manage all of the Port Authority's legal services. Applications accepted through March 10, 2023. Apply online at: https://sppa.com/generalcounsel.

PROFESSIONAL SERVICES

REAL ESTATE EXPERT WITNESS

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

ATTORNEY COACH / CONSULTANT

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.

MEDIATION TRAINING

Qualify for the Supreme Court Roster. Earn 30 or 40 CLE's. Highly-Rated Course. St. Paul 612-824-8988 transformativemediation.com.

3 Great Options in Minnesota CLE's Popular

SEASON PASS PROGRAM

IT'S THE BEST VALUE IN CLE!

Get more of the best education available! Save a bundle! Fix your education costs!

Find the Pass That Works Best for You!

FEATURES			BEST VALUE! 
Live In-Person Seminars	Unlimited	50% off	Unlimited
Live Online Seminars	50% off	Unlimited	Unlimited
On Demand Seminars	50% off	Unlimited	Unlimited
Skills Training Seminars	50% off	50% off	Included
a $245 value **eCoursebook Collection***	Included	Included	Included
a $545 value **LinkedLaw Deskbook Library***	50% off	50% off	Included
Other Minnesota CLE Publications (includes Automated Document Systems)*	50% off	50% off	50% off
$50 or $100 Discount for Current or Previous Season Passholders**	Yes	Yes	Yes
My CLE Credit Tracks Minnesota CLE courses attended	Yes	Yes	Yes
Price: MSBA Member / Standard	MSBA: $1095 Standard: $1295	MSBA: $1395 Standard: $1595	MSBA: $1695 Standard: $1895

* Applies to annual subscription. ** Depends on previous Pass expiration date and purchase date of new Pass.

NICOLET LAW

ACCIDENT & INJURY LAWYERS

Injured? Get Nicolet.

We Win, Or You Don't Pay.

We have been accepting injury case referrals and co-counseling with other Minnesota attorneys for over a decade. We take pride in delivering life-changing results while providing an excellent client experience. Refer your clients, friends, and family with confidence.

FAMILY OWNED AND OPERATED SINCE 2007

BUILT ON FAMILY. FOCUSED ON HELPING. DEDICATED TO WINNING.

NicoletLaw.com | 1-855-NICOLET

**Fee sharing arrangements where allowed per the rules of professional conduct.*