OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVI NUMBER VIII
SEPTEMBER 2019
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Bench&Bar OF MINNESOTA

COUNTRY LAWYER 2.0

Veteran small-town attorneys talk about their practices, their communities, their profession—and the ways they are changing

Willmar, MN – Photo by Jared Eischen

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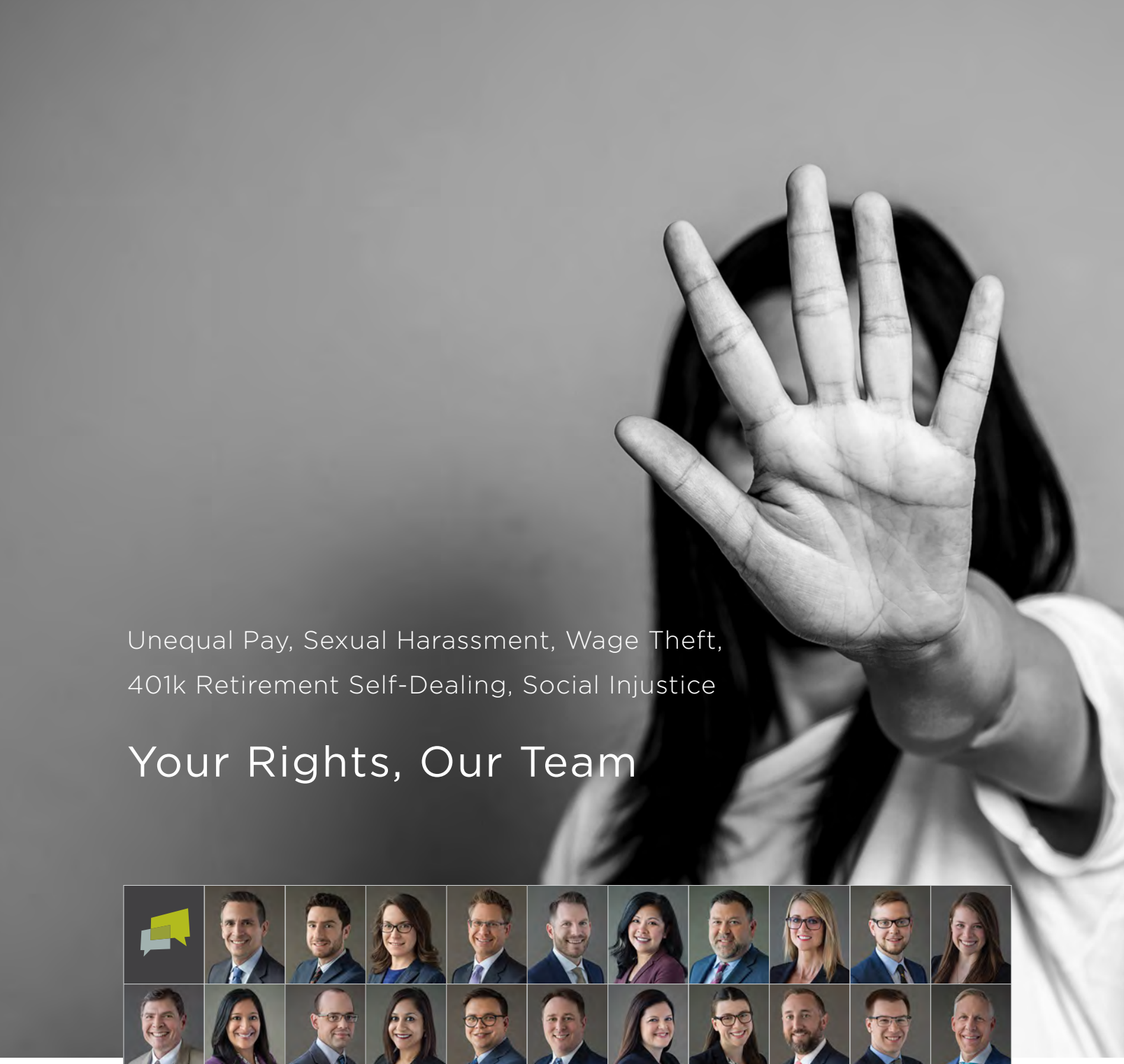

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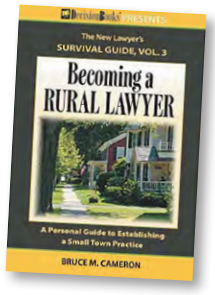

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Lawyer Health: Perilous Realities

Let's get to this topic sooner instead of later, because these threats are coming at us now, not down the road. The facts are haunting; the challenges are daunting. And the stakes are high—especially, and uniquely, for us lawyers—and also for those who trust and rely upon us, and for those who love and live with us.

First, a few facts—worth noting over and over again, until they sink in:

- **Mental health:** Amongst all of the professions, we experience the highest rate of emotional difficulties, including depression, anxiety, and stress. Not to mention the often-debilitating specter of "perfectionism." All in the context of the adversarial system and marketplace competitiveness.
- **Substance use:** By far, we are more likely to experience problematic drinking and other substance misuse—especially, and disturbingly, among our newest and youngest lawyers and law students.
- **Suicide and suicidal ideation:** Take this in. One in ten lawyers and law students has thought to themselves that life might be better if they just didn't wake up in the morning.
- **Loneliness and isolation:** Whether we work in tall buildings or solo at the kitchen table, we are the loneliest of professions—made even worse by the unfortunate stigma often attached to these experiences, lessening self-reporting and prompting interpersonal shunning.

Importantly, it doesn't have to be this way. First, though: "Know Thyself."

These perils arise out of a toxic brew of who we are and what we do. For example (and yes, I know, you might be skeptical about this next point—he writes with a wink), we rank way over the top when it comes to "skepticism" as a personality trait. It is, in so many ways, part and parcel of who we are; it's part of our wiring. It lurks in our self-selection into law school; and it's how we're trained, reinforced, and even rewarded. We raise our skeptical eyebrows at pretty much everything—alleged facts, opinions, relationships, even ourselves. Helpful in some ways, I suppose, given our professional obligations. But it can also lead to our being overly cynical or critical, judgmental, argumentative, self-protective, and self-isolating. It can also be contagious.

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

What else does "lawyer personality research" tell us? Well, we relish abstract reasoning; we live with a constant sense of urgency and obligation; and we rank low, indeed, in "sociability" and "resilience." We are even told to be "zealous," which sometimes morphs from appropriate zeal to bullying zealotry, adding yet another dose of toxicity to our day. Some of this may be helpful in our work, but it also creates emotional and physical risks. It is no wonder that work so consuming can also consume who we are.

In addition to "who we are," what we do creates risk in many ways, two in particular. First, our jobs often require us to jump into harm's way. Nothing like the mission or heroism of our military or First Responders, of course, but nevertheless fraught with peril, including the risk of secondary trauma. We meet—and try to help—people at their lowest, highest, most frightened and vulnerable, most excited, or saddest moments. That affects us, and it jeopardizes us. Second, sometimes we not only endure these perils, we amplify or inflame them—surely not knowingly or intentionally. This is where our best chance for self-assessment and self-awareness lies. The first step, after all, is acknowledging the problem.

So what can we do about all this? Well, I'm reminded of Desmond Tutu's challenge: "There comes a point where we need to stop only pulling people out of the river. We need to go upstream and find out why they are falling in." Luckily, we lawyers all have a bit of salmon in us—inclined to swim upstream against difficult currents.

- **Downstream**, when we see someone drowning, we simply have to jump in. Intervention; treatment; rescue. We've already lost too many along the rocky shores.
- **Midstream,** when we see someone struggling in choppy waters, we have to wade in with helpful and strengthening measures—resilience training, stress management support, mindfulness, maybe even leaves and sabbaticals.
- **Upstream,** where the surface of the water seems calmer, we have to strengthen our antennae to detect emerging perils—perils that others (or ourselves) may be experiencing, or perils that we may be amplifying or inflaming. And then we have to face them honestly and collaboratively.

Developing a new "inventory" of where we not only experience but amplify these perils is crucial. Maybe we can develop a new form of radar, or a new version of the Geiger Counter. This requires resources, of course, like money, staff, and time. It also requires empathetic leadership, committed to imagining and intuiting, without being defensive, what we do to make matters worse. And then we have to do something to make things better. This is a 24-hour duty, just like our duties of excellence, ethics, citizenship, and diversity and inclusion.

The good news? We can handle this—together. So reach out. Be strong enough to seek and offer help. ▲

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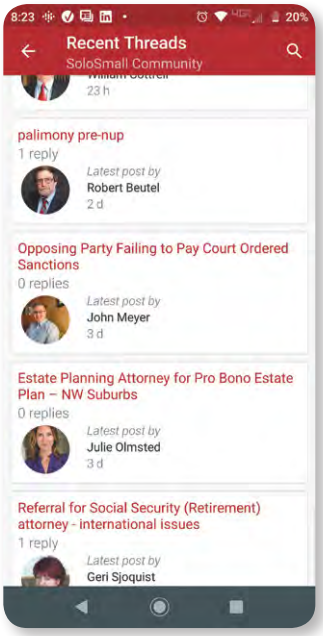

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Get ready: 2020 legislative session

As the new bar year gets underway, it's a good time to consider any legislative goals your section may have for the 2020 session of the Minnesota Legislature. Time is shorter than you may realize: The MSBA develops its legislative agenda in the fall of each year.

If your section or committee is interested in making a proposal, we invite you to attend the legislative preview event on October 10, 2019. There, section and committee members will have the opportunity to talk informally with Legislative Committee members about legislative ideas and get feedback about how to best help advance a proposal. The proposals are due on November 1 for consideration by the Legislative Committee.

If you have any questions, please contact the staff liaison for your section or committee or get in touch with Sherri Knuth (*sknuth@mnbar.org*; 612-278-6330).

MSBA amicus brief update

As reported in the July issue of *Bench & Bar*, the Court accepted the MSBA's request to appear as amicus in *K.M. vs. Burnsville Police Department* (A19-0414). The case involves the issuance and execution of a search warrant for an attorney's office and the seizure of all client files. The brief is now posted online, and you can read it by visiting *https://bit.ly/2MFCMjr*

Coming soon: Pro Bono Week

The MSBA will celebrate Pro Bono Week from October 21-25, 2019. Pro Bono Week is an opportunity to recognize the work of Minnesota's pro bono attorneys and learn about the ongoing legal needs of low-income Minnesotans. The MSBA will host its annual Pro Bono CLE on Tuesday, October 22, from 9-11:30 AM at the Minnesota CLE Center Auditorium, 600 Nicollet Mall, Minneapolis.

The program will focus on the intersection of domestic violence with other related legal issues. MSBA President Tom Nelson and Minnesota Supreme Court Justice David Lillehaug will provide greetings, followed by a panel discussion of experts and breakout sessions focused on developing solutions to the legal needs of domestic violence victims. Registration for the CLE will be available via the MSBA website (*www.mnbar.org*) in mid-September. We hope you will join us for this important program. Additional Pro Bono Week events are listed in the Calendar section at ProjusticeMN (*www.projusticeMN.org*).

Upcoming MSBA Certification offerings

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

Civil Trial Law
Sunday, September 15, 2019
Labor & Employment Law
Saturday, October 26, 2019
Criminal Law
Late 2019/early 2020
Real Property Law
Saturday, April 25, 2020

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

The justice gap is driving a legal ethics reform movement

This is a very exciting time to be in the business of attorney regulation. No, really—I mean it. More than ever people are asking, "Are the ethics rules striking the right balance between protection of the public and access to justice?" And: "How do the ethics rules inhibit innovation in the delivery of legal services?"

Several states are exploring revisions to their ethics rules in response to the growing access to justice gap and general challenges in the legal profession. As many of you already know, Minnesota has established a Legal Paraprofessional Pilot Project, the aim of which is to permit greater use of legal paraprofessionals in chronically underserved areas of consumer law such as housing disputes, family law, and creditor-debtor disputes. Washington and Utah have already taken action in this area.

Several other states are focused on broader ethics changes. Most notably, California—which finally adopted a set of ethical rules similar to the American Bar Association's model rules in November 2018—has charged straight ahead to considering significant changes to those just-adopted rules. Arizona, Utah, and Illinois are considering changes as well. I thought you might be as interested as I am to see the changes under consideration.

California

In July 2018, California formed a Task Force on Access through Innovation of Legal Services (ATILS).[1] The focus of the task force was to remove regulatory barriers to innovation in the delivery of legal services, keeping in mind the dual goals of consumer protection and increased access to legal services. In July 2019, ATILS issued a 251-page (!) report to the trustees of the California bar.[2] The report includes 16 reform options upon which ATILS is seeking public comment through September 2019.[3] Most of the recommendations relate to ethics Rule 5.5 (the unauthorized practice of law) and Rule 5.4 (fee-sharing).

SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

As it relates to Rule 5.5 (generally, who can practice law), the options—similar to the ones Minnesota is considering— include allowing non-lawyers to offer certain legal services within varying regulatory frameworks. The types of regulation under consideration include (1) entity regulation of where the non-lawyer works, (2) creating a new licensing scheme for providers who are not lawyers, and (3) certifying paraprofessionals to allow them to provide limited legal advice. Perhaps most interestingly, the options also include allowing approved entities to provide technology-driven legal services under a yet-to-be-developed regulatory scheme—that is, authorizing technologies that perform the analytic work of lawyers, and regulating the companies that sell these products as well as the products themselves.

As it relates to Rule 5.4 (fee-sharing), there are two options. Alternative 1—the narrower rule change—would allow a lawyer to share fees with a non-lawyer under certain circumstances, such as sharing with a nonprofit that employed the lawyer, and would allow a non-lawyer to hold a financial interest in a legal entity whose purpose was to provide legal services, provided the non-lawyer has no power to direct or control the professional judgment of a lawyer. This alternative resembles the unsuccessful proposed revisions to Rule 5.4 by the ABA Ethics 20/20 Commission. The broader Alternative 2 basically scraps Rule 5.4 and allows fee sharing with any non-lawyer or non-legal entity as long as the client gives informed written consent. This option does not contemplate any additional ownership or entity regulation. While ATILS proposed some "illustrative" rule language, the task force is mainly seeking input at this point on the concepts rather than any specific rule language. ATILS plans to submit its final report by December 31, 2019.

Arizona

In November 2018, the Arizona Supreme Court created a Task Force on the Delivery of Legal Services, and tasked it with (1) examining legal document-preparer programs, (2) recommending whether certain non-lawyers should be allowed to provide limited legal services before limited-jurisdiction courts, administrative hearings, and family courts, (3) proposing any rule changes that would encourage broader use of limited scope representations under Rule 1.2; and (4) weighing whether co-ownership by lawyers and non-lawyers in entities providing legal services should be allowed.[4] The Arizona task force continues its work, but the most recent draft materials on its website disclose that it plans to recommend substantial changes to its ethics rules. These include allowing lawyers and non-lawyers to form legal entities for the provision of legal services, recommending adoption of limited-license practitioners, and possibly authorizing Domestic Violence Lay Advocates to assist in the preparation of court documents. The task force is expected to finalize its recommendations by the end of December 2019.

Utah

Last year, Utah created a program to license paralegal practitioners. Like California and Arizona, Utah also formed a work group to look at lawyer regulation and its impact on innovation and access to justice. The work group was tasked specifically with (1) loosening restrictions on lawyer advertising, solicitation, and fee arrangements, including referral fees and fee-sharing; (2) reviewing the merits of non-lawyer investment and ownership of various legal service business models; and (3) creating a regulatory body under the court (Utah is a unified bar) designed to regulate and test innovative legal service models and delivery systems. The work group had hoped to complete its report by June 2019, but its work is still in progress.

Illinois

Illinois focused its initial efforts on client-lawyer matching services. In 2018, the Illinois Attorney Regulation and Disciplinary Commission (ARDC) issued a study and sought comment on a draft framework to regulate entities that connect clients and lawyers (largely in response to Avvo and related services). The proposal included a framework for regulating for-profit and non-profit referral services and permitting fee-splitting with registered matching services. The ARDC is in the process of reviewing the comments received.

Association of Professional Responsibility Lawyers (APRL)

APRL is a bar association for legal ethics lawyers. Most recently, APRL spurred a movement to change lawyer advertising rules that was embraced by the ABA and resulted in several changes to the advertising rules, which are currently under consideration in Minnesota. APRL has also formed a Future of Lawyering Committee focused on technology, the delivery of legal services, and the access to justice gap.[5] This committee is specifically looking at changes to the ethics rules and regulatory process. The committee has several subcommittees, including (1) referral fees/fee sharing (Rule 5.4/7.2); (2) multijurisdictional practice/unauthorized practice of law (Rule 5.5); (3) alternative business structures (Rule 5.4); and (4) firm management and related legal services (Rules 5.6/5.7). The committee has several liaisons members—including members from the National Organization of Bar Counsel (NOBC), a bar association for ethics regulation counsel like me. This committee anticipates its work will take approximately two years, likely wrapping up in mid-2020.

Conclusion

Exciting, huh? The law is undeniable hidebound in many respects, but the trade winds are blowing strong toward regulatory reforms that aim to improve access to justice for the many consumers who cannot afford counsel for basic legal services. It is also true that tech companies and other business service providers see this as an opportunity to break into the "practice of law" juggernaut that has been closely guarded, and rightly so, by the legal profession. I'm not sure what the right mix of changes will be, given the paramount regulatory goal of protecting legal consumers. But I'm excited to see the deep dives taking place, and I'm very glad the questions are being asked and debated. ▲

Notes

[1] *http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Task-Force-on-Access-Through-Innovation-of-Legal-Services*

[2] *http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024450.pdf*

[3] *http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/board-approves-public-comment-on-tech-task-forces-regulatory-reform-options-under-consideration*

[4] *https://www.azcourts.gov/cscommittees/Legal-Services-Task-Force*

[5] *https://aprl.net/aprl-future-of-the-legal-profession-special-committee/*

Too secure? Encryption and law enforcement

The U.S. government is reviving a push to force technology companies to undermine their own security by creating backdoors for the sake of easier law enforcement access. This past July, Attorney General William Barr revived the anti-encryption fight that most of us have probably already heard during a speech at the International Conference on Cyber Security at Fordham University. The main idea, as set forth by Barr, is the primary argument that's been put forth previously: "While encryption protects against cyberattacks, deploying it in warrant-proof form jeopardizes public safety more generally. The net effect is to reduce the overall security of society." Since criminals often use encryption to hide their activities from law enforcement, in other words, law enforcement should be granted a backdoor into the safeguards that keep the average user optimally secure from cybercrime.

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.

Just as in response to the San Bernardino terrorist shooting, in which Apple's security was targeted in order to gain access to a suspect's phone, tech companies are having to defend their pursuit of optimal security. One of these methods is an increasing use of encryption for consumers who want the best in data protection. Though Barr insists that law enforcement access must be made possible by weakening encryption, security experts agree that any purposefully created security vulnerability is a vulnerability that anyone may be able to exploit. No matter how skillfully implemented, it would remain entirely possible—if not likely—that it would only be a matter of time until unauthorized individuals or entities take advantage.

Encryption provides a valuable layer of security within organizations and for individual users by making data unreadable unless accessed with the correct key. Organizations rely on encryption to best protect client data. Without encryption, confidential data would be more readily available to cybercriminals.

Broad implications

More personally, the implications of weakened encryption for the average user are far-reaching. For the sake of making criminal investigations allegedly easier for law enforcement to conduct, each and every individual who uses encryption to better secure their data would be more at risk of compromise. Easier law enforcement access would create easier access for all, including foreign governments.

The law enforcement community has needed to adjust to the ever-changing and expanding network of challenges posed by technology. The smartphones most people carry in their pockets contain huge amounts of information pertaining to our daily lives, not to mention the stores of information contained on our other devices. These devices are huge potential sources of evidence for law enforcement, and it is absolutely true that immense hurdles often need to be overcome in order to access them effectively, if at all. It is also often true that critical information pertaining to a case may only be gathered through accessing a device.

Drawing the line

But weakening everyone's security cannot be an antidote for stymied criminal investigations. Technology companies are yet again being placed in a position where they have to defend the security of their devices—albeit, in this case, for being too secure. The burden must ultimately be placed on law enforcement to get creative when it comes to accessing digital devices. The way the majority of people bank, access health information, pay bills, and store their personal information cannot be purposefully compromised. Dangerous repercussions would result from forcing large organizations to use weakened encryption (or none at all). It is in everyone's best interest that the data stored on our devices be kept as secure as possible.

Barr believes that "making our virtual world more secure should not come at the expense of making us more vulnerable in the real world." What he fails to realize is that without digital security, we cannot have "real world" security. Our digital spaces are entirely intertwined with our real world. Technology certainly can be used for malicious or terroristic purposes. That is, unfortunately, a reality of our society that cannot be denied. But strengthening cybersecurity is going to assist the vast majority in protecting themselves against crime while continuing to take advantage of the vast array of benefits that technology offers. ▲

Legal technology translated for the real-world attorney

Chelsey Lambert, LexTechReview.com

Chelsey Lambert is a legal technology specialist, published author, and CLE speaker. As a former practice management advisor for the Chicago Bar Association, and vice president of marketing for a leading case management provider, she has seen our industry from many angles. Today, she works with vendors to bring their products or emerging technologies into the marketplace.

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'It turns out that I love my job'

Why did you go to law school?

I grew up wanting to be a lawyer, just like my dad. When I was a kid, I wrote a "will" that dictated which of my siblings and cousins would receive my stuffed animals upon my demise. Law school was the logical choice after graduating from Hamline University with my B.A. in legal studies and political science. It was a way I could start a career helping others.

You moved back to Mankato after law school and joined your father's firm. Was that always the plan, or were you tempted to go in another direction?

Working with my dad after graduating from law school was a special opportunity. He has been practicing for over 40 years, he loves his job, and he has a great reputation, so I knew that I could learn from his experience. He was in a law firm with five other attorneys that practiced in a variety of areas, so I thought that I could also get an idea of what area of law I wanted to focus on. It was always in the back of my mind that I would leave after a few years and move back up to the Twin Cities, but in 2017 my dad and I opened our own firm and I got married. It turns out that I love my job and the Mankato area, so I'll be staying put for the foreseeable future.

What's the best advice you ever got?

As I prepared to be a lawyer I always heard "your reputation is everything." Initially, I thought about how that applied to my conduct in the courtroom and in the community. It was easy for me to be professional, understanding that my reputation would follow me for years. However, it was not until I was a few months into my career that I understood how this piece of advice applied to many different aspects of my practice. When determining whether to represent clients, how to interact with opposing counsel, or what route to take in difficult cases, I tend to think about how that decision will affect my reputation. Thinking about my reputation has also helped guide me when making decisions about my career and my business. In law school, "your reputation is everything" seemed like such a simple, obvious piece of advice, but the more I practice, the more I understand how so many of my actions can directly impact my reputation.

LISA CHESLEY graduated from Hamline University School of Law (now Mitchell Hamline School of Law) in 2014 and moved to her hometown of Mankato, Minnesota to work with her father, Robert Chesley. They opened Chesley Law Firm in 2017 and focus their practice on helping families through estate planning, guardianships and conservatorships, long term care planning, and estate administration.

Tell us a little about what you get out of your MSBA membership and your involvement in the 6th District Bar Association.

Other than using almost all of the resources that come with the MSBA membership (practicelaw, mndocs, Fastcase, CourtOps, Communities—I could go on…), the MSBA community is the biggest benefit. The connections I have made through MSBA have undoubtedly benefited my practice and my clients. I was recruited as secretary/treasurer of the 6th District Bar Association after working in Mankato for less than a year. I eagerly jumped on board as a way to meet people and grow connections. After serving as secretary/treasurer (2015-2016), I transitioned to vice president (2016-2017), and became president for the 2017-2018 term. Serving in these roles allowed me to get to know many different attorneys in the Mankato area. This year I'm proud to be the 6th District's representative to the MSBA Assembly and am looking forward to representing my district and meeting new people from around the state.

What do you like to do when you're not working?

It's important to me to be active in my community. I serve as a board member for the Minnesota Chapter of the National Academy for Elder Law Attorneys, and for the Mankato victim advocacy and emergency shelter organization, Committee Against Domestic Abuse. I also volunteer with the Greater Mankato Area United Way and through my local church. I'm always looking for new ways to be involved in the Mankato area, but it's also fun to get away once in a while. My husband and I love to travel, even if it's just a day trip in the car. We enjoy seeing new places, trying new restaurants, and listening to live music. When I have spare time at home, I enjoy cooking and baking, kayaking, and gardening. ▲

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Atticus Doesn't Live Here Anymore

Rural Minnesota lawyers are facing a succession crisis. Can anything be done?

By Mike Mosedale

Growing up in Hibbing, Steven Peloquin made a leap to big city life after high school, when he left the Iron Range for Harvard College and then scooted across the Charles River to get a JD from the Boston University School of Law. After returning to Minnesota, Peloquin practiced briefly in the Twin Cities. But he didn't care for the white-knuckled commutes, and he says he always knew city life wasn't for him in the long run.

Eventually, he bought into a small firm in Perham (pop. 3,400), an old railroad town in west central Minnesota's Ottertail County. The spot was perfect—close, but not too close, to family and in-laws.

STEVEN PELOQUIN

Over the ensuing four decades, Peloquin built up a broad-based general practice—"typical small town grist," he calls it—that blends family law, civil litigation, and business law, with a bit of criminal defense on the side.

He appreciated the more informal aspects of rural lawyering. "I like to see people and talk to them. Part of the fun of being a small-town lawyer is having people popping in," he says, before the inevitable caveat: "Up to a point."

Peloquin also enjoyed mentoring younger lawyers, so over the years he took on a succession of associates and partners. In time, he was able to expand his practice into three nearby communities: Park Rapids (where he lives), Detroit Lakes, and New York Mills.

ANGELA SIPILA

In some regards, Peloquin notes, the life of the rural lawyer has never been easier. Mainly, that's a consequence of all the technological advances that have come to the profession since he started—first the fax machine, then email, then e-filing.

"It's certainly leveled the playing field in terms of accessing data. I don't need to have a huge library anymore. I've got access to the same data Dorsey does," Peloquin notes. "It also makes it much easier to have a multiple-office practice." And telecommuting has afforded his current partner and associate (both working mothers) the sort of flexibility that would have been unfathomable a few decades back.

Still, Peloquin has detected an unmistakable trend in the small towns where he practices. While he and his fellow baby boomers have turned gray, there doesn't seem to be a new generation of lawyers stepping in to fill their shoes. The result: a gradual—and sometimes not so gradual—winnowing of the population of country lawyers.

"I don't see lawyers handing off their practices to younger lawyers anymore. I see them closing their practices. It just kind of withers and dies," says Peloquin, who is now in his mid-60s and thinking about scaling back. "Are there less lawyers than 10 years ago? Yes, and a bunch of guys who are still hanging on have really reduced their practices."

In Virginia, just a few miles from Peloquin's boyhood home in Hibbing, Angela Sipila has seen the same thing. "Absolutely nobody is coming up to the Iron Range to practice law anymore," says Sipila, a Range native and Gen X-er who, with a full-throated laugh, characterizes herself as "the lawyer for the Finnish mafia."

But it wasn't always this way—not even that long ago.

Like Peloquin, Sipila likes to take on associates. At the height of legal recession, she had little trouble recruiting newly minted lawyers into her practice. In 2011, she says, a posting on a law school job board yielded about a dozen interviews. But as the economic climate gradually improved, the pool of applicants evaporated. By 2015, Sipila's solicitation on the law school job boards didn't elicit a single response.

When she hung out her shingle in 1999, Sipila says, baby boomers "absolutely ruled on the Range." At the time, she thought her generation was on the cusp of supplanting the old guard. It didn't happen. Even now, Sipila says, boomers dominate the private practices on the Range.

And when those older attorney do retire, or die, the void isn't always filled. In the northeast Minnesota town of Tower, she notes, a recent retirement has left that community lawyer-less.

For his part, Peloquin recently decided to shutter his New York Mills office. The move, he says, leaves the town of 1,200 without a law firm.

And what will that mean for New York Mills?

"That's a question I ask myself," says Peloquin. "And maybe we're wringing our hands about this too much. Maybe it won't be that big a deal. But I think it might be."

"Leaning on fence posts"

"I suppose I'm not really a rural lawyer," says solo Bruce Cameron, the author of *Becoming a Rural Lawyer: A Personal Guide to Establishing a Small Town Practice*. (See "Not Enough Work (and 7 other myths about rural law practice)," page 38.)

This half-joking aside derives from Cameron's standing definition of a rural lawyer as an attorney who practices where "the next lawyer is two towns over and the nearest Starbucks is a good hour away."

Although Cameron is, in fact, the only practicing lawyer in the southeastern Minnesota town of Mazeppa (pop. 840), he acknowledges that the nearest Starbucks is probably only 40 minutes away and thus he flunks his own litmus test.

That technicality aside, Cameron's practice—he focuses on estate planning and "transactional stuff"—is decidedly rural in nature. Most of his clients are farmers, and he lives on a hobby farm.

Cameron, who is now 56, came to the law relatively late in life. With a background in technology, he originally aimed to get into patent law. But after passing the bar exam in 2008, it quickly became apparent that no one was hiring. In speaking to friends and neighbors, something else became apparent, too: There wasn't a single practicing lawyer in Mazeppa.

At first, Cameron rented an office in Rochester, mainly because there wasn't any suitable space in Mazeppa.

Evelth, MN

But over time, he learned that his farmer-clients were amenable to house calls, so he dumped the office.

Showing up in a dairy barn in three-piece suit isn't the only thing that separates Cameron's practice from those of his urban counterparts. The marketing, he says, is different. With the exception of handing out custom pens with his name and number, he doesn't even advertise his services. With many rural clients, he observes, you can't be pushy.

BRUCE CAMERON

"You don't approach the business right away. Have a cup of coffee. Have a piece of pie. Sit down with people. Ask, did you get all your hay in?" he says. "I call it leaning on fence posts. There's more emphasis on the social parts."

As to the economics of rural law practice, Cameron is blunt: You're probably not going to make a fortune, but you can make a good living.

MICHELE STATZ

Developing a succession plan is still a major challenge for many rural lawyers. In speaking with older colleagues, he hears the same complaint. "They want to find someone who will step into their practice and continue it, not just somebody who wants to get a whole lot of experience and then move on," he says.

For his part, Cameron says he knows lawyers he could refer his clients to if he should suddenly fall ill. But he's yet to figure out his long-term plan.

"Maybe a bright kid will take over and chase me out of business," he offers. "I'm open to all eventualities."

Legal deserts

Since 2017, Michele Statz estimates that she's interviewed about 100 attorneys from northern Wisconsin and northeastern Minnesota, as well as about 30 state and tribal court judges. Statz isn't a lawyer. She's an anthropologist of law at the University of Minnesota-Duluth, where she is currently in the midst of a three-year research project into access of justice in northeastern Minnesota and northern Wisconsin.

While her work is not finished, she's already confident in one conclusion: There is "a severe and pervasive shortage" of lawyers across much of the region. The emergence of these legal deserts has hit some populations harder than others. While the destitute can still access services through organizations such as Legal Aid, she notes, the working poor—those who make just a little too much to qualify for such assistance—often have few options beyond the self-help kiosk at the county courthouse. That may be better than nothing—but, in Statz's view, not much.

"I don't think there's any substitute for legal representation," says Statz.

The worsening problem is hardly confined to Minnesota and it's worse in some places. In Nebraska, research by the state bar association revealed that there were zero attorneys in 11 of the state's 93 counties. At present, none of Minnesota's 87 counties are entirely bereft of practicing lawyers. But the count is in the single digits in at least seven counties, most of which are concentrated in the lightly populated far western reaches of the state. Traverse County has just one resident lawyer—the part-time county attorney.

So why don't more lawyers want to practice in rural areas?

Economics might seem to be the most likely explanation. But Statz thinks there's more to it—in part, she says, because rural lawyers can still make a pretty good living if they play their cards right.

Lawyers are notoriously cagey on the subject of their earnings, and comprehensive data on the topic is elusive. But anecdotally, at least, there are some pretty lucrative practices to be had outstate. As one farm country lawyer from southern Minnesota puts it, there are "some sweet little fishing holes out here."

"The rural market is not saturated, and there are always some people who can afford a private attorney," Statz notes. "One woman lawyer I interviewed intimated that she just opens up the pipe and the money comes flowing out."

Steve Peloquin echoes those sentiments.

"I look around me and see a lot of small town lawyers doing pretty well," says Peloquin. Attorneys "at the top of the food chain" in his territory can still command up to $250 an hour.

Finding a niche

The stereotypical country lawyer is a generalist who takes what comes through the door. But just as in urban practices, niche work is available to rural lawyers. In northeastern Minnesota, one such niche is cabin law. There are others, including some that are central to the issue of access to justice.

"My work is way different than a normal attorney," says veteran tribal attorney

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There is "a severe and pervasive shortage" of lawyers across much of the region.

Joe Plumer, who lives outside the north central Minnesota town of Cass Lake.

An enrolled member of the Leech Lake Band of Ojibwe, Plumer grew up in Cleveland. His family left northern Minnesota in the wake of the Indian Relocation Act of 1956, a federal law that was designed to induce Native Americans to leave their reservations.

JOE PLUMER

Plumer got his undergraduate degree at Oberlin College and a JD from Case Western, but he never lost touch with the homeland. While in law school, he returned for summers to work in the mines on the western side of the Iron Range, just like his father, grandfather, and uncles before him.

After getting his law license, Plumer spent 11 years in the Twin Cities, the first six as an assistant state attorney general under Skip Humphrey and then, for five years, working for the Shakopee Mdewakanton Sioux Community.

FRANK BIBEAU

When he and his family decided to move north, Plumer set about building a practice that focused exclusively on Indian law. He started out at Anishinabe Legal Service in Cass Lake, which provides civil representation to band members from three area tribes (Leech Lake, White Earth, and Red Lake) and, in 2007, he launched the Regional Native Public Defense Corporation.

But that just scratches the surface of the unusual practice Plumer has carved out for himself in Indian Country. He's served stints working as tribal attorney for the three nearby Ojibwe bands; he currently serves as general counsel at Red Lake. Plumer is a tribal judge for the Mille Lacs band. He also has far-flung judgeships working for tribes in Iowa and California.

In Minnesota, much of his work revolves around tribal sovereignty issues, where he collaborates with fellow attorney and treaty rights activist Frank Bibeau.

"We represent a lot of tribal members in off-reservation gathering rights cases," Plumer says. "People call from all over. I'm like a clearinghouse as far as people's calls."

Like Plumer, Bibeau, who lives in Deer River and is a member of the White Earth band, has served a couple of stints at the legal director at Leech Lake. He now serves as in-house counsel for the environmental organization founded by Winona LaDuke, Honor the Earth, which recently notched a legal win in its high-profile battle against a proposed pipeline project.

But Bibeau sees his work (and Plumer's) as part of a larger, long-term project to get the federal and state courts to adopt a more expansive view of treaty rights. And, looking around, Bibeau is not sure who will take up the cause when he finally retires.

"I'm hoping one of Joe Plumer's boys will follow up on what I'm doing. Because it might take years and years to get to the place we want to go," he says.

A solution?

No one disputes that much of outstate Minnesota is running low on lawyers and, further, that the trend raises serious concerns about access to justice for rural residents both now and into the future. But there's less consensus about what to do.

One possibility is to follow the lead of states like South Dakota, which offers incentives of up to $12,500 per year (for up to five years) to help young lawyers who agree to set up shop in rural counties.

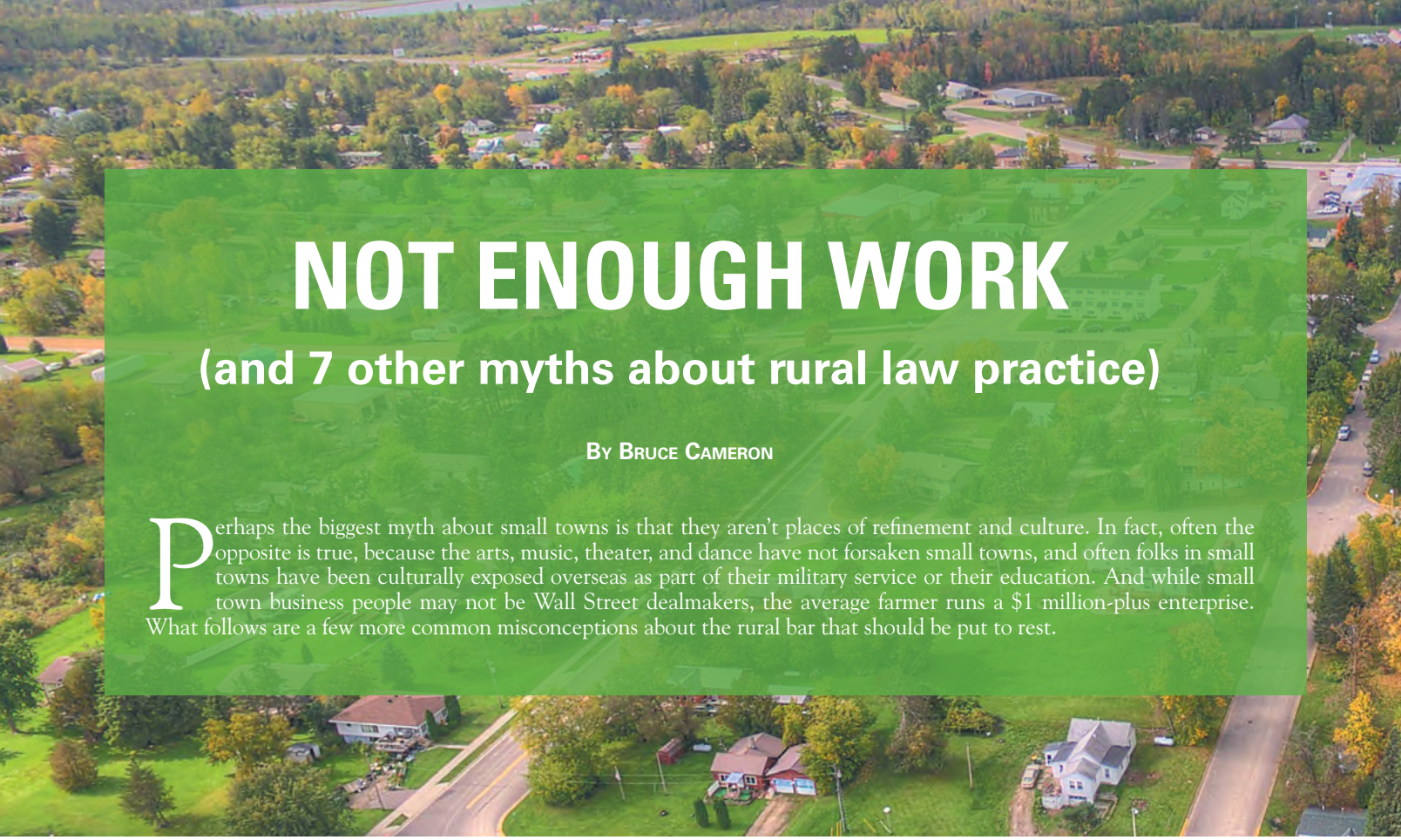
Minnesota already has similar incentives in place for other professionals whose services have become increasingly scarce in much of the state, a cohort that includes large animal veterinarians, doctors, and nurses.

But is there an appetite to help out lawyers?

Legislation floated at the Capitol in the 2019 session would have created a rural attorney loan repayment program. Under the terms of the bill (authored by Nick Frentz, a first-term DFL state representative and attorney from North Mankato), qualifying lawyers could receive up to $15,000 per year in assistance if they practice in a "designated rural location" and commit at least half their time to representing clients who earn no more than 400 percent of the federal poverty guidelines.

The proposal didn't make any headway this session. It didn't even get a hearing. MSBA lobbyist Bryan Lake says that's not unusual, given that more than 5,000 bills were filed at the Capitol this year. "A lot of bills take a few cycles to gain momentum," he notes.

But at the same time, Lake recognizes that it could be a hard sell, given many ingrained misconceptions about lawyers and money. "There is a real recruiting issue out there and it's a big problem," notes Lake. "But there's this wrong impression out there that all lawyers are rich. People don't realize that a lot of young lawyers are struggling." ▲



NOT ENOUGH WORK

(and 7 other myths about rural law practice)

By Bruce Cameron

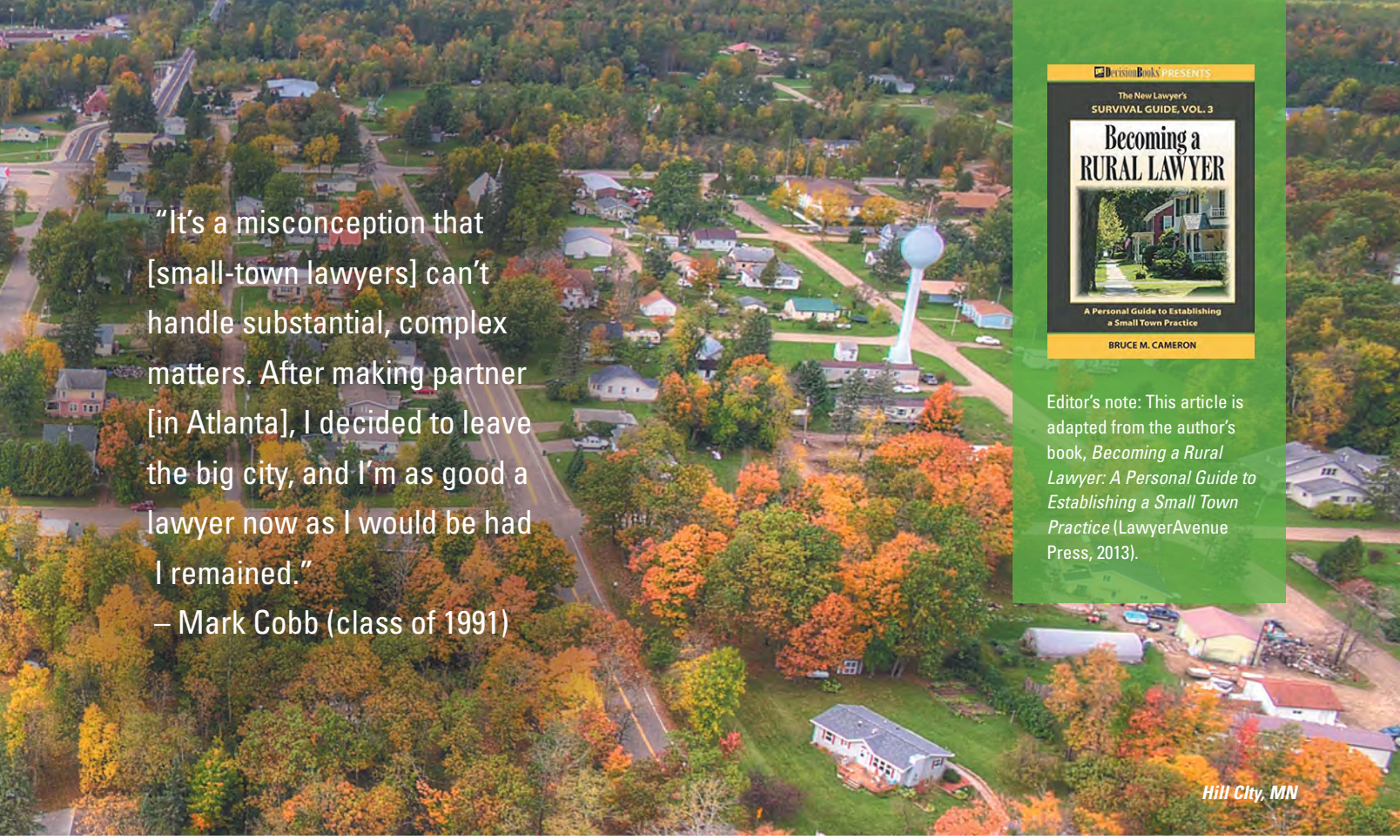
Perhaps the biggest myth about small towns is that they aren't places of refinement and culture. In fact, often the opposite is true, because the arts, music, theater, and dance have not forsaken small towns, and often folks in small towns have been culturally exposed overseas as part of their military service or their education. And while small town business people may not be Wall Street dealmakers, the average farmer runs a $1 million-plus enterprise. What follows are a few more common misconceptions about the rural bar that should be put to rest.

MYTH #1: There is not enough work out there. While it may not be raining soup, there is plenty of work for rural/small town lawyers. One little-known fact about rural practice is that the need for legal services remains high over time, as the supply of lawyers is diminishing faster than the rural population generally. The thing to keep in mind, though, is that to succeed a rural lawyer must first earn the trust and confidence of the community. Don't expect your reputation to precede you; most small towns are not going to be all that impressed by past triumphs, law school accolades, or a degree from a Tier 1 school. In fact, too much self-promotion will cause small town folks to avoid you. ("Putting on airs" breeds skepticism; small towns figure no one is that good.) In a small community, you have to be seen as accessible and competent, and you have to be a person first and a lawyer second. If you can achieve that balance, the work will come.

MYTH #2: I can't afford to work at a lower rate. There's no doubt that rural lawyers have lower rates then their urban counterparts. But before dismissing a rural practice out of hand, either because it doesn't generate a big city salary or because you carry a heavy law school debt load, remember that small towns lack the big city cost of living. For example, in the late 2000s the average lawyer in California was earning approximately $88,000/year, while the average lawyer in Montana earned around $48,000 (based on 2007 U.S. Census data). Yet if you adjusted for cost of living, that $48,000 had the same purchasing power in Montana as $101,000 in California! You should not dismiss the idea of a rural practice because your gross salary would be less than in a big city. Do the math, and you may find that you'll have greater earning power in a small town.

MYTH #3: I'd feel isolated. Well, yes, if you are a solo practitioner in a small town, you are going to be alone—just you, perhaps your staff, and whoever happens to drop by. But thanks to Twitter, LinkedIn, Facebook, legal listservs, and the entire social networking revolution, the small-town practitioner is no longer isolated from the rest of the legal community. Then again, the rural lawyer has never really ever practiced in isolation. Rural lawyers have always built loose webs of social, civic, and legal networks, because the one constant truth is that small towns tend to hire "their own" before they hire outsiders, and there are really only two ways to become one of their own: (a) arrange matters so that your family has lived in the town for at least three generations, or (b) be a "joiner." Small towns appreciate those who volunteer.

MYTH #4: I'd miss out on challenging legal work. Yes, the rural lawyer does miss out on things like M&A, intellectual property, securitization, and international corporate tax law. But if we are honest about it, the average metropolitan lawyer misses out on those things, too. Perhaps the key word here is "challenge." You'll find the average rural lawyer doing those small, messy—but challenging—legal things that matter to people. Things like family law, estate planning, civil and criminal defense, mechanics liens and construction matters, personal injury, bankruptcies, small business transactions, real estate, debt collection, agriculture law, and municipal law. And the average rural lawyer practices within a legal community that emphasizes and fosters collegiality and respect rather than one that seems to reward incivility and competition.



Editor's note: This article is adapted from the author's book, *Becoming a Rural Lawyer: A Personal Guide to Establishing a Small Town Practice* (LawyerAvenue Press, 2013).

MYTH #5: I wouldn't be exposed to a variety of practice areas. If you mean that you won't be exposed to a fixed rotation through the various departments of a major law firm, you are absolutely right. Rural lawyers have to be a bit more flexible—able to write a will, open a probate, handle a residential real estate closing, serve a summons and complaint in a divorce action, and defend a DUI case. And that's just what's on the agenda for Monday.

MYTH #6: I'd miss out on the BigLaw experience. There is no denying that a rural practice, even one in a small firm, is not going to offer the same slow, steady climb toward success that a big metropolitan firm offers. Since the rural lawyer has to be ready for direct client interaction and courtroom appearances from day one, rural practice is more like jumping directly into the deep end of the pool. Look, rural practice is not for everyone; nor is a career in BigLaw. You have to listen to your muse. If your dream is to build a practice in international mergers and acquisitions, and you require the diversity and density of metropolitan life, then you'll never be happy in Small Town, USA.

MYTH #7: Rural lawyers aren't as good or as sophisticated as big city lawyers. Don't underestimate the small-town lawyer. The lawyer opening his or her storefront office on Monday morning is just as likely to be a Harvard Law grad (Order of the Coif, magna cum laude) as a graduate of a Tier 4 law school. Small towns are not big on credentials; they value competence over accolades. And the rural lawyer soon learns that advertising one's professional expertise and legal acumen is an exercise in futility, because no one cares. So under that meek, mild-mannered disguise, a rural lawyer may be a top-notch litigator, an expert in estate planning, or a real estate wizard. Rural lawyers are not practicing out in the sticks because they aren't talented; they practice there because they choose to.

MYTH #8: Rural law is all backroom deals between the good old boys. Hate to bust this myth, but the notion that rural law is what's cooked up between an aging, semi-senile judge and a couple of conniving, good old country lawyers is Hollywood, not reality. The reality is that the rural bar—from the knowledgeable and keenly acute jurists to the talented lawyers—is sophisticated, technologically savvy… and welcoming. Rural courts may have their local customs (like preferring blue ink for signatures, or requiring three-inch top margins on any order that might be recorded in a land abstract, or holding foreclosure sales on the courthouse steps), but these are idiosyncrasies that can be easily mastered by asking the court clerk.

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COUNTRY LAWYER 2.0

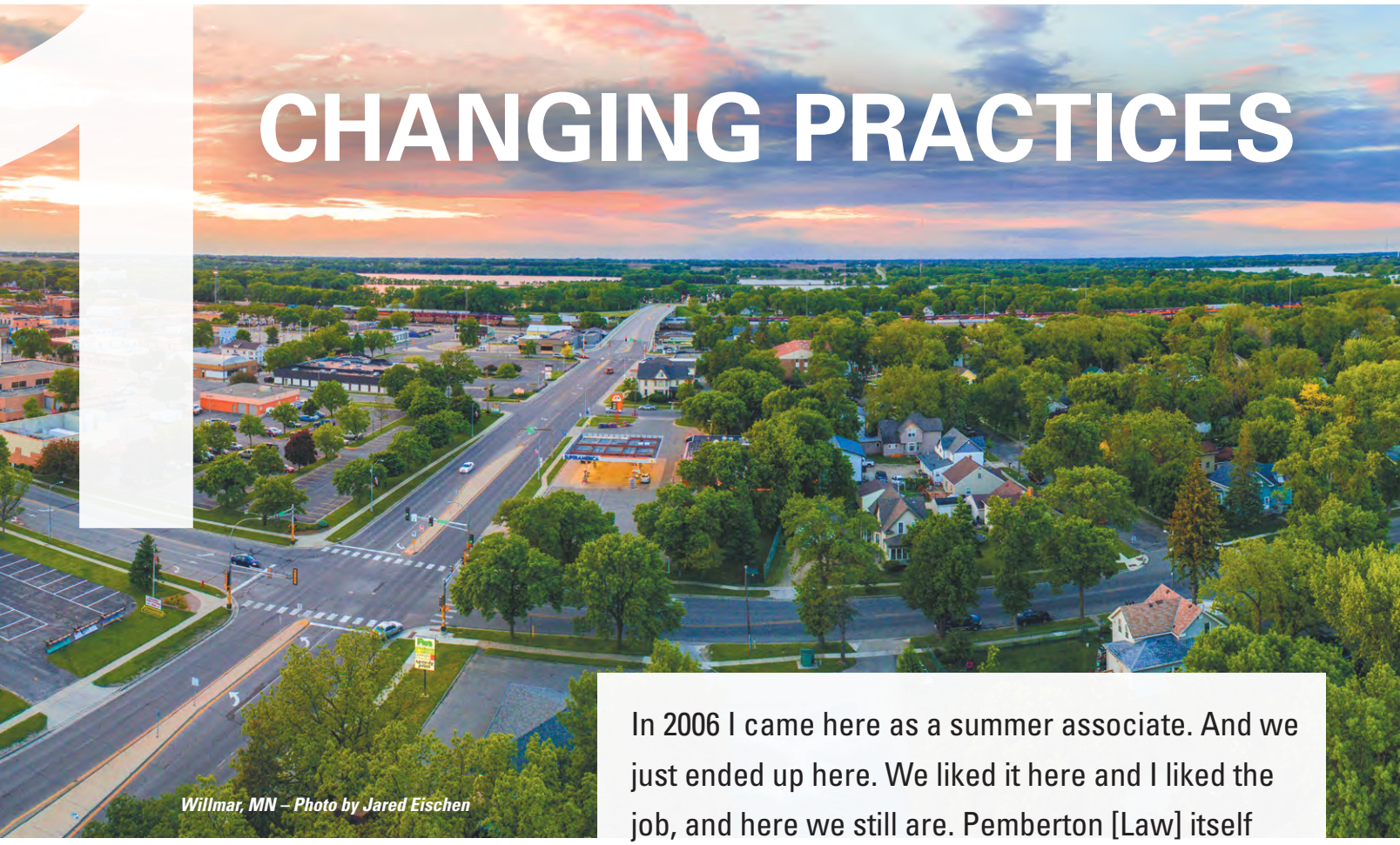
VETERAN SMALL-TOWN ATTORNEYS TALK ABOUT THEIR PRACTICES, THEIR COMMUNITIES, THEIR PROFESSION—AND THE WAYS THEY ARE CHANGING

Consider this: Strictly by the numbers, most Minnesotans have never even met a small-town lawyer. Yet nearly everyone can conjure a mental picture of one, gleaned from countless reference points in literature and popular culture. To a considerable extent, they are still what people think of when they think of the legal profession. They're the problem solvers in their towns, the dispute settlers, founts of institutional memory and practical wisdom.

It's a tidy picture and a flattering one, as far as it goes, but there is a lot about rural and small-town legal practice that it misses. This spring and summer, Bench & Bar editor Steve Perry interviewed 11 greater Minnesota lawyers at length about their work. And it probably shouldn't surprise anyone to learn that small-town lawyers are experiencing many of the same dislocations as their metro counterparts—changing client expectations, a shift toward more focused niche practices, struggles to integrate technology in ways that actually benefit their practices and their clients, concerns about isolation and emotional health and professional civility.

As a number of voices attest in the oral histories that follow, many areas in Minnesota face the additional problem of lawyer shortages. But their stories also reveal a setting rich with opportunities for younger lawyers capable of spotting good long-term investments of their time and talent.

CHANGING PRACTICES



Willmar, MN – Photo by Jared Eischen

In 2006 I came here as a summer associate. And we just ended up here. We liked it here and I liked the job, and here we still are. Pemberton [Law] itself has evolved in the time I've been here—I've kind of seen niches develop just in the last 12 years.
– Josh Heggem

STEVE BESSER
Dolan & Besser, Litchfield

When I got out of law school, I went to Duluth to be a torts attorney. A civil attorney. I joined Falsani, Balmer, Berglund, & Merritt, which was one of the three large personal injury law firms in town. November of 1997 is when I came to Litchfield. The first big change was—I'd gone from a specialized boutique practice, personal injury and workers' compensation, to a general practice, which you pretty much have to be in a small town these days. You take whatever walks in the door.

A conversation I had shortly after my arrival that I'll never forget: Will [Dolan] was walking through the office a couple of days after I got here, and he said, I need you to do a title opinion. I said, okay. He said, you've done a title opinion before, haven't you? I said no. He said, what kind of attorney has never done a title opinion? I'm a smartass. I said, have you ever had a leg-off case against a freighter company? He said no, and I said, what kind of attorney are you? [Laughs]

When I got here, there was a big learning curve coming from a specialized firm to be a small-town attorney. Everyone wants to ask you a question. The people in town who know you love to stop by. They walk in the front door—this is both the bane and the blessing of a small-town practice—and say, I just need to see Will or Steve for a minute. Which means meet me out in the lobby, I've got a couple of questions to ask you and I don't want you to open a file. [Laughs]

There are a lot of daily interruptions from walk-ins or quick calls. And we encourage our clients to do a quick phone call, because a lot of times in two or three minutes, we can give them a little bit of advice and help them avoid having to come in and see us professionally. We both like that aspect of the practice, because you generally go into law not just to have a profession but to do what we're supposed to do—solve problems, help people.

My practice started to change when I had some clients who came in and did a sale of their business to a national entity. I have now become kind of the lead contract counsel for this national entity, and a lot of my contract work comes to me via email from all around the nation. I'm spending a lot of time reviewing contracts and sending them back via email. So I have both a local practice and a national practice. Technology has enabled me to do that.

MICHELLE ZEHNDER FISCHER

Nicollet County Attorney, St. Peter

When I started my practice, the Nicollet County Attorney's Office was a part-time county attorney's office. So I did part-time prosecution and county attorney's office work and I also had a civil practice. When my boss, County Attorney Mike Riley, retired, there was an opportunity to consider making it a full-time office. The board appointed me to finish the term of Mike Riley in the fall of 2011 and decided to make it a full-time county attorney's office.

Through the years the case load has increased. We've seen increases in criminal cases coming in and also in the child protection/human services area, from child protection matters to vulnerable adult prosecutions to child support work. It does seem that there's more interconnection of all the pieces in a lot of cases. We might have a family we're dealing with that has a family law case, and then they might have a child protection case and a criminal case. And there could be a civil commitment case or a child support case. Those components are often intertwined. And trying to juggle all those interconnections in addressing whatever the issues are seems to be getting a lot more challenging.

As are the issues—we've certainly seen an increase in mental health issues since I started. I don't know whether it's due to increased awareness of mental health issues or it's a rise in mental health issues that people are facing. I think it's probably a combination of both. The changes in what the county attorney's office are seeing involves changes in the impact that chemical use and mental health issues are having on our work. Compared to other outstate areas, we're fortunate to have more access to resources than some other counties of similar size.

That said, we continue to struggle with finding enough services to offer individuals. We struggle to find service providers for chemical dependency and mental health. I attended a meeting recently where I learned that our providers for adolescent chemical dependency treatment continue to decrease. Which I find concerning, because if we can't address those issues when people are kids, we're just going to continue dealing with those issues when people reach adulthood. Early intervention and prevention are always the better answer.

I have four assistant county attorneys, I have four paralegals, and then I have a victim/witness coordinator. That's a full-time grant-funded position. The coordinator is something that had been a part-time position that evolved over time. We saw, number one, an increase in our statutory obligations as it relates to notifying victims of their rights. But we also saw an increased need to respond to victims and their needs.

I'm also the civil adviser for the county and the county board. My civil practice can include contract review, looking at any liability claims, addressing data practices issues. Somebody once described the county attorney's office as a kind of general law practice, because we do so many different things, both criminal and civil, through the course of the day. I handle drainage law for the county. We handle civil commitment and guardianship-conservatorship questions. We handle child support and paternity disputes. Eminent domain and condemnation actions. Any general civil questions that departments have, our office is responsible for responding to those.

BARBARA HEEN

solo practitioner, Willmar

I married a man from western Minnesota, and one of his life goals was to raise our children on the farm he grew up on. At the time we met and got married, we both lived in Minneapolis. He had a career as a journalist and communications professional, and I was working in financial services and going to law school. I wasn't interested in being a traditional attorney. I wanted a credential that I could use to do strategic analysis for insurance and investment companies. My intention was to work in downtown Minneapolis forever.

After 17 years of working downtown, corporate America and I effected a very amicable divorce. I got the kids, and at that time we understood that I simply was not built to be successful in very, very large multinational, multi-billion-dollar corporations. I used that time after I left working downtown to really think hard about what I'm actually good at. And during this evaluative time, in the early 2000s, a little old lady from church called me up and asked me to write her will. [Laughs] You hear of things like that, but it actually is true.

So I got the little old lady's will done and another family from church called me and said, you know, we've got two minor children and we should probably do something. So I did that estate plan with minors, and then I thought, wow, this is pretty great. I love working with people. And I had just spent 17 years avoiding at all costs working directly with the clients. Come to find out, that really was where my true heart is.

We moved to the family farm in the country, 30 miles south of Willmar. Willmar has a great tradition of a few very large employers, but they've done a really good job as a community of having medium and small businesses as well. So it just seemed there was enough life and livelihood that we made Willmar our commerce center.

Because of my planning background, I work very, very hard never to see the inside of a courtroom. I don't litigate, I refer that out. My law practice is a pure counseling and drafting business. So I work with clients on estate planning and small business transition, whether that's a farm or another kind of small business. But I don't branch out into any other area of the law, just so that I can keep control over my clients, my calendar, my expertise. Just getting our kids through school was

▶ When I got here, there was a big learning curve coming from a specialized firm to be a small-town attorney. Because everyone wants to ask you a question. The people in town who know you love to stop by. They walk in the front door—this is both the bane and the blessing of a small-town practice—and say, I just need to see Will or Steve for a minute. – Steve Besser

Alexandria, MN

▶ I opened my own office when my second child was born. At that time, I knew I wanted to do more estate planning and less litigation. Over time, I reduced my family law and litigation practice and transitioned, over several years, to an estate planning, probate and trust administration, and elder law practice.
– JoEllen Doebbert

a commitment, and if you have court dates on your calendar—if you do other kinds of law—then I would not have control over my time to the extent I wanted. Controlling my time was more important to me than building my business in a financially lucrative sense.

It's worked out pretty well. I have fiercely loyal clients and they bring their kids to me, their parents, their friends and family. So my practice is smaller on purpose, but it's guaranteed. I have people who will call me every couple of months and people who won't call me for five or six years. But whenever they call me, they're ready to go and I can serve them. I'm the greatest part-time estate planning attorney you ever met.

JOSH HEGGEM

Pemberton Law Firm, Fergus Falls

I was clerking for a judge in Anoka when I was in law school, kind of a summer deal where I was getting credit for it, and I ran into a guy who was clerking for another judge and happened to be from Fergus Falls. I was talking about wanting to live and work in a small town, and he said, you should check out Pemberton Law—they're in Fergus Falls. I had driven past Fergus Falls a couple of times on the freeway but had never been there. I jumped on their website and here's this rather large law firm in outstate Minnesota that actually had a summer associate program and was operating more like a bigger law firm. I'd been searching in the Brainerd area and there were a lot of smaller, four or five attorney firms there, but nothing like the size of Pemberton.

In 2006 I came here as a summer associate. And we just ended up here. We liked it here and I liked the job, and here we still are. Pemberton itself has evolved in the time I've been here—I've kind of seen niches develop just in the last 12 years. Back then people who came on board kind of started out as a small-town lawyer. We'd have people come on and do a little of everything. That's what I did. You start out helping whoever walks in the door. I did lots of different things the first couple of years—real estate, a lot of general litigation, family law. I represented a few clients' kids on DUIs. Random stuff.

This firm has been around for like 130 years. We can actually trace our roots back to a lawyer who had an office upstairs in the bank building, which we now occupy entirely. Historically, back when Dick Pemberton started, it was a litigation defense firm that did a lot of insurance defense work. And a lot of general small-town practice, like estate planning. That's changed even in the course of my time here—we've got practice groups in labor and employment, litigation, estate planning, real estate, corporate law. We have groups of people that are all specializing in those particular areas. I've got two other partners who do labor and employment law exclusively.

Even from the first day, I was involved with our labor and employment group, too. My early involvement was mainly with workplace investigations, which I really enjoyed doing. I quickly kind of became the go-to person at the firm to do workplace investigations. And that evolved into doing all kinds of other labor and employment work—primarily for public entities at first, because that's what some of my partners were doing. But also doing more and more work for private entities and nonprofits. We represent a lot of electrical cooperatives, and I work with them on labor stuff.

I definitely would call myself a workplace investigator. I do one to two a month, generally, and a lot of what I would call human resources consulting, where I'm working with HR on various types of problems, from 15-minute problems to ones that can involve lots of work over the course of months. I feel like I'm in a cool position, because I do this specialized work that not a lot of other people are doing, but I also get to live where I want to live. And there are a lot of benefits to living in small-town Minnesota. So in my view, I get the best of both worlds.

JOELLEN DOEBBERT

solo practitioner, Alexandria

I opened my own office when my second child was born. At that time, I knew I wanted to do more estate planning and less litigation. Over time, I reduced my family law and litigation practice and transitioned, over several years, to an estate planning, probate and trust administration, and elder law practice.

Preparing estate plans for clients who, for the most part, are in a positive and planning phase of their lives has meant a more enjoyable practice. In addition, working with clients who are at the end of their lives, who are reflective of where they have been and where they are going next, has been an honor and a real joy, which has brought meaning to my life and fulfillment to my practice.

Another aspect that I have added to my practice over the last decade, which has been very meaningful to my clients and to me as well, has been what I call a legacy conversation. I give the client the opportunity to talk about their values, what their life has meant to them, and how they want to be remembered, and the conversation is recorded and saved on a CD for their loved ones to listen to at some future point in time. The recording is a real treasure for family, and it is an honor and a blessing for me to hear people's stories and help preserve their memories and life lessons.

I typically use a combination of flat rate and hourly billing, depending on the service I perform. Once I know a client's situation, my goal is to give the estate planning client a written estimate of the costs involved by quoting a flat fee for the documents to be prepared, supplemented by an hourly rate for extra conference or research time if the number or extent of conference time, for example, cannot be predicted at the outset. Clients appreciate having a ball park estimate of fees early in the representation. As the owner of my firm, I am able to adjust my rates and fees on a case-by-case basis for those I feel cannot afford a certain fee.

MOLLY HICKEN

Cook County Attorney, Grand Marais

I started my first job as a lawyer in this office 12 years ago, as the assistant Cook County attorney. This office has just two attorneys—the county attorney and the assistant county attorney—and two staff. That tells you how small we are. I came to this kind of work out of law school wanting a career in public service and wanting a career that would have me in the courtroom. So when I moved back to Minnesota from Oregon, where I went to law school—I'm from Anoka—I was looking for assistant county attorney jobs thinking they would give me a good mix of public service and courtroom work. It checked both boxes for me.

I came to this office specifically because it's one of my favorite parts of the world. My parents have a cabin up here, so I was familiar with the North Shore and a fan of outdoor adventures. I'd spent my summers up here during college, so I knew I liked the area. I had never lived here year-round, so that was a new experience that took me a while to get used to.

As assistant county attorney, I was doing mostly criminal prosecution and child protection work. Also civil commitments. I did that work primarily for about four years, until this office was greatly disrupted by a shooting. Our former county attorney, Tim Scannell, was shot, and that happened in our office. I was present. It was a very traumatic event. That was four years in, and when Tim was in and out, I started picking up more civil work. Then he was later involved in a scandal related to a 17-year-old girl, and prosecuted for that.

That's how I went from assistant county attorney to county attorney. I was officially appointed county attorney in 2014, and I've been in that role since. This is my second term as county attorney. I guess I started taking on more than prosecution and child protection in 2011, and that's when I started getting a grasp on all the various work that goes through this office.

It's greatly varied. A county attorney's work has been compared to general counsel work for a corporation. You are practicing in a handful of areas of law every single day, constantly learning new things. There's no specialization, really. Municipal legal work is contract drafting and contract review, advising our county officials on open meeting and data practice laws, procedures having to do with official actions taken by the board, advising department heads on zoning actions, sitting in on planning commission meetings and board of adjustment meetings. We advise the public health and human services departments on licensing matters, such as day care and child care licensing and foster care licensing. It's really a great variety of work.

In general our case load has gone up. Our population has remained the same, but our case load has gone up. And I can't tell you exactly why, but I can tell you it correlates with a rise in our tourism base—the number of people coming into our county as tourists. That's where a lot of our work comes from. The criminal case load includes a lot of DUIs—it's probably proportionate to other counties our size, but more of our DWIs involve people who don't live here; they're visiting. As our tourist population has risen, our case load has risen slightly.

The types of cases haven't changed substantially. It's still primarily DWIs, domestic violence, and drug cases, as far as major cases go.

PAUL MUSKE

Muske, Suhrhoff & Pidde, Ltd., Springfield

I always wanted to be an attorney, from the time I was in high school. After graduating from law school, which was interrupted by a two-year stint in the Army, I practiced in Glencoe for about two and a half years. Then my wife graduated from law school and it wasn't going to work for us for her to work in the same county because of potential conflicts of interest. So we decided to go out on our own, and there was a gentleman who had retired from practice in Springfield and we saw an ad in the Bench & Bar and wound up coming down here. We've been here since 1978.

We started out doing just everything—real estate, estate planning, probate, typical smaller town work. In 1981 we became city attorney for Springfield and for Comfrey, and since then our municipal work has expanded. In those early days I did divorces, bankruptcies, just about anything that came through the door. I no longer do divorces or bankruptcies, so basically it's real estate, estate planning, and probate along with municipal that are our primary areas.

What we do at our firm really hasn't changed a lot. What we do is help people solve problems. That's still the bottom line. With the typical residential property sale, little has changed over the years. I think the biggest change has been that white-out and carbon paper used to be our best friends, and technology has changed how we provide the services. The services themselves have probably not changed drastically.

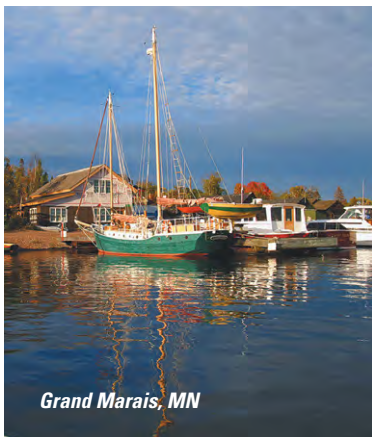
STEVE PELOQUIN

Peloquin Jenson PLLC,
Park Rapids/Perham

We're dependent on people who come and go and just walk in the door. So you're looking at doing deeds and wills and trying to figure out how to resolve disputes economically and avoid courtroom expenses.

We do tons of family law. As a matter of course in a general practice in a rural area, you're going to do family law. You're not going to specialize, or it's going to be rare. If you talk to any family law practitioner, in rural areas anyway, getting those bills paid is difficult. Even in cases that settle, which is most of them, the bill can be fairly high, the people are splitting and their economic base has just been divided by two. So you end up with a lot of

▶ When I moved back to Minnesota from Oregon, where I went to law school—I'm from Anoka—I was looking for assistant county attorney jobs thinking they would give me a good mix of public service and courtroom work. It checked both boxes for me. I came to [Cook County] specifically because it's one of my favorite parts of the world. My parents have a cabin up here, so I was familiar with the North Shore and a fan of outdoor adventures. – Molly Hicken



Grand Marais, MN

▶ We're dependent on people who come and go and just walk in the door. So you're looking at doing deeds and wills and trying to figure out how to resolve disputes economically and avoid courtroom expenses.
– Steve Peloquin

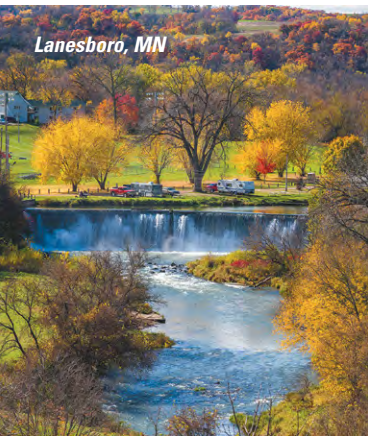
receivables, and there's just a ton of family law. That's part of our bread-and-butter work.

We live in lakes country here, and boundary disputes are an issue. You can spend 30 to 50 grand litigating cases that aren't even jury trials. To really litigate a criminal case, you can spend that kind of money too. I did a felony trial a few years ago that was a big deal, and it was a $75,000 bill. Well, how many people do that? The answer is, a handful. So you're never going to have that kind of practice. A criminal practice in the outstate [area]? Really difficult. It's mostly public defender stuff, or people who just can't afford the big guys.

If you look at real estate practice, that has changed dramatically in 30 years. The lawyers used to go to the closings and they did the documents; they were there to help at the signing. Hell, all that's done at title companies now. Lawyers are completely cut out. Why? Cost. So you don't see that. People are always coming in and asking, how can I get this done as cheaply as possible? That's normal, but we struggle with that. I remind my folks that we have to remember who we're serving here. And that reflects on our income, frankly.

At the [MSBA Greater Minnesota Practice Section], we've been talking about getting some real measure of lawyer incomes out here. It's stuff people don't want to talk about, but I can't imagine that there's a broad range of rural practitioners who make lots and lots of money—I'm talking about, say, six figures.

You look at judge and county attorney incomes, those guys make good money, I think. By the standards of rural areas, they make a lot of money. Plus they have all the benefits. We struggle with health insurance as a small firm, daycare benefits—all the stuff that just comes with a government job. I see solos going without malpractice insurance. We have it; I think that's a service that's needed. It's something you should have for the sake of your clients, but that's a way to cut costs for some folks. There are a lot of solos out here, and it's tough. Our accounts receivable reflect that.


Lanesboro, MN

▶ Being on the bench really ignited a fire—made me say, I can do this and I can do it better without killing myself in the process. So I came back, and I decided to do it differently than before. The business model became more of a niche, a boutique. So I have way fewer clients but I give way more service.
– Antonio Tejeda Guzman

ANTONIO TEJEDA GUZMAN

Tejeda Guzman PLLC, Willmar

I'm obviously not from here. [Laughs] I came to outstate Minnesota because I married this lady from here. Many years later we went through a divorce, but I stayed here because the practice is here. When I first came here, I was hired by a firm in Willmar with the intention to help one of the senior partners expand their workers' compensation practice. It was with an eye on the local Latino market, which was growing. This is 16, 17 years ago, and that was still a relatively new thing. So it was driven by supply and demand and a very niche need driven by a very large meat-packing plant in Willmar.

That's how I started doing what I do. As the years passed and I kept expanding my portfolio, I went independent a few years later and just kept doing workers' compensation, because by then it was what I knew how to do to pay the bills. I like to think I was somewhat successful about it, and I frankly didn't want to learn anything else. I didn't want to learn family law; I've never done a divorce. I hadn't done criminal law in 10 years.

So I just kept minding my niche. It was again driven by the market—no one else, or at least very few people, were doing it. When you get out of law school, everyone wants to be a "real lawyer" and do criminal law. Well, you can only be a PD or a prosecutor. Or people get out of law school and want to do family law. There's lots of competition doing that. Workers' comp is not high on anybody's list, unfortunately. It should be.

Over 90 percent of my practice is Spanish-speaking-only clients. And now, so many years later into my practice, I closed my workers' comp practice and I was a judge in St. Paul for a while. I didn't necessarily like it. Maybe I was too young for that. So I resigned the bench and came back to practice about a year and a half ago. And I absolutely love it, I absolutely love the practice of law now. Before it was more like a burden. Now it feels more like a hobby that I truly love.

[As a judge] I saw things in ways I had not seen them before. I learned new things just seeing the totality of the process from a judge's point of view. Only then did I fully grasp what a well-prepared advocate can really do. To be a judge, you really have to be willing to give up your advocacy hat. In hindsight, maybe I really wasn't ready to do that when I took the bench. That was my fault. Call it youth and ignorance. Being on the bench really ignited a fire—made me say, I can do this and I can do it better without killing myself in the process.

So I came back, and I decided to do it differently than before. The business model became more of a niche, a boutique. So I have way fewer clients but I give way more service. And it turned out to be more profitable and a whole lot more enjoyable, mentally and physically. I became more selective with my clients, for one. Workers' compensation is a contingency-fee practice, and that's by statute. So if you lose, you lose—you don't collect. So I learned to spot what's a decent file, what's a bad file, what's a really good file. Is the judge going to like this person? Am I really willing to work for free for this guy to the end? I really have to like the person. It was all those factors that made me better able to say, I want this person for a client or I don't want that person for a client. I became much more comfortable in saying, no, I don't want you as a client. And that's okay.

So that was the first big change. The second big change was being comfortable with a smaller case load, and not being so paranoid about, where's my next file going to come from? You find your place in the market and you have faith in the market and the market is going to take care of you. I really do believe that. And it's worked out well for me.

ROBERT A. WOODKE

Brouse, Woodke & Hildebrandt, PLLP, Bemidji

I started in Bemidji in November of 1978. Before that I was a law clerk for the District Court of Minnesota in the 5th Judicial District. I came to Bemidji as an associate with Romaine Powell. At that time, I did about 50 percent litigation and the other half was a mix of office practice—very general practice, everything from drawing wills and deeds and powers of attorney to contracts for sales of resorts, financing documents, you name it. A broad-based small business practice, I guess you could say, dealing with the needs of individuals and small businesses.

And while I still do that, there have been a lot of changes over the course of my career. Most notably, a tremendous growth in bureaucratic paperwork in the courts, particularly in the field of family law. All these mandatory forms and so on. When I started practicing law, a heavy divorce file might end up being a half-inch thick. That's everything—discovery, pleadings, the whole nine yards. Now those files fill bankers' boxes.

I've narrowed my focus as the years have gone by. But I still do a variety of things. I gave up estate planning in 1995 when my other partner—Bruce Meyer, who's now deceased—and I formed a partnership with Mike Brouse, who concentrated almost entirely on what I would call estate planning. That part of my practice went to Michael, who's now retired, but now I have a new partner, Amber Hildebrandt, who does all of that kind of work in the firm.

I don't do criminal litigation anymore. I also don't do personal injury work anymore. I gave up personal injury work when a couple of ambulance chasers came to the area and I wasn't willing to stoop to that. You're either in personal injury work or you're out of it; it's not smart to dabble in personal injury law. It's too complicated not to spend a lot of time on it. I found that, for me, a good commercial dispute or a good real estate dispute offered just as much personal satisfaction with a lot fewer headaches.

I still do product liability defense for manufacturing firms because I have unique knowledge of their products. I do that nationwide—not as much as I used to; I'm a victim of my own success. I had several manufacturers who, whenever they got sued, they wanted me to be in charge of their defense. As a result I was admitted *pro hac vice* in a number of jurisdictions, always affiliated with a local lawyer. Quite honestly, I had a really smart client, and they engaged me not only to defend the case but to assist them in their forward-looking risk management. So we've eliminated some of the risk by careful planning. So I don't have to do it as much anymore, but I've got really happy clients who send me other business. I'm not going to complain about that.

ANGELA SIPILA

solo practitioner, Virginia

I prefer to practice with another lawyer. In the last 16 years, I have trained in eight lawyers and 10 legal assistants, but I always return to being solo because I make more money that way. Since every phone call just gets forwarded to me anyway, I might as well answer it. I have a part-time lawyer keeping me company two days a week currently.

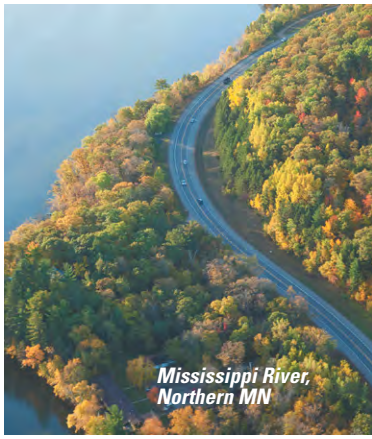
I have a firewall, a network, three monitors, and two dogs. I don't understand why HotDocs isn't a better product. I want Siri to draft deeds for me. I was surprised to find out that my VoiceOverInternet phone line accepts and sends faxes and texts. I adore getting emails of the transcribed voice messages, because it tests my patience to listen to voice mail.

I don't have time to keep track of my time. I use PCLaw to attempt to bill two hours a day. I usually cap my day at $600 for all-day mediations, and at $1200 for all-day court trials. At mediations, I'm playing on my phone during the downtime, and I'm not going to bill for that. Maybe this difference from charging for being present as a valuable-human-being to charging for the value-added is just me, but I don't have clients screaming at me for over-charging, and I have some very cheap clients. I question whether I could be getting my work done faster. You can have fast, good, or cheap—pick two. I can't spend eight hours a day cranking out documents. I often spend up to four straight hours drafting, with clients watching me type. Any intensive lawyering, such as working with clients, going to a contested court hearing, or mediating, drains my energy for the day and I need to goof off, either chatting or playing cards on the internet.

I do next to no criminal law— only if it's a first-time offense and a misdemeanor, where the client can get a stay of adjudication, I'm a one-trick pony. If it's anything more serious, if someone has any kind of record, or if the client qualifies for a public defender, then I get the file to someone else. And then I backseat-drive a little bit, trying to get that stay of adjudication so it won't be on the client's record.

I do legal work about six hours a day, counting meetings with clients. I'm on the phone for two hours, and then I spend two doing my administrative paperwork. I bill for about two hours a day. So I'm working about nine to 10 hours a day and billing about two. But that's okay. Am I a private social worker? Sometimes. I spent about an hour this morning with a client who dropped in and brought doughnuts. Fabulous doughnuts.

Every once in a while I'll have a big payday—a $10,000 or $15,000 probate in which the real estate sells. If I can keep my expenses low, that becomes my profit.



▶ I prefer to practice with another lawyer. In the last 16 years, I have trained in eight lawyers and 10 legal assistants, but I always return to being solo because I make more money that way. Since every phone call just gets forwarded to me anyway, I might as well answer it.
– Angela Sipila

CHANGING COMMUNITIES 2

Battle Lake, MN

Like most rural communities, [Springfield has] seen some decline in population and some change in population mix in the sense that when we first started, it tended to be true that people were born here, lived here, and died here. Over the years we've seen more influx and more outflow of people.

–Paul Muske

JOELLEN DOEBBERT
solo practitioner, Alexandria

As in Minnesota generally, the population living in the rural, lake-filled areas of west central Minnesota (Alexandria-Glenwood area) is becoming older. The recession hit this area about a year after the markets tumbled in 2008, and people tended to have less for "discretionary" spending, which often includes legal services. Although the economy appears to be strong now—if you look at the stock market—I sense uneasiness from clients and potential clients in terms of spending their money. There is underlying anxiety in the rural area about the economy and it is reflected in how people are choosing to spend their money.

BARBARA HEEN

solo practitioner, Willmar

If you are going to practice in greater Minnesota, you need to be willing to think beyond law practice. The more involved I became in my community, the busier I became as a lawyer. Last summer I had a backlog of six to seven weeks of work I had taken in, and it was never-ending. It just kept rolling for seven or eight months. I had more work than I could do, which enabled me to hire an assistant, which was the greatest thing in the world. I think it's attributable to community involvement.

I have families of clients. People bring their parents to me, their kids to me, their nieces and nephews—it branches out. If you are thoughtful and fair and decent, you can practice indefinitely in greater Minnesota. I've never worked a 2,000-billable-hour year ever. You can do all right, but it's an investment of time. I spend almost no money on marketing. It's a lot of face time. It's those winter health fairs and senior citizens' fairs. Community involvement. It takes more time than money. Advertising does help, but I look back at my marketing budget over the years and it really hasn't changed. The benefit to my practice from community involvement is the most significant impact.

STEVE BESSER

Dolan & Besser, Litchfield

There are a lot of people who really cannot not afford legal assistance at the going rate. Like I said, we do a lot of that. We don't record pro bono here, but we get a lot of people stopping to ask a quick question. I don't know that you'd find that in the Cities. I don't think someone's going to show up at Faegre Baker Daniels and say, I need to talk to a lawyer for a minute. [Laughs]

Litchfield is the county seat, 6,500 people. The town has changed. Some of the industry that's come here has helped greatly. We've got a trailer manufacturer that has an assembly operation here. Doosan bought out a company that made attachments for Bobcat, and they're also here. The towns that don't have that don't see a lot of people hang around. A lot of the young people have moved out. Some of the area towns outside Litchfield—Will [Dolan] and I serve as city attorneys for various towns, and there's not a lot of work to be done there. Mostly it's helping them if there's some real property issue or advising them if there's some zoning issue. But not a lot of activity in some of these towns.

In the farming end of it, too, we're noticing that in some of the farm leases we do, there are changes in how they're structured based on the drop in commodity prices. The interesting thing is, you might think it's a dreamy life in a small town, but believe it or not, there is constant flux, because you're trying to keep up with the law and also the population is aging. In my church, at 66 years old I'm one of the young people. So we see a lot more estate planning work now. That has probably doubled since I joined the firm in '98.

Another interesting thing in a small-town practice is, we fight what I call the traveling salvation show attorneys. There are some lawyers who have set up estate planning practices. They're usually out of a suburb in the Cities, and they come out and put on seminars and talk to people about estate planning and how they need a trust and they need to spend $1,995. We will oftentimes wind up talking to these people and telling them, you don't need that. You're being oversold. We end up either doing nothing for them or doing a little pro bono work there.

A woman called me one time who had gone to one of these seminars and said, this lawyer just called and said I'm going to need to spend $21,000 on a probate unless I get this trust in place. I said, where are you living? She was living in an assisted apartment here in Litchfield. I said, do you have a lot of real estate? Oh no, I just live in this apartment. Do you have a lot of investments or money that you need to control? Just my Social Security check each month. And I told her, you don't need to do a thing. You can put a transfer-on-death notation on your checking account, get a health care directive and a power of attorney, and you'll be okay.

Some of our work tends to be fighting misinformation and fraud. I suspect it goes on in the Cities, too, but in a small community you see it a little more at the firm, because people are more likely to call an attorney who they know personally.

And that's another thing about a small-town practice—there's a level of respect. Doctors and lawyers get lumped together here. In a small town reputation is important. And you know the saying: It takes years to build it up and a second to throw it away. That's especially true in a small town. You're continually under the microscope. We have a billboard that makes us visible and brings some chuckles sometimes, but that's really our only advertising besides the entry in the phonebook. The rest is word of mouth.

We are extremely busy. Our clientele is definitely aging, but we're also getting young people. The encouraging thing for me is I've done a lot of business set-up work for young people who are starting to buy out the older people. So that should keep us going well into the future.

MOLLY HICKEN

Cook County Attorney, Grand Marais

I'm involved with our local YMCA. I'm a fitness instructor there. So I'll go on my lunch breaks one or two times a week to teach a class. And I'll teach a couple of evening classes a week. I'm also on the board of our local radio station. But you won't find me volunteering in the recovery community, for example, or for anything related to bringing people up from drug or alcohol addiction, because I'm very sensitive to the power and authority I have in my position. I don't want people around me feeling intimidated by that.

▶ The more involved I became in my community, the busier I became as a lawyer. Last summer I had a backlog of six to seven weeks of work I had taken in, and it was never-ending. I had more work than I could do, which enabled me to hire an assistant, which was the greatest thing in the world. I think it's attributable to community involvement.
– Barbara Heen

▶ We are extremely busy. Our clientele is definitely aging, but we're also getting young people. The encouraging thing for me is I've done a lot of business set-up work for young people who are starting to buy out the older people. So that should keep us going well into the future.
– Steve Besser

▶ Our community has become much more diverse, and we have to be sure we're aware of that diversity and reaching all individuals in our community. We're making sure that our forms are available in Spanish, and making sure that we are addressing all the different language needs and getting our message to all the communities that we serve.
– Michelle Zehnder Fischer

They need to be able to freely share, and they wouldn't want to share about a relapse in front of a prosecutor.

Because I'm a transplant here, I've experienced living in a place where it's really easy to go grocery shopping or to go to Target and I don't have to drive five miles to the nearest convenience store or 20 miles to the nearest grocery store—which is the case for me, because I live in Lutsen. I can complain about all those inconveniences, but there are also many benefits to living in a small community. People are more accountable to each other.

In my practice as a prosecutor, it's a lot more difficult to draw a thick line between the good guys and the bad guys, because we are all each other's neighbors. So I have prosecuted people in my neighborhood, contractors who've been in my home to get work done. You can't just cut every single defendant out of your life and say, this is the good team and that's the bad team—which I think tends to happen with prosecutors in larger communities. In our office everybody gets treated with the same level of respect, whether you're charged with a crime or you're a victim or witness of a crime. Because we are forced to continue to interact with everybody, whether they're a defendant or a witness. So you learn to deal with conflict in a different way as an attorney.

And if you can't handle that—because the downside is that it can be uncomfortable to go into certain businesses while you're prosecuting the son of that business owner for a major crime—you need to move back to the metro area or wherever. But there's also benefit in your neighbors knowing you, because if you build trust with them, that will make your life easier and your job easier.

PAUL MUSKE

Muske Suhrhoff & Pidde, Ltd., Springfield

Springfield has had a fairly stable population. Like most rural communities, it's seen some decline in population and some change in population mix in the sense that when we first started, it tended to be true that people were born here, lived here, and died here. Over the years we've seen more influx and more outflow of people. There are more non-Springfield natives who live here in town.

The farm economy has changed significantly in that we had the typical small family farms where people would farm 200 or 300 acres, and now we're seeing 2,000-3,000-acre farms. Land values have increased significantly. When we came here $2,000 an acre was a high price for land, and we've seen it go up to $10,000 and now back down to $8,000-$8,500, which has complicated estate planning, of course.

MICHELLE ZEHNDER FISCHER

Nicollet County Attorney, St. Peter

We're seeing different demographics of culture and race in our practice, and who we're reaching with our work. We continue to reach out to different communities to have a dialogue about how we can work to address everyone's needs. That's a change I've seen in my 20 years. Our community has become much more diverse, and we have to be sure we're aware of that diversity and reaching all individuals in our community. That's one of the things we're looking at with our victim/witness coordinator role. We're making sure that our forms are available in Spanish, and making sure that we are addressing all the different language needs and getting our message to all the communities that we serve.

ANGELA SIPILA

solo practitioner, Virginia

There's always been poor people. I grew up poor here. My family was on food stamps. But other people were too, and you still functioned at a lower middle-class standard of living. Nowadays folks on food stamps and benefits, they suffer. We weren't suffering when I was little. There was enough to eat and the house was warm. I was happy to go to school. But now people have housing problems; they can't stay put. Drugs—some people smoked pot and drank a lot of alcohol when I was a kid, but I didn't see addiction disrupting families like I do now. Maybe it's because I was a kid, maybe because women in the past effectively put up with bums, but even in high school I didn't notice addiction disrupting families like I'm seeing it now.

The gap—back when I was poor, everybody was poor [laughs], there was no gap. It wasn't really poor. It was lower middle class. Now that gap is a different culture. The crisis of resources with the people I deal with, they don't even have friends who can drive them somewhere half of the time. They can't scrape up 20 bucks. They lose their driver's licenses and they can't get jobs. They can't run a computer. The online culture has just now taken hold here, and there is a divide between the people who have a smartphone and have enough money to pay the bills, and those who just don't.

I think we are going to kings and queens and peasants again. The world started that way. Maybe that's just the natural bias of human societies. I come from the peasants. A hundred years ago, when mines were mining the Iron Range, they would create housing for the workers. Very paternalistic. Here's your little house, here's your little garden. I just watched the PBS show *Lost Iron Range*. The companies controlled people to a mind-boggling extent, wanting them to not unionize. They paid them very little but they gave them a house, a society, and people were happy with that. That happened, and I can see company housing becoming a thing again, where everybody's got their little trailer house and they show up to work 8-5 like they're supposed to.

STEVE PELOQUIN
Peloquin Jenson PLLC,
Park Rapids/Perham

In Park Rapids, we live near some of the poorest counties in the state. If we look at Mahnomen, Becker, Clearwater, these guys are struggling. People are relying more on themselves to try to solve problems. You see dockets more crowded with unrepresented parties, which makes life more difficult for people who are represented on the other side. The expectations here in terms of how much you can charge people for your services are different, I think. There's much more low bono, if you will—we've been doing that for years.

So your hourly rates are always at issue, the amount you charge for flat-rate stuff is always a consideration. There are people making $30,000-$40,000 a year, so they're not looking to spend 10 grand on a legal problem if they can avoid it. That's tempered by the fact that there are people who do well and need help out here, but I think small law firms are particularly taxed by that in the sense that our income is not [steady]—I don't have an 80-lawyer firm with a bunch of good corporate clients who are going to generate repeated billings for associates.

In this area opioids and meth are a big-time deal. Does that affect families? Tremendously. You see it all the time; you see domestics affected by that. Alcohol remains a huge factor, too. Don't discount that. But [drugs] are as big a problem here as anywhere. Treatment facilities, diversion programs and the like, are potentially less plentiful here. Hubbard County is trying to get a drug court going.

If you look at meth, the drug itself is insidious in its addictive power. It's not something where you say, well, I'll dry out and then I'll be good to go. And with the opioids, the level of access to these drugs is unbelievable—you walk into a house in rural Minnesota and go to the medicine cabinet and you can find anything from Ambien to—name a narcotic. Fentanyl. It's all around us. We never really thought much about that until it happened to us.

There's probably more criminal law involvement with family courts. If Daddy is drunk or using meth and that's impacting the family and I've got to get out, get a divorce, there's probably going to be a criminal law reaction there as well as family law procedural stuff. I'm surprised at how often grandma and grandpa are the solution for raising children in these situations where both mom and dad are messed up with drugs, or one of them is messed up and the single parent says I'm working and I can barely support myself and I need help. And we've got kids with a drunken parent or drug-addicted parent who is not trusted.

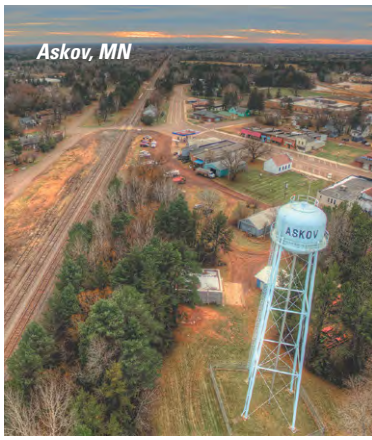
You see HROs, OFPs, restraining orders in just regular divorces. You see parenting plans that are affected by the fact Daddy was arrested and now we have a no-contact order. We have DANCOs, we have violations of DANCOs; how do we handle those? Do they still see the kids? How do we transfer people? All those things have an impact. We didn't deal with all that 30 years ago. Whether we should have been doing that back then is a really good question.

ROBERT A. WOODKE
Brouse, Woodke & Hildebrandt, PLLP,
Bemidji

I've represented clients who had work in Bemidji from as far away as California and New Jersey, and a lot of people from Iowa and Illinois and places like that. People from all over the state of Minnesota. So my practice is not just people who live and work in Bemidji. But I've seen a lot of change here. There seems to be a widening gap between the haves and the have-nots. There's a lot of need for legal services. I've had people say, well, we have legal service panels and firms and they take care of that.

Yeah, they do up to a point, but those folks have limited funding sources and they do what they can, but they can't do everything. When we went away from court-appointed defense lawyers—where the court would call up and say, we're assigning you to defend so-and-so, and you really didn't have a choice; you were on the hook—and pretty much everybody did that, those cases were not at your normal hourly rate. They were at a rate set by the court, usually enough to cover the overhead with a very small profit margin.

There was kind of an industry-wide commitment to pro bono, and today I see not as much pro bono being done as there used to be by most law firms. Now that's not an indictment of firms that have given it up, but I'm saying there's been a change in that philosophy. And part of that is the economic pressure on lawyers. For example, it used to be that virtually all titles were covered by a lawyer's title opinion. There was no title insurance industry to speak of in Bemidji when I started practicing. Now we still do title opinions when we're asked, but I doubt that we get a dozen of them in a year's time. I knew lawyers who used to do eight or 10 title opinions a week.



▶ In Park Rapids, we live near some of the poorest counties in the state. If we look at Mahnomen, Becker, Clearwater, these guys are struggling. People are relying more on themselves to try to solve problems. You see dockets more crowded with unrepresented parties, which makes life more difficult for people who are represented on the other side.
– Steve Peloquin

3 CHANGING TECHNOLOGY

The speed of the technological change in practice is overwhelming. Just five or 10 years ago, I was thinking I'd be retired before it catches me. I won't have to deal with any of this. Boy, was I wrong.

– Steve Peloquin

Perham, MN

ANTONIO TEJEDA GUZMAN
Tejeda Guzman PLLC, Willmar

In terms of technology, I've been paperless for over 10 years. I absolutely hate paper, so I rely on technology in every possible way. My paralegal lives in Nashville, Tennessee, so he's not even here in Minnesota. That's how much we push the envelope. From voicemails being automatically transferred into a WAV file that goes into an email to FAXes that go in to PDFs to a great legal managing software that does everything under the sun. Technology is the key to being able to do this with two people. Without technology I couldn't do what I do.

STEVE PELOQUIN
Peloquin Jenson PLLC,
Park Rapids/Perham

The speed of the technological change in practice is overwhelming. Just five or 10 years ago, I was thinking I'd be retired before it catches me. I won't have to deal with any of this. Boy, was I wrong. I'm a Luddite, frankly. It's not like I've embraced this stuff. In fact I do not carry a cellphone around the whole time. But my associates do. That's how they communicate, that's how they calendar, that's how they correspond. That has been a huge change, and it's probably not so different in rural or urban areas.

In a rural practice, one of the things we deal with is geography. The connectivity out here really levels the playing field in that respect. It also levels the playing field when we have access to databases that only came in book form 30 years ago and were expensive and voluminous. They took up a lot of space. Now it's all on a disc or on your phone because we're in the cloud now. A year or two ago I didn't renew Minnesota Statutes for the first time. That was hard. I like reading paper. But I couldn't justify the cost if I have them in WestLaw. My associates, Amy [Jenson] and Alicia [Norby], were looking at it and saying, why do we need that stuff? And they were right. Now we can play on the same field with, say, the Dorsey firm in terms of information access. That's a big change.

I don't enjoy the practice as much where I have somebody send me an email and expect an immediate response. I don't want to do that. I don't want to stay connected as much as everybody else does. I don't want to carry my cellphone around. I don't like to give my number out. I need a break. I also like to see people. That's one of the things I insist on that I think a lot of younger lawyers don't: Do we need to talk? Well, yeah—we should see each other. That said, the utility of being able to provide clients with complaints or letters to review, that's great. It really helps a lot and it's so quick.

That's the upside. The downside is, it's so quick. You want a change in practice? That's one that affects me every day, and I think about it all the time. We're way too connected, and there's too much said that is not really thought through. If you think back 30 years ago, bar associations met and socialized. Doing that is difficult. We still do it, but it's difficult to get lawyers together. People are busy and they might have to drive 20 miles. Social media has exacerbated the lack of opportunity to interact personally. As a result, it's less common to get on the phone and talk about a case and reach a resolution with another lawyer. That doesn't happen as much anymore. Instead the mediation system we've set up becomes sort of a crutch. It's like, I don't have to talk to you—we'll get a mediator and let them talk to us. I see that with younger lawyers in particular. They don't want to deal with that; we're going to send you a demand, and that demand's going to be what it is, and we're not going to talk back and forth. We'll mediate this.

If you looked at practice 30 years ago, you'd say it was slower paced. Had to be. You mailed stuff to each other. You talked on the phone. You don't do that anymore. In fact, people avoid you by emailing you, because you don't have to have a human interaction, and you can say difficult things because you're talking to your computer screen. You don't have to think about having an immediate reaction from the other side, or talking to the other side. Huge change in practice.

MOLLY HICKEN
Cook County Attorney, Grand Marais

Our attorneys and staff have to have mastery over about four times as many computer programs as we used to. When I started there was basically one online resource that I used regularly, and that was MNCIS, the court calendar. And we used a case management system called Damion for evidence management and organizing our criminal files. So there were two systems back then. Now we have multiple online and cloud-based resources. Through the court, we have e-charging and e-filing, MNCIS and Odyssey, and those are all separate programs with their own login sets and procedures and training. If you have to start somebody new in the job, you have to deal with training.

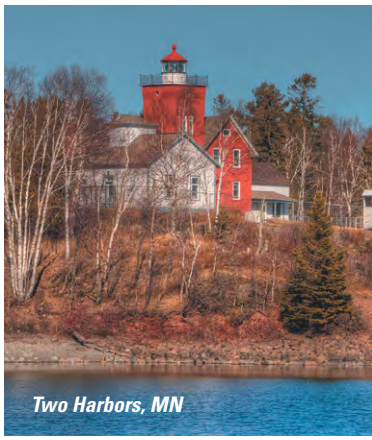
Related to criminal history records and other things that prosecutors need to have handy, we now have systems through the BCA that my staff is more familiar with than I am. So we've asked for more access instead of leaving information in the sheriff's hands only. That's a new program with new training and new policies we have to institute as an office to make sure we protect that data from disclosure.

That leads into something I wanted to talk about. All of this access to data and to electronic information, which is helpful for our cases, has also led to an increase in our obligations surrounding that data. As part of government, counties are required to be able to find and store that data and provide access to it if it's public—or restrict access to that data if it's private. We have a whole assortment of duties related to the Minnesota Government Data Practices Act, chapter 13. We have BCA-related obligations as well.

So we have to figure out how to store all this data and to organize it in a way that ensures any time I receive a data request from a member of the public, I can respond. They are entitled to a response within a certain number of days. They either need access to that data because it's public, or they need to be told why they can't have access. If it's in our possession, we need to be able to locate it. We put a lot of time into that.

As government attorneys we have to both know the rules about data and we need to assist in enforcing laws and policies and training government employees so that nobody is violating that really important set of rules about transparency in government. The state of Minnesota has some really high standards for transparency in government.

▶ All of this access to data and to electronic information, which is helpful for our cases, has also led to an increase in our obligations surrounding that data. We have a whole assortment of duties related to the Minnesota Government Data Practices Act, chapter 13. We have BCA-related obligations as well. – Molly Hicken



Two Harbors, MN

▶ I think with technology, the big thing is people demand more immediate response. It's like, I want an answer and I want it now, and I expect an email in 15 or 20 minutes, whereas in the old days you had time to think about it and draft a letter. The practice has gotten more intense in that respect.
– Paul Muske


Fergus Fall City Hall

▶ Taking the time to learn new tools and technologies is always a challenge; not only is it not my favorite thing to do, it takes time. And time is money.
– JoEllen Doebbert

It's a constant conversation and a constant demand on our resources to be able to handle it all. Technology provides us with efficiencies and with a lot of information to use in the important decisions we have to make. But with it come a whole new set of problems and obligations.

PAUL MUSKE
Musk Suhrhoff & Pidde, Ltd., Springfield

I think with technology, the big thing is people demand more immediate response. Especially with email. It's like, I want an answer and I want it now, and I expect an email in 15 or 20 minutes, whereas in the old days you had time to think about it [laughs] and draft a letter. The practice has gotten more intense in that respect. Technology has changed a lot of the way we deliver services, but it seems like the basic services have not changed that much.

STEVE BESSER
Dolan & Besser, Litchfield

The practitioners in town now have electronic filing with the courts; that saves having to send a runner or LA over to the courthouse with the filing fee and the documents or mailing them if they're out of county. We can do it instantaneously. So that has greatly assisted small-town practitioners. Being able to file immediately in other counties saves you a lot of money.

JOELLEN DOEBBERT
solo practitioner, Alexandria

When I was in law school in the mid to late '80s, Westlaw and other computer-based legal research tools were just being introduced. We learned the old-fashioned way—using large legal texts like Shepards [Citations] to check cites, and the West reporters—and, at the same time, we learned how to use Westlaw and Lexis. I have found it extremely difficult to transition to a purely digital format of legal research, without printing off cases, marking them up with notes, and writing up a few sentences summarizing major points. It is how I learned and it remains difficult to this day to read manuals or cases solely online and retain the information. The process of note taking, highlighting, and marking up a document has always reinforced my learning and retention of information.

Taking the time to learn new tools and technologies is always a challenge; not only is it *not* my favorite thing to do, it takes time and time is money. As a solo practitioner, sometimes you have to choose between serving your clients so that you can pay the rent and your staff versus spending time researching tools and meeting with vendors; it is the former that often wins out.

When I opened my practice in 1997, the biggest technology decision I had to make was what name I was going to use on my email address. About six years later, we hired a website designer and created a website. Since those early years on the web, the pressure to update the website and offer a presence (with frequent postings) on numerous platforms has been almost overwhelming. And yet, with all these new marketing methods, the old ones not only persist, but remain very demanding and expensive (Yellow Pages, newspaper and magazine advertising). As demographics change, the online marketing will likely replace the print media. But as long as we have people buying newspapers and using phone books, we are stuck in both the print and online media worlds.

ANGELA SIPILA
solo practitioner, Virginia

The practice of law in an office used to be a team, and now it's more efficient for one person. I save time not having meetings to go over the files, save time not fixing someone else's mistakes that I can't bill for. Yet with all my saved time, I can't leave for lunch. I eat Pop Tarts at my desk. I go a bit scooterbug needing someone to talk to.

ROBERT A. WOODKE
Brouse, Woodke & Hildebrandt, PLLP, Bemidji

There wasn't any such thing as case management software when I started practicing law. My case manager was a 3x5 index card deck that sat on the corner of my desk. But I've always believed in the importance of using technology to level the playing field, and you can. I was an early adopter of Amicus Attorney. Not that they're the only game in town, but they came out with a product that had the look and feel of a physical office. The folders looked like folders and the calendar looked like a calendar. The filing system was built in the same way an old-fashioned four-drawer filing cabinet was built. It was easy to learn. That's become a very valuable part of my practice.

They're internet-based now, but they have an option where you can put your database into a server in your office, and I have done that. So if someday they vanished, the raw data is in an SQL database where I can access it and work with it and don't have to start from scratch to build something. The other change I've seen is the ease with which you can have redundancy through technology. And redundancy is critical, because hard drives fail. The USB-driven external drives make it so easy to back up your server and carry it out the door with you if you want to. Now that poses a cybersecurity risk, but it's also an advantage, because if the office burns down and you've got the entire office in your pocket, you can be back up and running in an hour.

CHANGING PROFESSION 4

We have a paucity of attorneys in practice in rural Minnesota in general. I'm trying to make a quick list in my mind. In addition to the [Cook] County Attorney's office, which has two full-time attorneys, we have only two other full-time practicing attorneys here who live and work in the county all year round.

– Molly Hicken

PAUL MUSKE
Muske, Suhrhoff & Pidde, Ltd., Springfield

To some extent the collegiality between attorneys has changed. It used to be that the annual bar association meetings were a highlight of the year. Over the years I think the attendance has gone down, and frankly I've attended less. But I think we've maintained a very cordial arrangement. We still have relationships where we can trust each other not to lie or cheat or anything like that. If the other attorney in town says, I'll bring you over the check and you mail me the deed, we know it's going to happen. So we do have good relationships with the other attorneys.

One thing I noticed about 10 years ago was that many of us were getting older, and I was concerned that the availability of legal services in rural areas was going to vanish, but we have had some younger attorneys come out to the rural area to fill the gap as some of us reach the age where we aren't going to work anymore or work as much.

It's been a struggle. Over the years we've had a number of associates who have been with us for two to four years and gained experience and then moved on to larger communities. I think there's a lot of pressure on younger attorneys because of student debt. Economically our practices are not going to be as lucrative as practices in Mankato or the Twin Cities. I think that's a hindrance for some younger attorneys. But it does seem like we are able to retain an adequate supply of younger attorneys in the area.

BARBARA HEEN

solo practitioner, Willmar

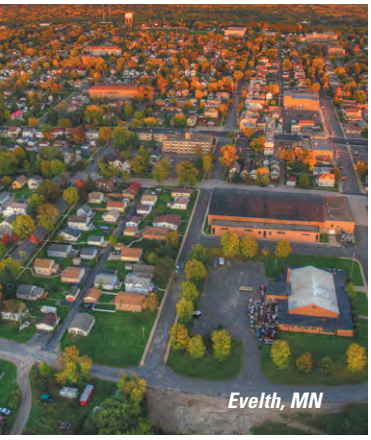
If you look at how the MSBA is structured, there are district bar meetings that I used to attend more often, but the camaraderie there is between a lot of people who do traditional law—the people who litigate and have a lot of court experience. I kind of don't, and so my colleagues really have arisen more from the [MSBA] subject matter sections—the Solo Small Section, the Greater Minnesota Practice Section. The MSBA structuring itself with the 23 district bars and then the subject matter sections—it means that one way or the other, you can find your way to a group of solid colleagues.

If you're on the MSBA communities at all, there are probably a dozen key people who are significant contributors on the solo small community, or the estate and probate community. Similar names keep coming up. The MSBA communities—because I am a solo practitioner, I don't have colleagues down the hall to bounce ideas off of, so I had to get pretty creative in deciding, okay, who is my team? The MSBA communities are a marvelous resource that I think everybody needs to participate in.

The caution in trying to attract attorneys in rural areas is, these kids are coming out of law school with between $100,000 and $200,000 in debt. They have a certain amount of money they absolutely have to earn in a month. They can't miss. So it's a very difficult proposition to stand here as a 20-year veteran and say, Patience. They don't have a lot of time. They kind of need to be making money that first year. The more strategic a person can be about their budget and their finances—what do you honestly have to have? Well, food and a roof.

In greater Minnesota, at least western Minnesota, longevity is rewarded. You need to go and decide that life is going to stink for several years, and you'll need to be satisfied with the fact it's hard to find clients. It's hard for people to understand who you are. It takes time to build that name value in the community. But if you're willing to stick it out, it does grow in time. My practice was never huge, but my 2017 revenue was significantly higher than my 2016, and my 2018 went up very rapidly. As I look around, I think it has to be attributed to longevity and community involvement. When people are finally convinced you're going to stick around a while, they're going to be with you.

▶ The camaraderie [at district bar meetings] is a lot of people who do traditional law—the people who litigate and have a lot of court experience. I kind of don't, and so my colleagues really have arisen more from the [MSBA] subject matter sections—the Solo Small Section, the Greater Minnesota Practice Section.
– Barbara Heen



Evelth, MN

JOELLEN DOEBBERT

solo practitioner, Alexandria

I was at the [MSBA] One Profession meeting in Willmar, and a lot of the same issues that were important to me as a relatively young attorney remain important to new grads today. One important change since the mid-80s, however, is the huge increase in tuition at law schools—I think I paid $5,000 a year going to William Mitchell at night. I don't remember having difficulty paying off my student loans. I don't even remember paying off my student loans. In Willmar, one gal was saying she graduated with $160,000 in student loans 15 years ago, and she still has $90,000 to pay. Her student loan payment is $1,400 [a month]. I just can't even fathom that.

I remember—it was at least 15 years ago, and there was a lovely young couple that joined our church, and they really didn't feel they could stay out in this area, because they were both attorneys and they both had student loans. They would have loved to stay; I think she was from this area originally, and he wanted to go where she wanted to go. But they both could not find jobs here that would pay their student loans.

STEVE BESSER

Dolan & Besser, Litchfield

In this bar district, the collegiality is still good. It's easy to pick up the phone and call one of the other people and say, hey, how are you doing? How are the kids? And can we get this one settled or are we going to have to fight? But—maybe this is just my perception—it does seem that there are fewer people hanging around after the [bar] meetings for a couple of hours talking. It does seem like lately there is less participation in the meetings. I don't know if it's because the upcoming generation is not into that; I don't want to blame them. I don't know if it's attributable, maybe, to technology—people stare at their phones and send texts. We've still got collegiality in this district, but the older generation is fading out and I don't know that the younger ones get together that much.

MICHELLE ZEHNDER FISCHER

Nicollet County Attorney, St. Peter

I have conversations with my colleagues in private practice about their ability to attract individuals to come to work here. The challenge sometimes is not finding individuals to start working, but getting them to stay. They gain their experience and then they seem to want to move back to the metro or to larger counties to work. I've been fortunate that my paralegal staff is very stable, and most of the assistant positions have been stable. But I've certainly seen the impact of the metro's draw. [Laughs]

The bar seems less collegial than when I first started. I think there's less time spent together outside of office hours, because the demands on our time have increased. Our family lives have changed, the activities our children are involved in have changed. It seems like we're a lot busier outside our practices than we were before.

And that bleeds over into how we practice inside the courthouse. I think there's less recognition, perhaps, that everyone has a job to do and it shouldn't be made personal. It just seems like some of the collegiality I witnessed when I first started doesn't seem to be in place today. I hear colleagues talking about arguments and disagreements straying into becoming more personal. I haven't been able to put my finger on a single cause, but it is troublesome when I look at the relationships people have across the practice. I'd like to see it change.

MOLLY HICKEN

Cook County Attorney, Grand Marais

We have a paucity of attorneys in practice in rural Minnesota in general. I'm trying to make a quick list in my mind. In addition to the county attorney's office, which has two full-time attorneys, we have only two other full-time practicing attorneys here who live and work in the county all year round. We have two other attorneys I can think of who work part-time in Cook County or are partially retired. We have zero public defenders at this time who live and work in Cook County.

For our criminal case load, since the early 2000s it's been the case that if you required a public defender, that would mean the person was driving up from Duluth every two weeks, essentially, for your court dates. That would be the most often you would be able to see them. Because the rest of the time they're in Duluth working their Duluth case load. You would have to drive to Duluth to see your attorney or wait for them to come up here for your case. It's not ideal. The public defender's office works really hard and their attorneys are really good, but when that's the set-up, you're missing a crucial connection to the community that's important in understanding the cases and the individuals involved. Duluth is a two-hour drive away, and it's a lot different from Cook County.

The latest solution to this problem is that one of those two full-time practicing attorneys up here is a new attorney named Tyson Smith, and he's taking everything he can get in terms of types of cases. He's partnering with the public defender's office to get another attorney working full-time in Cook County. Part of their case load will be private work through Tyson's office, and the other part is public defender work. So there will be a part-time public defender actually living and working on the North Shore for the first time in 15-plus years.

One way I would say our office has changed in the last 12 years is security of courthouses—our courthouse specifically, but it's a broader trend. It's not just the big courthouses that need security anymore. It's a statewide movement to get government workers and workers in the court system to feel safe and to be safe from hostility. Our example here [the shooting of Cook County Attorney Tim Scannell in December 2011] is the worst-case scenario of what can happen—somebody brings a gun and literally tries to kill somebody. There was a statewide initiative for courthouse security that Chief Justice Gildea led, and that led to some grant funding.

Courthouses are an interesting financial partnership between the state and counties. They must share the cost of court operations. So the counties run the capital asset of the building, but the court staff is employed by the state of Minnesota judicial branch. So what the chief justice was interested in was finding a way to more uniformly treat court staff across the state so that everybody was protected on some basic level. But they really only fund the staff. So it took a partnership between the counties and state, and what they came up with was this grant program. A lot of rural courthouses found the funds through the grant program to make some improvements. But the grant funding was available for a limited time, and it's not ongoing. It needs to be, in my opinion.

What happened here was an eye-opener—that kind of violence doesn't only happen in densely populated places, and rural courthouses can be particularly vulnerable to those attacks.

▶ The bar seems less collegial than when I first started. I think there's less time spent together outside of office hours, because the demands on our time have increased. It seems like we're a lot busier outside our practices than we were before. And that bleeds over into how we practice inside the courthouse. I think there's less recognition, perhaps, that everyone has a job to do and it shouldn't be made personal. – Michelle Zehnder Fischer

▶ I wish that there were more lawyers like me out there, doing what I do. There's a great need and it's a great way of making a comfortable living. To the extent law students read your magazine, I hope that they look at workers' compensation and that they look at outstate. To them I would say, reach out to us.
– Antonio Tejeda Guzman

STEVE PELOQUIN

Peloquin Jenson PLLC,
Park Rapids/Perham

If you look at my little firm here, we've gone through a number of people over the years. I'm working with mostly women. I have young moms, and because of the technology we're a lot less formal in terms of, well, you punch in at 8 and you punch out at 5. That doesn't work when your kid's sick and the daycare says, get them out of daycare.

Clearly, women in the legal profession in the rural areas are becoming more prevalent. There are a lot of them. And the practice style is really changing because taking care of families is involved. A lot of them are responsible for raising families, and as a result, trying to juggle career and family—they really need the flexibility. That's been a big change, too. It's good they can work from home: Here, I'm going to grab my computer and go, and I'll email you the contract I'm working on, but I've got to go home and take care of something. So my firm is different in the way we interact. When are we going to see each other? Well, it's been a couple of days—I've been in court, or I've been on the road.

I can recall, up to 10 or 15 years ago maybe, walking into courtrooms and talking to judges, talking to bailiffs, talking to defense counsel or the prosecutor, and saying, hey, what's going on? Hey, can we do this, can we resolve this? Hey, judge, how you doing today, how was your weekend? How are you doing, Harry the prosecutor? We got a bunch of DWIs here, what can we do about Joe Smith? Being able to do that has been virtually eliminated. We have more [concerns] with courthouse security now, and justifiably so. I'm probably more scared to walk into a courtroom now than I've ever been. I'm not saying I'm scared all the time, but I'm mindful of it. Twenty years ago I never would have said to a bailiff, hey, keep an eye on this client. I don't know what's going to happen. But I've had that conversation more in the last five years.

Then, too, there's been pressure for transparency, to have everything out front. I get that. But the informality that often made the system run nicely—not all the time; sometimes it was really abused—has changed. Some people might say that's a really good thing. Okay, fine. I take no position on it except to say that it's changed. I have hardly any interaction with judges, for example, except when I'm on the record in the courtroom. That's true of a lot of the lawyers too. Yet when you bump into a lawyer and you take five or 10 minutes chance to talk, you find you're hungry for that exchange of communication—the gossip, the what's going on in your life, the talk about dealing with a difficult client. If you're a solo, who else have you got to talk to?

ANTONIO TEJEDA GUZMAN

Tejeda Guzman PLLC, Willmar

The workers' comp bar is very closely related. We all know each other or at least of each other, we're all friendly to each other. We fight when we have to fight, but it's a very collegial bar. If I say there are 500 of us in the state, that's probably an overstatement. But because I only do workers' comp, I need to know people who do PI, people who do product liability, people who do malpractice, people who do immigration. So I go out of my way to meet people who do other areas and I get to know them, because I get all kinds of calls and I need to be able to send people that way. If Maria comes to me for a referral, I want to be able to send her to a place that will treat her well, because now my name is involved in the mix. I do have to go out of my way to be sure that attorneys are going to be culturally competent in dealing with the population that I deal with. I like to think I have a fairly good network of people. It works well.

I wish that there were more lawyers like me out there, doing what I do. There's a great need and it's a great way of making a comfortable living. It's a clean way of making a living, and to the extent law students read your magazine, I hope that they look at workers' compensation and that they look at outstate. To them I would say, reach out to us. We're out here. People in the Cities, they just don't see anything beyond the 13 counties. I lived there when I was a judge, and it's a huge disconnect. There's a whole world out here. Just reach out to us.

ROBERT A. WOODKE

Brouse, Woodke & Hildebrandt, PLLP,
Bemidji

Going clear back to 1977, my first introduction to a county bar association was in Lyon County, Minnesota—Marshall. Every month all the lawyers and their wives got together and they had the county bar association meeting. Had a cocktail hour, a nice meal. There was a lot of exchange of useful information, lot of informal discussions. It always had an educational component. And virtually everybody in the legal profession in that community attended unless they were ill or out of town. The Beltrami County Bar Association, when I came to Bemidji, didn't operate in quite the same way, but we had regular meetings with 20 or 30 people. The judges would come, the law clerks, and most of the lawyers in town. You have to understand, I was the 16th lawyer to come to town, so that was very good attendance.

Now we have a bar association meeting and we might have eight or nine people at it. Attendance has really fallen off. The judiciary, for the most part, doesn't participate. It's become more balkanized.

ANGELA SIPILA
solo practitioner, Virginia

Ten years ago they started having young lawyer meetings and I refused to go because I wasn't young. I was in my 40s. It was for the 30-somethings. But I'd go to introduce my new associates; I did that three or four times. Now it's morphed into a women lawyers' get-together. I've been to a few of those, and they're very important. We loosen up a little and get to know each other as people.

But it's not the same level of collegiality that I remember from those first Range Bar meetings twenty years ago, where the lawyers were there to tell jokes and unwind. The Range Bar is still full of wonderful people, but they are not joking and raucous. The amount of time we spend texting and emailing detracts from the amount of time we used to have to spend talking. And you'd get good at it and you'd want to show off your conversational skills. I feel like a freak after the meeting—like, after the meeting, people are muttering, yeah, she talks too much.

I used to be on my church council board, and we had a retreat. The bishop came in—this is back in 2014—and he said, church has changed. Ten years ago we surveyed people, and the majority of people who were members of our church would say it was very important to come to church every Sunday. That's gone. It's now very much a minority who say it's important to come every Sunday. The vast majority of people coming to church feel it's optional. Which fundamentally changes church.

It's the same concept here with the law. Three years ago, people fundamentally felt that they would need a guide in the legal jungles or they would get lost. They felt that the lawyer was a critical part of it. With every year that goes by, we are closer to the tipping point where people will not feel that the lawyer is an integral part of the legal process. People can go on a website and get their work done, maybe have a typed chat with a reviewer who reassures them, and that's enough. I'm competing with that typed chat review.

▶ Clearly, women in the legal profession in the rural areas are becoming more prevalent. There are a lot of them. And the practice style is really changing because taking care of families is involved. A lot of them are responsible for raising families, and as a result, trying to juggle career and family—they really need the flexibility.
– Steve Peloquin

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CRIMINAL LAW

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Domestic assault: For felony enhancement, Minn. Stat. §609.2242, subd. 4, requires two qualifying prior convictions, not sentences. In June 2009, appellant was convicted of third-degree assault and domestic abuse by violation of an order for protection for assaulting his estranged wife, D.L.D., and was sentenced on the assault conviction. In March 2018, appellant was charged with, among two other offenses, two domestic assault offenses after a confrontation with M.R.D. and her daughter. The domestic assault offenses were charged as felonies under Minn. Stat. §609.2242, subd. 4, because they were committed within 10 years of the June 2009 convictions. The district court granted appellant's motion to strike the domestic assault charges, concluding that, to comply with Minn. Stat. §609.035's prohibition of multiple punishments for the same course of conduct, only convictions for which appellant was sentenced may be used for enhancement under Minn. Stat. §609.2242, subd. 4. The state appealed and the Minnesota Court of Appeals reversed.

On appellant's petition for review, the Supreme Court affirms the court of appeals. Minn. Stat. §609.2242, subd. 4, enhances a domestic assault offense from a misdemeanor to a felony if the domestic assault offense was committed "within ten years of the first of any combination of two or more previously qualified domestic violence-related offense *convictions*" (emphasis added). The plain language of the statute refers to convictions, not sentences. The record shows appellant was convicted of third-degree assault on December 3, 2010, and then convicted of violating an order for protection. The fact that both convictions occurred on the same day is irrelevant. These two qualifying convictions occurred within 10 years of his March 2018 domestic abuse charges, and, thus, the 2018 charges qualify for enhancement under Minn. Stat. §609.2242, subd. 4. ***State v. Defatte***, 928 N.W.2d 338 (Minn. 5/22/2019).

Sentencing: Credit for time in Red Lake Nation custody permitted only if custody was solely in connection with Minnesota offense. Appellant received a stay of imposition and was placed on probation for 20 years following a guilty plea to a third-degree controlled substance crime in 2011. In 2017, she was convicted of two gross misdemeanor offenses on the Red Lake Reservation and was released pending sentencing. The stay of imposition of the sentence for her 2011 conviction was revoked for failing to remain law abiding, and the court ordered that appellant be taken into custody. She was taken into custody by Beltrami County after remaining in Red Lake custody for 21 days. Appellant thereafter requested execution of her 2011 sentence and custody credit for the 21 days she spent in Red Lake custody. The district court denied her request for credit for the time she spent in Red Lake detention, and the court of appeals affirmed.

Under Minn. R. Crim. P. 27.03, subd. 4(B), a defendant is entitled to custody credit for time spent in custody "in connection with the offense or behavioral incident being sentenced." To receive credit for time spent in another jurisdiction's custody, the Minnesota offense must be the sole reason for the custody. Although the Red Lake Nation is within the borders of Minnesota, it is an independent sovereign nation, and thus the rule for determining interjurisdictional, not intrajurisdictional, custody credit applies. Appellant was in Red Lake custody in connection with her Red Lake convictions and, thus, the sole reason for her detention could not be her Minnesota conviction. ***State v. Roy***, 928 N.W.2d 341 (Minn. 5/22/2019).

■ **Sentencing: Drive-by shooting at motor vehicle does not constitute offense against each occupant.** During an argument with C.L.G., appellant fired a handgun in C.L.G.'s direction, but hit the vehicle next to C.L.G., containing two adults and a child. Appellant pleaded guilty to drive-by shooting, second-degree assault, and reckless discharge of a firearm. He was sentenced to 48 months for the drive-by shooting and 36 months for the assault. On appeal, the question is whether the drive-by shooting and assault offenses arose out of a single behavioral incident and, therefore, whether the district court erroneously imposed multiple sentences.

Minn. Stat. §609.035, subd. 1, provides that "if a person's conduct constitutes more than one offense… the person may be punished for only one of the offenses." A defendant should be punished for the most serious of the offenses arising out of a single behavioral incident. However, Minn. Stat. §609.035, subd. 1, also includes a multiple victim rule: If a crime affects multiple victims, a court may impose more than one sentence for convictions arising out of a single behavioral incident.

The court of appeals applies *State v. Ferguson*, 808 N.W.2d 586 (Minn. 2012), in which the Supreme Court approved multiple sentences for eight counts of aiding and abetting drive-by shooting and one count of drive-by shooting in connection with a drive-by shooting of a building occupied by eight people. The drive-by shooting statute makes no distinction between the drive-by shooting of an occupied building or a motor vehicle—both are premised on the object of the shooting, the occupied building or motor vehicle, not the occupants. Therefore, the court holds that the offense of drive-by shooting of an occupied motor vehicle is not an offense against each of the vehicle's occupants. As such, the district court did not err in imposing sentences for appellant's drive-by shooting and assault convictions, even if both arose out of a single behavioral incident. ***State v. Branch***, 930 N.W.2d 455 (Minn. Ct. App. 6/10/2019)

■ **Circumstantial evidence: Uncontroverted circumstances from a state witness that do not necessarily contradict the verdict constitute "circumstances proved" but absence of evidence does not constitute a "circumstance proved."** Appellant was convicted of, among other offenses, first-degree controlled substance crime for possessing methamphetamine, but he argues there was insufficient circumstantial evidence to prove beyond a reasonable doubt he knowingly possessed methamphetamine. Appellant was pulled over for swerving and detained when police discovered he did not have a valid driver's license and was not the registered owner of the vehicle. The sole passenger, J.S., had a history of drug and weapon convictions and was a known methamphetamine user. J.S. was left in the vehicle, unmonitored, for 30-60 seconds while appellant was secured. When appellant was in the squad, the officer removed J.S. from the vehicle, searched her and her purse, finding nothing illegal, and conducted an inventory search of the vehicle. The inventory search revealed a duffle bag on the floor of the truck, within reach of the front seats. The bag contained a bullet-proof vest, a casino card with appellant's name, and a glove in which a plastic bag of methamphetamine was found. Additional methamphetamine was also found in appellant's wallet in the front console.

The state sought to prove appellant constructively possessed methamphetamine through circumstantial evidence. To analyze the sufficiency of this evidence, the court identifies the circumstances proved, deferring to the jury's acceptance of proof of these circumstances and rejection of evidence that convicted with evidence proved by the state, and, then, the court determines whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.

The state argues that J.S.'s criminal history and methamphetamine use cannot be considered, as they are inconsistent with the jury's verdict. However, these were uncontroverted facts established by a state witness, and the court of appeals finds that it is inconsistent with neither a verdict of guilty nor a verdict of not guilty. The state also argues against considering the fact that the state did not produce any evidence of appellant's DNA or fingerprints on the bag of methamphetamine. There was no testimony at all regarding DNA or fingerprint testing. The court of appeals holds that absence of evidence in the record regarding a certain circumstances does not constitute a circumstance proved.

The court concludes that the circumstances proved, particularly that the duffle bag contained a card with appellant's name and the additional methamphetamine found in appellant's wallet, tie the methamphetamine in the duffle bag to appellant—that is, the circumstances proved form a complete chain which, viewed in light of the evidence as a whole, leads so directly to appellant's guilt as to exclude beyond a reasonable doubt any reasonable inference except that of guilt. ***State v. German***, 929 N.W.2d 466 (Minn. Ct. App. 5/28/2019).

■ **Permit to carry: No disqualifying conviction for crime of domestic violence if conviction expunged under court's inherent authority, unless order expressly prohibits possession of firearms.** Appellant's application for a permit to carry a pistol was denied by the county sheriff due to his 1996 domestic assault conviction. That conviction was expunged by the district court in 2007, solely under its inherent authority. Appellant petitioned the district court for a writ of mandamus to compel the sheriff to issue the permit, but his petition was denied. The district court concluded appellant was disqualified from possessing a firearm because his domestic assault conviction was not expunged under 18 U.S.C. §921(a)(33)(B)(ii).

Under Minn. Stat. §624.714, subd. 2(b)(4)(ix), a sheriff is not required to issue a carry permit to a person prohibited from possessing a firearm under federal law. 18 U.S.C. §922(g)(9) prohibits any person convicted in any court of a misdemeanor crime of domestic violence from possessing a firearm. However, under 18 U.S.C. §921(a)(33)(B)(ii), a person is not considered convicted of a misdemeanor crime of violence if the conviction has been expunged, unless the expungement "expressly provides that the person may not ship, transport, possess, or receive firearms."

In 2007, the district court ordered the judicial records relating to appellant's conviction to "be expunged," directed that the case file be "seal[ed]," and directed the county corrections department to "seal" its records relating to appellant's arrest and court proceedings. Federal law does not require that an expungement be statutory or result in the sealing of records in every branch of government. Thus, the court of appeals concludes that the 2007 expungement order meets the plain meaning of "expunged" in 18 U.S.C. §921(a)(3)(B)(ii). Appellant's domestic assault conviction was expunged and, therefore, he is not prohibited from possessing a firearm or disqualified from holding a carry permit. Reversed and remanded. ***Bergman v. Caulk***, 931 N.W.2d 114 (Minn. Ct. App. 6/3/2019).

■ **Confrontation clause: Use of interpreter does not implicate confrontation clause or hearsay rules.** Appellant

agreed to give a recorded statement to police during a criminal sexual conduct investigation. Appellant's first and second languages are Mam and Spanish. A Spanish translator was used via telephone to translate the officer's questions and appellant's answers. During the interrogation, appellant admitted to having sexual intercourse with a child under 13. Appellant was charged with first-degree criminal sexual conduct. Prior to trial, he objected to the recording of his translated statement on confrontation clause and hearsay grounds because the interpreter was not present to testify. The district court admitted the video recording and the officer's testimony regarding the statement at trial, and appellant was convicted. The court of appeals affirmed the district court's conclusion that admission of the translated statements did not violate the confrontation clause or hearsay rules.

The Supreme Court concludes that the use of a foreign language interpreter to convert appellant's statements from Spanish to English does not implicate the confrontation clause. Although the facts of this case are quite different from those in *Crawford*, in that the statements at issue here were made by appellant himself and translated by an interpreter (rather than made by a third party), the bedrock principle of *Crawford* still applies—that the primary objective of the confrontation clause is to regulate the admission of testimonial hearsay by witnesses against the defendant.

An interpreter is merely the vehicle for conversion or translation of language. An interpreter does not add content to a declarant's statement. Thus, the act of processing the defendant's statement from one language to another does not transform the interpreter into a witness against the defendant. The translated statement is the original declarant's statement, not the translator's. The court notes that the proper method of challenging a translation's accuracy, completeness, or authenticity is a foundation objection.

Appellant's hearsay challenge also fails. Appellant was the declarant of the statements in question, and the statements were offered by the state against appellant. Therefore, under Minn. R. Evid. 801(d)(2)(A), the statements are not hearsay. ***State v. Lopez-Ramos***, 929 N.W.2d 414 (Minn. 6/12/2019).

■ **Criminal procedure: Rule 9.01, subds. 1-1a, does not authorize inspection of crime scene in third party's control.** Appellant was charged with first-degree

criminal sexual conduct and domestic assault by strangulation after a violent confrontation between appellant and his wife. A DANCO prevented appellant from entering the house he shared with his wife, where the confrontation occurred. The district court denied appellant's requests to allow his attorney and investigator to enter the home to inspect and photograph the crime scene. Appellant was found guilty after a jury trial. The court of appeals affirmed appellant's convictions, finding that, although the district court abused its discretion when it concluded that the defense was not required to have reasonable access to the crime scene, appellant was not prejudiced by the error.

The first question the Supreme Court addresses is whether Rule 9.01, subdivisions 1-1a, of the Minnesota Rules of Criminal Procedure requires the state to permit the defense to inspect a crime scene that is in a third party's control. Rule 9.01, subdivisions 1-1a, requires the state to allow the defense access to all matters within the prosecutor's possession and control that relate to the case. The state must also disclose the location of buildings and places that relate to the case and allow the defense to inspect and photograph any object, place, or building required to be disclosed.

So, while the state must disclose the location of the crime scene, the plain language of the rule does not require the state to allow inspection of a crime scene not within the prosecution's possession or control. To conclude otherwise would require the state to do something not within its power and would interfere with the property owner or possessor's rights. The Court overrules *State v. Michael Gary Lee*, 461 N.W.2d 245 (Minn. Ct. App. 1990), which it finds inconsistent with the plain language of the current version of Rule 9.01.In this case, appellant's wife controlled the crime scene, so the district court did not abuse its discretion by denying appellant's motions to inspect the crime scene.

The Court also addresses appellant's argument that the district court's denial of his motions violated his rights to due process and effective assistance of counsel. The Court does not decide whether there exists a constitutional right to inspect a crime scene, because it concludes that, even if there is such a right, any error in denying appellant's motions was harmless, given the very strong evidence of appellant's guilt, very little of which depended on an inspection of the crime scene. ***State v. Lee***, 929 N.W.2d 432 (Minn. 6/19/2019).

■ **4th Amendment: Search of rented room invalid only if officers knew or reasonably should have known it was in multiple-occupancy house.** Police obtained a search warrant for a home in St. Peter, which they believed was a single-family home. When executing the warrant, police made contact with D.H.J., the home's registered owner. The home was not registered as a rental unit. D.H.J. told officers another person, appellant, was in the house, but not that he lived there. Police found appellant upstairs behind a partially closed bedroom door that had a padlock on it. There was no signage or other indicators that the house contained rental units. In appellant's room, police found drug paraphernalia, guns, ammunition, and three homemade firearm suppressors. Appellant was charged with drug offenses and unlawful possession of a firearm suppressor. After a stipulated facts trial, appellant was convicted of the firearm suppressor offense.

The general rule regarding searches of multiple occupancy buildings is that a search is invalid unless the warrant describes the particular unit to be searched with sufficient definiteness. However, this rule is applied to apartment buildings, but not "community occupation," where two or more people occupy common living quarters but have separate bedrooms. The question here is, what if police are unaware when applying for the warrant and conducting the search that another person lives in the building?

The Minnesota Court of Appeals holds "that the validity of the search of a rented room, pursuant to a warrant authorizing the search of the entire house, depends on whether officers reasonable knew or should have known that it was a multiple-occupancy building at the time of the search." Here, the record shows that from outward appearances, this was a single-family residence. Inside, there were no indicators of private residences. Appellant's room had a lock on the door, but that is not determinative. Under the totality of the circumstances, the court finds there were insufficient indicators to objectively notify police at the time of the search that it was a multiple-occupancy residence. Thus, the search did not exceed the scope of the search warrant. ***State v. Marsh***, A18-1093, 2019 WL 2571677 (Minn. Ct. App. 6/24/2019).

■ **1st Amendment: Stalking-by-mail statute violates 1st Amendment, but mail-harassment statute is subject to narrowing construction.** The juvenile court and Minnesota Court of Appeals held that the stalking-by-mail, Minn. Stat. §609.749, subd. 2(6), and mail-harassment, Minn. Stat. §609.795, subd. 1(3), statutes are both constitutional under the 1st Amendment. Charges under these statutes arose against appellant after he and two friends posted a number of cruel and egregious insults about a classmate on Twitter, which made the classmate extremely upset, fearful, and suicidal. After trial, appellant was adjudicated delinquent. The Supreme Court finds both statutes violate the 1st Amendment as facially overbroad, but finds that the mail-harassment statute is reasonably subject to a narrowing construction.

Minn. Stat. §609.749, subd. 2(6), provides that a person stalks another if they "repeatedly mails or delivers or causes the delivery by any means, including electronically, of letters, telegrams, messages, packages, through assistive devices for people with vision impairments or hearing loss, or any communications made through any available technologies or other objects." Stalking is engaging "in conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim, regardless of the relationship between the actor and victim." Minn. Stat. §609.749, subd. 1.

The Supreme Court finds Minn. Stat. §609.749, subd. 2(6), overbroad, because it criminalizes mailing or delivery of *any* form of communication an actor directs more than once at a specific person whom the actor knows or has reason to know would cause, after considering the victim's specific circumstances, that person to feel frightened, threatened, oppressed, persecuted, or intimidated, and the victim subjectively feels that way. Even though the statute may proscribe some unprotected speech, the Court concludes the statute prohibits a substantial amount of constitutionally protected speech compared to the unprotected speech and conduct the statute reaches.

The Court points to a number of examples of clearly protected speech and expressive conduct the statute would criminalize, as well as the expansiveness of many elements of the crime. Even negligent conduct is reached. The statute focuses primarily on speech and expressive conduct (and even includes "any communication" within its scope), and the statute describes the *actus reus* with several broad, unqualified terms (frighten, threaten, oppress, persecute, intimidate). The Court contrasts Min-

nesota's statute with the federal stalking statute, which requires a more specific and onerous "malicious intent," requires "substantial" harm to the victim, and reaches far more unprotected speech and conduct than Minnesota's statute.

Finally, the Court concludes that the stalking-by-mail statute is not subject to a narrowing construction, as any narrowing constructions are inconsistent with the Legislature's intent to have a low *mens rea* standard for this offense. As facially overbroad and not reasonably subject to a narrowing construction, Minn. Stat. §609.749, subd. 2(6), violates the 1st Amendment.

As to the mail-harassment statute, the Court also finds it overbroad. Minn. Stat. §609.795, subd. 1(3), makes the following act a misdemeanor: "with the intent to abuse, disturb, or cause distress, repeatedly mails or delivers or causes the delivery by any means, including electronically, of letters, telegrams, or packages." The statute is overbroad because it criminalizes conduct closely connected to expressive activity, by focusing on letters, telegrams, and packages. Also, although it includes a specific-intent requirement, the range of the type of harm the actor must cause (abuse, disturb, or cause distress), is great and there is no requirement that the victim actually suffer any harm.

However, unlike Minn. Stat. §609.749, subd. 2(6), the constitutional defect in Minn. Stat. §609.795, subd. 1(3), can be remedied with a narrowing construction. The Court finds two types of potential harms too broad and unlimited in the speech and conduct they reach: "disturb" and "cause distress." Eliminating "disturb" and "cause distress" still gives the statute the effect intended by the Legislature while sufficiently narrowing the statute. Requiring only an "intent to abuse" reaches a more specific type of conduct and more substantial injury.

Appellant's adjudications are reversed and the case is remanded to the juvenile court for consideration under the newly-narrowed mail-harassment statute. ***Matter of Welfare of A.J.B.***, 929 N.W.2d 840 (Minn. 6/19/2019).

DWI: Driver's license revocation is "present" for DWI enhancement upon driver's receipt of notice of revocation. Appellant was arrested for DWI on 10/2/2016 and 12/18/2016. A week after his October arrest, appellant was notified that his driver's license was revoked, and the revocation was sustained in April 2017, after he waived judicial review. For his December DWI arrest, appellant was charged with second-degree test refusal

and third-degree DWI in August 2017, after waiving judicial review on the October revocation. Both charges were enhanced due to appellant's October license revocation. Appellant moved to dismiss both counts, arguing there was insufficient evidence to prove the enhancement of the offenses and that using the October license revocation as an aggravating factor to support the December charges violated due process. The district court denied appellant's motion. After a stipulated facts trial, the court found appellant guilty on both counts.

The issue on appeal is whether appellant's October driver's license revocation was "present" when he committed the December DWI. Second-degree test refusal requires proof that the defendant refused a chemical test and that "one aggravating factor was present when the violation was committed." Minn. Stat. §169A.25, subd. 1(b).

The court of appeals holds that a prior driver's license revocation is "present" as an aggravating factor to enhance a subsequent DWI after a driver receives notice of the prior driver's license revocation. A driver's license revocation is "present" when it becomes effective, and Minn. Stat. §169A.52, subd. 6, makes clear that a revocation becomes effective when a driver is notified of the revocation. It is undisputed that appellant's driver's license was revoked for one year on 10/9/2016, and that he received notice of the revocation. Thus, the revocation was "present" at the time he committed the December DWI.

Appellant cites *State v. Wiltgen*, 737 N.W.2d 561 (Minn. 2007), in which the Supreme Court read the statutory definition of prior impaired driving-related loss of license to "require that judicial review be completed" before the state can use a license revocation as an aggravating factor in a subsequent DWI charge. However, the court of appeals determines that *Wiltgen* did not alter the elements of an enhanced DWI offense, and only modified criminal procedure, or when the charge can be made.

Appellant also argues that he was not afforded due process because the state used his October license revocation as an aggravating factor, even though it was unreviewed at the time he committed the December DWI. Appellant again relies on *Wiltgen*, which held that the potential prejudice to the defendant "from the use of an unreviewed administrative revocation to enhance a subsequent DWI rises to the level of a violation of [the defendant's] right to procedural due process." However, in a footnote, the Supreme Court noted this problem could be avoided by delaying the issuance of a second-degree DWI complaint until after an implied consent hearing is conducted and the revocation sustained (or charge third-degree DWI before the hearing and amend the complaint to add second-degree DWI after the hearing). That is exactly what the state did here. ***State v. Anderson***, A18-1491, 2019 WL 2495520 (Minn. Ct. App. 6/17/2019).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Age, sex discrimination; claims dismissed.** An employee who claimed that her pay was cut and she was treated discriminatorily compared to another male employee due to her age and gender had her claim dismissed by the 8th Circuit Court of Appeals. Affirming a lower court ruling, the court held that "budgetary reasons" constituted the reason for cutting the claimant's pay. And because her work was different from a male co-worker's, her gender-based claim lacked merit. ***Routen v. Suggs,*** 2019 WL 2881586 (8th Cir. 7/3/2019) (unpublished).

■ **Agricultural employment; unemployment-insurances taxes payable on wages.** The wages paid by a grower to sell fruits and vegetables to farm workers on "H2A" and "J-1" Visas are subject to unemployment insurance taxation. The Minnesota Supreme Court ruled that because the duties performed by the workers constitute "covered agricultural employment" under Minn. Stat. §268.035, subd. 11(a), the wages are subject to unemployment insurance taxation to be paid by the employer. ***Spihel Vegetable Farm, Inc. v. DEED,*** 929 N.W.2d 391 (S.Ct. 6/12/19).

■ **FELA; collateral source exclusion upheld.** The exclusion by a trial judge of evidence of collateral source disability benefits received by an employee from the Veteran's Administration was upheld. Affirming a decision of the Hennepin County District Court, the Minnesota Court of Appeals held that the "broad discretion" accorded evidentiary decisions prompted upholding the trial court's exclusion of that evidence under the abuse-of-discretion standard. ***Houchins v. Soo Line Railroad Company,*** 2019 WL 2571720 (8th Cir. 6/24/2019) (unpublished).

■ **Unemployment compensation; one reversal, three affirmances.** The court of appeals reversed one adverse unemployment compensation determination in favor of an employee and affirmed three others. Denial of unemployment compensation benefits for a welder on grounds that he quit his job and was not available for "suitable other employment" was overturned. The appellate court reasoned that the evidence did not support a determination that the claimant's words and actions would lead a reasonable employer to believe that he would no longer work in any capacity other than as a welder, and there was no determination made by the unemployment law judge (ULJ) of the availability of other work and the labor market. ***Modeen v. Mirabell Enterprises, LLC,*** 2019 WL 2495655 (8th Cir. 6/17/2019) (unpublished).

A quitting employee lost his claim after he left work following a disciplinary meeting with management, even though continued employment was available. ***Rankila v. Fairview Health Services,*** 2019 WL 2416012 (8th Cir. 6/10/2019) (unpublished).

Another employee who quit his job because his pay was reduced 18% (after his employer told him he would not receive any pay raises in the future) was entitled to unemployment compensation benefits. The appellate court, upheld the decision of an unemployment law judge (ULJ), that the employee quit his job for "good reason" caused by his employer, due to the effective wage reduction. ***Interplastic Corp. v. Rausch,*** 2019 WL 2571703 (8th Cir. 6/24/2019) (unpublished).

An unemployment claimant was denied benefits because she filed an appeal from an adverse initial determination after the 20-day deadline for appeal. The employee's claim that she did not receive the notification because she had changed her address was insufficient because it was her responsibility to update her address after changing her residence. ***Carney v. Optum Services, Inc.,*** 2019 WL 2415258 (8th Cir. 6/10/2019) (unpublished).

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ENVIRONMENTAL LAW

JUDICIAL LAW

Court of appeals upholds Minnetonka's denial of EAW petition. The Minnesota Court of Appeals upheld the City of Minnetonka's denial of a petition brought by Protect our Minnetonka Parks (POMP) for an environmental-assessment worksheet (EAW) concerning a proposed project to establish 4.7 miles of 18–24-inch wide mountain bike trails in Lone Lake Park.

The court noted that prior to denying the EAW petition, the city council reviewed an independent biological assessment, a mountain bike study, multiple articles, correspondence from various state and federal agencies, and a technical memorandum prepared by an independent environmental-consulting firm on behalf of POMP. The city also heard testimony from concerned organizations and members of the public. On a 4-2 vote, the city council resolved that none of the criteria in POMP's petition required the preparation of an EAW and denied the petition.

Under Minn. R. 4410.1100, subp. 6, a responsible governmental unit such as the city council may deny an EAW petition "if the evidence presented fails to demonstrate the project may have the potential for significant environmental effects." A denial may be reversed by the court of appeals only if the decision is found to be unreasonable, arbitrary, or capricious, or unsupported by substantial evidence. *Watab Twp. Citizen All. V. Benton Cty. Bd. Of Comm'rs*, 728 N.W.2d 82,89 (Minn. App. 2007).

In this case, the court cited several reasons why POMP's claims for lack of substantive evidence to support the city's decision were not convincing, including:

(1) The project would not have a detrimental effect on the park's water resources;
(2) The grades, adhering to the National Park Service's best practices for mountain-bike-trail construction and management, will not result in significant soil erosion;
(3) The project, though it may displace individual animals, will not significantly impact the overall wildlife population within the park and only smaller trees will be removed, preserving the existing tree canopy in the park;
(4) The project will be sufficiently distant from known habitats of the long-eared bat, and will work with the U.S. Fish and Wildlife Service to minimize the impact on the rusty-patched bumble bee by identifying nesting areas and relocating trails accordingly;
(5) No evidence suggested that predatory mammal populations would drop or disease-carrying rodents would increase;
(6) The odds of finding a preserved but yet-undiscovered archaeological site within the park was low; and
(7) No evidence suggests that the bike trail would disturb the quiet sanctity of the park.

Nor, the court held, was there any evidence to suggest that the decision was arbitrary or capricious; the evidence made clear the city council identified POMP's concerns, reviewed the evidence, and reasonably concluded that the project will not cause significant environmental impact.

Finally, the city sufficiently reviewed all material evidence in deciding whether the project would have the potential for significant environmental effects. The city applied the correct standard in its decision, as well, because it assessed *significant* environmental impacts, rather than *some* environmental impacts. ***Protect Our Minnetonka Parks, Inc. v. City of Minnetonka***, A18-1503, 2019 WL 2495648 (Minn. Ct. App. 6/17/2019).

PolyMet legal challenges continue on several fronts. Following the issuance of all major environmental permits for PolyMet's NorthMet copper mining project—a proposed aboveground mine, processing plant, and transportation/utility corridor occurring over 20 years, processing 32,000 tons of ore per day—groups opposed to the project have mounted various legal challenges. There have been recent significant developments in some of these challenges, including the following:

Court of appeals rejects calls for an SEIS: First, the Minnesota Court of Appeals affirmed the denial by the Department of Natural Resources (DNR) of a petition by Minnesota Center for Environmental Advocacy (MCEA), Friends of the Boundary Waters Wilderness (Friends), and WaterLegacy (WL) to prepare a supplemental environmental impact statement (EIS) for the project. State and federal environmental review for the project has occurred over almost a decade, including completion of draft EIS in 2009, a supplemental draft EIS in 2013, and a final EIS (FEIS) issued in November 2015 and subsequently approved by the co-lead agencies—the DNR, the U.S. Forest Service, and the U.S. Army Corps of Engineers.

In June 2018, MCEA and Friends submitted a petition to the DNR for the preparation of a Supplemental EIS (SEIS) under Minn. R. 4410.3000 (2017), which was denied in July. Later in July, WL also submitted an SEIS petition, which was also denied in August. MCEA, Friends, and WL filed separate appeals (opportunity for appeal provided in Under Minn. Stat. §116D.04, subdiv. 10 (2018)), which were consolidated in this case.

The basis for the petitions was a number of alleged changes in circumstances or information that came to the knowledge of the DNR following its approval of the FEIS including: (a) a change to the proposed project to eliminate a wastewater treatment facility and add a pipeline between the mine and plant to transport wastewater; (b) an allegedly anticipated major expansion of the mine in the future that wasn't accounted for in the EIS; and (c) changes in projected internal rate of return that was lower than estimated prior to the FEIS.

In limited circumstances, an SEIS

must be prepared following approval of an EIS. Minn. R. 4410.3000, subp. 3. For example, an SEIS is required if (1) substantial changes have been made in the project that would affect the potential adverse environmental effects of the project or (2) there is substantial new information or circumstances that significantly affect the potential environmental effects (Minn. Stat. §14.69 (2018)).

In this case, the DNR determined that foreseeable changes in PolyMet's project proposal were not substantial enough to affect potential and adverse environmental effects under Minnesota rule. Applying the standards of review in Minn. Stat. §14.69, the court of appeals deferred to the decisions made by the DNR, which, the court concluded, were based upon the department's expertise. ***In re Application for Supplemental Environmental Impact Statement for the Proposed NorthMet Project***, A18-1312, 2019 WL 2262780 (Minn. App. 5/28/2019).

Court of appeals upholds non-ferrous mining rules: Second, the court of appeals rejected a declaratory judgment action, brought by MCEA and Friends of the Boundary Waters Wilderness pursuant to Minn. Stat. §14.44, seeking to invalidate Minn. R. chapter 6132, the non-ferrous mineral mining rules pursuant to which the NorthMet project permit to mine was issued. The DNR adopted chapter 6132 in 1993; however, no permit to mine was issued under chapter 6132 until 11/1/2018, when the DNR issued the permit to mine for the NorthMet project. Petitioners initiated this action about a month later.

After rejecting a defense asserted by PolyMet and the DNR based upon theories of standing and laches, the court turned to the petitioners' two main bases for seeking a declaratory judgments: (1) that the rules exceed the DBR's statutory authority, and (2) that the rules are unconstitutionally void for vagueness. On the first basis, petitioners argued that language in Minn. Stat. §93.47, subd. 3, requires the DNR to adopt rules setting performance or prescriptive standards governing reclamation; the actual language of chapter 6132, petitioners claimed, failed this requirement by conferring too much discretion on the commissioner to grant or deny a permit.

In rejecting these arguments and concluding that chapter 6132 does not exceed the DNR's authority, the court looked to the broader statutory context as well as to prior court decisions recognizing the importance of agency discretion in enforcement, "particularly in complex, evolving areas and particularly when procedural safeguards are in place." With regard to the second basis, the court questioned whether the petitioners, under applicable constitutional law standards, had even asserted a justiciable, viable facial challenge to the rules. Even assuming they had, the court held, they had not met their "steep burden of proving that chapter 6132 is 'unconstitutional in all applications,'" a burden that stems from "the presumption that statutes are constitutional" and a judicial practice of declaring a statute unconstitutional only with "extreme caution and only when absolutely necessary." (Citations omitted.) Applying these standards, the court easily found chapter 6132 constitutional, rejecting, for example, petitioners' claims that the some of the rules' standards are too generalized by observing that the requirements will "become specific through the permitting process." In this way, the court continued, "chapter 6132 does not implicate constitutional vagueness concerns because no one is left to guess what conduct is proscribed." ***MCEA, et al. v. MN DNR and PolyMet Mining, Inc.***, A18-1956, 2019 WL 3545839 (Minn. Ct. App. 8/5/2019).

Court of appeals stays PolyMet's NPDES permit: Third, on 8/6/2019, the court of appeals issued an order staying the National Pollutant Discharge Elimination System (NPDES) permit for the NorthMet project. The stay arises in the appeal brought by WaterLegacy and others challenging the NPDES permit. In June 2019, the court stayed the appeal and ordered a hearing in district court regarding alleged irregularities related to the grant of the permit, specifically concerning how the Minnesota Pollution Control Agency (MPCA) handled and allegedly concealed the receipt of comments from the federal Environmental Protection Agency that were critical of the draft permit. In granting the motion to stay the permit pending the outcome of the district court hearing, the court of appeals cited "substantial issue[s]" regarding the regularity of the permit proceedings as well as the potential irrevocable injuries to the petitioners' environmental interests should the project proceed.

DNR denies request to reconsider PolyMet mining and dam safety permits: Finally, on 8/7/2019, DNR Commissioner Sarah Strommer denied requests by a collection of environmental groups and tribes to reconsider the DNR's 11/1/2018 decisions issuing a dam safety permit and a nonferrous permit to mine to PolyMet for the NorthMet project, or, in the alternative, to reconsider the department's decision denying the group's prior motion to stay the permits. The group's requests were primarily based upon concerns stemming from the fatal January 2019 failure of a tailings dam in Brazil—which, according to the group, called into question the methods by which the NorthMet tailings basin dam would be constructed. In denying the requests, the DNR explained that not only did it lack standing to review the permits due to pending court appeals, the DNR had also reviewed all its tailings basin permits in light of the Brazil disaster and concluded that the NorthMet dam would still be sufficiently safe. The DNR also disagreed with the group's arguments that the NorthMet dam safety permit was irrevocable.

ADMINISTRATIVE ACTION

EPA issues memorandum aimed at enhancing partnership with state co-regulators. The Environmental Protection Agency (EPA) issued its final version of an interim memo that had been in place since January 2018, detailing the relationship between the EPA and states that are authorized, delegated, or approved to implement federal environmental programs.

In addition to maintaining its deference policy, under which the EPA defers to states on inspection, enforcement actions, and related matters in most instances, the memo also details a "no surprise" principle that the EPA intends to use as the foundation of joint work planning between the EPA and states in order to minimize the misunderstandings that are often caused by the lack of regular, bilateral communication.

In addition to providing for better communication between the EPA and states, the EPA stated its overall goal for joint planning is "the sharing of enforcement responsibilities with a clear agreement on EPA and state roles in individual inspections and formal enforcement actions."

The EPA's memo outlines that at a minimum, joint planning should consist of strategic planning, joint inspection planning, and formal enforcement planning.

> Strategic planning is intended to address: (1) the environmental compliance problems and needs in the states; (2) national, regional, and state compliance assurance priorities; (3) emerging issues; and (4) how the combined resources of the EPA and state could be used to address these needs.

Joint inspection planning is intended to identify which inspections the EPA or a state will perform. The purpose of identifying the appropriate party is to avoid duplicative inspection efforts, improve efficiency, reduce unnecessary burdens on regulated communities, and to provide the EPA and states with more flexibility in setting and adjusting inspections targets and compliance strategies. The memo goes on to provide for best practices that should be followed when conducting the joint inspection planning process.

Joint enforcement planning is intended to identify which enforcement actions, either individual or classes, the EPA or a state will initiate. The memo provides best practices the EPA and states should use on a case-by-case basis for each enforcement action.

Although the memo reiterates the EPA's intent to generally defer to states, it does provide for nine situations in which EPA involvement is warranted. The memo does not state that EPA involvement is mandatory in those nine situations; instead they are provided as examples of instance in which the EPA could be involved.

This memo has been viewed by some as an attempt by the federal government to reduce enforcement of environmental laws by placing the responsibility on the states, which may not have the budget or adequate resources to take on proper enforcement actions. ***Memorandum from the U.S. Envtl. Prot. Agency on Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work*** (7/11/2019).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **Summary judgment for plaintiff; waiver of affirmative defense.** In an ADA action brought against a St. Louis theater seeking captioning of theater performances, the parties cross-moved for summary judgment and the defendant did not raise an undue burden defense. After the district court granted the plaintiffs' motion, the defendant appealed, arguing that the district court had erred in failing to account for its potential undue burden defense. However the 8th Circuit found that it was the defendant's responsibility to assert the defense, and that "A party who does not assert a defense in the district court cannot assert that defense on appeal." ***Childress v. Fox Assocs., LLC***, ___ F.3d ___ (8th Cir. 2019).

■ **Standing; damages; due process.** The 8th Circuit found that the plaintiffs' receipt of two unlawful messages on their answering machine caused a "concrete injury" sufficient to confer standing on their TCPA claims, and also agreed with the district court that statutory damages of $1.6 billion would violate the due process clause, and affirmed the district court's reduction of damages to $32 million. ***Golan v. FreeEasts.com, Inc.***, ___ F.3d ___ (8th Cir. 2019).

■ **28 U.S.C. §1446(c); remand; no appellate jurisdiction.** The 8th Circuit found that it lacked jurisdiction over one defendant's appeal from a remand order, where the district court had remanded the action for lack of jurisdiction, and the 8th Circuit viewed the district court's characterization of its remand order as "colorable."

The 8th Circuit declined to reach the issue of whether the one-year limitation on removal under 28 U.S.C. §1446(c) is jurisdictional, though it acknowledged that "several courts" have held that it is not. ***Vasseur v. Sowell***, ___ F.3d ___ (8th Cir. 2019).

■ **DPPA; attorney's fees reduced.** The 8th Circuit found no abuse of discretion in Judge Montgomery's reduction of plaintiff's request for attorney's fees in a DPPA case by 60%, where she reduced fees 40% for "excessive billing and overstaffing," and an additional 20% for "limited success." ***Orduno v. Pietrzak***, ___ F.3d ___ (8th Cir. 2019).

■ **Fed. R. Civ. P. 38(d) and 39(b); late motion for jury trial denied.** Where the defendant was sued in 2016, the action was originally assigned to Judge Doty but was then consolidated with other RFC and ResCap litigation pending before Judge Nelson for pre-trial purposes, neither plaintiff nor the defendant demanded a jury trial in its pleadings, the judges in the district later determined that Judge Nelson would preside over a number of related cases through trial, Judge Nelson apprised counsel of this change, ResCap prevailed in the first trial and the defendant then filed a mo-

tion for a jury trial, Judge Nelson denied the motion, finding that counsel's delay in bringing the motion was "inexcusable" and had prejudiced ResCap, and that her impartiality was not in question. ***ResCap Liquidating Trust v. Primary Residential, Mortgage***, 2019 WL 3340698 (D. Minn. 7/25/2019).

■ **Fed. R. Civ. P. 6(b); D. Minn. L.R. 7.1(c)(1); motion to strike untimely memorandum denied.** Where the plaintiff moved to strike defendants' motion to dismiss that was filed without a supporting memorandum in violation of Local Rule 7.1(c)(1) and defendant then sought leave to file an untimely memorandum in support of its motion, Magistrate Judge Menendez granted defendants' motion and denied the plaintiff's motion, finding no prejudice to the plaintiff, cautioning defendants' counsel to make ""greater efforts" to comply with the Local Rules, and chastising all counsel for their "petty bickering." ***Management Registry, Inc. v. A.W. Cos.***, 2019 WL 3574464 (D. Minn. 8/6/2019).

■ **28 U.S.C. §1920; Fed. R. Civ. P. 54(d)(1); cross-motions for review of cost judgment.** Where the prevailing plaintiff filed a bill of costs seeking more than $300,000, the defendant filed an objection, the clerk awarded the plaintiff less than $48,000 in costs, and both parties sought review of the clerk's cost judgment, Judge Montgomery denied the plaintiff's request for more than $226,000 in ESI-related expenses, finding that the "forensic collection" of documents was not a taxable cost related to making copies, and that deduplication of files and OCR charges were not taxable costs. In response to the defendant's motion, Judge Montgomery reduced certain witness-related costs the clerk had awarded to the plaintiff but rejected a challenge to the clerk's award of $800 in *pro hac vice* fees. ***Inline Packaging., LLC v. Graphic Packaging Int'l, LLC***, 2019 WL 3387777 (D. Minn. 7/26/2019).

■ **Fed. R. Civ P. 54(b); Multiple motions to enter final judgments denied.** Judge Davis denied plaintiffs' motions to enter final judgment in related cases under Fed. R. Civ. P. 54(b) following the entry of summary judgment on many of their claims while other claims and counterclaims remained pending, finding that "there were no dangers of hardship or injustice" in declining to enter final judgment. ***Strategic Energy Concepts, LLC v. Otoka Energy, LLC***, 2019 WL 3431160 (D. Minn. 7/30/2019). ***Dean Street Capital Advisors, LLC v. Otoka Energy, LLC***, 2019 WL 3428834 (D. Minn. 7/30/2019).

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IMMIGRATION LAW

JUDICIAL LAW

■ **Federal court strikes down executive branch rule placing restrictions on asylum seekers.** In November 2018, the Attorney General and Secretary of Homeland Security issued an interim final rule adding "a new mandatory bar on eligibility for asylum for certain aliens" subject to a presidential proclamation that placed limitations on their entry into the United States (i.e., Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims). 83 *Fed. Reg.* 55934-53 (11/9/2018). *https://www.govinfo.gov/content/pkg/FR-2018-11-09/pdf/2018-24594.pdf*

The President issued a proclamation suspending for a period of 90 days "[t]he entry of any foreign national into the United States across the international boundary between the United States and Mexico," except by those "who enter[] the United States at a port of entry and properly present[] for inspection…" (i.e., Addressing Mass Migration Through the Southern Border of the United States). 83 *Fed. Reg.* 57661-64 (11/15/2018). *https://www.govinfo.gov/content/pkg/FR-2018-11-15/pdf/2018-25117.pdf*

Since then, the President has issued two additional proclamations disallowing entries across the southern border, except at a port of entry, for additional 90-day periods. (i.e., Addressing Mass Migration Through the Southern Border of the United States). 84 *Fed. Reg.* 3665-67 (2/12/2019); Addressing Mass Migration Through the Southern Border of the United States. 84 *Fed. Reg.* 21229-31 (5/13/2019). *https://www.govinfo.gov/content/pkg/FR-2019-02-12/pdf/2019-02303.pdf https://www.govinfo.gov/content/pkg/FR-2019-05-13/pdf/2019-09992.pdf*

In sum, these actions make foreign nationals entering the United States from Mexico, outside a designated port of entry, ineligible for asylum.

The lawfulness of this action was challenged a few weeks later in suits filed by 19 individuals from Honduras, El Salvador, Nicaragua, and Guatemala and two nonprofit organizations providing legal services to refugees, later consolidated into two cases, *O.A. v. Trump*, Civ. No. 18-2718, and *S.M.S.R. v. Trump*, Civ. No. 18-2838. The primary argument for the challenge rested on the Immigration and Nationality Act (INA §208(a)(1)), which declares "[a]ny alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival…*) irrespective of such alien's status, may apply for asylum." 8 U.S.C. §1158(a)(1). (Emphasis added.)

After concluding that it had federal question jurisdiction to review this matter, the U.S District Court for the District of Columbia found the action by the Attorney General, Secretary of Homeland Security, and President "contrary to law" and "in excess of statutory… authority." It consequently vacated the action while also allowing for certification of the proposed class and designation of the individual plaintiffs as class representatives. The matter of injunctive relief was mooted on account of the vacatur and assurances by the defendants to comply with the

court's decision. ***O.A., et al. v. Trump, et al.* and *S.M.S.R., et al. v. Trump, et al.*** (1:18-cv-02718-RDM) (D.D.C. 8/2/2019). *https://cases.justia.com/federal/district-courts/district-of-columbia/dcdce/1:2018cv02718/201831/92/0.pdf?ts=1564823895*

■ **Inadmissibility and public charge grounds.** On 8/14/2019, the Department of Homeland Security (DHS) published its final rule amending regulations addressing inadmissibility, on public charge grounds, of foreign nationals seeking admission or adjustment of status. The rule goes into effect on 10/15/2019. (Other portions of the rule addressed public charge bond and extension or change of status requests by nonimmigrants).

Although the rule is dense and vague in some of its aspects and consequently gives adjudicators more discretion, thus making the process more subjective, one can take away a few key features:

1) The rule will be applied to those individuals perceived to be more likely than not to receive designated benefits for more than 12 months in the aggregate within any 36-month period.
2) The rule will expand the list of current benefits programs (i.e., Supplemental Security Income (SSI), Temporary Assistance to Needy Families (TANF), state general relief or general assistance, and a Medicaid program covering institutionalization for long-term care) to include five additional programs: non-emergency Medicaid; Supplemental Nutrition and Assistance Program (SNAP); Section 8 Housing Choice Voucher Program; Section 8 Project-Based Rental Assistance; and Public Housing.
3) The rule will focus less on the current procedure of scrutinizing the petitioning sponsor's income and assets (as provided in the Affidavit of Support) to five statutory factors involving the foreign national's age, health, family status, financial status, and education.
4) Finally, the rule allows the foreign national to post a public charge bond in circumstances where the adjudicator believes (s) he may fail the public charge test.

84 *Fed. Reg.*, 41292-508 (8/14/2019). *https://www.govinfo.gov/content/pkg/FR-2019-08-14/pdf/2019-17142.pdf*

On 8/13/2019, the City and County of San Francisco and the County of Santa Clara filed suit in U.S. District Court in the Northern District Court of California seeking declaratory and injunctive relief, challenging the final rule. The grounds for the challenge: 1) the rule is not in accord with existing law as to how "public charge" is defined (i.e., a shift away from those who are "primarily" dependent on public assistance for survival to those who may have even a "minimal use of a much wider range of non-cash benefits"); 2) the rule is arbitrary and capricious, and an abuse of discretion, by relying "on factors Congress did not intend for it to consider," failing "to consider important aspects of the problem it is addressing," or explaining "its decision counter to the evidence before it." Other suits are likely to follow. ***City and County of San Francisco, et al. v. USCIS, et al.***, No. 3:19-cv-4717 (N.D. Cal. 8/13/2019). *https://www.sfcityattorney.org/wp-content/uploads/2019/08/Filed-Complaint.pdf*

■ **DHS and DOJ seek to prevent applications for asylum by those who travel through a third county without first seeking relief there.** On 7/16/2019, the Departments of Justice and Homeland Security published a joint interim final rule dictating a mandatory bar to asylum eligibility for individuals entering or attempting to enter the United States through the southern border while traveling through a third country without first seeking relief in that country. **84 *Fed. Reg.* 33829-45** (7/16/2019). *https://www.govinfo.gov/content/pkg/FR-2019-07-16/pdf/2019-15246.pdf*

On 7/24/2019, an order was issued (following suit filed by East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and Central American Resource Center on 7/16/2019) by the U.S. District Court in the Northern District of California enjoining the government from implementing the interim final rule until a final judgment had been made on the matter or a further order issued by the court. "The effect of the Rule is to categorically deny asylum to almost anyone entering the United States at the southern border if he or she did not first apply for asylum in Mexico or another third country." ***East Bay Sanctuary Covenant, et al. v. Barr, et al.***, No. 3:19-cv-04073-JST (N.D. Cal. 7/24/19). Stay tuned. *https://ccrjustice.org/sites/default/files/attach/2019/07/Preliminary%20Injunction%20Decision.pdf*

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TAX LAW

JUDICIAL LAW

■ **Property tax: Summary judgment motion denied; hospital district argument confuses "broad powers" with "broad purposes."** Minnesota law provides for the creation of "hospital districts," which are defined as municipal corporations and are political subdivisions of the state. Minn. Stat. 447.31, subd 1. Minnesota law also provides an exemption from property taxation for property "owned, leased, controlled, used or occupied by a district" if that property is used "for the purposes of sections 447.31 to 447.37."

Perham Hospital District in Otter Tail County is one such hospital district. The district owns Perham Hospital, as well as several clinics. It is the tax status of the clinics at issue in this property tax dispute. Before January 2016, the county classified the three at-issue clinics as exempt property. Since that date, however, the clinics have been classified

as commercial property, and have been subject to taxation. The district filed a motion for summary judgment, arguing the clinic properties are exempt from property tax because the district enjoys the power to own and operate the clinics under Minnesota law. The court denied the motion.

The court explained that the "District [mistakenly] insists that because Minnesota law grants hospital districts broad powers, it authorizes them to pursue broad purposes." The court reasoned that the purposes a hospital district may pursue are limited to those set forth in statute. Those purposes, according to the court, are limited to "to acquire, improve, and run the hospital, nursing home facilities, and facilities described in section 447.45, subdivision 2, paragraph (b)." Minn. Stat. §447.33, subd. 1.

If the district uses the real property occupied by the clinics for a statutorily authorized purpose, the tax exemption is appropriate. The court concluded, however, that there were disputed issues of fact concerning whether the district used real property occupied by the clinics for a statutorily authorized purpose. Because there were disputed issues of material fact, summary judgment was inappropriate. ***Perham Hosp. Dist. v. Otter Tail Co.***, No. 56-CV-18-1196, 2019 WL 3210638 (Minn. Tax 7/10/2019).

Poker hobby expenses: Deductions not permitted on Schedule C tax return. Mr. Zalesiak began playing poker in 2008 during college. He took a year off from poker to focus on gaining steady income and maintained full-time employment as a construction manager for a period of years. Mr. Zalesiak continued to play poker on nights and weekends and reported a small profit from his winnings in 2011 and 2015. In 2015, Zalesiak occasionally engaged in poker-related activities during his leisure time. Between May and September 2015, he did not engage in poker-related activities due to a busy work schedule. When work slowed down in December 2015, Zalesiak began traveling again to poker tournaments and casinos while visiting family and friends. Zalesiak's 2015 Form 1040 reported a net profit from gambling as $1,100.

Mr. Zalesiak filed a petition to contest a notice of deficiency issued by the Internal Revenue Service. The parties disputed whether Mr. Zalesiak was entitled to deduct gambling losses on a Schedule C as a professional gambler, or whether he may only deduct gambling losses only on Schedule A, as a nonprofessional gambler. The parties also disputed whether he had substantiated deductions for non-wagering travel expenses. The court held that the taxpayer lacked requisite profit objective to qualify his gambling activity as a trade or business for 2015 and therefore was permitted to deduct only losses or any allowable expenses on Schedule A. ***Zalesiak v. Comm'r***, T.C. Summary Op. 2019-16.

Pair of decisions clarify that federal rules determine Minnesota-based companies' R&D activities. General Mills filed its 2011 research and development (R&D) Minnesota corporate franchise tax return, claiming $1,112,772 as its tax credit. The Commissioner of Revenue did not dispute that General Mills was entitled to that tax credit, nor the amount of the credit. In 2015, General Mills filed an amended 2011 return based on a recalculation of its Minnesota R&D credit. General Mills originally calculated its R&D tax credit by using the federal "minimum base amount," but did not use the federal minimum base amount on its amended return. Additionally, on its initial tax return, General Mills used Minnesota "aggregate gross receipts" for calculating the R&D credit, but used the federal aggregate gross receipts for the R&D credit formula on its amended return. As a result of these changes, General Mills sought a refund of $949,236 plus interest. The commissioner denied General Mills' refund claim and the company appealed to the Minnesota Tax Court.

Similarly, IBM filed its Minnesota corporate franchise tax return for the 2011 tax year. The company claimed Minnesota R&D credits based on its increased research activities. In 2016, IBM filed an amended 2011 return, requesting a refund of $4,395,399 based on recalculation of the R&D credit. The Commissioner of Revenue denied IBM's refund claim. IBM appealed to the Minnesota Tax Court.

General Mills and IBM sought review on whether the Minnesota Legislature's incorporation of the federal tax code's definition of the term "base amount" in Minn. Stat. §290.068 (2010) included the federal minimum base amount limitation. The Commissioner of Revenue cross-appealed on whether the term "aggregate gross receipts" as used in the Internal Revenue Code's formula for calculating R&D tax credit refers to Minnesota or federal aggregate gross receipts.

Applying de novo review to this question of statutory interpretation, the Supreme Court affirmed the Minnesota Tax Court and held that the calculation of Minnesota's research and development tax credit incorporates the minimum base amount limitation of federal statute delineating base amount of qualified research expenses (QREs) for calculation of research credit.

The Court also resolved whether "aggregate gross receipts" refers to Minnesota, or federal, aggregate gross receipts. The Court noted that the Minnesota Statute incorporates the federal definition of "base amount" into Minnesota's R&D tax credit calculation. As the Court explained, "[o]ne element of the 'base amount' determination is calculation of the 'fixed-base percentage,' which is the ratio of 'aggregate qualified research expenses' over 'aggregate gross receipts.'" I.R.C. §41(c)(3)(A). The Court summarized its holding on this second issue as follows: "the plain language of Minn. Stat. §290.068, subd. 2(c), and its incorporation of the term 'aggregate gross receipts' through the term 'base amount,' referred to federal aggregate gross receipts for the 2011 tax year. …[F]ederal aggregate gross receipts must be used in the fixed-base-percentage formula contained within the base amount calculation for General Mills' 2011 Minnesota R&D tax credit." ***Gen. Mills, Inc. v. Comm'r***, No. A18-1660, 2019 WL 3439577 at *8 (Minn. 7/31/2019). The companion decision is reported at ***Int'l Bus. Machines Corp. v. Comm'r***, No. A18-1740, 2019 WL 3439708 (Minn. 7/31/2019).

Property tax: Affirmed in part and reversed in part; remanded to tax court. KCP owns a shopping mall and surrounding parking lot in Hastings (Dakota County). In 2015, the Minnesota Supreme Court remanded this valuation dispute to the tax court. The tax court reached a new valuation after taking additional evidence, and KCP again appealed the tax court's valuation. In this second opinion on the valuation of the subject property, the Minnesota Supreme

Court affirmed the tax court in most respects, but held the tax court erred in two ways: (1) the court erred in its assignment of value to an outlot on the property, (2) and the lower court erred in the use of a building area other than the one stipulated to by the parties.

The Court summarized the procedural history of the dispute, noting its reasons for the initial remand and the additional steps the tax court and parties had taken following that remand. Those steps including permitting both parties to supplement their appraisals with further analyses and holding at least one additional hearing. The tax court then filed its final order, setting out its final valuation of the subject property. KCP again appealed, raising numerous allegations of reversible error.

The Court held that the tax court neither abused its discretion nor exceeded the scope of remand by admitting a discounted-cash-flow analysis prepared by the county, and further that the tax court did not clearly err when it found that the appraisal conducted by the taxpayer's expert was a leased-fee appraisal (rather than a fee-simple appraisal). Similarly, KCP's argument relating to rejection of certain portions of expert evidence were not persuasive to the Supreme Court, and the Court held that the tax court did not abuse its discretion in deciding different evidentiary weight to place on differing valuation approaches. There was no error, the Court held, when the tax court determined terminal capitalization and discount rates based on market-survey evidence.

However, the tax court clearly erred when it assigned value to an outlot on the property on the basis that the outlot could be sold and developed. The tax court reasoned that although the outlot could not be sold due to zoning restrictions, a valuation was nonetheless appropriate since a potential buyer could seek a variance. The Supreme Court determined that although there is no reasonable probability for a change of the ordinance in the near future, the lot does add some value to the property. This Court therefore remanded the issue of the outlot's valuation.

The Court also held that the tax court erred when it held that KCP had abandoned a certain stipulation relating to building area. The Court reasoned that because the parties stipulated to the gross building area on 2/12/2014, an expert report written and filed with the court prior to that stipulation could not form the basis for the tax court's finding that KCP had abandoned the stipulation. It is "obvious," the Court noted, "that a party cannot abandon a stipulation that has not yet been made. KCP did not abandon its stipulation and the court erred by using the gross building area." **KCP Hastings, LLC, vs. Dakota Co.**, A18-0133 (Minn. 7/31/2019).

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TORTS & INSURANCE

JUDICIAL LAW

Defamation: Free speech and actual malice requirement. Plaintiff and defendant were married and subsequently divorced. During the divorce proceedings, defendant was a client of defendant nonprofit organization (NPO), which provided services for victims of domestic abuse. However, the dissolution decree did not reference domestic violence, defendant never sought an order for protection, and no criminal charges were ever filed against plaintiff for domestic abuse. Years later, defendant began volunteering with the NPO. Defendant spoke at community events about her experience "as a survivor of domestic violence" and made similar postings on social media. Later, defendant was given a "Survivor Award" by the NPO and her story was featured in the NPO's newsletter, which sought donations. Plaintiff filed suit against defendant and the NPO for defamation, and against the NPO for negligence. The district court granted summary judgment in favor of defendants. The court of appeals reversed and remanded.

The Minnesota Supreme Court affirmed in part, reversed in part, and remanded. The Court's decision featured a number of holdings. First, the Court held that plaintiff failed to provide evidence of actual harm to his reputation. Second, the Court held that "emotional damages are not compensable" in a defamation action "absent harm to reputation." Therefore, plaintiff's claims would fail unless he could recover presumed damages.

The Court went on to hold that while the statements at issue accused plaintiff of a crime—one of the categories of defamation *per se*, allowing recovery of presumed damages—plaintiff could not recover presumed damages if the statements involved a matter of "public concern" absent a showing of actual malice, which plaintiff had not made. The Court remanded the defamation claims back to the district court to determine whether or not the statements involved a matter of "public concern." The Court instructed that this determination should be made "based on a totality of the circumstances" including "the content, form, and context of the speech."

Finally, the Court affirmed summary judgment in favor of the NPO on plaintiff's negligence claim, finding "no dispute of material fact regarding whether [the NPO] breached" its duty of care to plaintiff. Justice Thissen filed an opinion concurring in part and dissenting in part. Justice Thissen concurred with the majority's holdings on the defamation claims but would have remanded the negligence claim for trial. ***Maethner v. Someplace Safe, Inc.***, No. A17-0998 (Minn. 6/26/2019). *https://mn.gov/law-library-stat/archive/supct/2019/OPA170998-062619.pdf*

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BROWN

Gov. Walz appointed Suzanne Brown as district court judge in Minnesota's 10th Judicial District. Brown will be replacing Hon. Daniel O'Fallon and will be chambered at the city of Anoka in Anoka County. Brown is currently head of the criminal division in the Scott County Attorney's Office.


ARONSON

HIAS, the global Jewish nonprofit agency that supports refugees, recently elected Robert D. Aronson as chair of its board of directors. Aronson, a shareholder Fredrikson & Byron, has served on the HIAS board for 28 years and has chaired several of the organization's committees.

Jason Engkjer, Bryan Feldhaus, and Brent Johnson have each been elected to a two-year term on Lommen Abdo's board. Mike Glover, Kathleen Loucks, and Barry O'Neil continue their two-year terms and Marc Johannsen is serving his second year as president.


BRADFORD

Mark Bradford was elected to the American Academy of Appellate Lawyers, which recognizes outstanding appellate lawyers and promotes appellate advocacy and the administration of the appellate courts. Bradford is a shareholder at Bassford Remele.


NELSON


JOHNSON

Nathan J. Nelson and Alex W. Johnson have joined Trepanier MacGillis Battina PA as a shareholder attorney and associate attorney, respectively. Nelson practices in all areas of business, corporate, and LLC law. Johnson represents clients in transactions involving all areas of real estate and business law.

Merchant & Gould, a national intellectual property law firm headquartered in Minneapolis, relocated its office to Fifth Street Towers, 150 S. Fifth Street, #2200, Minneapolis, MN 55402.

Andrew J. Pratt and Craig A. Kepler have joined Best & Flanagan's commercial lending and real estate practice group.

The Minnesota Chapter of the American Board of Trial Advocates presented its 2019 Trial Judges of the Year Awards to Dakota County District Judges Jerome B. Abrams and Kathryn Davis Messerich at its annual meeting on July 11.


ALIGADA

Gov. Walz appointed Reynaldo Aligada as district court judge in Minnesota's 2nd Judicial District. Aligada will be replacing the Hon. David C. Higgs and will be chambered at Saint Paul in Ramsey County. Aligada is currently the First Assistant Federal Defender at the Office of the Federal Defender.


ABEL

Matthew J. Abel has joined Goosmann Law Firm in Sioux Falls, SD. Abel is a trust and estate litigator who helps individuals and corporate trustees navigate the trust and estate litigation process.

IN MEMORIAM

Nickolas Even Westman died at age 87 on July 6, 2019. He started his illustrious career as an intellectual property attorney by joining the firm Duggar, Braddock and Johnson. He went on to start two more intellectual property law firms in Minneapolis: Kinney, Lange, Westman and Fairbairn (now Kinney and Lange), and Westman Champlin and Kelly (now Westman Champlin and Koehler).

Richard James Sands passed away on July 29, 2019 at the age of 76. After law school he worked as a MN Senate Counsel (1970-73) and then with the firm of Peterson, Popovich, Knutson & Flynn (1973-77), in his own private practice (1977-83), and a senior revisor of statutes at the MN Legislature (1983-2005).

Ronald Birger Hemstad died on June 15, 2019 at age 86. In 1960 he joined the Minneapolis law firm of Faegre & Benson and practiced there for 35 years.

William Yaeger, of Naples, Florida, died on August 2, 2019 at age 84. He practiced with his firm, Yaeger & Yaeger (now Yaeger Jungbauer & Barczak), in Minneapolis, until his retirement, when he divided time between Florida and Minnesota.

Joseph M. Buchmeier passed away on August 4, 2019 at age 80. He worked as a family law and small business attorney. He began his law practice with his father Francis on W. 7th St. and later moved downtown. For many years he did pro bono work for women's advocacy groups and was an early member of the Fort Road Federation. He served as a Ramsey County Conciliation Court Referee for over a decade.

Byron 'Barney' Olsen died July 9, 2019 at age 84. He worked in railroad law — he was the Soo Line's general counsel for a time — and later worked in transportation law at Felhaber until retiring in 2000.

Charles Jacob Frisch age 89, of St. Louis Park, died on August 5, 2019. He was a 43-year federal employee and veteran, serving as an attorney for the National Labor Relations Board and as an administrative law judge for the Social Security Administration.

KERR

ALLYSON KERR has joined Tuft, Lach, Jerabek & O'Connell, PLLC as an associate attorney. Her focus will be in family law litigation.

STERN

LLOYD STERN joined Henson Efron. For over 20 years, he has administered trusts and settled high-valued estates with complicated tax, accounting, and valuation issues.

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