OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

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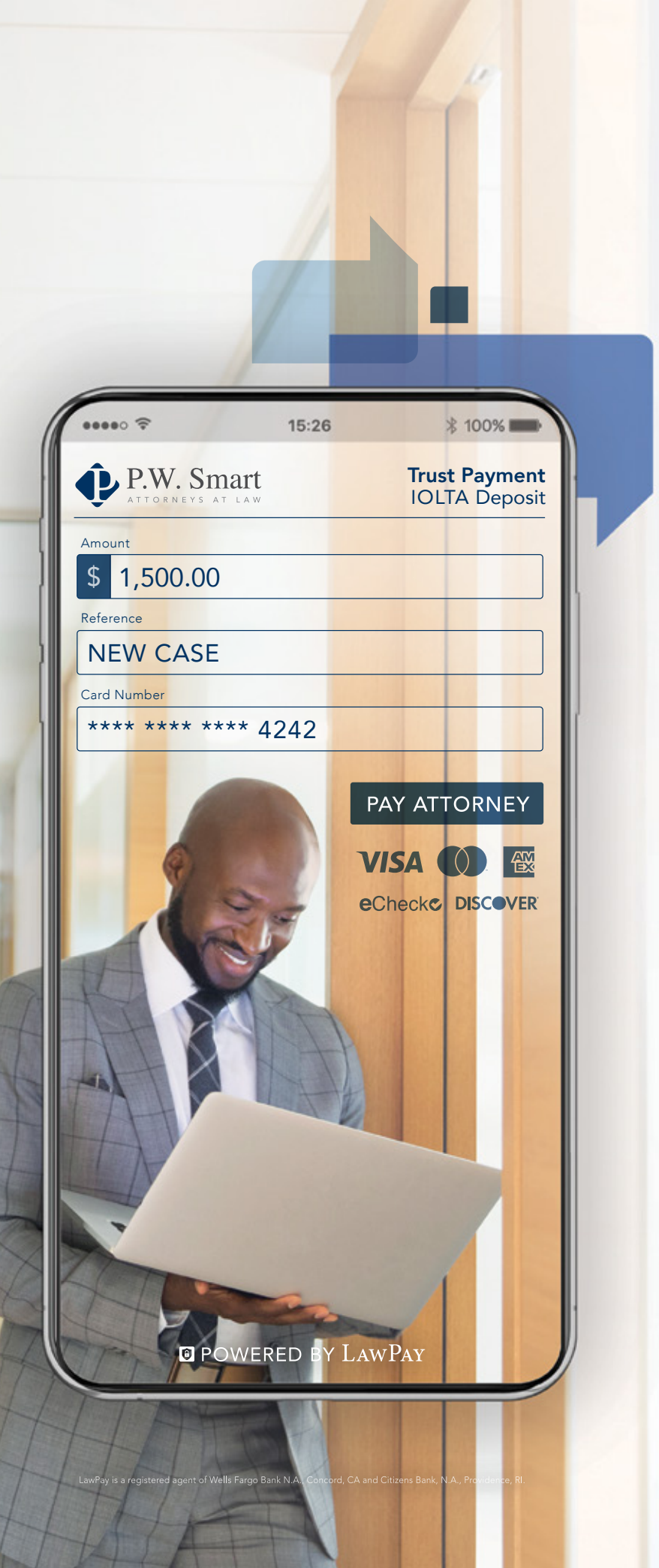
Bench & Bar OF MINNESOTA

Coping with stress

(pandemic/ holiday-induced and otherwise)

Staying sane and happy in holiday season 2020

Cultivating mindfulness through meditation



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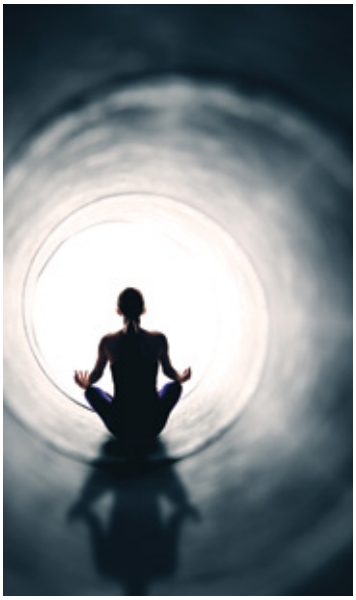
Poems for lawyers and other citizens

A review of *In Code*, a new collection of poems about law and public affairs by award-winning St. Paul poet Maryann Corbett.
By Bill Carpenter

ON THE COVER:

Coping with stress (pandemic/holiday-induced and otherwise)



CONCILIATION COURT

Your best client

Since starting in private practice more than 25 years ago, the majority of my work has been in civil litigation. When I meet with my clients to prepare them for a deposition or trial, in addition to telling them that they need to be ready to discuss the facts and the substantive issues in the case, I remind them that being physically and mentally prepared for the experience is just as important. I suggest they get enough sleep, try to take their mind off the case so they do not feel overwhelmed, and remember to put the matter in perspective. The clients who listen to this advice and focus on their personal well-being are the ones who tend to fare better in the litigation process, regardless of the outcome. They are at their best, win or lose.

I eventually realized that the advice I give to my clients about taking care of themselves is good advice for me as well. I need to be at my best, physically and mentally, in order to provide good service to my clients and to honor the professional oath I took so many years ago.

We know there are problems plaguing our profession. From substance abuse to untreated mental health issues—and an abiding reluctance to seek help—the statistics about the legal profession are staggering. A 2016 study by the American Bar Association and the Hazelden Betty Ford Foundation found that 28 percent of licensed, employed lawyers suffer from depression, 19 percent have symptoms of anxiety, and nearly 21 percent are problem drinkers.

DYAN EBERT is a partner at the central Minnesota firm of Quinlivan & Hughes, P.A., where she served as CEO from 2003-2010 and 2014-2019. She also served on the board of directors of Minnesota CLE from 2012-2019.

To be sure, law is a demanding profession. We make a living by taking on and trying to solve the problems of others, which can be both intellectually and physically exhausting. While honing our craft and being competent are certainly important to a successful legal career, it has taken our profession a long time to recognize that maintaining our physical and mental health is just as important. We need to be objective about these problems and accept and acknowledge that when our physical and mental health is compromised, the quality of our work is impacted.

The good news is that a growing number of organizations are rising to meet the challenges and address the issues afflicting our profession. The American Bar Association has committed significant resources to addressing the problems. Similarly, the National Task Force on Lawyer Well-Being (which includes members from 13 national legal associations, representing the judiciary, regulators, bar examiners, lawyers' assistance programs, and law schools, as well as individuals representing the risk-management/insurance industry and global law firms) is serving as a catalyst to improve health and well-being in the legal profession. Closer to home, in February 2019, the Minnesota Supreme Court issued a "Call to Action for Lawyer Well-Being" and the MSBA has committed to joining the Court in working to confront and overcome these issues facing attorneys across the state. All of these efforts emphasize that the first step is recognizing the problems and eliminating the stigma associated with them.

Individuals also need to address wellness. We need to pay attention to our physical and mental health, and build up our resiliency so we are better able to handle challenges in our work and personal lives. Each of us should strive to find a healthy outlet for our stress and to make our physical and mental health a priority. We also need to be mindful of our colleagues' well-being, and encourage them to find time to rest and to keep in perspective what truly matters. Make sure to reach out to colleagues who may be struggling to let them know you care. During a pandemic, when many are feeling the stress of isolation and financial losses, it's even more important to call or email solo practitioners in your area, or partners whom you haven't seen in a while. A simple contact could really boost their spirits.

When more serious concerns arise, we need to admit that we don't have all the answers and may need professional help. Lawyers Concerned for Lawyers (*www.mnlcl.org*; 651-646-5590) is an invaluable resource in this regard, and something you support through your license fees.

As we look forward to a new year, I ask that you make a commitment to doing something aimed at improving your physical and mental health, so you can be your best. Find something that will help you reenergize; do something to recharge your internal batteries. If you enjoy exercise, work something physical into your daily or weekly routine. If you enjoy reading, go to the library or join a book club. If you desire quiet time, practice meditation. It does not really matter *what* you do—what matters is *that you do it.* You owe it to your clients, you owe it to the profession, and most importantly, you owe it to yourself.

Here's to a much happier and healthier 2021! ▲

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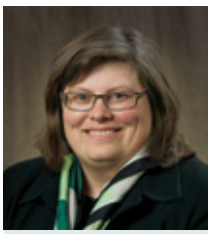
Safekeeping client property (including filing fees)

Safekeeping client or third-party property related to a representation is a fundamental ethics obligation. Lately several cases have crossed my desk involving failure to properly handle client money. For example, in July 2020, the Minnesota Supreme Court suspended Rochester attorney Michael Quinn for 18 months due in large part to how he handled a $306 filing fee.[1] There are several lessons in this case worth your time if you handle other people's money.

Mr. Quinn accepted representation in a bankruptcy matter, quoting an $1,800 flat fee for legal work, and $306 for a filing fee. Mr. Quinn did not have his client sign a fee agreement. The client paid $2,106 upon retention and Mr. Quinn promptly deposited the funds in his business account, not his trust account. Although he prepared a petition for bankruptcy, the client ultimately changed his mind and sought a refund. Mr. Quinn failed to refund the unused filing fee, failed to account to his client for the funds, and eventually stopped communicating with his client.



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

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I'm sure you can see the many issues of concern with the above facts. What is also true is the business account where Mr. Quinn placed and kept the filing fee fell below $306 on multiple occasions before the money was refunded. This fact significantly elevated the misconduct because this is misappropriation as the Minnesota Supreme Court, and courts throughout the country, have defined it. Everyone understands that misappropriation of client funds is serious misconduct, but does everyone understand what constitutes misappropriation? Failing to properly safekeep client money is also serious misconduct in itself, and is the path that ultimately led to Mr. Quinn's lengthy suspension. Due to the significant potential consequences, let's review the rules.

Rule 1.15, Minnesota Rules of Professional Conduct

Rule 1.15 is descriptively entitled "Safekeeping Property." It requires all funds (whether the client's or someone else's) held by a lawyer in connection with a representation to be placed in trust.[2] This fact was hopefully drummed into all of our brains in law school. When a client gives you an advance fee for legal services, it belongs in trust with limited exceptions that I will discuss.[3] If a client gives you funds to pay to a third party on their behalf, like filing fees, those funds also belong in trust.[4] There is no exception for this latter requirement, except a modest administrative one that I will also cover.

Mr. Quinn did not follow these basic rules. The advance legal fees that his client paid, which were unearned at the time of payment, were placed in his business account along with a specifically designated filing fee. As the Supreme Court made clear, this violation is, by itself, serious misconduct. The misconduct is failing to safekeep client funds—which, because they are not in trust, are potentially at risk. As those who are familiar with the Minnesota ethics rules know, there is a way that an attorney may ethically place an advance, unearned flat fee into a business account. To do this, you must follow the requirements in Rule 1.5(b)(1), MRPC. But you must follow the rules. Just because you have a verbal flat fee agreement with your client, and tell them the fees paid in advance will not be held in trust, does not mean that you can ethically put it into your business account.

Because you are not safekeeping the fees in trust until earned, the ethics rules require you to "in advance" have a written fee agreement signed by the client—not someone else—that contains the information in the five subparts of Rule 1.5(b)(1).[5] Mr. Quinn did not have a written fee agreement with his client, so the flat fee paid in advance by his client belonged in trust until he earned the fee by completing the work.

The filing fee paid by the client was specifically identified as such. Accordingly, that sum belonged in trust too, even if Mr. Quinn had in place a compliant agreement that allowed him to treat the $1,800 flat fee as his property subject to refund. (Remember, also, that you may not ethically describe fees as nonrefundable or earned upon receipt.)[6] This requirement can present challenges if clients want to pay by a combined check or use a credit card.

An exception to the requirement that advance fees and expenses must go immediately into trust exists if the client is paying by credit card, and the service provider the lawyer uses cannot deposit monies into trust, while debiting transaction and other fees from a non-trust account. In that limited circumstance, credit card payments may be deposited into a non-trust account, but then must "immediately" be transferred to a trust account to the extent the funds are unearned (or a compliant fee agreement is not in place) or are advances for expenses.[7]

Mr. Quinn testified that he placed the filing fee in his business account because he needed to pay the filing fee with his personal credit card. The Court did not credit this argument, as Mr. Quinn could easily have placed the funds into trust and then transferred the filing fee from trust after he had separately paid the fee. Clearly, Mr. Quinn placed his own convenience in avoiding recordkeeping obligations over compliance with the rules. Had he taken that simple step in the first instance, he would not have engaged in the significantly more serious misconduct of misappropriating the filing fee.

Misappropriation

The Court has been crystal clear in numerous cases. A lawyer misappropriates funds when "funds are not kept in trust and are used for a purpose other than one specified by the client."[8] Because Mr. Quinn's business account frequently fell below $306 before he made the refund (which he did only after an ethics complaint was filed), misappropriation was clear. The Court also rejected Mr. Quinn's *quantum merit* claims regarding the filing fee. Mr. Quinn claimed that he did additional work that entitled him to convert the filing fee to earned fees. The referee found the client had made no such agreement and the Court affirmed on a clear error standard of review.

Mr. Quinn made additional mistakes in this matter that contributed to his discipline, including failure to cooperate with the Director's multiple requests for his bank records, but the gravamen of his misconduct was the filing fee misappropriation, which all happened because he failed to put the filing fee in the right place in the first instance. Misappropriation of client or third-party funds is more than deliberate theft of unearned funds from trust, the classic definition. The minute we learned that Mr. Quinn had failed to safekeep and then spent that $306, both I and the attorney handling this case knew the likely outcome, and it is fair to say we did not like it. The case law was clear, though. And just because we didn't like it did not mean it was not the correct outcome. Mr. Quinn chose to disregard fundamental and pretty straightforward ethics rules that exist to safekeep property, rules that ensure the property is protected and available to use as specified by the client.

Conclusion

Unfortunately, we are currently working on several additional cases where lawyers have placed filing fees in their business accounts, and then in the short run spent those sums other than as the client specified. Please understand that the Court's case law considers this to be serious misconduct that will lead to significant discipline, and will be prosecuted as such by this Office. Even small sums have significant consequences. Please learn from Mr. Quinn's matter. There are a number of articles and resources on our website to assist you in properly maintaining your trust account, including articles on the most common mistakes.[9] Safekeeping client and third-party property is an important responsibility; please treat it as such, and let us know if we can assist you in meeting this obligation. ▲

Notes

[1] *In re Quinn*, 946 N.W.2d 583 (Minn. 2020).
[2] Rule 1.15(a), MRPC.
[3] Rule 1.15(c)(5), MRPC.
[4] Rule 1.15(a), MRPC.
[5] Rule 1.5(b)(1)(i)-(v), MRPC; Rule 1.15(c)(5), MRPC.
[6] Rule 1.5(b)(3), MRPC.
[7] Appendix 1 to Rule 1.15(i), MRPC.
[8] *Quinn*, 946 N.W.2d at 587.
[9] *See, e.g.*, Susan Humiston, "Is Your Trust Account in Order?" Bench & Bar (September 2016).

Deciding when to use technology-assisted review

Amid the increasing use of artificial intelligence, I am frequently asked about predictive coding, a form of technology-assisted review (TAR), and its applications—when to use it, its value as a tool, and its potential pitfalls, among others. Simply put, predictive coding is a search and review tool that uses AI to identify responsive documents based on human inputs and decisions. Predictive coding or TAR is most frequently used during the search and review phase of a case to find responsive documents within a larger set (typically, and ideally, a much larger set). According to TAR expert Dr. Maura Grossman, TAR is most aptly described as:

> A process for prioritizing or categorizing an entire collection of documents using computer technologies that harness human judgments of one or more subject matter expert(s) on a small subset of the documents, and then extrapolate those judgments to the remaining documents in the collection.[1]

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

Apart from predictive coding, Knowledge Engineering or the "rule-based" approach is another form of TAR; Dr. Grossman describes predictive coding, which uses machine learning, as requiring a training set of responsive or non-responsive documents for teaching the algorithm to distinguish between responsive and non-responsive material. These training sets can vary substantially depending on the provider and the execution of the TAR process.

In recent years, TAR has become a widely accepted method. In *Da Silva Moore v. Publicis Groupe* 287 F.R.D. 182 (S.D.N.Y. 2012) Hon. Andrew J. Peck wrote, "This judicial opinion now recognizes that computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases." *Global Aerospace, Inc. v. Landow Aviation, L.P.*, No, CL 61040 (Vir. Cir. Ct. 2012) was the first state court case to permit TAR; the production was undisputed. Since 2012, TAR's reputation as a valuable ESI review tool has grown.

Predictive coding can be a practical, cost-effective, and time-saving tool—when it's used correctly in appropriate cases. Several factors deserve consideration in deciding whether TAR is the right approach, but I will examine a few key questions. First, how many documents or text files are up for review? In *Global Aerospace, Inc. v. Landow Aviation, L.P.*, two million documents were collected.[2] In this instance, manual review would be cost-prohibitive and absurdly time-consuming. Imagine attempting to read and identify responsive items out of a population of two million documents! In this case, leveraging machine learning while limiting (though not completely eliminating) human intervention was reasonable given the sheer number of documents under review. Second, from how many custodians will data be collected? When many documents, and many custodians, are in question, using TAR is often advisable depending on the cost structure.

But I have also seen cases in which TAR was considered or used without a truly justifiable reason. In one instance, TAR was being assessed as an option to assist in reviewing about 160 documents, to be collected from about five different custodians. The cost and time needed to effectively implement a predictive coding process would outweigh the benefit of not needing to manually review the documents for relevancy. It should also be noted that while predictive coding is useful in identifying responsive documents, emails, or many other kinds of text files, it is not appropriate for cases involving other types of structured or non-textual ESI, such as databases, audio or video files, or certain kinds of images.

In deciding whether or not to use TAR, it is important to weigh the potential benefits with respect to the overall value of the case, the budget, the kinds and amount of data involved, and the number of custodians. If it is ultimately determined that TAR is the preferred choice, carefully selecting the right approach, provider, and process is critical in ensuring the best outcome. Like any technology, predictive coding and TAR tools evolve and can come with risks of their own. Balancing human involvement and oversight with the conveniences afforded by this approach is crucial. ▲

Notes

[1] Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review* with Foreword by John M. Facciola, U.S. Magistrate Judge, 7 FED. COURTS L. REV. 1 (2013), *http://www.fclr.org/fclr/articles/html/2010/grossman.pdf*

[2] *https://www.ediscoverylaw.com/files/2013/11/MemoSupportPredictiveCoding.pdf*

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* 2020 Clio Legal Trends Report

'Building something new is an amazing adventure'

Why did you go to go law school?

I had initially pondered law school as an undergraduate at the University of Minnesota, after interning under Wy Spano and Sarah Janecek at their lobbying firm. But I wasn't confident it was the right choice, and as a Gates Millennium Scholar I had the opportunity to pursue a Masters of Education with a generous scholarship, so I became a 5-12 grade public school teacher. But after a few years, it was apparent my strengths and skills were somewhat mismatched with my job. At the same time, the desire to go to law school remained. So I applied and enrolled at the University of St. Thomas.

You've chosen to build your practice in greater Minnesota. What led you there?

I grew up on a farm a few miles north of Butterfield, Minnesota, and graduated from Butterfield-Odin High School in a class of 13 (and two were foreign exchange students). During my 15-year leave of absence, I discovered I had a passion for rural life, and while I vaguely thought I might return some day, it was always a day far in the future. When my mother passed unexpectedly in October 2014, I began questioning whether the obstacles to returning to my hometown were as insurmountable as I had previously believed. Around this same time, I had the joy of connecting with Attorney Jan Zender, who was managing my mother's estate. Through a series of events, it became clear that the only thing holding me back from becoming a small-town attorney was my fear of the unknown—and that just wasn't a good enough reason! Over the next few years, I had the opportunity to work closely with Jan at Sunde Olson Kircher & Zender.

PAMELA D. STEINLE opened Steinle Law PLLC in her childhood home in south-central Minnesota on January 1, 2020, with an emphasis on estates, businesses, and barns. After graduating from the University of St. Thomas magna cum laude in 2011, she practiced for several years at the full-service litigation firm Bassford Remele before returning to Watonwan County. Pam currently serves as the president of the St. James Rotary club and teaches in children's ministries at her church.

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Within the past year you've started your own firm. How's the experience been?

Creating and building something new is an amazing adventure. But, like many things in life, this new growth was preceded by significant and unexpected loss. The transition to Steinle Law PLLC was a visual representation of the new independence I had to find after three key women in my life—my mother, Sarah Janecek, and Jan Zender—died unexpectedly at about 60 years of age within a few years of each other. The process was filled with mixed emotions, because I had to leave some safe and good things behind as I moved forward.

That said, overall it has been a very positive experience. I have never been more thankful for the people in my life who have supported me along the way, including my husband Justin, and my mentor Jennifer Gilk—they believed in me on days when I had given up. I am also keenly aware of how very blessed I am to have Bernie, Buck, and Kennedy on my team here at the office. Together, we balance a strong commitment to our clients with an equally strong commitment to our own families. And we have a lot of fun in the process!

You've been very involved with bar organizations, including a period as president of the 6th Judicial District. What do you get out of your bar volunteer activity?

One of the biggest challenges to working in greater Minnesota versus downtown Minneapolis was the lack of opportunities to connect with other colleagues outside of my firm. I observed that greater Minnesota is more prone to the phenomenon of legal silos—law firms and lawyers who either do not engage with attorneys outside of their firm, or only engage with attorneys outside their firm who are exactly like them. Being involved with the local bar association challenges me to avoid the security of the echo chamber (the place where everyone agrees with me because they're just like me) by inviting a diversity of legal perspectives into my practice.

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

I am in the life stage, "attorney with young children." My husband Justin and I are parenting a six-year old and two-year old, so my nonworking hours are spent watching *Fancy Nancy*, playing detective, spotting children as they master the monkey bars, and rapping the alphabet with Basho & Friends. ▲

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Lanham Act disgorgement just got more complicated

Understanding the Supreme Court's decision in *Romag v. Fossil*

In *Romag v. Fossil*, the Supreme Court recently decided a circuit split over one of the Lanham Act's most potent remedies: disgorgement of the defendant's profits. Prior to this decision,[1] approximately half of the circuits—including the 8th Circuit—had held that showing the defendant's "willfulness" was a prerequisite to disgorgement. Under Justice Gorsuch's opinion for a unanimous Supreme Court, however, willfulness is now merely one of many "important considerations" in a court's disgorgement calculus.

In the weeks following the decision, commentators suggested that the *Romag* decision would not likely lead to an increase in disgorgement of profits.[2] One suggested: "Profits awards will likely continue to be limited to fairly egregious cases."[3] Now, six months later, is an opportune time to examine how *Romag* has affected the disgorgement landscape. The cases since *Romag* suggest that courts will give more weight to other equitable factors when making disgorgement decisions.

Willfulness: no longer necessary, but likely still sufficient

Whether it's a claim for trademark infringement, false advertising, or unfair competition, the *Romag* decision granted courts greater latitude in disgorging lost profits. But this leeway has always been baked into the Lanham Act's actual text. The Act specifically provides that the district court may, "subject to the principles of equity," award a plaintiff the "defendant's profits."[4] And in assessing these damages, the district court may, "according to the circumstances of the case," treble them.[5]

These provisions make no reference to willfulness, which speaks to a defendant's blameworthiness. Generally speaking, willfulness is characterized by a deliberate intent to deceive and is satisfied if the defendant was aware of the effect of its conduct on the public and did not have a genuine basis to act.[6] Rather than seeking to punish willful conduct, the Lanham Act makes clear that the disgorgement remedy should not be used to punish: "Such sum in either of the above circumstances shall constitute compensation and *not a penalty*."[7]

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Drawing on these plain terms—and the lack of any reference to willfulness—the Supreme Court explained that the Lanham Act's text "has *never* required a showing of willfulness to win a defendant's profits."[8] But the Court acknowledged that willfulness is still a critical inquiry:

> *Mens rea* figured as an important consideration in awarding profits in pre-Lanham Act cases. This reflects the ordinary, transsubstantive principle[9] that a defendant's mental state is relevant to assigning an appropriate remedy. That principle arises not only in equity, but across many legal contexts. It's a principle reflected in the Lanham Act's text, too, which permits greater statutory damages for certain willful violations than for other violations. 15 U.S.C. §1117(c) [for counterfeiting]. And it is a principle long reflected in equity practice where district courts have often considered a defendant's mental state, among other factors, when exercising their discretion in choosing a fitting remedy. Given these traditional principles, we do not doubt that a trademark defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate. But acknowledging that much is a far cry from insisting on the inflexible precondition to recovery [the defendant] advances.[10]

In two concurrences, four justices emphasized that although willfulness is not a prerequisite, it is a highly relevant consideration, and mere negligence is typically insufficient.[11] Thus, although willfulness is no longer necessary, it may be sufficient—and has been in egregious cases.

Courts affirmed by *Romag* have long applied multi-factor tests

The Supreme Court's decision focused on the text, but suggested that case law over the last two centuries also had not clearly required a showing of willfulness.[12] The problem with this observation, however, is that there do not appear to be any cases on record in which a court has awarded disgorgement without also finding some deliberateness on the part of the defendant.

For example, the Supreme Court cited a 6th Circuit case from 1931 in support of its observation.[13] Although that opinion stated the 6th Circuit "d[id] not understand upon what theory the profits should be… confined" to cases of willfulness, the 6th Circuit found the defendant had acted deliberately (albeit, under a mistaken view of the law). The other two cases consisted of a Southern District of Alabama opinion from 1883 that did not cite any authority in support of its reasoning,[14] and a *state* court opinion from the Court of Appeals of Maryland in 1870 that merely stated disgorgement might be awardable absent "*fraudulent* intent."[15]

It is for this reason that Justice Sotomayor remarked that the suggestion that courts of equity were "just as likely to award profits" in cases of innocence does "not reflect the weight of authority, which indicates that profits were hardly, if ever, awarded for innocent infringement."[16] In fact, although half of the circuits prior to *Romag* had not necessarily *required* a finding of willfulness, there do not appear to be any instances in which

district courts in those jurisdictions disgorged profits without finding some degree of intent. My research has not identified a case in which profits were awarded absent some degree of willfulness that justified the court's decision. The 5th Circuit, a circuit that did not expressly require willfulness pre-*Romag*, itself admitted that its own "independent research [did not] reveal any cases from this circuit where an accounting of profits has been awarded without a finding of willfulness."[17]

Although several circuits did not require willfulness prior to *Romag*, they adopted multi-factor tests with factors that in some ways bear on willfulness:

- The degree of certainty that the defendant benefited from the unlawful conduct/whether sales have been diverted.
- Availability and adequacy of other remedies.
- The role of the defendant in effectuating the infringement/false advertising.[18]
- The public interest in making the misconduct unprofitable/deterring future conduct.
- Whether there is palming off (i.e., counterfeiting).
- Plaintiff's laches.
- Plaintiff's unclean hands.[19]

In rejecting the willfulness prerequisite, the *Romag* opinion implicitly affirms this multi-factor approach. Thus, litigants can likely expect that the above-listed factors will be relevant in disgorgement analyses nationwide post-*Romag*.

Recent cases citing *Romag* demonstrate increased reliance on holistic considerations

In the six months since the opinion in *Romag*, very few cases have substantively discussed the decision. Only one circuit court has addressed the holding as of this writing: the 9th Circuit, which had previously required a showing of willfulness.[20] The 9th Circuit remanded "to the district court to decide whether disgorgement of profits is *appropriate in the circumstances of this case*."[21] This broad characterization of the test demonstrates the wide latitude district courts will likely have in making disgorgement determinations in the future.

The Southern District of New York has also discussed *Romag* in the intervening months, holding that in addition to willfulness, courts should consider: "(1) the degree of certainty that the defendant benefited from the unlawful conduct;

(2) availability and adequacy of other remedies; (3) the role of a particular defendant in effectuating the infringement; (4) plaintiff's laches; and (5) plaintiff's unclean hands."[22] In applying these factors in the context of a default, the district court did not explicitly mention the defendants' willfulness, reasoning:

> The complaint alleges that Hendrix and GRCU benefitted from their improper use of plaintiffs' trademarks and that Hendrix and GRCU are directly responsible for the infringement. Plaintiffs have not delayed in enforcing their rights nor is there any evidence that plaintiffs have unclean hands. Further, we conclude that an award of profits is necessary to deter others from trademark infringement in the future. Accordingly, plaintiffs have shown an entitlement to an award of profits under 15 U.S.C. §1117(a).[23]

Both of these decisions suggest a trend away from emphasizing willfulness in the disgorgement analysis, and a trend toward giving equal weight to all relevant equitable considerations. Thus, *Romag* may have caused a shift in how courts approach disgorgement. Thus, decreased reliance on willfulness could actually *increase* the likelihood of disgorgement. But reduced focus on willfulness may also work to lower this risk. Indeed, some pre-*Romag* cases *denied* disgorgement remedies despite a showing of willfulness.[24] If willfulness is no longer the primary litmus test, this precedent may gain greater prominence, and even willful defendants may be able to avoid disgorgement if all of the other facts and circumstances weigh in favor of denying such relief.

The key insight for practitioners is to give greater attention to all the factors courts have considered in the disgorgement analysis—and perhaps the same attention as given to willfulness. Although willfulness remains a "highly important consideration,"[25] these additional factors will likely be given greater weight in this post-*Romag* world and should not be overlooked. ▲

The author wishes to thank Timothy D. Sitzmann and David Karaz for their thoughtful insights and research assistance. The views, thoughts, and opinions expressed in this article belong solely to the author, and are not those of the author's employer, organization, committee, or other group or individual.

Notes

[1] *Romag Fasteners, Inc v. Fossil, Inc.*, 140 S. Ct. 1492 (2020).
[2] *E.g.*, 7 Westlaw Journal Intellectual Property 02 (5/6/2020).
[3] *Id.*
[4] 15 U.S.C. §1117(a).
[5] *Id.*
[6] *Grasshopper House, LLC v. Clean & Sober Media LLC*, 394 F. Supp. 3d 1073, 1108 (C.D. Cal. 2019) (collecting cases). Gross negligence does not rise to his level. *Id.* at 1110. Rather, willfulness is akin to bad faith, and a genuine belief that the conduct at issue does not violate the Lanham Act is insufficient. *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1406 (9th Cir. 1993), abrogated on other grounds by *SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179 (9th Cir. 2016).
[7] *Id.* (emphasis added).
[8] 140 S. Ct. at 1495 (emphasis in original).
[9] "The term 'trans-substantive' refers to doctrine that, in form and manner of application, does not vary from one substantive context to the next." David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L.Rev. 1191, 1191 (2013).
[10] 140 S. Ct. at 1497 (citations omitted).
[11] *See id.* (Alito, Breyer, and Kagan, J.J., concurring); *id.* at 1498 (Sotomayor, J., concurring). For examples of willfulness, see 31 A.L.R. Fed. 3d Art. 13 (2020).
[12] *See id.* at 1496.
[13] *See id.* (citing *Lawrence-Williams Co. v. Societe Enfants Gombault Et Cie*, 52 F.2d 774, 778 (6th Cir. 1931)).
[14] *See id.* (citing *Oakes v. Tonsmierre*, 49 F. 447, 453 (C.C.S.D. Ala. 1883)).
[15] *See id.* (citing *Stonebraker v. Stonebraker*, 33 Md. 252, 268 (1870)).
[16] *Id.* at 1498.
[17] *Seatrax v. Sonbeck Int'l*, 200 F.3d 358, 372 n.9 (5th Cir. 2000) (holding that disgorgement was not appropriate because the jury did not find willfulness).
[18] Note that although *Romag* was solely a trademark infringement case, at least one court has applied the holding to false advertising claims as well. *See LegalForce RAPC Worldwide, P.C. v. DeMassa*, No. 18-CV-00043-MMC, 2020 WL 4747909, at *4 n.9 (N.D. Cal. 8/17/2020).
[19] *See, e.g.*, *George Basch Co., Inc. v. Blue Coral, Inc.*, 968 F.2d 1532, 1540 (2d. Cir. 1992); *Banjo Buddies, Inc. v. Renosky*, 399 F.3d 168, 175 (3d Cir. 2005); *Synergistic Int'l, LLC v. Korman*, 470 F.3d 162, 175 (4th Cir. 2006); *Quick Techs., Inc. v. Sage Grp. PLC*, 313 F.3d 338, 348-49 (5th Cir. 2002); *Laukus v. Rio Brands, Inc.*, 391 F. App'x 416, 424 (6th Cir. 2010) (unpublished); *Optimum Techs., Inc. v. Home Depot U.S.A.*, Inc., 217 F. App'x 899, 902 (11th Cir. 2007) (unpublished).
[20] *Monster Energy Co. v. Integrated Supply Network*, LLC, No. 19-55760, 2020 WL 4207590, at *2 (9th Cir. 7/22/2020) (unpublished).
[21] *Id.* (emphasis added).
[22] *See Experience Hendrix, L.L.C. v. Pitsicalis*, No. 17CIV1927PAEGWG, 2020 WL 3564485, at *6 (S.D.N.Y. 7/1/2020), report and recommendation adopted, 2020 WL 4261818 (S.D.N.Y. 7/24/2020) (citing George Bash, 968 F.2d at 1539-40).
[23] *Id.* (citation omitted).
[24] *See, e.g.*, *Texas Pig Stands, Inc. v. Hard Rock Cafe Int'l*, 951 F.2d 684, 687 (5th Cir. 1992) (affirming a denial of a profits award because the defendant's intentional use of the plaintiff's marks on sandwiches "was done not as an attempt to profit from the mark but rather in simple disregard of plaintiff's rights").
[25] 140 S. Ct. at 1497.

MSBA sections roundup

■ On Wednesday, December 16, the MSBA Communications Law Section is hosting its annual Communications Law State Legislative Preview (12:00 – 1:00 pm). While this is normally held in person along with a holiday social, the section is still looking forward to connecting virtually to discuss what the upcoming session of the Minnesota Legislature may produce. Visit *mnbar.org/cle-events* for more details and to register.

■ Grab your favorite ugly sweater and your beverage of choice and join the MSBA and HCBA New Lawyers Sections as they partner for a virtual trivia event on December 16 from 6:45 – 8:15 pm. Law students, new attorneys, and seasoned attorneys are all welcome. Questions will be fun and take in a variety of areas. No need to be a trivia expert to have fun at this event. Teams will be assigned randomly at the beginning of the event so you can meet and network with other attorneys. Sign up at *mnbar.org/cle-events*.

Association Health Plan update

Have you made your benefit selections for next year? If not, consider the new MSBA Association Health Plan (AHP), available to MSBA attorneys and their staffs. Plans are available to law firms that have at least one primary owner in good standing with the MSBA and at least one additional individual on staff. The MSBA Association Health Plan is an industry-based AHP serviced by Mercer and sponsored by the MSBA. Medical insurance is underwritten by Medica. MSBA is quoting these plans for eligible member groups beginning with January 1, 2021 plan effective dates. Visit *health.msbainsure.com* to learn more and get a quote.

Holiday season self-care in the pandemic era

By Joan Bibelhausen

The leaves have fallen and the ads in our Sunday paper are promoting their annual holiday gathering wares as if nothing has changed. But it has. Some are grieving—or living in fear of—the loss of loved ones to the coronavirus; all of us are grieving the loss of traditions and rituals, each in our own way. Have you caught yourself beginning to plan for holiday meals, gifts, and traditions, only to stop short? It's not uncommon to focus on the meaning of our holidays and traditions only when we fall exhausted into the holiday world we endeavored to create. This year? We need to find new ways to observe what matters to us, cope, and perhaps even thrive.

Since everything is upside down this year, begin at the end. Here's an exercise to help you visualize what is actually possible. Imagine you are talking with a friend in early January, checking in about the past few weeks. As you think back while comparing experiences, you realize that you found surprising fulfillment, less stress, and true connections. What will you tell your friend about how you got there? How did you begin with the meaning of the holidays and how did you support that?

Holiday stress arises from intertwined triggers: financial, relationship, physical, time pressures, environmental, emotional, and others. This year, all are overshadowed by the times we are living in—the pandemic, economic factors, social justice issues, and a national election. If we are mindful of the goals we hope to reach, our tasks and decisions may more easily fall into place.

Financial. Setting and sticking with a holiday budget is always a challenge. Now circumstances for you and those in your circle have changed. Some may hide that they are struggling. Focus on gifts for children, choose a charity, consider gift cards to businesses that are most impacted, or make family/friend agreements to limit or eliminate gifts; perhaps you make donations to charity in each other's honor instead. The point is to reduce the stress of uncertainty and give everyone a break. What can your dollars most meaningfully support? If you have previously sent gifts to clients, those boxes of chocolate may be delivered to an empty office. Consider

TAKE SOME DOWN TIME TO STOP, BREATHE DEEPLY, AND EXHALE THE TENSION.

a charity as a token of your gratitude for their business.

Relationships. Too many of us have lost someone. How will you honor that person in your traditions? Perhaps this is the year to start new ones. Sometimes a large source of holiday stress is spending time with people you would rather not see, especially in an election year. The pandemic allows us—in fact, the governor's order *requires* us—to strictly limit our contacts for health and safety reasons.

But many people, inevitably, will choose to gather anyway. If you are part of such a gathering, there are many other safeguards you can use to limit size and exposure. People in recovery will often have an escape plan if they feel uncomfortable in the presence of alcohol. Similarly, what will be your escape plan if you don't feel safe or respected? The governor's guidelines for gatherings can help us draw clear lines. The loss of connection and togetherness is hard, and people don't always know what is safe; the latest CDC guidelines are at *www.cdc.gov*; enter "holidays" in the search box.

Physical. The fact that we may share fewer sumptuous meals and holiday treats this year may ultimately benefit our health. This time of year many of us burn the candle at both ends—it's a status symbol to be busy, miss sleep, and juggle multiple demands and projects. Sometimes we drink too much. What is meaningful to you about holiday food? Can you teach someone to make a treasured recipe over a virtual platform so you both can share it with those in your household?

Time pressures. What will you do with the time you would have spent at your favorite bar association's holiday party? Rather than adding something else, can you slow down and reflect or do a better job on something that was getting short shrift? Year-end and month-end deadlines will continue to exist. By leaving open times open, you may feel less deadline pressure.

Environmental. Our profession tends toward perfectionism and this can explode when we try to create perfect surroundings and events. This year, let the need to simplify extend to your surroundings. Must you unpack every box? Environmental factors also include traditions such community tree-lighting or solstice celebrations. You may need to miss or change some of these, and you have a choice about the impact on you. If you are distressed about something changing or missing, ask "what can I control about this?" If it really is out of your control, where can you find the best in what is available?

Emotional. This may take the largest toll this year—and offer the greatest opportunity. We are grieving, we are sad, we are afraid. All of this is normal. Give yourself relaxation breaks, especially when you notice yourself feeling stressed or anxious. Take some down time to stop, breathe deeply, and exhale the tension. Your clients, family, and friends will be better served. If you have experienced a loss in the past year, the holidays will be difficult. Friends and family want to be there for you but may not know how. Tell them what you need.

Sometimes emotions are tied to traditions, and those traditions may need to change. You may find you like the new way better. As you think ahead to your January conversation with your friend, what stress triggers come to mind? What are your options to reduce the impact of those triggers so you can be present for what really matters? Explore the deeper meanings of whatever spiritual home you have. Doing so mindfully can change your reaction to a sometimes uncontrollable reality.

Take time to reflect on what matters most to you. Setting holiday priorities brings a healthier perspective and reduces stress. Self-help strategies can work wonders, but sometimes more help is needed. If you are feeling persistently sad or anxious or irritable, experiencing physical complaints, not sleeping, or find yourself overindulging—especially in alcohol—beyond your comfort level, talk to your doctor, mental health professional, or call Lawyers Concerned for Lawyers for resources. Lawyers Concerned for Lawyers is free, confidential, and available 24/7. ▲

JOAN BIBELHAUSEN *is executive director of Lawyers Concerned for Lawyers, which helps legal professionals and their organizations thrive in a stressful profession. www.mnlcl.org, help@mnlcl.org, 651-646-5590. She hopes Amazon users will go through Amazon Smile and choose LCL as the beneficiary.*

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Stress is what you think

The importance of a clear mind

By Senior Judge Susan R. Miles

The Saturday morning queue in front of Whole Foods was about 10 deep. I figured it would take at least five or 10 minutes to clear the vestibule, correctly masked in pleated cloth. Pulling on latex gloves, I glanced up to find myself in the crosshairs of a scowling glare from the guy ahead of me. I startled for a second. After 22 years on the bench, I'd seen this piercing look many times. Just not at the grocery store.

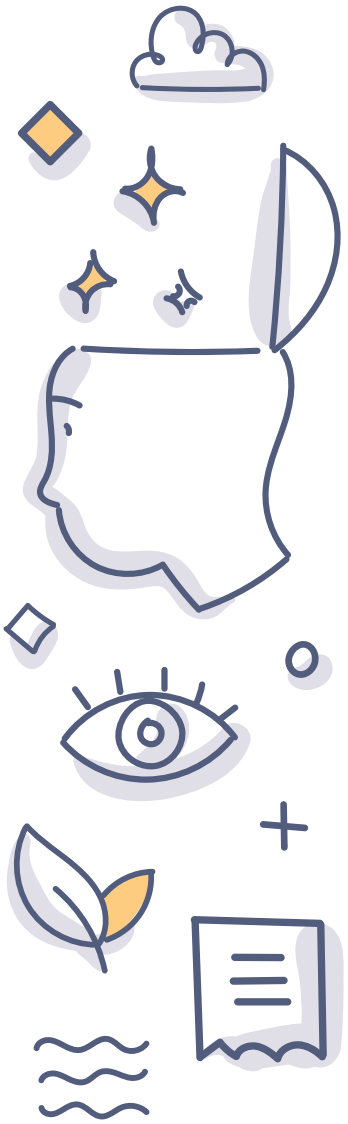
The burly guy, dressed in baggy canvas camouflage shorts, turned to his female companion and said in a bullhorn voice, "this mask stuff is bulls***. What a bunch of god-da**ed sheep." The woman, holding a mask in her own hand, turned toward me, an expression of apology etched on her brow. Camo-guy continued his rant about the ridiculousness of the shutdowns and mask mandates. Finally cleared to enter the store, he turned toward me and started making *baa*-ing noises like a sheep, while hopping up and down and scratching his ample torso to mimic a monkey. I wondered if she would be safe while he was in that state of agitation.

I could relate to camo-guy. During several of my early years on the bench I manifested symptoms of Black Robe Disease, allowing my stress to come out sideways in the form of churlishness and anger. One tirade in particular triggered a notice from the Board of Judicial Standards of an accusation that I had conspired with the local court administrator to deprive the complainant of his right to appeal a decision. Although the complaint did not directly relate to my demeanor, the lawyer who filed it undoubtedly did so in reaction to an angry outburst I lobbed at him.

While the complaint was dismissed for lack of merit, it did serve as a wake-up call that I needed to get to the root of my stress and anger. I called Lawyers Concerned for Lawyers. Four (free) therapy sessions got me to a place where I could begin to understand that my anger was a symptom of a deeper problem: multiple stressors, including the inability to shake off a sense of nagging guilt and conflict over an earlier, agonizing decision to terminate parental rights.

Eventually I found my way to a meditation class offered through the local school district's community education program and developed a practice that saved my career and changed my life. Meditation gave me the ability to see and relate to stressful events in a new way, discovering that I didn't have to be prisoner to my own unfiltered thoughts.

The mind *is* what the brain *does*.[1] We in the legal profession are perpetual thinking machines: calculating, criticizing, creating, and communicating. We are professional fretters. Will I make this deadline? Solve this problem? Win this case? What if I fail? And we are all judges. Of ourselves. Of others. Sometimes it may seem the only way we can cope with unfiltered thinking is to escape through mindless distractions. Eating. Binge streaming. Social media. Drinking. Gambling. Drugs. Shopping. The list goes on and on. And when those strategies don't work and we sink deeper into a pool of misery, we are more prone to anger, anxiety, and depression. We are more susceptible to addictive behavior. Worse yet, we neglect our well-being and our relationships, and discount pleasantries that could restore us to a healthy balance.



Stress begins with our perception of events or conditions through any of our many sense doors, including the external ones of sight, hearing, smell, taste, and touch.

Perceptions

People who are resilient to stress assess events and conditions as they arise and are able to respond appropriately. Saki Santorelli, the former clinical director of the Center for Mindfulness at the University of Massachusetts Medical Center, aptly states that the ability to see and understand what is going on inside and around us is an essential skill if we are to be less subject to unconsciously driven actions. Through cultivation of mindfulness, he counsels that we may change our relationship to threatening events and develop an ability to handle stressful situations effectively.[2]

Stress begins with our perception of events or conditions through any of our many sense doors, including the external ones of sight, hearing, smell, taste, touch, and the internal ones of proprioception, vestibular, and some would argue, thought. Simply put, an event occurs, we perceive it through sense doors, filter it through the mind, assess whether or not the event (or ongoing condition) represents a threat or danger, and if so, whether or not we have sufficient resources at hand to overcome the stressor. The same process occurs whether the threat is actual, as in a car careening out of control in our direction, or imagined, as in a personal conditioned belief that we lack the wherewithal to successfully convince a judge that our client's cause is just.

Stress reactions

Should our exposure to stress be significant or sustained, we become likely to experience any of the common stress reactions of fight, flight, or freeze. These reactions originate in the amygdala, deeply seated in the brain's limbic system. We have the amygdala to thank for keeping us alive when it is necessary to flee a real threat, like a saber-toothed tiger, but the amygdala lacks the ability to self-regulate in situations where our stressor is simply the product of our imagination. Returning briefly to camo-guy, he correctly perceived a real threat from covid-19, which he exacerbated by perceiving new threats from social distancing and masking requirements. When he reacted to the sight of my mask and the requirement that he wait in line to get into the grocery store, his amygdala went into high gear and gave birth to the angry outburst.

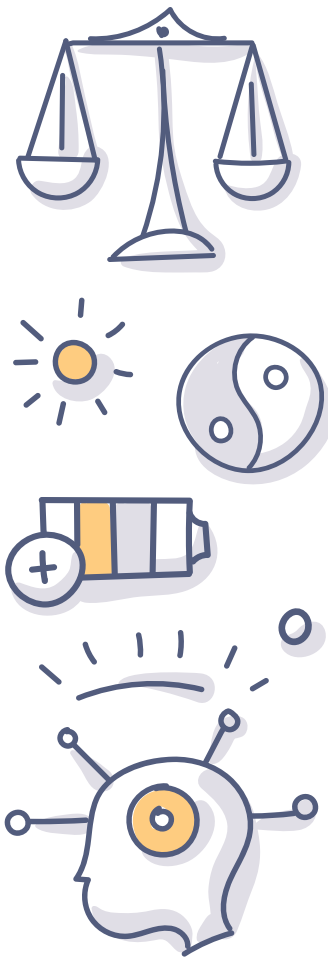
But there's more. Once a fight, flight, or freeze stress reaction has been activated, then contemporaneously our autonomic nervous system (ANS) is triggered. The ANS regulates internal states of the body, including heart and respiration rates, blood pressure, the digestive process, and ultimately, the release of adrenaline and cortisol.[3] Its components are the sympathetic nervous system, which arouses the foregoing phenomena and prepares us to fight or run away from danger, and the parasympathetic nervous system, which restores our bodily and hormonal systems to normal once our perception of danger has abated. Over time, sustained stress results in over-activation of the sympathetic nervous system, creating deleterious impacts on our physical and emotional health. We are susceptible to a tendency to cope with this state of stress by indulging in unhealthy behaviors, including excessive consumption of food, drink, and illicit drugs, as well as compulsions like overindulgence in gambling, shopping, or working, to name but a few.

Mindfulness changes the brain

We are better than this, to paraphrase Rep. Elijah Cummings. Although our stress reactions have been conditioned over a lifetime, they can be modified or eliminated. With practice, *homo sapiens* have the ability to change unskillful perceptions of events by bringing awareness to our thought processes. Happily, the remedy is simple. But simple doesn't mean easy.

Cultivating present, non-judgmental awareness of our thoughts, also known as mindfulness, begins with examining our perceptions of stressors. Through mindfulness informed by meditation, we can learn to recognize, both cognitively and somatically, thoughts and perceptions of stress as they arise. Once equipped with this ability, even entry-level meditators can engage the body's parasympathetic nervous system to help bring hormonal and endocrinal releases back into balance, alleviate health risks, and quell the tendency to behave in a reactive, regrettable manner. In many cases, this intervention merely involves taking a well-timed breath.

Functional magnetic resonance imaging studies have documented that our neural pathways are changeable, or plastic, and mindful meditation changes these pathways over a short course of daily practice.[4]



Functional magnetic resonance imaging studies have documented that our neural pathways are changeable, or plastic, and mindful meditation changes these pathways over a short course of daily practice.

Amygdala-driven stress reactions give way to reasoned responses governed by our prefrontal cortex, which even increases in physical size relative to the amygdala. Potential outcomes include a greater capacity for concentration, resiliency, and even compassion for ourselves and others,[5] discovery of our inner sources of implicit bias and racism,[6] and recognition of maladaptive coping strategies before they become entrenched.[7]

The importance of practice

In all honesty, cultivation of mindfulness of thought and perception takes commitment. Daily, I "sit" for about 30 minutes, bringing awareness to my breath. Inevitably, thoughts interrupt my concentration and I either investigate them or let them go, depending on the type of thought. It's a process that I have to repeat over and over during my meditation period. As time permits during the day, I might practice mindful stretches and other physical movements to hone my awareness of my body's stress clues.

Learning to meditate initially involves concentration on a single object of awareness, commonly the breath. After a few weeks of practice, the student usually shifts her concentration to other objects of awareness, including thoughts. That's when things get interesting. The meditator soon learns the art of "dis:" recognition and acceptance of *dis*tressing thoughts and reactions that can be *dis*armed, while letting go of negative self-judgment.

Paying attention to my breath for 30 minutes in the morning trains my mind in the same manner that consistently showing up at the gym trains my body. The benefits are worth the time commitment and, paradoxically, a mindfulness practice can *save* time by enhancing discernment of time-wasting, mindless habits. When we can recognize and cut out superfluous distractions, the time to practice emerges.

Hundreds of meditation apps offer a possible alternative to a daily practice, and their effectiveness is beyond the scope of this article. Simply put, there is wide variation in the educational value of apps, which are heavily reliant on guided meditations, though all of them at least afford a peaceful respite during a stressful day.[8] For my money, the true benefit of my daily meditation practice is the insight I gain from understanding the foibles of my own mind, which I don't feel I can learn from an app.

Another way of looking at the time commitment is that a mindfulness practice is not a selfish indulgence. Meditators have a quieting effect on those around them. The lawyer who comes unglued in the face of stress may cause harm to the organization and cause he represents, while the lawyer who manifests calm under trying circumstances will inspire the confidence of clients and colleagues alike. Though I did not have a quieting effect on camo-guy, I was able to resist the temptation to get back in his face because I realized he was not a true threat, just as I've stopped making hand gestures to drivers who tailgate me. What I do know is that, although I am not impervious to stress, my relationship to it has improved. Ask my husband.

In the end, I am spending my retirement teaching mindfulness to lawyers, judges, legal professionals, and the general community because collective peace of mind benefits our profession and all who we represent. ▲

Notes

[1] Hanson, Rick, Ph.D., *Buddha's Brain* (New Harbinger, 2009) p. 52.

[2] Santorelli, Saki,Ed.D., "Mindfulness and Mastery in the Workplace," *Engaged Buddhist Reader* (Parallax Press, 1996), at 41.

[3] Jon Kabat-Zinn, Ph.D., *Full Catastrophe Living* (Bantam Books, 2013) 312-15.

[4] Holzel, Carmody, et. al., "Mindfulness Practice Leads to Increases in Regional Brain Gray Matter Density," National Center for Biotechnology Information (2010).

[5] Davidson, Richard, Ph.D. and Begley, Sharon, *The Emotional Life of Your Brain* (Hudson_Street Press, 2012), p. 224.

[6] See generally, Magee, Rhonda, *The Inner Work of Racial Justice* (Tarcher_Perigee, 2019).

[7] Riopel, Leslie, "Mindfulness and the Brain: What Does Research and Neuroscience Say?" PositivePsychology.com, accessed 8/17/2020.

[8] Vilardaga and Bourdreaux, "Review and Evaluation of Mindfulness-Based iPhone Apps," accessed at *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4705029/* on 8/19/2020.

What I do know is that, although I am not impervious to stress, my relationship to it has improved.

Senior Judge SUSAN R. MILES was a judge in the 10th Judicial District from 1997 to 2018 and served as assistant chief judge of the 10th District, as well as president of the Minnesota District Judges Association and Minnesota Women Lawyers. She teaches Mindfulness Based Stress Reduction at the University of Minnesota and is founder of TheSettledMind.com.

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Total Print Distribution + Paid Electronic Copies: Average number copies each issue during preceding 12 months: 14,422. Number of copies of single issue published nearest to filing date: 14,586. d. Percent Paid (Both Print & Electronic Copies): Average number copies each issue during preceding 12 months: 99%. Number of copies of single issue published nearest to filing date: 99%. 17. Signature and Title of Editor, Publisher, Business Manager, or Owner: /s/ Steve Perry, Editor. Date: October 1, 2020. I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

The Conciliation Court Conundrum

Minnesota's system has many virtues. Procedural consistency isn't one of them.

By Courtney Ernston

Conciliation court offers a dispute resolution process for people pursuing small claims without forcing them to hire an attorney, spend countless hours doing discovery, present legal arguments, or become familiar with the rules. But what these courts lack in formality, they unfortunately also lack in procedural consistency. If a litigant were to have seven different conciliation court cases in seven different courts throughout Minnesota, chances are every single hearing would be conducted differently. This lack of uniformity frequently leads to confusion and chaos. Speaking of confusion and chaos, the coronavirus pandemic has, perhaps not surprisingly, elicited differing responses from the state's conciliation courts. The last portion of this article will discuss the wrench that has been thrown into an already stressed system, which now begs the question, can we use this as a time to reset and start over?

Background: A theoretical paradise

Conciliation courts were originally established in France in 1790.[1] The original concept was to take a dispute between two parties of similar social standing and place it in the hands of someone belonging to a higher social stratum.[2] The impulse was to minimize litigation and persuade parties to settle on a recommendation of the judge.[3] Debates about the merits of conciliation court were widespread in the mid-19th century.[4]

Over time, this system evolved into the one we currently have, which is similar apart from the social class aspect. Today conciliation court, aka small claims court, consists of individuals or companies attempting to informally resolve their disputes quickly and cheaply before a trained referee or judge. While conciliation court dollar limits vary widely in the United States—from $2,500 to $25,000—Minnesota has the second highest conciliation court limit in the country, allowing a plaintiff to seek up to $15,000.

Reality: A beautiful mess

Minnesota Statute §491A.01 provides that each district court in the state of Minnesota shall establish a conciliation court. The statute goes on to describe the conciliation courts' powers and jurisdiction as being the same as that of a district court for ordinary disputes up to $15,000.[5] This relatively high limit allows conciliation courts to take a lot of the burden off district courts. Conciliation courts are subject to certain limitations,[6] but generally they provide an excellent remedy without requiring litigants to be familiar with the rules of civil procedure, evidence, discovery, or general practice. But there are several issues with the lack of uniformity that can cause conciliation court to go from an easy, low-cost solution to a complex and uncertain mess.

To begin a case, the plaintiff files a relatively short Statement of Claim and Summons, which gives a very generic description of the issue and the relief sought. If the claim is less than $2,500, the court administrator serves the defendant.[7] If the claim is in excess of $2,500, the plaintiff must serve the defendant by certified mail.[8] "Service by mail, whether first-class or certified, shall be effective upon mailing."[9] While the rule seems relatively straightforward, some referees or judges will continue a hearing if the plaintiff's certified mail is returned, even if it was due to the defendant's refusal to accept the certified mail. This increases the cost and burden to a litigant, regardless of whether they are represented by counsel.

If the defendant receives the statement of claim, it can bring a counterclaim if it's within the jurisdictional dollar amount limit of $15,000. If the counterclaim is in excess of $15,000, the defendant can remove the case to district court by filing an affidavit.[10] The affidavit must state that the defendant "has commenced or will commence within 28 days an action against plaintiff…"[11] Despite the rule that states that "[t]he pleadings in conciliation court shall constitute the pleadings in district court,"[12] a defendant cannot commence an action in district court as a defendant; thus they become the plaintiff, and the former plaintiff is forced to become the defendant.

If the case is not removed to district court, a hearing date is set. For those individuals or companies that choose to hire an attorney to assist, the inconsistencies during the hearing make it practically impossible for the attorney to help the client understand what to expect. The best example of this is contained in the Minnesota General Rules of Practice as they relate to the role of an attorney in the proceedings.[13] The rule states that the parties "…may be represented by a lawyer admitted to practice law before the courts of this state. A lawyer representing a party in conciliation court *may participate in the trial to the extent and in the manner that the judge, in the judge's discretion, deems helpful*."[14] (Emphasis added.)

Owing to this nearly limitless discretion, the attorney must explain to the client myriad possible outcomes at the hearing—and attempt to prepare the client for all of the likely scenarios. As an attorney who regularly represents businesses in conciliation court, I have experienced everything from the conciliation judge who allowed me to present nothing more than legal objections to the one who permitted me to put on a mini-trial that included opening and closing statements, direct and cross-examination, and formal introduction of exhibits. Some courts also require mandatory pre-trial settlement conferences, which increases the cost of hiring an attorney. I've also had conciliation judges refuse to allow me to appear without having previously filed a request for permission to appear before the conciliation judge, despite there being no conciliation court rule that requires such a request.

An aggrieved party has the right to appeal the decision of the conciliation judge to district court.[15] The rules for appeal constitute another example of district courts adding yet another layer of uncertainty. All cases appealed to district court in Dakota County, Hennepin County, Olmsted County, and the 6th Judicial District are placed on the expedited litigation track (ELT).[16] Within the ELT designation, judges have the discretion to set an immediate trial date with no other scheduling, to order mediation, or to issue an abbreviated discovery plan.[17] In those counties or districts that have no expedited litigation track, the appeal results in a full-blown lawsuit, drastically changing the time and money required. The result is a free-for-all in which the rules are largely judge-dependent. In these instances, it is nearly impossible to tell a client what an appeal would cost or entail. Coupled with the fact that a business *cannot* represent itself in district court,[18] this ensures that businesses are often set up for failure from the outset. Needless to say, all of this means that conciliation court misses a core value within the framework of U.S. jurisprudence: consistency.

Destined for greatness: overcoming adversity

Despite these issues, conciliation court is increasingly popular and has broken new ground in recent years. Conciliation courts have become increasingly popular venues for divorce mediation.[19] Not only is this form of dispute settlement less costly and less combative, it has proven extremely efficient. A study of one U.S. county's first 200 divorce cases, as an example, found that only 14 percent of the cases returned to court.[20] The parties saved money, and the study estimated the county's savings to be $175,044.

Conciliation court has also made its way into immigration law.[21] Conciliation court in the realm of immigration has been praised as "unfettered by technicalities" with "judges [who] are peacemakers."[22] It also allows parties to tell their story, often highly personal in nature, without lawyers confusing litigants with legal jargon and formal processes conducted in a foreign language.

That's not to say that conciliation court is viewed fondly in all quarters. The NAACP, to cite a prominent example, has long taken the position that persons of color denied service in public places should choose district court over conciliation court.[23] It explains that courts following settled procedures provide less opportunity for arguments circumventing the law—such as the defendant's argument in one case that the plaintiff was denied service not due to their color but their "unique body odor." Conciliation court handles these matters off the record, making judges less accountable. Judges will not have to return and justify former positions when new cases arise.

Despite its flaws, conciliation court provides an important and affordable forum to ensure that everyone has the opportunity to be heard—a core tenet of our legal system. Conciliation court is also seen as a progressive form of alternative dispute resolution.[24] But the inconsistencies in the system amount to stumbling blocks not only for attorneys but for *pro se* litigants who enter with no idea of the procedures this particular conciliation judge will employ. Should a *pro se* litigant be expected to know how to cross-examine a witness or introduce evidence if the judge decides on the mini-trial format? An experienced attorney can usually think on his or her feet and come up with an opening and closing, but what about the average person? These are reasons why all parties would benefit from a clear understanding of how the hearing will proceed.

Reconciliation: Judgment day

The Wild West nature of conciliation court allows for both increased efficiency and decreased consistency. In comparison to the relative procedural predictability of regular litigation, conciliation court can be seen as a roll of the dice. The need for better regulation of alternative methods of resolving disputes is widely understood;[25] how this will be done remains open to interpretation.

How do we increase the formality of conciliation court in Minnesota *just enough* that consistency is no longer an issue without losing what is loved about conciliated disputes? While the possibilities are endless, I believe the best way forward involves several changes to the rules. First, conciliation judges' complete discretion over attorney participation should either be throttled back, or conciliation judges should be required to create judicial preference pages similar to those posted by district court judges. If the judge or referee conveys how he or she runs a conciliation court hearing, the parties can be adequately prepared. Second, refine the rule for a counterclaim that is in excess of $15,000 by putting forth requirements that the plaintiff commence the action in district court within a certain time and serve a formal complaint, to which the defendant may respond and assert its counterclaims. Finally, expand the ELT program to all districts to ensure that conciliation appeals follow a uniform procedure. These steps would allow conciliation court to remain an effective tool for smaller disputes while also ensuring more uniformity and clearer expectations.

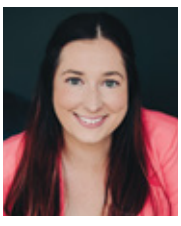
Conciliation court and covid-19

Covid-19 has changed the way that everything operates, conciliation courts very much included. It should come as no surprise that decisions about remaining open and hearing cases were not made uniformly across all conciliation courts. Below is a view into the capacity at which individual conciliation courts have operated:

COUNTY	Pending conciliation cases as of week of March 16, 2020	Pending conciliation cases as of week of July 6, 2020	Conciliation cases with a hearing held since March 16, 2020
ANOKA	1,327	1,667	2
CARVER	115	98	98
DAKOTA	723	1,201	7
HENNEPIN	2,744	3,884	23
RAMSEY	991	1,707	7
SCOTT	296	334	75
WASHINGTON	755	840	200

** Statistics provided by the State Court Administrator's Office*

It appears that all but Carver County have become even more backlogged due to the pandemic, with some courts forced to put more cases on hold than others. Decisions about when to reopen, when to try cases in person, and at what capacity the court will be running have been made unilaterally by each court. Scott County, for example, has been holding scheduling hearings while most counties have recently started rescheduling of hearings. Hearings will not be held in person when they do resume. While covid-19 has changed the way that conciliation courts have operated, it has left the theme of conciliation intact: Everyone does things a little differently. ▲



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Notes

[1] Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication, 10 Theoretical Inq. L. 423.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] Minn. Stat. 491A.01 Subd. 3.
[6] Notable exceptions to conciliation court jurisdiction include actions involving title to real estate, defamation, specific performance, class actions, prejudgment remedies, injunctions, certain state-owed debts, eviction, and malpractice. Conciliation court's informality makes it an improper candidate for these types of cases. Minn. Stat. 491A.01 Subd. 4.
[7] Minn. R. Gen. Prac. 508(d)(1).
[8] Minn. R. Gen. Prac. 508(d)(1).
[9] Minn. R. Gen. Prac. 508(d)(4).
[10] Minn. R. Gen. Prac. 510.
[11] *Id.*
[12] Minn. R. Gen. Prac. 522.
[13] Minn. R. Gen. Prac. 512(c) (emphasis added).
[14] *Id.*
[15] An "appeal" of a conciliation court case is really a removal of the claims to district court. Within 20 days of the judgment order from the conciliation court, a party must: serve a demand for removal, file with the court administrator, file an affidavit stating that the removal is in good faith and not to delay, and pay the fee. Minn. Gen. R. Prac. 521.
[16] Special Rules for the Pilot Expedited Civil Litigation Track, Rule 1(b)(1).
[17] *Id.*
[18] *See Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753 (Minn. 1992).
[19] SPECIAL PROJECT: Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society, 37 Vand. L. Rev. 845.
[20] *Id.*
[21] FEATURE: ARBITRATION, TRANSPARENCY, AND PRIVATIZATION: Arbitration and Americanization: The Paternalism of Progressive Procedural Reform, 124 Yale L.J. 2940.
[22] *Id.*
[23] PUBLIC INTEREST LAW: IMPROVING ACCESS TO JUSTICE:LENA OLIVE SMITH: A MINNESOTA CIVIL RIGHTS PIONEER, 28 Wm. Mitchell L. Rev. 397.
[24] ARTICLE: POCKETS OF INNOVATION IN MINNESOTA'S ALTERNATIVE DISPUTE RESOLUTION JOURNEY, 33 Wm. Mitchell L. Rev. 441.
[25] NOTE: Demystifying ADR Neutral Regulation in Minnesota: The Need for Uniformity and Public Trust in the Twenty-First Century ADR System, 83 Minn. L. Rev. 1839.

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Conciliation court

A valuable tool for litigators

By Nicholas J. Sideras

Imagine a prospective client comes to your office with the following issue. Sally does semi-professional landscaping work as a side-job from her main employment. Sally's neighbor, Marcus, agreed to pay Sally $7,500 to landscape his backyard. Sally knew Marcus, a well-connected person, may give her some positive word of mouth with his friends for further projects, so she agreed. Sally and Marcus decided not to execute a written agreement for Sally to complete this work. Unfortunately, after Sally finished the job, Marcus only paid Sally $2,500. Sally wants to know her options.

The most obvious is to send a letter to Marcus on your office's letterhead demanding payment for Sally. This is a low-cost solution for Sally, and it certainly may result in payment. But when Marcus rejects the demand, do you file a complaint in district court over the outstanding $5,000? The costs in taking such action may not make Sally whole when attorney fees are considered, assuming an hourly billable rate for the file. In a circumstance like this, you may want to consider conciliation court.

Conciliation court represents a valuable avenue for clients that sometimes is overlooked. In Minnesota, conciliation courts have broad jurisdiction over a substantial ambit of civil cases when the damages are $15,000 or less. This article walks through the conciliation court process and addresses the advantages and disadvantages that attorneys should consider when advising clients.

Conciliation court jurisdiction and procedure

In Minnesota, conciliation courts are a part of the district court.[1] Conciliation courts have jurisdiction in cases where the claims do not exceed $15,000 ($4,000 for matters involving consumer credit transactions).[2] But remember that the Legislature has carved out specific cases that conciliation courts cannot address; they include matters involving title over real estate, defamation, injunctive relief, evictions, and medical malpractice, among others.[3]

Conciliation court is an expedited process for civil cases. Rather than engaging in discovery or motion practice, after the filing of a statement of claim and summons, the court schedules the matter for a bench trial.[4] In some counties, these cases are stacked onto a calendar for the same time with the expectation that most cases will either be resolved without court involvement or through default against one party.[5]

The contested proceedings before a conciliation court are less formal than district court proceedings.[6] The conciliation court receives the evidence offered by the parties,[7] as expected, and it may receive evidence, in its discretion and the interest of justice, that would otherwise be inadmissible under the rules of evidence.[8] No transcript of these proceedings is made.[9] A conciliation court then issues a judgment after the proceeding.[10]

A conciliation court's judgment becomes final unless the aggrieved files a notice of removal to the district court.[11] The process to remove a conciliation matter to the district court is similar to an appeal, and parties must act timely to preserve this right.[12] An aggrieved party must: (1) serve their demand for removal, (2) file the original demand with the court administrator with proof of service, (3) file an affidavit with the court administrator that removal is in good faith and not to delay, and (4) pay the costs for removal.[13]

After successfully removing the matter to the district court, the matter is scheduled for a *de novo* trial.[14] At this point, the Rules of Civil Procedure apply to the proceedings.[15] A party may modify their pleadings from the conciliation court, if they choose, by serving a formal complaint on the opposing party.[16] Either party may demand a jury trial after removal.[17] A district court's determination on the merits of the removed matter may then be appealed to the court of appeals.[18]

Benefits of the conciliation court process

The benefits of the conciliation process will depend on each client's individual needs and goals in litigation. Three benefits will likely apply to most clients that choose to have their matter heard in conciliation court. First, clients will be able to realize substantial savings (financial and emotional) through the streamlined process in conciliation court. Second, the conciliation court, although informal, allows for a client's matter to be examined by a judicial officer to render judgment.

Third, conciliation court can be an efficient process. Instead of clients waiting for resolving discovery matters and the like, a client's case may be heard with a judgment entered shortly after filing the claim (months rather than a year).

Disadvantages of the conciliation court process

Even if a client may be entitled to bring their case in conciliation court, attorneys should be aware of potential disadvantages in this process. Initially, the conciliation court rules permit an attorney to represent a party at the judge's discretion in a manner that the judge deems helpful.[19] Representation by an attorney presumably will assist the conciliation court in addressing the matters and benefit the process overall. Although the rules permit a judge to not allow an attorney to represent their client in conciliation court proceedings, it seems unlikely that most judges would disallow representation without good cause. An attorney may want to consider submitting a letter to the conciliation court, verifying their authorization to represent their client before appearing for proceedings.

Another disadvantage of the conciliation court process is that the court will generally have limited information before it at the time the matter is scheduled for trial, so complicated factual or legal issues may be a challenge to address. That said, courts could ask for written submissions—especially if attorneys are involved—to help provide further explanation of facts and legal analyses to render a just decision.[20] A final disadvantage to note is that conciliation court decisions could result in multiple subsequent proceedings by operation of removal to the district court and any subsequent appeal. Although matters commenced in district court could likewise result in an appeal, conciliation court builds another layer into that process.

A valuable tool in the litigator's toolbox

Let's return to Sally, whose case is excellent for conciliation court. She suffered a financial loss of $5,000 in a dispute with limited factual issues. A conciliation court would need to determine: Did a contract exist between Sally and Marcus, and if so, how much is Sally owed in damages? Sally would benefit from the expedited process, avoiding discovery and other costs common to litigation in the district court. So in considering cases that come your way, be mindful of conciliation court as a tool that may help your clients benefit from an informal proceeding that may provide effective relief for their legal issue. ▲

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Notes

In 1921, the Minnesota Legislature created conciliation courts as part of the municipal court system. 1921 Minn. Laws ch. 317, §§1-10, at 387-393. The conciliation courts eventually merged with the district courts. *See* 1982 Minn. Laws ch. 398, §8, at 227-28 ("Upon the effective date of a judicial district reorganization, the district court, except in the second and fourth districts, shall also exercise the powers, duties, and jurisdiction conferred upon courts by chapters 260, 484, 487, 491, 492, 493, and 525."). Two counties that continued to operate a separate conciliation courts following merger with district courts were Hennepin and Ramsey. Minn. Stat. §§488.12-17, .29-.34 (1992). In 1993, the Minnesota Legislature adopted one body of law governing conciliation courts across Minnesota. 1993 Minn. Laws ch. 321, §§ 1-4, at 1945-51.

[2] Minn. Stat. §491A.01, subd. 3a(a) (2020).

[3] A full list of the limitations for conciliation courts can be found at Minn. Stat. §491A.01, subd. 4 (2020).

[4] Minn. R. Gen. Prac. 508(a) (requiring a trial date to be more than 14 days after the mailing or service of the summons unless otherwise ordered by a judge).

[5] *See* Minn. R. Gen. Prac. 512(e), (f), (g) (permitting conciliation courts to enter judgments based on the settlement of the parties, or dispose of matters in the absence of one of the parties). A conciliation court is also permitted to attempt to resolve the matter between the parties. *Id.* (e) ("The judge may attempt to conciliate disputes and encourage fair settlements among the parties.").

[6] *See* Minn. Stat. §491A.02, subd. 1 (2020) ("The determination of claims in conciliation court must be without jury trial and by a simple and informal procedure."). When the Minnesota Legislature created conciliation courts in the 1920s, the statutes even noted that proceedings would be conducted without attorneys, unless the proceedings were removed to municipal court when an attorney could be involved in the action. Minn. Gen. Stat. §1378 (1923). The procedure allowed "[a]ny person having a claim within the jurisdiction of said municipal court may appear before said conciliation judge and here state his [or her] cause of action without pleading and without formality." Minn. Gen. Stat. §1379 (1923).

[7] Minn. R. Gen. Prac. 512(b). Of note, defendant may file counterclaims (compulsory or permissive) in response to the statement of claim filed by the plaintiff. Minn. R. Gen. Prac. 509(a). A counterclaim must be filed at least seven days before the trial, but a conciliation court may consider a late counterclaim within its discretion. *Id.* (b), (d).

[8] Minn. R. Gen. Prac. 512(d).

[9] *See* Minn. Stat. §491A.03, subd. 3 (2020) ("A court reporter may not take official notes of any trial or proceedings in conciliation court.")

[10] Minn. R. Gen. Prac. 512(e) ("If no agreement is reached, the judge shall hear, determine the cause, and order judgment."). A conciliation court is not required to explain its rationale in issuing its decision. *Id.*; *see* Minn. R. Gen. Prac. 512 1993 comm. cmt. ("Rule 512(e) does not prohibit a court from providing the parties with a written explanation for the court's decision. Explanations, regardless of their brevity, are strongly encouraged. Explanations provide litigants with some degree of assurance that their case received thorough consideration and may help avoid unnecessary appeal.").

[11] Minn. R. Gen. Prac. 515 ("The judgment so entered becomes finally effective 21 days after the transmission of the notice, unless:… (b) removal to the district court has been perfected….").

[12] *See Maskalo v. Hilton*, No. A19-2001, 2020 WL 4432641, at *1-2 (Minn. App. 8/3/2020) (unpublished) (rejecting a defective removal notice as untimely).

[13] Minn. R. Gen. Prac. 521(b).

[14] *Id.* (a).

[15] Minn. R. Gen. Prac. 523.

[16] Minn. R. Gen. Prac. 522.

[17] Minn. R. Gen. Prac. 521(b), (c).

[18] Minn. Stat. §491A.02, subd. 8 (2020).

[19] Minn. R. Gen. Prac. 512(c); *see also Thom v. Apple Valley Ford, Inc.*, No. A09-0992, 2010 WL 88859, at *3 (Minn. App. 1/12/2010) (recognizing the permissibility of counsel to represent a party in conciliation proceedings) (unpublished), *review denied* (Minn. 3/16/2010).

[20] *See* Minn. Stat. §491A.01, subd. 2 (2020) ("The conciliation court has all powers, and may issue process as necessary or proper to carry out the purposes of this chapter.")

Landmarks in the Law

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

CRIMINAL LAW

JUDICIAL LAW

Traffic violations: Lawful basis for a violation of failure to make a complete stop before entering intersection exists when a driver drives past stop line or stop sign before coming to a complete stop. Appellant was pulled over for failing to come to a complete stop before a white stop line at a stop sign. Based on appellant's lack of physical identification and his answers to the officer's questions, the officer asked and was permitted to search appellant's vehicle. The officer found blank checks, a printer, a computer, and several identification cards for various individuals. Appellant was charged with forgery and giving a false name to a peace officer. The district court found the stop unlawful and suppressed the evidence seized from the vehicle, but the court of appeals reversed.

Section 169.30(b) requires every driver of a vehicle to "stop at a stop sign or at a clearly marked stop line before entering the intersection…" The question is whether the statute required appellant to completely stop before the vehicle crossed the stop line or merely near the stop line.

The Legislature defines "stop" in section 169.011, subd. 79, which, when applied to section 169.30(b), means a vehicle must make a complete cessation from movement "at" a stop sign or stop line. "At," however, is not defined. The court looks to the dictionary definition of "at," "expressing location or arrival in a *particular* place or position," as well as the common usage of "stop at" in the context of traffic control. Stop lines and stop signs are signals specifying a precise place or position at which a driver must stop to maintain traffic control and safety. Thus, under the plain meaning of the statute, the court holds that section 169.30(b) is violated when the driver of a vehicle drives past the stop sign or stop line before coming to a complete stop.

The parties do not dispute, and the record demonstrates, that appellant failed to bring his vehicle to a complete stop before driving his vehicle past the stop line and stop sign. Therefore, the officer's traffic stop was lawful and the district court erred in suppressing evidence seized from appellant's vehicle. ***State v. Gibson***, 945 N.W.2d 855 (Minn. 7/8/2020).

Juvenile: Delinquency adjudication or felony offenses listed in Minn. Stat. §624.712, subd. 5, are "felony convictions" for determining if an offense is "crime of violence." As an adult, appellant was charged with possession of a firearm by an ineligible person, based on a prior fifth-degree controlled substance possession juvenile delinquency adjudication. He pleaded guilty to the firearm offense. His postconviction petition, which was denied by both the district court and court of appeals, argues that the fifth-degree controlled substance juvenile delinquency adjudication does not qualify as a crime of violence, because a delinquency adjudication cannot be deemed conviction of a crime under Minn. Stat. §260B.245.

Possession of a firearm by an ineligible person requires proof that the defendant "has been convicted of, or adjudicated delinquent… for committing… a crime of violence." Minn. Stat. §624.713, subd. 1(2). The definition of "crime of violence" includes felony convictions of chapter 152 (drugs, controlled substances). Minn. Stat. §624.712, subd. 5. Section 260B.245, subd. 1(a), states that juvenile delinquency adjudications shall not "be deemed a conviction of crime." However, section 260B.245, subd. 1(b), provides an exception, stating that persons adjudicated delinquent for crimes of violence, as defined in section 624.712, subd. 5, are not entitled to possess firearms. Reading these subsections together, the Minnesota Supreme Court concludes that a juvenile delinquency adjudication for felony-level offenses listed in section 624.712, subd. 5, may be deemed "felony convictions" and meet the statutory definition of crime of violence.

Appellant admitted he had been adjudicated delinquent for committing fifth-degree possession of a controlled substance, which is a felony-level offense listed in section 624.712, subd. 5. Thus, there was a sufficient factual basis for appellant's guilty plea to possession of a firearm by an ineligible person. ***Roberts v. State***, 945 N.W.2d 850 (Minn. 7/8/2020).

■ **Firearms: A motor vehicle on a public highway is in a "public place."** Police observed a vehicle swerving in and out of traffic on a public highway and pulled it over. The driver, respondent, admitted to consuming alcohol and failed field sobriety tests, and was arrested for DWI. Respondent asked the officer to retrieve his wallet and keys from the vehicle, describing the phone as in the center console, next to his gun. The officer found the keys, wallet, and gun. Respondent was charged with DWI and carrying a pistol while under the influence of alcohol.

Minn. Stat. §624.712, subd. 1, prohibits carrying a pistol on or about one's clothes or person in a public place while under the influence of alcohol and/or controlled substances. The district court granted respondent's motion to dismiss for lack of probable cause, finding the center console of respondent's vehicle is not a "public place."

The Minnesota Court of Appeals previously held that "public place" in section 624.712, subd. 1, is ambiguous, and defined "public place" as "generally an indoor or outdoor area, whether privately or publicly owned, to which the public have access by right or by invitation, expressed or implied, whether by payment of money or not." *State v. Grandishar*, 765 N.W.2d 901, 903 (Minn. Ct. App. 2009).

The court finds that the proper focus of the analysis is not respondent's vehicle, but the public highway on which respondent drove his vehicle, by looking to the "mischief to be remedied" by section 624.712, subd. 1, which is the danger to the public inherent in firearm possession while impaired. The court holds that, for purposes of section 624.712, subd. 1, a personal vehicle operated on a public highway is a mode of transportation and cannot be considered a private place. Thus, the district court erred in dismissing the charge against respondent of carrying a firearm in a public place while under the influence of alcohol. ***State v. Serbus***, 947 N.W.2d 690 (Minn. Ct. App. 7/13/2020).

■ **Search and seizure: Warrant misidentifying person to be searched does not lack sufficient particularity if warrant and supporting documents provide sufficient correct identifying information, there is no reasonable probability the wrong person could be searched, and the correct person was searched.** Appellant collided with another vehicle on a highway, causing the death of the other vehicle's driver and injuries to appellant. Appellant denied drinking but admitted to smoking marijuana before the accident. Appellant was taken to a hospital while police obtained a warrant to search appellant's blood or urine. The detective who drafted the warrant did not have appellant's name and entered the name of the vehicle's registered owner, appellant's father, into the warrant. The warrant also stated the person to be searched was the only occupant and driver of the vehicle, the driver admitted to smoking marijuana, and referenced the "attached affidavit." The affidavit was from the sergeant on the scene, who spoke with appellant and correctly identified appellant. A judge issued a warrant and it was taken to the hospital. The deputy at the hospital noticed the warrant incorrectly identified appellant and the detective left to retrieve a corrected warrant. While the detective was doing so, the deputy obtained a urine sample from hospital staff and, shortly thereafter, a warrant correctly identifying appellant was brought to the hospital. Testing of appellant's urine sample revealed the presence of marijuana. The district court denied appellant's motion to suppress the urine test results, finding the error in the warrant in effect at the time appellant's urine was collected did not invalidate the warrant, because it created no reasonable possibility the police would search the wrong person. Appellant was found guilty after a stipulated facts bench trial.

Search warrants must particularly describe the place to be searched, but errors in the description of the place to be searched do not necessarily invalidate a warrant. The description of the place to be searched must be "sufficient so that the executing officer can locate and identify the premises with reasonable effort with no reasonable probability that other premises might be mistakenly searched." The court may consider the warrant, warrant application, supporting affidavits if they are expressly incorporated into and attached to the warrant, and the circumstances of the case, including the

executing officer's personal knowledge of the place to be searched and whether the correct place was actually searched.

Here, the wrong person was identified in the warrant, but the warrant and its supporting documents contained correct information pointing to appellant. The officers at the hospital also knew who was to be searched and his location, and the correct person was, in fact, searched. Thus, "the warrant's error presented no reasonable probability that the wrong person would be mistakenly searched." The warrant identified the person to be searched with sufficient particularity, and the district court did not err in denying appellant's motion to suppress. ***State v. Wilde***, 947 N.W.2d 473 (Minn. Ct. App. 7/13/2020).

■ **Criminal sexual conduct: In attempted third-degree criminal sexual conduct, driving to child's location and walking toward child's house with supplies are acts beyond mere preparation.** Appellant sent messages to a decoy profile of a 14-year-old boy created by police, including sexually explicit messages and photographs. Appellant and the decoy agreed to meet for sex. Appellant was arrested walking toward the decoy location, carrying a bag of "supplies" for the sexual encounter. He was convicted after a bench trial of attempted third-degree criminal sexual conduct, electronic solicitation of a child, and electronic distribution to a child of material, language, or communications relating to or describing sexual conduct.

The Supreme Court finds the evidence was sufficient to support appellant's attempt conviction. The attempt statute provides that "[w]hoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime." Minn. Stat. §609.17, subd. 1. The parties disagree on the interpretation of "more than preparation for." The Court notes that the common and approved usage of "prepare" is "[t]o make ready beforehand for a specific purpose, as for an event or occasion." Thus, the only reasonable interpretation of "more than preparation for" is that it excludes substantial steps that occur beforehand to make ready for the intended offense. The Court rejects appellant's argument that the phrase requires the state to prove a substantial step occurred at the time and place of the intended crime, as the attempt statute makes no mention of a location requirement.

Here, appellant intended to commit the offense, as his communications with the decoy showed. He took a substantial step toward the offense by arranging to meet the decoy and gathering supplies. He also moved beyond preparation by driving to the decoy's location, arriving at the parking lot, and walking toward the decoy house carrying the bag of supplies he intended to use. Appellant's conviction for attempted third-degree criminal sexual conduct is affirmed. ***State v. Degroot***, 946 N.W.2d 354 (Minn. 7/15/2020).

■ **Criminal sexual conduct: In attempted third-degree criminal sexual conduct, walking up to child's house and knocking on door are acts beyond mere preparation.** Appellant sent messages and explicit photographs to a fictitious 14-year-old, "JT," asked JT for explicit photographs, and made an agreement to meet to have sex with JT. Appellant drove to a house he believed was JT's home, knocked on the door, and was arrested when police answered. He was charged with attempted third-degree criminal sexual conduct. After a bench trial, he was convicted, and the court of appeals affirmed his conviction. Appellant argues the state failed to prove he committed "a substantial step toward, and more than preparation for" the commission of third-degree criminal sexual conduct.

First, the Supreme Court rejects appellant's argument that, "while a sexual act on the part of the defendant is not required," an attempted sex offense "begins with the initial attack." The Court notes that, for attempt cases, while the substantial step must be strongly corroborative of the actor's criminal purpose, it need not objectively reveal the nature of the intended crime.

Next, the Court finds the state provided sufficient evidence to support appellant's conviction. It is undisputed that appellant formed an intent to commit third-degree criminal sexual conduct. He took a substantial step toward the offense by arranging to meet JT, and he moved beyond preparation when he walked up to the house and knocked on the door. Appellant's conviction is affirmed. ***State v. Wilkie***, 946 N.W.2d 348 (Minn. 7/15/2020).

■ **Criminal sexual conduct: Victim may be "mentally incapacitated" when unable to give consent because they are voluntarily under the influence of alcohol or drugs.** Appellant met the victim, J.S., outside a bar. J.S. consumed multiple alcoholic beverages and Vicodin earlier that night and was heavily intoxicated. Appellant brought J.S. to a residence, where they both eventually "passed out" together on a couch. J.S. later woke up to appellant sexually penetrating her. J.S. told appellant "no," and then lost consciousness again. Appellant was charged with multiple counts of criminal sexual conduct, including two that involved sexual activity with a person when the actor knows or has reason to know the victim is mentally impaired, mentally incapacitated, or physically helpless. The district court instructed the jury J.S. could be "mentally incapacitated" even if she voluntarily consumed the alcohol and narcotics. The jury found appellant guilty of third-degree criminal sexual conduct involving a mentally incapacitated or physically helpless person.

A person is "mentally incapacitated" for purposes of the criminal sexual conduct statute when "under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person's agreement." Minn. Stat. §609.341, subd. 7. The court of appeals finds the modifier "administered to that person without the person's agreement" applies only to "any other substance." The court rejects appellant's argument that the modifier applies to alcohol, noting that alcohol is usually consumed through volitional acts of drinking and swallowing. The statute also focuses on the ability or inability of the victim to consent, not the manner in which the victim becomes unable to consent. It does not require that the defendant cause the victim's mental incapacity or even have knowledge of how the incapacitation arose.

Whether voluntarily or involuntarily intoxicated, an incapacitated person lacks the judgment or ability to give a reasoned consent to sexual contact. It is the ability to give reasoned consent that is the focus of the criminal sexual conduct statutes. Thus, the court concludes that section 609.341, subd. 7, provides that a victim may become mentally incapacitated if they are under the influence of (1) alcohol, a narcotic, or anesthetic, however consumed, or alternatively (2) any other substance, administered to that person without the person's agreement. The court ultimately affirms appellant's conviction. ***State v. Khalil***, 948 N.W.2d 156 (Minn. Ct. App. 7/27/2020), *review granted* (10/1/2020).

■ **1st Amendment: Criminal coercion statute violates the 1st Amendment.** After his girlfriend, J.C., ended their relationship, respondent made threatening calls to J.C.'s father, threatening to release a video of J.C. talking about smoking

marijuana to J.C.'s employer, J.C.'s professional licensing board, and the Department of Human Services, unless respondent was paid $25,000. Respondent was charged with attempted coercion, but the district court granted respondent's motion to dismiss, finding the coercion statute violates the 1st Amendment. The court of appeals affirmed.

The subdivision under which respondent was charged, Minn. Stat. §609.27, subd. 1(4), provides that anyone who "orally or in writing makes… a threat to expose a secret or deformity, publish a defamatory statement, or otherwise expose any person to disgrace or ridicule," and who "thereby causes another against the other's will to do any act or forebear doing a lawful act is guilty of coercion."

The Supreme Court first examines what subdivision 1(4) covers, finding it a content-based regulation of speech, because whether a person may be prosecuted under the subdivision depends entirely on what the person says. Subdivision 1(4) has a broad sweep, as it covers "threats," not only "true threats," which are unprotected. It also criminalizes a wide range of communications on a variety of subject matters, and criminalizes communications containing threats that touch upon matters of public concern. Also, subdivision 1(4) criminalizes speech whether the recipient of the threat takes—or forebears from taking—any action in response. Section 609.27, subd. 1, requires that the threat cause someone to act or forebear from doing a lawful act. However, section 609.275 provides that any threat prohibited by section 609.27, subd. 1, that "fails to cause the intended act or forbearance" is punishable as an attempt to coerce. Finally, subdivision 1(4) does not require that the recipient of the threat suffer any tangible harm or injury, or that the maker of the threat intend any injury or loss to the recipient.

Second, the Court rejects the state's argument that section 609.28, subd. 1(4), is limited to regulating unprotected "fighting words." Subdivision 1(4) criminalizes much more, prohibiting threats that do not contain "personally abusive epithets" or are not "inherently likely to provoke violent reaction." The Court also rejects the dissent's argument that the definition of "threat" is so narrow that it includes only unprotected "speech integral to criminal conduct."

Next, the Court determines that subdivision 1(4) plainly criminalizes a substantial amount of protected speech, giving numerous examples. Thus, subdivision 1(4) is unconstitutional on its face. Finally, the Court finds that subdivision 1(4), and the related attempt statute, cannot be saved with a narrowing construction. Therefore, the Court invalidates subdivision 1(4) as violating the 1st Amendment. ***State v. Jorgenson***, 946 N.W.2d 596 (Minn. 7/22/2020).

Predatory offender registration: Person charged prior to statutory amendments is required to register only if subject to registration requirement on or after amendments' effective date. Appellant was charged in 2000 with aiding and abetting fourth-degree criminal sexual conduct and disorderly conduct. He pleaded guilty to disorderly conduct and the aiding and abetting charge was dismissed in 2001. At that time, Minn. Stat. §243.166 did not require appellant to register as a predatory offender. However, section 243.166 was amended in 2005 to require registration if a person is charged with aiding and abetting criminal sexual conduct and is "convicted of… that offense or another offense arising out of the same set of circumstances." The amendment notes that it applies to persons subject to registration on or after the amendment's enactment. In 2017, appellant was released from prison in an unrelated case and was told he needed to register as a predatory offender. He did so, but was later charged with failing to register after moving to North Dakota without updating his registration. He pleaded guilty but appealed his conviction.

The court of appeals agrees with appellant that his conviction must be reversed. Appellant was not subject to the registration requirement at the time of the 2005 amendment to section 243.166. Under the amendment's plain language, his 2000 charge of aiding and abetting fourth-degree criminal sexual conduct did not require him to register as a predatory offender. The Legislature could have but chose not to set the effective date of the amendment to include someone in appellant's position. As appellant pleaded guilty to an offense for which he could not properly be convicted of at trial, the case is reversed and remanded to allow appellant to withdraw his guilty plea. ***State v. Davenport***, 948 N.W.2d 176 (Minn. Ct. App. 7/27/2020).

Traffic offenses: Failure to yield to an emergency vehicle requires proof the emergency vehicle used its siren. Appellant was cited with petty misdemeanor failing to yield to an emergency vehicle after police observed appellant's van fail to slow and pull over to let an ambulance with flashing emergency lights pass. The

district court found appellant guilty of both offenses, and appellant appealed to challenge his failing to yield to an emergency vehicle conviction.

The failing to yield statute plainly defines when a driver must yield to an emergency vehicle: when the driver is approached by an authorized emergency vehicle, the emergency vehicle displays a visible red light, and the emergency vehicle emits a siren. Here, there is insufficient evidence to support the district court's finding that the ambulance emitted an audible siren. Neither direct nor circumstantial evidence proved the ambulance's siren was used. Thus, appellant's conviction is reversed. ***State v. Li***, 948 N.W.2d 151 (Minn. Ct. App. 7/27/2020).

■ **Malicious punishment: State must prove use of unreasonable force, but not that force occurred in the course of punishment.** Appellant had four-year-old J.V.R. in her home for day care. Her property included a fenced-in yard with monkey bars and a picnic table. On one particular day, the table was placed on top of the monkey bars, so appellant could mow the lawn. J.V.R. tried to knock the table off the monkey bars twice and was "sassing" appellant when she told him to stop. When J.V.R. tried to go to the monkey bars a third time, appellant knelt in the grass, held onto J.V.R.'s arms with her hands and told him he could not use the monkey bars. Her grip left marks on J.V.R.'s arms. When his aunt picked him up later, appellant told her about the marks on J.V.R.'s arms. Appellant was charged with malicious punishment of a child—less than substantial bodily harm. A jury found her guilty and she appealed, arguing the state did not prove he used unreasonable force in the course of punishing J.V.R. The court of appeals affirmed appellant's conviction.

The Supreme Court holds Minn. Stat. §609.377 does not require the state to prove that a defendant's use of unreasonable force occurred in the course of punishment. Malicious punishment of a child occurs when "[a] parent, legal guardian, or caretaker who, by an intentional act or series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances…" Minn. Stat. §609.377, subd. 1. Subdivisions 2-6 address when the offense is a gross misdemeanor or a felony and refer to the level of "punishment." Appellant argues, therefore, that the acts described in subdivision 1 must occur "in the course of punishment."

However, the lengthy, detailed definition of "malicious punishment" in subdivision 1 plainly does not state that the defendant's acts must be done in the course of punishment. The pattern jury instruction for section 609.377 states that "[u]nreasonable force is such force used in the course of punishment as would appear to a reasonable person to be excessive under the circumstances." The court rejects this instruction, as it would lead to the court adding "in the course of punishment" into the plain language of section 609.377. ***State v. Altepeter***, 946 N.W.2d 871 (Minn. 7/29/2020).

■ **Procedure: Upon a motion to quash a subpoena for victim's cell phone, court must determine whether compliance with the subpoena would be unreasonable under the circumstances.** Yildirim was charged with third-degree criminal sexual conduct for an alleged assault against B.H. When reporting the assault, B.H. told police she recalled sending a text message before the assault, used her phone to take pictures of the location of the assault, and communicated with Yildirim about the assault on Instagram. B.H. gave her phone to police, who extracted evidence and returned the phone to her. Yildirim moved to compel the state to produce B.H.'s cell phone for independent forensic inspection, but B.H. would not turn her phone over. Yildirim then moved the court for an order to subpoena B.H.'s cell phone under Minn. R. Crim. P. 22.01, subd. 2(c), which the court granted. B.H.'s subsequent motion to quash the subpoena was denied, as was her motion to stay the district court proceedings pending her appeal. B.H. then filed a petition for writ of prohibition with the court of appeals, but the court of appeals found the district court did not abuse its discretion by finding Yildirim's right to review potentially exculpatory evidence outweighed B.H.'s privacy concerns, which could be protected by an *in camera* review of her phone.

The parties do not contest that two of three elements for a writ of prohibition are met here: An inferior court must be about to exercise judicial power and the exercise of such power will result in injury for which there is no adequate remedy. At issue is whether the district court's exercise of power in denying B.H.'s motion to quash was unauthorized by law.

First, the Supreme Court determines that, when a district court is faced with a victim's motion to quash or modify a subpoena sought under Minn. R. Crim. P. 22.01, subd. 2(c), the court must make a determination whether compliance is unreasonable given the totality of the circumstances. These circumstances include, but are not limited to: the relevance and materiality of the records sought; the specific need of the defendant for the records and whether they are otherwise procurable; the admissibility or usefulness of the records, including whether they can be used for impeachment of a material witness; whether the request is made in good faith and is not a fishing expedition; and the burden on the party producing the information, including the victim's privacy interests.

Second, the Court finds the district court's denial of B.H.'s motion to quash was unauthorized by law. The district court ordered B.H. to turn her phone over to a defense expert or counsel to review all information on her phone from the relevant time period and extract potentially relevant data to give to the court for *in camera* review. No law authorizes such access to a victim's confidential information *before* the court conducts an *in camera* review. In addition, the district court did not adequately consider the reasonableness of requiring B.H. to comply with the subpoena.

The court grants B.H.'s petition for a writ of prohibition. ***In re B.H.***, 946 N.W.2d 860 (Minn. 7/29/2020).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

Age discrimination and retaliation; claims dismissed. An employee who alleged age discrimination retaliation after she was fired by a Twin Cities bank lost her appeal. The 8th Circuit Court of Appeals affirmed a ruling by U.S. District Chief Judge John Tunheim dismissing the lawsuit on grounds that the bank articulated a legitimate, non-discriminatory reason for the termination and the retaliation claim failed to establish causation. ***McKey v U.S. Bank National Association***, 2020 WL 6220010 (Minn. Ct. App. 10/23/2020) (unpublished).

Wrongful termination; safety issues not actionable, but cost award reversed. A plant worker at an automobile manufacturing plant lost his challenge to a wrongful termination claim after he reported safety issues with the plant's manufacturing process. The 8th Circuit upheld summary judgment under the Federal Moving Ahead for Progress in the 21st Century Act, which governs safety matters "relating to motor vehicle defects," on grounds that the complaint about the quality control process did not fall within the "defect" provision of the statute and, therefore, the employee did not engage in statutorily protected activity. However, the court did reverse the minor determination award for costs for posting and shipping for the employer. ***Barcomb v. General Motors, LLC***, 2020 WL 6072606 (Minn. Ct. App. 10/15/2020) (unpublished).

An appeal of a noncompete injunction; mootness doctrine defeats appeal. An employee who was enjoined for violating a noncompete clause was not entitled to challenge the injunction after it expired. The 8th Circuit ruled that the case was moot and, therefore, dismissed the appeal. ***Perficient, Inc. v. Munley***, 973 F.3d 914 (8th Cir. 9/3/2020).

One-time claim; estoppel inapplicable. A flight paramedic who sued for unpaid overtime wages under his company's policy prohibiting overtime pay unless an employee works more than 82 hours over a two-week time period, pursuant to the Fair Labor Standards Act, was unsuccessful in challenging dismissal of his lawsuit. The 8th Circuit, in a decision written by Judge David Stras of Minnesota, affirmed the dismissal on grounds that the employer was not equitably estopped from arguing that a statutory exemption for "air carriers" applied and the employee was covered by that classification. ***Riegelsberger v. Air Evac EMS, Inc.***, 970 F.3d 1061 (8th Cir. 8/17/2020).

Long-term disability benefits not covered by ERISA. A government employee who applied for long-term disability benefits under the Employee Retirement Income Security Act (ERISA) was unsuccessful because the arrangement under which he sought the benefits was a government plan that was not subject to the statute. The 8th Circuit affirmed dismissal on grounds that ERISA did not extend to government plans and, furthermore, a breach of contract claim was not actionable because the employer acted in accordance with a contract in denying the claim after the employee elected a refund of his plan contributions, which ended his participation in the benefits pool. ***Hampton v. Standard Insurance Company***, 2020 WL 4557654 (Minn. Ct. App. 8/7/2020) (unpublished).

Workers compensation intervention; collateral attack disallowed. The health care provider who does not intervene in a workers compensation proceeding after receiving notice of an employee's pending proceeding cannot collaterally attack the award on stipulation. The Supreme Court, affirming a decision of the workers' compensation court of appeals, held that when a health care provider who voluntarily declines to intervene in a pending proceeding after receiving timely and adequate notice, cannot initiate the collateral attack on the award under Minn. Stat. §§176.271,.291 or Minn.R. 1420.1850 , subp. 3B. ***Koehnen v. Flagship Marine Co.***, 947 N.W.2d 448 (Minn. Ct. App. 8/12/2020).

Whistleblower claim dismissed; no causal connection established. A custodian failed in a challenge to dismissal of a whistleblowing claim against the school district for which he worked under the whistleblower statute, Minn. Stat. §181.932, and Minnesota Occupational Safety & Health Act (MOSHA). The Minnesota Court of Appeals affirmed dismissal on grounds that the employee failed to show a causal connection between reporting air and quality concerns and other safety hazards and his termination, further noting that the employee intentionally disobeyed directives from the school's principal regarding when to lock the school's fire doors. ***Slaughter v. Ind. Sch. Distr. #833***, 2020 WL 4579014 (Minn. Ct. App. 8/10/2020) (unpublished).

Denial of unemployment benefits upheld. An employee who was fired after he missed two days of work while in jail was denied unemployment compensation benefits. The court of appeals, upholding a decision by an unemployment law judge, held that the applicant was disqualified due to employment "misconduct," but it reversed the determination that the employee engaged in aggravated misconduct on grounds that he was discharged for absenteeism. ***Leuze v. Minnesota Alfalfa Producers***, 2020 WL 4743505 (Minn. Ct. App. 8/17/2020) (unpublished).

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ENVIRONMENTAL LAW

JUDICIAL LAW

Court of Appeals upholds MPUC's electric-vehicle charging pilot programs. The Minnesota Court of Appeals filed its decision regarding the Minnesota Public Utilities Commission's (MPUC) approval of Xcel Energy's (Xcel) Petition for Approval of Electric Vehicle Pilot Programs.

As required under Minnesota Statutes, Section 216B.1614, subdivision 2, public utility providers in Minnesota selling electricity at retail are required to file a tariff with the MPUC for the purpose of allowing customers to purchase electricity solely for recharging electric vehicles. Since Minn. Stat. §216B.1614 was enacted, the MPUC has determined that even though public utilities are required to allow customers to purchase electricity solely for charging electric vehicles, numerous significant impediments were hindering the efforts of advancing the electrification of transportation.

In response to these impediments, MPUC directed public utilities, such as Xcel, to take reasonable steps to help encourage the use of electric vehicles and electric vehicle charging stations. This directive led Xcel to petition MPUC for approval of three different electric vehicle pilot programs.

Of the three pilot programs submitted by Xcel, MPUC approved two: a fleet pilot and a public charging pilot. A group of large industrial customers of Xcel (XLI) petitioned for reconsideration of MPUC's decision, but that petition was denied. In appealing MPUC's denial of its petition, XLI argued (1) that MPUC acted in excess of its authority or jurisdiction, and (2) that MPUC's approval of components of Xcel's cost-recovery request was arbitrary or capricious.

The court first addressed whether MPUC exceeded its statutory authority by regulating public utility investments "behind the customer meter." The court ultimately held that MPUC did not exceed its statutory authority because MPUC has been given express authority by the Legislature to regulate pilot programs such as the ones submitted by Xcel. In reading Minnesota law, the court determined that MPUC is vested with "the powers, rights, functions, and jurisdiction to regulate… every public utility." (Citing Minn. Stat. §216B.08). Included in these powers to regulate public utilities is the ability for Xcel to "ascertain and fix just and reasonable standards, classifications, rules, or practices to be observed and followed by any or all public utilities with respect to the service to be furnished." (Minn. Stat. §216B.09, subd. 1)

The court determined that by installing and maintaining the conduits, wiring, and chargers used in the pilot programs, Xcel was providing a "service" under §216B.08, and therefore, MPUC had the authority to regulate the standards, classifications, rules, or practices used by Xcel in providing those services. MPUC had thus acted well within its authority, the court held, in approving Xcel's proposed pilots.

XLI's second argument was that even if MPUC had authority to regulate the pilot programs, MPUC's approval of components of Xcel's cost-recovery request was arbitrary and capricious. XLI argued that MPUC deviated from past decisions in approving the cost-recovery request without providing an explanation by ignoring past-used standards, and therefore acted in an arbitrary and capricious manner.

The court disagreed with XLI and found that MPUC had provided compelling reasons for its departure from past standards, mainly that Xcel deviated from past-used standards in order to determine whether the approved pilots would help MPUC and other stakeholders in evaluating the extent to which electric vehicle charging investments would benefit the general public. ***In re Xcel Energy's Petition***, Nos. A19-1785, A20-0116, 2020 Minn. App. (unpublished). LEXIS 791 (9/21/2020).

Minnetonka reaches novel settlement agreement concerning Rusty Patched Bumble Bees. On 9/22/2020, the city of Minnetonka and the Center for Biological Diversity reached an agreement to settle the center's "notice of intent to sue" letter under the Endangered Species Act (ESA) citizen suit provision. 16 U.S.C. §1540(g)(1)(A). The agreement is notable because it is one of the first, if not the first, settlement of allegations that a party is "taking" the Rusty Patched Bumble Bee (RPBB) under Section 9 of the ESA; prior challenges involving the RPBB have occurred in the context of the Section 7 ESA review process for federally permitted projects.

The RPBB—so-called because of a small rust-colored patch on its abdomen—was added to the federal list of endangered species by the US Fish & Wildlife Service (FWS) effective 2/10/2017. Widely distributed across the U.S and Canada as recently as the 1990s, the RPBB has declined precipitously and is now found in only 14 states, including Minnesota. At issue was the city's approval and planned construction of a multi-use mountain-bike trail in Lone Lake Park. RPBBs have been observed in the park, and the city worked with the FWS to design and construct the trail to avoid impacts to the RPBB. The center nonetheless claimed that construction and operation of the trail would be reasonably certain to kill, harm, harass, and otherwise "take" the RPBB. The center demanded that the city obtain from the FWS an "incidental take permit" (ITP) under Section 10 of the ESA before commencing construction.

Under the settlement agreement, the city will not seek an ITP but agreed to various measures to further protect the RPBB, including having bee-spotters onsite during construction, conducting annual bee surveys, limiting the use of pesticides, creating a one-acre bee meadow at the park, and promoting bee habitat throughout Minnetonka through policies, education, and action. More information on the agreement can be found at the city's website, ***www.minnetonkamn.gov***.

ADMINISTRATIVE ACTION

EPA finalizes Part B revisions to the coal combustion residuals closure regulations. On 10/16/2020, the U.S. Environmental Protection Agency (EPA) published its final rule regulating the disposal of coal combustion residuals (CCR). This rule follows EPA's previous rule regulating the disposal of CCR from electric utilities, published 7/29/2020, titled "A Holistic Approach to Closure Part A: Deadline to Initiate Closure." This rule is titled "Part B: Alternate Demonstration for Unlined Surface Impoundments."

Coal combustion residuals, also referred to as coal ash, are the byproducts of burning coal in coal-fired power plants, and they contain arsenic, lead, mercury, and other hazardous chemicals. Power plants largely dispose of CCR by collecting it into huge surface impoundments or coal ash ponds.

Under the Obama administration in 2015, EPA issued the first CCR rules requiring that facilities producing coal ash must build composite-lined impoundments to prevent leakage into groundwater. The rules also required that leaking and unlined coal ash impoundments must cease receiving CCR and begin to close down.

In 2018, the Trump administration attempted to amend the 2015 CCR regulations, rolling back key features of the rules. However, in *Utility Solid Waste Activities Group v. EPA (USWAG)*, the District of Columbia Circuit Court of Appeals overturned certain provisions of the 2015 regulations and remanded some provisions back to EPA, requiring it to

set even higher standards of protection. 901 F.3d 414 (D.C. Cir. 2018). The D.C. circuit court held that the rule did not meet the minimum criteria required in the statute to prevent harm to either human health or the environment, because the rule allowed the continued operation of unlined impoundments, which could leak contaminants into groundwater.

On 7/29/2020, EPA finalized their revisions to the CCR rules called, "A Holistic Approach to Closure Part A." 85 Fed. Reg. 53516 (8/28/2020). Part A, in accordance with *USWAG*, required utilities with unlined impoundments to retrofit or close by 4/11/2021. Additionally, the rule reclassified utilities with clay-lined impoundments as "unlined," and required them to retrofit or close by the revised deadline. This rule specified that all unlined surface impoundments are required to retrofit or close, even if they have not detected leakages or groundwater contamination.

On 10/16/2020, EPA published Part B of the Holistic Approach to Closure. This part of the CCR rules establishes procedures for unlined impoundments to continue operating past the April 2021 closure deadline on a site-by-site basis. In order to do so, utilities with unlined surface impoundments must apply to EPA and present evidence to demonstrate that the continued operation of the surface impoundment will not result in groundwater contamination above levels that would adversely affect human health or the environment. The evidence must demonstrate that either the construction of the individual surface impoundment is sufficient to prevent leaks or the evidence demonstrates a low potential for infiltration into groundwater if there is a leak based on the local subsurface hydrogeologic site conditions. For example, a utility may demonstrate its surface impoundment is operating over a naturally occurring thick layer of impermeable clay.

Part B provides that all applications will be available for public comment on EPA's docket for 20 days, and that EPA will notify the utility of its determination on the continued operation of the surface impoundment within 60 days of receiving a complete application. **Docket ID: EPA-HQ-OLEM-2019-0173.**

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FEDERAL PRACTICE

JUDICIAL LAW

Fed. R. Civ. P. 4(c)(2); service of process by *pro se* plaintiff. Fed. R. Civ. P. 4(c)(2) allows any adult who is not a party to serve process. Where a *pro se* plaintiff attempted to serve the Minnesota Attorney General by email at an email address specifically created for service of process during the covid-19 pandemic, and that email originated from the plaintiff's personal email address, Judge Tostrud held that the attempted service was invalid because the party-service rule applies with equal force to attempts at service by mail and email. ***Jackson v. Minnesota Dept. of Human Servs.***, 2020 WL 6468132 (D. Minn. 11/3/2020).

Fed. R. Civ. P. 26(e) and 33(d); production of data; "business record." Where the parties had resolved the bulk of their dispute relating to the defendants' production of data pursuant to Fed. R. Civ. P. 33(d), but the plaintiff sought to compel the supplemental production of any "future summary or analysis of that data" by the defendants in accordance with Fed. R. Civ. P. 26(e), Magistrate Judge Thorson found that attorney work product intended to summarize or compile the data was not a "business record" subject to production under Fed. R. Civ. P. 33(d). ***Sohmer v. UnitedHealth Group, Inc.***, 2020 WL 6375880 (D. Minn. 10/30/2020).

Preliminary injunction; voluntary cessation; no mootness. Where the plaintiffs sought a preliminary injunction to prevent the defendants from placing armed agents at polling places in Minnesota, and one defendant entered into an "assurance of discontinuance" with the Minnesota Attorney General and then argued that the "assurance" was sufficient to moot the request for injunctive relief, Judge Brasel found that defendants' failure to voluntarily cease their conduct prior to the attorney general's involvement, as well as their failure to admit that their conduct would violate the law, were both indications that the case was not moot. ***Council on American-Islamic Relations – Minnesota v. Atlas Aegis, LLC***, 2020 WL 6336707 (D. Minn. 10/29/2020).

Sanctions granted and sanctions denied. Adopting reports and recommendations by Magistrate Judge Menendez, Chief Judge Tunheim awarded the plaintiff $86,018.93 in discovery-related sanctions, and additional $20,000 in attorney's fees pursuant to 28 U.S.C. §1927, and also found that the defendants' "egregious conduct" required that the jury be instructed that the defendants had failed to cooperate with discovery, and that it could infer that the defendants had attempted to conceal information that would not have been helpful to their position. ***Mgmt. Registry, Inc. v. A.W. Cos.***, 2020 WL 4915832 (D. Minn. 8/21/2020).

Two months later, Chief Judge Tunheim denied defendants' motion to stay enforcement of more than $86,000 in sanctions, distinguishing the immediate enforceability of the sanctions judgment from the fact that it was not immediately appealable, and further determining that a stay pursuant to Fed. R. Civ. P. 62(h) was not warranted. ***Mgmt. Registry, Inc. v. A.W. Cos.***, 2020 WL 6264467 (D. Minn. 1023/2020).

Finding that certain of the defendants' discovery objections were not "substantially justified," Magistrate Judge Wright awarded attorney's fees to the plaintiff pursuant to Fed. R. Civ. P. 37(a)(5)(A) in an amount to be determined.

Wright v. Capella Educ. Co., 2020 WL 6285220 (D. Minn. 10/27/2020).

While finding defendants in contempt for their failure to comply with his previous order, Judge Tostrud declined to impose monetary sanctions where evidence suggested that the defendants lacked "significant resources," or to order confinement of the individual defendant where imprisonment would be disproportionate to the harm caused. ***Allied Med. Training, LLC v. Knowledge2SaveLives L.L.C.***, 2020 WL 6269196 (D. Minn. 10/26/2020).

Judge Frank denied plaintiffs' motion for $500,000 in sanctions under the court's inherent powers and 28 U.S.C. §1927, exercising his discretion and finding that any award of sanctions would be "inappropriate." ***Jensen ex rel. Jensen v. Minnesota Dept. of Human Servs.***, 2020 WL 6205722 (D. Minn. 10/22/2020).

Judge Brasel denied the defendants' request that the *pro se* plaintiff be declared a frivolous litigant as a Fed. R. Civ. P. 11 sanction and enjoined from filing further actions without leave of court, where the defendant failed to comply with the safe harbor requirements of Fed. R. Civ. P. 11(c)(2). ***Mehralian v. Parkland Estates Homeowner Ass'n***, 2020 WL 6144665 (D. Minn. 8/24/2020).

Chief Judge Tunheim awarded the plaintiffs just over $32,000 in attorney's fees and costs for expenses related to a successful contempt motion, while rejecting the plaintiffs' original request for more than $49,400 in fees and costs. ***Portz v. St. Cloud State Univ.***, 2020 WL 6119960 (D. Minn. Oct. 16, 2020).

Chief Judge Tunheim denied the defendants' motion for sanctions pursuant to 28 U.S.C. §1927 in a copyright action, finding that the plaintiffs had brought a "good-faith, colorable claim." He also denied the defendants' request for an award of attorney's fees and costs under the fee-shifting provision of the Copyright Act. ***Aamot v. Peterson***, 2020 WL 4926598 (D. Minn. 8/21/2020).

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REAL PROPERTY

JUDICIAL LAW

■ **Adverse possession and tax payments.** A claim of adverse possession to any portion of a separately assessed parcel requires the adverse claimant to pay taxes for at least five consecutive years unless a statutory exemption under paragraph 3 of Minn. Stat. §541.02 applies. At issue before the Minnesota Supreme Court was whether defendant Dormeier's adverse possession claim to part of a parcel under adverse possession necessitated that, before initiating the claim, he must have paid real estate taxes previously assessed on the land. At the district court, disseizor Dormeier admitted to not paying property taxes on a separate parcel of land to which he claimed to own 52% of by way of adverse possession. Dormeier argued that the 52% of the parcel that he sought to disseize was not "all or substantially all" of the separately assessed parcel to trigger the tax payment requirement of Minn. Stat. §541.02 as set forth in *Grubb v. State*, 433 N.W.2d 915, 920 (Minn. App. 1988). The district court granted the fee owner's motion for summary judgment seeking trespass and ejectment and rejecting Dormeier's adverse possession claim after concluding that the 52% of the parcel sought by the disseizor met the *Grubb* standard, and the court of appeals affirmed in *St. Paul Park Refin. Co. LLC v. Domeier*, 938 N.W.2d 288 (Minn. Ct. App. 2020). The Minnesota Supreme Court affirmed, but on different reasoning. The Court held that the plain, unambiguous meaning of Minn. Stat. §541.02 requires a disseizor of any portion of a separately assessed parcel to pay taxes for five consecutive years to satisfy an adverse possession claim unless an exception applies—specifically if the action is a boundary line dispute. The Court, thereby, abrogated the *Grubb* standard that the tax payment requirement applies only to adverse possession claims for "all or substantially all" of a separately assessed parcel. ***St. Paul Park Refining Co., LLC v. Brian Domeier***, A19-0573, ___ N.W.2d ____, 2020 WL 6479104 (Minn. 2020).

■ **Landlord did not oust tenant in bad faith for failure to make first month's rent payment.** The Minnesota Court of Appeals affirmed the district court's determination that landlord's removal of ostensible tenants who signed a written lease and occupied the property, but had not paid the first month's rent or first- and last-month's rental deposits as required by such lease, did not violate Minnesota's "lock-out" statute and was not liable in damages for bad-faith removal under Minnesota's ouster statute. ***Reimringer v. Anderson***, No. A19-2045, 2020 WL 5624132 (Minn. Ct. App. 9/21/2020) (unpublished).

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TAX LAW

JUDICIAL LAW

■ **Theft loss denied for now: Taxpayers must comply with Rev. Proc. to receive safe harbor benefit the Rev. Proc. offers.** Brothers Michael and William Giambrone were in the mortgage business. Their federally chartered stock institution failed, in part due to a third party's misappropriation and fraud relating to the institution's deposits. The Giambrones discovered the loss in 2010 but did not claim the loss until a later tax year. The Giambrones sought to use a safe harbor in Rev. Proc. 2009-20 to claim the loss. The safe harbor, however, required that the theft loss be claimed in the year the loss is discovered. Since the Giambrones did not claim the loss until a later year, they were not entitled to the deduction. This is so despite the Giambrones' contention that the Rev. Proc. is inconsistent with Sec. 165, the statutory provision granting the theft-loss deduction. The court opined that the brothers were "laboring under a fundamental misconception: Rev. Proc. 2009-20, supra, is not required to comport with the terms of section 165 (or the accompanying regulation). It is an exercise of administrative discretion on the part of the IRS, offering beneficial treatment for categories of theft losses meeting certain well-defined conditions. The Giambrones cannot gain the benefit of it without adhering to its conditions the IRS imposed." Although the Service was entitled to summary judgment on its argument that the Giambrones were not entitled to the benefit of the safe harbor, the court left "all other questions, including whether the Giambrones qualify for the section 165 theft loss deductions, to be decided by further proceedings." ***Giambrone v. Comm'r***, T.C.M. (RIA) 2020-145 (T.C. 2020).

■ **Hot mess of issues.** In an opinion that read like a law school exam, a California taxpayer lost on eight of eight issues

relating to her residential real estate business, grocery store, and pizza shop. Although the taxpayer was married and operated most of the businesses with her husband, the couple elected to file taxes separately and only Ms. Wienke and the business returns were at issue. The court first found that California community property laws required Ms. Wienke to allocate rental property income between herself and her husband and her failure to do so resulted in underreported income from the rental properties. The court also held that Ms. Wienke must include in her gross income cancellation of indebtedness of just under $200,000 resulting from foreclosure, because she did not provide any evidence, other than her own testimony, that the debts were nonrecourse.

Had the debts been nonrecourse, the debt relief resulting from the foreclosure would properly be treated as a sale or other disposition of the property, and any resulting income would have constituted gain on the disposition of property rather than discharge of indebtedness income. The court went on to sustain the Service's characterization of what Ms. Wienke called "income" as constructive dividends and rejected Ms. Wienke's argument that she was entitled to depreciation deductions in excess of those the Service permitted. The commissioner did not abuse his discretion, the court held, in changing Ms. Wienke's method of accounting and making a section 481(a) adjustment to include $243,405 in her gross income. The court sustained the inclusion of additional unreported income, and agreed with the commissioner that Ms. Wienke's company was not entitled to deduct its business expenses since Ms. Wienke provided no evidence substantiating those deductions. Neither was Ms. Wienke permitted to offset the company's gross receipts with cost of goods sold (COGS) in amounts greater than those respondent allowed for the years in issue—again, because she provided no evidence to substantiate that the company had COGS in excess of any amounts respondent already allowed for the years in issue. Finally, although noting the court was sympathetic to Ms. Wienke's personal difficulties, the court held the taxpayer liable for additions to tax under section 6651(a)(1) for failure to file timely returns. ***Wienke v. Comm'r***, T.C.M. (RIA) 2020-143 (T.C. 2020).

■ Compulsive gambler's luck may be turning; court holds taxpayer substantiated his position that his gambling losses exceeded his gambling winnings. Taxpayer John Coleman is a retired licensed insurance agent who gambled his entire life and did so compulsively after his retirement. Eventually his gambling began adversely affecting his financial circumstances and his family life; he lost his home in a tax sale and at one point could not pay his cell phone bill. Like many compulsive gamblers, Mr. Coleman occasionally won big, but more often, he lost. Gambling winnings are taxable income, but winnings can be offset by losses for income tax purposes. In other words, gamblers are taxed only on their net (not gross) winnings.

Mr. Coleman failed to file a federal income tax return for 2014, and the IRS prepared a substitute for return and issued a notice of deficiency. Most of the issues settled, but the gambling loss issue remained. The Service argued that Mr. Coleman had not substantiated his gambling losses and that therefore those losses could not offset his gambling winnings. "In practice," the court observed, "not all gamblers keep complete accounts of their gaming wins and losses." Mr. Coleman was one such gambler, and he had few records of his winnings and losses. However, the court further noted that in some circumstances, the court "may estimate the amount allowable" as a deduction so long as the court has "some basis upon which an estimate can be made." The court articulated the issue in the dispute as "one of substantiation," with Mr. Coleman tasked with substantiating "his losses to a degree sufficient for [the court] to estimate, using [its] best judgment, that his gambling losses exceeded his gambling winnings." With help from experienced attorneys, who represented Mr. Coleman pro bono, Mr. Coleman was able to demonstrate to the court that his losses were sufficiently substantiated. In addition to prevailing in this case, perhaps a greater turn of luck for Mr. Coleman is that, "[w]ith the help of the attorneys representing him in this case, [he] has been receiving treatment for his gambling disorder." Attorneys John B. Magee and Eric J. Albers-Fiedler of Morgan Lewis represented Mr. Coleman. ***Coleman v. Comm'r***, T.C.M. (RIA) 2020-146 (T.C. 2020).

■ Continued conservation confusion. Over the past several months we have reported on a series of conservation easement cases in which taxpayers' claimed deductions for charitable easements are denied for failure to comply with the requirement that the easement be "granted in perpetuity" as the court interprets that statutory requirement. *See, e.g.*, *Oakbrook Land Holdings, LLC v. Comm'r*, 154 T.C. 25 (TC 2020) (divided tax court upholding regulation setting out rules for charitable donations for conservation easements and interpreting the perpetuity requirement in Sec. 170(h)(2)(C)). Citing *Oakbrook Holdings*, the tax court continues to uphold the denial of charitable deduction for a conservation easements. ***Glade Creek Partners, LLC, Sequatchie Holds, LLC v. Comm'r***, T.C.M. (RIA) 2020-148 (T.C. 2020).

The 11th Circuit, however, recently weighed in on this question in an easement case out of Alabama and disagreed in part with the tax court's interpretation of the perpetuity requirement. In the decision below, the tax court interpreted two at-issue clauses, and also made a valuation determination. Specifically, the court determined that the easements were not "granted in perpetuity" because the donor had reserved to itself limited development rights within the conservation areas. Second, the tax court concluded one of the claimed easements complied with the perpetuity requirement, even though the easement included a clause permitting the contracting parties

to bilaterally amend the grant. Finally, the court valued the 2007 easement at $4,779,500—which, it turns out, is almost exactly midway between the parties' disparate appraisals. (Note the tax court's opinion in this case was summarized in the February 2019 Tax Notes & Trends.)

The 11th Circuit court affirmed in part and reversed in part, then sent the case back to the tax court. In particular, the reviewing court held "(1) that the 2005 and 2006 easements satisfy §170(h)(2)(C)'s granted-in-perpetuity requirement, (2) that the existence of an amendment clause in an easement does not violate §170(h)(5)(A)'s protected-in-perpetuity requirement, and (3) that the Tax Court applied the wrong method for valuing the 2007 easement." ***Pine Moutain Pres., LLLP v. Comm'r***, No. 19-11795, (11th Cir. 10/22/2020).

■ **Individual income tax & bankruptcy: Willful attempt to evade tax renders couple's multimillion-dollar tax liability nondischargeable.** In another decision from the 11th Circuit, a taxpaying couple was denied the benefit of the "fresh start rule" in bankruptcy because the couple was not an "honest but unfortunate debtor." Congress has decreed that debtors who "willfully attempt[] in any manner to evade or defeat… tax" are sufficiently dishonest that they are not entitled to the benefit of the "honest but unfortunate debtor" rule. In this case, the couple accumulated a multimillion-dollar tax debt. Despite the tax debt, the couple continued their lavish lifestyle—including personal chefs, million-dollar vacations, and a hundred-thousand-dollar clothing bill. Ultimately, the couple's lifestyle, bad investment luck, and health problems caught up to them, and the couple petitioned for bankruptcy seeking to discharge their tax debt. The bankruptcy court rejected the petition, holding that the couple's choice to spend lavishly on personal luxuries rather than paying their taxes, combined with submitting multiple low-ball offers-in-compromise with documentation that did not reflect their true financial status, demonstrated willful and affirmative acts to avoid payment or collection of taxes. The bankruptcy decision was appealed to the district court, which affirmed. The 11th Circuit was similarly dismissive of the taxpayer's arguments. Bankruptcy Judge Peek McEwen concluded, "as their immoderate spending choices show, they were far more focused on living in the lap of luxury. They would have been wise to heed the proverb which cautions that *enough is better than too much*. As it is, however, the Feshbachs' misjudgment ultimately cost them complete relief." ***In re Feshbach***, 974 F.3d 1320 (11th Cir. 2020).

■ **Court denies motion to recuse entire tax court.** Supervalu/Columbia II Rockridge Center filed petitions challenging the Pay 2018, Pay 2019, and Pay 2020 assessed value of the subject property, located at 4445 Nathan Lane North in Plymouth.

On 3/9/2020, Supervalu moved for an "*Erie*-Shuffle Order" to transfer the three cases to the Hennepin County District Court for "determination of issues which have arisen that are beyond the subject matter jurisdiction of this Court to consider." Additionally, Supervalu asked the tax court to recuse itself entirely from further proceedings. A hearing on the *Erie* motion was held on 3/23/2020, and Supervalu confirmed on the record it was not moving the court for recusal, nor asserting actual bias or impropriety by any member of the court. Concluding that no motion for recusal was before the court, the court denied the *Erie* motion on its remaining grounds.

On 9/10/2020, Supervalu filed the instant motion, asking the court to transfer the three cases to the Hennepin County District Court and to recuse itself entirely from further proceedings. The motion states that, because of the former substantive participation of Judge Bowman as counsel of record for the county, the court as a whole should exercise discretion to recuse itself. Supervalu asserts, 1) Judge Bowman's presence on the court creates an appearance of impropriety, and 2) the impartiality of the judges of the court may reasonably be questioned concerning these cases.

Minnesota Rule of Civil Procedure 63.03 specifies the removal procedure with respect to a judge who already has presided at a motion or other proceeding of which the party had notice. Specifically, a judge having already presided over a proceeding may not be removed except upon an affirmative showing that the judge is disqualified under the Code of Judicial Conduct. The standard for an affirmative showing of disqualification is an objective examination of whether the facts and circumstances would cause a reasonable examiner to question the judge's impartiality. See *State v. Burrell*, 743 N.W.2d 596, 601 (Minn. 2008).

The Minnesota Code of Judicial Conduct "establishes an independent responsibility for judges to disqualify themselves 'from any proceeding in which the judge's impartiality might reasonably be questioned.'" Minn. Code Jud. Conduct R. 2.11(A). Judicial Rule 2.11(A) sets forth five circumstances, which include: (1) personal bias or prejudice concerning a party or personal knowledge of disputed facts, (2) the participation in the proceeding of individuals with specified relationships to the presiding judge, (3) the existence of an economic interest in the case on the part of certain individuals with specified relationships to the presiding judge, (4) extrajudicial public statements by the presiding judge that appear to commit the judge to a particular outcome in the case, and (5) the existence, on the part of the presiding judge, of certain prior employment relationships.

The court interpreted Supervalu's motion for "recusal" as a motion for disqualification pursuant to Rule 63.03. During the hearing on the *Erie* motion, Supervalu expressly stated that the request for recusal was not asserting any actual bias or impropriety on the part of any member of the court. Supervalu contends that in the Pay 2018 case, however, Judge Bowman, prior to her joining the court, filed a pretrial brief on behalf of the county, and now, her appointment to the court creates an appearance of bias for other judges on the court, citing "collegial relationship."

The court states that Supervalu's suggestion is based on conjecture, not evidence, and there is no true affirmation of bias. Furthermore, recusal of an entire court is only warranted in extraordinary circumstances, such as a direct threat of injury to all judges of the court. *See In re Nettles*, 394 F.3d 1001, 1002-03 (7th Cir. 2005). Because Supervalu offers no evidence in support of its motion for recusal of the entire court, the court denied the motion to transfer. ***Supervalu/Columbia II Rockridge Center v. Hennepin Co.***, 2020 WL 6166017 (Minn. Tax Court 10/19/2020).

■ **Property tax: Court dismisses untimely petition.** On 7/15/2019, James C. and Robin B. Melville filed a petition in the tax court alleging that the estimated market value of the subject property for the 2018 assessment date, for taxes payable in 2019, exceeded its actual market value. The petition includes a property tax statement setting forth an estimated market value of $762,000 for taxes payable in 2019. The petition also includes a letter from the City of Minneapolis Assessor, dated 5/16/2019, setting forth a reduction in the estimated market value of the subject property as of the 2019 assessment date, for taxes payable in 2020, from $807,500 to $630,000.

On 7/29/2020, the county moved to dismiss the Melvilles' petition for lack of

subject matter jurisdiction. The county asserts the Melvilles failed to timely file and serve the petition pursuant to Minn. Stat. §278.01, subd. 1(c) (2018). The Melvilles did not respond to the motion, but Ms. Melville appeared for the telephonic hearing held on 8/28/2020.

During the phone hearing, Ms. Melville confirmed that the petition was filed on 7/15/2019. However, Ms. Melville contended that the July 15 filing was timely because, pursuant to Minn. Stat. §278.01, subd. 4 (2018), a petitioner may file a chapter 278 petition up to 60 days after receiving notice from the county assessor of a change to the assessment. Ms. Melville stated that the 2019 letter from the assessor, which reduced the 2019 assessment (Pay 2020) from $807,500 to $630,000, constituted such notice. Because the 2019 letter is dated 5/16/2019, Ms. Melville contended by filing the petition on 7/15/2019, the requirements were met.

Minnesota Statutes, section 278.01, subdivision 1 states that a petitioner must file a petition, with proof of service on the necessary individuals, on or before April 30 of the year in which the tax becomes payable. Statutory time limits to appeal to the tax court are strictly construed and are jurisdictional. *See Kmart Corp. v. Cty. of Clay*, 711 N.W.2d 485, 488-90 (Minn. 2006); *see also Benigni v. Cty. of St. Louis*, 585 N.W.2d 51, 54 & n.9 (Minn. 1998).

An exception to the April 30 deadline lies in Section 278.01, subdivision 4 (2018), stating that when a valuation is changed and the property owner is notified after February 28 of the year the tax is payable, a petitioner has 60 days from the date of mailing of the notice to initiate an appeal.

The court lacked subject matter jurisdiction over this petition because it was filed 76 days after the deadline. Additionally, the letter received by the Melvilles did not extend the time to file their petition because it concerned taxes payable in 2020. Therefore, the court granted the county's motion to dismiss. ***Melville v. Hennepin Co.***, 2020 WL 6165968, (Minn. Tax Court 10/19/20).

■ **Court modifies scheduling order to allow petitioner to include previously unavailable evidence.** This matter concerned consolidated 2017 and 2018 appeals of the market value of a Kohl's store in Eagan, MN. An amended scheduling order set the 2017 appeal for trial on 4/22/2019. Accordingly, on 4/8/2019, the parties filed their respective witness and exhibit lists along with their proposed exhibits.

On 5/14/2019, the parties filed a joint motion to stay the 2018 appeal pending the court's resolution of the 2017 appeal. Instead, the court filed an order consolidating the 2017 and 2018 appeals and ordered the consolidated matter to proceed with the original schedule governing the 2018 appeal, which set a trial date on 1/6/2020. On 12/16/2019, the parties filed updated witness and exhibit lists, along with their proposed exhibits. Appraisal reports for the 2018 appeal were prepared by the same experts as the 2017 appeal. William Toelke's report for the county quoted an August 2019 white paper by the International Association of Assessing Officers (IAAO), which discussed the meaning of "fee simple estate." Michael MaRous's appraisals for Kohl's neither quote nor mention the IAAO white paper.

A Minnesota Supreme Court decision was issued on 1/29/2020 that discussed whether the tax court erred in valuing a big box retail store. See *Lowe's Home Centers, LLC (Plymouth) v. County of Hennepin*, 938 N.W.2d 48 (Minn. 2020). Mr. MaRous, Kohl's appraiser, prepared the Lowe's appraisal report in *Lowe's (Plymouth)*. Additionally, The Appraisal Institute's Winter 2020 Appraisal Journal contained a peer reviewed article titled "Revisiting Market Value and Market Rent," which, according to Kohl's, "addressed many of the same issues and concepts discussed by the IAAO in its 2019 position paper" that was quoted by the county's assessor, Mr. Toelke.

On 3/30/2020, the court struck from its calendar the 4/15/2020 trial date in these matters due to the covid-19 pandemic. Kohl's now filed a motion requesting: (1) limited direct testimony of its appraiser, Mr. MaRous; and (2) leave to amend its witness list and/or its exhibit list to include additional anticipated necessary rebuttal testimony and evidence relating to the issues recently raised by the decision in Lowe's.

The county opposed Kohl's motion, arguing, among other things, that the *Lowe's* decision provides no basis for allowing direct testimony from Mr. MaRous, and that Kohl's has failed to explain "why it would need to amend its witness list or indicate who such witnesses might be."

The court allowed Kohl's to amend its exhibit list to include the documents pertaining to the 2019 IAAO paper that were not previously available, explaining that the documents that could possibly bear on the report from the county's appraiser, Mr. Tolke, were not available until early 2020, rendering it impossible for Kohl's to include the documents on its previously filed exhibit list. Furthermore, the court stated that it is not ruling how the exhibits may be used at trial, nor whether they would be admissible evidence.

Additionally, the court denied Kohl's request for direct testimony of Mr. MaRous, stating that the scheduling order provides that the written appraisal will serve as the appraiser's direct testimony, and the Supreme Court's decision in *Lowe's* does not warrant further comment from Kohl's appraiser. The court also agreed with the county regarding an amended witness list, concluding that Kohl's failed to identify a particular witness; therefore the motion to amend its witness list was denied. ***Kohl's Illinois, Inc. v. Dakota Co.***, 2020 WL 6374971 (Minn. Tax Court 10/27/20).

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Joseph Bauer and Sheila Niaz joined the Minneapolis office of Merchant & Gould PC, serving IP clients in the software and electrical industries.


MURILLO

Elisa Murillo was named a Class A shareholder with Aafedt, Forde, Gray Monson. Murillo is fluent in Spanish and is admitted to practice in Minnesota, Wisconsin, and the U.S. District Court of Minnesota. Murillo works in multi-party matters involving injuries, on behalf of employers, insurers, and injured workers.

Courtney Ernston was promoted to partner at Minnesota Construction Law Services. Ernston joined the firm in 2017.


SHERMOEN

Gov. Walz appointed Jerrod Shermoen as a district court judge in Minnesota's 9th Judicial District. Shermoen will be filling the vacancy that occurred upon the retirement of Hon. Charles M. Leduc. The seat will be chambered in International Falls in Koochiching County. Shermoen is an attorney and president at ShermoenJaksa Law, PLLC.

Amy Yanik Meisel has been named a fellow of the American Academy of Matrimonial Lawyers. Yanik Meisel practices family law at Henschel Moberg, PA.


SINGER

George H. Singer, a finance, bankruptcy, reorganization, and capital recovery partner in the Minneapolis office of Ballard Spahr, has been named a fellow of the American College of Bankruptcy.


PORTER

Gov. Walz announced that Erin Sindberg Porter will serve as chair of the Commission on Judicial Selection. She succeeds outgoing chair Lola Velazquez-Aguilu, who stepped down earlier this year. Sindberg Porter is a partner in the business and tort litigation group at Jones Day in Minneapolis.

IN MEMORIAM

Alberto Quintela Jr. died October 18, 2020 at age 69. He was a graduate of the University of Minnesota Law School. Throughout his career as an attorney and administrator, Quintela served the City of St. Paul, the State of Minnesota, the General Conference Mennonite Church and World Conference, the West Side community of St. Paul, and immigrant communities.

James L. Fetterly, longtime resident of Minneapolis, passed away October 5, 2020 at the age of 84. In 1962 Fetterly started his life-long career in litigation with the firm Robins, Davis and Lyons. Jim built his 58-year law practice focused on civil litigation with an expertise in fire and mass disaster litigation. He has been named a Super Lawyer and Best Lawyer several times throughout his career as well as lecturing, teaching, and appearing on *NBC Dateline* about his expertise on fire litigation.

Russell Alph Norum passed away on August 29, 2020 at 82. His professional goal was to practice law, earning a JD degree in his early 40s from Hamline University Law School. He worked as an attorney up until the weeks before his death. Throughout his career, he provided free legal services to the underrepresented community. Russell served as an arbitrator in Hennepin County, where he was recognized for his fair and well-reasoned decisions. He volunteered frequently as mock trial judge for Hamline University, where he was honored with a plaque on its Judges Hall of Fame. And he helped senior citizens to obtain free legal services.

Jeffery Dean Carpenter died September 26, 2020 at the age of 64 from early onset Alzheimer's disease. He graduated from Hamline University School of Law and practiced law as a clerk in the U.S. Bankruptcy Court, and was a partner at Rider, Bennett, Egan & Arundel and Henson & Efron.

Roderick Adams Lawson died on September 18 at the age of 101. He attended the University of Minnesota Law School. He then practiced law in Stillwater and Lake Elmo for over 50 years, including significant pro bono legal work. In the 1970s he was on the Minnesota-Wisconsin Boundary Area Commission, working to make the St. Croix a designated wild river. He was an early proponent of historical preservation in Stillwater. And in the 1980s, along with other graduates, he started the St. Paul Central High School Foundation and remained president of the foundation well into his 80s.

Janet Coleman died August 11, 2020 at age 74. She received her JD from Hamline University. Coleman co-founded the law firm General Counsel, Ltd. at a time when women were just starting to crack glass ceilings.

Charles Addison Bassford, Jr. died October 6, 2020. In 1973 he graduated from William Mitchell College of Law and began his long career as an attorney. The past 25 years were spent with an emphasis on senior co-op housing. He became nationally known in the field.

Robert E. (Bob) Harding died peacefully at his St. Paul home on October 13, 2020. After graduating in 1983 from University of Minnesota Law School, he joined the Gray Plant Mooty law firm and practiced there for 36 years. He specialized in representing public and private universities, private colleges, and health care systems in connection with major gifts, charitable trusts, and endowment funds.

Bernice Lenora Fields, 76, of Minneapolis, died July 18, 2020. In 1979 she received her JD from the University of Minnesota Law School. Fields practiced law for 40 years, specializing in workplace bullying. She was one of the founders of the Minnesota Black Women Lawyers Network.

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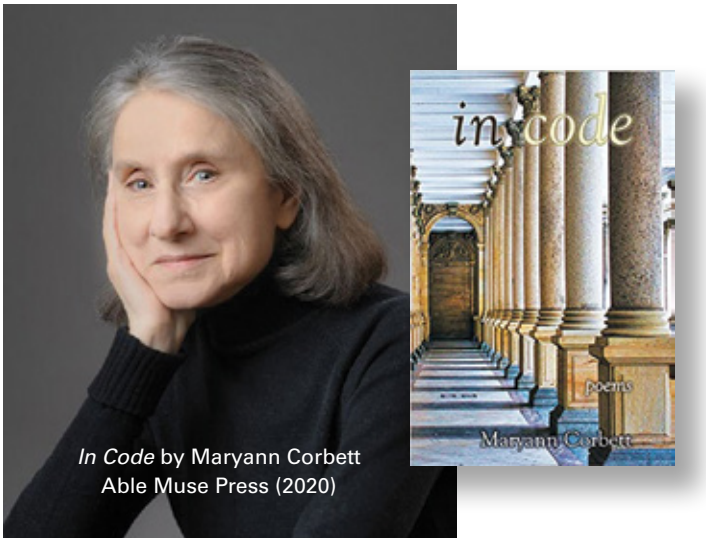

In Code by Maryann Corbett
Able Muse Press (2020)

Poems for Lawyers and Other Citizens

REVIEW BY BILL CARPENTER

In Code is a new collection of poems about law and public affairs by the award-winning St. Paul poet Maryann Corbett. Sound unusual? It may help to know that Ms. Corbett recently retired after nearly 35 years with the Minnesota Legislature in the Revisor of Statutes office. The collection embodies reflections on the daily work of compiling the laws, the gap between the formulas of law and the messiness of experience, and the ways that the contradictions between representation and truth—and between culture and compassion—define our lives. It is a brilliant, troubling book, displaying throughout a penetrating wit and understated eloquence. It is most accessible to lawyers, with their professional interest in law and public policy, but non-lawyers should read it too, since law and policy (and art) belong to us all. As does "contemporary life," the overall subject and source of Ms. Corbett's poetry from her first published chapbook, *Gardening in a Time of War*.

Readers will relate to this book. Following an election season like no other, the three-part "Judgments" resonates with the tawdriness of electioneering yet arrives at a painful claiming of residual faith. The first part is "Polling Place," in which the voter, discouraged by "the blandeur of a beige community room," utters her *cri de coeur*:

> This after weeks
> of politicians' droppings in the post!
> Hectoring months
> of calls and ads! A grumpy memory speaks—
> a sort of Ghost
> of Pollings Past—and says, *It meant more, once!*

All too familiar, but the voter goes through with the ritual notwithstanding: "Still, I'm here with the scuffing line, ready to flaunt my red *I voted* sticker…"

In the second part, "Roster Judge," the poet has the unpleasant task of dealing with a voter whose ballot is rejected, probably because her current information does not match the rolls. "You rip the page up, hissing, *Fascist!* and storm out, red-faced. Dumb, I take the smudged form to its fate. *Judge not,* sayeth the Lord, *lest ye be judged."* Alas, no public service goes unpunished.

Part three, "Afterword," has the poet listening to the news the morning after the election. Storms scourged the East Coast in the election she recalls, yet dedicated voters stood in line for hours:

> People with shattered homes, people exploring
> the strange new depth of their old powerlessness,
> shivered and shuffled toward their polling places
> under a lead-white sky.
> The voice signed off.
> I wept in silence into my scrambled eggs.

Pity, with a self-deprecating touch of the ridiculous.

Other topical poems include "Wildfire Season," "Song for the Shooters," and "'Massacre of Children in Peru Might Have Been a Sacrifice to Stop Bad Weather,'" which suggests a connection between ancient child sacrifice and law enforcement shootings. More digressively, "Concealed Carry" riffs on the title phrase as referring to the IED in every heart, ready to go off at an unintended jolt: "Lob the grenade of your long and placid marriage at the gray clerk, alone again at sixty. Grand-child gossip—it's acid in the face of the woman down the aisle, still empty-armed." We end with a man in the produce aisle hearing Marvin Gaye on the PA: "setting his broccoli down sharply, like someone skewered through the vitals." These hidden histories call for compassion.

The collection opens with "Threats," a reflection on our post-9/11 security regime triggered by a bomb threat to the State Office Building in St. Paul, where the Revisor's office is housed. The poet traces the threat environment pre-9/11 to the Oklahoma City bombing in 1995. She acknowledges a tentative mercy in the false alarm, which leaves behind a consciousness of fragility. The poem sets a baseline of dread for the volume, which is also topical.

BILL CARPENTER
practices in the fields of commercial and civil litigation with the law firm of Briol & Benson, PLLC.
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"Seven Little Poems About Making Laws" is a string of haikus about life at the Legislature, like "Judgments" touched with dry humor. Haikus present terse illuminations in a strict 5-7-5-syllable form. For example:

> Prayer by the chaplain:
> cloudy pleas, made to a god
> we keep nebulous.
>
> …
>
> Sulfite pages in
> early casebooks flake to crumbs.
> So much for the past.
>
> …
>
> Where white silk brocade
> covers the tall, formal walls
> we cut food support.

What is in those casebooks? "A Volume of Cases" discloses, in curt, strict rhymes:

> The deference. The court's respect.
> The reasoning it must reject.
> The lives behind the pages, wrecked.
>
> The pieces that will not align.
> The silent matters they decline.
> The gold impressed into the spine.

That is pointed, but do not think the poet exempts herself from "the guilty knowledge of these gains, those losses guarded by a professional ambience." Disillusion is a good thing, the poet seems to say, when it leads us to dismiss the false and know the true. Disillusion is also a good thing when it leads us to hear the call of compassion on the boundary of habit and culture. In its starkest form, "Fugue in October" juxtaposes a glorious performance of Monteverdi's *Beatus vir* (in which the poet sings) with the hard life of the homeless struggling nearby.

"Poses," which is the grandest poem in the collection, presents this boundary in a tour of the Capitol mall in St. Paul. Ms. Corbett relentlessly pierces the veil of public art, and comes to an unusual take on the war memorials, whose truth risks eroding with time into a reiteration of "the Old Lie" (a phrase from Wilfred Owen's poem, "Dulce et Decorum Est"):

> The unspeaking bronzes lie
> out in all weathers. Their mild clemency
> turns Gettysburg, the Somme, the Bulge, My Lai,
> the unnamed nightmares as they multiply,
> to dumb abstraction. In that light, a statue
> settles into forgetting. Such a statue
> deadens against the pain and finally,
> stripped clean of truth, is beautiful. To see
> this is a sort of peace. A sort of mercy.

"Poses" is cast in the demanding canzone form, which requires a different arrangement of five repeating end-words in each of the five twelve-line stanzas and the final five-line envoi. As seen in the excerpt, Ms. Corbett mitigates that pattern, using rhymes more often than repeating end-words. This is her way with form generally. Her meter is often loose, even concealed. Rhymes, when used, may be slant (different vowel sounds) or unstressed.

"Personal Account," Ms. Corbett's humorous sonnet to her retirement account, is unrhymed, so maybe not a sonnet at all. Some of the haikus in "The Nutshell Studies of Unexplained Deaths" run on to the next in the series, undoing the form's emphasis on momentary illumination. In a 2011 interview, Ms. Corbett observed that she "straddles" metrical and non-metrical forms, and that form can be a bully "if you let it slap you around." She does not. Substance prevails. Even when the form is on the stricter side, it serves substance, as in the repetition of "statue," the repetitions of the villanelle form addressing the grim "routine" of school shootings, and the *terza rima* in the "reassessment" of Dante. The poems are always musical in some sense, even if the music is that of divided segments of prose in "The Forgery" and "A Duty."

Civic life in the Twin Cities has taken a beating. You might say it takes another beating under Ms. Corbett's prosecutorial eye, but the dose of disillusion she administers is salutary—she refuses to be "bullied" by it. Instead, she bends disillusion to the purposes of truth and compassion, as well as humor and sheer enjoyment in ingenious speech.