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1:00pm	Shotgun Start
2:00pm	Bike Registration
2:30pm	Bike Ride Begins
5:15pm	Cookout
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features

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LET YOUR YES BE YES AND YOUR NO BE NO

Written By Paul Floyd

July 1, 2023
Draft #1

FADE IN

Ext. SUBURBAN HOME – NIGHT.

We OPEN on a modern suburban home.

CUT TO:

Int. FRONT ROOM – NIGHT.

A small social gathering of adults is taking place. The room is filled with lively conversations and laughter. There is one empty chair. PAMELA, the host, a mid-30s female, rises and walks to the door as a knock is heard. She opens it to reveal ADAM, a smartly dressed man in his mid to late 30s, holding a gift of flowers and a bottle of wine.

ADAM

Sorry I'm late. I was actually sitting in my car finishing a call with a client I couldn't get to earlier because I had two MSBA meetings today. But I--

PAMELA interrupts ADAM.

PAMELA

Well, better late than never. Come on in. There are some friends I want you to meet.

PAMELA takes the flowers and wine bottle from ADAM and turns to the group.

PAMELA

Hey, everyone, let me introduce ADAM, he's a lawyer and a good guy.

MALE GUEST #1

Isn't that an oxymoron?

A few guests chuckle, while ADAM maintains a polite smile.

BARBARA

Don't be mean. ADAM, come sit over here by me.

ADAM takes a seat next to BARBARA, a mid-50s woman dressed in a very chic shawl. BARBARA leans in and speaks softly to ADAM.

BARBARA

So, you're a lawyer and a good guy. Nice to meet you, ADAM. I'm BARBARA. PAMELA and I are on the Arts Board together and she has told me all about you. Well, we have a rare opening on our Board and we need a lawyer just like you. It will be great for your business; you gotta say yes.

ADAM

That's interesting. I've actually done some trademark work for artists. I'm pretty busy at the moment, though, what with work, friends, and my other responsibilities.

BARBARA

You'll love it. We need an attorney with your smarts and great reputation. We only meet once in a while, so you really won't have much to do. It'll be easy and we really need you.

ADAM contemplates for a moment, the weight of his current commitments evident in his expression.

ADAM

Well, it sounds interesting. Let me talk with my partner CHRIS and I will get back to you.

BARBARA

I understand. Take your time. The Executive Director will call you next week. It will be great having you on our Board. See you next month.

BARBARA gets up, leaving ADAM sitting alone on the couch. He lets out a sigh and mutters under his breath.

FADE OUT.

If you were ADAM, which of the following would you do:

A. Accept the board position. It's a small ask and could be an opportunity to bring in more business. Your life is busy but you can find a way to squeeze in one more thing.
B. Accept the board position but don't tell Chris. You're on so many boards and committees, he really doesn't keep track anyway.
C. Accept the board position. You probably don't have to show up for every meeting.
D. Resign from a committee or board you don't like very much so that you can take on this new thing.
E. Turn down the position. Your time is maxed out; perhaps the opportunity will come up again in the future.

As lawyers, we are asked to join many worthy organizations, boards, and projects. As MSBA members, we have outstanding opportunities to participate in sections, committees, and bar social events. These endeavors promise many benefits: advancing our careers, building personal and professional friendships, and expanding our referral networks—all the while having fun.

But saying Yes to these opportunities presents its own set of challenges. As busy lawyers, our time is limited, and we must carefully consider the trade-offs when taking on new endeavors. Saying Yes carries an implicit promise that you will show up, do the work, and be fully engaged. It requires carefully evaluating your other commitments, whether those are your obligations to client matters, ongoing projects, personal desires, or additional requests that come your way. It becomes crucial to strike a balance between work, family, socializing, and personal well-being. As lawyers, we often feel compelled to say Yes to prove our capabilities and demonstrate that we can handle

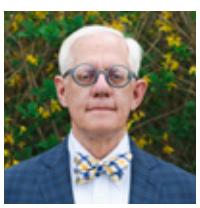
any task presented to us. Saying Yes to too many compelling requests or feeling unable to decline, however, can quickly lead to a chaotic, frantic, and exhausting life.

Conversely, saying No can be strangely challenging for many of us. Perhaps it is FOMO (fear of missing out). We may think that if we say No now, we won't be asked again. Perhaps we don't want to disappoint people. Or maybe we just suffer from the planning fallacy—the tendency to chronically over-estimate our capacity to handle all the tasks we've said Yes to. Or maybe we recall the time we did decline and found ourselves questioning and doubting our decision.

Truthfully, although volunteers are the lifeblood of the MSBA and other organizations, no one wants a committee of Yeses who should have been Noes. The work simply cannot get done when volunteers are so overburdened that they cannot consistently attend meetings, share in drafting documents, and take on other tasks.

At a recent bar leaders' conference, a speaker emphasized that "No" is a complete sentence. In other words, when you say No, you do not have to justify your decision. A well-considered No is a valid response. Saying No frees up our time, resources, and energy, allowing us to say Yes to activities that truly bring us joy and fulfillment.

There is no single right answer to ADAM's dilemma. Mastering the art of saying Yes and No as a lawyer requires self-awareness, discernment, and the courage to prioritize our own well-being. As the bar year continues, when bar-related opportunities arise, respond with a confident Yes if you are capable and a firm No if you are not. We as bar leaders will support your decision to say No and ask how we can help you fulfill the commitment in saying Yes. ▲



PAUL FLOYD is one of the founding partners of Wallen-Friedman & Floyd, PA, a business and litigation boutique law firm located in Minneapolis. Paul has been the president of the HCBA, HCBF, and the Minnesota Chapter of the Federal Bar Association. He lives with his wife, Donna, in Roseville, along with their two cats.

THANKS TO OUR OUTGOING CERTIFICATION BOARD MEMBERS!

The MSBA's certification boards are composed of several dozen experienced attorneys who volunteer their time and expertise. This year, five board members stepped down after years of service. We are grateful for the time and expertise these individuals have shared to help shape the MSBA Certification designation into what it is today.

Martin Costello has been an attorney for over 40 years. He is an MSBA Board Certified Criminal Law Specialist and Labor & Employment Law Specialist. He has been a prosecutor in Ramsey, Hennepin, and Dakota Counties and a defender in other Minnesota counties.

Thomas Glennon is in his 43rd year of practice providing legal advice and counseling to individuals and businesses in employment law matters and representation in civil litigation and other contested proceedings. He was honored and delighted to serve on the MSBA Labor & Employment Law Certified Specialists Board with members for whom he has tremendous professional respect and affection.

Laura Krenz has almost 30 years of legal experience concentrated in commercial real estate. She was on the MSBA Real Property Law Specialist board and is a longtime certified specialist. She focuses her practice in the areas of real estate development, financing, and leasing, and has significant experience with multifamily housing, mixed-use, office, and industrial properties.

Thomas Radio provides a range of services for corporations, individuals, nonprofit organizations, and public entities on issues related to construction, real estate valuation, and land use. He serves as a mediator/arbitrator and is listed on the Minnesota Supreme Court's Rule 114 roster of qualified neutrals. Tom is an MSBA Certified Civil Trial Law Specialist and Certified Real Property Law Specialist and has been recognized as a Minnesota "Leading Attorney" and Super Lawyer by Minnesota Law and Politics.

Gary A. Renneke is recognized by his peers as a leading Minnesota attorney in real estate transactions. He has extensive experience in all facets of commercial real estate. Gary has advised clients in commercial transactions involving millions of square feet and values in the billions of dollars. He has represented property owners, developers, investors, retail center operators, contractors, financial institutions, and a wide variety of other clients, ranging from publicly traded companies to individuals and small businesses. ▲

NEEDING HELP WITH LEGAL TECH?

MSBA has undergone a number of changes in technology related to online services recently. MNdocs is on a new platform; the online communities, including PracticeLaw, received an updated look and functionality; and we added the new MSBA Resource Hub.

With the quick-changing pace of the technology around us, it can be difficult to keep up. If you need assistance navigating any of MSBA's online services, we're here to help. Contact Legal Technologist Mary Warner at **mwarner@mnbars.org** to find out how to set up a half-hour demo of any of our online services or to troubleshoot any issues. ▲

Pro bono spotlight
NIA DOHERTY

Nia Doherty, a senior attorney editor at Thomson Reuters, has cultivated a vibrant volunteer resume with The Advocates for Human Rights. As a volunteer, Doherty has worked on many projects over the last four years.

In 2021, right after the fall of Afghanistan to the Taliban, the Advocates put out a call for volunteers to help with intake screenings for refugees. Jumping at the opportunity, Doherty began two intake screenings a month for the group. Six months later, she reflected on the knowledge she had curated and felt confident enough to take on a pro bono asylum case.

So why does this work matter to her? Doherty's years of exposure to these cases have shaped her understanding of what the legal field can do. "I was inspired to begin volunteering with the Advocates after witnessing the plight of refugees from Syria several years ago," she remembers. "It's hard to imagine, but think about suddenly needing to leave your war-torn country with your family and a few possessions you can carry with you. Imagine having to travel hundreds of miles to seek help, and then having to wait months or years to be able to leave.

"Imagine finally coming to the United States, but you do not speak the language, cannot get a job, and have no notion of what you should do next to be able to stay long-term. A new arrival cannot navigate all those changes without help."

Doherty reminds us that pro bono work is a learning opportunity. What has she learned? "I learned that leaving your comfort zone to help another family in need is an amazing experience," she says. "I feel like I was able to make a difference in the world, even if it was only helping one family." ▲

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A Comprehensive Guide
with Sam Peacoe of Fastcase

Tuesday, August 22
Cybersecurity and Law Firms:
Minimize the Threat
with Jordan Turk of Smokeball

Wednesday, August 23
Leveraging Change Management
Principles to Identify and Adopt
Your Optimal Legal Tech Stack
with Dorothy Radke of SimpleLaw

Thursday, August 24
Cash Out: A Law Firm Financial
Management Heat Check
with Jared Correia of Red Cave Consulting

Register at: www.mnbar.org/cle-events

UNPROFESSIONAL RELATIONSHIPS *with clients*

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

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

Recently, the Minnesota Supreme Court suspended a family law lawyer for engaging in explicit sexual conversations with a client he was representing in a divorce.[1] This case is certainly a cautionary tale and I wanted to take this opportunity to share some important ethical reminders.

The case

Mr. Winter (respondent) was hired by his client to represent her in a divorce. Before retaining counsel, the parties had generally agreed to custody and parenting time terms for their minor children. They had few assets. Due to strained finances, in fact, the client and her husband continued to cohabitate notwithstanding their separation. From the beginning, the client reported, the respondent conducted himself in what she described as a flirtatious manner, such as complimenting her appearance and eyes. This conduct continued through mediation, where respondent told his client that she was beautiful, and made other suggestive statements. At this point, the client had exhausted the initial $5,000 retainer (advanced by her husband against the equity in the family home) and had paid respondent an additional $3,000 at the time of mediation. After the matter failed to resolve at mediation, the client expressed her anxiety about the lack of progress and the ongoing attorney's fees.

In a meeting following the mediation to discuss next steps, respondent apologized to his client for being "really flirty" but said that she was "sexy," so he was unable to help himself. This made the client uncomfortable, but she did not believe she could terminate the representation. She didn't have the funds to hire new counsel, particularly given that the divorce petition had not yet been filed. Things escalated from there to a sexually explicit email chain that I will not summarize here but is set forth in the petition for disciplinary action. Close in time to this exchange, respondent also invited his client on a couple of occasions to come into his office, including on the weekend for a haircut (the client was a stylist). Shortly thereafter, the client consulted with another attorney, who agreed to take her case without an advance fee retainer, and terminated the representation. The matter came to the attention of the director upon the client complaint and, following a contested probable cause hearing, ultimately resulted in a petition alleging that respondent engaged in misconduct—namely, engaging in explicit sexual conversations with a client, including contemporaneous efforts to meet in person, causing a conflict of interest; failing to recognize that conflict of interest; and attempting to engage in sexual relations with his client in violation of Rules 1.1, 1.7(a)(2) and 8.4(a), Minnesota Rules of Professional Conduct.

Respondent ultimately admitted the misconduct and stipulated to recommending to the Court the imposition of a public reprimand. Whether a public reprimand was the appropriate briefing, however, was a matter of some debate. In fact, the Court requested additional briefing on this topic from the parties. After briefing, the Court suspended respondent for 30 days, with one justice stating separately that she believed more discipline was warranted.

Sex with clients is prohibited

Rule 1.8(j), MRPC, prohibits a lawyer from having sexual relations with a client unless a consensual sexual relationship predated the lawyer-client relationship. The comments to the rule articulate several bases for this prohibition, namely (1) potential unfair exploitation of the lawyer's fiduciary role; (2) potential interference with the exercise of independent professional judgment when a lawyer becomes personally involved; and (3) blurred lines potentially impacting client confidentiality and privilege.[2] Because most states teach the model rules in law school professional responsibility classes, this prohibition is likely not a surprise to any reader. Minnesota is one of 39 states that expressly prohibit sex with clients through adoption of some form of the American Bar Association's model rules, but you might be surprised to know that there are several states that do not have such a bright-line rule.[3] Because of the strict prohibition in the rule, even when a relationship is consensual, it is unethical if it started after the attorney-client relationship began.

While I was not surprised to learn that there are states that do not have such an express prohibition, I confess I'm surprised that there is a contingent of states and lawyers that do not think affairs with clients should be prohibited or who think that if there are no "sexual relations," a defined term in Minnesota's rules, there is no ethics violation. Perhaps I should not be, because

NOTES

[1] *In re Petition for Disciplinary Action against William A. Winter*, 991 N.W.2d 278 (Minn. 2023) (Mem).

[2] Rule 1.8(j), MRPC, comment [17].

[3] Hanna Albarazi, *Are Attorneys Being Held Accountable for Client Sexual Contact*, Law360 (6/28/2023) (reporting that 11 states plus the District of Columbia have not adopted a form of the model rule: Georgia, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, Rhode Island, Tennessee, Texas, and Virginia).

Minnesota has a unique provision in its rule—Rule 1.8(j)(4), MRPC, which requires the director to consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge if someone other than the client files the complaint. This provision is not found in the model rule, which simply states: A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

The prohibition applies with organization clients as well—specifically, to any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization, pursuant to Rule 1.8(j)(2), MRPC. This provision is also narrower than the model rule—which covers, per the comment, any individual who supervises, directs, or regularly consults with that lawyer concerning the organization's legal matters.

Conduct short of sex can be problematic

As the Winter matter demonstrates, conduct short of sex can also raise ethical issues and lead to discipline. Rule 1.7(a)(2), MRPC, defines a conflict as a "significant risk that the representation of one or more clients will be materially limited by... a personal interest of the lawyer." Rule 8.4(a), MRPC, prohibits an attempt to violate the rules. Sexual harassment also violates the ethics rules (Rule 8.4(g), MRPC)—as it should. I have no idea why someone would believe that it is okay to flirt with their client or engage in sexually explicit texts or emails with a client. Do not do this. If you are personally interested, terminate the fiduciary representation and then there is no issue. Part of the #MeToo movement reflected an improved society-wide understanding of power dynamics. Due to the fiduciary nature of the lawyer-client relationship, as the comment to Rule 1.8(j) indicates, such relationships are almost always "unequal." Competency is also at issue when a lawyer fails to recognize when a personal interest may burden the attorney-client relationship with a conflict.

The Court's decision to impose a suspension in Winter recognizes the harm that such conduct can cause to the client and to the public's perception of the profession and should serve as a strong deterrent to those lawyers who do not have a personal bright line on this point. The Court had not previously had occasion to articulate the appropriate discipline where a lawyer engaged in sexually explicit communications with a client and attempted to engage in sexual relations, but did not have sex with the client. In suspending respondent, the Court imposed more discipline than other courts that have had occasion to impose discipline in such cases, where the more typical discipline is a public reprimand. A strong message indeed.

Conclusion

It goes without saying that any sexual assault or quid pro quo involving sex with a client will result in significant discipline. Sex with clients is a type of conflict that usually results in a suspension, although each case is considered on its unique facts. The Court's recent decision in the Winter matter provides a warning to lawyers that certain conduct short of sex, such as sexting, creates a conflict that can give rise to public discipline. ▲

CISO BEWARE

Cyber accountability is changing

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

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

Each July, organizations are encouraged to remind employees and management about preparing for a particularly pernicious type of cyber threat. As part of Ransomware Awareness Month, many organizations take stock of their current defenses and reiterate to their teams that acting cautiously on the internet is not to be taken lightly. Unfortunately, July 2023 started with a large ransomware attack in Japan that clearly demonstrated how this type of threat can impact business operations. While not all the details have been made known as of this writing, Japan suffered a ransomware attack on its biggest port, delaying shipments. "Russia-based ransomware group Lockbit 3.0 was responsible for the hack," according to Bloomberg News, which went on to note, "Ransomware attackers tend to target vulnerabilities in VPNs and remote desktop protocols."[1]

In addition to providing data encryption and IP address masking, a virtual private network, or VPN, can give a user direct access to a system or network. Vulnerabilities in such a scenario may involve a VPN connection with improper access controls or misconfigurations. Remote desktop protocol allows users to grant remote access to their device. This ability could allow for successful social engineering attacks (for example, a cybercriminal posing as an IT person requesting control over a victim's device and proceeding to install malicious software). Insecure devices and networks or poor cyber hygiene outside of the physical office can also help a cybercriminal gain access. To combat these problems, Mihoko Matsubara, NTT Corporation's chief cybersecurity strategist, stated that updating and software patching is a critical part of business operations. Implementing a robust cybersecurity awareness program is equally essential in addressing the threat of ransomware, ideally including more than an annual training.

Ransomware and cyber threats more generally have always come with any number of interlacing risks—damage to how consumers view an organization that mishandled their personal information; financial losses brought about by mitigation efforts, lost business, or worse, paying a ransom to an attacker; legal ramifications following a failure to report. Now, these legal consequences are becoming even more personal for those most responsible for an organization's cybersecurity and incident response.

This past May, Uber's former chief security officer, Joseph Sullivan, was sentenced to a three-year term of probation and a $50,000 fine for his role in the 2016 Uber attack response.[2] In that episode, a hacker was able to trick an employee into sharing their credentials, granting access to sensitive data.[3] The investigation subsequently revealed that Sullivan kept information from the FTC during its investigation and that he actively paid the hackers for their silence. This coverup gave the hacking group more time to continue to attack and extort other companies, a fact that Sullivan knew.[4] The verdict was much anticipated and the case itself was remarkable in that it represents a distinct shift in how accountability for cybersecurity is viewed. Chief information security officers (CISOs) are being held personally responsible for how cyber incidents are managed, and individuals are being called to task for their actions. In handing down the sentence, the Wall Street Journal noted, "District Judge William Orrick... said that because of Mr. Sullivan's character, the unusual nature of the case and that it was the first of its kind, he had shown Mr. Sullivan leniency, but he said chief information security officers shouldn't expect that in future cases."[5] In addition to the release of the new National Cybersecurity Strategy,[6] it is clear that a more aggressive approach to cybersecurity failures is being implemented.

Similarly, "SolarWinds recently disclosed that the Securities and Exchange Commission notified top executives of pending legal action over the company's landmark data breach—a step that some have described as unprecedented."[7] The notice stated that SolarWinds may have violated the law "with respect to its cybersecurity disclosures and public statements, as well as its internal controls and disclosure controls and procedures."[8] While the outcome of the case remains to be seen, increased regulatory pressures are already beginning to take shape. Following appropriate reporting procedures is essential, and actions taken to cover up a cyber event are unethical and potentially illegal. Ransomware, zero-day vulnerabilities, social engineering, and supply chain risks are among some of the many issues that organizations should consider when evaluating the strength of their cybersecurity postures (including their education programs). It is also important to remember that while some measures, such as using a VPN, may give us peace of mind, no single security measure is foolproof. ▲

NOTES

[1] *https://www.bloomberg.com/news/articles/2023-07-05/ransomware-attack-cripples-japans-biggest-port-delaying-cargo*

[2] *https://www.justice.gov/usao-ndca/pr/former-chief-security-officer-uber-sentenced-three-years-probation-covering-data*

[3] *https://fortune.com/2022/10/06/uber-former-chief-security-officer-joseph-sullivan-convicted-cover-up-2016-data-breach-hackers-stole-millions-customer-records/#*

[4] *https://www.justice.gov/usao-ndca/pr/former-chief-security-officer-uber-convicted-federal-charges-covering-data-breach*

[5] *https://www.wsj.com/articles/former-uber-security-chief-gets-probation-in-obstruction-case-87c7c0b9*

[6] *https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/02/fact-sheet-biden-harris-administration-announces-national-cybersecurity-strategy/*

[7] *https://www.washingtonpost.com/politics/2023/06/29/sec-notices-spark-alarm-cyber-executives/*

[8] *https://www.reuters.com/legal/us-sec-considering-action-against-solarwinds-over-cyber-disclosures-2022-11-03/*

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NAVIGATING CHRONIC PAIN
Lawyers' edition

BY SARAH SOUCIE EYBERG sse@disabilitylawmn.com

SARAH SOUCIE EYBERG is the principal attorney of Soucie Eyberg Law, LLC, a client-centered and future-oriented law firm focused on helping people suffering from disability get benefits to which they are entitled. She is also an active member of many legal professional organizations and serves in several leadership roles.

"*Describe your average pain on a scale of 1 to 10, with one being little to no pain, and ten being pain that would require a trip to the emergency room.*" This is a question I hear over and over from administrative law judges speaking to my clients. In the Social Security Disability system, chronic pain is a factor in almost every case I bring to hearing. Most of my clients have been living with pain—whether it's dull, burning, aching, sharp, or throbbing—day in and day out for years. Most of them will tell you there is no such thing as an "average" day. And most of them will tell you they have zero "pain-free" days.

This kind of unrelenting pain, even when "mild"—say, a 2-3 on that infamous pain scale—can have disastrous effects to people over time.

As one writer has put it, "The burden of chronic pain is not only personal, but societal."[1] Studies show people with chronic pain struggle with daily activities like getting dressed, cooking, cleaning, driving, and attending work. And it is unfortunately very common. By some estimates nearly a third of all people worldwide suffer from chronic pain. According to the British medical journal The Lancet, "Pain is the most common reason people seek health care and the leading cause of disability in the world."[2]

Chronic pain causes significant psychological distress. Clinical studies have found chronic pain actually induces depression.[3] Research has also shown that brain pathways associated with injury sensors are the same brain regions that deal with mood management.[4]

What research has also revealed is that chronic pain can cause actual physiological changes in our brains. According to a CNN summary of one study, "People with higher levels of pain were also more likely to have reduced gray matter in other brain areas that impact cognition, such as the prefrontal cortex and frontal lobe – the same areas attacked by Alzheimer's disease. In fact, over 45% of Alzheimer's patients live with chronic pain."[5]

Until 2018, chronic pain was not recognized as a discrete medical diagnosis.[6] Doctors and researchers are still finding the best ways to effectively treat chronic pain. Most are familiar with the opioid crisis we are facing as a nation, which was partially fueled by the need to help people with chronic and intractable pain. Unfortunately, the pendulum has swung the other way and many chronic pain patients have been forced to seek other means of pain control.

Lawyers are not immune to the realities of chronic pain. And unfortunately, stress—a common denominator across most fields of legal practice—has been found to *increase* chronic pain.[7] As a wellness article at CNN noted, "Stress can also modulate how pain is perceived by the body; it can cause muscles to tense or spasm, as well as lead to a rise in the levels of the hormone cortisol. This may cause inflammation and pain over time."[8]

Lawyering is a profession that is cerebral in nature, with attorneys relying on their cognition to effectively write, communicate, balance caseloads, direct staff, argue orally, and come up with trial strategy. Chronic pain compromises our cognitive abilities over time. It affects mood, recall, affect, understanding and retaining information, and maintaining concentration.

Attention to well-being can be a saving grace in living with chronic pain. Activities like meditation, yoga, and other forms of mindfulness practice have been shown to reduce pain.[9] "[Mindfulness] doesn't make the pain state any less real [but it] demonstrates that changing the way you think about your pain condition [can] help you deal with that pain condition," says Dr. Tony Yaksh, professor of anesthesiology and pharmacology at the University of California, San Diego.[10]

Physical exercise has also been linked to better outcomes for chronic pain sufferers. There are a few reasons this may be true. One study has linked physical exercise to higher pain tolerance.[11] That study was based on subjective reporting of both levels of pain and frequency of exercise, though, so the findings aren't particularly precise. But as the authors note, we do know exercise releases endorphins, which are "natural pain-relieving chemicals in the brain." Physical activity also improves cardiovascular health, controls weight, enhances mental health, builds stronger bones, increases lifespan, and boosts your immune system.

Chronic pain poses unique challenges for lawyer wellbeing, affecting both the attorney's personal and professional lives. It is crucial for attorneys to recognize the impact of chronic pain and take proactive steps to address it. By fostering a supportive environment, implementing strategies for pain management, and prioritizing self-care, lawyers can better navigate the complexities of their profession while managing their chronic pain. A healthier lawyer is a more empowered and effective advocate. ▲

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PUBLIC ACCESS, PRIVATE LIVES

In Minnesota most divorce records are public documents, accessible to anyone with an internet connection. That's a problem.

BY MICHAEL P. BOULETTE, SEUNGWON R. CHUNG, AND ABBY N. SUNBERG

Our courts have long favored open access to court records,[1] ensuring "citizens [can] keep a watchful eye on the working of public agencies" and allowing the media to "publish information concerning the operation of government."[2]

But that public access has never been deemed an "absolute" good.[3] As Justice Powell once cautioned, court records can also contain "painful and sometimes disgusting details" that may legitimately be shielded from public scrutiny.[4] And in the decades since, courts have been left to balance the risk that court files could "become a vehicle for improper use" against often strong presumption in favor of access.[5]

Technological advances are making this balancing act far more challenging. Just a decade ago, parties' privacy could be protected with little effort—divorce files sat locked in a file cabinet behind a court clerk's desk, available only to those with the time, know-how, and motivation to go in search of them. But with the advent of Minnesota Court Records Online (MCRO), court files are now accessible in everyone's living room—at any time of day and for any reason. And with this increased access comes a need for Minnesota to re-evaluate its approach to personal privacy in family law cases.

The problem with public divorce decrees

Minnesota isn't alone: Most states share Minnesota's policy favoring open access, even in the face of electronic records.

But other states have also recognized that family law cases often don't raise the same government-oversight concerns as other types of matters. While criminal and civil court decisions may implicate matters of general concern, your neighbors' divorce or child custody fight seldom does. In the words of one recent article, "No other person has a legitimate interest in mom's affair, whether dad has a drinking problem, or if junior has health, psychological, or other difficulties, or in the custody schedule of that child."[6] These cases are inherently personal to the families involved, yet some states, including Minnesota, fail to appreciate that distinction, treating all court records alike.

The Pennsylvania Superior Court in *Katz v. Katz*[7] summed up the problem nicely:

> "Trials of divorce issues frequently involve painful recollections of a failed marriage, details of marital indiscretions, emotional accusations and testimony which, if published, could serve only to embarrass and humiliate the litigants. While the public has a right to know that its courts of justice are fairly carrying out their judicial functions, no legitimate public purpose can be served by broadcasting the intimate details of a soured marital relationship."

Indeed, divorcing couples face a particular threat to their privacy through open access to their court records. The information readily discernible from these case records is far more expansive than in a civil or criminal case. By law, divorce pleadings must address the most sensitive information about the divorcing couple, spanning all aspects of the parties' lives: emotional, medical, financial, and more.

In divorce cases involving children, courts are required by law to make detailed findings about the parties' finances, their relationships with their children, their strengths and weaknesses as parents, any mental or physical health concerns of the parents or children, any incidents of domestic violence, and more. "Nearly everything about a person is relevant—particularly if children are involved," which is especially problematic considering the low burden of proof involved in establishing allegations of misconduct (proof by a preponderance of the evidence).[8] Sensitive family history is forever memorialized in a document accessible to anyone with a smartphone.

The danger of online access cannot be overstated:

> "[W]hen courts permit these case files to become electronic and connected to the Internet without proper safeguards, they will make all this personal information available easily and almost instantly for downloading, storage, searching, data compilation, aggregation, and massive dissemination for purposes that were never intended by either litigants, witnesses, victims, jurors, or others involved with or connected to a court proceeding."[9]

Gone are the days when an individual had to go down to the courthouse to request a case file; now anyone can read about the most intimate, and often most difficult, moments in parties' lives by perusing the court's electronic files.

Access by John or Jane Doe isn't the only concern. This sensitive, often painful information is also available to any child old enough to Google. While family courts aim to "shield minor children from the adverse effects of divorce and custody litigation," that goal means little when a child can view their parents' divorce records with a few clicks.[10]

While open-record advocates often insist that these harms are constitutionally necessary, the Supreme Court has repeatedly disagreed, recognizing the private and personal nature of marriage and family relationships. Why wouldn't these same principles extend a similar protection and privacy when the relationship ends?

As more divorce records are uploaded to MCRO each day, Minnesota must reassess the extent of access the public should have to a family's greatest challenges. It's time for Minnesota to join the growing consensus among states by limiting online access to family law cases.

The spectrum of confidentiality in divorce decrees across the nation

Other states provide any number of options for the path Minnesota might choose. Across the country, states presumptively restrict access to records in family law cases.[11] Missouri, for one, allows public access to electronic case records, except for final civil judgment in "domestic relations proceedings including, but not limited to, dissolution proceedings, paternity proceedings, and modifications thereof."[12] Likewise, New York mandates that officers of the court in a divorce action "shall not permit a copy of any of the pleadings, affidavits, findings of fact, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony, or any examination or perusal thereof" by anyone other than a party to the case or their counsel, "except by order of the court."[13]

Still other states protect party privacy in family law cases by limiting who can access divorce records, what information can be accessed, and how that information can be accessed.[14] So Pennsylvania and Massachusetts limit access to divorce filings to the attorneys of record.[15] Similarly, Utah only allows the parties and their attorneys to access divorce filings.[16] Meanwhile, California permits the sealing of pleadings that state the location or otherwise provide identifying information about the parties' finances and debts.[17] South Carolina and Florida take a similar approach, requiring attorneys and parties to redact personal information before e-filing pleadings.[18]

And the vast majority of states at least allow restrictions on access to certain court documents upon the motion/request of a party and/or a hearing.[19] These states tend to require some showing that: (1) that the public interest in disclosure is outweighed by a legitimate or overriding interest in confidentiality, (2) making the pertinent record confidential is the least restrictive means of protecting the overriding interest, and (3) the restriction is narrowly tailored to the overriding interest. On the extreme end, California requires all three findings and even requires the requesting party to show "there is no less restrictive means of achieving the overriding interest."[20]

Even some states that allow full access to divorce records nonetheless restrict that access to records kept at the courthouse. Thus, in Wisconsin, the public can access any nonsealed document by going to the county clerk of court's office, but only parties and their lawyers can electronically access filed documents.[21]

JUST A DECADE AGO, PARTIES' PRIVACY COULD BE PROTECTED WITH LITTLE EFFORT—DIVORCE FILES SAT LOCKED IN A FILE CABINET BEHIND A COURT CLERK'S DESK, AVAILABLE ONLY TO THOSE WITH THE TIME, KNOW-HOW, AND MOTIVATION TO GO IN SEARCH OF THEM.

Minnesota's *Schumacher* balancing test

Minnesota has long existed on the more pro-access end of the national spectrum, recognizing the common law right to inspect and copy civil court records, but providing some categories of sensitive information (tax returns, paystubs, bank statements) that parties may keep confidential.[22]

Thus, family law records, like all other court records, can only be made nonpublic under the test in test in *Minneapolis Star & Tribune Co. v. Schumacher*.[23] Under *Schumacher's* balancing test, courts must weigh the interests supporting access (including the presumption in favor of access) against the interests in denying access.[24] Those factors include the right to privacy, safety concerns, and potential for improper use of the sealed file.[25] Under this test, the party requesting to keep the record sealed must show "strong countervailing reasons why access should be restricted."[26]

The Judicial Branch has supplemented *Schumacher's* test with the Rules of Public Access to Records of the Judicial Branch.[27] Rule 4 of those public access rules governs the type of cases and documents that are required to be non-accessible while setting guidelines for how to restrict access to other cases and documents. Those rules of public access similarly reflect a strong presumption in favor of public court documents, limiting access only to domestic abuse and harassment records, certain juvenile cases, and pre-adjudication paternity proceedings.[28] In doing so, the rules required any court considering sealing a civil case to consider the factors in *Schumacher*.[29] But the rules of public access makes no specific mention of how public access should be handled in particular divorce and custody proceedings.

The intersection of Rule 4 and family court rose to prominence more recently when two prominent Minnesotans had their divorces fall within the public eye. In 2016, the Star Tribune unsealed the 2006 divorce of Prince Rogers Nelson from Manuela Testolini[30] previously made confidential by agreement. Applying the *Schumacher* factors, the district court rejected Ms. Testolini's concerns for her privacy as "stale," given the nine years since the divorce.[31] And against that concern for privacy, the district court balanced the public's right to access the court documents in order to inspect the actions of the state, which sits as a third party in divorce proceedings.[32] Based on those considerations, the district court unsealed the Nelsons' divorce file.

In 2018, the Star Tribune moved to unseal then-Congressman Keith Ellison's 2012 divorce from Minneapolis School Board Member Kim Ellison,

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when Mr. Ellison ran for attorney general. Again, the district court unsealed the file, relying on Minnesota's policy that "all court records—including divorce records—are presumptively public, unless narrow, clearly-delineated exclusions apply."[33] Once unsealed, details of the Ellisons' divorce made their way into media.[34]

Of course, these cases might seem remarkable—a celebrity and a candidate for public office—until we remember that *all* orders, decrees, notices, and appellate opinions are publicly available in all family cases, including divorces and custody proceedings,[35] regardless of the fame, wealth, or public profile of the spouses.

While many parties (particularly those with the resources to hire counsel) have stipulated to limit public access to their case, most such orders are unlikely to withstand scrutiny absent "inflammatory" allegations.[36] So in *Strosahl v. Strosahl*, husband asked to seal the divorce after a "contentious trial" and accusations of domestic abuse, out of concern for the harm it could cause his employment.[37] Years later, wife changed her mind and sought to unseal the divorce records.[38] After the district court denied her request, the court of appeals reversed and remanded for further consideration of the strong presumption favoring public access.[39] On remand, the district court concluded that husband had failed to present "strong enough evidence of personal harm to warrant sealing of the record."[40] So four years after they agreed to seal the divorce case, the Strosahls' divorce was made public. By contrast, *Anderson v. Anderson* affirmed the sealing of a file in contentious post-decree custody litigation, but only after noting the "inflammatory" nature of the accusations that "implicate[d] substantial privacy interests."[41]

No one wants their dirty laundry aired for their neighbors to see. While the personal can very well be political, sometimes it's just personal—especially to the people involved.

THE IMPACT OF THESE HARMS FALLS HARDEST ON THOSE WITH THE FEWEST RESOURCES. PARTIES OF MEANS HAVE (AND USE) THE ABILITY TO CIRCUMVENT PUBLIC ACCESS THROUGH A COMBINATION OF NON-PUBLIC AGREEMENTS, ALTERNATIVE DECISION-MAKERS, AND CHOICE OF FORUMS.

This is particularly true with respect to the impact of open access on children. Courts and practitioners often remind parents that they should do their best to keep their children insulated from the impacts of divorce. Statute even bases custody decisions (in part) on a parents' ability to "[m]inimize exposure of the child to parental conflict."[42] Yet minutes after the divorce is final, the decree—including detailed findings about intimate aspects of a family's life—is posted online, searchable by name, for anyone with internet connection or a smartphone. We are being naïve if we imagine that children won't access these records, or have them accessed by others with more malign motives (including bullying).

Parents' privacy rights also matter. Very few people would want the intimate details of their lives posted online for the world to see. A parent's sexuality, sexual history, or gender identity. A parent or child's mental health history or chemical use. Or even the more banal (but still private) details of wealth (or debts) and incomes. These facts about a person's life are (rightly, we think) regarded as private enough that it falls to each individual to decide what they feel comfortable disclosing. Yet when a marriage or relationship ends, we force these disclosures on parties as the price of court assistance. And then we force courts to make detailed findings on what they learn, all of which is then available for public consumption online.

And the impact of these harms (like so many others) falls hardest on those with the fewest resources. Parties of means have (and use) the ability to circumvent public access through a combination of non-public agreements,[43] alternative decision-makers,[44] and choice of forums. But lower- and middle-class Minnesotans often have no such choices as they try to navigate an unfamiliar justice system without the benefit of lawyers.

Why? Ideals of public access seem too airy an answer—particularly when the solution could be as simple as removing online access to family law filings and returning access to the courthouse counter. One thing is certain: We should not demand of Minnesotans a detailed accounting of their private lives with a promise that those details will live forever on the internet. ▲

NOTES

[1] *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

[2] *Id.* at 598.

[3] *Id.*

[4] *Nixon*, 435 U.S. at 598.

[5] *Id.*: *Minneapolis Star & Tribune Co. v. Schumacher*. 392 N.W.2d 197 (Minn. 1986).

[6] Marshal S. Willick, *Closed Hearings, Sealed Files, Privacy, and Public Access: Why the Rules Are the Way They Are, and What They Should Be Going Forward*, Willick Law Group (8/16/2021), *https://www.willicklawgroup.com/vol-73-closed-hearings-sealed-files-privacy-and-public-access-why-the-rules-are-the-way-they-are-and-what-they-should-be-going-forward/* .

[7] 514 A.2d 1374, 1379–80 (Pa. Super. Ct. 1986).

[8] Gale Humphrey Carpenter, Comment, *Protecting the Privacy of Divorcing Parties: The Move Toward Pseudonymous Filing*, 17 J. of the Am. Acad. of Matrim. Law. 105, 112 (2001).

[9] Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 Wash. L. Rev. 307, 321 (2004).

[10] *Id.*

[11] Miss. Elec. Ct. P. 5(D) (restricting internet access to divorce records to counsel of record and court staff); *see also* N.D.C.C. §14-05-24.3 (North Dakota's statute prohibiting public access to "the property and debt listing of the parties to a divorce").

[12] Mo. S. Ct. Op. R. 2.04(2)(B).

[13] NY CLS Dom. Rel. §235(1).

[14] Laura W. Morgan, *Preserving Practical Obscurity in Divorce Records in the Age of E-Filing and Online Access*, 31 J. of the Am. Acad. of Matrim. Law. 405, 412–13 (2019).

[15] *See* Pa. R.C.P. 1930.1; Mass. Trial Ct. R. 5(b)

[16] *See* Utah R. of Jud. Administration 4-202.02(3)

[17] *See* Cal. Fam. Code §2024.6. *But see In re the Marriage of Burkle*, 135 Cal. App. 4th 1045, (Cal. Ct. App. 2006) (finding the statute to unconstitutionally limit the press's access to divorce records).

[18] SCRCP 41.2; FL ST GEN PRAC AND ADMIN Rule 2.425.

[19] Alabama allows sealing of a divorce record upon motion, *Ex part Barze*, 184 So. 3d 1012, but prohibits the press's right to access such files. *Ex parte Balogun*, 516 So. 2d 606. *See also*, Alaska R. of Admin. 37.6; Ariz. Fam. Law Proc. R. 17; Fla. R. Jud. Admin. 2.420(c)(9); Burn Ind. Code Ann. §5-14-3-5.5; Iowa Code §598.26; E. & W.D. Ky. LR 5.7; E.D. La. LR 5.6; E.D. Mich. LR 5.3; Nev. Rev. Stat. Ann. §125.110; N. J. Court Rules, R. 1:38-11;M.D.N.C. Civ. Prac. 5.4; 51 Okl. St. §24A.30; ORS §1.040; R. I. Gen. Laws §8-10-21; Tenn. Sup. Ct. R. 34; Tex. R. Civ. P. 76a; Vt. Pub. Acc. Ct. Rec. Rule 6; WY R. Access to Ct. Records Rule 8.

[20] *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337; *Johanson v. Eighth Judicial Dist. Court of Nev.*, 182 P.3d 94 (2008).

[21] Peggy Hurley, *Public Access to Circuit Court Records*, Wis. Legis. Couns. (2019), *https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2019/courts_and_criminal_law/ib_court_records_ph_2019_10_01* .

[22] Minn. R. Gen. Prac. 11.01.

[23] 392 N.W.2d 197 (Minn. 1986).

[24] *Id.* at 202–203.

[25] *Id.*

[26] *Id.* at 205–206.

[27] Minn. R. Pub. Access to Recs. of the Jud. Branch, adopted 2/1/1988.

[28] Minn. R. Pub. Access to Recs. of the Jud. Branch 4.

[29] Minn. R. Pub. Access to Recs. of the Jud. Branch 4, subd. 2.

[30] *In the Marriage of Manuela Nelson and Prince Rogers Nelson*, Hennepin County Court File No. 27-FA-06-3597.

[31] Order Unsealing Court File dated 8/15/2016. Hennepin County Court File No. 27-FA-06-3597 at 11.

[32] *Id.* at 15.

[33] *See* Order Unsealing Court File dated Oct. 12, 2018, Hennepin County Court File No. 27-FA-11-7451, at 4; *see also* Minn. R. Pub. Access to Records of the Jud. Branch R. 2.

[34] *See e.g.*, Stephen Montemayor, Keith Ellison divorce file shows no abuse allegation against him by ex-wife, Star Tribune (10/17/ 2018), *https://www.startribune.com/keith-ellison-divorce-file-shows-no-abuse-allegation-against-him-by-ex-wife/497840751/*; Deanna Paul, In unsealed divorce records, Rep. Keith Ellison says ex-wife abused him, Washington Post (10/17/2018), *https://www.washingtonpost.com/politics/2018/10/17/unsealed-divorce-records-rep-keith-ellison-says-ex-wife-abused-him/*;

[35] *See* Minnesota Court Records Online (MCRO), Minnesota Judicial Branch, *https://mncourts.gov/Access-Case-Records/MCRO.aspx*.

[36] *Strosdahl v. Strosdahl,* A20-0189, 2020 WL 5507842 (Minn. Ct. App. 9/14/2020); *Anderson v. Anderson*, No. A12-0018, 2012 WL 3641293 (Minn. Ct. App. 8/27/2012).

[37] *Id.* at *1.

[38] *Id.*

[39] *Id.* at *2.

[40] *See* Findings of Fact, Conclusions of Law, and Order on Motions dated 2/26/2021, *Strosahl v. Strosahl*, Carver County Court File No. 10-FA-16-404 at 5.

[41] *Id.*

[42] *See* Minn. Stat. §518.17, subd. 1(12).

[43] Minn. R. Pub. Access. To Recs. of the Jud. Branch 4, subd.2.

[44] Minn. Gen. R. Prac. 114.

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Minnesota reforms law to ban (almost) all noncompete agreements

BY GEORGE H. SINGER ghsinger@hollandhart.com

Agreements not to compete have existed as part of the common law for hundreds of years.[1] These restraining agreements are designed to reduce economic harm to an employer when a "key" employee departs and are often required at the time of obtaining a job or as a condition of receiving a monetary payment in a severance arrangement. As the use of noncompete agreements has increased over time, so too has the controversy surrounding them.

Imprudent efforts by employers to enforce noncompete agreements against former low-level or modestly compensated employees with little bargaining power have led to political scrutiny. On May 16, 2023, the Minnesota Legislature passed SF3035, a measure that bans nearly all post-termination noncompete agreements with employees and independent contractors in the state of Minnesota. SF3035, part of a broader labor regulation initiative entitled the "Omnibus Jobs and Economic Development and Labor Funding Bill," was signed into law by Gov. Tim Walz on May 24, 2023. The legislation represents a significant shift in Minnesota's labor and employment law.

Anatomy of a noncompete agreement

Noncompete agreements typically have three central features: first, the "noncompetition" provision, also known as a "covenant not to compete," which precludes an employee from engaging in specific activities that may, or do, compete with the employer's business; second, the "nonsolicitation" provision, which restricts the employee from soliciting other workers or customers from the former employer; and third, in most cases, a "nondisclosure" provision that limits an employee's unauthorized use and disclosure of confidential information, which can include a broad range of information and data related to an employer's business operations.

Courts have historically balanced the interests of the employer and the employee when faced with challenges to the scope and enforceability of noncompete agreements–the interests of the business owner in protecting information, trade secrets, and customers from the activities of the departing worker; the interests of the worker in having the freedom to pursue individual interests and employment opportunities.[2] A rule of "reasonableness" has developed to address this balance. Courts have, despite the language and after consideration of all facts, determined whether the agreement at issue operates as a "restraint on trade generally," which is considered void, or one that is reasonably tailored with respect to matters such as scope, duration, and geography, which is valid and enforceable.[3] Courts have historically had the authority to "blue pencil" and modify an existing noncompete provision if it is found to impose unreasonable requirements.

Legislative developments

Minnesota and many other states have grappled with a range of workplace challenges. Noncompete restrictions are viewed as a focal point of concern due to the changing employment landscape. These agreements are now common throughout the labor market and have evolved beyond their historic purpose of addressing the special situations of executives and other high-wage earners.[4]

Noncompetes have traditionally been the province of state regulation, with each state making policy decisions appropriate for its population relative to the needs of the state's workforce, predominant industries, and economy. In recent years, states have begun to reevaluate their noncompete laws to address the power imbalance and inequities resulting from overbroad noncompete agreements that prevent large numbers of individuals from seeking employment in the same sector. Minnesota recently joined the ranks of California,[5] North Dakota,[6] Oklahoma,[7] and Washington, DC[8] in banning practically all noncompete agreements, with a few narrow exceptions. Colorado, Illinois, Maine, Maryland, New Hampshire, Oregon, Rhode Island, Virginia, and Washington prohibit noncompete agreements unless the worker earns above a certain specified monetary threshold.[9] In the jurisdictions that either ban or significantly curtail noncompetes, the rationale is premised on the view that noncompetes are harmful to workers at all income levels and across industries because they limit mobility and depress wages. Additionally, noncompetes can be harmful to businesses that are restricted from hiring talented workers.

At the federal level, the issue of competitive restraints and labor rights has also received a lot of recent attention. On July 9, 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy that encouraged the Federal Trade Commission "to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."[10] On January 5, 2023, the FTC proposed a rule that "would ban employers from imposing noncompetes on their workers, a widespread and often exploitive practice that suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses."[11] Similarly, on May 30, 2023, the general counsel for the National Labor Relations Board issued a memo to all regional directors, officers-in-charge, and resident officers setting forth her view that noncompete provisions in employment contracts violate the National Labor Relations Act except in limited circumstances.[12]

Minnesota's new statewide ban on covenants not to compete

Minnesota is the first state in 100 years to implement a complete ban on employee noncompete agreements. Minnesota's new law is codified at Minnesota Statutes §181.988 and is comprehensive. The statute's heading signals its scope: "COVENANTS NOT TO COMPETE VOID IN EMPLOYMENT AGREEMENTS; SUBSTANTIVE PROTECTIONS OF MINNESOTA LAW APPLY."

The new statute makes "void and unenforceable" "any covenant not to compete" between employers and employees as well as employees and certain independent contractors that, in either case, restricts future employment with another employer.[13] The law bans noncompetes irrespective of a person's income or position, so even high-ranking executives cannot be restrained from seeking competitive employment with this type of agreement.

MINNESOTA'S NEW LAW BANS NONCOMPETES IRRESPECTIVE OF A PERSON'S INCOME OR POSITION, SO EVEN HIGH-RANKING EXECUTIVES CANNOT BE RESTRAINED FROM SEEKING COMPETITIVE EMPLOYMENT WITH THIS TYPE OF AGREEMENT.

It is significant to note that the law banning noncompete agreements provides that only the impermissible covenant would be rendered void, not the entire contract that may contain the noncompete.

The law defines a "covenant not to compete" as "an agreement between an employee and employer that restricts the employee, after termination of employment, from performing: (1) work for another employer for a specified period of time; (2) work in a specified geographical area; *or* (3) work for another employer in a capacity that is similar to the employee's work for the employer that is party to the agreement."[14]

Moreover, "employee" is broadly defined in the statute to include "independent contractors."[15] While not yet tested in courts, this appears to encompass business-to-business noncompete agreements between companies contracting with each other—vendors, suppliers, distributors, and sales rep companies.

Exceptions to ban

The law contains several important exceptions. All of the exceptions to the new ban on noncompetes strive to maintain protection for what the legislators deemed to be narrow categories of legitimate employer interests.

First, it does not prevent employers from prohibiting employees from competitive work *while employed*. Second, the statute makes express exception for a "nondisclosure agreement"[16] or other agreements designed to protect an employer's trade secrets or confidential information, and a "nonsolicitation agreement."[17] These broad carve-outs to the ban are particularly important in a digital age that affords workers ready access to and transmission of proprietary information. Third, covenants not to compete are legal when the agreement or provision is part of an agreed-upon arrangement for the sale of a business or its dissolution, provided it is reasonable in geographic and temporal scope.[18] A purchaser of a business should be entitled as part of an arm's-length bargaining process to restrict the former owners from competing and undermining expectations, particular when adequate consideration is being paid for the enterprise.

Prohibition on attempts to circumvent law

The Legislature recognized that employers might attempt to escape the reach of the Minnesota ban by making agreements subject to the jurisdiction of another state. The new law expressly prohibits agreements that purport to apply the law and venue of a state other than Minnesota. And an employee has the right, upon election, to void choice of law and forum selection provisions of a contract required as a condition of employment.[19]

Existing agreements remain enforceable

The ban on noncompete agreements applies to agreements entered into on or after July 1, 2023. It will not apply retroactively to agreements entered into before that date. Minnesota courts should therefore continue to evaluate noncompete agreements entered into prior to the effective date based on the established body of law in the state providing for the enforcement of noncompete agreements that are reasonable in scope. However, future litigation with respect to pre-existing agreements may well be influenced by the prohibitions of the new law.

Costs of enforcement

Not only will covenants not to compete be unenforceable in Minnesota—the new statute expressly both provides for injunctive relief and permits a court to award attorneys' fees against an employer when the employee is required to enforce his or her rights under the statute.[20]

Implications of the new law

Minnesota employers who have traditionally used noncompete provisions as part of a strategy to protect legitimate business interests cannot ignore the breadth of the new law. Effective July 1, 2023, new employment-related contracts and independent contractor agreements must be structured to eliminate noncompete provisions. Business owners should also consider revisiting, and perhaps updating, existing agreements and internal policies in light of the new law.

Going forward, employers will need to use tailored confidentiality and nonsolicitation agreements to protect their interests. Although the new noncompete ban does not prohibit nondisclosure or nonsolitication agreements, the ban would extend to provisions in agreements that operate as *de facto* noncompete clauses, written so broadly as to have the functional effect of prohibiting workers from seeking or obtaining new employment.

Courts will certainly look beyond labels and narrowly construe restrictive covenants and forfeiture provisions. Employers should avoid over-broad language and narrowly tailor restrictive covenants in employment-related agreements to protect legitimate and identifiable business interests. The ban on noncompetes was enacted to rebalance the employment power dynamic, so employers should refrain from a one-size-fits-all mentality: It's important to consider carefully which employees have responsibilities or access to confidential information that justify the restrictions imposed in any agreement. ▲

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NOTES

[1] *See* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 626 (1960) (providing a detailed history with respect to the enforcement of noncompete agreements from the 16th Century in England up to the 20th Century in the United States). *See also Alger v. Thacher*, 36 Mass. 51, 53 (1837) (noting that an agreement not to compete that was limited in geographic scope was enforced in the 1621 decision of *Broad v. Jollyffe,* Cro. Jac. 596).

[2] *See, e.g., Bennett v. Storz Broadcasting Co*., 270 Minn. 525, 134 N.W.2d 892 (1965) (enforcing a noncompete agreement when "the restraint is necessary for the protection of the business or good will of the employer" and when the agreement does not impose "greater restraint [on the employee] than is reasonably necessary to protect the employer's business"). "Legitimate interests that may be protected include the company's good will, trade secrets, and confidential information." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 456 (Minn. Ct. App. 2001). *See Lapidus v. Lurie LLP*, No. A17-1656, 2018 WL 3014698 (Minn. Ct. App. 6/18/2018) (direct access and knowledge with respect to confidential information is a legitimate interest to be protected when reasonable in scope and in duration).

[3] *Bennett,* 134 N.W.2d at 899. The element of "reasonableness" is not limited to the consideration set forth in the contract but extends to all facts relevant to the issue of "whether such restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public." *Horner v. Graves* [131 Eng. Rep. 284, 287 (C.P. 1831)], Tindal, C.J.

[4] An estimated 350,000 workers in Minnesota are currently subject to noncompete covenants. Testimony of Mary Hogan, Senior Policy Analyst, Federal Reserve Bank of Minneapolis, before House Commerce Finance & Policy Committee on HF295 (1/31/2023). In 2014, it was revealed that the sandwich chain Jimmy John's had required sandwich makers to sign noncompete agreements. The revelation resulted in enforcement action by state attorneys general. *https://www.nytimes.com/2014/10/15/upshot/when-the-guy-making-your-sandwhich-has-a-noncompete-clause.html*.

[5] *See* Cal. Civ. Code §1673; *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 945 (2008) (employee noncompetes banned since 1872).

[6] *See* N.D. Cent. Code §9-08-06; *Werlinger v. Mutual Serv. Cas. Ins. Co.*, 495 N.W.2d 26 (N.D. 1993) (employee noncompetes banned since 1865—before North Dakota was a state).

[7] *See* Okla. Stat. tit. 15, §§217, 219A (employee noncompetes banned since 1890—before Oklahoma was a state).

[8] *See* D.C. Official Code §32-581.01 *et seq*.

[9] *A Brief History of Noncompete Regulation*, Fair Competition Law (2021), *https: //faircompetitionlaw.com/2021/10/11.*

[10] Executive Order on Promoting Competition in the American Economy, *https://www.federalregister.cov/documents/2021/7/14/2021-15069.*

[11] FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, Press Release (1/5/2023), *https://ftc.gov/news/press-releases/2023/01.*

[12] NLRB General Counsel Issues Memo on Non-competes Violating the National Labor Relations Act, Press Release (5/30/2023), *https://nlrb.gov/news-outreach/news-story*.

[13] Minn. Stat. §181.988 subd. 2.

[14] *Id.* §181.988 subd. 1(a) (emphasis added).

[15] *Id.* §181.988 subd. 1(c) & (d). The term "independent contractor" is broadly defined in the statute to include individuals as well as corporations, limited liability companies, and partnerships that provide services.

[16] *Id.* §181.988 subd. 1(a). Nondisclosure agreements prohibit the employee from using confidential information acquired during an employee's time on the job. Unlike other restrictive covenants, confidentiality provisions with employees often do not include time limitations and therefore can continue indefinitely.

[17] *Id.* Nonsolicitation agreements prohibit the use of client or contact lists and restrict former employees from initiating contact with the former employer's customers, vendors, or other employees for a period of time with a view to move the relationship to new employer. Initial versions of the proposed legislation did *not* exclude nondisclosure or nonsolicitation from the scope of the law's ban.

[18] *Id.* §181.988 subd. 2(b)(1) & (2).

[19] *Id.* §181.988 subd. 3 (such provisions in employment contracts are voidable at the option of the employee).

[20] *Id.* §181.988 subd. 2(c).

MINNESOTA ENDORSES NONSOLICITATION AGREEMENTS

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Minnesota Statutes Section 181.988, which went into effect on July 1, 2023, bans noncompete agreements entered into after that date. In doing so, however, the Legislature has also affirmed that nonsolicitation agreements are enforceable and consistent with Minnesota public policy. Minn. Stat. SS 181.988, Subdivision 1, states in part: "A covenant not to compete does not include a nonsolicitation agreement, or agreement restricting the ability to use client or contact lists, or solicit customers of the employer."

Contracts prohibiting solicitation of customers by departing employees have been utilized for many decades in Minnesota, often in conjunction with a noncompete provision. Now that noncompetes are banned in Minnesota, nonsolicit clauses will ascend in importance to become the primary means of protecting customer goodwill.

In a sense, this is not a tectonic shift. Historically, pure noncompetes were only enforceable to the extent they were necessary to protect a legitimate business interest. Courts in Minnesota had largely limited the scope of "legitimate business interest" to (a) customer goodwill and (b) confidential and proprietary information.[1] A nonsolicit paired with a nondisclosure should, therefore, offer almost as much protection as a blanket noncompete.

The noncompete previously held allure, however, because the former employer could attempt to enjoin the former employee from working at all. If successful, the former employer would avoid the challenging task of proving actual damages in the form of lost profits. Because courts in Minnesota have become less inclined to grant injunctions over the past decade or so, practitioners have become less likely to seek injunctive relief. That means we have already started the transition away from injunction battles and toward showing actual harm from diversion of customers or other business. (To be clear, injunctive relief to enforce a nonsolicit is a viable option, but it does not keep the employee from working for a competitor.)

Minnesota court decisions regarding nonsolicitation provisions

Under Minnesota law, a nonsolicitation-of-customers agreement is enforceable if it is supported by consideration, it protects a legitimate employer interest, and it is reasonable in scope.[2] In *Dynamic Air*, the Minnesota Court of Appeals held that a territorial limitation is irrelevant with regard to a nonsolicitation covenant because the restriction to former clients is sufficiently narrow.

Minnesota courts had sometimes expressed a preference for nonsolicits over noncompetes because they are less burdensome and more precise. In *Thermorama, Inc. v. Buckwold*,[3] the Minnesota Supreme Court noted that if the former employee had not breached the terms of his agreement, he would "suffer little detriment by the issuance of the injunction," but on the other hand, if the employee breached, then "the former employer may well lose a number of customers for whom it has not had a fair opportunity to compete, and may forfeit as well future benefits which are difficult to evaluate."[4]

In *Softchoice, Inc. v. Schmidt*,[5] the Minnesota Court of Appeals held that a promotion was sufficient consideration to support a nonsolicitation agreement, suggesting that the strict consideration requirements for nonsolicits are the same as for noncompetes.

Minnesota courts have applied the "blue pencil doctrine" to limit nonsolicits to certain customers.[6]

What is "solicitation"?

Whether "solicitation" must involve an active outreach to the customer is frequently debated. The employee sometimes claims that they did not solicit the customer; rather, the customer approached them and they merely provided services. This begs the question of what the term "solicit" actually means. Minnesota appellate courts have not squarely addressed this question, although they have danced around it for over a hundred years.[7]

In *Al's Cabinets, Inc. v. Thurk*,[8] Al's Cabinets sued former employee Jack Thurk and his new employer, alleging that Thurk had violated a nonsolicitation agreement. While working for his new employer, Thurk accepted two orders from clients at his former employment. Both clients called and initiated the contact, one of which, Thurk claimed, "occurred without his knowledge or participation."[9]

The district court found that while there was no direct showing that Thurk had solicited his former customer, his preparation of a bid containing pricing and delivery guarantees were "designed to induce the customer to enter into a contract...."[10] The appeals court affirmed the lower court's decision, stating:

> "[T]he nonsolicitation provision does not just prohibit endeavors to 'divert or entice away' business from respondents; it also expressly prohibits Thurk from 'attempt[ing] to sell or market any products to' respondents' customers. Product pricing is an important aspect of inducing a customer to enter into a contract. Therefore, regardless of who initiates the contact, it would be unreasonable to construe the preparation of a bid for a potential customer in connection with a specific project as anything other than an 'attempt to sell' a product."[11]

The court concluded that the district court did not err in holding that Thurk violated the non-solicitation agreement.

In 2013, however, a federal court in Minnesota distinguished the holding in *Al's Cabinets*. In *Honeywell Int'l v. Stacey*,[12] Honeywell sued a former employee whom it alleged had breached a noncompete agreement. New Jersey law governed the agreement. The nonsolicitation agreement prohibited Stacey from directly or indirectly soliciting, or attempting or assisting to solicit, Honeywell's customers.[13] Stacey's defense was that "so long as the customer first contacts [him], and [he] does not first contact the customer, [he] has not 'solicited' the customer in violation of his agreement with Honeywell."[14] Honeywell argued Stacey anticipatorily violated the agreement by expressing his belief that working with his new employer's preexisting customers was permitted, even if they were also Honeywell's customers.

The court found that New Jersey precedent supported Stacey's position that former employees who do not initiate contact with former clients, and merely accept the business, do not violate their nonsolicitation agreements. The court distinguished the cases advanced by Honeywell because they "involve[d] broader contractual language."[15] The court also categorized *Al's Cabinets* as a nonsolicitation agreement that used broad contractual language because it prohibited the former employee from "'attempt[ing] to sell or market any products' to former clients."

The case that most clearly supported Honeywell's argument, the court noted, did not hold "that accepting business from a former client constitutes solicitation; instead, it holds that, under the facts of that case, the defendant's activities constituted more than merely 'accepting business.'"[16]

In another case, the Minnesota Court of Appeals upheld a restrictive covenant against soliciting customers. In *Webb Publishing v. Fosshage*,[17] after terminating an employee from his position as an account executive, the employer brought an action for damages and injunction to enforce the restrictive covenant agreement, which provided that the employee would not solicit customers of his division for a period of 18 months.[18] The court noted that the employee's success in soliciting business from his customers demonstrated the "personal hold" he had on them, that loss of these customers would cost the employer 45 percent of its custom publishing revenue, and the damage to its business reputation in that area would be substantial and not easily measured.

Does the new Section 181.988 allow or bar agreements "not to do business" with a customer?

When a nonsolicitation agreement does not explicitly forbid acceptance of unsolicited business, many courts around the country have interpreted such agreements in favor of the former employee. Conversely, many courts have enforced less ambiguous nonsolicitation agreements that prohibit former employees from accepting business from former clients. *Al's Cabinets*, *Honeywell*, and other decisions highlight the importance of including broad language in Minnesota nonsolicits, at least before the new Section 181.988 was enacted. This is because covenants not to "do business with" clients circumvent the whole bothersome question of whether "solicitation" occurred.

But a significant uncertainty arises as to whether the new statute allows such language. On the one hand, a restriction on "doing business" with a client might be seen as a species of nonsolicit restriction, but simply less ambiguous as to the meaning of "solicit." On the other hand, a restriction on "doing business" with clients might be seen by a court as a form of a noncompete because it restricts the employee from performing "work for another employer in a capacity that is similar to the employee's work for the employer that is party to the agreement" under 181.988, Subd, 1 (3). This may be one of the first questions the courts will be asked to answer when interpreting the new law.

Pre-existing customers

New York law has developed a doctrine that disallows employers from restricting former employees from soliciting business from customers or client relationships that they had prior to employment.[19] Minnesota has not expressly adopted this concept. In one Minnesota federal court decision, the court affirmatively enforced a restrictive covenant that applied to a group of employees' pre-existing customers. In *Merrill Corp. v. R.R. Donnelley & Sons Co.*,[20] the court observed that the restrictive covenants prohibited the individual defendants from soliciting "existing or potential Merrill client[s]" and made no exception for pre-existing clients brought to the company by the individual defendants. The court held that once the individual defendants began working for the company and once their pre-existing clients became clients of the company, that those clients became "existing" clients and were protected by the restrictive covenants.

The Minnesota Court of Appeals reached the opposite conclusion, however, in *Sysdyne Corp v. Rousslang*.[21] In *Sysdyne*, an employer sued its former employee for breaching nonsolicitation provisions of a restrictive covenant agreement and sued the new employer for tortious interference with contractual relations and prospective business relationships. The nonsolicitation provision provided that the employee may not "in any manner contact, solicit or cause to be solicited, customers or former or prospective customers" of the former employer, located in the seven-county metro area. The Minnesota district court "blue-penciled" the employment agreement to exclude the employee's pre-existing customers from the restrictive covenant agreement.[22] The district court concluded that in regard to pre-existing customers, the former employer was "not seeking to prevent [the employee] from appropriating [the employer's] relationships as his own; rather, [the employer] was seeking to appropriate the employee's relationships as its own."[23] The district court further explained that "guarding against appropriation is a legitimate business interest, appropriation is not." The Minnesota Court of Appeals upheld the district court's application of the blue pencil doctrine and found that the district court did not abuse its discretion by modifying the nonsolicitation provision to exclude the employee's pre-existing customers.

As nonsolicits rise to the fore in the face of Minnesota's new ban on noncompetes, legal advisors should pay careful attention to drafting language that is as broad as possible without running afoul of a noncompete ban. Litigators should keep in mind that a common law claim of breaching the duty of loyalty can be asserted against an employee who solicits customers for himself or a competitor prior to the last day of employment.

Nonsolicitation of employees

Provisions barring solicitation of other employees have become extremely common in Minnesota but there are few court decisions interpreting their use. These restrictions have not attracted as much public or legislative attention as noncompetes have. Inasmuch as they are intended to prevent employee mobility, it is possible we will see increased scrutiny of these provisions in the future.

Minn. Stat. §181.988 refers to both a "nonsolicitation agreement" and an "agreement restricting the ability to use client or contact lists, or solicit customers of the employer." If a nonsolicitation agreement is different from an agreement "restricting the ability... to solicit customers of the employer," then by canons of statutory construction, each must mean something distinct. One possibility is that the statute also tacitly refers to nonsolicitation of employee provisions.

No Minnesota appellate court has squarely addressed the enforceability of nonsolicitation-of-employees covenants in a reported decision. It is generally assumed, however, that post-employment restrictions on recruiting employees are lawful in Minnesota and should be analyzed under the same legal framework as any other restrictive covenant. In order to make it enforceable, therefore, the employer would have to demonstrate that it has a legitimate protectable interest, that the restriction is reasonably necessary to protect that interest, and the employee received adequate consideration, among other factors.[24] The same question arises as to whether "solicitation" of employees must be "direct," as is the case with customers.

In *Schwan's Consumer Brands North America, Inc. v. Home Run Inn, Inc.*,[25] a judge in the U.S. District Court for the District of Minnesota found that a non-solicitation of employee provision did not appear to be supported by adequate consideration under Minnesota law, essentially applying the same analysis used for noncompete agreements. In *Frank B. Hall & Co. v. Alexander & Alexander, Inc.*,[26] the Eighth Circuit Court of Appeals appeared to assume that an "anti-raiding" agreement was enforceable under Minnesota law and observed that the nonsolicitation clause "did not prohibit the parties from merely hiring an employee of the other without solicitation."

The Minnesota Court of Appeals denied injunctive relief to enforce an employee nonsolicit in *ReliaStar Life Insurance Co. v. KMG America Corp*.[27] In *ReliaStar*, two executives resigned from ReliaStar. After their resignation, they solicited and made offers to eight other ReliaStar employees to join KMG, successfully hiring seven. The original two executives were subject to a prohibition on soliciting "employees, agents, and customers" for a period of 12 months. The trial court denied Reliastar's motion for an injunction and the court of appeals affirmed.[28]

In another employee solicitation dispute, this time involving the freight-brokerage industry, a court in Hennepin County issued an injunction prohibiting "all" employees who used to work at one company (XPO) and who were still subject to a two-year nonsolicitation provision with their former company (C.H. Robinson) "from soliciting or initiating contact regarding employment with any C.H. Robinson employee for the period of their non-solicitation agreement."[29] To be clear, the court did not prevent anyone who had already been solicited from continuing their employment. The court in *C.H. Robinson* emphasized the protected interest at stake, noting, "Plaintiff's... [a]greements are properly read as preventing former employees from leveraging their relationships with current employees, whom they were exposed to as a result of their employment with Plaintiff, in an effort to misappropriate the goodwill that Plaintiff's employees have developed with Plaintiff's customers."[30]

If a plaintiff does not seek injunctive relief, or if it is not available, Minnesota courts have provided little guidance as to the measure of damages in the case of a breach of a nonsolicitation agreement. Lost damages might include cost of recruiting and training a replacement, and possibly more.[31]

Conclusion

Minnesota's ban on noncompetes will not end the motivation for former employers to assert lawsuits against former employees if the former employer thinks that their customer base or business is in jeopardy. Nonsolicitation agreements will be the primary basis for these types of disputes going forward. ▲

NOTES

[1] *Oberfoell v. Kyte*, A17-0575, 2018 WL 492629 (Minn. Ct. App. 1/22/2018).

[2] *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993).

[3] 125 N.W.2d 844 (Minn. 1964).

[4] *Id.* at 845.

[5] 763 N.W.2d 660 (Minn. Ct. App. 2009) (partially applying Missouri law).

[6] *See, e.g., Management Recruiters Int'l v. Professional Placement Servs.*, No. C6-91-2055, 1992 WL 61542, at *1 (Minn. Ct. App. 3/31/1992) (narrowing non-solicitation provisions applicable to recruiter by prohibiting him from having contact with five specific telecommunication companies); *Yonak et al. v. Hawker Well Works Inc. et al.*, No. A14-1221, 2015 WL 1514166, at *1 (Minn. Ct. App. 4/6/2015) (upholding the district court's narrowing of a nonsolicitation provision "to the employees, lenders, suppliers and customers of the Defendants that existed on or before" a specific date).

[7] *See, e.g. Menter Co. v. Brock*, 180 N.W. 553, 555 (Minn. 1920) ("There is no evidence that [the former employee]... made or threatened to make any effort to secure or attract plaintiff's patrons.")

[8] No. C9-02-1348, 2003 WL 891419 (Minn. Ct. App. 3/4/2003).

[9] *Id.* at *1–2.

[10] *Id.* at *3.

[11] *Id.* at *4.

[12] No. 13-CV-3056 PJS/JJK, 2013 WL 9851104 (D. Minn. 12/11/2013).

[13] *Id.* at *8.

[14] *Id.*

[15] *Id.* (emphasis added) (citing *Esquire Deposition Servs., LLC v. Boutot*, No. 09–1526, 2009 WL 1812411, at *1 n.1 (D.N.J. 6/22/2009) in which a former employee could not "solicit or contact... to do business with" former clients or customers); *Platinum Mgmt., Inc. v. Dahms*, 666 A.2d 1028, 1033 (N.J. Super. Ct. Law Div. 1995) where a former employee could not solicit or accept business from former customers).

[16] *Id.* (citing *FCE Benefit Adm'rs, Inc. v. George Washington Univ.*, 209 F.Supp. 2d 232, 239–40 (D.D.C. 2002)).

[17] 426 N.W.2d 445 (Minn. Ct. App. 1988).

[18] *Id.* at 447.

[19] *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 690 N.Y.S.2d 854 (1999).

[20] 2008 WL 3162490, *1 (D. Minn. 8/1/2008).

[21] No. A13-0898, 2014 WL 902713, *1 (Minn. Ct. App. 3/10/2014) (unpublished).

[22] *Id.* at *2.

[23] *Id.* at *4.

[24] *See, e.g. Webb Publishing Co. v. Fosshage*, 426 N.W.2d 445, 449-450 (Minn. Ct. App. 1988).

[25] No. 05-2763 (DWF/JJG), 2005 WL 3434376 (D. Minn. 2005).

[26] 974 F.2d 1020, 1024, n.5 (8th Cir. 1992).

[27] No. A05-2079, 2006 WL 2529760 (Minn. Ct. App. 9/5/2006).

[28] *Id.* at *6.

[29] *C.H. Robinson Worldwide, Inc. v. Kratt*, No. 27-CV-1216003, 2013 WL 6222078 (Henn. Co. Dist. Ct., 4th Judicial Dist. of Minn., 1/17/2013.)

[30] *Id.* at *24.

[31] *See, e.g. St. Jude Medical, S.C., Inc. v. Biosense Webster, Inc.*, 818 F.3d 785 (8th Cir. 2016) (affirming damages for "lost profits" arising from tortious interference by hiring employee with a "term of years" contract).

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Refocusing the Minnesota Environmental Policy Act through an environmental justice lens

BY MICHAEL DAMASCO

As the Minnesota Environmental Policy Act (MEPA) turns 50 this year, it's an opportune time to reexamine its place in a world increasingly invested in environmental justice. MEPA, Minnesota's environmental review statute, is an information-gathering tool used to determine the environmental impacts of development projects. Highly publicized environmental justice battles, such as the Dakota Access Pipeline protest, have galvanized the public and contributed to new interest in environmental justice-focused legislation.

MEPA is much older than this recent legislation, but can it still be just as effective? The fact is that MEPA already provides some of the tools necessary for Minnesota to actively tackle environmental justice issues. The statute only needs to be refocused, not rewritten. MEPA is broad enough to incorporate many of the concerns presented by environmental justice advocates and it is time for those working with the law (state agencies, local governments, project proposers, and advocates) to address in their environmental review the social and economic impacts and disparities that MEPA has long required.

The purpose of this article is first to look at what environmental justice is and how it has been applied in Minnesota's environmental review process. It will further analyze how other environmental review statutes incorporate environmental justice and then discuss where MEPA implementation falls short and how to fill in the gaps.

What is environmental justice?

Environmental justice is a broad term that means different things to different people. To focus the discussion, we will use the Minnesota Pollution Control Agency's (MPCA) definition of environmental justice. The MPCA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income. In general, EJ is intended to ensure that all people benefit from equal levels of environmental protection and have the same opportunities to participate in decisions that may affect their environment or health."[1]

Inadequate access to clean water and healthy food, and the unequal burden of air pollution, are examples that help to illustrate environmental justice issues. Environmental justice is at the root of widely reported crises such as the Dakota Access Pipeline and the Flint, Michigan drinking water disaster. The Dakota Access Pipeline saw an oil pipeline plan being constructed directly through the Standing Rock Indian Reservation's water supply—after being moved from its original site due to proximity to municipal water sources and residential areas. The Flint crisis saw the water supply of a historically Black city contaminated with lead in a cost-saving measure.[2]

What is Minnesota doing?

Enacted in 1973, the Minnesota Environmental Policy Act (MEPA) was intended to "encourage productive and enjoyable harmony between human beings and their environment; to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings; and to enrich the understanding of the ecological systems and natural resources important to the state and to the nation."[3]

MEPA requires state agencies to consider the impact of government actions on the environment, by using "all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which human beings and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the state's people."[4] The phrase "all practicable means and measures" has resulted in rules mandating the completion of an environmental assessment worksheets (EAW) and in some cases, an environmental impact statement (EIS). An EAW is a brief fact-gathering document that is used to determine whether a full environmental review, in the form of an EIS, is needed.[5]

The purpose of an EIS is to provide detailed information about a project that has potential for significant environmental effects and to explore alternatives as well as ways to mitigate the likely environmental impacts of the project. An EIS must analyze environmental, "economic, employment, and sociological effects that cannot be avoided should the action be implemented."[6]

The analysis is multi-pronged, requiring a discussion of potential effects, "be they direct, indirect, or cumulative."[7] Cumulative impacts are defined as "the impact on the environment that results from incremental effects of the project in addition to other past, present, and reasonably foreseeable future projects regardless of what person undertakes the other projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time."[8]

Neither MEPA nor its implementing rules uses the phrase "environmental justice analysis" in describing what is required as part of the review process. In part, this is because MEPA was enacted in the early 1970s and the environmental justice movement did not start until the late '80s. But the same environmental justice ideals are still present in MEPA. For example, MEPA instructs agencies and project proposers to study the "economic, employment, and sociological effects"[9] of their decisions before they make them. Unfortunately, environmental review has historically glossed over "socio-economic" impacts in favor of more traditional "environmental "analyses." One reason the environmental review process has failed to

DESPITE ITS AGE, MEPA ALREADY PROVIDES SOME OF THE TOOLS NECESSARY FOR MINNESOTA TO ACTIVELY TACKLE ENVIRONMENTAL JUSTICE ISSUES.

adequately analyze environmental justice issues on a consistent basis is because of the Environmental Quality Board's (EQB) guidance for EAWs. EQB's guidance directs the preparers of EAWs to limit their analysis to specific issues and fails to mention environmental justice as required. EAWs neglect environmental justice, but there are EISs that we can look to that do assess environmental justice issues.

Enbridge Line 3 pipeline replacement project

Minnesota's environmental review for the Enbridge Line 3 pipeline replacement project is an example of a thorough environmental justice analysis completed under MEPA. The purpose of the project was to replace old pipelines with new, larger pipelines that would carry heavier oil and larger quantities of it. The project saw the construction of 330 miles of new 36-inch-diameter pipeline to replace 282 miles of the existing 34-inch pipeline in Minnesota.[10]

The Minnesota Department of Commerce drafted the EIS for the project. The EIS was extensive and included a separate environmental justice analysis. The Department of Commerce's analysis focused on who was affected and what those impacts looked like. Here, tribal communities were disproportionately and adversely impacted. Worth noting is the discussion around the disproportionate harm and the history of tribal relations. For example, the Department of Commerce states that these communities have "historically been burdened by pipelines and other projects resulting in adverse impact;" and that they "typically lack resources, opportunity, mobility, and the power to influence decisions that affect the environment and their health." Additionally, the EIS touched on the way these resources mean something unique to this community as compared to the general population. (For example, the EIS highlights how water is not only a health issue for this community, but a spiritual and religious issue as well.)

Despite the project's impacts as detailed in the EIS and the thorough analysis of the project's potential environmental justice impacts, the Enbridge Line 3 replacement project was still approved and built. It is understandable for environmental justice advocates to be disappointed in this outcome and to question the role of MEPA in the environmental justice review process when problematic projects still get approved. Environmental review, in itself, isn't meant to block projects but to provide a means of gathering thorough information to let decisionmakers know the real consequences of their decision before they make it.[11]

Environmental review primarily serves as an information-gathering tool. But it still serves two important purposes. First, gathering all this information into one place is valuable. This is part of the process, and if we are to have better outcomes, then we need adequate review. Second, it allows for public participation. Public participation is part of the bedrock of the environmental justice movement. No one understands a community better than the people who live in it. We should strive for thorough environmental justice review despite its not always resulting in the preferred outcome.

The Enbridge Line 3 replacement project's level of environmental justice analysis is the expectation but not the norm. Rarely does an EIS include an explicit environmental justice analysis, but this project serves as a reminder that a relatively thorough analysis is possible under our current environmental review statutes and rules.

NEPA and other states

It's clear that Minnesota has tools at its disposal to advocate for environmental justice issues, but there are still more lessons to be learned from both the federal government and other states. The National Environmental Policy Act (NEPA),[12] which governs federal environmental review, was used as a model for MEPA. NEPA requires that federal agencies assess the environmental impacts of a proposed action prior to making a decision. As in the case of MEPA, NEPA review is a two-step process: First an environmental assessment is prepared, then a more detailed environmental impact statement is completed when necessary. NEPA requires an analysis of three types of impacts: direct, indirect, and cumulative.

While NEPA, like MEPA, does not explicitly mention environmental justice, the U.S. Environmental Protection Agency (EPA) does provide guidance on how to incorporate environmental justice analysis into the review process. For example, *Promising Practices for EJ Methodologies in NEPA Reviews*[13] outlines guiding principles on two important topics—how to define an affected environment and how to provide for effective impact analysis.

The guidance encourages agencies to embrace a broader definition of environment to effectively account for environmental justice issues. Conditions to be considered include "ecological, aesthetic, historic, cultural, economic, social, [and] health." After considering these conditions, agencies can consider how "the extent of the affected environment may be larger (or smaller) and differently shaped than the boundaries would have been drawn without the existence of [these] conditions."

In cumulative impact analysis, the guidance describes cumulative impacts as the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." When assessing cumulative impacts, the guidance directs agencies to be mindful that minority and low-income populations may be differently affected by these impacts compared to the general population and that "in some circumstances, [agencies should] consider (among other existing conditions) chemical and non-chemical stressors that could potentially amplify impacts from

the proposed action to the health of minority populations and low-income populations." Examples of non-chemical stressors include "health status" (for example, pre-existing health conditions) and past exposure histories as well as social factors such as community property values, sources of income, level of income, and standard of living. While this is only guidance—and therefore not binding—it does provide an example of how current statutes can be interpreted to better encompass environmental justice ideas.

The Minnesota Legislature modeled MEPA after NEPA and because of this, Minnesota courts are guided by NEPA case law.[14] NEPA requires a "hard look" analysis of environmental justice implications of a proposed project.[15] NEPA requires that potential environmental justice populations be identified and impacts be properly analyzed.[16] Additionally, to satisfy environmental justice responsibilities under NEPA, an analysis that states a population would not be disproportionately impacted must be reasonably supported.[17] "Reasonably supported" means looking at a wide range of factors. In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, a federal district court found in 2017 that an EIS's environmental justice analysis was inadequate because while it managed to identify an environmental justice community, it failed to adequately analyze multiple issues raised, offering only "bare-bones" conclusory statements that no further discussion was needed.[18] Specifically, the court found the environmental justice analysis lacking because it only looked at construction impacts and failed to look at spill impacts. And both cultural and economic factors are different for the tribal community, thereby amplifying the prospective negative impacts of an oil spill.

Many other states have their own MEPA-like statutes, some of which have been interpreted to require environmental justice analysis. For example, California's mini-NEPA, known as CEQA, requires an analysis of both social and economic factors, but these factors alone are not sufficient to trigger CEQA review.[19] Social and economic factors are only analyzed in connection with direct environmental impacts. The extent of environmental impacts is quite broad, however. For example, the construction of a new shopping center, which pulled customers away from small businesses downtown, resulting in urban decay, was seen as an environmental impact that required CEQA analysis.[20] In New York, a significant impact on the characteristics of a community or neighborhood is enough to trigger environmental review.[21] Impacts to the characteristics of a community can include displacement and gentrification. These environmental review statutes can be used as a guide on how we can better interpret MEPA.

Recommendations

MEPA already allows for environmental justice analysis; it is just a matter of ensuring that those who are responsible for implementing the statute—governments and project proposers—complete the required analysis in a manner that is thorough and effective. There are three ways this can be achieved: implementing the environmental justice analysis from the beginning of the environmental review process, aligning MEPA implementation with NEPA and other states, and ensuring that agencies are held to the "hard look" standard required under current case law.

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First, environmental justice needs to be part of the process from the very beginning. We have seen a thorough environmental justice analysis done as part of an EIS, but only a few projects even reach that level of review. Most projects only require an EAW and nothing more. According to the EQB, between 2018 and 2020, only 2 percent of environmental review was for an EIS, while 74 percent of environmental review was for an EAW.[22] To be more effective, we should strive for two things as part of the EAW process: (1) require the identification of potentially affected environmental justice communities and (2) identify potential impacts to these communities. An EIS can go further in quantifying and fully analyzing these impacts, but, at minimum, the identification should occur as part of the EAW process.

Second, state agencies and local governments must begin to heed MEPA's statutory language, which requires analysis of "economic, employment and sociological" impacts. Federal law provides helpful assistance on how to do this. NEPA guidance suggests that a full understanding of the environment includes conditions such as the economic, social, aesthetic, and social aspects of a project's impacts. And NEPA suggests that the addition of nonchemical stressors as part of the cumulative impact analysis should typically be required. To effectively analyze environmental justice concerns, MEPA review should adopt a similar approach. Additionally, we can look to how other states advocate for environmental justice. California and New York teach us that there is room to interpret MEPA to be more inclusive of environmental justice. Both states take a holistic approach, allowing more factors to be considered at an earlier stage of the review process. Minnesota courts should afford MEPA the same degree of scope and interpret MEPA to include urban decay, gentrification, and community characteristics as part of the environmental review process.

Third, for environmental justice review to be effective, it should be held to the "hard look" standard required under current case law.[23] But too often EISs under MEPA dedicate only a paragraph or less to environmental justice analysis and include conclusory statements claiming that no environmental justice analysis is needed. A thorough review should include the metrics that agencies looked at in determining whether any environmental justice communities were impacted; an analysis of the social, occupational, historical, or economic factors of a community that may make any environmental impact more severe; and the impact to cultural resources.

Minnesota was ahead of the curve when MEPA was first established, and the law continues to be a useful tool for environmental justice advocates. But this does not mean that there is not room for improvement. With these recommendations, we can ensure that Minnesota becomes a model of proper environmental justice implementation in the Midwest. ▲

NOTES

[1] It is worth noting that this definition fails to consider the historical pollution burdens certain communities have had to endure. Any discussion of environmental justice should not only focus on ensuring environmental protections and meaningful involvement moving forward but also an acknowledgment and remediation of past harms.

[2] Merit Kennedy, *Lead-Laced Water in Flint: A Step-By-Step Look at The Makings Of A Crisis*, NPR, 4/20/2016.

[3] Minn. Stat. Ann. §116D.01

[4] Minn. Stat. Ann. §116D.02

[5] Minn. Stat. §116D.04, subd. 1a(c)

[6] Minn. Stat. §116D.04, subd. 2a(a)

[7] Minn. R. 4410.2300(H)

[8] Minn. R. 4410.0200, subp. 11

[9] Minn. Stat. §116D.04, subd. 2a(a)

[10] *https://www.enbridge.com/projects-and-infrastructure/public-awareness/minnesota-projects/line-3-replacement-project#projectdetails:project-scope*

[11] In certain instances, some projects may be blocked under Minn. Stat. Ann. §116D.01 subd. 6.

[12] 42 U.S.C. §§4321

[13] *https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf*

[14] *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 323-27 (Minn. 1977).

[15] Under NEPA the "hard look" standard requires that agencies ensure that "the adverse environmental effects of the proposed action are adequately identified and evaluated." In evaluating the significance of a proposed action's impact, an agency is to consider, inter alia, the effect on "public health or safety"; "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources"; the extent to which the environmental effects "are likely to be highly controversial" or "are highly uncertain or involve unique or unknown risks"; "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts"; and the degree to which the action "may cause loss or destruction of significant... cultural[ ] or historical resources." *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 123 (D.D.C. 2017).

[16] *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017).

[17] *Id.*

[18] *Id.*

[19] Cal. Code Regs. tit. 14 §15064(e).

[20] *Bakersfield Citizens for Loc. Control v. City of Bakersfield*, 124 Cal. App. 4th 1184, 1193, 22 Cal. Rptr. 3d 203, 220 (2004)

[21] 6 NYCCR §617.7

[22] Environmental Quality Board, Mandatory Environmental Review Categories – Legislative Assessment Report. at p. 14 (2021). *https://www.eqb.state.mn.us/sites/default/files/documents/EQB%202021%20Mandatory%20Category%20Report%20-%20FINAL.pdf*

[23] *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006).

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

Arson: State must prove a fire was started without authorization. Appellant reported his house was on fire, prompting both police and insurance investigations, which concluded the fire was set intentionally. After a jury trial, appellant was convicted of first-degree arson. First-degree arson makes it a crime to "unlawfully by means of fire or explosives, intentionally destroy[] or damage[] any building that is used as a dwelling at the time the act is committed..." Minn. Stat. §609.561, subd. 1. The court of appeals rejected appellant's argument that "unlawfully" creates an element of the offense, holding that appellant carried the burden of proving he had some permit, license, or other authorization to start the fire, as provided in section 609.564.

The Supreme Court disagrees. "Unlawfully" is not defined in the arson statute, but Black's defines "unlawful" as "not authorized by law." The statute itself does not modify or limit the reach of "unlawfully," but the court of appeals' interpretation adds language to the statute that limits "unlawfully" to lack of authorization under section 609.564. The Supreme Court disagrees that this is the only way to show a fire was authorized. The Court looks to the text and structure of section 609.561 as clues that the Legislature intended for "unlawfully" to be an element of first-degree arson, rather than an exception to criminal liability. "Unlawfully" is not set apart from the other elements of the offense and was intentionally added by the Legislature to a prior iteration of the statute.

From the circumstances proved at trial, the Supreme Court finds that the state met its burden of proving each element of the offense, including that appellant set the fire unlawfully. Appellant's conviction is affirmed. ***State v. Beganovic***, A21-0477, A21-0480, 2023 WL 3985540 (Minn. 6/14/2023).

Orders for protection: DANCO cannot serve as basis for issuance of subsequent OFP. Appellant was convicted in the early 2000s of sexually abusing respondent, his stepsister, and a DANCO was issued that expired in August 2021. In February 2022, appellant went to a restaurant where, unbeknownst to appellant, respondent worked as a server. Respondent later petitioned for an OFP against appellant, claiming fear of appellant hurting or harassing her now that he knew where she worked. Although the district court found the contact between the parties to be accidental, it issued a "subsequent" OFP, based on the initial expired DANCO and respondent's fear.

The Minnesota Court of Appeals considers whether the district court abused its discretion by treating the expired DANCO as an OFP for purposes of issuing a subsequent OFP. Under Minn. Stat. §518B.01, subd. 4., an OFP may be issued if the petitioner shows domestic abuse by a preponderance of the evidence. Under subd. 6a, if the petitioner has an existing or prior OFP, the OFP may be extended or a subsequent OFP may be issued.

The court of appeals holds that a DANCO may not be treated as an existing or prior OFP for purposes of issuing a subsequent OFP under subd. 6a. Section 518B.01 states that OFP proceedings are in addition to other civil or criminal remedies, including a DANCO, which is a remedy granted by separate statute only in criminal proceedings. The OFP statute does not reference DANCOs and the DANCO statute only references OFPs when it provides that DANCOs may be issued in OFP violation proceedings. DANCOs and OFPs also have substantive differences. As a DANCO is not an OFP and cannot serve as the basis for issuing a subsequent OFP, the district court abused its discretion by issuing the OFP against appellant. ***Isenhower v. Isenhower***, A22-1225, 2023 WL 4167078 (Minn. Ct. App. 6/26/2023).

Predatory offender registration: Registration requirements do not amount to a continuing violation tolling the statute of limitations for §1983 claims. Appellant was originally required to register as a predatory offender for a 10-year period following a conviction in 2009. His registration period was repeatedly extended, ultimately to 2031,

due to additional convictions and supervised release violations. In 2020, he filed a civil action under 42 U.S. §1983, and various constitutional provisions, alleging that subjecting him to continuing predatory offender registration requirements violated his constitutional rights. Respondent, the superintendent of the BCA, filed a motion to dismiss, which the district court granted, finding that appellant's arguments were barred by the six-year statute of limitations for his claims, as more than six years had passed since appellant was initially required to register. The court of appeals affirmed.

Under Minn. Stat. §243.166, a person required to register as a predatory offender must initially register and thereafter file yearly reports with specific information until their registration period expires. Suits under section 1983 must be brought within the state's personal injury action statute of limitations, which in Minnesota is six years. A statute of limitations begins to run when the cause of action accrues—that is, when all the elements of the action have occurred.

Appellant does not argue his claim did not accrue in 2009, when he was initially required to register, but argues the statute of limitations should be extended under the continuing violation doctrine. He argues the violation of his constitutional rights over the years, via the ongoing registration requirements, was effectively a single discriminatory act. The key question is whether any present violation exists within the statute of limitations period. The Supreme Court agrees with respondent that the registration requirements are a continued *consequence* of his initial registration, but the act itself (the BCA's initial determination that appellant must register as a predatory offender) is not ongoing or continuing. "[T]he registration requirements are a residual burden resulting from the BCA's initial, single determination that [appellant] must register, meaning no present Bicol action exists within the statute of limitations period." The court of appeals is affirmed. ***Franklin v. Evans***, A21-1378, 2023 WL 4218095 (Minn. 6/28/2023).

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Employment & Labor Law

JUDICIAL LAW

Arbitration award; vacated decision reversed. The Minnesota Supreme Court reversed a ruling of the court of appeals that overturned an arbitration award in favor of a pair of Hennepin County unions. An arbitrator's award that the county health system violated the collective bargaining agreements by maintaining temporary staffers for more than six months, the maximum allowed under the union agreement, had been vacated by the appellate court on grounds that the arbitrator exceeded his authority. But the Supreme Court overturned that ruling in a divided decision, holding that the arbitration award properly "drew its essence" from the underlying contracts and, therefore, was proper under the Uniform Arbitration Act, Minn. Stat. § 572B.23(a)(4). ***Hennepin HealthCare System, Inc. v. AFSCME***, 990 N.W.2d 454 (Minn. 2023).

LEGISLATIVE ACTION

Federal

• The Federal Speak Out Act, 42 U.S.C. §§19401-19404, prohibits nondisparagement agreements in connection with matters of sexual assault and harassment claims under federal, state, or tribal laws.

• A ruling by the National Labor Relations Board (NLRB) restricts use of nondisparagement clauses in most severance and settlement agreements in *McLaren Macomb and Local 40 RN Staff Council, Office and Professional Employees, International Union (OPEIU), AFL-CIO*, Case No. 07-CA-263041, 372 NLRB 58 (2/21/2023).

• The Federal Trade Commission (FTC) has proposed a regulation that would bar most noncompete agreements under 16 C.F.R. 910, although it has not yet gone into effect and will undoubtedly attract considerable litigation.

• The Pregnant Workers Fairness Act, which went into effect this summer, supplements the Americans with Disabilities Act, 42 U.S.C. §§2000gg-2000gg-6, by requiring employers with 15 or more employees to engage in an "interactive dialogue" and provide "reasonable accommodations" to employees due to pregnancy, childbirth, or other "known" medical limitations.

• The Pump for Nursing Mothers Act, 29 U.S.C. §218d, requires that employees be provided with a "reasonable break time" to produce breast milk for a nursing child for up to one year after a child's birth. Facilities with less than 50 employees are exempt if doing so would impose an "undue hardship."

State

• A new Minnesota law bars most noncompete agreements, except in connection with the sale or dissolution of a business. It was effective 7/1/2023 and is not retroactive. It does not proscribe certain nonsolicitation and confidential data protections. Minn. Stat. §181.988.

• New Minnesota legislation provides paid sick and safe leave for most employees under Minn. Stat. §181.032, §181.9445-181.9488. Effective 1/1/2024, it will allow employees to be paid to a maximum of 48 hours per year, based upon one hour earned for every 30 hours worked. The measure is modeled after similar laws in Minneapolis, St. Paul, and Duluth.

• The state's new paid Family and Medical Leave Act will allow most employees to be paid from a state-created fund for up to 12 weeks of leave of absence for personal and family health-related reasons, effective 1/1/2026, under Minn. Stat. §268B.01-268B.29. Employers will need to begin submitting wage information in mid-2024.

• Some employers receiving state financial aid for certain home-building activities must pay "prevailing wage" to their employees under Minn. Stat. §116J.871, subds. 1 and 2. Minn. Stat. §181.165, subd. 2 also makes contractors liable for payment of wages and benefits to employees of subcontractors in most circumstances.

• The Minnesota Peace Officer Standards and Training (POST) Board has issued new regulations relating to revocation of law enforcement officer licenses for violators of its professional standards of conduct. The new rules, at Minn. Rules 6700.0700 and 6700.1600, go beyond prior provisions that required a criminal felony or gross misdemeanor conviction to warrant loss of licensure.

• Public school employees who are paid on an hourly basis, such as staff and paraprofessionals, are now eligible for unemployment insurance when not working in the summer between academic terms under Minn. Stat. §268.085, subd. 7, the first measure of

its kind in the nation.
- A 12-month post-birth period for employers to provide time at work for nursing mothers to express milk has been extended to an unlimited time after the baby's birth, and employers must provide a "clean, private and secure" room for the practice under Minn. Stat. §181.939.
- Restrictive solicitations and hiring agreements are curtailed in franchise agreements under Minn. Stat. §181.991.
- Employers will need to change drug and alcohol testing policies to conform with the new permissibility of recreational cannabis, and they are barred from conducting pre-employment or random testing for cannabis, with some specific exceptions.
- Employees who decline to attend employer-sponsored meetings to discuss religion or political topics may not be disciplined under Minn. Stat. §181.531.
- A number of other measures were enacted during the past legislative session addressing workplace safety for nursing home employees as well as employees at health care facilities and warehouse distribution centers.

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Family Law
JUDICIAL LAW

An award of attorneys' fees through the court's inherent authority must be necessary to preserve the judicial function. Husband and wife agreed in a binding settlement agreement that husband would transfer their daughter's college savings account to the daughter when she turned 21 years old. When the daughter turned 21, husband took no action to transfer the account. Wife's attorney then began corresponding with husband regarding transferring the account. After eight months of correspondence, wife's attorney requested a hearing date from the court. Husband ultimately transferred the account without a hearing. Wife moved for conduct-based fees under Minn. Stat. §518.14. The district court denied wife's request for fees under Section 518.14 because the behavior did not take place during the litigation process, but granted wife attorneys' fees under the court's inherent authority.

The Minnesota Court of Appeals affirmed. On review, the Minnesota Supreme Court reversed and remanded. The Supreme Court distinguished their decision in *Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995). There, the district court used its inherent authority to exclude evidence lost by an expert before the litigation began. Although a district court may in some circumstances use its inherent authority to address conduct that occurred outside of litigation, the Supreme Court reasoned that since this matter did not proceed to a hearing, husband's conduct did not defy the authority of the district court itself. Therefore, the conduct did not warrant the district court relying on its inherent authority to award attorneys' fees. ***Buckner v. Robichaud***, ___ N.W.2d ___, No. 21-1549, 2023 WL 4340153 (Minn. 7/5/2023).

A domestic abuse no contact order may not be treated as an order for protection

for purposes of a subsequent order for protection. In 2011, Jeffrey pled guilty to sexually abusing his stepsister, Natasha, and the court issued a 10-year domestic abuse no contact order (DANCO). The DANCO expired in August 2021. In February 2022, Jeffrey went to lunch at a restaurant where, unbeknownst to Jeffrey, Natasha worked as a server. Natasha later petitioned for an order for protection (OFP). Relying on Minn. Stat. §518.01, subd. 6a, the district court granted Natasha a "subsequent" OFP based on the expired DANCO and Natasha's fear of seeing Jeffrey.

On appeal, the court of appeals reversed, holding that a DANCO cannot be used as an OFP for purposes of issuing a subsequent OFP. The court reasoned that under the plain language of the Domestic Abuse Act, OFPs are additional and distinct remedies from DANCOs, so DANCOs could not be used to support the issuance of a subsequent OFP. The court also distinguished DANCOs from OFPs, noting that DANCOs are issued in criminal or juvenile delinquency proceedings, issued at the request of a prosecutor or *sua sponte*, and without the right to a hearing to contest the DANCO. In contrast, an OFP is a civil remedy requested by the victim and with the opportunity for the respondent to contest the OFP at a hearing. Because of the differences, the court held that a DANCO cannot be used to issue a subsequent OFP. ***Isenhower v. Isenhower***, ___ N.W.2d ___, A22-1225, 2023 WL 4167078 (Minn. Ct. App. 6/26/2023).

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Federal Practice
JUDICIAL LAW

Personal jurisdiction; due process; corporate consent by registration. Since 2017, this column has noted a number of unsuccessful due process challenges to Minnesota laws that make a foreign corporation subject to general personal jurisdiction in Minnesota if it has registered to do business in the state.

The Supreme Court recently rejected a challenge to a similar (but not identical) Pennsylvania statute. Finding that the issue was controlled by its 1917 decision in *Penn. Fire Ins. Co. of Phila. v. Gold Issue Min. & Milling Co.* (243 U.S. 93 (1917)), the Supreme Court held 5-4 that the statute did not violate the due process clause.

Justice Barrett, writing for four dissenters, rejected the majority's focus on corporate "consent," and would have instead focused on whether the corporate defendant was "at home" in the state. Based on this decision, challenges to similar Minnesota statutes (Minn. Stat. §§303.10, 303.13) and the 8th Circuit's decision in *Knowlton v. Allied Van Lines, Inc.* (900 F.2d 1196 (8th Cir. 1990)) will be unsuccessful. ***Mallory v. Norfolk Southern Rwy. Co.***, ___ S. Ct. ___ (2023).

9 U.S.C. §16(a); appeal of denial of motion to compel arbitration; stay required. Resolving a circuit split, the Supreme Court, relying primarily on *Griggs v. Provident Consumer Discount Co.* (459 U.S. 56 (1982)), held 5-4 that district courts must stay proceedings while the denial of a motion to compel arbitration is appealed pursuant to 9 U.S.C. §16(a).

Justice Jackson's dissent focused on the absence of mandatory stay language in the statute and criticized the majority's reliance on *Griggs*. ***Coinbase, Inc. v. Bielski***, ___ S. Ct. ___ (2023).

Legislative privilege; petition for writ of mandamus granted; dissent. The 8th Circuit granted most of a petition for a writ of mandamus brought by current and former members of the North Dakota Legislature under the Voting Rights Act, finding that the petitioners met all three conditions for the writ to protect their claims of legislative privilege.

Judge Kelly dissented, arguing that privilege may have been waived with regard to many of the documents, and that the petitioners could shield any privileged documents by utilizing a privilege log. ***In Re: N. Dakota Legis. Assembly***, 70 F.4th 460 (8th Cir. 2023).

Denial of post-dismissal motion to amend complaint affirmed. Affirming a district court's dismissal of Sherman Act claims, the 8th Circuit also affirmed the district court's denial of the plaintiffs' post-dismissal motion to amend their complaint, finding that there was no abuse of discretion where "the information in the amended complaint was previously available" to the plaintiffs "and should have been pleaded before the judgment was entered." ***Par v. Wolfe Clinic, P.C.***, 70 F.4th 441 (8th Cir. 2023).

Denial of motion to amend complaint affirmed; failure to comply with local rules. The 8th Circuit continues its virtually unbroken streak of affirming the denial of motions to amend pleadings where the motion fails to comply with local rules.

Most recently, the 8th Circuit affirmed the denial of two motions to amend where, in both instances, the plaintiff "incorporated prior pleadings by reference" instead of reproducing an entire new pleading.

While this appeal arose from the Northern District of Iowa, D. Minn. L.R. 15.1 includes similar requirements regarding the form of a proposed amended complaint. ***Muff ex rel. Muff v. Wells Fargo Bank NA***, ___ F.4th ___ (8th Cir. 2023).

Motion to remand denied; federal question despite only state law claims. Where the state brought state law claims arising out of defendants' sales of firearms, the defendants removed based on the alleged existence of a federal question, and the state moved to remand, Judge Tunheim, applying the so-called *Grable* factors (*Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 543 U.S. 308 (2005)), found that the action fell "under the small subset of cases where a federal issue is so pervasively involved in the Complaint as to justify federal jurisdiction." ***State of Minnesota v. Fleet Farm LLC***, ___ F. Supp. 3d ___ (D. Minn. 2023).

Summary judgment; sham affidavit doctrine; declaration disregarded. Finding that a plaintiff's declaration "contradicts his prior testimony and constitutes an unexplained revision of his testimony," Judge Frank applied the so-called "sham affidavit" doctrine and "disregard[ed]" the declaration "as it cannot be used to create an issue of fact where none existed based on his deposition testimony." ***Christian Labor Ass'n v. City of Duluth***, 2023 WL 3996240 (D. Minn. 6/14/2023), *appeal filed* (8th Cir. 6/16/2023).

Fed. R. Civ. P. 37(c)(1); motion to exclude untimely expert disclosures denied. While "not condon[ing]" the plaintiff's disclosure of expert reports five months after the

deadlines established in the pretrial scheduling order, Judge Nelson denied the defendant's motion to exclude both reports, finding that they were "highly important," and that the defendant had not been "sufficiently prejudiced or harmed" by the late disclosures "to justify striking" the expert. ***Hernandez v. Ecolab, Inc.***, 2023 WL 3984815 (D. Minn. 6/13/2023).

Motion to compel arbitration granted; arbitration clause not "unreadable." Judge Frank granted a motion to compel arbitration despite the plaintiff's argument that arbitration clause was "unreadable" where it appeared on the back side of contract in an "extremely small font," finding that the arbitration clause was "valid and enforceable" where the heading of the arbitration clause was underlined and in capital letters, and that the arbitration clause was "not unreadable." ***Acuity Ins. v. Vivint, Inc.***, 2023 WL 4186303 (D. Minn. 6/26/2023).

Motions for leave to serve pre-Rule 26 conference subpoenas granted. In a series of recent decisions, Magistrate Judge Foster has applied the so-called *Arista Records* factors (*Arista Records, LLC v. Doe*, 604 F.3d 110 (2d Cir. 2010)) and granted motions for leave to serve pre-Rule 26 Conference subpoenas on internet service providers in an attempt to identify 47 John Doe defendants. ***Strike 3 Holdings, LLC v. Doe***, 2023 WL 4074544 (D. Minn. 6/20/2023); ***Strike 3 Holdings, LLC v. Doe***, 2023 WL 3336809 (D. Minn. 5/10/2023); ***Strike 3 Holdings, LLC v. Doe***, 2023 WL 2728821 (D. Minn. 3/31/2023).

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Immigration Law
JUDICIAL LAW

Exhaustion requirement does not require request to reconsider an unfavorable BIA decision. On 5/11/2023, a unanimous U.S. Supreme Court ruled that INA §242(d)(1) is not jurisdictional and, furthermore, a noncitizen need not request discretionary forms of administrative review, such as reconsideration of an unfavorable BIA determination, in order to satisfy §242(d)(1)'s exhaustion requirement. The Court accordingly vacated the 5th Circuit's determination that the petitioner—a transgender woman from Guatemala seeking withholding of removal and Convention Against Torture (CAT) relief—was required to seek reconsideration from the BIA before pursuing judicial review. The case was remanded for further proceedings. ***Santos-Zacaria v. Garland***, 598 U.S. ___, No. 21-1436, *slip op.* (2023). *https://www.supremecourt.gov/opinions/22pdf/21-1436_n6io.pdf*

Offense "relating to obstruction of justice" does not require pending investigation or proceeding under INA §101(a)(43)(S). On 6/22/2023, the U.S. Supreme Court issued a decision involving a conviction for "obstruction of justice." It noted that an aggravated felony may include federal or state offenses "related to obstruction of justice" under INA §101(a)(43)(S) and that noncitizens convicted of an aggravated felony are removable from the United States. The question addressed by the Court was whether an offense could "relate to obstruction of justice" if it did not require that an investigation or proceeding be *pending*. The Court held an offense may "relat[e] to obstruction of justice" even if the offense does not require an investigation or proceeding to be pending. ***Pugin v. Garland***, 599 U.S. ___, Nos. 22-23 and 22-331, *slip op.* (2023). *https://www.supremecourt.gov/opinions/22pdf/22-23_d18e.pdf*

Biden administration's immigration enforcement priorities upheld. On 6/23/2023, the U.S. Supreme Court observed this case to be "extraordinarily unusual." It noted that the states of Texas and Louisiana challenged the Biden administration's 2021 Guidelines for the Enforcement of Civil Immigration Law—a memorandum seeking to prioritize the arrest and removal of noncitizens who are suspected terrorists or dangerous criminals or recent and unlawful entrants to the country. The Court noted that the two states in effect "want a federal court to order the Executive Branch to alter its arrest policies so as to make more arrests. Federal courts have not traditionally entertained that kind of lawsuit...." The Court found that both states clearly lacked Article III standing to challenge the 2021 guidelines. Beyond the standing issue, the Court expounded on the Executive Branch's authority to develop its enforcement priorities. "In light of inevitable resource constraints and regularly changing public-safety and public-welfare needs, the Executive Branch must balance many factors when devising arrest and prosecution policies." There is nothing unusual in the Court's decision here. As it pointed out, this decision "does not alter the balance of powers between Congress and the Executive, or change the Federal Judiciary's traditional role in separation of powers cases." ***United States, et al. v. Texas, et al.***, 599 U.S. ___, No. 22-58, *slip op.* (2023). *https://www.supremecourt.gov/opinions/22pdf/22-58_i425.pdf*

Provision of the Immigration and Nationality Act (INA) criminalizing the encouragement of illegal immigration is not unconstitutionally overbroad. On 6/23/2023, the U.S. Supreme Court held that INA §274(a)(1)(A)(iv), which criminalizes acts "encouraging or inducing" illegal immigration (in the instant case, U.S. citizenship obtained through an "adult adoption" program run by Hansen), forbids only the purposeful solicitation and facilitation of specific acts known to violate federal law, and is thus not unconstitutionally overbroad under the 1st Amendment. Citing *United States v. Williams*, 553 U.S. 285, 292 (2008), the Court opined that the provision "does not 'prohibi[t] a substantial amount of protected speech'—let alone enough to justify throwing out the law's 'plainly legitimate sweep.'" ***United States v. Hansen***, 599 U.S. ___, No. 22-179, *slip op.* (2023). *https://www.supremecourt.gov/opinions/22pdf/22-179_o75q.pdf*

Proposed social group (witnesses who cooperate with law enforcement) is not socially distinct. On 6/5/2023, the 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) did not err when it concluded the Guatemalan petitioner's proposed social group, "witnesses who cooperate with law enforcement," was not socially distinct. Consequently, the petitioner was deemed ineligible for asylum and withholding of removal. ***Oxlaj v. Garland***, No. 22-1734, *slip op.* (8th Circuit, 5/3/2023). *http://media.ca8.uscourts.gov/opndir/23/05/221734P.pdf*

Asylum based on sexual orientation denied. On 6/5/2023, the 8th Circuit Court of Appeals held that substantial evidence supported the Board of Immigration Appeals' (BIA) finding that the petitioner failed to demonstrate a well-

founded fear of persecution based on his membership in the particular social group "married homosexual males in Mexico." At the same time, the court found his alternative particular social group, "homosexual men in Mexico," was prohibited by the one-year bar under INA §208(a)(2)(B). The court further found the petitioner failed to preserve for review his third proposed particular social group, "Mexicans perceived to be against Catholicism." ***Pacheco-Moran v. Garland***, Nos. 21-3779 and 22-2383, *slip op.* (8th Circuit, 6/5/2023). *http://media.ca8.uscourts.gov/opndir/23/06/213779P.pdf*

Removable under INA §237(a)(2)(B)(i) for Kansas conviction involving possession of methamphetamine. On 6/14/2023, the 8th Circuit Court of Appeals denied the petition for review, holding that the Board of Immigration Appeals (BIA) correctly found that the petitioner's Kansas conviction for possession of methamphetamine in violation of Kan. Stat. Ann. §21-5706(a) made him removable from the United States for having committed a controlled substance offense under INA §237(a)(2)(B)(i). ***Rincon Barbosa v. Garland***, No. 22-1655, *slip op.* (8th Circuit, 6/14/2023). *http://media.ca8.uscourts.gov/opndir/23/06/221655P.pdf*

BIA's evaluation did consider hardship to petitioner's relatives. On 6/14/2023, the 8th Circuit Court of Appeals concluded that the Board of Immigration Appeals (BIA) properly evaluated the hardship to the Sierra Leonean petitioner's relatives as one of her positive equities when it reviewed and denied a waiver of inadmissibility. At the same time, the court found that it lacked jurisdiction to review the BIA's balancing of equities, specifically in relation to how it weighed the petitioner's crimes. ***King v. Garland***, No. 22-2166, *slip op.* (8th Circuit, 6/14/2023). *http://media.ca8.uscourts.gov/opndir/23/06/222166P.pdf*

Adverse credibility determination damages asylum claim. On 6/16/2023, the 8th Circuit Court of Appeals held that sufficient evidence warranted the immigration judge's adverse credibility determination. The petitioner, a citizen of Burkina Faso with an asylum claim based on fears due to his political opinions and affiliation with the Congress for Democracy and Progress, was not credible because the immigration judge had identified specific and cogent reasons to disbelieve his testimony. As such, the Board of Immigration Appeals (BIA) did not commit error when it affirmed the immigration judge's denial of both asylum and withholding of removal. As to the question of relief under the Convention Against Torture (CAT), the court ruled it had no jurisdiction since no arguments relating to CAT had been raised earlier before the BIA. ***Zongo v. Garland***, No. 21-3847, *slip op.* (8th Circuit, 6/16/2023). *http://media.ca8.uscourts.gov/opndir/23/06/213847P.pdf*

No violation of due process when immigration judge continued, rather than terminated, the case. On 6/27/2023, the 8th Circuit Court of Appeals found that the Honduran petitioner was not prejudiced by the continuation, rather than termination, of her case when the immigration judge determined her humanitarian parole would expire in two months. At the same time, the court concluded the Board of Immigration Appeals (BIA) articulated the appropriate standard for evaluating "past persecution" and did not commit error when it concluded that threats from the MS-13 gang did not rise to the level of past persecution. ["(T)he threats were telephonic, sporadic, and over a period of four years."] The court also found no error in the BIA's finding that the petitioner failed to establish a "well-founded fear of future persecution." ***Brizuela v. Garland***, No. 22-1738, *slip op.* (8th Circuit, 6/27/2023). *https://ecf.ca8.uscourts.gov/opndir/23/06/221738P.pdf*

ADMINISTRATIVE ACTION

"Asylum transit ban" final rule promulgated. On 5/16/2023, the Departments of Homeland Security (DHS) and Justice (DOJ) published a final rule ("Circumventing Lawful Pathways," aka asylum transit ban) establishing a rebuttable presumption of asylum ineligibility, with a few exceptions, for certain noncitizens who enter the United States (between 5/11/2023 and 5/11/2025) at the southwest border without documentation while travelling through a country that is a signatory to the 1951 Refugee Convention or its 1967 Protocol. (The category includes Colombia, Panama, Costa Rica, Nicaragua, Honduras, Guatemala, Belize, and Mexico.) In short, these individuals neither availed themselves of a lawful, safe, and orderly pathway to the United States nor sought asylum or other protection in a country through which they traveled. **88 Fed. Register, 31314-452** (5/16/2023). *https://www.govinfo.gov/content/pkg/FR-2023-05-16/pdf/2023-10146.pdf*

The ACLU, ACLU of Northern California, Center for Gender and Refugee Studies, and National Immigrant Justice Center have filed a complaint in the U.S. District Court for the Northern District of California on behalf of the East Bay Sanctuary Covenant, American Gateways, Central American Resource Center, Immigrant Defenders Law Center, National Center for Lesbian Rights, and the Tahirih Justice Center. ***East Bay Sanctuary Covenant, et al. v. Biden, et al.***, No. 4:18-cv-06810-JST (N.D. Cal. 5/11/2023). *https://www.aclu.org/documents/complaint-east-bay-sanctuary-covenant-v-biden*

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Indian Law

JUDICIAL LAW

The Indian Child Welfare Act does not exceed Congress's powers under Article I of the Constitution and does not violate the 10th Amendment's anticommandeering principle. Consolidating three separate child-custody proceedings involving the participation and intervention of several states, hundreds of Indian tribes, and dozens of advocacy groups, the Supreme Court issued a 7-2 decision upholding the Indian Child Welfare Act from numerous constitutional challenges. The Court first held that the law itself does not violate Congress's Article I authority in the Indian Commerce Clause, the Treaty Clause, and the trust relationship, and that the law does not impermissibly encroach on the family law authority of the states. Next, the Court held that the law's requirements of active efforts prior to termination, searches for preferred-order placements, and record-keeping responsibilities do not violate the 10th Amendment's anticommandeering principle. The case also involved equal protection and non-delegation doctrine challenges to the law's placement preferences, but the Court held that no parties in the case had standing to raise those challenges. ***Haaland v. Brackeen***, ___ U.S. ___, 143 S. Ct. 1689 (2023).

The Bankruptcy Code unequivocally abrogates the sovereign immunity of federally recognized Indian tribes. After a debtor filed for Chapter 13 bankruptcy, he challenged the alleged actions by his creditor Lendgreen, a business owned by a federally recognized Indian tribe, for violating the automatic stay requirement of the Bankruptcy Code. Over the tribe's arguments that Congress did not explicitly and unambiguously abrogate the sovereign immunity of Indian tribes in the law as required by Supreme Court precedent, the Court held that the phrase "other foreign or domestic government[s]" in the law includes tribal nations in this instance. ***Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin***, ___ U.S. ___, 143 S. Ct. 1689 (2023).

Federal court ruling on tribal court jurisdiction premature when tribal appellate court ruling on subject of jurisdiction had not yet been issued. Following a finding of jurisdiction over a contract dispute involving smoking on right-of-way land within the Fort Berthold Indian Reservation, the non-Indian company filed an injunctive action in federal district court. The 8th Circuit reversed the district court's finding that the tribal court did not have jurisdiction over the dispute, because the tribal court's opinion was still under review by the Mandan, Hidatsa, and Arikara Nation Supreme Court. The 8th Circuit reaffirmed that the tribal court exhaustion doctrine includes review by tribal appellate courts. ***WPX Energy Willison, LLC v. Jones***, ___ F.4th ___, 2023 WL 4308905 (8th Cir. 2023).

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Intellectual Property
JUDICIAL LAW

Trademark: Limiting Rogers test to non-source identifying marks. The Supreme Court unanimously reversed a 9th Circuit decision holding that defendant VIP's parody use of Jack Daniel's trademarks and trade dress was protected from trademark liability. Jack Daniel's owns trademarks on the Jack Daniel's bottle and many of the words and graphics on the bottle label. VIP sells dog chew toys under the trademark "Bad Spaniels," with the chew toy resembling a Jack Daniel's bottle's shape, font, and label. While Jack Daniel's label identifies the whiskey as "Old No. 7 Brand Tennessee Sour Mash Whiskey," Bad Spaniels identified the chew toy as "The Old No. 2 On Your Tennessee Carpet." VIP sued Jack Daniel's, seeking declaratory judgment, and Jack Daniel's counterclaimed for trademark infringement and dilution. The district court found a likelihood of confusion between the Bad Spaniels toy and the Jack Daniel's bottle as well as reputational harm to Jack Daniel's. The 9th Circuit reversed, holding that VIP's product was protected speech under the 1st Amendment. Specifically, the 9th Circuit applied the *Rogers* test because Bad Spaniels argued its products were an expressive work that communicates a humorous message, regardless of commercial use. The Supreme Court ignored the 9th Circuit's application of the *Rogers* test, making no ruling on its applicability in other contexts. The Court held that the *Rogers* test only applies when the infringer uses the trademark in a non-source identifying way. VIP had admitted in its complaint that Bad Spaniels was its own mark and trade dress for dog toys. Therefore, VIP represented the Bad Spaniels mark and trade dress as an identification of source, so the *Rogers* test does not apply. ***Jack Daniel's Properties, Inc. v. VIP Products LLC***, No. 22-148 (U.S. 6/8/2023).

Trademark: Lanham Act provisions are not extraterritorial. The Supreme Court unanimously reversed the 10th Circuit's affirmance of judgment against Abitron. Hetronic makes and sells radio remote controls for construction equipment. Hetronic licensed five companies and one individual, collectively known as Abitron, for product distribution. After Abitron reverse-engineered Hetronic's products, Abitron claimed they had the rights to most of Hetronic's intellectual property, including the trademarks at issue. Abitron sold most of the products in Europe, with some direct sales into the United States. Hetronic sued Abitron in the United States for trademark violations under Sections 1114(1)(a) and 1125(a)(1) of the Lanham Act. Section 1114(1)(a) prohibits unauthorized "use in commerce [of] any reproduction... of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services" when "such use is likely to cause confusion." Section 1125(a)(1) prohibits the "us[e] in commerce" of a protected mark, whether registered or not, that "is likely to cause confusion." The district court rejected Abitron's argument of impermissible extraterritorial application of the Lanham Act, awarding Hetronic $96 million as well as giving a worldwide permanent injunction against Abitron from using Hetronic's mark anywhere. The 10th Circuit affirmed, narrowing the injunction to only select foreign countries. The Supreme Court ruled that these two provisions of the Lanham Act are not extraterritorial. The Court reasoned that there is a presumption against exterritoriality that, when applied, involves a two-step framework. The first step involves requires the Court to determine whether Congress has affirmatively and unmistakably instructed that the provision at issue should apply to foreign conduct. The second step involves determining the "focus" of congressional concern and whether the conduct relevant to the statute's focus occurred in the United States. In this case, the Court determined that despite the Lanham Act's broad definition of "commerce," neither provision is extraterritorial. For the second step, both provisions' "use in commerce" is relevant for conduct relevant to the focus. ***Abitron Austria GmbH v. Hetronic International, Inc.***, No. 21-1043 (U.S. 6/29/2023).

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Probate & Trust Law
JUDICIAL LAW

Devise to heirs of testator's ex-spouse nullified. A testator executed a will naming his then-wife, if she survived him, as the primary residual beneficiary of his estate. In the event his then-wife did not survive him, the residue of his estate was to be split between his heirs at law and his wife's heirs at law. The couple divorced, and the testator died without updating his will. The testator's brother sought to probate the will and asked the district court to determine that the testator's heirs were the sole residuary beneficiary of the estate. The testator's

ex-wife's parents, who would have been her heirs had she pre-deceased the testator, objected and claimed that they were wrongfully omitted as devisees in the petition. The district court found that the devise to the testator's ex-wife's heirs failed as a matter of law because the testator did not have a wife at the time he died and, therefore, the devise to "my wife's" heirs failed.

A divided panel of the Minnesota Court of Appeals reversed in a precedential opinion. The court of appeals held that the residual beneficiary terms of the will unambiguously devised one-half of the residual estate to the former spouse's heirs. While many would agree that such a devise should be revoked on divorce, the court of appeals would not make such a finding because "the legislature has not adopted a statute reflecting that policy." The Minnesota Supreme Court reversed the court of appeals decision. Specifically, the Supreme Court found that the use of the phrase "my wife's heirs-at-law" was not used in operative portions of the will as a descriptor of any named individual(s), but rather signaled an intention to describe beneficiaries as members of a group identified by familial ties. Because the testator had no wife at the time of his death, his "wife's heirs-at-law" no longer existed and any gift to them failed. The Supreme Court further found that it was unreasonable to conclude that the Legislature intended to revoke a devise to a former spouse, but not a devise to the relatives of the former spouse, especially to the detriment of the testator's own heirs. ***Matter of Estate of Tomczik***, ___ N.W.2d ___, A21-1420, 2023 WL 4340196 (Minn. 7/5/2023).

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Tax Law
JUDICIAL LAW

Forgery in tax returns; what is needed to refute a signature in instances of forgery. The petitioner received a notice of deficiency for his 2013 taxes and while preparing for trial, began to question whether the return corresponding to the notice was his return at all. The return in question included two signatures, one for the CPA who signed as the preparer of the return and another under the petitioner's name.

The petitioner argued that since he did not personally sign the return, the return cannot be valid. Although Section 6064 "provides that an individual's name signed on a return is 'prima facie evidence for all purposes that the return... was actually signed by him," earlier case law establishes that the presumption of validity can be overcome with sufficient evidence. *Soni v. Commissioner*, 122 T.C.M. (CCH) 358, at 367 (T.C. 2021).

Through the use of a forensic document examiner who opined "that it is highly probable that the signature on the 2013 Form" was not the petitioner's and the production of various exemplars of the petitioner's signature, the court concluded its decision for the taxpayer. The 2013 tax forms were invalid. ***Parducci v. Comm'r of Internal Revenue***, T.C.M. (RIA) 2023-075 (T.C. 2023).

Petitioner narrowly avoids frivolous argument penalties after pretrial arguments that as a "citizen," he is not an "individual" subject to tax. Over a period of eight years, the petitioner in this case contended that he did not receive any taxable income as he is not an "individual." With deficiencies totaling $1,566,802, the petitioner argued that since "person" is defined as an "individual" under section 7701(a)(1), and "citizen" and "person" are listed together in various Code sections, the two must be mutually exclusive. 26 U.S.C.A. §7701(a)(1).

The court, unsurprisingly, was not persuaded by petitioner's argument. Section 1 defines individuals subject to tax as any "individual who is a citizen or resident of the United States." 26 C.F.R. §1.1-1(a). Further, citizens are defined as "[e]very person born or naturalized in the United States and subject to its jurisdiction." *See id.* para. (c). Given that the petitioner was born in the United States and is subject to its jurisdiction and regulations, the court concluded he was subject to income tax. As a result, the commissioner's determination that the petitioner received unreported income was upheld. After a determination on the petitioner's substantive argument, the court then examined the record to see if there was sufficient evidence to establish additional penalties for fraudulent failure to file. After examining the petitioner's background, education, shady payment practices, and other record evidence, the court found there was sufficient evidence to establish that the petitioner acted with fraudulent intent and thus to increase the amount due as a penalty for fraudulent failure to file under Section 6651(f). ***Sanders v. Comm'r of Internal Revenue***, T.C.M. (RIA) 2023-071.

A cautionary tale of last-minute e-filing. A North Carolina resident filed a petition seeking redetermination after receiving a notice of deficiency. The resident first attempted to file his petition at 11:00 pm the night it was due, and perhaps learned an important lesson about procrastination. From the outset, the petitioner struggled in using the court's electronic filing system (DAWSON). After unsuccessfully attempting to upload from his phone for nearly an hour, he switched to his desktop to file his petition.

The clock struck midnight a mere 11 seconds before the petitioner was able to successfully upload his petition. DAWSON updated the automatically generated coversheet to reflect the new day. The commissioner moved to dismiss for lack of jurisdiction, arguing the petition was not timely filed. Following the motion, the court invited briefs from *amici curiae* and received one from the Center for Taxpayer Rights (founded by former national taxpayer advocate Nina Olson, the Center for Taxpayer rights is a nonprofit organization dedicated to furthering taxpayer rights in the U.S. and internationally). The center's main argument focused on the timeliness question.

The court recognized the center's argument as analogous in part to the timely mailing rule (26 U.S.C.A. §7502(a)), which deems a document to be considered filed on the day it is postmarked. The court was not persuaded that the analogy was controlling in this case, however. Even if the timely mailing rule applied to electronic filings, which it does not, the record showed the petitioner began to upload the petition nine seconds *after* midnight—still past the filing deadline.

Additionally, the petitioner alleged that this late upload was a result of the DAWSON being inaccessible. Two years after DAWSON, Congress enacted section 7451(b), providing that if a "filing location is inaccessible or otherwise unavailable to the general public on the date a petition is due, the relevant time period for filing such petition shall be tolled for the number of days within the period of inaccessibility plus an additional 14 days." Agreeing that DAW-

SON is a filing location, the court then had to distinguish whether the system was inaccessible (which would excuse the 11-second delay), or whether the petitioner suffered from user-specific issues (which would strip the court of jurisdiction). Upon finding DAWSON was operational at all relevant times, the court concluded the problems facing the petitioner in accessing DAWSON were not shared by the general public, but rather involved a series of user errors, and dismissed the case for lack of jurisdiction. ***Sanders v. Comm'r of Internal Revenue***, No. 25868-22 WL 4078722 (T.C. 6/20/2023).

Commissioner not responsible for reasonable administrative or litigation costs. Section 7430(a) states that "[i]n any administrative or court proceeding which is brought by or against the United States in connection with the determination... of any tax... the prevailing party may be awarded a settlement for (1) reasonable administrative costs... (2) reasonable litigation costs." 26 U.S.C.A. §7430(a). The petitioners prevailed in the action at hand, but the court dismissed their motion for costs because the Service had established that its position was "substantially justified." 26 U.S.C.A. §7430(c)(4)(B)(i).

The commissioner argued that its previous positions were "substantially justifiable" under the circumstances because when the petitioners were selected for an audit in 2012, banking information showed deposits totaling over $1 million from the previous four years. What the commissioner was not aware of at the time of the audit was that in 2007, one of the petitioners (a dual citizen of Japan and the United States) and the other (a citizen of Japan working on a visa in the United States) had sold their U.S. assets and returned to Japan. These deposits, the petitioners asserted, were not a U.S. source of income, but instead income from a Japanese corporation.

While the commissioner was incorrect in its assumption that the deposits in the petitioner's banks were U.S.-based income, that mistake does not mean the commissioner's position was not justified. The court found the commissioner's position reasonable in light of the evidence available at the time. Given the large deposits of money, one petitioner's citizenship in the United States, and the petitioners' failure to update their lawful permanent residence, the court found it reasonable to assume the petitioners remained liable for U.S. tax on their income. Since the court found the respondent's position substantially justified, it concluded that the petitioners are not entitled to an award of costs. ***Yamada v. Commissioner of Internal Revenue***, T.C.M. (RIA) 2023-070 (T.C. 2023).

Flurry of settlement officer abuse of discretion cases. This past month, the tax court failed to find in a series of cases that settlement officers (SO) abused their discretion. In these cases, petitioners' cases failed because, among other reasons, they all failed to provide necessary evidentiary support for their arguments.

In determining whether an SO has abused their discretion, the court considers three points: (1) whether the SO properly verified that the requirements of applicable law or administrative procedure have been met; (2) any relevant issues raised by petitioners; and (3) weighing "whether any proposed collection action balances the need for efficient collection of taxes with the legitimate concern of [petitioners] that any collection action be no more

intrusive than necessary." 26 U.S.C.A. §6330(c).

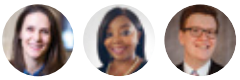
When petitioners are given a reasonable opportunity to present evidence with respect to their issues and fail, they fail to properly raise an issue before the court. 26 U.S.C.A §301.6320-1(f)(2). If petitioners want to be successful, they must start properly raising their issues before the courts, with evidentiary support sufficient to establish the SO abused their discretion. ***Dietz v. Comm'r***, T.C.M. (Ria) 2023-069 (T.C. 2023), ***Hyde v. Comm'r***, T.C.M. (RIA) 2023 -076 (T.C. 2023), and ***Seggerman v. Comm'r***, T.C.M (RIA) 2023-078 (T.C. 2023).

Tax court's valuation of pipeline system affirmed. The Minnesota Supreme Court affirmed the tax court's valuations of Minnesota CenterPoint Energy Resources Corp's (Minnegasco) natural gas distribution pipeline system for the two tax years at issue. Following a three-day trial, the tax court issued findings of fact and conclusions of law; ultimately, the tax court's valuations differed from both the commissioner's and that of Minnegasco. The commissioner appealed, asserting error related to the tax court's treatment of the income-capitalization approach as well as its cost approach analysis. In particular, the commissioner asserted that the tax court erred by disregarding the capitalization-rate opinions of the commissioner's expert in its income-capitalization approach. Relating to the cost approach, the commissioner asserted that the tax court erred as a matter of law by shifting the burden to the commissioner to contradict Minnegasco's *prima facie* showing of external obsolescence and, separately, that the lower court clearly erred in its external-obsolescence conclusions.

In analyzing the challenge related to the income-capitalization approach, the court rejected the commissioner's argument that the tax court had inappropriately relied on the commissioner's own *initial* assessments. The discrepancy arose because the commissioner's trial expert (as well as Minnegasco's trial expert) advocated for capitalization rates that differed from the rates the commissioner published in his annual studies. In finding the tax court's references to the initial assessment proper, the Supreme Court distinguished prior case law that had held that "the assessed value of property for tax purposes is not relevant to the question of that same property's market value." *Comm'r v. CenterPoint Energy Resources Corp.* (quoting *EOP-Nicollet Mall, L.L.C. v. County of Hennepin*, 723 N.W.2d 270, 283 (Minn. 2006)). The tax court's use of the initial assessment—to bolster the tax court's decision to give more weight to one trial expert over the other—was not error. The court also rejected the commissioner's argument that the tax court abused its discretion when considering the conflicting expert testimony.

Turning to the first issue in the external-obsolescence discussion, the court reiterated its determination that even "after a taxpayer presents a prima facie case demonstrating that the property's value has been impacted by external obsolescence, the taxpayer retains the burden of proving, by a preponderance of the evidence, the amount of that external obsolescence" (quoting *Enbridge Energy, Ltd. P'ship v. Comm'r*, 945 N.W.2d 859, 868-69 (Minn. 2020). The commissioner pointed to a phrase in the tax court opinion that, the commissioner argued, demonstrated that the tax court improperly shifted the burden to the commissioner. While implying that, out of context, the tax court's statement might have suggested an impermissible burden shift, the reviewing court held that "it is clear the court applied the correct burden of proof when evaluating external obsolescence."

The commissioner's final argument—that the tax court's external-obsolescence determinations were clearly erroneous—fared no better. Reviewing the tax court's determinations for clear error, the Supreme Court concluded that "there [was] sufficient evidence in the record to support the tax court's decision that Minnegasco's property suffered external obsolescence." ***Comm'r v. CenterPoint Energy Res. Corp.***, No. A22-1069, 2023 WL 3985221 (Minn. 6/14/2023).



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Torts & Insurance
JUDICIAL LAW

First party insurance; pre-award interest. After suffering damage to his home as a result of fire, plaintiff notified defendant insurer. Defendant promptly investigated the claim and made a payment to plaintiff of what it considered the amount of the actual cash value of the damaged property, less required holdbacks. After the parties disagreed as to the amount of the repair costs, plaintiff demanded an appraisal. The appraisal panel determined that the actual cash value of the loss was less than already paid by defendant, but that the repair costs exceeded the amount paid. Following the award, plaintiff demanded pre-award interest on the entire amount of the repair costs awarded from the date notice was provided until the award was issued. The district court denied plaintiff's request for pre-award interest. The court of appeals reversed and remanded.

The Minnesota Supreme Court reversed the decision of the court of appeals. The Court began by noting that Minn. Stat. §549.09, subdivision 1(b), the statute governing the award of pre-verdict, pre-award, and pre-report interest, states in relevant part: "*Except as otherwise provided by contract or allowed by law*, preverdict, preaward, or prereport interest on pecuniary damages shall be computed... from the time of the commencement of the action or a demand for arbitration, or the time of a written notice of claim, whichever occurs first[.]" (emphasis in original). As a result, the question for the Court was whether the insurance policy precluded an award of pre-award interest from the date notice was provided until the date of the award. The insurance policy provided in relevant part: "Loss will be payable five business days after we receive your proof of loss and: a. reach agreement with you; b. there is an entry of a final judgment; or c. there is a filing of an appraisal award with us. *No interest accrues on the loss until after the loss becomes payable*." (Emphasis in original.) Because the loss did not become payable until five days after the award was issued, and because the policy provided that no interest accrued prior to the loss becoming payable, the Court held that plaintiff was not entitled to pre-award interest. ***Wesser v. State Farm Fire & Cas. Co.***, No. A21-1587 (Minn. 4/26/2023). *https://mn.gov/law-library-stat/archive/supct/2023/OPA211587-042623.pdf*

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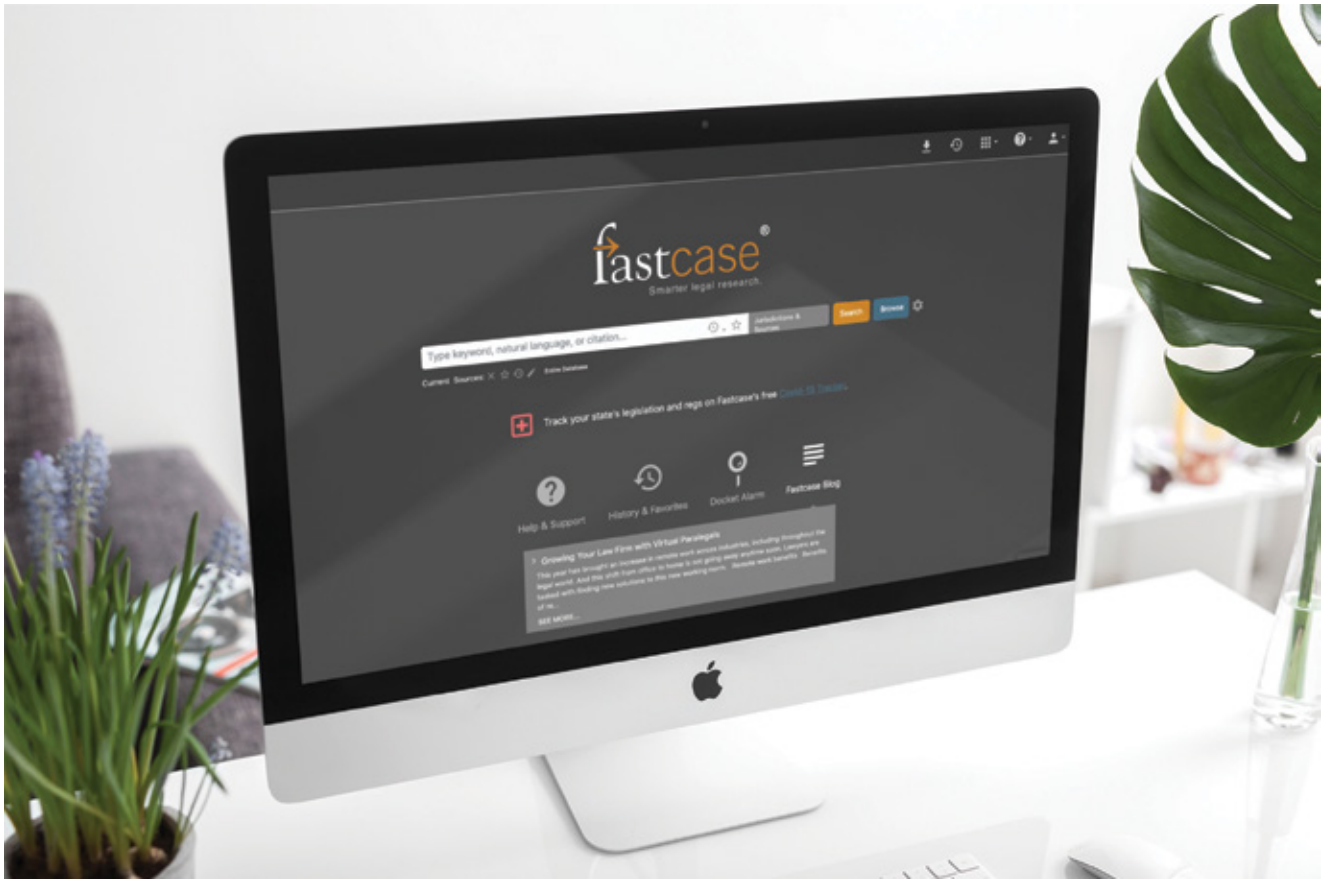

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PEOPLE + PRACTICE

Christopher Vatsaas was advanced to the role of income partner at Chestnut Cambronne. He leads the firm's family law practice group. He is also an adjunct professor at the University of St. Thomas School of Law.

James J. Vedder was elected president of the Minnesota Chapter of the American Academy of Matrimonial Lawyers. Vedder's term began on June 7, 2023, and will run for two years. He is as shareholder at and family law attorney at Moss & Barnett.

Gov. Walz appointed **Judge Keala Ede** and **Jon Schmidt** to the Minnesota Court of Appeals. Ede currently serves as a judge in the 4th Judicial District in Hennepin County. Schmidt is a principal attorney at the Hennepin County Attorney's Office.

Steve Ling joined Spencer Fane in the real estate practice group as a partner.

Heather Neubauer was named a fellow of the Litigation Counsel of America. She is a partner at Meagher + Geer and serves on the management committee and chairs the firm's products liability, asbestos, mass tort/toxic tort, and safety and environmental practice groups.

James P. Rieke joined Merchant & Gould as a partner and co-chairs the design patent & trade dress group and is a member of the mechanical practice group.

Maslon LLP announced that partner **Terrance Newby** was appointed to serve as chair of the firm's Diversity, Equity, and Inclusion Committee.

Gov. Walz appointed **Nicole Hopps** as district court judge in Minnesota's 6th Judicial District in Duluth in St. Louis County. Hopps is the managing attorney for the 6th Judicial District Public Defender's Office in Duluth.

In memoriam

MARK HENRY MEYER, age 85 of Melrose, MN died on March 25, 2023. Mark attended William Mitchell College of Law in St. Paul and practiced law in Cold Spring and then in Melrose.

JAY FRANCIS COOK died on June 12, 2023. He practiced real estate law with Dorsey & Whitney LLP and was a partner in the firm from 1979 until 2007, when he moved to Naples, Florida, where he continued to practice law until he passed.

MARK W. GEHAN, JR., 76, died on June 21, 2023. He attended the University of Minnesota Law School and started as a Ramsey County prosecutor in 1971. He later moved to private practice at Collins, Buckley, Sauntry & Haugh, where he finished his long career in 2014.

Melissa Miroslavich joined Schromen Law, LLC focusing on estate planning. She has experience as a mediator, board member, and business owner.

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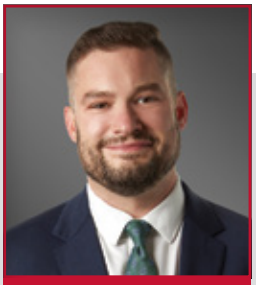

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Mitchell Hamline welcomes newest faculty members

Left to right: Alisha Watkins; Vonda Brown; Sarita Matheson; and Nicole McConlogue

BY TOM WEBER

Alisha Watkins '20, assistant teaching professor

Alisha Watkins joined Mitchell Hamline's Institute to Transform Child Protection as an assistant teaching professor in November 2022. She works closely with students in the institute's clinic who represent parents and kin in child protection cases. Watkins also developed the institute's first community kinship event in St. Paul this spring, aimed at establishing community engagement regarding kinship representation.

Before joining Mitchell Hamline, Watkins was a senior paralegal and law clerk for more than 15 years. She also became a volunteer guardian ad litem to represent the best interests of children in child welfare proceedings.

Watkins attended both law school and undergrad while working full-time and raising her children, utilizing Mitchell Hamline's blended-learning enrollment option. She was the school's first Hybrid/EJD representative for the Black Law Students Association, during which she spearheaded the creation of a national mentorship program for the group's members.

Vonda Brown, assistant teaching professor

Vonda Brown joins Mitchell Hamline's full-time faculty after several years as an adjunct professor, having taught courses on administrative law, trial advocacy, and environmental law. Most recently a staff attorney at the ACLU of Minnesota, Brown worked on constitutional law and civil rights cases.

She previously worked as an assistant attorney general in the child support division of the Texas attorney general's office from 2016 to 2022, including three years as an attorney trainer.

A 2014 graduate of Thurgood Marshall School of Law, Texas Southern University, Brown earned CALI Excellence awards in legal writing as a law student and was the lead articles editor for the Thurgood Marshall Law Review, where she also published "Introduction: A History of Civil Rights Issues from Education to Voting Rights and Their Modern Implications."

Sarita Matheson, assistant teaching professor

Matheson was drawn to law school and the legal profession after earning her undergraduate degree in biochemistry from the University of Illinois at Urbana-Champaign and a graduate degree in molecular, cellular, and development biology and genetics from the University of Minnesota.

A 2014 graduate of the University of Minnesota Law School, Matheson served as an Equal Justice Works AmeriCorps Legal Fellow with Mid-Minnesota Legal Aid. At Legal Aid, she represented children in immigration cases and consulted on state-court proceedings. She also clerked for Judge Edward Wahl, helping to manage a caseload of approximately 150 cases.

Matheson has practiced at Kelly Drye & Warren in Chicago and Carlson, Caspers Vandenburgh & Lindquist in Minneapolis, where she handled matters involving intellectual property, antitrust, and contracts. She also mentored new attorneys on research and writing and launched a firm-wide pro-bono program serving migrants at the U.S. Mexico border.

Nicole McConlogue, associate professor of law

Nicole McConlogue's academic career has placed a strong focus on experiential education and public interest practice. Before joining Mitchell Hamline, she was clinic director at West Virginia University College of Law. There, she introduced several creative initiatives increasing students' exposure to diverse forms of public interest advocacy and enhancing the impact of the clinical program on low-income communities statewide.

McConlogue also completed a clinical teaching fellowship at the University of Baltimore School of Law. Prior to that experience, she held positions managing a pro bono program and working as a disability benefits lawyer.

McConlogue's scholarly interests concern economic mobility and span a range of substantive topics including consumer protection, competition law, poverty law, and technological surveillance of the poor. Her forthcoming article "The Road to Autonomy" proposes a new approach to problem-solving in the context of transportation justice.

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