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MINNESOTA CANNABIS LAW & THE BATTLE OVER HEMP DERIVATIVES

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their property taxes?

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collection of rocks and fossils
on public lands in Minnesota

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LAWYERS MAKE GREAT LEADERS. *That includes you.*

BY JENNIFER THOMPSON

Jennifire. You read that correctly. *Jennifire*. That was the nickname one of my coaches gave me while playing sports growing up. I was fiery. I liked to spark and rally my teammates. I liked the pressure of being the one to do the thing that was needed to hold the lead, to come from behind, to pull it off when it looked like we were down and out. In short, I loved to lead. I still do. The call to leadership is something that is innate in me, and it is certainly a big driver behind why I became a lawyer.

Lawyers make great leaders. We are fiery, often providing the spark that rallies a movement or cause. Lawyer leaders are particularly important in times of change and lawyers will undoubtedly play a large role in leading our world into the post-pandemic era.

But leadership skills are like a muscle that needs to be conditioned and built, even when a person has natural tendencies for it. There are many ways to learn to lead, but I think the MSBA offers some of the best opportunities to practice one's leadership skills.

Step up now

Springtime in the bar year could be also dubbed leadership opportunity time. As we edge toward June 30 and the end of another bar year, we also start to think about the start of the next year and the opportunities to be involved as a MSBA leader.

For instance, there are openings to join section councils and lead continuing legal education programming and legislative and amicus work within one's practice area. There is also the opportunity to join an MSBA committee—like the Access to Justice Committee or the Technology Committee, to name a couple—and help develop, implement, and oversee the MSBA's strategic goals and mission. MSBA members also have the option to lead by serving in the MSBA's Assembly, the policy-making body of the association, or on the Council, the association's board of directors.

The MSBA also appoints a number of representatives to various boards and committees within the profession, including the Minnesota State Bar Foundation Board of Directors, Minnesota Supreme Court boards (such as the Lawyers Professional Responsibility Board, Board of Continuing Legal Education, and Bar Admissions Advisory Council), and legal services boards.

And, of course, there is also the opportunity and the honor to lead our profession as an officer of the MSBA, including as president.

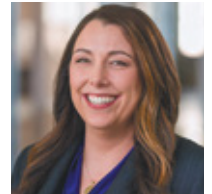
So much to gain

I have been fortunate to have the chance to lead in the legal profession by participating in a number of the MSBA opportunities listed above. In doing so, I have gained valuable leadership skills in consensus building; motivating, incentivizing, and influencing; diversity, equity, and inclusion insights and skills; developing and executing strategic visions; leveraging strengths of others for the success of the larger group; communicating and receiving constructive feedback; evaluating and supporting initiatives; and managing conflict. All these skills make me a better lawyer and are transferrable to other areas of my professional and personal life.

Beyond the skills I have had the opportunity to build as a leader in the MSBA, there are other major benefits to be gained in serving. For instance, I have been able to experience unique and first-time professional opportunities, like appearing before the Minnesota Supreme Court to advocate for an MSBA position or drafting and collaborating on amicus briefs on matters of importance to my practice area and the profession. I have also made amazing professional and personal connections with other lawyers, judges and judicial branch staff, affinity bar leaders, MSBA staff, legal services providers, those involved in the administration and regulation of the profession, and many, many others.

It has provided me with an amazing view into our profession, the justice system, and the practice of law, as well as expanded my professional and personal networks. And not to be overlooked, serving as a leader in the MSBA has been so very fun. There has been hard work, to be sure, but there is no doubt that working at or near the head of a project or cause is exciting and getting to know and work with lawyers around the state has been a pleasure.

The MSBA's leadership opportunities are part of the call to MSBA membership. Whether leader was part of your childhood nickname or leadership is an experience you are looking to explore for the first time, the MSBA welcomes and encourages you to explore a leadership role within the association. ▲



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



Updates COURTS AND LEGISLATURE

■ The MSBA's petition to amend Minnesota Rule of Civil Procedure 30.02(f), which addresses subpoena notices to organizations and the "meet and confer" requirement, has been adopted by the Court. The changes, which take effect on July 1, will align Minnesota's rule with recent changes to the corresponding federal rule.

■ MSBA President Jennifer Thompson and former President Mike Unger represented the MSBA at the Court's public hearing in late January on the MSBA petition to amend Rule 7 of the Minnesota Rules of Professional Conduct pertaining to attorney advertising. The proposed amendments align with those made to the ABA's Model Rules with one exception, which is to maintain Minnesota's current language regarding use of the term "specialist."

■ The MSBA's petition to amend court rules to facilitate personal leave upon certain triggering events was filed with the Court in February and awaits further action.

■ The legislative session is in full swing and the MSBA's 2022 Legislative Blueprint, which highlights our legislative priorities for the year and provides brief background on our other standing legislative positions, is in the hands of legislators. You can see the blueprint by visiting www.mnbar.org/legislation ▲

MSBF matching grant will boost legal aid

The MSBA is proud to announce that thanks to its members, we raised over \$10,000 in our recent campaign for the Minnesota State Bar Foundation (MSBF). With the matching monies, that means that over \$20,000 is headed to organizations around Minnesota that provide legal services to those with limited incomes. In addition to the matched dollars, the MSBF has committed to distributing at least \$75,000 in additional grants to legal services organizations beyond its planned annual giving.

While the match has completed, it's always a good time to donate to the MSBF. Your contribution will support legal aid and pro bono programs, community agencies, and other law-related programs statewide. Donate at www.mnbar.org/donateMSBF. Thank you to everyone who donated and continues to support the MSBF's mission. ▲



GET INVOLVED WITH THE Minnesota Unbundled Law Project

The MSBA, RCBA, and HCBA recently co-hosted an engaging CLE on unbundled law practice in Minnesota. In all, 57 attorneys attended the CLE, which included a presentation on rules and ethical considerations in unbundled practice by Karin Ciano of the Office of Lawyers Professional Responsibility as well as a question-and-answer session moderated by Theresa Bofferding (Ortner & Bofferding, LLC) and featuring panelists Amanda Porter (Porter Law Office), Cresston Gackle (Cresston Law LLC), and Jenna Westby (LegalNudge).

Periodic CLE sessions like this one satisfy the training requirement to be eligible to participate on the MN Unbundled Law Project (www.mnunbundled.org) roster. The ULP provides potential clients with an easy online platform to request unbundled legal services from participating attorneys, who agree to report back on the outcome of referrals. In addition to the training, participants are provided with a handbook containing helpful tools for conducting this type of practice in an efficient and ethical manner. If you're interested in participating, or just learning more, you can access the CLE from the MSBA On-Demand library at www.mnbar.org/on-demand. Or you can get more information on the Minnesota Unbundled Law Project by contacting Melina Chasteen (mchasteen@mnbars.org). ▲



DEADLINE APPROACHING!

Did you do more than 50 hours of pro bono work in Minnesota in 2021? If so, the March 18 deadline to certify your hours and be recognized as a North Star Lawyer is coming up fast.

The program recognizes attorneys who demonstrate the important role that our profession plays in addressing the access to justice gap for Minnesotans. By certifying that you have completed the aspirational goal of 50 hours of pro bono work, you are doing more than gaining recognition for your individual efforts. You are showing up as a part of the community, making an open declaration that you believe in the power of providing your legal expertise for the public good. To certify, visit our website at www.mnbar.org/northstar. Please contact Melina Chasteen (mchasteen@mnbars.org) with any questions about certifying your 2021 pro bono hours. ▲



Pro bono & donor spotlight DANA MCKENZIE

MSBA student member Jasmin Hernandez Du Bois recently interviewed member Dana McKenzie, a donor and pro bono attorney for Legal Assistance of Dakota County.

In reflecting on what inspired her to get involved, McKenzie recalls her days as a young, inexperienced lawyer. “As a new lawyer, the way you learn to be a good lawyer is not just by getting into a case or going to court,” she recounts. “The best way we learn to be good lawyers is to learn from the really good lawyers who started before you who share their knowledge with you. In our profession especially, there is a tradition of lending a helping hand, and helping young lawyers become better.”

Lending a helping hand is even more critical when the needs of the community intensify. Although a social re-opening is now underway, McKenzie noted that now is actually when the financial impacts of covid-19 are making themselves most deeply felt in the lives of the less fortunate—whether it be through evictions, bankruptcies, or messy divorces.

“If everyone contributed just one hour of their billable hourly rate to their local legal aid agency, it would be tremendous,” she noted, “and money is just one way to help. For those unable to donate money, I’d encourage them to donate their time. Taking even just one pro bono case will make a world of difference to that one client. If we each handled just one case, there would be thousands of clients whose lives would be made better, just by the gifts of our time.”

To read the full interview, visit our pro bono spotlight page at www.mnbar.org/pro-bono-spotlight. ▲

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

ABA OPINION 500

takes on language access in the client-lawyer relationship

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.

Minnesota's Rules of Professional Conduct are based on the Model Rules of Professional Conduct established by the American Bar Association Standing Committee on Ethics and Professional Responsibility. Each year, the ABA Standing Committee publishes formal opinions interpreting the Model Rules; these opinions provide guidance to practitioners in interpreting the Model Rules and, by extension, the Minnesota Rules. In October 2021, the ABA issued Formal Opinion 500: *Language Access in the Client-Lawyer Relationship*.¹

Competence and diligence are critical

Once representation has commenced, lawyers must be prepared to communicate effectively with clients who have limited proficiency in the lawyer's native language or are not able to hear, speak, or read without accommodation. As the opinion makes clear, a lawyer's foundational duties of competence (Rule 1.1) and communication (Rule 1.4) do not change simply because communication may be more challenging or costly due to language barriers or the need for a disability accommodation. When language barriers or non-cognitive disabilities impede effective communication, Rules 1.1 and 1.4 require the lawyer to facilitate better communication—specifically, to “take steps to engage the services of a qualified and impartial interpreter and/or employ an appropriate assistive or language-translation device to ensure that the client has sufficient information to intelligently participate in decisions relating to the representation and that the lawyer is procuring adequate information from the client to meet the standards of competent practice.”

The duty to communicate with your client requires effective communication, no matter their primary language or physical abilities—and effectiveness includes comprehension.

When must a lawyer affirmatively facilitate communication?

The mode of communication is ordinarily a mutual decision between client and lawyer. Opinion 500 makes clear that “[a] lawyer may not... passively leave the decision to the client or thrust the responsibility to make arrangements for inter-

pretation or translation entirely upon the client.”² Rather, “it is the lawyer’s affirmative responsibility to ensure the client understands the lawyer’s communications and that the lawyer understands the client’s communications.”³ When there is doubt about whether either side understands what is being said, it falls to the lawyer to resolve that doubt in favor of facilitating communication through an interpreter, translator, or assistive device.

According to U.S. Census data from 2015, more than 100 languages besides English are spoken in Minnesota, and about half a million Minnesotans speak languages other than English at home.⁴ Of that half-million, slightly less than half speak Spanish; tens of thousands more speak Hmong, Cushite (a language family including Oromo and Somali), German, Vietnamese, and Chinese.⁵ Also in 2015, the Minnesota State Demographic Center reported that 193,400 Minnesotans lived with a hearing disability.⁶

Demonstrating the potential gap, the Minnesota State Bar Association’s online lawyer directory lists 85 members who speak Spanish, 26 who speak German, 12 who speak Chinese, three who speak Hmong, two who speak Vietnamese, one who speaks Somali, and two who communicate through American Sign Language (ASL).⁷ While this is undoubtedly an undercount—not all MSBA members list their language skills, and there are of course other attorneys within the state who are not MSBA members who have proficient language skills—the data suggest an imbalance between demand and supply for legal services in languages other than English. The Minnesota courts publish forms in several languages—including Spanish, Hmong, Somali, and Karen—but the forms must be completed in English. Many Minnesotans may need help communicating their legal needs across a language or disability barrier, and the English-speaking lawyers who serve them may be ethically (as well as legally) required to provide that help.

Who is qualified to facilitate communication?

Opinion 500 uses “interpreter” for spoken language and “translator” for written language; I will refer to both as “communication facilitators.” Whichever the mode of communication, a communication facilitator must be (1) qualified to

Mitchell Hamline alum reflects on year working in the White House

BY TOM WEBER

Christopher Garcia '16 never imagined he'd work at the White House. Then, he purchased a DVD of the show "The West Wing" and was hooked.

"I'm going to make it there one day," Garcia recalls thinking at the time. "I don't know how it's going to happen, or what I'm going to do, but that's going to be me."

Within a decade, he was one of President Biden's first 100 appointees, being named a senior legislative affairs advisor in the White House Office of Legislative Affairs. As the president marked his first year in office, Garcia reflected on his journey that started, arguably, in a Jimmy John's restaurant.

The 36-year-old didn't attend college immediately after high school; he worked at one of the sandwich chain's shops. There, he gained experience as a general manager and motivation before going to college in his mid-20s.

Garcia graduated in the top of his class and then became the first person in his family accepted to law school. "Mitchell Hamline will always have a soft spot in my heart."

Soon after graduating from Mitchell Hamline in 2016, Garcia returned to San Antonio, where he grew up, to work on the campaign of former U.S. Rep. Pete Gallego. Campaign staffers often are hired to work for candidates after an electoral win, which had Garcia thinking about a possible move to Washington.

But Gallego lost the race.

Even so, Garcia still wanted to move to D.C. and packed his bags (and life savings). In Washington, he slept on a friend's couch—a classmate from Mitchell Hamline!—while job searching. After several interviews, Garcia was finally offered an unpaid internship. In accepting the gig, Garcia asked himself "How bad do you want this dream?"

The internship eventually led to jobs with Minnesota Senator Amy Klobuchar; Congresswoman Deb Haaland, who is now interior secretary; the Biden-Harris transition team; and finally, the appointment to President Biden's administration in 2020.

Garcia vividly remembers getting the call to work in the White House. "I thought about the sacrifices that my single mom made to get me here," he said. "I thought of my culture and every Mexican-American person who has come to this country and tried to make another life for their kids."

Garcia has spent the year working with members of Congress to pass the administration's priorities, including a \$1.9 trillion coronavirus relief bill and an infrastructure bill that passed with bipartisan support.

Now that Garcia is working his dream job daily alongside members of Congress and the president, he wants more representation from all cultures and genders. "It's important



"I thought about the sacrifices that my single mom made to get me here," he said. "I thought of my culture and every Mexican-American person who has come to this country and tried to make another life for their kids."

Christopher Garcia

to me because I'm one cog on the wheel who can trailblaze a change so when I'm 80 or 90, there's a higher percentage of people of color serving the highest level of our government."

Garcia says he's still in awe that he works at the White House. His office is in the East Wing, just a short walk from the West Wing that inspired him on the small screen.

"Embrace the ambiguity," he suggests for aspiring attorneys, but always "start with kindness."

facilitate communication in the language or mode required, (2) “familiar with and able to explain the law and legal concepts” in that mode, and (3) “free of any personal or other potentially conflicting interest that would create a risk of bias or prevent the individual from providing detached and impartial” services.⁸ The opinion is primarily focused on human communication facilitators, but acknowledges that existing and emerging technologies may also be appropriate for consideration.

It is the lawyer’s duty to assess the qualifications of the communication facilitator (or communication technology). Opinion 500 recommends hiring an outside professional, but acknowledges that other options may suffice if appropriate precautions are taken. One option is to look to a multilingual firm employee, bearing in mind the greater risk of inaccuracies if the person is not a professional. Another option is to allow a client’s friend or family member to facilitate communication. Lawyers relying on friends and family to facilitate communication must proceed cautiously because, as Opinion 500 notes, “an individual in a close relationship with the client may be biased by a personal interest in the outcome of the representation.”⁹ It may also be challenging to ensure that a friend or family member maintains the client’s information in confidence as required by Rule 1.6, and there may be privilege issues as well.

What if adequate communication services are not available, or prove too costly for the lawyer or client? Opinion 500 states that the lawyer should ordinarily decline or withdraw from

representation, or associate with another lawyer or firm that can supply the necessary services. Please be mindful that anti-discrimination statutes such as the Americans with Disabilities Act and the Minnesota Human Rights Act also regulate the provision of services to people with disabilities; if they apply to your firm, they may require greater accommodation efforts than do the Minnesota Rules of Professional Conduct and may prohibit passing along costs associated with the accommodation.

In exigent circumstances, Opinion 500 permits the lawyer to render emergency legal assistance to the same degree permitted for a client with diminished capacity under Rule 1.14, comment [9].

How should a lawyer supervise a communication facilitator?

The short answer: exactly the same as any other nonlawyer service provider. Rule 5.3 requires a lawyer to ensure that the conduct of a nonlawyer service provider—such as a communications facilitator—is consistent with the lawyer’s professional obligations. In the context of communications facilitators, Opinion 500 calls out the obligation to keep client information confidential under Rule 1.6. It is the lawyer’s burden to ensure that the facilitator understands the nature of the lawyer’s duty of confidentiality and the nature of the attorney-client privilege, and agrees to protect client information to the same degree the lawyer would. Obtaining this agreement in writing—whether or



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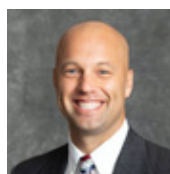
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not the facilitator is a professional—may help ensure that they understand and comply with the lawyer’s professional obligations. It’s one way to demonstrate the measures you have in place for supervision.

What about communicating across cultural differences?

Perhaps the most intriguing aspect of Opinion 500 is its acknowledgment that professional competence includes cultural competence. “[T]he ability to understand, effectively communicate, gather information, and attribute meaning from behavior and expressions are all affected by cultural experiences.”¹⁰ To practice law competently across cultural differences, Opinion 500 recommends (i) identifying these differences, (ii) seeking to understand how they affect the representation, (iii) being aware of cognitive biases (such as implicit bias) that can distort understanding, (iv) framing questions with the client’s cultural context in mind, (v) explaining the matter in multiple ways to help clients understand better, (vi) scheduling longer meetings and asking confirming questions of the client to be sure there is mutual understanding, and (vii) seeking out additional resources when necessary to ensure effective communication.¹¹

Conclusion

“Communication is a two-way street.”¹² Opinion 500 helps lawyers understand that our side of the street includes facilitating communication effectively with clients across language and

disability barriers. As always, if you have questions regarding how the ethics rules should guide your practice, please call our advisory opinion service at 651-296-3952. And thank you to Karin Ciano, OLPR managing attorney, for assistance with this month’s column. Karin has a passion for supporting solo and small office lawyers in their practices and is a great resource. ▲

NOTES

¹ The most recent 12 months of formal opinions may be accessed on the ABA’s website at no charge whether or not you are a member of the ABA. See https://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/

² ABA Formal Op. 500 at 5-6.

³ ABA Formal Op. 500 at 6.

⁴ Ibrahim Hirs, *Minnesotans speak more than 100 languages at home, new data finds*, MinnPost, 11/5/2015, available at <https://www.minnpost.com/new-americans/2015/11/minnesotans-speak-more-100-languages-home-new-data-finds/> (last visited 2/3/2022).

⁵ *Id.*

⁶ Andi Egbert, *Minnesotans with Disabilities: Demographic and Economic Characteristics*, Minnesota State Demographic Center Population Notes (March 2017) at 2.

⁷ See <https://www.mnbar.org/member-directory/find-a-lawyer> (last visited 2/3/2022).

⁸ ABA Formal Op. 500 at 7.

⁹ *Id.*

¹⁰ ABA Formal Op. 500 at 9.

¹¹ *Id.*

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What we can already learn from the Cyber Safety Review Board

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.

In my last article, I discussed the recently discovered Log4j vulnerability that has left experts concerned about the cybersecurity postures of most organizations (“The Log4j vulnerability is rocking the cybersecurity world. Here’s why,” B&B Jan./Feb. 2022). Essentially, this incredibly pervasive flaw (it’s rooted in readily available open-source software) allows attackers easy access to networks and data. Since the problem has become known, organizations have been urged to determine how they are affected and to implement patches as they become available. But the ubiquitous nature of the vulnerability makes accurately evaluating the potential scope of the impact no easy task. Worse yet, as I also noted last month, it’s possible (or probable?) that attackers have already placed backdoors in many systems to facilitate future attacks even after the original vulnerability is mitigated.

Though this vulnerability has posed a grave risk for many, and the future ramifications are still unclear, there is a silver lining. In keeping with the 2021 Executive Order on Improving the Nation’s Cybersecurity,¹ the U.S. Department of Homeland Security (DHS) established the Cyber Safety Review Board (CSRB) last month.² A primary goal of the CSRB is to combine the efforts of the public and private sectors to more efficiently combat the growing number of cyber threats and risks faced by the United States today.

A thorough assessment of the Log4j vulnerability will be the main topic of the CSRB’s first report, which is to be delivered this summer and will include “a review and assessment of vulnerabilities associated with the Log4j software library[;]... recommendations for addressing any ongoing vulnerabilities and threat activity; and, recommendations for improving cybersecurity and incident response practices and policy based on lessons learned.”³ Strong cybersecurity cultures, whether within an organization or on a national level, require top-down management support and a commitment to education. Learning from past events (as the CSRB has highlighted) with the purpose of creating actionable goals for improvement is a promising foundation for this initiative.

While it remains to be seen what the first official report will contain, and what measures will be proposed, marshaling the combined expertise of the private and public sectors is certainly a step in the right direction. Choosing to center on the

Log4j vulnerability as the topic of the CSRB’s preliminary assessment is altogether appropriate given the number of organizations, companies, and agencies affected and its potential for causing future damage. This focus will be a good starting point for collaboration between its public and private sector members, including Robert Silvers (under-secretary for policy, Department of Homeland Security) as its chair and Heather Adkins (senior director of security engineering, Google) as its deputy chair. Other agencies and companies represented include the Department of Justice, the National Security Agency, Microsoft, the FBI, and Palo Alto Networks, among others. This multitude of backgrounds and perspectives will undoubtedly be helpful in analyzing the Log4j vulnerability from various angles to provide the most comprehensive review and set of recommendations possible.

Developing strong security cultures hinges on our ability to learn from past mistakes—and past successes. When it comes to advocating for best practices and pushing for the implementation of proactive measures, oftentimes the most important resource to draw upon is your organization’s own history in handling cyber events. Ask yourself questions like: What elements of our incident response plan were well-communicated and practiced prior to the event(s) occurring? What was the response timeline, from initial reporting to identification to mitigation? What aspects of our security posture either positively or negatively contributed to our handling of the event(s)? What new considerations are there moving forward, such as regulations or industry-specific cyber threats, that should be shaping our current response procedures?


Retrospectives following cyber events gather invaluable information but are frequently skipped or poorly documented. In addition to regularly scheduled security assessments, allotting time for review and lessons learned allows for a real-life understanding of existing weaknesses, strengths, and attitudes regarding cybersecurity. One potential issue that may become apparent? Empty seats at the table for key cybersecurity stakeholders, from the IT department and upper management to HR and accounting. As many of us look forward to this summer’s first report, we can take a cue from the Cyber Safety Review Board’s inclusive approach to security planning today. ▲

NOTES

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/12/executive-order-on-improving-the-nations-cybersecurity/>

² <https://www.dhs.gov/news/2022/02/03/dhs-launches-first-ever-cyber-safety-review-board>

³ *Id.*



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Q:

What's your most useful legal technology tool — or tools, if you can't pick just one — and why?



Timothy Baland

timothy@balandlaw.com

The most useful technology, at least from my perspective, is fourfold: video meetings, document-signing software, case management software, and cloud-based file storage. I also have a virtual receptionist and multiple virtual paralegals. You have to take the standard ethical precautions and make sure that any system that you want to incorporate into your practice is secure, but otherwise I find that the use of technology has drastically improved my practice.

When the covid-19 pandemic hit, attorneys had to shift paradigms—to pivot hard and fast to new ways of providing service and doing business. For me, that meant having more video and telephone meetings with clients. I can literally count on the fingers of one hand the number of in-person client meetings I have had since approximately March 2020.

What amazed me most was the resiliency and innovation shown by attorneys during the pandemic. Attorneys quickly adopted new ways of doing everything—drive-through

parking lot signatures, video depositions and mediations, remote client meetings. In many ways, the pandemic gave attorneys the kick in the pants that we needed to adopt new technologies to assist us in our practices.

Part of the reason I started the video roundtable discussions through the Minnesota State Bar Association was to help other attorneys become more familiar with video and other technology. We were all stressed out, and nobody knew much of anything. We needed a forum in which to talk and share ideas, and the roundtables provided such a forum.

Court hearings by way of video are a true blessing, because it makes appearing for a court hearing much easier and much more efficient, both for the attorney and for the client. The client does not have to take half a day off of work—maybe only an hour. From the attorney's perspective, you can appear in multiple counties throughout the state in the same day, depending of course on the length of the hearing.

I would be remiss not to mention the lowly telephone, because I have a lot of telephone consultations with clients and prospective clients. But if you were to visit my office, you would not see a physical telephone anywhere. Rather, I use VOIP technology for all my phone calls.

So what is my short list? In no particular order:

1. Zoom for video meetings

with clients, prospective clients, and depositions;

2. MyCase for case management software and remote document-signing;

3. Dropbox for file storage;

4. everything Google for the rest; and

5. Cloud-based applications, such as bankruptcy software, to assist me in my practice.

Timothy Baland is an attorney who helps landlords with evictions and all other aspects of landlord-tenant law and represents debtors in bankruptcy. Tim is also a mediator who helps people resolve disputes without going to court.



**Jess Birken,
Birken Law Office**

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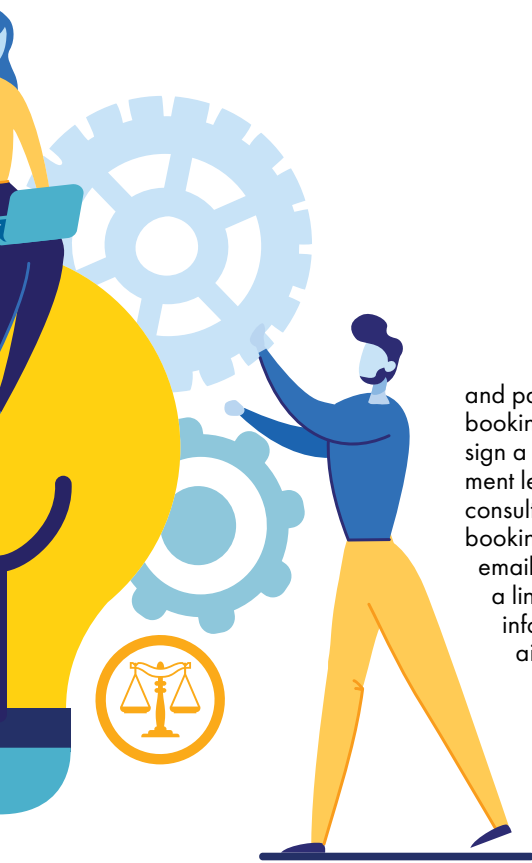
Just imagine never typing this sentence again: "Unfortunately, none of those times work for me, what about Monday at 1pm or Wednesday at 4:30pm?" You know what I mean—the inefficient, aggravating process of emails between you (or your staff) and your clients, attorneys, potential clients, vendors, etc.

in the name of setting up a meeting. Wasting all that time drives me crazy.

I tried a bunch of solutions, but it was Acuity Scheduling that CHANGED my lawyer-life! Acuity Scheduling (acuityscheduling.com) is an online scheduling tool. You connect it to your calendar(s), set up appointment types, set any limitations or forms, and then you're off to the races. Need to get a time scheduled with a potential client? Send them a link! Acuity displays only the times that I'm free on my calendars, so there's no chance of double booking, which is an easy mistake if left to do it myself. Want to limit your available hours? It does that too. Here's how much value I get out of this one tool...

Networking: I'm mostly networking virtually now (obviously!). There's a link for that. In the confirmation email and calendar invite, friends get a clickable link to either my Zoom room or to call me. It's a seamless experience.





Lunch or happy hour on location? Different link. Now, this may seem crazy, but I give up control and tell them I'm coming from the northeast side of Minneapolis and let them choose the time and place. You might be more of a control freak; that's okay! You could list five locations in a drop-down menu if you want instead. I use limits to prevent happy hours during weeks when I have my kids. And keep two days blocked for client work.

Client meetings: This is a big one. As a part of my legal subscription service, nonprofit clients can schedule short phone consults with me. Instead of trying to field unexpected calls or deal with an overloaded inbox, my clients know all they need to do is click a link to schedule a call and leave a note saying what it's about. This assures clients they have my undivided attention. Happy clients = fewer problems.

Limited scope engagements: Acuity made switching from free to paid consults or one-off small projects so easy. Guess what makes it painless? Doing all the payments

and paperwork at the time of booking! Clients schedule it, sign a limited scope engagement letter and pay for the consult all in Acuity. After booking, Acuity sends an email I've customized with a link to submit their intake information. All ethically air-tight, of course!

Package offering? Same deal. If you have a flat fee service tied to at least one meeting, you can use Acuity to do the paperwork and billing. Simple. I

love it so much I created a little e-book about it. Grab it at hackyourpractice.lawyer/acuity-gift.

Jess Birken is the owner of Birken Law Office, where she helps nonprofits solve problems and get back to their mission. Jess also helps other lawyers change their practices through her Hack Your Practice project.



Cresson Gackle
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I am always on the lookout for tools that integrate tasks and seamlessly transfer information between applications. As a solo practitioner, I track and bill my own time and keep my own monthly accounting, including

trust accounting. I love the fact that Clio, a web-based subscription service, connects directly with LawPay, a credit card processing service. This allows me to easily track my time, including managing files and individual billing rates; generate full bills with trust accounting; and provide clients with a link to pay their bills and refill their retainers by credit card on LawPay. LawPay ensures that all credit card fees are properly routed to my business checking account. This not only saves an immense amount of time and energy in my practice—it also helps me meet my clients' expectations for a modernized, automatic, and easy billing process.

For managing my calendar and daily tasks, I rely on the modernized to-do list offered by Things 3, a mobile application. Things 3 automatically merges in a summary of my daily calendar and lets me schedule tasks and sub-tasks for completion. I set weekly and other regular reminders for case reviews and client check-ins. Once I complete a task, it's satisfying and motivating to mark it complete with a checkmark. The app also keeps a searchable log of all completed and scheduled tasks so I can easily check when I finished a project. These tools all help me maintain diligence, efficiency, and marketability as a solo attorney.

Cresson Gackle is a solo practitioner of juvenile and family law and a part-time public defender of children in child protection and delinquency matters. Before entering solo practice, he was a law clerk in the 4th Judicial District for Judge Kathleen Sheehy.



Jody Cohen Press

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When covid-19 turned the world upside down, Zoom became my most useful legal technology tool. In the early days of the pandemic, for clients who didn't want to come to the office, Zoom was a way to meet and continue preparing estate plans. (Will signings, however, could not be done on Zoom—so they took place in cars in parking lots and bank drive-throughs.) Zoom also allowed probate and guardianship hearings to take place. An added benefit, especially in Hennepin and Ramsey counties, was that Zoom eliminated the need for attorneys and clients to drive downtown, find and pay for parking, and navigate the courthouse. Zoom also eliminated the need to drive in inclement weather as well as the need to re-schedule hearings when clients were out of town.

The pandemic also forced me to find new ways to get recorded real estate documents and record new deeds. RecordEase is a real estate document retrieval system. It eliminated the need to go to county recorder offices or a hire a courier to get documents. Simplifile is an online document recording system that allows deeds to be recorded within minutes of signing.

Jody Cohen Press is an estate planning and probate attorney in St. Louis Park. She practices law with her husband, Steve Press.

ESQUIRE THIS AND ESQ. THAT

*Or: A stuffy, didactic trifle
under 1,000 words*



It's
Esq.



BY ADAM T. JOHNSON  adam@lundgrenjohnson.com

In 2015, when I still had some green behind my ears—and not nearly the size of paunch that I now boast (the kind you can rest a Big Gulp on whilst second-chairing)—I wrote a short piece for the then-existing Tips & Traps page of Bench & Bar on the topic of the honorific title “esquire” (“On the use of ‘esquire,’” B&B Dec. 2015). At the time, I observed a breach of good form and custom among many of my fellow lady and gentleman lawyers in their use of the term as applied to themselves. Almost weekly I was receiving emails or letters signed, “John Mouldycastle, Esq.” And I bethought, “Does John Mouldycastle not know that this term is reserved for honoring another and not oneself?”

It would be of no moment if my tips from 2015 had been in vain. If the mere status quo had persisted, I might have chosen to take up some other cause—perhaps an article on the failing fashion

of Hush Puppies as court slippers, or the merits of returning to “unpublished” opinions. But it appears that “esquire” is a kind of Hydra, capable of growth at treble rates. The succeeding years have witnessed exponential expansion in lawyers running around and pretentiously propounding themselves as “esquires” everywhere—in books and magazines, on business cards, letters, briefs, and baubles, and throughout the internet, practically everywhere save friendship bracelets and promise rings. This practice of taking a knee in tribute to oneself is almost as irritating as the solo practitioner whose website is littered with references to “*Our Lawyers*,” or solicitations from sham companies offering vanity awards, like *The Top 2,000 Lawyers Under 2,000 Who Make Barely \$2,000*. “Esq.” is everywhere; it is in the very wind. So I write again—pedantically, and perhaps even Sisyphiciously—but with a not ignoble project, I assure.

**"ESQUIRE" SHOULD NOT ADORN A BUSINESS CARD, NOR A SIGNATURE BLOCK.
IT SHOULD NOT ADORN ONE'S WEBSITE. IT SHOULD BE RESERVED FOR
HONORING ANOTHER AND NOT ONE'S PERSON.**

To begin, it is fitting to at least identify the meaning of the term. Its usage is diverse, both throughout time and across lands. For example, Dr. Johnson's and Dr. Deuce-Ace's definitions of *esquire* are anything but in parity. And on top of that, the meaning of the word has evolved. Whereas it was once employed to identify the heir to a knight, it is now boldly associated with any number of American precinct crawlers. It is thus necessary to place this word in its proper context—with an eventual mind for its contemporary usage—while giving some regard for its origins.

"Esquire" is a derivative of the Latin word *scutarius*, which originally had the meaning of "shield bearer." By the Middle Ages, "*scutarius* had given rise to the French word *esquire*[" and the "word is representative of French feudalism and its two class system of noble and ignoble, or lord and serf."¹ There is a long history involving kings, queens, knights, a Norman Conquest, coats of arms, new property owners, and a new class of "gentlemen," with the eventual creation of a feudal system that defined at least four classes of "esquire."

Suffice it to say that by the time of Blackstone's Commentaries (and in fact even before), the word "esquire" was used as a title of dignity to denote a station above "gentleman" and below "knight." Additionally, it was an official title given to sheriffs, sergeants, barristers at law, justices of the peace, and some others.² Because of this quasi-egalitarianism, the popularity of the term (and its Latin form *Armiger*) increased. In *The Merry Wives of Windsor*, Shakespeare needled those who made pretentious use of it:

Robert Shallow: Sir Hugh, persuade me not; I will make a Star Chamber matter of it. If he were 20 Sir John Falstaffs, he shall not abuse Robert Shallow, esquire.

Abraham Slender: In the county of Gloucester, Justice of Peace and Coram.

Robert Shallow: Ay, cousin Slender, and Custa-lorum.

Abraham Slender: Ay, and Rato-lorum too; and a gentleman born, Master Parson, who writes himself Armigero, in any bill, warrant, quittance, or obligation, Armigero.

Robert Shallow: Ay, that I do, and have done any time these 300 years.³

Over the course of time, "esquire" became so commonly used in England "that it was... used in correspondence abbreviated as 'Esq.,' as an alternative to 'Mr.'"⁴ This practice was continued in the English colonies of the Americas. According

to attorney Ted N. Pettit, "It became customary to append the title to attorneys at law in addressing them by letter."⁵ And while the American Revolution largely rendered titles of social distinction obsolete, the "tradition of describing certain officials as esquires lived on mainly due to the common legal heritage of the United States and England."⁶ American attorneys have latched on ever since, and the term is "an honorary title, used as a courtesy to both male and female lawyers."⁷

In *South Carolina Lawyer*, Scott Moise created a short "English Test for Lawyers." Among the questions is the following:

QUIZ

Fatima A. Zeiden just graduated from law school, passed the bar exam, and wants to have cards and stationery made. Choose the correct name for her business documents:

- (A) Fatima A. Zeiden, Esquire
- (B) Fatima A. Zeiden, Esquire
- (C) Ms. Fatima A. Zeiden, Esquire
- (D) Ms. Fatima A. Zeiden, Esquire
- (E) Ms. Fatima A. Zeiden
- (F) Fatima A. Zeiden
- (G) All are correct

The correct answer is (F). This is because, as Bryan Garner describes in *A Dictionary of Modern Usage*, "the term 'esquire' is not used on oneself."⁸ Nor is it proper etiquette to use *other* honorific titles, such as "Mr." or "Ms." along with "Esquire." One is enough. As I wrote in 2015, Mr. Thomas Coffin is fine, as is Thomas Coffin, Esq. But Mr. Thomas Coffin, Esq. is flat out. "Esquire" should not adorn a business card, nor a signature block. It should not adorn one's website. It should be reserved for honoring *another* and not one's person. To all my *Armigeros*: Stop this insanity!

NOTES

¹ Ted N. Pettit, " 'Esquire' and Discrimination in the Legal Profession," 2-JUN Haw. B.J. 22, June 1998.

² Blackstone's Commentaries 406.

³ William Shakespeare, *The Merry Wives of Windsor*, Act I, Scene I.

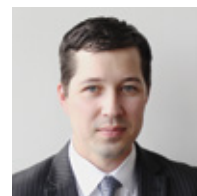
⁴ Supra note 1.

⁵ *Id.*

⁶ *Id.*

⁷ "Back by Popular Demand: English Test for Lawyers," 22-SEP S.C. Law. 49, September 2010.

⁸ Bryan A. Garner, *A Dictionary of Modern Usage* 327 (2d. ed. 1995).



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OFTEN REFERRED TO AS
"MARIJUANA LIGHT,"
DELTA 8 THC HAS BECOME
WIDELY AVAILABLE
THROUGHOUT MINNESOTA
BY BENEFITTING FROM A
LEGAL LOOPHOLE. NEITHER
THE FEDERAL LAW NOR THE
MINNESOTA LAW THAT
LEGALIZED HEMP PLACES
RESTRICTIONS ON DELTA 8.



MINNESOTA CANNABIS LAW

AND THE BATTLE OVER HEMP DERIVATIVES

A recent appellate decision throws a fledgling industry into chaos

BY JASON TARASEK ✉ jason@taraseklaw.com

Imagine, if you will, a place where you could walk into a retail storefront and be presented with a wide variety of marijuana products for sale. If you ever travel beyond Minnesota's borders, you know these places exist. For example: Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, Washington, the District of Columbia, the Northern Mariana Islands, and Guam. Indeed, the countries of Canada, Mexico, South Africa, Uruguay, and Germany have also legalized adult-use marijuana.

Yet, here in Minnesota adult-use marijuana remains illegal and likely will remain illegal for the near future. Why? It's complicated.

Unlike most states that have legalized adult-use marijuana, Minnesota lacks a citizen-led ballot initiative process. Rather, the Legislature and governor would need to each approve placement of a legalization initiative on the ballot. Alternatively, as with the passage of any law, the Legislature and governor could legalize adult-use marijuana. Recent efforts to pass such legisla-

tion, however, have met resistance from Minnesota Republicans.

In April 2019, for example, the Minnesota Senate Judiciary Committee defeated legislation that would have legalized adult-use marijuana in Minnesota. All Democrats on the committee voted in favor; all of the committee's Republican majority opposed the measure.

On the heels of that defeat, DFL House Majority Leader Ryan Winkler (DFL-Golden Valley) embarked on a "Be Heard on Cannabis" listening tour throughout Minnesota to gauge public interest in legalization. Unsurprisingly, during town halls conducted over the summer of 2019 in Eden Prairie, Shakopee, New Brighton, and elsewhere, Minnesotans overwhelmingly voiced support for legalization.

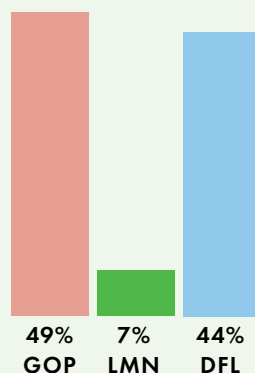
In the fall of 2019, therefore, Winkler introduced House File 600 to legalize marijuana. Ultimately, the bill passed the DFL-controlled House but was rejected by the GOP-controlled Senate. Republican opposition to legalization could be rooted in legitimate public policy grounds but also may be based on the electoral-politics advantage that the GOP enjoys so long as marijuana remains illegal.

In addition to the DFL and GOP, Minnesota has two other major political parties with a singular focus on marijuana legalization. As of 2018, based on the performance of their candidates for statewide office, the Legal Marijuana Now party (LMN) and the Grassroots-Legalize Cannabis party (GLC) each qualified for major party status. Although these “pot parties” were ostensibly formed to support legalization, they may now actually be impeding legalization. Indeed, if pot-party candidates had not siphoned votes from DFL candidates in 2020, the DFL might well have seized control of the Minnesota Senate. Consider, for example, Sen. Gene Dornink’s (R-Hayfield) 49-44 percent victory over his DFL opponent in a race where the LMN candidate attracted 7 percent of the vote. Would enough LMN votes have gone to the DFL candidate to change the outcome? Maybe. Maybe not. You can see, however, that the presence of the LMN candidate was an important factor in tipping the scales in favor of the GOP.

In other contests, pot-party candidates attracted a share of votes that exceeded the GOP margin of victory in a Minnesota House race and in the battle that sent GOP Rep. Jim Hagedorn to the U.S. Congress. Indeed, Democrat U.S. Rep. Angie Craig only defeated her opponent by 2 percentage points while a pot-party candidate attracted 6 percent of the vote.

While some of these cannabis-party candidates may be independently choosing to seek office, some candidates have indicated that they were encouraged by Republicans to run. Following the 2020 election, one pot-party candidate told reporters that he was recruited by a “Republican operative” to run in the race that resulted in the election of former GOP state Sen. Michelle Fischbach to the U.S. Congress. According to a June 15, 2020 article in the *Minnesota Reformer*, the LMN candidate who ostensibly opposed Sen. Dornink posted a pro-Dornink video and was an outspoken supporter of former President Trump.

Whatever the reason for the ongoing GOP opposition to legalization, it is unlikely that the DFL will control the House, Senate, and governorship in the near future. That may mean that the legalization of adult-use marijuana in Minnesota is still several years off. But it doesn’t mean that legal battles over cannabis, hemp, and their various products are years away. They are here.



If pot-party candidates (LMN) had not siphoned votes from DFL candidates in 2020, the DFL might well have seized control of the Minnesota Senate. Consider, for example, Sen. Gene Dornink’s (R-Hayfield) 49-44 percent victory over his DFL opponent in a race where the LMN candidate attracted 7 percent of the vote. Would enough LMN votes have gone to the DFL candidate to change the outcome?

A brief history of cannabis in America

Cannabis has been cultivated and used by people for thousands of years. In ancient China and Mesopotamia, it was used for rope, sail cloth, and textiles. Native Americans used cannabis for thread, clothing, and food. American colonists grew hemp and exported it to England. In early America, hemp was used for paper, textiles, and rope.

Marijuana was not widely used as a drug in the United States until the 20th Century. Following the Mexican Revolution in 1910, Mexicans began moving to the United States and they brought marijuana with them. In response to these newcomers, anti-Mexican resentment arose. Many states began outlawing marijuana and, in 1937, the federal government essentially banned hemp and marijuana by imposing a \$100 tax on sales of the plant.

Cannabis made a brief comeback during World War II, but the government shut it down again after the war. The 1952 Boggs Act and the 1956 Narcotics Control Act established mandatory sentences for drug-related violations; a first-time offense for marijuana possession carried a minimum sentence of 2-10 years in prison and a fine of up to \$20,000. Although those penalties were largely repealed by the early 1970s, the Anti-Drug Abuse Act of 1986 reinstated stiff federal penalties for a variety of marijuana offenses.

In 1970, the federal government adopted the Controlled Substances Act to regulate the manufacture and distribution of drugs. The Act places drugs in five categories, or “schedules,” depending upon the following perceived characteristics of the drug: (1) potential for abuse, (2) safety, (3) addictive potential, and (4) whether or not it has any legitimate medical applications. Among the Schedule One drugs deemed most dangerous of all are LSD, heroin—and marijuana. Schedule Two drugs, which are less restricted than marijuana, include cocaine, codeine, OxyContin, and methamphetamine.

Schedule One drugs are those substances that, in the government’s opinion, have a high potential for abuse and no currently accepted medical use. The irony here is manifest: In 1996, California became the first state to allow medical marijuana and since then more than 30 states, including Minnesota, have adopted medical-marijuana programs.



Minnesota's medical marijuana program

Minnesota's medical-marijuana program, approved in 2014, continues to be one of the most restrictive in the country. The conditions that enable patients to qualify for Minnesota's program include:

- cancer associated with severe/chronic pain, nausea or severe vomiting, or cachexia or severe wasting;
- glaucoma;
- HIV/AIDS;
- Tourette's Syndrome;
- Amyotrophic Lateral Sclerosis (ALS);
- seizures, including those characteristic of epilepsy;
- severe and persistent muscle spasms;
- Crohn's disease;
- terminal illness;
- intractable pain;
- post-traumatic stress disorder (PTSD);
- autism;
- obstructive sleep apnea;
- Alzheimer's Disease;
- chronic pain;
- sickle cell disease; and
- chronic motor or vocal tic disorder.

To obtain medical marijuana in Minnesota, a new patient must meet with a doctor, who "certifies" a patient as one who suffers from one of the above-identified qualifying conditions. Minnesota doctors do not prescribe marijuana. Rather, once a patient is "certified," they meet with a cannabis pharmacist at a medical dispensary to obtain a prescription. Nearly 30,000 patients are currently enrolled in the state's medical cannabis program. About 62 percent are in the program for chronic pain, 42 percent for intractable pain, and nearly 30 percent for PTSD. (Some patients are enrolled for multiple conditions.) The average medical marijuana patient is roughly 46 years old. Because medical marijuana is not covered by health insurance, patients must pay out of pocket. It is not unusual for patients to pay several hundred dollars each month for their medicine. With the recent legalization of sales of raw "flower" to patients, prices are expected to drop yet continue to exceed those found on the illicit market.

CBD, Delta 8, and the growing legal battles over hemp-derived products

In terms of legal cannabis, Minnesota also allows the growing, processing, and sale of hemp and hemp-derived products. Marijuana and hemp come from the same plant, *cannabis sativa L.* Typically, hemp plants are shorter and bushier than tall, thin marijuana plants. The only pertinent difference between marijuana and hemp, however, involves a legal distinction related to the concentration of Delta-9 tetrahydrocannabinol (often known simply as Delta 9). Hemp is defined as having 0.3 percent or less Delta 9; marijuana is defined as anything with more than 0.3 percent Delta 9.

In 2014, the same year that Minnesota approved its medical-marijuana law, the federal government adopted the 2014 Farm Bill, which provided that "[n]otwithstanding the Controlled Substances Act... or any other Federal law, an institution of higher education... or a State department of agriculture may grow or cultivate industrial hemp," provided it is done "for purposes of research conducted under an agricultural pilot program or other agricultural or academic research" and those activities are allowed under the relevant state's laws.¹

The 2014 Farm Bill defined "industrial hemp" as the plant *Cannabis sativa L.* or any part of such plant, "with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis."²

On December 20, 2018, President Trump signed the 2018 Farm Bill, which distinguished hemp from marijuana and removed hemp from federal controlled substance schedules. The bill also expanded the definition of "industrial hemp" beyond the terms of the 2014 Farm Bill to include not only "the plant *Cannabis sativa L.* and any part of that plant," but also "the seeds thereof and all derivatives, extracts, cannabinoids... with a [Delta 9] concentration of not more than 0.3 percent on a dry weight basis."

Similarly, in 2018, Minnesota adopted the Minnesota Industrial Hemp Development Act,³ which expressly authorized the cultivation, processing, possession and sale of hemp and hemp-derived products. See Minn. Stat. sec. 18K, subd. 3; Minn. Stat. sec. 18K, subd. 3.



JASON TARASEK is a cannabis attorney and lobbyist with Minnesota Cannabis Law. He represents clients in the hemp/CBD industry in Minnesota and Wisconsin, clients in the medical-marijuana industry in South Dakota, and clients in the adult-use marijuana industry in Michigan.



Cannabidiol, or CBD, is one of more than 100 cannabinoids, including Delta 9, found in the hemp/marijuana plant.

And with that, the CBD industry was born. Cannabidiol, or CBD, is one of more than 100 cannabinoids, including Delta 9, found in the hemp/marijuana plant. The human body's complex endocannabinoid system has receptors for cannabinoids found in the cannabis plant. Because cannabis has been federally illegal for so long (and essentially unavailable for testing), there is very little scientific research on how cannabis interacts with the human body. Anecdotally, however, many people use CBD in place of aspirin to treat aches and pains. Some claim that CBD has a calming effect that helps them sleep. Interestingly, most states that legalize marijuana still have robust CBD markets because CBD seems to work better in combination with a Delta 9 concentration higher than 0.3 percent but low enough that it does not produce a "high" in the consumer.

Other cannabinoids that have garnered attention include CBG, CBN, and CBC. But one cannabinoid in particular has outpaced the others: Delta 8 THC. Often referred to as "marijuana light," Delta 8 has become widely available throughout Minnesota by benefitting from a legal loophole. Neither the federal law nor the Minnesota law that legalized hemp places restrictions on Delta 8. Rather, each law only addresses allowable concentrations of Delta 9. Arguably, therefore, so long as Delta 8 is derived from hemp, it is legal in Minnesota.

At least that appeared to be the case until the Minnesota Court of Appeals issued its decision in *State v. Loveless* in September 2021.⁴ As noted above, following the federal legalization of hemp, Minnesota adopted laws that expressly legalized the sale of processed hemp, including hemp-derived liquids.

In *Loveless*, however, the appellate court noted that although Minnesota removed hemp from the state's Controlled Substances Act (CSA), it failed to remove non-plant Delta 9 from the state's CSA.⁵ Consequently, the court upheld a man's criminal conviction because he possessed a liquid that contained Delta 9 even though the prosecution failed to prove that the liquid contained more than 0.3 percent Delta 9. As one hemp retailer noted, "It goes without saying that all hemp growers, processors, and retailers could be convicted under such an interpretation. It ought to cause an outcry of concerns for the public."

The appellate court noted that, despite statutory changes expressly authorizing the cultivation, processing, and sale of hemp, "the legislature did not amend the relevant provisions of chapter 152 [the CSA] to make it lawful to possess a liquid mixture with a low concentration of [Delta 9]." Although the Minnesota Supreme Court accepted review of *Loveless*, a legislative fix may be required to close the *Loveless* loophole.

As noted above, many observers believe that Delta 8 was legalized through the passage of the 2018 Farm Bill and Minnesota's hemp statute. As CBD shops attempted to weather the "Green Rush" of entrepreneurs, many retailers reported that sales of Delta 8 were the only thing keeping them in business.

It should come as no surprise, however, that Delta 8 has begun to draw increased scrutiny from regulators. A few cases in point:

- At least one CBD shop in Northwest Minnesota was threatened by local law enforcement—who, citing *Loveless*, ordered all THC products off the shelves, even those with less than 0.3 percent Delta 9.
- Similarly, a CBD shop in southern Minnesota was targeted with a cease-and-desist notice from the Minnesota Department of Agriculture for selling Delta 8 "gummies."
- A few months ago, the City of Stillwater enacted a moratorium on all new CBD retailers.
- Recently, too, local law enforcement executed search warrants against a "smoke shop" and its owners in Park Rapids, during which police seized hundreds of thousands of dollars' worth of hemp-derived products.

In the meantime, although briefing is underway on *Loveless* at the Minnesota Supreme Court, the high court likely will not issue a decision until late Summer 2022. Legislation aimed at closing the *Loveless* loophole is currently winding its way through the labyrinthine committee process at the Legislature. Legislative efforts to expressly outlaw Delta 8 are expected, too. Even if Minnesota prohibits Delta 8, however, it is widely available for online purchase from companies located outside Minnesota. In light of all this, the legality of hemp-derived products will remain muddled even as nearby states continue to legalize adult-use marijuana. ▲

NOTES

¹ See 7 U.S.C. §5940(a).

² *Id.* at §5940(a)(2).

³ Minn. Stat. §18K.01, *et. seq.*

⁴ *State v. Loveless*, 2021 WL 4143321 (Minn.App. 9/13/2021).

⁵ *Id.* *10



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REVISITING MINNESOTA'S 60-DAY RULE AND BUILDING PERMIT APPLICATIONS

BY JULIE N. NAGORSKI ✉ jnn@dewittllp.com

Nearly two decades ago, the Minnesota Court of Appeals decided that Minnesota's 60-Day Rule, Section 15.99 of Minnesota Statutes, did not apply to a building permit application submitted to the City of Northfield.¹ Based on that holding, most cities and most practitioners believe that while the 60-Day Rule requires government to take prompt action on applications of many sorts, from those for variances to those for conditional-use permits, it does not apply to building permit applications. This belief needs a re-examination.

Minnesota's 60-Day Rule requires that "an agency must approve or deny within 60 days a written request relating to zoning... for a permit, license, or other governmental approval of an action."² Section 15.99 identifies definitions for many of its terms. An "agency" is "a department, agency, board, commission, or other group in the executive branch of the state government; a... city, county, town or school district...."³ A "request" is statutorily defined as "a written application relating to zoning, septic systems, watershed district review, or the expansion of the metropolitan urban service area, for a permit, license, or other governmental approval of an action."⁴ The statute does not define the nature of an application that constitutes a request "relating to zoning."

In 2013 the Minnesota Supreme Court adopted a broad definition of Section 15.99's term "a written request relating to zoning."⁵ In *500, LLC v. City of Minneapolis*, the Supreme Court determined:

"[T]he phrase 'a written request relating to zoning' is unambiguous and refers to a written request that has a connection, association, or logical relationship to the regulation of building development or the uses of property. If a written request has such a connection, association, or logical relationship, then the 60-day time limit in Minn. Stat. §15.99, subd. 2(a), applies."⁶

In so deciding the meaning of Section 15.99's phrase "relating to zoning," the Minnesota Supreme Court explicitly rejected the argument by the City of Minneapolis that the phrase "refer[s] to only those requests that are explicitly authorized by an applicable zoning ordinance or statute." The arguments advanced by the City of Minneapolis and rejected in *500, LLC* found support in the language of the decision in *Advantage Capital*. The Minnesota Court of Appeals had decided in *Advantage Capital* that a "written request relating to zoning" was "a request to conduct a specific use of land within the framework of the regulatory structure relating to zoning or, in other words, a zoning application."⁷ Based on its conclusion that Section 15.99's "relating to zoning" phrase required a narrow construction, the court of appeals in *Advantage Capital* held that Section 15.99 did not apply to the building permit application at issue.⁸

The Minnesota Supreme Court in *500, LLC* held, however, that an application for a "certificate of appropriateness" submitted to the Minneapolis Heritage Preservation Commission had "a connection, association, or logical relationship to the regulation of building development and the uses of property" and was, therefore, a request relating to zoning to which Section 15.99 applied.⁹ To reach that holding, the Supreme Court analyzed three factors. First, it noted that "a certificate of appropriateness involves a particular property and affects specific property rights":

"In this case, for example, 500 LLC cannot alter the property to convert it into an office building without first securing the approval of the Commission or the Minneapolis City Council. See Minneapolis, Minn., Code of Ordinances § 599.310 (2013). Such a restriction, like the requirement for a conditional-use permit, affects 500 LLC's specific rights to alter and use its property—which is typical of a zoning restriction."¹⁰

The Minnesota Supreme Court noted, second, that the state's historic-preservation-enabling laws, under which the Minneapolis Heritage Preservation Commission operated, "recognize a connection, association, or logical relationship between heritage

preservation and zoning." Third, the Court noted that "the City's heritage-preservation ordinances identify a connection, association, or logical relationship between an application for a certificate of appropriateness and zoning" (reversing and remanding the district court's decision granting summary judgment to the city on the applicant's Section 15.99 claim).

Following the decision of the Minnesota Supreme Court, the Minnesota Court of Appeals held that an application to the Minnesota Department of Transportation for a driveway-access permit also constitutes a request "relating to zoning" governed by Section 15.99.¹¹ The court of appeals, in so deciding, applied the holding and analysis required by the Minnesota Supreme Court's decision in *500, LLC*. It held that the driveway-access permit application showed an "association... or logical relationship to the regulation of building development or the uses of property." In the only appellate decision construing the meaning of Section 15.99's phrase "relating to zoning" since *500, LLC*, the court of appeals held that the statute applied to the driveway-access permit application and directed the district court to issue the peremptory writ of mandamus compelling MNDOT to grant the driveway-access permit.¹²

An argument based solely on *Advantage Capital* that a building permit application is not subject to the 60-Day Rule ignores the later decision of the Minnesota Supreme Court in *500, LLC* and the later decision of the Minnesota Court of Appeals in *Kottschade* and, in many instances, the facts of the specific situation. At least one Minnesota district court rejected a city's motion for summary judgment on this issue. Rather than resting on the common wisdom providing that "building permit applications are not subject to the 60-Day Rule," one should complete a more careful analysis and determine whether the 60-Day Rule applies in the particular circumstances at issue. If a building permit application has a "connection, association, or logical relationship to the regulation of building development or the uses of property" under the three factors considered by the Court in *500, LLC*, then it is a written request relating to zoning and Section 15.99 applies to it. ▲

NOTES

¹ *Advantage Capital Mgmt. v. City of Northfield*, 664 N.W.2d 421 (Minn. App. 2003).

² Minn. Stat. §15.99, subd. 2.

³ Minn. Stat. §15.99, subd. 1.

⁴ *Id.*

⁵ *500, LLC v. City of Minneapolis*, 837 N.W.2d 287 (Minn. 2013).

⁶ *Id.* at 291.

⁷ 664 N.W.2d at 427.

⁸ *Id.*

⁹ 837 N.W.2d at 293.

¹⁰ *Id.* at 292.

¹¹ *Kottschade v. State, Dep't of Transp.*, No. A13-1034, 2013 WL 6725872, at *3 (Minn. App. 12/23/2013).

¹² *Id.*



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WHAT HAPPENS WHEN PROPERTY OWNERS DON'T PAY THEIR **PROPERTY TAXES?**

A primer for lawyers



What happens to nonpayers of property taxes is a question many property owners—those with mortgages—have little reason to consider. Banks and mortgage companies often collect the money to pay for property taxes from mortgage payments and save that money in an escrow account. Then those institutions pay property taxes directly to the government from the escrow account.

When property taxes are not paid, however, the property owner will eventually lose his or her title to the property in an act known as “forfeiture.” The title goes to the state of Minnesota, and the county in which the property is located holds the property in trust for the state and manages the property. Property forfeiture is not to be confused with “foreclosure,” which is a completely different legal action and process.

Let’s consider how the property tax laws affect an imaginary taxpayer: Darla Anderson, living at 1234 West Seventh Street, St. Paul, Minnesota. Darla owns her single-family home outright, without any mortgage or other encumbrance on the property. She has owned her home for 15 years and has obtained a homestead classification, which provides for a lower tax rate for her property. The home has a tax value of \$200,000. Darla always pays her property taxes on time, that is, the first half before May 16 and the second half before October 16—the due dates set forth in Minnesota Statutes Section 279.01, subd. 1. In January 2017, Darla began suffering from major depression, quit her job, and stopped paying many of her bills.

YEAR ONE OF MISSED TAX PAYMENTS

When Darla missed the property tax payment due before May 16, 2017, her property tax payment was deemed late and she was assessed a penalty of 2 percent of the unpaid tax.¹ When she did not make the payment by June 1, 2017, she incurred an additional penalty of 2 percent. And the penalties keep accruing when she does not make the payment: 1 percent each month, not to exceed 8 percent.

Since Darla lives in St. Paul, her property taxes are assessed by Ramsey County, which will send her a letter after the first missed payment. That is a courtesy letter; the law does not require Ramsey County to inform Darla of the missed payment at this point. Sadly, Darla’s continuing illness also led her to miss the tax payment due before October 16, 2017.

Months go by, and as of the first business day in January 2018, Darla still has not paid her 2017

property taxes. Those 2017 taxes are now delinquent. The Ramsey County Auditor will prepare a list of all properties in Ramsey County with unpaid taxes and send this delinquent tax list to the district court administrator for the 2nd Judicial District, which is the judicial district for Ramsey County.² The county auditor has until February 15 to send this list to the district court. The filing of this list functions as a complaint by Ramsey County against each property on the list.

The district court administrator will sign a notice of delinquent taxes and return the notice and the delinquent tax list to the county auditor.³ The county is required to publish this list and notice in the legal newspaper selected by the county board of commissioners.⁴ The list and notice must be published twice, once per week; the first publication must be before March 20 and the second not less than two weeks later.⁵

If Darla happens to be reading the newspaper closely, including all the legal notices, she may see the notice of delinquent tax for her property. If she pays the delinquent tax owed, her property will be removed from the list when it is published the second time. The law requires the county to also mail a notice to Darla by March 20.⁶ If Darla fails to pay the delinquent tax within a certain period of time⁷ following this notice, the district court will enter judgment against her property in favor of the state of Minnesota. It’s important to note that Darla, within 20 days after the last publication of the notice, can also file an objection to the delinquent tax in district court.⁸ But taxpayers do not often object to the delinquent tax, as there are few defenses against property taxes.

If Darla still does not pay the delinquent tax by the second Monday in May 2018, the county auditor “shall bid in for the state” her property.⁹ This means giving the state of Minnesota a lien interest in her property. Darla then has three years (plus a 60-day grace period)¹⁰ to redeem her property from this tax judgment sale. Properties generally have a three-year redemption period, with a few exceptions.¹¹

YEAR TWO OF MISSED TAX PAYMENTS

Darla’s illness continues, and she again fails to pay her property taxes in 2018. As she already has delinquent taxes from 2017 that were published as required in 2018, her property will not appear again on the delinquent tax list that is published in the newspaper in 2019. The county auditor will simply incorporate the new delinquent taxes into the existing judgment and lien.

MANY INDIVIDUALS STRUGGLE WITH THE EXPENSES OF MAINTAINING A HOME, INCLUDING THE EXPENSE OF PROPERTY TAXES. IT IS VITAL THAT YOU IMPRESS UPON YOUR CLIENTS THE SEVERE CONSEQUENCES OF FAILING TO PAY TAXES.



NOTICE OF FORFEITURE

Even if Darla pays her 2018 property taxes, she will still need to pay her 2017 property taxes to avoid having her home forfeited to the state of Minnesota. If she is unable to come up with the money to pay those delinquent taxes, her redemption period will expire in May 2021.

The law requires the county to provide notice of forfeiture in four different ways.¹² Two of the methods of notice are specifically to reach Darla as owner and occupant so that Darla is aware of the consequence of failing to pay her property tax. The other two methods are intended to notify possible mortgagees or other lienholders in the property. Minnesota Statutes Section 281.23 starts with requiring the county auditor to post a notice of expiration of redemption in the auditor's office; the form of the notice is set forth in the statute.¹³ Then the auditor must publish this notice for two successive weeks in the official newspaper of the county.¹⁴

Once the notice has been published, then the county auditor sends the notice by certified mail, return receipt requested, to the property owner.¹⁵ The auditor also has the county sheriff (or other adult at least 18 years old) personally serve the notice to the occupants of the property.¹⁶ These two forms of notice are intended to ensure that someone like Darla who owns and occupies her property is aware that her property will forfeit to the State of Minnesota in a relatively short period of time unless she takes action.

Sometimes governments make more efforts at notification than required by law. For many years, in addition to the statutorily required notices, Ramsey County would send an additional letter to the property owner prior to forfeiture. Also, Ramsey County property tax department staff would try to reach property owners on the phone to alert them and explain the process if necessary. In 2021, for the first time, Ramsey County staff made personal visits to properties pending forfeiture to ensure that property owners and occupants understood the legal action that was about to occur. It was overall a worthwhile effort. One situation in particular stands out: The property occupants were renters who did not speak English. So presumably they did

not understand the notice posted on their door. County staff explained the forfeiture process and were able to obtain contact information for the landlord. After County staff contacted the landlord, the landlord paid the delinquent taxes and avoided forfeiture.

FORFEITURE

If Darla still fails to pay the delinquent tax owed on her property, her property will forfeit to the State of Minnesota. At that point, she no longer owns her home. County staff may ask her to leave her home and evict her from the home if she refuses to leave. Alternatively, county staff may allow her to stay if she pays rent or if she enters into a repurchase contract, as described in further detail below.

OPTIONS TO AVOID FORFEITURE

Perhaps Darla decides she wants to get caught up on her taxes to avoid losing her home. She has a few options.

Confession of judgment

Darla could opt to enter into a "confession of judgment" (CJ) for the delinquent taxes—essentially a payment plan for taxes. The CJ will combine all of Darla's delinquent taxes into one amount.¹⁷ Then Darla will be able to make installment payments over a 10-year period.¹⁸ At the time Darla enters into the CJ, she will make a down payment of one-tenth of the amount of the delinquent taxes, costs, penalty, and interest, and pay the current year taxes that are owed.

By entering into the CJ, Darla waives any defenses or objections she may have to the tax judgment on her property. Darla must also continue to pay the property tax that is due each year.¹⁹ If she misses any payment under the CJ, the CJ will be cancelled.²⁰ She may enter into another CJ after that, but she is limited to two CJs per set of taxes.²¹

Bankruptcy

Another option is to file for bankruptcy. A bankruptcy case results in an automatic stay on all collection efforts by any creditor, including governmental units.²² A bankruptcy case would also stay any forfeiture process. Property taxes are *ad valorem* and run with the land, and therefore would be a secured claim in a bankruptcy case.²³

Darla can choose to file a Chapter 7 bankruptcy case, which will result in a liquidation of her assets to pay her creditors.²⁴ The money that results from the liquidation may be sufficient to pay her property taxes. If Darla begins working again, she can also choose to file a Chapter 13 bankruptcy case, which is available to those who have regular income. Chapter 13 allows debtors to enter into a payment plan to repay all of their debts, which include property taxes.²⁵

In any bankruptcy case, the county auditor would file a proof of claim for the delinquent taxes owed.

REPURCHASE AFTER FORFEITURE

If Darla's property forfeits and she loses title to her home, the law gives her the opportunity (but not the right) to buy back the home from the state by working with county government. If Darla wants to make installment payments, Darla will enter into a repurchase contract with the county auditor, which must be

approved by the county board of commissioners.²⁶ Darla would have to pay back all of the delinquent taxes, plus assessments, penalties, interest, and costs. She can pay in installments over a 10-year period.²⁷ Or she may pay back the entire amount at once.

During the time Darla is making payments under her repurchase contract, the county will most likely allow her to stay in her home. If she misses a payment, the county will cancel her contract.²⁸ The county may then sell her property to a third party or a governmental unit as described in Chapter 282 of the Minnesota Statutes. Darla will have no right to the proceeds in that sale of the property she formerly owned.

CONCLUSION

Many individuals struggle with the expenses of maintaining a home, including the expense of property taxes. It is vital that you impress upon your clients the severe consequences of failing to pay taxes. Here are a few ways that you can assist:

1. Research whether your client may be eligible for lower property tax rates. There are a variety of different programs to lower property tax rates, chief among them the homestead classification. More information can be found at <https://www.revenue.state.mn.us/property-tax-programs>
2. Pay property taxes early. If your client is struggling with cash flow issues, encourage the client to prioritize taxes and pay property taxes prior to their due dates of May and October. Then the client will not have to pay penalty and interest on outstanding balances. The client can make partial payments until the due date without penalty.
3. Pay attention if your client informs you that they have fallen behind with their taxes. First, property owners may seek a waiver for penalties for one missed payment in the current tax year.²⁹ The County Board of Commissioners also has authority to abate property taxes, costs, penalties, and interest, for clerical errors or due to hardship, for the current year and the two prior years.³⁰
4. Encourage your client to enter into a confession of judgment with their county auditor's office.
5. If your client is not eligible for a confession of judgment, consider the possibility of filing for bankruptcy.

Your County Auditor's Office is your best resource for help with property taxes. Do not hesitate to reach out to them with your property tax questions. ▲

Notes

¹ Minn. Stat. Sec. 279.01, subd. 1(a).

² *Id.* Sec. 279.05

³ *Id.* Sec. 279.06

⁴ *Id.* Sec. 279.08, .09.

⁵ *Id.* Sec. 279.09.

⁶ *Id.* Sec. 279.091

⁷ Twenty days from the later of the filing of the affidavit of publication or the affidavit of mailing. Minn. Stat. Sec. 279.16.

⁸ *Id.* Sec. 279.15

⁹ *Id.* Sec. 280.01

¹⁰ *Id.* Sec. 281.33

¹¹ *Id.* Sec. 281.17, subd. (a). *See also* Sec. 281.173 and 281.174.

Properties in targeted communities that are not homesteads have only a one-year redemption period. *Id.* Sec. 281.17, subd. (b).

Property owners in targeted communities are perhaps unaware of their communities' status as such. Targeted communities are those which meet one of four criteria set forth in Minnesota Statutes

Section 469.202 subd. 2.

¹² *Id.* Sec. 281.23

¹³ *Id.* Subd. 2

¹⁴ *Id.* Subd. 3

¹⁵ *Id.* Subd. 5

¹⁶ *Id.* Subd. 6

¹⁷ *Id.* Sec. 279.37, subd. 1

¹⁸ *Id.* Subd. 2.

¹⁹ *Id.*

²⁰ *Id.* Subd. 9.

²¹ *Id.* Subd. 10.

²² 11 USC §362

²³ Minn. Stat. Sec. 272.31, 11 USC § 506

²⁴ 11 USC §704(1)

²⁵ 13 USC §1322

²⁶ *Id.* Sec. 282.241, subd. 1.

²⁷ *Id.* Sec. 282.261, subd. 1

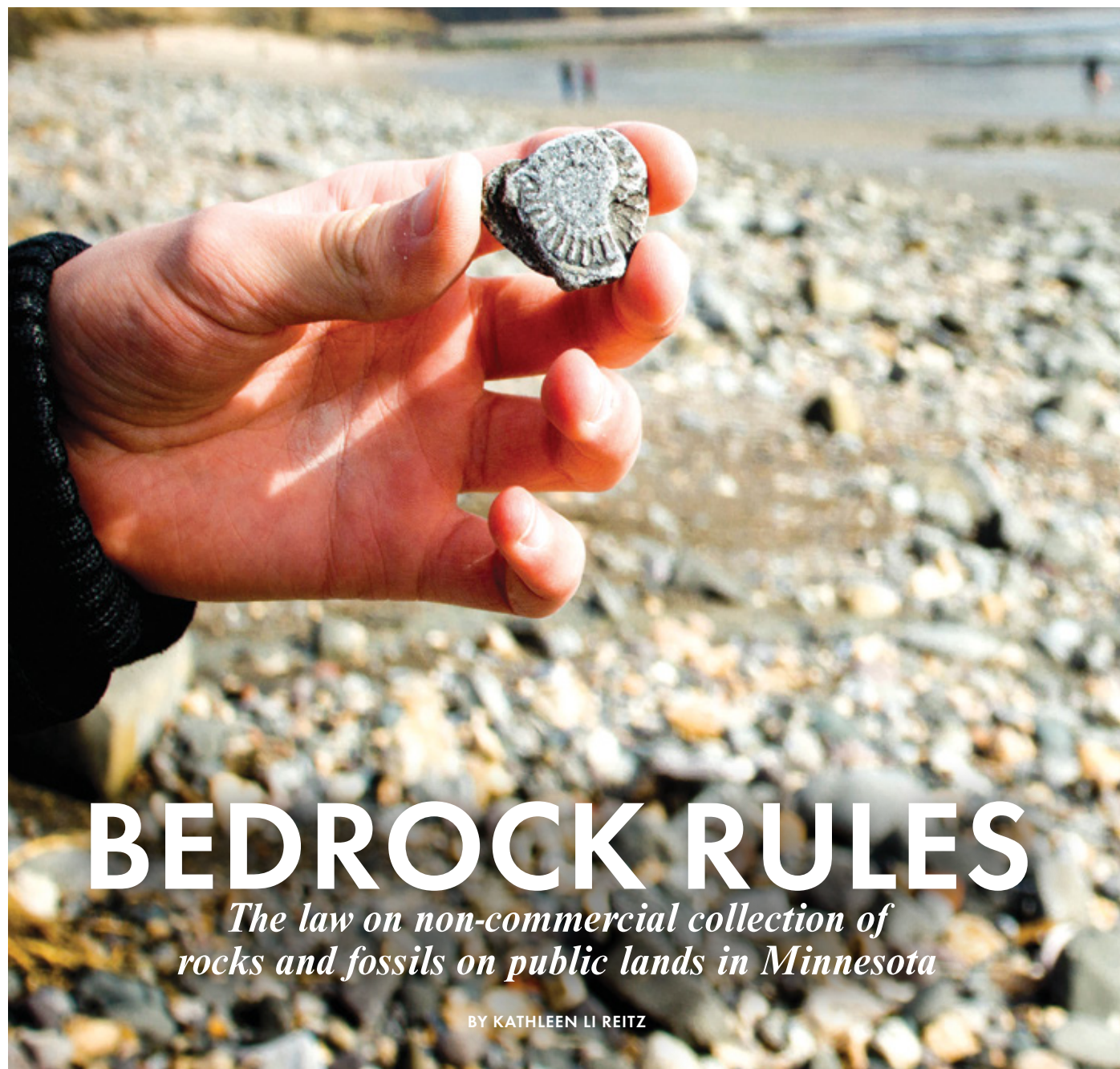
²⁸ *Id.* Sec. 282.304, subd. (b).

²⁹ *Id.* Sec. 279.01 subd. 2.

³⁰ *Id.* Sec. 375.192, subd. 2.



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BEDROCK RULES

The law on non-commercial collection of rocks and fossils on public lands in Minnesota

BY KATHLEEN LI REITZ

Suppose that you recently acquired the surface estate of a property, and then unearthed numerous fossils there—including the nearly complete skeletal remains of a T-Rex. Better still, you also found the fossilized remains of two dinosaurs locked in combat when death struck. But someone else retains the mineral rights underneath the property.¹ Do you own the fossils, which are worth millions? In 2020, the Murray family received their long-awaited answer to this question from the Supreme Court of Montana.² To their delight, the Court reasoned that yes, they as surface owners get to claim the fossils—because fossils are not minerals.

Perhaps your own backyard is not a treasure trove like the Murrays' (it helps to live in Montana, a state intermittently covered by sea for eons, resulting in many layers of sedimentary buildup). But if you live in Minnesota and are a hobbyist rockhound or fossil hunter, a researcher of geology or paleontology, or a science teacher wishing to take your class on a collection

field trip, where can you go and how can you collect these specimens *legally*? What about petrified woods—are they considered fossils or minerals? Read on.

Home to a relatively well-exposed portion of the oldest nucleus of the North American continent, Minnesota contains rocks that record some 3.5 billion years of the earth's 4.54 billion years of geohistory.³ Whether you are a professionally trained geoscientist or an amateur collector of these inorganic specimens, Minnesota has much to offer as long as you know where to look.

For purposes of this article, scientific collectors of geological (rocks⁴) or paleontological (fossils) resources collect primarily for scientific purposes and for the education of the general public. Educational collectors are usually led by the educational programs of schools, museums, camps, and other organizations. Amateur or casual collectors obtain the specimens for their personal enjoyment without selling, reselling, or bartering. They are all non-commercial collectors.

A fossil is considered “land” rather than personal property before its excavation.⁵ Rocks, like the soil (and other naturally occurring materials that make up the earth on a land parcel), belong to the real property owner. Because the rights to collect rocks and fossils on private lands depend on each individual owner’s directives, the best practice is to always identify the rightful property owner and ask for permission before collecting.⁶ This article lays out the bedrock rules for scientific, educational, and recreational collectors of rock and fossil specimens on Minnesota’s 12 million acres of public lands, which constitute about 24 percent of the state’s land area.⁷ For collectors who venture across state borders, the general statutes and rules are similarly applicable to federal lands elsewhere, and the sources of authority on state lands can hopefully be of referential value to those who seek other states’ legal counterparts.

In Minnesota, the federal government owns about 3.5 million acres of the land area,⁸ while the state government owns about 8.4 million acres.⁹ What you can or cannot do on these lands depend on which governmental agencies control and manage them.

COLLECTION ON MINNESOTA’S FEDERAL LAND

The vast majority of Minnesota’s federal land is managed by the Forest Services (FS).¹⁰ Other sizeable federal lands are national wildlife management areas (about 516,000 acres), managed by the Fish and Wildlife Service (FWS); and national parklands (about 140,000 acres), managed by the National Park Service (NPS). The Department of Defense (DOD) and the Bureau of Land Management (BLM) manage a relatively meager 2,000 and 1,101 acres of federal lands in Minnesota, respectively.

Until about a decade ago, legislation for the protection of fossils on federal public lands scattered across various sources of authority with—at times—ambiguous and oscillating legal positions.¹¹ In 2009, Congress enacted the Paleontological Resources Preservation Act (PRPA) as part of the Omnibus Public Land Management Act of 2009. The PRPA allows “casual collection” of a “reasonable” amount of certain fossils to the extent they are collected with the use of non-powered hand tools resulting in only negligible damage to the Earth’s surface and other resources.¹² As a collector, you will be glad to know that the broad definition of these collectible fossils includes fossilized remains, traces, or organism imprints of common invertebrates and plants.¹³ But you should stay away from any fossil items that bear a connection with human life or civilization: Materials associated with an archaeological resource¹⁴ or any cultural items¹⁵ are excluded from the casual collection rule.¹⁶ For instance, if an ammonite fossil also happens to have been used by an ancient civilization as a hand tool or a funerary object, it would be off-limits to fossil hunters under the PRPA.

National forests and grasslands

A casual collector of common invertebrate or plant fossils does not need to obtain a permit on lands controlled by the Forest Service (FS),¹⁷ which constitutes most of Minnesota’s federal land (nearly 3 million acres), or the 2,000 acres controlled by the Bureau of Land Management (BLM). The recreational fossil hunter’s collection is limited to less than 25 pounds per person, per day; and not more than 100 pounds per year.¹⁸ A researcher or science teacher should apply for a permit if he or she intends to collect fossils on these public lands for the purpose of furthering paleontological knowledge or for public education.¹⁹

Rockhounding on national forests and grasslands requires a free-use permit.²⁰ Note that petrified wood is treated as a mineral rather than a fossil by the regulation, and also requires a free-use permit to collect.²¹ While such free-use permits can be issued to an individual, nonprofit organization, or corporation, these permit holders may not remove more than 5,000 cubic yards (or its weight equivalent) during any 12 consecutive months.²² Free-use permit rock collectors can only collect for their non-commercial use. That is: no sale, resale, or bartering.²³

Federal wildlife refuge areas

Minnesota is home to approximately 516,000 thousand acres of federal wildlife management areas managed by the Fish and Wildlife Service. The FWS issues permits for paleontological (as well as archeological) research pursuant to the PRPA and the Archeological Resource Protection Action of 1979.²⁴ The FWS also allows personal recreational collection of most rocks from the surface only, by hand (this includes handheld gold pans) but prohibits searching for and removing valuable semi-precious rocks, stones, or mineral specimens.²⁵ Recreational collection of fossils—as well as silver, platinum, and gemstones—is prohibited within land managed by the FWS.²⁶ This means, for example, that rockhounds cannot collect Minnesota’s state gemstone (agate) anywhere in the Minnesota Valley National Wildlife Refuge.



WHETHER YOU ARE A PROFESSIONALLY TRAINED GEOSCIENTIST OR AN AMATEUR COLLECTOR OF THESE INORGANIC SPECIMENS, MINNESOTA HAS MUCH TO OFFER AS LONG AS YOU KNOW WHERE TO LOOK.



(Left) Minnesota's state gemstone is the beautiful Lake Superior agate, designated in 1969.

(Right) In 2021, the Science Museum of Minnesota successfully led the effort to name a state fossil for Minnesota—the Giant Beaver.

Image courtesy Science Museum of Minnesota

National parks and scenic trails

Minnesota is home to 140,000 acres of national parklands managed by the National Park Service (NPS), including five national parks and the Minnesota segment of the North Country National Scenic Trail.²⁷ Recreational and educational collections of geological specimens (fossils and rocks) are both prohibited within these bounds.²⁸ The NPS, however, encourages scientific research into these geological resources by reputable scientific and educational institutions as well as state or federal agencies, provided that such research-based collection would neither damage other natural or cultural resources nor adversely affect environmental or scenic values, and the subject specimen is not readily available elsewhere.²⁹ If you are a geologist or paleontologist, you may apply for a specimen collection permit through the National Park Service Research Permit and Reporting System (RPRS).³⁰

COLLECTION ON MINNESOTA'S STATE LANDS AND REGIONAL/CITY PARKS

The Minnesota Department of Natural Resources (DNR) manages 5.6 million acres of state lands, the majority of which are forested lands (4.2 million acres). Other lands mainly include 1.3 million acres of wildlife management areas, 66 state parks, 166 scientific and natural areas, and 700 aquatic management areas. In general, the DNR may issue permits to allow “scientists, educators, natural resource professionals and the public” to conduct scientific research on Minnesota lands and natural resources.³¹

State parks and forest recreational areas

Minnesota's state parks are created to preserve and perpetuate for future generations the features and resources that existed prior to settlement and other significant changes present today.³² Consistent with this mission, Minnesota's state parks and forest recreational areas generally prohibit recreational collection of rocks and fossils.³³ Collectors for scientific and educational purposes should seek the written permission of the state's DNR commissioner.³⁴ Rockhounding and fossil hunting for non-commercial use are allowed in one particular state park—Hill Annex Mine State Park in Itasca County—but watch out for posted signs that specify certain areas are off-limits.³⁵

Other major types of state lands

State forests' day-use areas permit “recreational use of the forest in its natural state,” which includes “interpretation [of nature] and nature observation.”³⁶ Non-commercial collection of its inorganic resources is not specifically provided for in the statute, but the DNR does review proposals for scientific and educational collection and issues permits on a case-by-case basis.³⁷ Minnesota's wildlife management areas, such as the Lieuna State

Wildlife Management Area north of Duluth, are established to protect lands and waters that have a high potential for wildlife production.³⁸ Recreational collection is generally not permitted in these areas, but research-based collection is. The state's aquatic management areas are established to protect, develop, and manage Minnesota's various waterbodies and adjacent wetlands and lands.³⁹ Many such areas exist in the form of state easements on private lands, and any types of collection would be subject to the permission of the private landowner.

Regional and city parks

The collection of geological and paleontological specimens in regional and city parks is subject to the rules of the counties or municipalities that manage these parks. For instance, Dakota County's ordinance contains a blanket prohibition of the intentional removal, alteration, or destruction of soil, mineral, or other natural resources within its parks, including the expansive Lebanon Hills Regional Park in the south metro.⁴⁰ Some other local authorities may have more elastic rules. For example, right on our doorstep, the City of St. Paul offers a wealth of geological wonders—the Decorah Shale geologic formation contains abundant fossils.⁴¹ The best place to observe the Decorah Shale is at St. Paul's Lilydale Regional Park, where one can also view at close range the nearby St. Peter Sandstone and Platteville Limestone formations.⁴² Lilydale Regional Park at one point issued fossil hunting permits for casual collectors but that program has been on hold for some time.⁴³ The City of St. Paul principally prohibits the intentional digging and removal of any natural resource (including stones) from its park system without prior permission.⁴⁴ Despite the general ban, collectors of geological and paleontological specimens for scientific and educational purposes can still seek permits by submitting case-specific written requests to the director of St. Paul's park system.⁴⁵

DESIGNATING A STATE FOSSIL, MINERAL, ROCK, OR STONE

Until 2021, Minnesota was one of just seven U.S. states without an official state fossil.⁴⁶ In 1988, the Giant Beaver almost made the cut through proposed legislation, but that initiative ultimately failed.⁴⁷ In 2021, the Science Museum of Minnesota successfully led the effort to name a state fossil for Minnesota, and this time the Giant Beaver emerged triumphant. It is being submitted by the museum to the Minnesota Legislature to obtain official state fossil status.⁴⁸ Minnesota's state gemstone is the beautiful Lake Superior agate, designated in 1969,⁴⁹ but the state has yet to designate a state mineral, rock, or stone.⁵⁰ If you are interested in filling in these blanks for our state, please contact elected representatives and ask them to introduce a bill proposing designations. ▲

NOTES

¹ Like Montana, where the events described here actually occurred, Minnesota also recognizes severance of mineral rights from surface ownership. See Minnesota Department of Natural Resources, Division of Lands and Minerals, *Mineral Rights Ownership in Minnesota* at 1-2. But Minnesota's courts have not been presented with a similar fossil v. mineral question yet.

² *Murray v. BEJ Minerals, LLC*, 464 P.3d 80 (Mont. 2020). This case began in Montana state court, and was then removed to the District of Montana on the basis of diversity jurisdiction. The federal trial court granted summary judgment, holding that dinosaur fossils were not "minerals" under mineral deed. The mineral rights holder appealed to the 9th Circuit, which certified the particular question "whether dinosaur fossils constituted 'minerals' for purpose of mineral reservation" to be answered by the Supreme Court of Montana.

³ Richard W. Ojakangas, *Roadside Geology of Minnesota*, at 5 (2009).

⁴ For word economy, this article refers to rocks and minerals collectively as rocks. Geologically speaking, rocks and minerals are different—a mineral is a naturally occurring homogeneous solid composed of a single inorganic element or compound. A rock is an aggregate of one or more minerals. See U.S. Department of the Interior, FAQs https://www.usgs.gov/faqs/what-difference-between-a-rock-and-a-mineral?qt-news_science_products=0#qt-news_science_products; see also <https://www.nps.gov/subjects/geology/minerals.htm> (last accessed 8/2/2021).

⁵ *Black Hills Inst. of Geological Research v. S. Dakota Sch. of Mines & Tech.*, 12 F.3d 737, 742 (8th Cir. 1993).

⁶ Timothy J. Witt, J.D., *Legal Aspects of Rock, Mineral, and Fossil Collecting*, <https://geology.com/minerals/legal-aspects-of-rock-collecting/> (last accessed 8/2/2021).

⁷ Minnesota Department of Natural Resources, Public Lands Summary (v. 1.4, 6/27/2019).

⁸ Congressional Research Service, *Federal Land Ownership: Overview and Data*, at 10 (updated 2/21/2020).

⁹ See *supra* n. 7.

¹⁰ See *supra* n. 8.

¹¹ See Robert W. Malmsheimer, Alisa S.H. Hilfinger, *In Search of a Paleontological Resources Policy for Federal Lands*, 43 Nat. Resources J. 587, 592-98 (2003).

¹² 16 U.S.C. §470aaa (1) (2021).

¹³ 16 U.S.C. §470aaa (4).

¹⁴ 16 U.S.C. §470bb (1).

¹⁵ 25 U.S.C.A. §3001(3).

¹⁶ 16 U.S.C. §470aaa (4)(A)-(B).

¹⁷ 36 C.F.R. §291.3(e).

¹⁸ *Paleontology, Traces of Past Life*, Forest Service (FS-1058, Oct. 2015).

¹⁹ 16 U.S.C. §470aaa-3 (b)(2).

²⁰ 36 C.F.R. §228.62(d). See also Rockhounding Guide, Forest Service (FS-1091, June 2017).

²¹ 36 C.F.R. §228.62(e).

²² 36 C.F.R. §228.62(d)(2).

²³ 36 C.F.R. §228.62(d).

²⁴ U.S. Fish and Wildlife Service, Historic Preservation, (<https://www.fws.gov/historicPreservation/crp/index.html>) (last accessed 8/14/2021).

²⁵ 50 C.F.R. §27.63.

²⁶ 50 C.F.R. §36.31(b).

²⁷ See National Park Service, Minnesota, (<https://www.nps.gov/state/mn/index.htm>) (last accessed 8-15-2021).

²⁸ 36 C.F.R. §2.5(a).

²⁹ See 36 C.F.R. §2.5(b).

³⁰ U.S. Department of the Interior, RPRS Portal (<https://irma.nps.gov/RPRS/>) (last accessed 8-2-2021).

³¹ DNR Permits, <https://www.dnr.state.mn.us/permits/index.html> (last accessed 8/15/2021).

³² Minn. Stat. §86A.05, subd. 2.

³³ Minn. R. 6100.0900, Subp. 1.

³⁴ *Id.* See also Research in Minnesota State Parks, (https://www.dnr.state.mn.us/parks_trails/research.html) (last accessed 8/15/2021).

³⁵ Minn. R. 6100.0900, Subp. 2.(C).

³⁶ Minn. Stat. §86A.05, subd. 7(b)(1).

³⁷ DNR, Scientific Research (<https://www.dnr.state.mn.us/permits/scientific-research.html>) (last accessed 8-15-2021).

³⁸ Minn. Stat. §86A.05, subd. 8.

³⁹ Minn. Stat. §86A.05, subd. 14.

⁴⁰ Dakota County Ordinance No. 107, Park Ordinance, Ch. V. Sec. B.1.

⁴¹ See *supra* n. 8, at 279.

⁴² J. Mossler and S. Benson, University of Minnesota, *Minnesota Geological Survey: Minnesota at a Glance, Fossil Collecting in the Twin Cities Area* (1995; revised Mar. 1999; updated Aug. 2006), available at www.geo.umn.edu/mgs.

⁴³ Currently, Lilydale is not issuing fossil hunting permits. See St. Paul Minnesota Lilydale Regional Park, <https://www.stpaul.gov/facilities/lilydale-regional-park> (last accessed 8/15/2021).

⁴⁴ See City of St. Paul Parks and Recreation Rules and Regulations, Ch. 1., Sec. 3 & Ch. 4., Sec. 13 (c), (d).

⁴⁵ Telephonic inquiry with the City of St. Paul Permit Office on 8/16/2021.

⁴⁶ Science Museum of Minnesota State Fossil Campaign, <https://new.smm.org/dino-days/mn-state-fossil> (last accessed 8/2/2021).

⁴⁷ *Minnesota State Symbols—Unofficial, Proposed, or Face-tious*, Compiled by the Minnesota Legislative Reference Library, <https://www.leg.mn.gov/leg/unsym> (last accessed 8/2/2021).

⁴⁸ Alexandria Simon, *Giant Beaver Edges out Competition to Become Minnesota's State Fossil*, <https://www.kare11.com/article/news/local/giant-beaver-minnesota-state-fossil-science-museum/89-84a4ada3-db88-4292-8290-bd460874b-cf8> (last accessed 10/16/2021).

⁴⁹ Minn. Stat. §1.147 (2021).

⁵⁰ Wang, Yanan, *The 50 State Gems & Minerals*, at 34 (2020).



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This article represents the view of the author only and does not reflect the view of the Minnesota Attorney General's Office.

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.

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JUDICIAL LAW

■ **Confrontation clause: Allowing police officer to testify via Zoom due to his covid-19 exposure did not violate the defendant's right to confrontation.** Appellant was charged with third-degree sale of a controlled substance following a controlled buy of methamphetamine. Three law enforcement officers were involved in the controlled buy. One agent was exposed to covid-19 four days before trial and was advised by public health officials to quarantine. The district court permitted the agent to testify at trial via live, remote, two-way video technology (Zoom). On appeal, appellant argues her 6th Amendment right to confront the witnesses against her were violated.

The court of appeals determines that the proper analysis for this confrontation clause question is that presented by the U.S. Supreme Court in *Maryland v. Craig*, 497 U.S. 836 (1990). In *Craig*, the Court held that the confrontation clause could be satisfied absent a physical, face-to-face confrontation “only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.” *Id.* at 850. The policy involved here is protecting public health.

While the court holds that the generalized concerns surrounding covid-19 are not sufficient on their own to dis-

pense with a defendant's right to confront a witness face-to-face, there is a particularized showing of necessity in this case. Here, the witness was exposed to someone who tested positive for covid-19 and advised to quarantine. If he were made to testify in person, the judge, other witnesses, jurors, and other court personnel would also be exposed.

To be reliable, the witness testifying remotely must be under oath and understand the seriousness of his or her testimony, must be subject to cross-examination, and the judge, jury, and defendant must be able to properly see and hear the witness. The agent's testimony was sufficiently reliable in this case. He was under oath, everyone was able to see and hear him testify, he was thoroughly cross-examined, and the defense was given the opportunity for re-cross. Thus, the court finds appellant's right to confront the special agent was not violated by the agent testifying at trial via Zoom. *State v. Tate*, A21-0359, __ N.W.2d __, 2022 WL 16575 (Minn. Ct. App. 1/3/2022).

■ **Harassment: Proof of intent to have a substantial adverse effect on safety, security, or privacy is not required for HRO based on dissemination of private sexual images.**

Appellant sought an HRO against respondent, her ex-husband, alleging respondent sent a private sexual image of appellant to her current significant other without her consent. After a hearing, the district court declined to issue

the HRO, finding respondent did not disseminate the photo with the intention of having a substantial adverse effect on appellant's safety, security, or privacy.

An HRO may be issued if the district court finds reasonable grounds to believe the respondent has engaged in harassment. Minn. Stat. §609.748, subd. 5(b). Harassment is defined as a single incident of physical or sexual assault, a single incident of harassment under §609.749, subd. 2(8), a single incident of nonconsensual dissemination of private sexual images under §617.261, or repeated incidents of intrusive or unwanted acts, words, or gestures *that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another*. Minn. Stat. §609.748, subd. 1(a)(1). The question on appeal is what language the qualifying phrase, italicized above, modifies.

The Minnesota Court of Appeals finds that, per the plain language of the statute and rules of grammar, the qualifier is specific to only the final type of conduct listed in the statute—that is, repeated incidents of intrusive or unwanted acts, words, or gestures. This interpretation is supported by §609.748's reference to §617.261, the statute criminalizing nonconsensual dissemination of private sexual images, which also does not require an intent to harass. Thus, the court holds that, when an HRO is sought based on the nonconsensual dissemination of private sexual

images, the petitioner does not need to show that the dissemination was done with the intent of having a substantial adverse effect on the safety, security, or privacy of another. As the district court denied the HRO based on an erroneous interpretation of the law, the case is reversed and remanded. *Borth v. Borth*, A21-0571, __ N.W.2d __, 2022 WL 90612 (Minn. Ct. App. 1/10/2022).



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Employment & Labor Law

JUDICIAL LAW

■ **Disability discrimination; no disability found.** An applicant for a job lost his disability discrimination claim after he was not hired following a conditional employment offer. The Minnesota Court of Appeals affirmed a lower court ruling that the claimant's alleged alcoholism did not constitute a cognizable "disability" under the state Human Rights Act. *Johanning v. Summit Orthopedics, Ltd.*, 2021 WL 5872664 (Minn. Ct. App. 12/13/2021) (unpublished).

■ **Breach of warranty; claim not viable in employment law.** Dismissal of an employment law claim by an employee in a diversity action prompted dismissing the balance of the lawsuit alleging breach of implied warranty of good faith. The 8th Circuit Court of Appeals affirmed summary judgment on grounds that the remaining breach claim was not recognized under state law. *Mastin v. Navistar, Inc.*, 2022 WL

130006 (Minn. Ct. App. 01/14/2022) (unpublished).

■ **Unemployment compensation; three quitters lose, one gets remand, and one wins.** A trio of employees who resigned their jobs near the end of last year lost their claims for unemployment compensation benefits in decisions rendered by the Minnesota Court of Appeals; one obtained a remand; and another prevailed.

An employee who quit after her medical leave of absence expired was denied benefits because she expressly said she quit and did not seek an extension of her leave.

Strohmayer v. A & E Care Services, 2021 WL 5764233 (Minn. Ct. App. 12/06/2021) (unpublished).

An employee who quit after 16 days of work because of dissatisfaction with his job and lack of payment was denied benefits. A "reasonable" employee in his situation would not have quit under these circumstances.

Holly v. Cedarbrook Builders, LLC, 2021 WL 5442549 (Minn. Ct. App. 11/22/2021) (unpublished).

An employee who quit because he believed the employer was not complying with covid-19 safety requirements at the workplace was denied benefits. The employee was not adversely affected by the claimed deviations because he was working remotely from home. *Olson v. Schneiderman's Furniture, Inc.*, 2021 WL 5872277 (Minn. Ct. App. 12/13/2021) (unpublished).

The denial of benefits to an employee who resigned without requesting an accommodation to seek treatment for chemical dependency was remanded. The appellate court remanded the decision by an unemployment law judge (ULJ) because the ULJ did not adequately assist the *pro se* applicant in reveal-

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ing the record as to whether an accommodation was sought before the employee quit. *Gates v. Advanced Web Techs., Inc.*, 2022 WL 90221 (Minn. Ct. App. 01/10/2022) (unpublished).

But an employee was granted benefits because he had “good reason” to resign caused by the employer when a change in his job requirements resulted in having to undergo a new 120-mile daily round trip commute, taking an additional 12-20 hours of uncompensated time. *Sirek v. NW Respiratory Services, LLC*, 2021 WL 5441808 (Minn. Ct. App. 11/22/2021) (unpublished).

■ **Unemployment compensation; misconduct bars benefits.** An employee was denied unemployment compensation benefit due to numerous unauthorized absences from work. The appellate court also rejected the contention that the unemployment law judge erred in not issuing requested subpoenas. *Williams v. ME Savage, Inc.*, 2021 WL 5872495 (Minn. Ct. App. 12/13/2021) (unpublished).



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Environmental Law JUDICIAL LAW

■ **MN Court of Appeals remands PolyMet NPDES/SDS permit for Cty of Maui “functional-equivalent” analysis; affirms on all other grounds.** The Minnesota Court of Appeals, in an unpublished January opinion, affirmed in part, reversed in part, and remanded the National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) permit issued by the Minnesota Pollution

Control Agency (MPCA) for a new copper mining project in St Louis County, MN, proposed by PolyMet Mining, Inc.

In January 2019, several environmental groups and the Fond du Lac Band of Lake Superior Chippewa challenged the permit to the court of appeals. Among other things, appellants alleged that MPCA had followed irregular and unlawful procedures by pursuing and entering into an agreement by which the U.S. Environmental Protection Agency (EPA) would not submit written comments on the permit during the public-comment period but would read the proposed comments to MPCA staff in a conference call. In May 2019, the court of appeals granted a motion by one of the appellants to transfer the case to the district court solely for the purpose of examining the alleged unlawful procedures. The district court determined that while MPCA had followed several procedural irregularities (related to a failure to preserve evidence), the agency’s other conduct, including MPCA’s efforts to persuade the EPA not to submit written comments during the public comment period, were not procedurally improper.

In reviewing the district court’s decision, the court of appeals determined that it did not need to decide whether the challenged procedures were unlawful because appellants had not demonstrated that the procedures prejudiced their substantial rights. For example, the court noted that MPCA’s actions did not prevent appellants from submitting comments on the permit, and even if EPA had submitted comments during the public comment period, they likely would have come toward the end of the comment period such that appellants could not have considered EPA’s comments in

drafting their own comments. Plus, EPA did communicate its comments to MPCA. Even though the court rejected appellants’ procedural challenges, the court did note that “[t]he procedures employed by the PCA in this matter are contrary to some of the purposes of MAPA: ‘to increase public accountability of administrative agencies’ and ‘to increase public access to governmental information.’”

The court of appeals opinion also evaluated appellants’ other arguments challenging the permit, which included but were not limited to: (a) MPCA erred by not regulating seepage discharges to groundwater from the project’s proposed tailings basin under the NPDES portion of the permit, making the discharges subject to Clean Water Act (CWA) permitting requirements; (b) MPCA should have included water-quality-based effluent limits (WQBELs) in the permit; (c) MPCA did not follow CWA requirements to ensure the permit will not violate tribal water quality standards, *see* 40 CFR §122.4(d); and (d) MPCA wrongly denied one appellant’s request for a contested case hearing on the permit. The court of appeals affirmed MPCA on all issues except one: groundwater. This was because a decision of the U.S. Supreme Court issued after MPCA issued the permit, *County of Maui v. Hawaii Wildlife Fund* (140 S. Ct. 1462, (2020)), established a new standard for when discharges to groundwater are subject to NPDES permitting under the CWA. The high court clarified that the CWA applies to discharges of pollutants from a point source to groundwater, if the discharge “is the functional equivalent of a direct discharge” to navigable waters. Accordingly, the court of appeals reversed MPCA on this issue and remanded to the agency with instructions to conduct

the “functional-equivalence” analysis required by *Maui*. *In re Contested Case Hearing Requests & Issuance of Nat’l Pollutant Discharge Elimination Sys.*, Nos. A19-0112, A19-0118, A19-0124, A20-1271, A20-1380, A20-1385, 2022 Minn. App. Unpub. LEXIS 53 (1/24/2022).

■ **Minnesota mineral lease updates.** Two recent decisions, at both the state and federal levels, have impacted the future of mining in northern Minnesota. At the federal level, the U.S. Department of Interior (DOI) announced on 1/25/2022 that it was canceling two hardrock mineral leases held by Twin Metals Minnesota. Both Twin Metals leases were adjacent to the Boundary Waters Canoe Area Wilderness (BWCAW). At the state level, a Ramsey County court judge upheld the determination by the Minnesota Department of Natural Resources (DNR) to terminate mineral leases held by Mesabi Metallics. The Mesabi Metallics leases are located near Nashwauk, Minnesota.

Twin Metals: The leases that Twin Metals sought to renew were initially issued in 1966. Although no mining production had actually ever taken place under the leases, Twin Metals sought to renew them in 2016 under the Obama administration. In December 2016, the U.S. Forest Service (USFS) withheld consent to the renewal of the leases, leading to the Bureau of Land Management (BLM) denying renewal of the leases.

In December 2017, the Trump administration Department of the Interior (DOI) concluded that the BLM had erred in its 2016 determination to deny renewal of the leases. The DOI determined that the BLM lacked the power to grant or deny the lease renewals, instead finding that Twin Metals had a non-discretionary right to

renewal based on the terms of the 1966 leases. This reversal meant that the BLM and USFS would need to reconsider the lease renewal applications submitted by Twin Metals. Subsequently in 2018, the Twin Metals leases were approved for renewal, and Twin Metals was ultimately granted a 10-year extension.

On 1/25/2022, the Biden administration DOI announced it was canceling the Twin Metals leases. In canceling the leases, the DOI determined that the leases were improperly renewed in 2019 under the Trump administration. Specifically, the DOI pointed to three distinct issues with the renewal of the leases: (1) The customized lease forms utilized for Twin Metals included lease terms that departed from and altered the BLM's standard lease form and terms; (2) the BLM did not request nor obtain consent from the USFS prior to issuing the lease renewals; and (3) the environmental analysis used to inform lease renewal decisions under the National Environmental Policy Act (NEPA) was inadequate and failed to include a no-renewal, no-action alternative.

The future of the Twin Metals leases also faces another challenge, as the Biden administration has proposed a 20-year moratorium on new mining activity in an area spanning more than 225,000 acres of federal land near the BWCAW, an area that includes the proposed location of the Twin Metals leases. *Memorandum Opinion, M-37072*, "Authority to Cancel Improperly Renewed Twin Metals Mineral Leases and Withdrawal of M-37049, 'Reversal of M-37036, 'Twin Metals Minnesota Application to Renew Preference Right Leases (MNES-01352 and MNES-01353)'" (1/25/2022).

Mesabi Metallica's: The

Ramsey County District Court ruled in favor of the DNR in a lawsuit brought by Mesabi Metallica's Co., LLC, against the DNR regarding the DNR's termination of mineral leases held by Mesabi Metallica's. Ultimately, the court found that the DNR had properly terminated leases held by Mesabi Metallica's, and ordered Mesabi Metallica's to compensate the state of Minnesota \$17.5 million in past-due royalties associated with the leases.

The DNR had granted Mesabi Metallica's certain leasing and mining rights in conjunction with the construction of a taconite ore pellet plant in Nashwauk, Minnesota. The leases originally commenced in 2004, but went through various amendments over time, including a number of "master lease amendments" referred to as the "bankruptcy amendments," and further amendment in 2020 after Mesabi Metallica's struggled with multiple legal and financial delays. Under the terms of the 2020 amendment, in order for Mesabi Metallica's to continue with its project, it was required to procure and deposit, by 5/1/2021, financing in the amount of \$200 million. Mesabi Metallica's failed to procure the \$200 million in financing; thus, the 2020 amendment did not become effective.

Because the 2020 amendment did not become effective, the terms of previously agreed-to bankruptcy amendments were still in place, including, among other things, requirements that Mesabi complete the project by 12/31/2019 and make a minimum royalty payment to the state of Minnesota for the year 2020 in the amount of \$18 million by 1/1/2021.

The DNR determined that Mesabi Metallica's had not completed the project by 12/31/2019, nor had it made royalty payments in

WHEN PERFORMANCE COUNTS



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the amount of \$18 million; accordingly, DNR determined Mesabi Metallica was in default under the bankruptcy amendments. The DNR notified Mesabi Metallica of its defaults and provided Mesabi Metallica with 20 days to cure said defaults. Mesabi Metallica failed to cure the defaults, and on 5/26/2021, the leases terminated.

The court sided with the DNR and granted its motions for judgment on the pleadings and motion for summary judgment. Specifically, the court found that the terms of the 2020 amendment were clear and undisputable, and Mesabi Metallica's failure to comply with those terms led to the 2020 amendment being ineffective and, as a result, Mesabi Metallica being in default under the bankruptcy amendments. Due to this default, the court found that the DNR was within its right to terminate the leases. Further, the court found that because Mesabi failed to comply with the terms of the bankruptcy amendments, the DNR was entitled to a monetary judgment of \$17,516,940 for unpaid minimum royalties. *Mesabi Metallica Co., LLC, et. Al. v. Minnesota Dep't of Natural Resources*, 62-CV-21-3142.

ADMINISTRATIVE ACTION

■ **EPA announces enforcement of coal combustion residuals closure regulations.** In January the U.S. Environmental Protection Agency (EPA) announced it would begin enforcing its rules regulating the disposal of coal combustion residuals (CCR), previously published in 2015 and revised in 2020. Simultaneous to its press release, EPA published several proposed decisions on requests for extensions

to the current deadline for the closure of utilities with unlined CCR impoundments.

Coal combustion residuals, also referred to as coal ash, are the toxic byproducts of burning coal in coal-fired power plants, and they contain arsenic, lead, mercury, and other hazardous chemicals. Power plants largely dispose of CCR by collecting them into large surface impoundments or coal ash ponds. There are approximately 500 unlined CCR impoundments across the nation.

In 2015, EPA issued the first CCR rules, requiring that facilities with leaking and unlined coal ash impoundments must cease receiving CCR and begin to close down. In 2018, the Trump administration attempted to amend the 2015 CCR regulations, rolling back key features of the rules. However, in *Utility Solid Waste Activities Group v. EPA (USWAG)*, the District of Columbia Circuit Court of Appeals overturned certain provisions of the 2015 regulations and remanded some provisions back to EPA, requiring it to set even higher standards of protection. 901 F.3d 414 (D.C. Cir. 2018).

On 7/29/2020, EPA finalized their revisions to the CCR rules called, "A Holistic Approach to Closure Part A." 85 Fed. Reg. 53516 (8/28/2020). Part A, in accordance with *USWAG*, required utilities with unlined impoundments to retrofit or close by 4/11/2021, but allowed utilities to apply for an extension to the closure deadline. On 10/16/2020, EPA published Part B of the Holistic Approach to Closure. This part of the CCR rules established procedures to allow unlined impoundments to continue operating past the April 2021 closure deadline on a site-by-site basis.

Part A of the final rule gave until 11/30/2020 for utilities to submit demonstra-

tions for extensions of the closure deadline. Fifty-seven applications were submitted requesting deadline extensions, and on 1/11/2022, EPA announced that it had received and reviewed those applications. Of the 52 applications that were determined to be complete, EPA proposed determinations on four applications, of which three were proposed denials and one was proposed conditional approval. The proposed conditional approval required the utility to correct groundwater monitoring requirements, and the three proposed denials hinged on "several potential deficiencies with groundwater monitoring, cleanup, and closure activities."

The remaining determinations for closure extensions will be announced "as expeditiously as possible." The comment period for the current proposed determinations ended on 2/23/2022.

Finally, other highlights in EPA's announcement include the agency's notification to utilities which may have present possible issues that could impact human health and the environment, reminding them of their compliance obligations. EPA also announced it will be finalizing a federal permitting program for future disposal of coal ash and regulations for legacy coal ash impoundments, while also continuing to review state-level CCR program applications to ensure they meet federal regulatory standards.

Press Release, EPA: EPA Takes Key Steps to Protect Groundwater from Coal Ash Contamination (1/11/2022). <https://www.epa.gov/news-releases/epa-takes-key-steps-protect-groundwater-coal-ash-contamination/>; CCR Part A Implementation Determinations, EPA (1/25/2022), <https://www.epa.gov/coalash/coal-combustion-residuals-ccr-part-implementation/>.



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Federal Practice JUDICIAL LAW

■ **Colorado River abstention; stay; appellate jurisdiction; dissent.** The 8th Circuit dismissed an appeal from a stay entered by a district court pursuant to *Colorado River* abstention, finding that the stay was a non-appealable "wise-judicial-administration" ruling rather than a "surrender" of federal jurisdiction to a state court, and therefore was not a final order appealable under 28 U.S.C. §1291 or an appealable interlocutory collateral order.

Judge Colloton dissented, arguing that the stay was appealable because the state court could decide an "essential" part of the federal action that would be *res judicata* in the federal action. *Window World Int'l, LLC v. O'Toole*, 21 F.4th 1029 (8th Cir. 2022).

■ **28 U.S.C. §1367(c); remand; appellate jurisdiction.** Denying the plaintiffs' motion to dismiss an appeal from a 28 U.S.C. §1367(c) dismissal for lack of jurisdiction, the 8th Circuit held that the remand order was a reviewable final judgment "because it effectively put [the defendant] out of federal court," and that the appeal was not barred by 28 U.S.C. §1447(d). *In Re Cotter Corp. (N.S.L.)*, 22 F.4th 788 (8th Cir. 2022).

■ **ADA; masks in schools; most of preliminary injunction affirmed.** Agreeing with a district court that "mask

requirements are reasonable accommodations required by federal disability law,” the 8th Circuit rejected defendants’ multiple standing-related arguments and their argument that the plaintiffs were required to exhaust their remedies under the Individuals with Disabilities Act (IDEA), and found that the plaintiffs were entitled to a preliminary injunction, but that the injunction should be limited to schools (and school districts) the plaintiffs attend.

Judge Erickson dissented, arguing that the plaintiffs had failed to exhaust their options under IDEA, meaning that the preliminary injunction was “premature.” *ARC of Iowa v. Reynolds*, ___ F.4th ___ (8th Cir. 2022).

■ **Denial of motion for leave to file third amended complaint affirmed.** The 8th Circuit found that the plaintiff had “procedurally defaulted” on his request to file a third amended complaint when his initial request was a “passing mention” in his opposition to a motion to dismiss and his subsequent motion was untimely and did not include a supporting brief as the Local Rules required. *Anderson v. Bank of the West*, ___ F.4th ___ (8th Cir. 2022).

■ **Erie; preliminary injunction; no presumption of irreparable harm.** In November 2021, this column noted a decision by Judge Schiltz (*Moeschler v. Honkamp Krueger Fin. Servs., Inc.*, 2021 WL 4273481 (D. Minn. 9/21/2021)) finding that the inference of irreparable harm arising out of the breach of a restrictive covenant is a Minnesota procedural doctrine that does not apply in federal court.

More recently, denying the plaintiff’s motion for a temporary restraining order and expedited preliminary injunction, Judge Wright

joined Judge Schiltz in finding that because a preliminary injunction is procedural under *Erie*, the presumption of irreparable harm arising from the breach of a confidentiality agreement under Minnesota law does not apply in federal court. *Personal Wealth Partners, LLC v. Ryberg*, 2022 WL 15425 (D. Minn. 1/18/2022).

■ **28 U.S.C. § 1443(1); removal; eviction; remand; 28 U.S.C. § 1447(c); fees denied.** Where the defendants in a Dakota County eviction action removed the case under 28 U.S.C. § 1443(1) based on their federal defense and the plaintiff moved to remand, Judge Schiltz found that the defendant had “an adequate State remedy to protect their federal rights” and granted the plaintiff’s motion to remand.

In addition, while describing the question as “very close,” Judge Schiltz found that the defendants had an “objectively reasonable basis” for removal, and declined to award the plaintiff attorney’s fees pursuant to 28 U.S.C. § 1447(c). *Olson Prop. Invests. v. Alexander*, 2022 WL 179195 (D. Minn. 1/20/2022).

■ **Rooker-Feldman doctrine; motion to dismiss denied.** While ultimately dismissing all of the plaintiffs’ claims on other grounds, Judge Tostrud denied defendants’ motion to dismiss under *Rooker-Feldman*, finding that plaintiffs’ claims did not “invite or require rejection of the state courts’ judgments.” *Kvalvog v. Park Christian School, Inc.*, 2022 WL 119010 (D. Minn. 1/12/2022).

■ **Diversity jurisdiction; amount in controversy.** Denying a motion to dismiss a diversity action for an alleged failure to meet the \$75,000 amount-in-controversy requirement, Chief Judge Tunheim

treated the motion as a factual challenge to jurisdiction, considered the declarations submitted by the parties, and found that the amount in controversy was “established sufficient[ly] for diversity jurisdiction.” *Young v. Arthur J. Gallagher & Co.*, 2022 WL 37470 (D. Minn. 1/4/2022).

■ **Fed. R. Evid. 702; Daubert; motion to exclude expert denied.** Judge Wright denied the defendant’s motion to exclude the plaintiff’s expert in a whistleblower case, finding that the defendant’s arguments “implicated the weight and credibility” of the expert’s testimony “as opposed to the admissibility of his testimony.” *Carlson v. BNSF Rwy. Co.*, 2022 WL 37468 (1/4/2022).

■ **Fed. R. Civ. P. 26(a)(2) and 37(a)(1); motion to exclude expert’s testimony denied.** Denying the defendant’s motion to exclude an expert witness after considering: (1) the importance of the excluded material; (2) the party’s explanation for its failure to make a timely disclosure; (3) the potential prejudice that would arise from allowing the material to be used; and (4)

the availability of a continuance to cure any prejudice, Magistrate Judge Leung found that the plaintiff’s failure to produce a timely expert report was not “substantially justified,” but that any prejudice to the defendant could be cured by plaintiff’s counsel’s payment of certain deposition costs and attorney’s fees, and an amendment to the scheduling order. *Weiss v. Fed. Ins. Co.*, 2022 WL 35742 (D. Minn. 1/4/2022).

■ **Fed. R. Civ. P. 15(a)(2); L.R. 15.1(b); motion to amend complaint denied.** Dismissing plaintiffs’ complaint under Fed. R. Civ. P. 12(c) for lack of standing, Judge Montgomery denied plaintiffs’ motion for leave to amend their complaint where neither a proposed amended complaint nor a redline was filed along with that motion, finding that denial of the motion to amend was “appropriate” under the circumstances. *Ca-june v. Indep. Sch. Dist. 194*, 2022 WL 179517 (D. Minn. 1/19/2022).

■ **Untimely opposition to motion to dismiss rejected.** Where the plaintiff’s opposition to defendants’ motions

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to dismiss was originally due on 5/27/2021; the plaintiff obtained multiple extensions of that deadline, the last of which extended his filing deadline to 11/29/2021; and the plaintiff ultimately filed his opposition on 12/20/2021. Judge Frank found that the plaintiff's submission was "procedurally defective," found no "extraordinary circumstances" or "good cause," and "decline[d] to accept or consider the submission." *Garlin v. Sprinkler Fitters Local 417*, 2022 WL 219573 (D. Minn. 1/25/2022).

■ **Fed. R. Civ. P. 4; dismissal for failure to prosecute.**

After the plaintiff failed to serve the defendant within 120 days of filing and failed to respond to Magistrate Judge Leung's order to show cause why her claims should not be dismissed, Magistrate Judge Leung recommended that the action be dismissed without prejudice for failure to prosecute, and only then did the plaintiff claim that her attempts at service had been "stonewalled" by the defendant and that it would be "unjust" to require her to pay a second filing fee. Judge Schiltz dismissed the action without prejudice as an "appropriate consequence" for counsel's conduct. *Wiedersum v. First Reliance Standard Life Ins. Co.*, 2022 WL 102272 (D. Minn. 1/11/2022).

■ **28 U.S.C. 1292(b); certification denied.** While finding that the issue on which the defendant sought interlocutory appeal involved a controlling question of law and that there "may" be a substantial ground for difference of opinion, Judge Doty denied the request for certification where a trial would be required in any event, and "the litigation would be substantially the same." *Watkins Inc. v. McCormick & Co.*, 2022 WL 122315 (D. Minn. 1/13/2022).

■ **Unopposed motion to proceed anonymously granted.** Applying a 10-factor test developed by the 2nd and 11th Circuits, Magistrate Judge Bowbeer granted the plaintiff's unopposed motion to proceed anonymously in a case that alleges excessive force during her arrest while she was pregnant and subsequent delivery and labor. *S.A.A. v. Geisler*, 2022 WL 179198 (D. Minn. 1/20/2022).



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Immigration Law

JUDICIAL LAW

■ **Migrant protection protocols (MPP) ("Remain in Mexico"): The beat goes on.**

As previously reported in the December issue of *Bench & Bar*, DHS Secretary Mayorkas issued a second memorandum on 10/29/2021 terminating MPP and addressing, at the same time, issues raised by U.S. District Court Judge Matthew Kacsmaryk, Northern District of Texas, with the Secretary's earlier 6/1/2021 memorandum terminating MPP. In the 10/29/2021 memorandum, Secretary Mayorkas announced termination of MPP after finding the benefits were outweighed by the costs of the program, while noting that DHS would continue to comply with the district court's injunction until such time as is practicable, after a final judicial decision to vacate the injunction had been made. https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf

On 11/2/2021, in view of Secretary Mayorkas' 10/29/2021 memorandum terminating MPP, the administration asked the 5th Circuit Court of Appeals to

vacate the injunction requiring reimplementing of MPP. <https://www.courthousenews.com/biden-administration-makes-case-for-end-of-trump-immigration-program/>

On 12/13/2021, the 5th Circuit denied the request to vacate the injunction. While noting that the administration had indeed issued a second termination memorandum with an enhanced rationale for terminating MPP, it declared that it had not eliminated the issue of whether the first memorandum terminating MPP was in compliance with the Administrative Procedure Act. In view of that, the 5th Circuit argued, the injunction requiring MPP would stay in place. *Texas, et al. v. Biden, et al.*, No. 21-10806, *slip op.* (5th Circuit, 12/13/2021). <https://www.ca5.uscourts.gov/opinions/pub/21/21-10806-CV1.pdf>

On 12/29/2021, the Biden administration filed a writ of *certiorari* seeking Supreme Court review of the 5th Circuit's decision and requesting a decision this term. Key issues raised in this latest salvo are: 1) whether 8 U.S.C. §1225 requires DHS to continue implementing MPP when it states that the secretary of DHS "may" return noncitizens to Mexico to await their immigration proceedings; and 2) whether the 5th Circuit erred by concluding the DHS secretary's second memorandum terminating MPP had no legal effect. *Biden, et al. v. Texas, et al.*, No. 21-954 (2021). https://www.supremecourt.gov/DocketPDF/21/21-954/206810/20211229162636127_Biden%20v.%20Texas%20-%20Cert%20Petition.pdf

Per the terms of the injunction, the Biden administration continues its return of people to Mexico to await their immigration proceedings.

■ **Board of Immigration Appeals employed proper**

legal standard while undertaking "exceptional and extremely unusual hardship" analysis. The 8th Circuit Court of Appeals affirmed the Board of Immigration Appeals' denial of the petitioner's application for cancellation of removal, holding that the board conducted an "exceptional and extremely unusual hardship" analysis that was future-oriented, not focused solely on the current conditions of the petitioner's daughter. "While we sympathize with the respondent's children and we understand that the respondent's family will likely encounter difficulties in the respondent's absence, the Immigration Judge addressed these hardships and properly concluded that, considered in the aggregate, the hardships that the respondent's United States citizen children will face upon his removal to Mexico are not substantially beyond that which would ordinarily be expected from the removal of a family member." *Garcia-Ortiz v. Garland*, No. 20-3446, *slip op.* (8th Circuit, 12/17/2021). <https://ecf.ca8.uscourts.gov/opndir/21/12/203446P.pdf>

ADMINISTRATIVE ACTION

■ **In the name of public health: Title 42 expulsions at the border.** On 8/2/2021, the Centers for Disease Control (CDC) issued its third order continuing the policy of President Biden's predecessor, authorizing the expulsion of migrants from entry into the United States from Canada or Mexico, if they had arrived at or near the U.S. land and adjacent coastal borders. This could include those noncitizens not having proper travel documents, noncitizens whose entry is otherwise

contrary to law, and noncitizens who are apprehended at or near the border seeking to unlawfully enter the United States between ports of entry (POE).

In one point of divergence from the previous administration, however, the 8/2/2021 order made provision for exemption of unaccompanied noncitizen children. Nor does the order apply to the following: 1) U.S. citizens, U.S. nationals, and lawful permanent residents; 2) members of the armed forces of the United States and associated personnel, U.S. government employees or contractors on orders abroad, or their accompanying family members who are on their orders or are members of their household, subject to required assurances; 3) noncitizens who hold valid travel documents and arrive at a POE; 4) noncitizens in the visa waiver program who are not otherwise subject to travel restrictions and arrive at a POE; 5) noncitizens otherwise subject to this order who are permitted to enter the U.S. as part of a Department of Homeland Security (DHS)-approved process, where the process approved by DHS has been documented and shared with CDC, and includes appropriate covid-19 mitigation protocols, per CDC guidance; and 6) persons whom customs officers determine, with approval from a supervisor, should be excepted from this order based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests. DHS will consult with CDC regarding the standards for such exceptions to help ensure consistency with current CDC guidance and public health recommendations.

86 Fed. Register, 42828-41 (8/5/2021). <https://www.gov-info.gov/content/pkg/FR-2021-08-05/pdf/2021-16856.pdf>

On 2/3/2022, following a review, the CDC extended the order for an additional 60 days. <https://www.lexis-nexis.com/LegalNewsRoom/immigration/b/insidenews/posts/cdc-keeps-title-42-expulsions-in-place>

■ **H-1B cap initial registration period commences on March 1.** U.S. Citizenship and Immigration Services (USCIS) announced on 1/28/2022 that the initial registration period for the fiscal year 2023 H-1B cap will commence at noon Eastern on 3/1/2022 and run through noon Eastern on 3/18/2022. Prospective petitioners and representatives will have the opportunity to complete and submit their registrations through the USCIS H-1B registration system. If enough registrations are received by 3/18/2022, USCIS will randomly select registrations and then send select notifications through users' myUSCIS online accounts. Those selected through this process should expect to be notified by 3/31/2022. **News Release.** <https://www.uscis.gov/newsroom/alerts/fy-2023-h-1b-cap-initial-registration-period-opens-on-march-1>



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Indian Law JUDICIAL LAW

■ **Public Law 280 distinguishes Minnesota state criminal jurisdiction from that addressed in the *McGirt v. Oklahoma* Supreme Court case.** In a second postconviction petition following the appellant's conviction for first-degree premeditated murder, the appellant argued that the state court lacked subject matter jurisdiction because he is an enrolled member

of the Fond du Lac Band of Lake Superior Chippewa and the murder took place on the Fond du Lac Reservation. The Minnesota Supreme Court rejected the appellant's argument that the recent ruling in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) applied, explaining that Public Law 280 granted Minnesota criminal jurisdiction within Indian country—exclusive of the Red Lake Reservation—a law that distinguishes criminal jurisdiction in Minnesota from that in Oklahoma. ***Martin v. State***, __ N.W.2d __, 2022 WL 164345 (Minn. 2022).

■ **Tribal police officers acting under color of tribal law not subject to §1983 action in state court.** An enrolled member of the White Earth Band of Ojibwe sued two White Earth Tribal Police Department Officers under 42 U.S.C. §1983 for damages stemming from a traffic stop that occurred on-reservation. The plaintiff argued that the cross-deputization of the officers created a doubt as to whether they were acting under color of state law, as required for the §1983 claim. The district court held that the officers'

actions in wearing tribal police uniforms, driving marked tribal police department vehicles, issuing a citation for violation of tribal law, and verbally informing the plaintiff that they were tribal officers and the citation was for tribal court was enough to establish they were acting under the color of tribal, not state, law. ***Howard v. Weidemann***, No. 20-cv-1004, 2021 WL 6063630 (D. Minn. 12/22/2021).



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Intellectual Property JUDICIAL LAW

■ **Patents: Allegations insufficient to change inventorship.** Judge Wright recently granted defendant LiquidCool Solutions, Inc.'s motion to dismiss plaintiff Iceotope Group Limited's claims that the inventorship on two United States patents owned by LiquidCool were incorrect and needed to be corrected. Iceotope sued LiquidCool in December 2020 alleging that the inven-

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tions claimed in LiquidCool's patents were invented by Iceotope and described in Iceotope's patents, patent applications, and whitepapers. Iceotope sought complete substitution of inventors on LiquidCool's patents under 35 U.S.C. §256. Section 256 permits "complete substitution of inventors" where a patent erroneously names an individual as an inventor who is not an inventor (misjoinder) and erroneously omits an inventor (nonjoinder). To allege a claim under §256, a plaintiff must allege facts sufficient to plausibly show that (1) the erroneously omitted inventor conceived the invention claimed in the patent and (2) the named inventor on the patent did not conceive the invention. With respect to Iceotope as inventor, the court found Iceotope alleged the inventions claimed in the LiquidCool Patents were conceived by five Iceotope employees but failed to allege facts sufficient to support the conclusory allegation. With respect to LiquidCool as not the inventor, the court found Iceotope alleged that the inventions claimed in the LiquidCool Patents were actually invented by Iceotope, not by LiquidCool, but failed to allege facts sufficient to support the conclusory allegation. Iceotope's claims for complete substitution failed. In the alternative, Iceotope sought to have its five employees added as joint inventors arguing that they were erroneously omitted. To be added as a joint inventor, the alleged joint inventor must demonstrate that his or her labors were conjoined with the efforts of the named inventors. The court found Iceotope's complaint lacked any allegations related to collaboration. Accordingly, the court dismissed Iceotope's complaint without prejudice. ***Iceotope Grp. Ltd. v. LiquidCool Sols., Inc.***, No. 20-cv-2644 (WMW/JFD),

2022 U.S. Dist. LEXIS 12426 (D. Minn. 1/24/2022).

■ **Trademark: Preliminary injunction denied.** Judge Brasel recently denied Plaintiff WRB, Inc.'s (WRB) motion for preliminary injunction against DAMM, LLC and its owners. The dispute arose over a German drinking game involving striking nails with a hammer into a stump of wood. WRB trademarked its version under the name "Hammer-Schlagen." WRB also registered the trade dress. WRB offers a service for use at Oktoberfest festivals while DAMM sells an at-home version of the game called "Minneschlagen." WRB sued DAMM for trademark and trade dress infringement and moved for a preliminary injunction to enjoin DAMM and its owners from using the mark "Hammer-Schlagen" and the trade dress "Hammer-Schlagen" stump, cross-peen hammer, and nails, or similar marks that may confuse consumers under federal trademark infringement law.

To succeed on its claims, WRB had to show a property interest in the marks and a likelihood of consumer confusion. Because WRB registered marks for "Hammer-Schlagen" and the stump, cross-peen hammer, and nails, it established *prima facie* evidence that it owned protectable marks for each. DAMM, however, presented sufficient evidence that consumers use the marks generically to rebut the *prima facie* case. WRB's contention that its mark is incontestable does not insulate it from potentially being cancelled if the mark is later found to be generic. The court also found that WRB failed to show DAMM's use of the marks was likely to cause confusion in the marketplace. DAMM presented evidence sufficient to raise a question of fact about whether consumers used "Hammer-Schlagen"

or the stump for a secondary meaning. WRB failed to show "Minneschlagen" and "Hammer-Schlagen" are confusingly similar. The Court found WRB and DAMM operate in distinct markets, a lack of evidence that DAMM intended to confuse consumers, and a lack of evidence of actual confusion. Because WRB failed to show a likelihood of success on the merits, it was not entitled to the rebuttable presumption of irreparable harm, which was amended into the Lanham Act in 2020. Accordingly, the court denied the motion for preliminary injunction. ***WRB, Inc. v. DAMM, LLC***, No. 21-CV-1899 (NEB/TNL), 2022 U.S. Dist. LEXIS 7879 (D. Minn. 1/14/2022).



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Real Property JUDICIAL LAW

■ **Accord and satisfaction met when contractor cashed check marked "final payment," thus barring contractor's breach of contract claim against homeowner.** Homeowners hired a contractor to perform various work on their property, paying 50% down. After receiving an invoice from the contractor for the completed work, the homeowners wrote a letter to the contractor outlining their issues with incomplete, unacceptable work and detailing water damage caused to the property during the course of the contractor's work. The homeowners subtracted various amounts from the invoice, indicating a "final payment" amount in the letter and enclosing a check with a memo line containing the words "final payment." The contractor did not object to the letter, cashed the check,

and eventually sued the homeowners for the difference. The district court granted the homeowners' summary judgment motion, finding that the contractor's claims were barred by the doctrine of satisfaction of accord. The court of appeals affirmed, holding that the homeowners' letter contained a conspicuous statement that the tendered check was full satisfaction of the debt. The appellate court also confirmed that accord and satisfaction is not a contract modification, but a new contract discharging all rights and duties under a previous contract, thus rejecting the contractor's argument that the underlying contract required modifications be in a writing approved by both parties. ***Detailed by Design LLC v. Langer***, A21-0879 (Minn. Ct. App. 1/10/2022) (unpublished).

■ **Interpretation of a common interest community's restrictive covenants.** Property owners within a common interest community (CIC) constructed a 1600-square-foot garage after the CIC rejected the property owner's plans for the garage, asserting that the garage violated the CIC's restrictive covenants. The relevant restrictive covenants of the CIC included (1) "[a]ll such outbuildings shall have a maximum size of 1200 square feet (as per Wabasha County zoning restriction)," and (2) that no construction can begin unless the property owner first submits building "plans to Declarants and obtain[s] prior written approval of the plans from Declarants." The zoning restriction referred to in the first restrictive covenant had been repealed by the county. The first covenant was affirmed to be ambiguous because the provision could mean that no garage could be built on a property that exceeded 1200 square feet, or it could mean

that the maximum size of an outbuilding could not exceed the applicable limit set by the county's zoning ordinance.

The appellate court reversed the district court's grant of summary judgment in favor of the property owner on whether they violated this covenant because the extrinsic evidence in the record did not "conclusively" demonstrate the drafter's intent. The second restrictive covenant was unambiguous because the term "declarant" was expressly defined as the original developer and there was no language making the CIC the "declarant" for purposes of the restrictive covenants. And because the property owners obtained the original developer's permission for the garage, they did not violate that covenant. Thus, the court of appeals remanded the case for additional proceedings to determine the proper interpretation of the first covenant as a matter for the fact finder. *Windcliffe Ass'n, Inc. v. Breyfogle*, A21-0700 (Minn. Ct. App. 1/18/2022) (unpublished).



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Tax Law JUDICIAL LAW

■ **Tax court lacks jurisdiction to hear appeals if whistleblower's petition is rejected.** Mandy Mobley Li filed an application to receive a monetary whistleblower award for supplying the IRS with actionable tax violation information. The Whistleblower Office reviewed the application, and it concluded that Li's allegations were "speculative and/or did not provide specific or credible information regarding tax underpayments or violations of

internal revenue laws," making Li ineligible for an award. The Whistleblower Office informed Li of its decision via a letter, which also informed Ms. Li that she could appeal the decision to the United States Tax Court. Ms. Li appealed to the tax court, which found that the Whistleblower Office adequately performed its evaluative function in reviewing Li's application and did not abuse its discretion by rejecting her application for an award.

After the tax court denied Ms. Li's motion for reconsideration, she appealed to the D.C. Circuit Court of Appeals. The D.C. Circuit did not reach the merits of the dispute; instead, noting that "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction," the court determined that the tax court lacked jurisdiction to hear Li's appeal. The court explained that the whistleblower statute gives the tax court exclusive jurisdiction over only a "determination regarding an award" under certain statutory subsections. A threshold rejection of a whistleblower award, such as the rejection Ms. Li received, does not constitute such an award determination. In fact, the court continued, "there is no determination as to an award under [these] subsections... whatsoever.... [A]n award determination by the IRS arises only when the IRS proceeds with any administrative or judicial action... A threshold rejection... means the IRS is not proceeding with an action against the target taxpayer. Therefore, there is no award determination, negative or otherwise, and no jurisdiction for the Tax Court." The reviewing court had jurisdiction only to correct the jurisdiction defect, and after doing so, the court dismissed the appeal for lack

of subject matter jurisdiction and remanded to the tax court with instructions to do the same. *Li v. Comm'r*, 22 F.4th 1014, 1015 (D.C. Cir. 2022) (abrogating *Cooper v. Comm'r*, 135 T.C. 70 (2010) and *Lacey v. Comm'r*, 153 T.C. 146 (2019)).

■ **Individual income tax: Filing status clarified and various Schedule C deductions denied.** The taxpayer, an emergency room physician and would-be medical staffing entrepreneur, claimed numerous deductions for items such as a home office, commuting, continuing education, and other Schedule C expenses related to both his emergency medical practice and his staffing business. Nearly all the deductions were denied, though some were permitted in part. At trial, the Service raised a new issue and challenged the taxpayer's filing status. Since the commissioner raised the filing status issue for the first time at trial (and it was not raised in the original deficiency determination), the commissioner had the burden of proof as to that matter. The court first addressed the filing status issue. For tax year 2008 the taxpayer claimed

single filing status, and for tax year 2009 he claimed head of household filing status. The taxpayer was married in 2008, but he argued that since his wife was living abroad, he should be entitled to single status. The court disagreed. However, the taxpayer's status as a head of household for 2009 was deemed appropriate. Although the taxpayer was married at the close of the taxable year, for purposes of the head of household filing status, a taxpayer is not considered married if that person's spouse is a nonresident alien. The taxpayer testified that at the end of 2009 he was married but his wife, an alien, was not present in the United States. Because the commissioner provided no evidence to refute petitioner's testimony, the taxpayer prevailed on that issue. The court then turned to the Schedule C deductions. The claimed deductions were largely denied for failure to substantiate, though the court noted that many of the expenses would have been disallowed even if substantiated. For example, the taxpayer claimed a deduction for cost of goods sold, but the taxpayer's planned medical staffing business had

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not yet begun, so the expenses would have been denied since they were start-up expenses. The taxpayer's claimed home office deduction was denied in full. Penalties were upheld. *Elbasha v. Comm'r*, 123 T.C.M. (CCH) 1001 (T.C. 2022).

■ **Court clarifies meaning of "unavailable" in mandatory disclosure rules.** Petitioners CWI, Inc. and Camping World RV Sales, LLC filed property tax petitions alleging that the estimated market value of four subject properties for taxes payable in 2020 and 2021 exceeded their actual market value, and that the subject properties were unequally assessed. All four petitions describe the respective subject properties as income-producing.

Anoka County filed motions to dismiss the petitions, alleging petitioners failed to comply with the requirements of the mandatory disclosure rule relating to income-producing property. See Minn. Stat. §278.05, subd. 6 (2021). Petitioners contend their disclosures comply with requirements of the mandatory disclosure rule because they do not possess or maintain documents that are responsive to the mandatory disclosure rules.

A petitioner may avoid dismissal for failure to provide mandatory disclosures if the failure was due to the unavailability of the information at the time the information was due. Minn. Stat. §278.05, subd. 6(b)(1). The sole question in this case was whether petitioners complied with the requirements of the mandatory disclosure rule or may avoid dismissal because the failure to provide the information was due to its unavailability.

The parties disagreed over the meaning of the word "unavailability" for purposes of the mandatory disclosure rule. The county argued that the

information required was not unavailable because petitioners are the sole tenants with respect to the subject properties and by necessity possess the information required to comply with the mandatory disclosure rule. Further, the county contends that because petitioners are the sole tenants, they cannot in good faith "lack information regarding the name of the tenant operating the subject properties, the start and end dates of their own leases or their base rents under those leases, as well as the expenses incurred by the subject properties under those leases."

Petitioners argue, however, that the information is unavailable for two reasons. First, petitioners assert "they are only obliged to provide information they 'actually possess,'" and because "they d[id] not 'actually possess' the information," they did not violate the mandatory disclosure rule. Petitioners also argued that they did not have access to the information. That argument was supported by affidavits from the senior real estate asset manager for their parent entity, stating that petitioners do not "keep, maintain, or have access to the documents that are responsive to the mandatory disclosure requirements." The affiant further states that petitioners "do not 'keep any record of expenses directly associated with the operation of any real estate wherein the business operates as a tenant.'" Second, petitioners argue they are not required to create documents that are not kept in the ordinary course of business.

The court turned to the definition of unavailable, as well as the Supreme Court's interpretation of unavailable in *Wal-Mart Real Estate Bus. Tr. v. Cnty. of Anoka* (931 N.W.2d 382, 389 (Minn. 2019)), where the court rejected a petitioner's

argument that information is unavailable "simply because a petitioner does not actually possess it." "Rather, a petitioner must demonstrate a lack of access to the required information."

Concerning petitioners' obligation to *create* documents, the court interpreted the statute according to its plain meaning. Subdivision 6(b)(1) states that "[f]ailure to provide the information required in paragraph (a) shall result in the dismissal of the petition, unless (1) the failure to provide it was due to the unavailability of the information at the time the information was due." The court points out that the plain language of subdivision 6 does not refer to "*documents*." Rather, it requires a petitioner to provide *information* that it does have, regardless of the format. Accordingly, the court granted the county's motions to dismiss for all subject properties. *CWI, Inc v. Anoka Co.*, 2022 WL 287438, (MN Tax Court 1/27/2022).

■ **"Head of household" status requires qualifying children.** This matter involves two motions: Petitioner Kidane Shulbe moved to have the presiding judge removed for cause, citing procedural bias. Respondent Commissioner of Revenue moved for summary judgment on the merits of Mr. Shulbe's appeal of his individual income tax return for 2019, arguing that Mr. Shulbe is not entitled to claim: "(1) 'head of household' status; (2) the Minnesota Working Family Credit; or (3) the Minnesota Education Credit, as his two minor children were not 'qualifying children' under I.R.C. §32 (2018), and Minn. Stat. §§290.0671 and 290.0674 (2019)."

"A judge or judicial officer who has presided at a motion or other proceeding... may not be removed except upon

an affirmative showing that the judge or judicial officer is disqualified under the Code of Judicial Conduct." Minn. R. Civ. P. 63.03. "Although Rule 63.03 requires an 'affirmative showing' of bias,... case law advises that a 'judge should not try a case, even in the absence of bias, if circumstances have arisen which give a bona fide appearance of bias.'" *Olson v. Olson* (392 N.W.2d 338, 341 (Minn. App. 1986)).

Mr. Shulbe alleged that the presiding judge was biased and prejudiced based on three factors. First, Mr. Shulbe observed that the "court permitted the Commissioner to schedule motions *prior* to the court-ordered trial-ready date, thereby depriving him of a merit hearing on certain claims." But governing procedural rules allow parties to file motions to dismiss and motions for summary judgment prior to trial. See Minn. R. Civ. P. 12.

Second, Mr. Shulbe alleged that the commissioner and the tax court colluded to have a prior hearing cancelled under the guise that the commissioner was experiencing technical difficulties. But Mr. Shulbe showed no evidence of collusion, and the court found that the commissioner's failure to connect to the previously scheduled Zoom hearing did not support any allegation of bias. Finally, Mr. Shulbe alleged that the court was biased because it previously ruled against him. Prior adverse rulings, however, do not amount to bias. *Olson*, 392 N.W.2d at 341. Further, Mr. Shulbe had no "evidence rising to the level of an affirmative showing of bias, nor do the circumstances amount to 'a bona fide appearance of bias.'" As such, the court denied Mr. Shulbe's motion to remove.

Mr. Shulbe shared joint legal custody of his two minor

children pursuant to a district court order for judgment. The custody order indicates that Mr. Shulbe's parenting time is 10 nights per month, which totals to less than half the nights per year. Mr. Shulbe's children reside with their mother for more than half the year.

On 8/11/2020, the commissioner sent a notice to Mr. Shulbe that changed his filing status from "head of household" to "single" for standard deduction purposes. The order further disallowed the working family credit and the education credit that Mr. Shulbe claimed.

The commissioner argued that Mr. Shulbe incorrectly filed as "head of household." In 2019, the requirements to file as head of household included, "(1) that the taxpayer be unmarried (or considered unmarried) on the last day of the year; (2) that the taxpayer paid more than half of the cost of maintaining a home for the tax year; and (3) that a 'qualifying child' lived with the taxpayer for more than half of the tax year." See Minn. Stat. §290.06, subd. 2c(c) (2019); see also I.R.C. §2(b) (2018) definition of "qualifying child." Although Mr. Shulbe shared joint custody of his children with their mother, the children are not qualifying children for head of household status because the children reside with their mother for more than half the year.

Next, the commissioner argued that Mr. Shulbe was not allowed to claim either the Minnesota Working Family Credit or the Minnesota Education Credit because the child must be a qualifying child. The definition of qualifying child for the working family credit and the education credit is defined in I.R.C. §32(c)(3)(A) and also imposes the requirement that any such child must live with the parent for more than

half of the year.

Mr. Shulbe did not dispute that his children lived with their mother for more than half the year. Accordingly, Mr. Shulbe did not qualify as a head of household filer for tax year 2019, nor did he qualify for the Minnesota Working Family Credit, or the Minnesota Education Credit, and the court granted the commissioner's summary judgment motion. *Shulbe v. Comm'r of Revenue*, 2022 WL 164548, (MN Tax Court 1/13/2022).

LOOKING AHEAD

■ Circuit split on equitable tolling likely to be resolved.

The Supreme Court heard argument in January to determine "[w]hether the 30-day time limit to file a petition for review in the Tax Court of a notice of determination from the commissioner of internal revenue in 26 U.S.C. §6330(d)(1) is a jurisdictional requirement or a claim-processing rule subject to equitable tolling." Whether the statute bars a taxpayer who missed the deadline from asserting equitable tolling has split the circuits. In the case now at the Supreme Court, the 8th Circuit held that §6330(d)(1) is jurisdictional. *Boechler, P.C. v. Comm'r*, 967 F.3d 760, 764 (8th Cir. 2020), *certiorari granted* 142 S. Ct. 55 (2021). In so holding, the 8th Circuit agreed with a 2018 9th Circuit decision, *Duggan v. Comm'r*, 879 F.3d 1029 (9th Cir. 2018). The DC Circuit, in contrast, permitted equitable tolling in a case from 2019: *Myers v. Comm'r*, 928 F.3d 1025 (D.C. Cir. 2019).



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Torts & Insurance JUDICIAL LAW

■ Legal malpractice; expert affidavit requirements apply to breach of fiduciary duty claims.

Plaintiff claimed that defendant, his alleged attorney, breached his fiduciary duties by failing to disclose his participation in a lease agreement involving plaintiff's home and place of business. The district court dismissed plaintiff's breach-of-fiduciary-duty claim on summary judgment, finding plaintiff failed to show that defendant took unfair advantage of their professional relationship or that the terms of their dealings were unfair. The court of appeals affirmed on different grounds, concluding that summary judgment was appropriate because plaintiff did not provide the expert-disclosure affidavits required by section 544.42.

The Minnesota Supreme Court reversed and remanded. The Court held that section 544.42, which requires that plaintiffs provide two expert-disclosure affidavits "in an action against a professional alleging negligence or mal-

practice in rendering a professional service where expert testimony is to be used by a party to establish a *prima facie* case," "can apply to breach-of-fiduciary-duty claims against attorneys if the statute's other requirements are met." The Court interpreted the statute's phrase involving actions for "negligence or malpractice" against an attorney to encompass claims for breach of fiduciary duty in addition to claims for negligence and breach of contract. The Court went on to state: "Generally, the 'duty and breach elements of malpractice... must be established by expert testimony... [but] [a]n exception applies... 'where the conduct can be evaluated adequately by a jury in the absence of expert testimony.'" Because the district court did not reach this issue in the first instance, the case was remanded to the court of appeals for further consideration. *Mittelstaedt v. Henney*, A20-0573 (Minn. 2/2/2022). <https://mn.gov/law-library-stat/archive/supct/2022/OPA200573-020222.pdf>



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MEMBER NEWS

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



Teresa B. Molinaro joined Fabyanske, Westra, Hart & Thomson as a shareholder. Her practice will focus on estate and trust litigation, guardianship and conservatorship litigation, and estate planning and business succession.

Winthrop & Weinstine announced two new members of its board of directors, **Erin Mathern** and **Joseph Windler**. Mathern works with real estate development clients and Windler represents clients in a wide variety of litigation matters.



Emily A. McNee and **Benjamin Sandahl** have been

elevated to shareholders at the Minneapolis office of Littler. Both focus their practices on employment and labor law.



Justin S. Boschwitz and **Sicheng Shen** have joined Moss

& Barnett. Boschwitz is a member of the litigation team, and Shen is a member of the business law team.

Maslon LLP announced the election of its 2022 Governance Committee, which manages the firm: **Keiko Sugisaka**, **Mike McCarthy**, and **Shauro Bagchi**. **Susan Markey** was also appointed to serve as co-chair of the corporate & securities practice group with **Martin Rosenbaum**. **Andrew Tataryn** and **Kaitlin Eisler** have joined the firm, focusing their practices on corporate & securities law.

Matthew Veenstra was promoted from associate to counsel at Saul Ewing Arnstein & Lehr LLP. Veenstra assists clients with commercial litigation matters.

Katie Pivec and **Josh Grossman** have been elected shareholders at Siegel Brill, PA. Pivec focuses her practice on business and succession planning. Grossman practices in the areas of real estate and business transactions.

Best & Flanagan announced the election of **Elizabeth Drotning Hartwell**, **Nicholas Hulwi**, and **Helen Sullivan-Looney** as partners.



Gov. Walz appointed **Christy Hormann** as a district court judge in Minnesota's 3rd Judicial District. Hormann will

replace Hon. Steven R. Schwab and will be chambered in Albert Lea in Freeborn County. Hormann is the chief deputy Steele County attorney.



Gov. Walz appointed **Thomas Christenson** to serve as a judge on Minnesota's Workers' Compensation Court of

Appeals. Christenson will be replacing Hon. Gary M. Hall, who retired earlier this year, and he will serve a six-year term. Christenson is a workers' compensation attorney and shareholder with Quinlivan & Hughes, PA.

Lauren Schnobrich has joined Heimerl & Lammers with the family law team.



Bowman and Brooke LLP announced that **Kim Schmid** has been reelected to the firm's executive committee, where she serves as executive managing partner. Additionally, **Roshan Rajkumar** has been elected as managing partner. **Lauren Russ** and **Sly Onyia** have joined the firm as associates.



Shana N. Conklin and **Kaitie A. Eke** have joined

Fredrikson & Byron as associates. Conklin will practice in the real estate group and Eke will practice in the trusts & estates group.



Kathleen Pfitzenreuter has become a partner at Wagner Tax Law. Pfitzenreuter practices in tax controversy matters.

Matt Yost has joined Messick Law, PLLC as an associate attorney. His practice will focus on family law.



Matthew Janzen joined Meagher + Geer as an associate. He practices in the areas of commercial litigation, construction, insurance, and products liability.

Gov. Walz appointed **Stacey Sorensen** as district court judge in Minnesota's 1st Judicial District. Sorensen will be replacing Hon.

Jerome B. Abrams and will be chambered in Hastings in Dakota County. Sorensen is an attorney for Liberty Mutual Insurance Company.



Nicholas Lira Lisle has joined Flaherty & Hood, PA as an associate. Lira Lisle will focus his practice on labor and employment matters.

*In memoriam***RONALD 'RON' PETERSON**

died on December 22, 2021. He graduated from the University of Minnesota Law School in 1973. In his early practice years, he was with the law firm of Steffen & Munstenteiger, and later Barna, Guzy. He was a shareholder/managing partner at Messerli & Kramer in the 1990s. He was then a shareholder with Peterson, Habicht, until he joined the DeWitt Law Firm in 2017. He practiced law for over 48 years.

HON. DAVID M. DUFFY

died on January 15, 2022. In 1977 he joined the Office of the Hennepin County Public Defender as an assistant public defender. In 1987 Gov. Rudy Perpich appointed him to the position of Hennepin County district judge, where he served until his retirement in 2012.

JOSEPH "BUMPA" "JOE" O'NEILL

age 90 of St. Paul, passed away January 25, 2022. He practiced law in St. Paul for 50-plus years, including with O'Neill, Grills & O'Neill with his son, and partner. He served the St. Paul district in the Minnesota Legislature from 1966-1976 and became Senate minority leader. He was a University of Minnesota law professor from 2004 to 2013.

GERALD S. "GERRY" DUFFY

passed away on January 29, 2022. After graduating from the University of Minnesota Law School, Duffy served in the U.S. Army, Judge Advocate General (JAG) Corps. He later transitioned to private practice and continued his military service in the Reserves as a JAG officer, attaining the rank of lieutenant colonel. He retired from the U.S. Army Reserves in 2004.

CHARLES F. 'CHARLIE' KELLY

age 68 of Edina, died of covid-19 on January 14, 2022. He founded Kelly Law Firm and practiced law for almost 30 years until early-onset Alzheimer's forced an early retirement in 2015.

HON. THOMAS M. NEUVILLE

passed away on January 26, 2022 at age 72. He was a law partner with Marv Grundhoefer and David Ludescher for 31 years. In 1990, he was elected to the Minnesota State Senate and served 17 years. Gov. Tim Pawlenty appointed Neville as Rice County District Court Judge in 2008 where he served for 10 years.

LAWRENCE R. COMMERS

passed away on February 10, 2022 in Minneapolis. Commers appeared as special counsel in 36 states plus the District of Columbia. He served as director, officer and shareholder at MacIntosh & Commers, partner at O'Connor & Hannan, and partner at DeWitt Mackall, Crounse & Moore.

MSBA



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3rd Judicial District
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Staff Attorneys to assist low-income clients in northwest Minnesota. Full-time, flexibility offered. For more information about the firm and the positions see our website: www.lsnmlaw.org Requirements and Qualifications: Law degree and a license to practice law in Minnesota or candidate for admission. Provisional hiring contingent upon taking and passing the Minnesota bar examination is possible. Application deadline: March 31, 2022, or until filled. Please send your cover letter, resume and three references to: ahoeftgen@lsnmlaw.org.

ANISHINABE LEGAL SERVICES STAFF ATTORNEY – FTE (SALARIED)

Anishinabe Legal Services is seeking a highly motivated attorney to provide civil legal assistance and court representation to program clients before area Tribal Courts, State Courts, and Administrative Forums. This attorney will be housed out of our main office on the Leech Lake Reservation in Cass Lake, Minnesota. Compensation: \$54,000+ D.O.E. Generous benefit package includes individual and family health and dental insurance, paid time off, and life insurance. Hybrid in-office/work at home and flex scheduling available. To Apply: Please email a cover letter and resume to Executive Director Cody Nelson, at: cnelson@alslegal.org. Applications will be accepted until the position is filled.

BUSINESS LITIGATION/ EMPLOYMENT LAW/ APPELLATE/PERSONAL INJURY

Arthur, Chapman, Kettering, Smetak & Pikala, PA is a team-oriented firm committed to providing our clients with superior legal services. We are seeking a highly motivated attorney to join our busy district court and appellate litigation practice. The ideal candidate will possess at least two years of practical experience in civil litigation, will have excellent legal research, writing, and analysis skills. A strong work ethic and the ability to thrive in a team-oriented atmosphere are necessary. We are motivated to attract, recruit, and retain talented employees. Our Firm is dedicated to creating a collegial, diverse workplace. We offer a competitive compensation package that is commensurate with experience; along with a competitive benefits package. If you are interested in joining our team, please send us your cover letter along with your resume, salary expectations, and writing sample(s) in confidence to: Arthur, Chapman, Kettering, Smetak & Pikala PA, Director of Administration, recruiting@arthurchapman.com, www.arthurchapman.com, Equal Opportunity Employer.

ASSOCIATE ATTORNEY

Falsani, Balmer, Peterson & Balmer seeks attorney with five plus years' experience for our people-intensive practice of representing individuals in personal injury, workers compensation, Social Security disability, and general litigation in MN and WI due to impending re-

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ASSOCIATE ATTORNEY

Rajkowski Hansmeier Ltd., a regional litigation firm with offices in St. Cloud, MN and Bismarck, ND, has an opening for an associate attorney with zero to five years' experience to join its team of trial attorneys. Our firm has a regional practice that specializes in the handling of civil lawsuits throughout the State of Minnesota, North Dakota and Wisconsin, including a significant volume of work in the Twin Cities. We offer a collegial workplace with experienced trial attorneys who are recognized leaders in their field of practice. We are seeking an associate who has relevant experience, strong motivation and work ethic along with excellent communication skills. Our lawyers obtain significant litigation experience including written discovery, motion practice, depositions coverage, trial and appellate work. We try cases and are committed to training our younger attorneys to provide them with the skills to develop a successful litigation practice. Competitive salary and benefits. Please submit resume, transcript, and writing sample to: Human Resources, Rajkowski Hansmeier Ltd., 11 Seventh Avenue North, St. Cloud, MN 56302, 320-251-1055, humanresources@rajhan.com. EOE.

ASSOCIATE ATTORNEY - FAMILY LAW

DeWitt LLP is a full-service law firm with nearly 140 attorneys practicing from offices in Madison, Greater Milwaukee, and Green Bay, Wisconsin and Minneapolis, Minnesota. At DeWitt, we utilize our creativity to offer proactive and effective legal solutions to our clients. DeWitt has earned national recognition by the U.S. News Media Group and Best Lawyers®, where it was ranked as a First Tier Law Firm, the highest ranking, in nearly 20 areas of law. Our attorneys are responsive, experienced, approachable, knowledgeable, focused, passionate and cost-effective. We represent clients throughout the United States and internationally. DeWitt's Minneapolis location is seeking a full-time associate attorney with an interest in family law, including handling matters such as divorce, child custody, support, mediation, and more. Preference will be given to attorneys with two or more years of experience in family law, but we may consider the right person with fewer years of experience. The right person will be creative, curious, and patient. It is, after all, a family law position. A sense of humor is also a plus. DeWitt provides excellent pay, benefits, and a culture where people thrive and grow professionally. We currently offer a hybrid work-from-home environment, though in-office or in-court presence is required at times. Members of our Firm receive the following benefits subject to eligibility: flexible schedule provided client needs and firm standards are met; competitive compensation; 401(K)

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Johnson/Turner is again ready to add to our attorney team. We are hiring lawyers in the Twin Cities Metro Area, Rochester and Duluth. We are interested in candidates that have two plus years of experience in estate planning & probate. Experience or interest in estate planning and probate is an advantage. We only consider candidates who will be team players, will have a positive attitude, compassion for clients, a strong work ethic, great communication, and an enthusiasm for innovation. If you enjoy a traditional firm environment, billing by the hour, the sound of your own voice, or complaining about your co-workers, please do not apply. We are a growing law firm that values our culture, strives for excellence, dreams big and has a lot of fun along the way. Attorneys at Johnson/Turner Legal enjoy the following benefits:

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

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Sjoberg & Tebelius, PA, a boutique law firm in Woodbury, Minnesota, is seeking a lateral associate with at least five years' experience in an area that would enhance the firm's already well-established estate planning, business planning, tax, real estate, family law, probate, and employment practice. The ideal candidate will have a strong academic/professional background and a demonstrated ability to network and originate clients. Send resume to: theresa@stlawfirm.com

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Gregerson, Rosow, Johnson & Nilan, Ltd. seeks candidates with one to four years of post-grad experience to join its diverse and intellectually challenging practice in downtown Minneapolis, with a primary focus on civil and criminal litigation. Our litigation practice includes personal injury defense, high-stakes business disputes, insurance coverage, construction matters, and misdemeanor prosecution. Associates will also have opportunities to experience our transactional and advisory practices, including municipal law, real estate, business law, and estate planning. Strong academic performance and exceptional research and writing skills are required. Judicial clerkship will be credited as experience. Submit cover letter, resume, writing sample, transcript, and references to: contactus@grjn.com

LITIGATION ATTORNEY

Meagher + Geer has an opening for an associate attorney in the Minneapolis office within the products liability/mass tort/safety/environmental practice. Candidate should have one to three years of experience. Litigation experience or judicial clerkship experience preferred. Candidates should have excellent client service, strong writing skills and strong oral communication ability. For immediate consideration, send resume, cover letter, transcript and two writing samples to: recruitment@meagher.com. New hires are expected to submit proof of their COVID-19 vaccination or proof of testing on their first day of employment.

LITIGATION ATTORNEY

Small, growing litigation firm with national personal injury defense practice seeking a lawyer with five

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Winthrop & Weinstine, an entrepreneurial, full-service law firm, located in downtown Minneapolis has an excellent opportunity for an attorney in its fast-paced Regulatory and Government Relations practice. The client base is robust and diverse, spanning virtually every industry, and ranging from individual entrepreneurs to Fortune 100 companies. Qualified candidates will have four to eight years of regulatory law experience, with a strong preference for candidates who have served in the general counsel's office or as outside counsel for a state or federal agency. In addition, candidates must have

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FAMILY LAW ATTORNEY

Johnson/Turner is ready again to add to our attorney team. We are hiring lawyers in the Twin Cities Metro Area, Rochester and Duluth. We are interested in candidates that have two to five years of experience in family law. Experience or interest in estate planning and probate is an advantage. We only consider candidates who will be team players, will have a positive attitude, compassion for clients, a strong work ethic, great communication, and an enthusiasm for innovation. If you enjoy a traditional firm environment, billing by the hour, the sound of your own voice, or complaining about your co-workers, please do not apply. We are a growing law firm that values our culture, strives for excellence, dreams big and has a lot of fun along the way. Attorneys at Johnson/Turner Legal enjoy the following benefits: Better Compensation plan – High achievers are rewarded. Base salary, plus a formulaic monthly incentive plan that transparently shows you what

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SE Minnesota law firm looking for an attorney to practice primarily in family law and criminal defense. Experience preferred but not required. Please submit resume and writing sample to: pmstie@gmail.com

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