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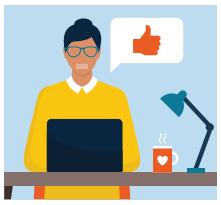


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Coronavirus: Risks, Responses, and Responsibilities

By now, many of us (maybe even most of us) have family members or friends, or colleagues or acquaintances, who have tested positive for the virus, or have been hospitalized or put on ventilators, or even worse. All in the context of isolation and distancing, and in the face of understandable fears for our own personal health and job security, hitting far and wide, and all too close to home. Such are our times.

Lawyers that we are, our core wiring and an adrenaline rush have no doubt kicked in, prompting us to triage a hierarchy of needs: family and personal safety first, of course; then staples and supplies; and plans and strategies in the event of illness or emergency. That's who we are—inclined to be, or at least seem, in control. It'll take some getting used to, this not being totally in control. On top of all that, we are obliged and lucky enough to be asked to help clients and colleagues, who have their own human, as well as law-related and business-related, needs. It's a lot, and sometimes it'll seem like too much. Such is our lot.

It's hard to discern when and how we'll get to the other side of this experience, and how we'll even know when we get there. Short of a vaccine, I suppose. It's like running in a marathon with no finish line, or climbing a cloud-topped and summit-less mountain. We seem not only to be looking, but stepping, through the looking glass. There will be phases and stages along the way (all of which we will likely have in common, even if at different times): patience and fortitude; confusion and hope; periodic denial or anger or panic; undifferentiated pressure and endless to-do lists; distraction and lack of focus; and bouts of exhaustion. The fact that we all have or will have these moments should, in its own way, prompt a brief but collective sigh of relief. Put simply, they're entirely normal.

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

Luckily, along the way, we will also have moments of grace, gratitude, and humor. We will employ and enjoy new twists on our vocabulary—with N95 being a mask instead of a highway; Zoom being a new lens into our lives (and our home décor); the "Corona Curve," describing how we navigate our occasional walks under the rule of social distancing; and, of course, the 7 p.m. "Pounding of the Pans." We will be reminded that a smile and laughter, too, can be a good (and maybe the best) medicine: watching a Rube Goldberg video; an Ode to Joy flash mob; a *Some Good News* episode; stuffed animals in the window for kids to wave at; for the lucky few, the now-sweet smell of Purell; a chaotic and even comic multi-site family holiday; and jazz, opera, a single cello, or hip-hop from balconies around the world.

Amazing, indeed, how the technology that allows us to "go remote" helps us to stay "in touch." We will remember, too, to be grateful to those who are helping, and supportive of those who are not as fortunate. Disproportionate impact is surely a fact. In its own way, today's virus has laid bare our world's unfair disparities—putting in stark relief the need for civilized relief. Imagine, just for a moment, what it might be like to be ordered to "stay at home" when you have no home, or when you can't do from home the job that you and your family depend upon; or when "home" is where violence lurks or lives.

Not that you don't have enough to worry about, but in the midst of all this, we lawyers also have some especially important matters to tend to—and work to do. We are, after all, a unique profession, bound by a cultural contract of service and citizenship. It's in our rules; it's part of our pledge and promise. We are "public citizens," bearing a "special responsibility for the quality of justice" and a duty of "public service." We are obliged to play a "vital role in the preservation of society." Couple these obligations with the troubling reality that the very fabric of our democracy itself might be especially vulnerable during times of crisis, and our duty as guardians of democracy comes forcefully to the fore. Here are three dynamics, in particular, that are cause for concern.

The rule of law

The origins of the phrase are ancient and a bit elusive, but we know what it means: "Lex Rex," not vice versa. We not only respect it, we revere it; we depend upon it. It is our bedrock, our North Star. Its key is the separation of powers and checks-and-balances in our government—an equilibrium amongst equal branches. It depends upon independent, non-political judicial review—and the vote—as well as equal justice, and access to justice, for all. Representatives, senators, judges, and presidents alike are all required to take an oath to support, preserve, protect, and defend the Constitution. Our rights under the rule of law were not only granted but fought for and won, and taking those rights for granted will only serve to weaken them. As lawyers, we are responsible for guarding and preserving the rule of law. That is one of our most important "essential services" during these difficult days.

But the rule of law is being subjected to surprising and disturbing challenges, isn't it? Even attacks. Importantly, no elected official has "total" authority (the root, of course, of the term "totalitarianism"); and no virus, no matter how powerful, has the authority to crown a king or queen. So what should be our response to such challenges? Well, surely not silence. Silence either is or is deemed to be consent. No, I think we have to speak up—to clarify and confirm, and to educate. That may be uncomfortable on occasion, but it is also what our unique role requires, and what the public deserves. Maybe these moments call for a new wave of civic education, following the lead of Justice Sandra Day O'Connor. More people, current citizens as well as

new citizens, need to know more about the basic and delicate design of our democracy. That doesn't call for politics, it calls for citizenship, and that, too, is who we are. It's the least we can do.

None of which is theoretical or ethereal. No, there are on-the-ground, real world realities to the rule of law, which require us not only to speak up but also to roll up our sleeves. On the criminal front, for example, there are grave concerns about custody (including the rights and health of prisoners, prison staff, and law enforcement), and disturbing dilemmas arising out of the rights of speedy, public, and safe jury trials and proceedings. On the civil side, although sometimes not so dire, we have to be concerned about emergencies and equities, and the need to have safe hearings to consider them.

The right to vote

Our right to vote is "the crown jewel of American liberties;" the "very foundation of our American system;" "fundamental" and "precious" and "the essence of a democratic society." It is and should be our secular sacrament; in its own way, sacred. It's also "Civil Right No. 1." To put it bluntly: If you don't or can't vote, you won't be counted—which puts in peril our ability to influence our shared political dynamic. This should be an especially powerful presence this year, when we mark the 100th year since the passage of the 19th Amendment, and while we conduct thousands of elections all over the country.

It's also a fragile right, subject to clever, even cunning, schemes dedicated to suppression (warped gerrymandering, where politicians seem to choose the voters instead of vice versa; burdensome ID demands; and unnecessary restrictions on absentee or mail-in or multi-day voting, even in the midst of bipartisan support). Voter suppression is like water running into our home's basement—seeking the lowest levels and rotting out the footings.

Our duty, then, is to preserve and guard the right to vote—to strengthen it, not strangle it. We should guard against real voter fraud, of course, if and wherever it exists, but we needn't be stymied by fabricated fraud. This is especially true now, when the health of voters and polling place volunteers is at stake, all of which is tied to the health of our democracy. That all seems fair enough. The point of an election, after all, is to win the vote, not to suppress it or deny it altogether. Maybe we need an emergency infusion of funds to build a better infrastructure to support the people's right to vote.

The justice gap

Our justice gap is widening, and it threatens to widen even more in the wake of the pandemic. For example, civil legal aid is forced to turn away fully 60 percent of those otherwise eligible for help because of lack of resources. Beyond that, a justice gap is going to explode for those neither "poor enough" to get what civil legal aid help there is nor "rich enough" to hire the lawyer or lawyers of their choice.

Right now, our economy seems to be in a "medically induced coma," necessary for our nation's health, but not meant to last for long. That light at the end of the tunnel, though, may turn out to be a train barreling our way, bearing boundless, burdensome, and all-too-real legal needs. It has all the makings of a brutal vice, with needs skyrocketing and resources plummeting. Our coming realities could well include clients (corporate or individual) considering stand-downs and slow-downs or downright shutdowns, cutbacks in non-essential litigation or transactions, and drag-outs in the payment of accounts payable. All of which will likely be coupled with pressure to keep production up, collections flush, and docket management on track, no doubt leading to fall-back leaves and furloughs, accompanied by genuine concerns about lawyer well-being and professional responsibility. Not all of the coming legal needs will fit into the current models of our professional business; the flood will likely be high in volume and of ferocious velocity, with only low or no hourly rates available. We won't be able to "pro bono our way out of it." Returning to our American way of life will surely require getting back to business, but it will also require delivering justice as promised. We will need new and creative models, as we open our way toward our new and next normal.

This is, to say the least, "an uncertain spring," and it promises to reach into our summer and beyond. The process of recovery will not resemble an on/off light switch. No, it'll be more like sliding a dimmer toward the light. Hopefully, we'll have the chance and strength to find value in these vulnerable times, and to note and take advantage of lessons learned. That is our responsibility as well as our opportunity. We all, of course, long for the day when we can get together again. It'll come; and we will value it anew. In the meantime, may "[n]othing ill come near thee." Along the way, don't leave love or friendship unsaid. Be strong, safe, and kind; and stay "in touch." ▲

Legal ethics in a pandemic

In the "before time" most of us were comfortable with how the ethics rules applied to our day-to-day legal practice. A short while ago the world dramatically shifted around us, requiring us to do our jobs in very different ways. In the midst of these changes, lawyers and their staffs may not have thought through the ethics questions presented by the new normal. I certainly don't have all the answers, but I do have some guidance.

What has not changed

We have received a lot of calls on our ethics line regarding how to address particular ethics issues relating to covid-19. While the topics vary, there is a general sense that some lawyers are hoping our response will be that whatever the court or client is asking them to do, it is incompatible with their ethical obligation in times of a pandemic. Invariably we must reply that, no, all of the ethics rules remain in full force and effect. The rules, particularly those that are nondiscretionary, generally do not have exigent circumstance exceptions. Even those rules that incorporate "reasonable" refer to "a reasonably prudent and competent lawyer." The rules do not expect you to simply do your best under the circumstances, but rather set a minimum standard of conduct for lawyers irrespective of the circumstances. As attorneys, we must embrace the challenge of ensuring that the new manner of our practice is compliant. There are two general areas I would commend to your particular attention: remote work and issues of incapacity.

Remote work

Your duty of competence requires you to maintain the requisite knowledge and skill needed to practice, "including the benefits and risks associated with relevant technology." Remote access to networks, video conferencing, and electronic signatures thereby join email, wifi, and cloud-based storage on the list of areas that lawyers are obliged to understand. All platforms have potential security issues, and compliance with this duty does not require systems to be infallible. But your ethical duty does require you to inform yourself of how to use the technology correctly and what vulnerabilities it may have as part of a continuous vetting process. Everyone asks, can you ethically use Zoom for client calls? Yes, provided you understand and follow the security recommendations (including password-protected meetings).

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.

SUSAN.HUMISTON@COURTS.STATE.MN.US

The main point is to continually assess your technology platforms to ensure you are using them correctly and understand and adjust to any needed corrections. I cannot emphasis this enough. Sometimes I feel that lawyers have managed the barest of basics—such as only using secured networks and maintaining strong password protection. Other basics: Is your home network secured by a password? Does your computer have updated security patches? These are questions that we may not ask ourselves enough but certainly must be asking now. A lot is required of us to ensure technological competence in remote working environments.

Your duty of confidentiality requires you to protect client information. Much of this is encompassed under competent technology use, but old school basics are still important. Are you discussing client information around family members? Can your neighbor working in his yard hear your client call because your window is open? Do you have a secure place to maintain client files? Is Alexa listening in? Are you securely destroying client information? Are you taking pictures of your new work space and posting them to social media?A special note on that last point: Just don't. If people can see your work space, stop and think about what might be disclosed when the pictured is zoomed in. Have you discussed all of this with your staff? Do you understand your staffers' work environment, and believe they are doing what you are doing to protect client confidences? Your ethical duty of supervision requires you to make reasonable efforts to ensure that your nonlawyer staff's conduct is compatible with your ethics obligations. This is particularly important now, when many on nonlawyer staff are working remotely for the first time. Remote working agreements that detail these ethical obligations (primarily around technology use and confidentiality) are a good way to assist in meeting this obligation.

Your duty of communication is also extremely important during these times. Do you know how to get hold of your client and have you effectively communicated how to best get hold of you? Have you updated your outward-facing materials to facilitate easy contact with you? Is someone staying on top of mail, and promptly getting it to remote workers? Have you explained how covid-19 will affect the matter you are handling? Do you know to whom you can speak if your client is incapacitated and you need direction? Does your client know who will contact them if you become incapacitated?

One of the most important things we do is communicate with our clients the information they need to make informed decisions about the representation. What makes our jobs difficult is that in many respects, our evolving grasp of the substantive law implications of covid-19 will lag our obligation to provide real-time advice and counsel. The guidance that ethics provides in times like this is that you must stay informed about the changing landscape, and you must communicate what is known and unknown to the client so that the client can make informed decisions. This requires you to discuss the client's various options relating to the matter so that the client can make informed decisions about how they wish to proceed in the new circumstances, and the best practice is to document those discussions. If you do not know, you also should disclose that. If you think too much is unknown to provide competent guidance, you must raise those concerns with the client in order that objections can be raised, if that is the decision, or continuance can be sought until more guidance is available.

Your duty of diligence requires you to act with reasonable diligence and promptness in representing a client. Comment [1] to this rule requires us to pursue a matter despite "opposition, obstruction, or personal inconvenience to the lawyer." You need to stay on top of your calendar, and pay particular attention (as always) to statutes of limitations and scheduling deadlines. Because actions may take longer to accomplish remotely, you must anticipate such challenges, such as figuring out how you will perform previously routine tasks such as e-filing or gathering affidavits. Your particular health circumstances may raise an issue of whether you can diligently continue representation.

Courts and opposing parties may work with your particular circumstances, or they may not. What is the backup plan for the representation if you have to self-isolate or become ill and critical deadlines are approaching? Lawyers are good at assisting clients with contingency plans and terrible at making their own. If you are experiencing a downturn in work as clients put off legal expenses (or even if you are not), use this time to think through contingency plans for specific matters, and for your practice in general. Also take the time to make sure your active files are in good shape. One of the most daunting things about this virus is all that we do not know about how it's spread, so it's difficult to accurately gauge our individual vulnerability. Now is the time to plan for a worst-case scenario if you have not already. Such planning need not be complicated. It starts with identifying one or two people who agree to help temporarily if something happens to you, and keeping your files in good enough shape that someone can review them and understand the current status and next steps.

Conclusion

I wish I could provide more specifics or tell you not to worry because we all have enough on our plates, but I cannot. Your ethical obligations remain the same in the face of this pandemic or any other disaster. But you are well-suited to rise to this occasion if you know the basic ethics requirements and think through how they apply to new circumstances. Asking yourself the above questions will go a long way toward guiding you to compliance, and there is no substitute for just sitting down and reading the rules and thinking about the new ways in which you practice.

Remember, too, the adage that what goes around comes around. Now is not the time to forget basic kindness and civility. It is difficult to exaggerate the amount of stress that everyone is feeling. If any time called for professionalism, it is now. Also, remember we can help you with any specific ethics issues you have. The best way to contact us in these remote working times is through our website at *lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinions.aspx*. Take care. ▲

Working from home and protecting client data

In recent days, remote work has become the norm in the legal community. Teleconferencing, email, and myriad digital communication methods are even more important now than they were before the covid-19 pandemic. This abrupt shift requires consideration of ethical obligations when sending and receiving client data and personal information electronically. It's especially critical now, since many organizations had to rush to get proper remote work infrastructure in place, emphasizing convenience and operationality over security protocols. The legal community is held to a particularly high standard when it comes to protecting client information, and is therefore required to stay apprised of best practices in cybersecurity. Referring to the CIA triad—a security model that focuses on the confidentiality, integrity, and availability of data—is helpful as we work to optimize security and efficiency in our remote work environments.

According to the ABA Standing Committee on Ethics and Professional Responsibility's Formal Opinion 477R:

> A lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

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.

This requirement acknowledges that using technology is imperative for efficiency and ease of communication with clients. But it also maintains that lawyers must have a degree of technical proficiency and knowledge of cybersecurity best practices. Lawyers must do everything in their power to protect the confidentiality of client data, and to make sure that in the event of a compromise, data would still be accessible. The confidentiality, integrity, and accessibility of client data is paramount as the legal community continues to work at offsite locations.

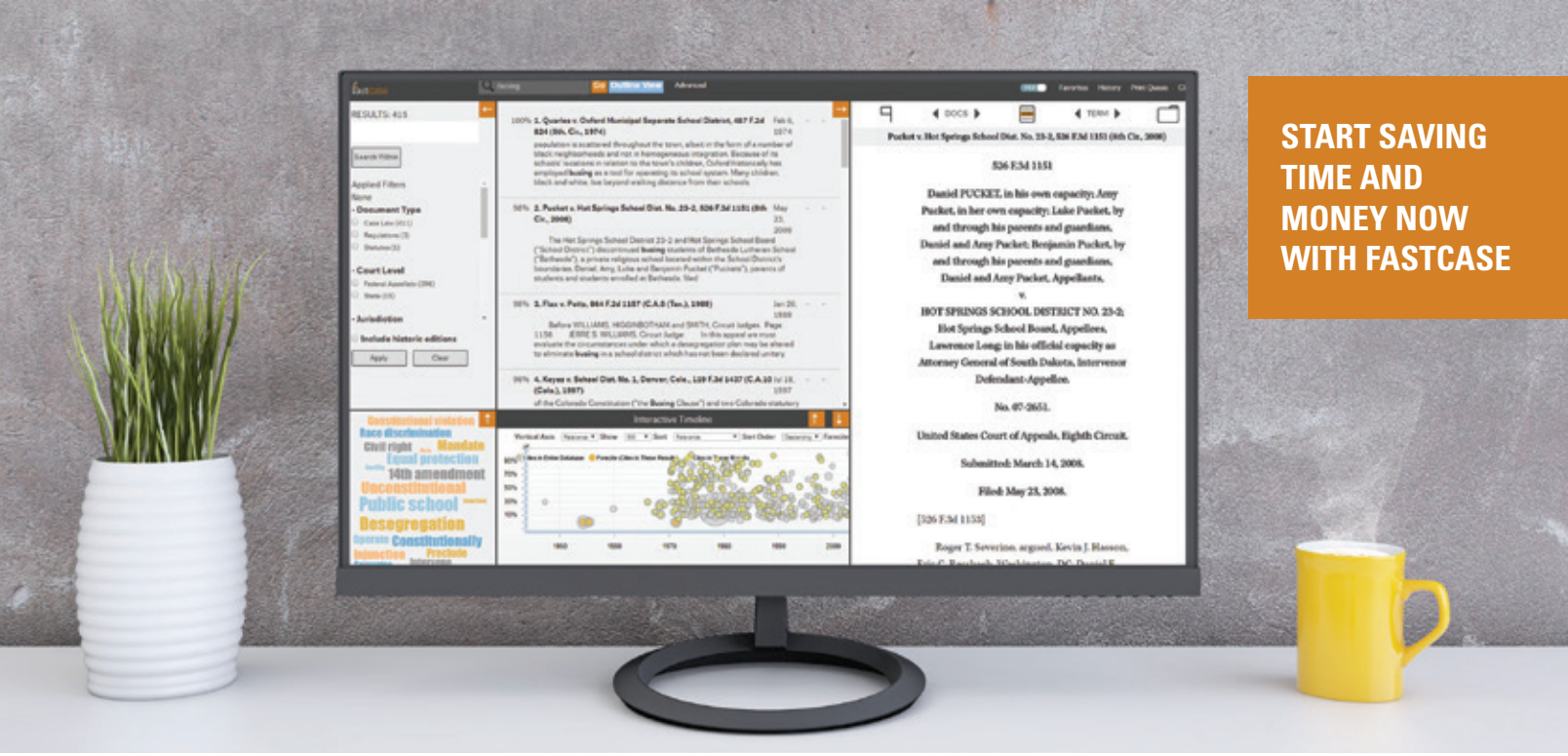
Though the situation is challenging, now is not the time to shrug off poor security practices. Relying on email disclaimers such as "If you are not the intended recipient of this email, please delete" is not enough to ensure the confidentiality of client data. Shifting blame from the sender to the unintended recipient is not an acceptable security strategy. Instead, standard email encryption policies protect client data by making data unreadable until it is "unlocked" via a decryption key. Use of VPNs, strong passwords and multi-factor authentication, avoiding public wifi, and securing endpoints are all a few ways that remotely working attorneys can protect their clients. Other important steps in securing remote work environments: avoiding suspicious websites or links, updating software when necessary, and making sure to only use approved technologies (such as known USB devices or hard drives). Each remote device in your network is essentially another gateway, another potential access point for an attacker; the covid-19 pandemic has brought about a number of nasty attack campaigns for which we should all be on the lookout.

Training on phishing scams and social engineering attacks helps to mitigate some of the threat, as these attacks are regularly conducted through email. As cyberattackers continue to take advantage of covid-19, staying apprised of potential cyber threats is an element of cybersecurity awareness that is required of attorneys. Slowing down can make all the difference when it comes to becoming a victim or spotting an attack. If an email seems strange, unexpected, or urges you to act quickly in a way that violates standard procedures, think twice. Communicating any suspicious activity while working remotely helps to prevent breaches; it also helps to inform clients of when they can expect communications and what they will contain.

Just as client data must remain confidential, ensuring its integrity and availability are top priorities. Managing access controls in-house lessens the risk that client data will be inadvertently (or purposefully) altered or destroyed. Make sure that the IT department is performing regular backups in a sound manner, and that system upgrades are being conducted when necessary. This pandemic has brought about a high number of cyberattacks, especially against those organizations that were underprepared for remote work and are now even more vulnerable. Denial-of-service and ransomware attacks can leave an organization unable to operate for an extended period of time. Having a backup plan protects against the financial, reputational, legal, and operational risks that come with a cyber event.

In many ways, cybersecurity is now more important than ever. Given their reliance on digital devices and communication, attorneys should take special note of their ethical obligations in dealing with client data. Remote work security strategies should be communicated to clients, as well as how they should expect to be contacted during covid-19 (establishing, for example, what types of information will be transmitted via email). Moving out of our physical work spaces does not mean that we can ignore the security protocols governing how we use technology in the office. If anything, additional layers of diligence and information-sharing should be added to account for the complex threats we now face.

Going above and beyond those "reasonable efforts" is necessitated by the extraordinary working situation in which many of us find ourselves. Maintaining a strong personal cybersecurity posture may help to ease some of the risks that a reliance on remote work introduces; it may also ease the minds of clients during a time when many things seem uncertain. ▲



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Legal paraprofessional pilot project sought to improve access to justice

By Justice Paul C. Thissen and Judge John R. Rodenberg

Litigants going through a divorce or facing eviction are often not represented by an attorney. This lack of representation has real consequences for litigants and for the trust people have in our courts. But those litigants—and lawyers too—now have an opportunity to weigh in on a proposed two-year pilot project allowing legal paraprofessionals to deliver civil legal services in family law and landlord/tenant law cases under the supervision of a licensed attorney. The pilot will test and assess whether allowing legal paraprofessionals to provide additional services will increase access to competent, quality representation for low- and modest-income Minnesota litigants, reduce court congestion, and provide opportunities for lawyers to expand their practices.

The recommendation for the new, expanded authority for legal paraprofessionals was part of a report filed on March 2, 2020, by the Implementation Committee for the Proposed Legal Paraprofessional Pilot Project. Under the recommendation, a roster of legal paraprofessionals who meet strict education, experience, and ethical requirements would be assembled to provide the services. Feedback about this proposed pilot is being sought by the Minnesota Supreme Court. The Supreme Court order establishing a public comment period and hearing, which also includes a copy of the Implementation Committee's report and recommendations, can be found at *bit.ly/3flP1g5*.

The recommendations include clear and specific instances in which a legal paraprofessional may appear before the court, offer legal advice, or file documents on behalf of a party. Specifically, legal paraprofessionals:

- may provide advice to tenants and appear in court on behalf of tenants in housing disputes defined in Minnesota Statute Chapter 504B, as well as eviction expungement proceedings;
- may provide advice to and appear in court on behalf of clients in cases dealing with child support modifications, parenting-time disputes, paternity matters, and informal family court proceedings;
- may represent clients in mediations where, in the judgment of the supervising lawyer, the issues are limited to less complex matters, such as simple property divisions, parenting time, and spousal support; and
- may prepare and file a limited and identified set of documents without the supervising attorney's final review. (See Report Appendix G in the Committee's report for a list of approved documents.)

The committee also recommended that the pilot would be limited to district courts in counties that have established a housing court or a dedicated calendar for landlord-tenant actions, and to family law cases that do not include allegations of domestic violence and/or child abuse.

The Implementation Committee for the Proposed Legal Paraprofessional Pilot Project is an outgrowth of the recommendations made by the 2017 Minnesota State Bar Association's (MSBA) Alternative Legal Models Task Force. The work of the committee is also in line with the recently passed American Bar Association resolution encouraging the adoption of regulatory innovations to address the access to justice crisis in the United States. The committee was co-chaired by Minnesota Supreme Court Associate Justice Paul C. Thissen and Minnesota Court of Appeals Judge John R. Rodenberg. Lawyers and paralegals from throughout Minnesota made up the membership.

The committee held 11 public meetings and met subsequently to summarize the work for its report. Its work included conducting a survey that was distributed online and to all licensed attorneys, district court judges, and paralegal association members in Minnesota, and yielded 579 survey responses. The committee also convened a focus group consisting of additional attorneys and legal paraprofessionals which was held over the course of two days. Members of the committee met with divisions of the MSBA to explain the committee's charge and to hear concerns, comments, and other feedback from lawyers. Its work and materials can be found on the committee's webpage: *mncourts.gov/implementation-committee.aspx*.

Any member of the public can review the report and the Supreme Court order establishing the comment period and public hearing using P-MACS, the Minnesota Appellate Courts Case Management System, under case number ADM19-8002, or find it on the committee's webpage. Public comments must be submitted to the clerk of the Appellate Courts no later than July 17, 2020. The public hearing to review submitted comments will take place in the Supreme Court Capitol Courtroom on August 11, 2020, at 10 a.m. and will be livestreamed via the Minnesota Judicial Branch website. ▲

Mitchell Hamline professor Ana Pottratz Acosta wins award for helping immigrants

Attorney moved quickly after program was shut down

BY TOM WEBER

When the Trump administration ended a program in 2017 that had given temporary legal residence to nearly 3,000 minors from Central America, Ana Pottratz Acosta sprang to action.

Working with the International Institute of Minnesota, the immigration attorney helped screen those in the program, called Central American Minors (CAM), to see if another immigration path was possible. Later, an organization that sued the administration over the elimination of CAM cited Acosta's work in its litigation that eventually led to the program's reinstatement.

"Ultimately, we didn't know what was going to happen when we did legal screenings in fall of 2017," said Acosta, an assistant teaching professor at Mitchell Hamline and clinical instructor for the Medical-Legal Partnership. "But it ended up being much more successful than we ever thought it would be."

For this and other work in the rapidly changing world of immigration law, the International Institute of Minnesota recently awarded Acosta its Olga Zoltai Award. The award is named for a Hungarian refugee and immigrant advocate once referred to by the Star Tribune as the "patron saint of area immigrants." Zoltai also co-founded the immigration law clinic at William Mitchell College of Law in 1985.

The daughter of a Mexican immigrant, Acosta grew up in the central Minnesota town of Melrose. She gravitated toward immigration law, especially after working on an asylum case in law school. She then worked with immigrants and refugees at Lutheran Social Services of New York for six years.

In Minnesota, her work has included helping young people in the DACA (Deferred Action for Childhood Arrivals) program and even going to Tijuana, Mexico, in late 2018 to advocate for asylum-seekers. As clinical instructor for the Medical-Legal Partnership, Acosta supervises students in assisting patients at United Family Medicine in St. Paul with legal issues affecting their health, including issues related to immigrant status.

"Ana is an extraordinary immigration attorney," said fellow immigration lawyer Kara Lynum, a 2011 graduate of William Mitchell. Lynum accompanied Acosta on that trip to Tijuana and now works for the U.S. Senate. "Her kindness, compassion, and empathy are matched by her deep well of knowledge that she uses to help vulnerable populations.

"Her approach to lawyering should be a goal for all attorneys."

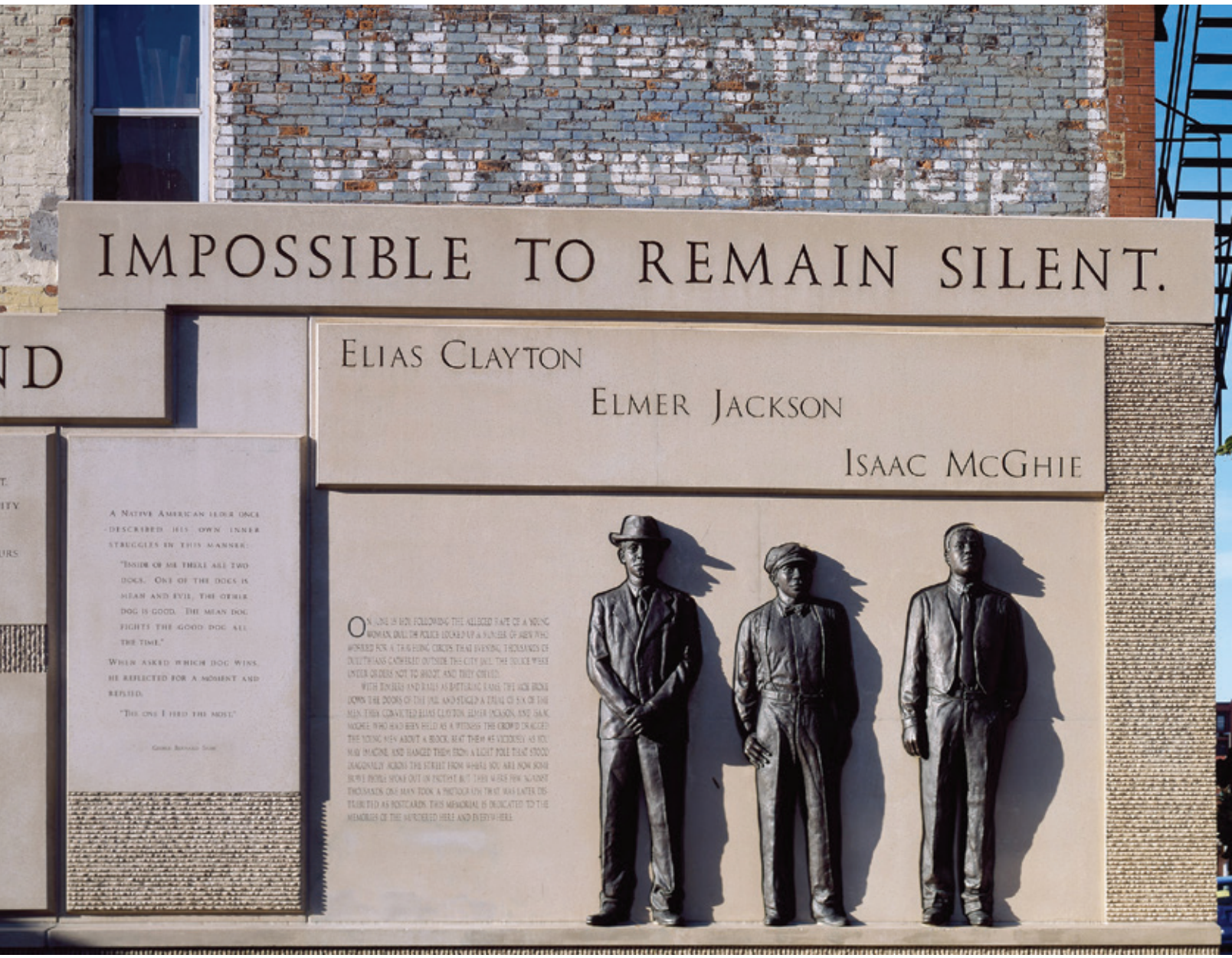
Acosta, 40, joined the Mitchell Hamline faculty in late 2016; her first class paralleled a new president beginning his term enacting several highly controversial changes in immigration law and policy.

"A lot of the problems highlighted now have existed a long time, but a lot of issues, particularly in removal and asylum laws, are being exacerbated now," said Acosta. "The silver lining is students are very motivated to help, and I feel lucky to be in a position to be teaching and training the next generation of lawyers."

Thoughts about Commemorating the Duluth Lynchings

A prize-winning Minnesota historian looks at the legacy of the murders 100 years later

By William D. Green



A memorial built in 2003 at the site of the lynchings in Duluth, MN. Photo by Carol M. Highsmith – Library of Congress

After a lecture I gave in Rochester earlier this year, a man walked up to welcome me to the city and thank me for my remarks. After a brief exchange, he asked me if I planned to go to the June 15 commemoration of the Duluth lynchings. I said that I had other commitments. At the time, I hadn't fully realized how much of an event it was scheduled to be—not in terms of activities, but the scope of its impact on the community. In the quieter moments of my drive home, I wondered whether I was missing something bigger than the apparently widely anticipated, long-overdue recognition of that tragic event. And this—my reaction, that is—began to perplex me, as well.

In the early '90s, when I first began teaching at Augsburg University, I had come across a book entitled, uncomfortably, *They Was Just N*****s*, taken from a statement that one of the lynchers made in defense of his action. The author, Michael Fedo, a native of Duluth, had selected the title, to the discomfort of his publisher, in order to provoke attention to the incident and the sensibility of Duluthians at the time, as well as to stimulate thoughtful reactions. He definitely succeeded, but not in the way he had hoped. After his public readings, especially in his home city, it was not unusual that people (at least in one place—the public library) had lined up to tell him that in writing the book, he had wrongly aired the city's "dirty laundry." They must have felt a sense of justice when the book was allowed to quietly go out of print. Though it had long since vanished from bookshelves, Michael agreed to join me in a panel discussion at the campus.

I secured a classroom but made few preparations for an event I expected to be small. After all, faculty were grumpily grading finals; and as fortune would have it, the day of the event happened to be the first beautiful day of spring, when there would surely be much celebration by students in the park. I was stunned to see the room slowly fill with students, faculty, and even people from the community standing wall-to-wall to hear the story. A conversation scheduled to run for an hour lasted all afternoon because, as it turned out, many people wanted to know more. Some, no doubt, considered what Michael described to be like a parallel universe where people in the mob were completely (and perhaps even safely) foreign; to them the story, while interesting, ultimately had little to say to or about modern Minnesota. Some were drawn to the macabre tale like moths to a flame, and somehow, in turn, felt licensed to luxuriate in their own rectitude. Others still simply wanted to learn, and in doing so, to give tribute in some small way to the memories of Isaac McGhie, Elias Clayton, and Elmer Jackson—and perhaps thereby to extend quiet sorrow and even apologies for the sins of the fathers. But none present was in denial: There was a unanimous recognition that the awful incident had occurred. My gallows humor led me to presume that it was because we weren't in Duluth; but, really, I wanted to believe that by the time of that discussion, even the older citizens of Duluth had come to acknowledge that chapter in their city's history.

I was pleased to learn afterward that the Minnesota Historical Society had decided to reissue the book, albeit under the less-provocative title *The Lynchings in Duluth*. To the credit of the editors, they selected a cover that would leave no doubt as to what the book was about: the infamous black-and-white photograph of two African Americans hanging from the lamp post, a third prone before them, all surrounded by white men mugging for the camera like fishermen displaying their prize catches.


LAST EDITION

THE DULUTH HERALD

THREE NEGROES LYNCHED IN DULUTH

POLICE FORBIDDEN TO USE THEIR FIREARMS TO WITHHOLD RIOTERS

SOME RESULTS OF ASSAULT ON POLICE HEADQUARTERS BY FRENZIED MOB WHICH LYNCHED THREE NEGROES TUESDAY NIGHT; INTERIOR OF BUILDING IS WRECK

GRAND JURY IS CALLED TO FIX RESPONSIBILITY FOR HANGING OF MEN

TROOPS SENT TO DULUTH BY THE GOVERNOR

INFURIATED MOB TAKES THREE NEGROES FROM POLICE STATION HANGING THEM TO LIGHT POLE

Thousands Gather in Streets Tuesday Evening, Force Way Into Jail, Smash Bolts and Bars and Drag Negroes to Their Doom.

NOVEL PLAN IS PROPOSED

EXCLUSION OF ASIATICS

Michael would later recount his father describing the reaction of a long-time friend who had stopped by the house, seen a copy of this new edition on the coffee table, and exclaimed in horror—not as much at the awful image of the three hanged African Americans as at one of the gleeful white faces taking in their triumph: her own beloved father. I wondered what kind of horror a non-relative would feel at the sight of the hangings, or at the thought that the hangings occurred in our state. In 1920, it appeared that right-thinking Minnesotans were shocked for the second reason. They smelled the smoldering embers, but didn't look to see from where the smoke was coming.

Nationwide, lynchings and mob violence against African Americans had become commonplace. In 1915, *The Birth of a Nation* drew sell-out crowds at movie theatres, Minneapolis included, giving license to find entertainment in the image of a black man swinging from a tree. Nellie Francis, a black leader at the time, was even more alarmed to hear from white political allies that the film was harmless. The superintendent of Minneapolis schools praised the film for its educational merit. In 1916, the women's suffrage chapter in Albert Lea used the film to promote the movement.

Meanwhile, the NAACP collected data on racial violence in the country, reporting in 1920 that over the 31-year period from 1889 to 1919, 2,549 black men (most of them accused of raping a white woman) and 51 black women were lynched. During the year of 1919 alone, 78 African Americans were lynched, 11 of whom were ex-soldiers. One was a woman. Fourteen were burned at the stake. Twenty-eight cities staged race riots in which more than 100 black people were killed. And even as some of these facts appeared in newspapers of the day (though less so in the white press), Minnesotans, if they were aware at all, looked on as if those events had occurred on the other side of the moon, assured by the conviction that they were the inheritors of a tolerant and civilized community where such things did not occur. Three months after the report appeared in March 1920, the Duluth mob assembled to commence its deadly work.

The point is, it did not happen spontaneously. The "fire" needed kindling that had been widely spread by the degrading social custom of racial discrimination. But the absence of reported dust-ups between black and white Minnesotans lulled the society into believing that there were no racial problems. Blacks in St. Paul, Minneapolis, and Duluth avoided the indignity of bad service in white-owned establishments and places—including most of the cities' streets—where they could be subject to harassment and insult. A variation of Jim Crow ruled within much of the North Star State. In effect, the permission to dehumanize had been codified. To avoid the perennial threat of having their dignity affronted, the black middle class was discouraged from being visible while the black working class was reduced to a valueless stereotype. To the passive white observer, the arrangement seemed benign. But at the time, they had no sense of recent history. In 1895 in St. Paul, black men on two separate occasions were nearly lynched, one virtually in the shadow of the state capitol, both to the cheers of a mainstream press that had, only four years earlier, praised a black girl named Nellie Francis for delivering a high school graduation speech on America's responsibility to address the race problem.

Paradox has always been the key element to understanding race relations. But because Americans have never done well with paradox, we've never done well talking about race. We come close by looking at the sensational. And what could be more sensational than the stark duality of race and sex evinced in the Duluth lynchings of 1920? Yet I think the lynchings themselves may *paradoxically* cloud the elements, not just regarding what happened, but how the events in Duluth demonstrated that the city and state were fundamentally no different from other places where similar tragedies occurred, North and South.

Labor strife had lately intensified in the region, and the city's largest employer had brought in large numbers of black workers from the South. In the middle of what had already been a hot summer, there were too many young men anxious to show their manhood after being deemed ineligible to serve in the recently concluded "War to End All Wars." J.A.A. Burnquist, the pro-business Republican governor who had cracked down on radicals, labor activists, and war dissenters, was also president of the St. Paul chapter of the NAACP and thus *the friend of my enemy* in the eyes of many around Duluth. Readers of local newspapers saw a steady stream of depictions of African American men either as shiftless caricatures or criminals—typically petty thieves or sexual predators of white women, or both, to reinforce the widespread belief in their inherently bestial nature. On a different front, firemen and police officers were frustrated by their own negotiations with the city for better wages. The U.S. Attorney had recently been indicted for smuggling Canadian whiskey. Jailers harassed women prisoners from the working-class neighborhood of West Duluth. During the events of June 15, the mayor was out of town and the police chief sat ensconced in his office on the top floor of the police station, where he would remain throughout the rioting.

During the assault on the jail, officers were ordered not to fire on the encroaching mob. Upstanding citizens watched with amusement as the mob either cut fire hoses about to be trained on them or turned them against the police standing out front. One of the "judges" on the kangaroo court that condemned the prisoners had weeks before written an award-winning high school essay that condemned lynching in America.

Carl Hammerberg, an immigrant teenager of diminished capacity and limited English skills whose curiosity drew him into the wake of the mob as it rampaged through the jail—punching holes in walls, roughing up officers, and passing the black men into waiting hands to be hanged—would become one of only three "culprits" convicted for the crime of rioting. He would likely have shared one of the few cells that had not been destroyed with the only black man who would later be found guilty of raping the young white woman. Meanwhile, a black man coming home from work saw the "excitement" but was told by a nearby white man in the crowd that he best hurry home because the crowd was about to kill some Negroes. As the mob surged forward, a priest futilely called for calm. Later a reporter would liken the doomed men as they were hoisted up to balloons ascending upward over a carnival.

None of the senior officials believed that it could happen in "one of the most racially tolerant, northernmost states in the Union." County Attorney Warren Greene told jurors at the opening of the first trials that it was incumbent upon the jury system to remove the stain, for the lynchings had lowered Minnesotans to the level of Southerners: It was really, he said, the jury system that was on trial. But with each acquittal, the cheers from outside the courtroom grew in volume, blurring the line between due process and mob law. With the conviction of the immigrant youth and the others by a jury no longer composed of working-class men, boosters of the state hoped that Minnesota's standing would be rehabilitated. No one was prosecuted for murder. Only one black man was convicted of rape. All other charges were dropped. The city could then decide that this was enough: *best* (as they say) *to let sleeping dogs lie.*

Max Mason, the black man found guilty of rape, appealed his conviction before the state Supreme Court, challenging the method by which he was identified by the accuser. The conviction stood, though a dissenting opinion asserted that the identification of Mason was flawed: "It is common knowledge," wrote Justice Dibbell, "that colored men are not easily distinguished in daytime and less readily in the dark or in the twilight. Young southern negroes, such as [Mason], look much alike to the northerner. The proof is in the case." The curious yet divergent logic of racial awareness in the opinion and the dissent were like branches of the same tree: The life and soul of black men were immediately devalued because they all looked alike. Accordingly, the whole ugly chapter could now be closed and in the end, no one would get justice. The stain seemed destined to

Nellie Francis helped to lead the women's suffrage campaign in Minnesota and later wrote and lobbied the Legislature for passage of the state's antilynching bill.

University of Minnesota's women's suffrage club, 1913. Photos courtesy of Minnesota Historical Society.

remain due to the system's failure to pursue justice as well as the community's insistence to accept this outcome; but redemption, of sorts, did come in the form of the enactment of the state's antilynching law in the spring of 1921.

This brings me to the Rochester lecture that I mentioned in the beginning. My talk was on the life and times of Nellie Francis, a remarkable African American woman of many accomplishments, starting with her high school graduation speech. She helped to lead the women's suffrage campaign in Minnesota and later wrote and lobbied the Legislature for passage of the state's antilynching bill. Her participation in suffrage work represented interracial cooperation at a time when the national leadership of white suffrage organizations was more than willing to compromise the voting rights of black women for the support of the southern Congressional bloc.

But in Minnesota, the formidable Clara Ueland, president of the Women's Suffrage Association, set a new tone in her organization. For one, there would be no approval given to chapters that wanted to present *The Birth of a Nation* in order to promote the suffrage movement, and Francis's role would be more than symbolic. In 1919, Gov. Burnquist signed Minnesota's certificate of ratification for the 19th Amendment. And in 1921, when Francis launched her lobbying effort, suffragists no doubt provided her with support in securing the needed votes from state legislators, which she, in a most spectacular manner, succeeded in doing. With a vote in the House of 81-1, and in the Senate, 41-0, the bill was signed into law on the 18th of April. Gov. J. A. O. Preus, who succeeded Burnquist, had said even before the bill's passage that it would be his pleasure to sign it.

It would seem that Minnesota had solidly declared support for racial justice, and in doing so by enacting legislation, it seemed that Minnesotans, through their chosen representatives, had at last, after a year, removed the stain from Duluth and from the state as a whole. Now, unfortunately, it seemed that it was time for high-minded Minnesotans, resting on their laurels of reform, to return to complaisance. In the last year of Preus's tenure, when Nellie and William Francis purchased a new home that was located in a white neighborhood of St. Paul, the Francises—Minnesota's champions of racial dignity and opportunity, who had done so much to inspire people to be better than their baser instincts—watched as crosses were burned on their front lawn.

With few exceptions, white friends and allies did not come to their defense. Instead the couple learned one simple message, loudly and clearly: Maybe they could not be lynched and Nellie could vote, but they still had to know their place and stay in it, *or else*. In 2003 a memorial monument to the victims of lynching was dedicated in Duluth; today, another significant step in removing the stain of the Duluth lynchings begins by reaffirming that it happened, as the commemorations marking the event do. But it must never be a one-dimensional effort to demystify the state's self-image of exceptionalism. Rather, to have truly learned the lesson of Duluth is to commence a sustained effort to remedy the multifaceted nature of racial inequity. ▲

WILLIAM D. GREEN, J.D., Ph.D., is professor of history at Augsburg University. He is a two-time recipient of the Minnesota Book Award-Hognander Prize—in 2016, for Degrees of Freedom: The Origins of Civil Rights in Minnesota, 1865-1912, and in 2020, for The Children of Lincoln: White Paternalism and the Limits of Black Opportunity, 1860-1875. His forthcoming biography, Nellie Francis: Fighting for Racial Justice and Gender Equality, will appear in January 2021.
GREENB@AUGSBURG.EDU

LEGAL ETHICS AND RISK MANAGEMENT IN THE TIME OF PANDEMIC

By Chuck Lundberg

Annual HCBA Bar Benefit held at the Lumber Exchange Event Center

This is all still pretty new. Even though it feels like it's been forever, at this writing the covid-19 pandemic crisis is not yet 60 days old.

It began while I was on spring break vacation from my law school class, March 6-16. The night before I left, I attended the annual HCBA Bar Benefit. As the photo attests, the usual crowd turned out: hundreds of lawyers and judges, packed elbow-to-elbow in the Lumber Exchange ballroom enjoying great food and refreshing adult beverages. It was a wonderful night. I talked to some of my old partners and many other longtime friends; shook a lot of hands; and hugged a few people.

An utterly familiar scene—and one that we are not likely to see again for a long while.[1]

The day after I got back, the governor closed restaurant and bars statewide. By that time, the law school had already switched to entirely remote teaching, effective immediately. A complete statewide lockdown (except for "essential" services) followed the next week. And we have all been working remotely since then.

By the end of March, the coronavirus outbreak and resulting lockdown had already caused unprecedented disruption in law firms and created a host of new issues for firm general counsel and ethics partners. On March 30 I published a column in Minnesota Lawyer describing a number of new ethics and risk management issues that had arisen almost overnight.[2]

This article updates and expands on that column, from several sources. The ethics and risk issues for law firms have been discussed nationally on a daily basis in the legal press and various legal ethics and malpractice blogs and listservs. In Minnesota, the Firm Counsel Group[3] met via Zoom in late April and took a deep dive into the most pressing issues for firms and firm counsel.

What we are living through has been called a "black swan"—an unpredictable event that blows past the normal range of outcomes and has potentially severe consequences. Black swan events are characterized by their extreme rarity and severe impact. In itself, the emergence of a potentially dangerous new virus is not unpredictable; that happens every few years. What was entirely unprecedented this time was that the world and the economy were shut down in response.

The economic toll on law firms is now beginning to be felt and tracked, and it will be severe. In the weeks following the outbreak, most large law firms around the U.S. have engaged in massive layoffs, furloughs, pay cuts or distributions changes, cancellation or restructuring of summer associate programs, or other such cutbacks. Smaller firms are now or will soon be following suit.

It is also reported that law firm mergers—all the rage just a few months ago—have dried up almost completely due to the pandemic. Deal-making has come to a screeching halt; it is the first time in four years that the industry will see a decline in mergers or similar deals between law firms—if there is any significant number at all.

While some legal work is contracting, other practice areas seem to be experiencing substantially increased volume; Law360 has reported that restructuring work is exploding. Litigation funding deals are also keeping many lawyers busy.

Malpractice, anyone?

There will inevitably be a marked rise in legal malpractice claims in the coming months and years. If there is one thing that's an absolutely sure bet, it is that legal malpractice claims increase dramatically during an economic downturn.

But malpractice claims are even more likely to increase now, because in this setting, unlike any we have ever seen before, *the law itself is changing on a daily basis*, and in unprecedented ways. Statutes of limitation and procedural deadlines have been completely altered overnight—by order of court, by legislative action, or by emergency order of state governors. If lawyers are not keeping up with every single change in the law in their practice areas, legal malpractice claims are sure to follow.

Here is a textbook example of a new ethics problem that will result in a legal malpractice claim if not handled correctly. Analytically, it is called the "underlying work" conflict problem: Your firm does work for a client on project x. A year or two later, the x deal results in litigation or arbitration, and the subject of the client's dispute *is the very clause your firm drafted for the deal.*

Think of a *force majeure* clause, for example. The clause you drafted for the deal turns out to be too narrow to include an industry-wide shutdown caused by covid-19. (Google "*force majeure* clause"; there are pages of results from just the past few weeks illustrating this problem.)

So when litigation or other claim resolution proceedings ensue and the client (naturally) comes back to you as their lawyer to handle the new matter, can you do so? Don't you have a huge conflict?[4] And don't you have an ethical duty to advise the client that it may have a malpractice claim against you?

On a more mundane, workaday level, one noted authority has focused on "hoarding and dabbling" problems:

> As business dries up, lawyers are worried their compensation will be cut or they may even lose their jobs. In desperation, some lawyers may start "hoarding" work.... [W]hen a transactional lawyer learns that her client has a dispute with a business partner, the lawyer tries to solve the problem herself instead of passing it on to the firm's litigation group, because she thinks she needs more billable hours.
>
> A related problem is "dabbling," where a lawyer—due to similar financial concerns—starts to drift outside his practice area. For example, a commercial litigator whose business is slowing down due to court closures may put out feelers for employment, bankruptcy, or insurance work, because that is where most of the business seems to be.
>
> Hoarding and dabbling are dangerous because they almost inevitably lead to mistakes, which lead to unhappy clients and, in some cases, malpractice claims. Law firm management should remind lawyers of their duties of competence, caution against straying outside their practice areas, monitor client intake forms to ensure that new matters are allocated to the correct practice groups, and spot-check time entries to confirm that lawyers are spending their time appropriately.[5]

Supervision & Rule 5.1 issues

Under Rule 5.1 of the Minnesota Rules of Professional Conduct, all supervisory lawyers in a firm have an ethical duty to make efforts to ensure competent practice by all lawyers in the firm, and to supervise the subordinate lawyers with whom they work:

> **Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer**
>
> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer's conduct conforms to the Rules of Professional Conduct.

Even before the pandemic hit, the 5.1 supervision issue had become a new focus of attention. Office of Lawyers Professional Responsibility Director Susan Humiston's article in this journal last December raised some troubling issues about what firms are required to do to satisfy their Rule 5.1 supervision duties.[6] The article suggests that firms may have to do formal audits to reasonably ensure compliance—that only when a firm has in place formal policies and procedures, training, and auditing, can the firm feel confident that it has the required 'measures' in place to assure compliance. And Bill Wernz has a forthcoming article on the same issue that will appear in this magazine next month.

In any event, Rule 5.1 is not subject to a pandemic exception. Indeed, the practical steps that firm management and supervisory lawyers must now take to fulfill the duties imposed by the Rule are entirely different and magnified when the lawyers to be supervised are practicing not down the hall but scattered remotely across a greater metropolitan (or rural) area. How do you effectively deal with these issues? Firms should be having videoconferences for the entire firm, as well as for individual practice groups. During this time of self-isolation, firms should consider other creative measures to encourage regular communication among lawyers and staff.

Ideally, associates and nonlawyer staff should feel free to pick up the phone and call senior lawyers and partners to ask questions or bounce ideas around. And a friendly check-in call from a partner or senior lawyer should not be so rare that it creates a sense of trepidation in the associate.

New cybersecurity and confidentiality concerns for remote work

Working from home has become the new normal, and even during the various, yet-undetermined stages of "reopening," it will remain a major factor. The pandemic has forced law firms into a new

work paradigm, switching overnight to a remote workforce. A recent ABA panel of experts warned that law firms need to be mindful of how employees working remotely because of the pandemic can avoid computer viruses and other cybersecurity risks.

Even if cybersecurity was not a top-of-mind risk issue for law firms before (it should have been), it is now. Cybercrime is on the rise because the transition to a fully remote work environment creates new vulnerabilities for the hackers to exploit—among them technology systems in disarray and unsophisticated users thrust into new ways of working and communicating. In fact, there was substantial evidence in the literature of a new and more serious risk of malware threats earlier this year, before the pandemic hit.

Law firms must protect their clients' sensitive personal information whether it is viewed at a lawyer's home or at the firm. In addition, firms must guard against the predictable tendency for lawyers to be less careful at home that they would be at the office.

Lawyers working remotely must also be careful to consider the security and confidentiality of their procedures and systems. Some basics include protecting computer systems and physical files and ensuring that telephone and other conversations and communications remain privileged. As Susan Humiston notes elsewhere in this issue (see p. 6), privilege issues that never would have occurred in the office are now implicated. How does working from home (with kids? a spouse/partner/roommate?) implicate attorney-client privilege and confidentiality? Many commentators also caution that Alexa units and any other smart devices with microphones around the home should be unplugged. (Cybersecurity expert and Bench & Bar columnist Mark Lanterman discusses remote work security concerns in his recent columns, including this month's on page 8.)

Think of it this way: I do not know a single person who has been infected or otherwise affected personally by the covid virus. But I know of three law firms that have suffered serious computer attacks, such as malware or ransomware, in the last month or so. The widely reported hack of the Grubman Shire Meiselas & Sacks entertainment law firm in early May is one of the higher-profile examples of the problem

It is critical to determine whether a firm has adequate insurance coverage for data security losses—and to know that a legal malpractice policy does *not* offer it. These events can be incredibly expensive—six figures, easy. Consider whether you need to supplement your firm's coverage.[7]

Attorney wellness issues

Until about three years ago, "attorney wellness" as a law firm risk management issue wasn't even a thing. It is now one of the top five concerns in the ethics and risk management arena. And without question it has become a much bigger issue in the time of pandemic.

Wholly aside from the physical health issues inherent in a pandemic, mental health and wellness issues loom large. By now we are all acquainted with the dire findings of *The Path to Lawyer Well-Being*, the milestone 2017 report that chronicled the high incidence of stress, depression, and unhealthy substance use in the profession. As Joan Bibelhausen of Lawyers Concerned for Lawyers writes elsewhere in this issue (see p. 27), the current pandemic and the many dislocations it's causing are rife with challenges to mental and emotional stability.

> The competency issues raised by the pandemic range far beyond learning to use new technologies and keep them secure. In every area of practice there are new and different challenges posed by the new normal.

In view of this, law firms must maintain regular communication with their lawyers and staff members, so that they notice if someone drops off the radar. Practice group leaders should keep track of who attends weekly conference calls and check in personally with anyone who is missing. Monitoring time records is another way to track engagement. If someone has not entered their time for several days, it is a good idea to check in with them to see how they are doing.

Here's another entirely new problem: Traditionally, law firm staffers have been management's eyes and ears in the office. If a lawyer seems off or is making odd demands, the staff is often the first to notice and to talk about it. Usually, word gets back to firm management. But now, since the staff never sees the lawyers at all, that effective early warning system is simply gone.

The ABA Commission on Lawyer Assistance Programs has published a list of resources titled "Mental Health Resources for the Legal Profession During covid-19." And the MSBA has just launched a new webpage devoted to covid-19 resources for Minnesota legal professionals that includes resources on coping and wellness at *www.mnbar.org/covid-19-resources*.

Competence: Keeping up with changes in the law and standards for practice

Across all practice areas, it's an ethical imperative to ensure that all lawyers are competent in using any new technology—such as meeting with a client on the suddenly inescapable Zoom. (Speaking of Zoom, have you checked the privacy policy for that app to see what information is being collected about you?)

This was practically a catechism even before the pandemic—ethical competence now *includes* technological competence. The Rules were amended a few years ago to specifically so state. But the competency issues raised by the pandemic range far beyond learning to use new technologies and keep them secure. In every area of practice there are new and different challenges posed by the new normal:

- In litigation, court rules, calendars, and statutes of limitation have been suspended.
- Commentators suggest that by halting trials, the coronavirus may push more parties to the settlement table. Now could be an opportune time for litigants to reach out to opposing parties to see if resolution is appropriate in light of the circumstances.
- What about the new normal for depositions? Sure, you were a competent taker of depositions before, but have you mastered the new and different skills required to depose a witness over Zoom?
- In employment law, the pandemic raises numerous new issues revolving around HIPAA, medical issues, and new law governing family or medical leave and emergency sick leave.

- Estate planning experts have expressed new concerns about children or other beneficiaries contacting the parents' attorney to have elder parents' estate plan changed. More fundamentally, how are documents to be executed in the era of social distancing?
- Immigration law has entirely new problems to confront.
- M&A practice has been fundamentally changed, as has mediation/arbitration, which is now conducted via Zoom and other remote technology.
- How do firms keep up with the changes that are occurring almost daily as governments respond to the pandemic? Every day, general counsel responsible for workers across multiple jurisdictions are trying to get up to speed on new mandates, while seeking advice from outside counsel and other external resources.

A new paradigm for civility and reasonableness?

In March, the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee called for a new emphasis on lawyer civility:

> "In light of the unprecedented risks associated with the novel Coronavirus, we urge all lawyers to liberally exercise every professional courtesy and/or discretional authority vested in them to avoid placing parties, counsel, witnesses, judges or court personnel under undue or avoidable stresses, or health risk... Given the current circumstances, attorneys should be prepared to agree to reasonable extensions and continuances as may be necessary or advisable to avoid in-person meetings, hearings or deposition obligations."

A notorious decision out of the federal district court in Chicago in March (known among ethics nerds at "the Unicorn case") vividly illustrated the new paradigm. A company that creates "lifelike portrayals of fantasy subjects" such as elves and unicorns sought an emergency hearing in its trademark infringement suit. The court deferred the hearing for a couple of weeks, citing health and safety issues arising from the coronavirus.

Plaintiff's counsel promptly moved for reconsideration on an emergency basis. The court was not amused: "Plaintiff has not demonstrated that it will suffer an irreparable injury from waiting a few weeks. At worst, Defendants might sell a few more counterfeit products in the meantime. But Plaintiff makes no showing about the anticipated loss of sales. One wonders if the fake fantasy products are experiencing brisk sales at the moment.... If there's ever a time when emergency motions should be limited to genuine emergencies, now's the time."

The opinion concluded with this gem: "The filing calls to mind the sage words of Elihu Root: 'About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.'... The world is facing a real emergency. Plaintiff is not."

Now the point is this: Two months ago, before covid hit, there would have been nothing particularly remarkable about counsel pressing for an expedited hearing as he did. But everything has changed now. The pandemic has suddenly narrowed the Overton Window of reasonableness in litigation.

Finally, consider soberly the issue of how best to communicate with clients when we can only communicate with them remotely. For some *it's just not the same* as in-person contacts. Communication with clients in the time of pandemic should be handled delicately. One commentator has noted that when you call your clients now, the first few minutes of any conversation should have nothing to do with the legal matter at hand. "It's time to discuss life, family, fears, and of course, health. This is also a time to be honest and transparent. We're all going through this. No one is immune." ▲

CHUCK LUNDBERG is recognized nationally as a leader in the areas of legal ethics and malpractice. A former chair of the Minnesota Lawyers Board, he retired in 2015 after 35 years of practice with Bassford Remele. He now teaches at the University of Minnesota Law School and consults with and advises attorneys and law firms on the law of lawyering through Lundberg Legal Ethics (www.lundberglegalethics.com).

CHUCK@LUNDBERGLEGALETHICS.COM

Notes

[1] Think about what we've all lost here, at least for now: Bar association gatherings like this have long been on my list of "must attend" events. For decades I have attended the spring Bar Benefit, the summer MSBA convention, the fall Judges Social, the winter Ramsey County Bench & Bar dinner, etc. It's automatic. But no more: this year's bar convention has already been cancelled, at least as to any live event—especially the bar event of the year, the annual President's Reception. And does anyone really think things will be sufficiently back to normal so that we can have a Judges Social this year?

[2] *https://minnlawyer.com/2020/03/30/quandaries-and-quagmires-legal-ethics-risk-management-in-pandemic/*

[3] I have written in this journal before about this group. The 25 largest firms in Minnesota all have experienced general counsel who spend all or much of their time representing and advising the law firm. For more than 10 years they have met regularly to discuss breaking or troublesome ethics or risk issues.

[4] Law360 recently published an article directly on point: "Think Twice Before Using Deal Counsel as Litigation Counsel," 4/17/20 (paywall). More fundamentally, the underlying work problem is so well-recognized that there is an entire section on the topic in the online Bible of conflicts of interest, *Freivogel on Conflicts*: *http://www.freivogelonconflicts.com/underlying-work.html*

[5] See Hyland, "Tips For Minimizing Law Firm Liability During covid-19." *https://www.law360.com/articles/1268179/tips-for-minimizing-law-firm-liability-during-covid-19*

[6] Susan Humiston, "Your ethical duty of supervision," Bench & Bar of MN (December 2019). *https://www.mnbar.org/resources/publications/bench-bar/columns/2019/12/01/your-ethical-duty-of-supervision*

[7] The ABA Standing Committee on Lawyers Professional Liability recently published a second edition of *Protecting Against Cyber Threats: A Lawyer's Guide to Choosing a Cyber-Liability Insurance Policy*. This very handy guide to insuring against this increasingly dangerous exposure—a 32-page paperback book, retailing for $22.50 for ABA members—has been described as "extremely useful for law firms that are looking to purchase a cyber liability policy" and "a must read for any law firm that recognizes that it's not a matter of 'if' but 'when' a data breach happens; (and) how a cyber policy can protect the firm and effectively manage the breach." Here's the link: *https://www.americanbar.org/products/inv/book/385016340/*

THE REMOTE LAWYER'S SURVIVAL GUIDE

By Kristi J. Paulson

The world can change in a matter of minutes—we knew that. But of course none of us thought that in 2020 the entire world would change completely in a couple of weeks. The practice of law as we have always known it was suddenly turned upside down. As lawyers, we went from being members of a center-stage, crowd-adoring, face-to-face profession to a situation in which we suddenly found ourselves retreating into our homes, sheltered away. Everyone became a remote worker overnight.

Lawyers embrace challenges. We moved into home offices. We connected and had a lot of meetings, seminars, and zoom happy hours. There was no home office envy or drama. We were all in this together. After all, isn't it fun to work from home in your PJs?

And then the world found out: Working remote is not so easy. It is not sitting at home in your pajamas, listening to your favorite music, sipping on cups of coffee, and effortlessly bringing home the bacon at the same time. The novelty quickly wears off. Restlessness sets in. Conversations seem harder. You find yourself talking to the dog and swear he talks back. You order from Amazon just so you can chat with the delivery person. You fear you are becoming a hermit.

The concept of working remotely is hardly new. Some of us have been doing this for decades. However, being surrounded by the entire community also working remotely is new. And it changes everything. We are in uncharted territory and right now there are all kinds of unknowns, risks, and fears on the horizon about what the future holds.

For many, the workplace as they have known it will be forever changed. We have discovered technology and connectivity, and our culture can support remote working. The courts are embracing technology. Clients are adapting. And, with uncertainty looming, it is likely that more and more professionals will continue working remotely either full-time or part-time.

Remote work can be wonderful. It can also be filled with all kinds of unique challenges and requirements. Having done this for over two decades, I am going to share my thoughts and suggestions in this Remote Worker's Survival Guide.

Survival Tip #1:
Get up. Get dressed. Get out.

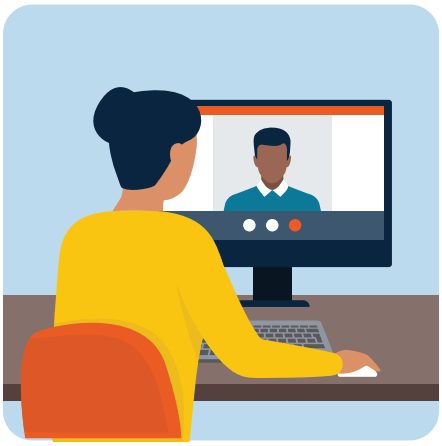
It is easy to feel like every day is a Saturday when you work out of your home or work remotely. Flexible schedules and the ability to work from virtually anywhere are perks of remote work. You can work from home in your pajamas and bunny slippers. Does it get much better than this?

Working remote does not mean that clothing is optional. While I will admit I love working in my PJs as much as the next person, there is a point where comfy goes too far. Granted, no one knows if you are wearing a suit while working remotely and, more importantly, no one cares. But it is easy to take comfortable way too far. Trust me.

You need discipline and routine. Always get dressed. 'Dress for success' doesn't have to mean wearing a suit and a tie or a dress. But wash-and-wear does come in more styles than just lounge pants. You can find work clothes that are comfortable and easy to clean, yet still professional-looking.

Pretend you have somewhere to be—or actually force yourself to go out, even if it is to buy a cup of coffee. Having a get-ready routine signals you are beginning your workday. It also allows you to signal the end of the day by putting your PJs back on. Each day needs an opening and a closing. Don't rob yourself of that by wearing your pajamas all day.

Taking care of your appearance is a sign of respect to yourself. It will make you feel more respected and professional.



Survival Tip #2:
Remote work is real work

Remote working does not mean *not* working. You have clients, you have a workload, and people are depending on you. You are still assessed on how you deliver. Remote work just means you have more flexibility and are able to squeeze in walking the dog or an hour of tutoring at the school in the middle of writing a legal brief.

I have worked remotely for almost two decades, most of that working out a home office. For the most part, I love it. I am productive. I am happy. I am empowered. I don't dislike working in an office and I sometimes miss the social aspects of an office. But I have a work area and a zone that allows me to be productive from home. Working remotely can bring wonderful things to your life if you can train it and maintain it.

It's not for everyone. For some, it is highly productive, liberating, and allows for a wonderful work-life balance. For others, it means uncertainty as well as worries about practical and social aspects of their work life. Some people need the structure of an office. Some people need the social aspect of an office. Some people need to get out of the house. Some people lack focus. Some people lack discipline.

Of course, as lawyers we are never totally free to set our own agenda, as things like meetings, court hearings, and clients can dictate our schedule to a great extent. But most remote workers will get the extra flexibility to accommodate work routines to their lifestyles and personalities.

If you speak to remote workers, you will hear about many work routines, though seldom are they 9:00-5:00. When my kids were young, I would often start my workday at 4 or 5 a.m. and by the time they woke up, I essentially had almost a half day completed. Many people find the quiet hours of the late evening to be productive hours. These varied schedules do not mean that remote workers are not working a full day. Remote workers simply have to find hours that suit them best.

It is very easy for family and friends to assume that working remotely or working from home means—hey, you're home all the time! This can be one of the most challenging aspects of working remotely: explaining to people that, although you are home, you are not available for a random chat or a long walk. Yes, you can be a bit more flexible, but if you allow others to take advantage of that flexibility, your productivity suffers. If your productivity suffers, your bottom line reflects that.

Nobody has working remotely figured out 100 percent. What really matters is to find a system that works for you and for your company. You need to embrace the fact you are a remote worker. You need to believe, and you need to show the world, a remote worker is a real worker.

Survival Tip #3:
Resist the shiny objects

You need to learn to resist the shiny objects in your life. When you are at home, there is no social distance that stands between you and your television set, or the washer and dryer, or that really good novel you started reading last night. It happens all the time, you sit down to work on a major project, and suddenly a load of laundry is calling your name, or the dog needs a walk, or a meal needs to be prepared. And, without a doubt, the minute you get on a conference call, the children will suddenly need you and be calling for you loudly.

There is that newfound freedom of owning your day. Nothing stops you from running errands, taking a class, gardening all day, or working out in the middle of the day. It becomes easy to justify doing those things during the day, promising yourself you will work late or get up early. That plan works well until you factor in the procrastination.

All remote workers procrastinate. Then again, all workers do. There may be no way to avoid it, but there are techniques that can make it productive when you work remotely. There is really nothing wrong with taking a power nap, walking the dog in the middle of the day, or sitting outside in the sun journaling your thoughts. The guilt we feel as remote workers for doing such things is really self-imposed and not justified. Remote life does offer flexibility and the opportunity for balance and autonomy. By focusing your procrastination, you can rebuild instead of draining yourself.

Survival Tip #4:
It is okay if you have kids and the dog is your legal assistant

Lawyers are robots devoid of families, pets, spouses, homes, and anything else that might make them real. Showing a personal side of yourself might be perceived as weakness. If you work from a home office, you are less successful than someone who has a downtown office.

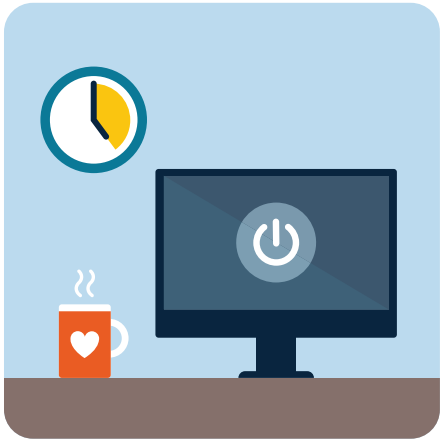
I remember thinking these very things when I started working remotely. I was so very wrong.

Embrace your kids and pets if you are lucky enough to have them in your life. Having children and attempting to have a remote practice or a home office often presents challenges and uphill battles. Many people discovered this when distance learning set into the home at the same time remote working became the norm. Kids have a knack for appearing at inopportune times. Dogs like to bark during Zoom calls. There is no place a cat would rather be than on your desk and swishing its tail in front of your camera. It's very easy to want to make excuses for them or try to keep them completely out of the picture. The question is why?

A huge advantage to remote work is that you do get to spend more time with your family. And for your own sake as much as anyone's, you really need to do that. It is easy to work through the entire day and into the night. You need to take

breaks and enjoy the moments with your family. Make it a point to not check email or be thinking about a case when you are with them. Treasure the exercise you get walking the dog. It isn't really a break if you are not present in it. Allow your mind to reset and refocus. Breaks with a purpose can make you more productive in the long run.

Set your expectations and then communicate with others. Create a system that signifies a need to not be disturbed and only use that when you really mean it. For example, I have signs that are placed on the door signifying I am on a call or video conference and, absent the house burning down, I do not want to be disturbed. Let your clients, your colleagues, and others know when you are available and how to contact you. Unless you are a 911 operator, there is nothing wrong with stepping away from your desk and taking a break or letting a call or two go to voicemail. You need a balanced work life. And it is acceptable to be both a remote worker and a human being.



Survival Tip #5:
It's always 5:00 somewhere

'It must be great to set your own schedule' is something I hear a lot. Usually from someone who assumes that means I get up really late, work in my pajamas, and knock off shortly after lunch. The fact of the matter is, there seldom is a typical 8 to 5 day when you work remotely.

Indeed, you can start your day when you want. The bigger problem can be stopping. When you work remotely, the workday may never end. It can be hard to know when to stop. No one is going to tell you. There is always that temptation to check for messages, look at your emails, work on that case a little more. I mean…what is a full remote day?

For remote workers, it can be difficult to disconnect from your computer, your office, and work. Contrary to assumptions, it becomes easy to overwork rather than underwork. As lawyers, we often love what we do, and it is easy to keep doing what we love. This is a global age and different people are online at different times. You will get calls, messages, requests, and emails at all hours of the day.

You need to step away from your job and your workspace each and every day. All of the other aspects of your life need to be as important as work. Set boundaries. It is important to focus on work and get it done in a timely matter. This doesn't mean you need to be online 24/7 and respond to everyone within seconds. To make a clean break between work and home, you need to learn to close your workday. And, when your day ends, make sure it really does end.

Survival Tip #6:
Don't forget to make rain

It is easy to feel like an island when you are a remote worker. There are no coworkers with offices lining the hall where you can just drop in to chat or discuss a case. Lunch in your kitchen is not the same as lunch in a bustling restaurant. Walking down the stairs to your home office is not the same as a skyway filled with people. It's hard to network and make friends when you sit in front of a computer all day.

Rainmaking and networking will always be essential to business and business development. A remote worker needs to establish connections, take time to network, and follow up with those contacts. Indeed, social media can make it much easier to network. But you need to work those channels and connections with purpose to make them meaningful. Equally as important: You need to ignore all of those social media posts, forums, and groups that, interesting as they may be, do nothing for your business and only take up your time. Time is one of the most valuable assets a remote worker has, so use it wisely.

Survival Tip #7:
Have a life outside of the law

As lawyers, much of our lives and our identity are made up of being a lawyer. The demands on our time are great and we tend to measure our success by billable hours at the end of the year or our legal accomplishments. It can be hard to justify setting aside personal time.

Having an activity or hobby to offset work can greatly help one's mindset. It doesn't really matter what you do—do what you enjoy. Run marathons. Quilt. Sew. Draw. Read. Work out. Doing something you love and want to do helps you to relax. A relaxed mind can be a creative and productive work mind.

Remote work also allows for more opportunities to embrace your community. Remote workers enjoy a flexibility that is rare. Embrace that gift and give back or learn about your community. Enjoy the opportunity to participate in local events. There is no place for guilt in enjoying work flexibility. The key is to make time for something you enjoy and take the time to enjoy it.

Life holds no guarantees. What purpose is there in waiting for tomorrow, or a year from now, or until you retire, to enjoy yourself? What a shame it will be if you are robbed of an opportunity to enjoy your life because you waited. ▲

KRISTI J. PAULSON is the President of PowerHouse Mediation and an attorney with Paulson Mingus Law. She is a Rule 114 Qualified Mediator (Civil and Family Law) and Arbitrator and has over 25 years experience as a plaintiff's trial lawyer. Kristi serves on both the Minnesota Lawyers Professional Responsibility Board and the ADR Ethics Board.
www.PowerHouseMediation.com
KRISTI @PAULSONMINGUS.COM

Technology is just one of the tools we need to get through this crisis and the next

By Joe Van Thomme

"Nevertheless, many continued hoping that the epidemic would soon die out and they and their families be spared. Thus they felt under no obligation to make any change in their habits as yet. Plague was for them an unwelcome visitant, bound to take its leave one day as unexpectedly as it had come."
– The Plague, Albert Camus

Pandemics do strange things to the imaginations of people. Most people are rightly worried about their health, their families, and their jobs. But as Albert Camus put it, "the only way of escaping that intolerable leisure was to set the trains running again in one's imagination and in filling the silence with the fancied tinkle of a doorbell, in practice obstinately mute." And so our minds stray into abstract questions about the mathematics of toilet paper rationing, whether hand sanitizer works just like a cleaning wipe, or if pizza boxes can transmit viruses.

But the most pressing question on most people's minds has been asked in headlines everywhere from *The Atlantic* to the Boston Globe and to the BBC: "When will things go back to normal?"

Legal services, whether deemed so by executive order or by their very nature, are *essential* services. People come to lawyers much as they come to doctors, expecting and needing an expert's guidance on family law cases, contract disputes, estate plans, or criminal matters, to name a few. That expectation from our clients, whether they be individuals, institutions, governments or tribes, should be empowering and fulfilling. In a chaotic time, it should give you purpose.

Unfortunately, right now no one has any expert answer about that pivotal question of when life will return to normal. Given the gravity of the problem the world is facing, I would be suspicious of anyone who suggests that they do.

But that fact does not alter who we are as lawyers, judges, court administrators, paralegals, and other legal practitioners: problem-solvers. In fulfilling that role for our clients, we should start by setting the return-to-normalcy question aside for a moment, and ask a more fundamental one: "What should the new 'normal' look like?"

Asking fundamental questions

Holocaust survivor and psychotherapist Viktor Frankl has written extensively about the importance of perspective and a search for meaning even in the gravest circumstances, recognizing that crises often present opportunities for introspection and growth. The current crisis provides us with that opportunity, particularly with a chance to examine why we practice law the way we do. The best lawyers will ask themselves how their practices have helped the communities where they live and work and how they can continue to provide their services. But before we can meet any crisis, we need to know what tools we have to do the job and what tools we need to finish it.

Technology has changed our lives immeasurably in the last few decades, and as a tool for meeting this global crisis, it came into play immediately. Minnesota Gov. Tim Walz's most visible response to the state's crisis—an executive stay-at-home order—depends on working remotely, something that technology now allows but few of us could have done for any extended period just a few years ago. Lawyers must use technology to adapt their practices if they are to continue to serve their clients through this pandemic and afterward.

Looking to the court system, it is easy to imagine the benefit of harnessing technology and the risk in failing to do so. Courts in every county have developed over time their own local practices for holding hearings, mediating disputes, and processing court filings. Most in-court proceedings have been significantly disrupted by the pandemic. And with a highly contagious disease in our midst for the foreseeable future, limiting in-person contact for groups of people is undoubtedly the right response. But to simply reduce the number of in-person hearings and wait until courts can reopen like "normal" is to not only miss a chance to reassess our practices but to possibly exacerbate the harm caused by the delay.

Imagine a person seeking a protective civil order from a domestic abuser being told that their hearing cannot occur until hearings can be held in-person once again. Imagine a poor defendant in a criminal case being denied job opportunities, limited as they will be during an economic downturn, because of a pending minor criminal matter that cannot be resolved until cases are heard like "normal." When technology allows for hearings to be conducted in alternate ways, such as through remote appearances, refusing to allow such hearings would be tantamount to denying access to justice. If attorneys, judges, and legal practitioners truly are problem-solvers, the looming imperative is to quickly adapt our practices and processes to ensure that courts and the law do not cease to be mechanisms to resolve disputes and protect the rights and safety of the people we serve.

It is tempting to point to the magnitude of this crisis—a 100-year-pandemic!—and imagine that this problem will be one that only time can solve. But recent history has also shown us that technology can be rapidly mobilized to address a problem.

The use of electronic warrants in criminal cases directly resulted from a string of state and national appellate decisions that drastically altered the way in which law enforcement could investigate impaired-driving crimes. As a response, judges, courts, and law enforcement agencies needed to adapt—quickly—by using technology to meet a significant challenge. Court-system stakeholders met the challenge and by virtually all accounts, the resulting process not only better serves public safety, but is more efficient.

Finding alternatives to the normal in-person hearing model is an access to justice issue, as using technological alternatives may also expand the ability to participate of parties typically excluded or discouraged from in-person attendance, such as disabled lawyers or parties, low-income litigants, or even victims in criminal cases. Additionally, by efficiently utilizing technology, judges may end up with better information than they might otherwise have in a traditional hearing, as in the case of electronic search warrants.

The challenge: Think differently

Technology will help us leverage this crisis into an opportunity to improve our practices. But technology alone will not solve this problem. The tool we will need is critical thinking—specifically, *thinking differently*—about the challenge before us. Rather than continuing to think of this problem as one that can only be solved by waiting for a return to normal, we should reframe the crisis as one that provides us an opportunity to increase access to justice for citizens, whether that means rethinking court processes, adapting our individual practices, or using alternative resources to continue our service to clients. Thinking differently requires us to ask: How can we ensure that our citizens, clients, and communities continue to have access to justice?

The courts again provides a tangible example. For many who practice in the court system, delays and continuances are a constant source of concern. Litigants and parties live in limbo, witness memories age, and cases stack up one behind another. Certainly there are many reasons, including some very good ones, for delaying proceedings. But to the extent that courts get backlogged because of sheer caseloads or limited judicial resources, it may be time to reassess whether the traditional court hearing model for all cases is the safest and most efficient, especially in a world where social distancing will be the norm for the better part of the next few years.

For instance, in many counties, a hearing officer program greatly expands access to the courts for defendants charged with minor offenses. A hearing officer is a judicial officer who gets specific authorization to resolve certain cases by a given city or prosecutor. The officers in most cases are available for walk-in defendants and in some counties even by appointment. In contrast to requiring defendants in low-level cases to come to one specific court date in a mass "cattle-call" format that may take the better part of an afternoon, allowing some offenses to be handled by a hearing officer reduces the number of court hearings to be scheduled, which further reduces backlogs of court cases.

Reframing this as a possible solution that increases access to justice, you can easily imagine the impact such a program could have for many litigants. Imagine the benefit to a low-income defendant—who, instead of taking time off from an hourly job, finding childcare, or (worse) bringing their children to court for the hearing, could instead come to the courthouse to discuss their low-level traffic offense with a hearing officer at a time when they have childcare or are not working. Not only would the low-income person receive greater access to justice, but cases would be resolved more efficiently, backlogs would be reduced, and overall public safety would be protected. This is what increasing access to justice could look like.

Since there are no good answers to how long this pandemic will last, how it will ultimately affect our practices, and most importantly, how it will change our lives, the challenge will be for those of us in the legal field to combine the tools we have (technology) with the tools we need (critical thinking and problem-solving) to help us reframe this problem as an opportunity for growth.

We can start by asking ourselves if there are ways to improve access to justice for poor or unrepresented parties. We can ask if there are ways to ensure that transactional practices can continue without the traditional in-person consultation and execution models. Indeed, recent legislative bills have been introduced with just such goals in mind. We can ask whether our client communication process is meeting the needs of our clients, who right now may feel an increased need for advice and guidance. Questions abound about the challenges we face, and answers are in short supply. But if we are to come out of this for the better—because we *will* come out of this—it is crucial that we ask the right questions. What should come next in our practices? What kind of world do we want to create?

Lawyers are problem-solvers, but we are also leaders for our clients and our communities. To ignore an opportunity to leverage change for the better is to fail our clients, our communities, and our practices. It is to sit idly and wait for, as Camus put it, "the fancied tinkle of a doorbell, in practice obstinately mute." ▲

***JOE VAN THOMME** is a shareholder and city prosecutor with the law firm Eckberg Lammers P.C., which represents communities in the Twin Cities and across Minnesota. He was chair of the Criminal Law Section in 2013-2014 and 2018-2019 and is a board member for the domestic violence advocacy group Standpoint.*

JVANTHOMME@ECKBERGLAMMERS.COM

Detours on the Path to Lawyer Well-Being

Finding our way forward in an upside-down world

By Joan Bibelhausen

In my office, I have a small glass box. Two equilateral triangles are joined by flat pieces of glass soldered together to form a lovely piece filled with sand and small shells. It's a great well-being tool: If you change your perspective by turning the box, you will see things differently.

In the face of a global pandemic, the box may seem quaint, even trite. Perhaps it should be smashed to bits or buried—that seems more appropriate to what we're facing. But the box can continue to be a metaphor, even in the worst of times.

As we look at our place in an uncertain world, it becomes even more important to focus on all aspects of who we are. The watershed 2017 report *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* identified six facets of well-being: occupational, intellectual, spiritual, physical, social, and emotional. To that, I would add cultural. Each of these aspects of the whole lawyer is affected in different ways by the pandemic, with distinct triggers and opportunities. Many of us are required to attend to health, financial, and career challenges far beyond anything we have had to confront in years, if ever. What do you mean well-being? I don't have time for that! Yet attending to the whole lawyer will help us.

Maslow's Hierarchy of Needs provides a useful tool to examine these facets of the whole lawyer. Illustrated with a five-level pyramid, the bottom two levels consist of physiological and safety needs; both may be endangered. Love and belonging are the third level, and can be threatened when our place is insecure. If these needs are met, we often don't notice or consider them closely; if they are not met, we struggle. The top two levels of need are self-esteem and self-actualization, and this is where we might think well-being belongs: "I'll get around to it when I have the important things 'in place'." But attention to our mental health and well-being can help us better satisfy the most basic needs of the whole lawyer. We need not rise to a certain level of the pyramid to attend to our well-being. There is no threshold.

Our new reality

Several of our colleagues, in different places in our profession, have shared this thought: *I have dealt with many challenging situations and handled them. I don't know how to handle this*. When we are faced with an unknown and threatening situation, our normal response is fear. Fear helps us with a flight, fight, or freeze reaction to become safe. In the face of this pandemic, we don't have a clear sign of when the danger will be past or how large the threat will be. We may deny, we may become paralyzed, or we may lash out. This same fear reaction, when viewed mindfully, can also show us where we need to pay attention. When we look at the facets of the whole lawyer's well-being, where are we struggling the most? Additional attention is needed to care for that part of ourselves. Where are we strongest? Additional attention is needed to allow that aspect to grow and support the whole lawyer.

Let's take a look at what we can reasonably expect. We will experience a range of emotions, and each facet of the whole lawyer may respond differently. If we are working from home, we may feel less productive and effective, both personally and professionally. This can lead us to "awfulize": *I can't do anything well.* An entire support system in our firm or office helps us do our best work. It may be available in different forms now, or not at all. Yet we expect to perform at the same level. If our job ended or we don't have enough work, our options are hard to identify and may seem unfathomable.

At home the "office" dynamics are different in so many ways, and our negotiated and managed methods for supporting our families and managing our households are upended. We feel we have failed if we did not smoothly glide into a routine just as organized as before. We don't get to leave work and come home. Our virtual meetings, without a handshake, seem distant and incomplete. I heard both a lawyer and a judge say, "I'm online with people all day and I'm lonely." If we are back in the office, that milieu has changed too. Whatever your disruptions, they are different and they are difficult.

■ **Grief.** If you have lost loved ones or are connected personally to someone with the virus, we offer our deepest condolences. If you have lost your job or wondered if your firm or business will survive, you are grieving as well. We are also grieving individually and as a society for what we have lost and what might have been. You may be in a place of denial and isolation, anger, bargaining, sadness (or depression), or acceptance—and in different places with respect to different losses. Recognizing you are grieving can help you move through it, sometimes with the assistance of others.

■ **Burnout.** This psychological syndrome arises in response to chronic interpersonal stressors on the job. It may result in feelings of cynicism, detachment, ineffectiveness, and exhaustion. Burnout may impact different aspects of the whole lawyer in different ways, but all of these are connected and can be affected. We feel powerless and overwhelmed. If you recognize some of these symptoms and feel you are at risk, decades of research have yielded tools.

■ **Trauma.** This complex topic involves the unique individual experience of an event, series of events, or set of circumstances. The individual's ability to integrate their emotional experience is overwhelmed and the experience is physically or emotionally harmful or threatening; it has lasting effects on the person's functioning and every facet of well-being. In other words, the whole lawyer.

In our profession, we commonly encounter clients and parties who have experienced direct trauma, and we can experience secondary trauma. We define secondary trauma as stress reactions and effects from providing services or listening to others recount traumatic experiences. Now we are experiencing both, and earlier experiences in our lives may be triggered by something that is happening now.

We identify these challenges not to create a sense of doom but to suggest that recognizing and calling them by name can lessen their impact. How do we do that? Let's start by recognizing, again, that we do not have to cross a threshold of distress to begin. As our stress develops over the course of a day or week, it will build until there is a noticeable stress reaction.

It may be depression or an anxiety disorder—or we may lash out, withdraw from meaningful connections, drink to forget, or something else. The point is, we reached a limit. But if we know we are at risk and mitigate the impact more frequently, our risk is lower. To be clear, we can reduce our risk for mental health or substance use issues, but it is no more our fault if we develop a mental health disorder than if we develop cancer. If there is one silver lining of the pandemic, it is that stress and distress are now universally recognized as something we have permission to address.

Tools for resilience

Resilience is the ability to respond to stress in a healthy, adaptive way to achieve personal goals at minimal psychological and physical cost. It encompasses the ability to persist in the face of challenges and to rebound from adversity. It gives us the courage to grow from stress. Basic self-care, such as the way we eat, sleep, and move, is critical to enhancing our immune systems. People in recovery from any mental health issue are facing new risks. Providers and recovery communities have quickly

When you find yourself creating an inventory of all the ways in which you feel deficient, turn it around. Are you doing the best you can? Probably.

adapted to virtual opportunities to offer additional support. The tools that follow are intended to support those higher-level needs even as we attend to the basic ones on the pyramid.

■ **Self-awareness and mindfulness.** How many of us were advised to "count to 10" when something angered us as children? This is mindfulness! It can range from a simple breathing exercise to active yoga or meditation practices to seriously examining our worldview and analyzing what is affecting us the most and why. By being aware of our inner selves, we can feel that we are leading our lives rather than being hijacked by external factors beyond our control. In addition to what you might find with your own search or on LCL's YouTube channel, try this. Within your environment, what are five things you can see, four things you can touch, three things you can hear, two things you can smell, and one thing you can taste? Engage all of your senses, and repeat as needed.

■ **Connections.** Ample evidence supports the importance of touch as a way to release hormones that help us feel connected and develop trust (those missing handshakes). If you are away from people you might normally embrace, the loss may be palpable. Human connection helps our immune system, reduces our risk for mental and physical health challenges, and reduces perceptions of pain and threat. The five-senses mindfulness exercise reminds us that we have more senses than touch. Look for opportunities to have positive interactions with people, even if remotely. Hear everything, not just the words. Look someone in the eyes. Direct eye contact activates mirror neurons leading to the same social benefits as touch.

■ **Boundaries.** What is your personal space and how is it different for clients or parties, colleagues, and personally? Think about and create your safe positive space with each of these groups. Think about how you will protect and secure it so you can do your best thinking and be your best self. What is safe, reasonable, and permissible for each aspect of the whole lawyer? Don't be afraid to ask for what you need. In our own distress in difficult times, we may be far less aware when crossing the boundaries of others—and that may be particularly true for what our clients are asking of us.

■ **Perspective.** When you find yourself creating an inventory of all the ways in which you feel deficient, turn it around. Are you doing the best you can? Probably. Return to the aspect of well-being where you feel strongest and spend some time with that part of yourself. As lawyers, we are often paid to find (and litigate or negotiate) within a worst-case scenario, so that is often where we go when faced with a stressful situation.

This deconstruction exercise asks you to look at best- and worst-case scenarios, and your place in making them happen. Imagine a situation and its worst possible outcome. What *must* you do for that to happen, and how likely are you to do that? Now imagine the best possible outcome and what you *can* do to work toward that outcome. This reframes the situation and gives you a tool to operate as the driver, not the victim. There are situations and scenarios we cannot control. Focus on what you can, because that's where you will see the greatest positive result, and the greatest likelihood of mitigating your stress.

■ **Gratitude.** Gratitude is true appreciation for what you receive and acknowledgment of a source that is outside of you. You can be grateful for past experiences, for future opportunities (optimism), and just for today. Gratitude practices have been linked to improved personal and professional relationships, and improved physical and mental health. This is mutual help, not just self-help. These practices can include cultivating a greater awareness of what you are grateful for as well as regular exercises, such as a gratitude journal.

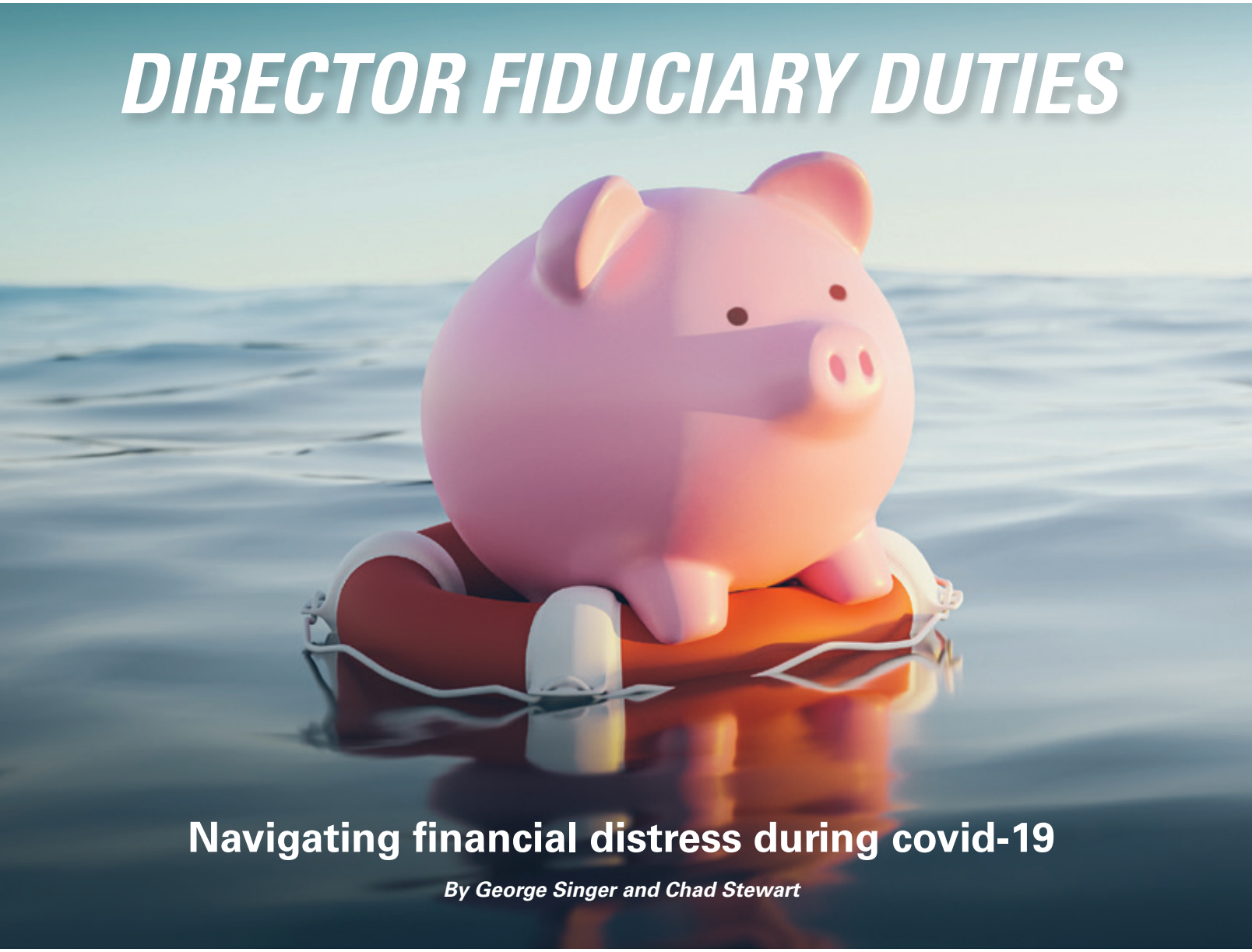
Our MSBA president, Tom Nelson, is known for his handwritten thank you notes. I've been the recipient of a couple of them and the kind way in which he expresses appreciation for LCL's work makes my day and sometimes my week. Thinking about an opportunity to be grateful is a mindfulness exercise in itself. Start by exercising gratitude to yourself for taking the time to engage in well-being practices. Sometimes they are inconvenient or difficult, but you are worth it. Then choose an activity such as a morning or evening gratitude journal or a gratitude inventory. Remember the image of the small glass box and turn it over as you ponder another way to consider a situation. What opportunity for gratitude does the new formation provide? Just eight weeks of a gratitude practice can alter our brains to experience more empathy and satisfaction.

■ **Asking for help.** As we face challenges we have never before seen in our lives, we need help. We need help to secure food in new ways. We need help to care for our loved ones in new ways. And we need help for our well-being. We need not wait for a sign, omen, crash, or event to seek it. There is no threshold. Lawyers Concerned for Lawyers has long advertised that we have a 24-hour "hotline." Every day, for any reason, there is a "warmline." LCL will take your calls, respond to your emails, and meet you in our virtual groups and programs. If you are concerned about another, we will coach you on reaching out to them. Minnesota and national resources may be found on LCL's website, social media pages, and YouTube channel. We will come to your organization to talk about well-being in a CLE or other seminar. If you think it will get better on its own, it won't. Call us. We'll help. LCL has your back. ▲

***JOAN BIBELHAUSEN** is executive director of Lawyers Concerned for Lawyers. Founded in 1976, LCL provides free, confidential peer and professional support to lawyers, judges, law students, and their immediate family members on any issue that causes stress or distress. Legal organization staff members may call us too. There is someone to talk to 24 hours a day and counseling is offered throughout Minnesota. You can help us reduce the stigma. To learn more or get involved, go to www.mnlcl.org, call 651-646-5590, or email help@mnlcl.org.*

JBIBELHAUSEN@MNLCL.ORG

DIRECTOR FIDUCIARY DUTIES



Navigating financial distress during covid-19

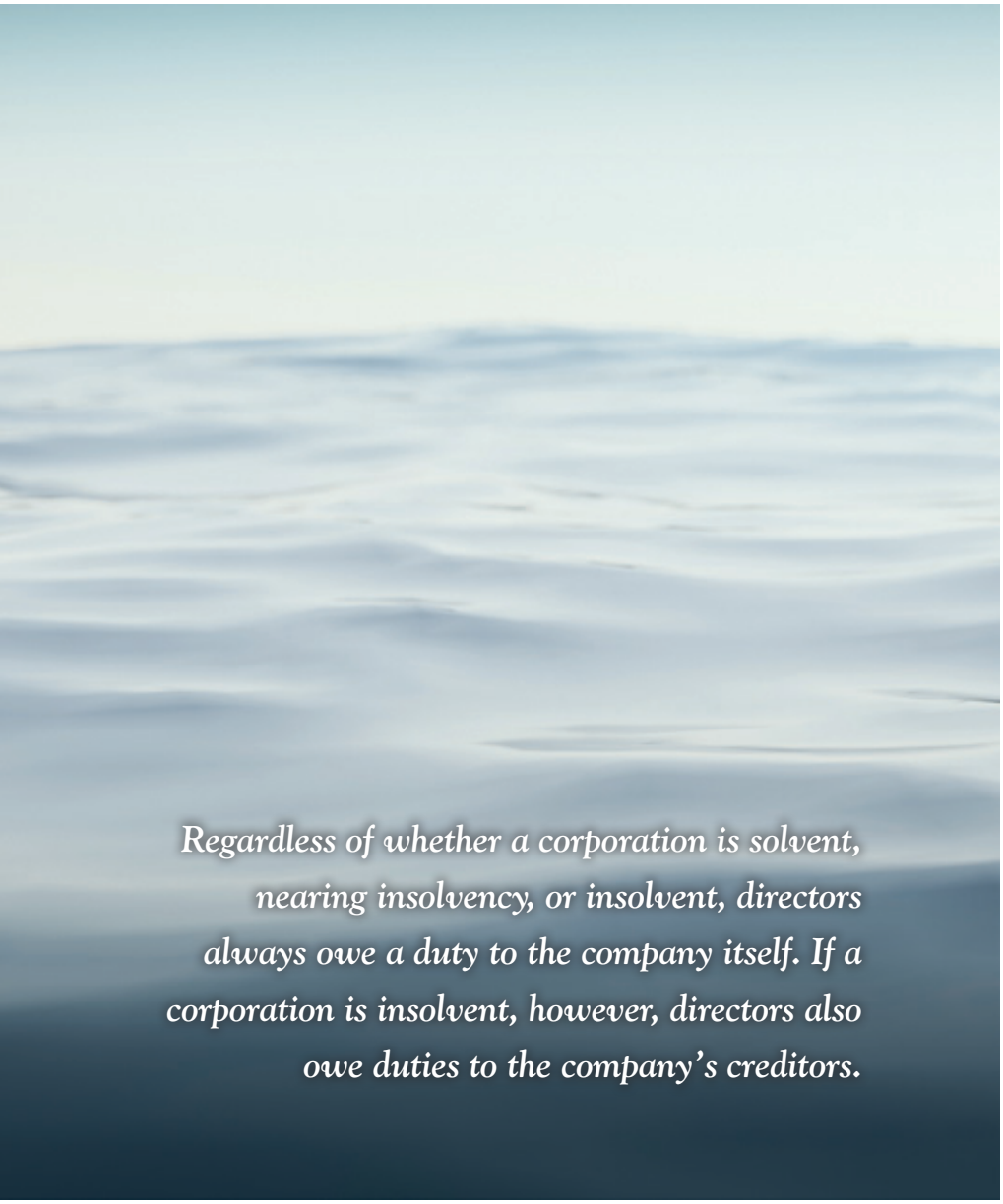
By George Singer and Chad Stewart

We are currently at the beginning of an economic downturn driven by a global pandemic that has resulted in severe and unprecedented economic disruption.[1] Many companies are now confronting immediate difficulties that include the inability to conduct normal operations, dramatic declines in revenue, inability to service debt, disruption to M&A activity, and delayed or canceled financing rounds. This environment requires companies to make difficult decisions regarding operations, capital, employees, and a host of other matters in order to survive. As companies wrestle with these challenges, directors must be acutely aware of and adhere to their fiduciary duties or risk exposure to personal liability.

While the challenges posed by the covid-19 virus may be novel, the standards by which directors' decisions are measured remain the same. Regardless of whether a corporation is solvent, nearing insolvency, or insolvent, directors always owe a duty to the company itself. If a corporation is insolvent, however, directors also owe duties to the company's creditors.

Fundamental duties. Directors generally owe two main fiduciary duties to the company and its stakeholders: (1) the duty of care; and (2) the duty of loyalty.[2] *Care* requires a director to be reasonably informed of all relevant information and alternatives, to act in good faith and in a prudent and deliberate manner when making business decisions. The duty of care cannot be delegated to other decision-makers. A director's personal liability to the corporation or its stockholders for breach of its duty of care may be eliminated or limited in a corporation's articles or certificate of incorporation.[3] *Loyalty* requires that a director act in, and make decisions based on, the best interests of the corporation and not to act out of self-interest. Certain states, including Minnesota, have constituency statutes that permit directors to consider the interests of constituencies other than stockholders in discharging their duties (such as employees, customers, and suppliers).[4]

Solvency. When a company is solvent, directors owe fiduciary duties to the corporation and its stockholders. This remains true even when a company approaches the zone of insolvency.



Stockholders have standing to bring derivative claims for breach of fiduciary duty against directors and officers.

Insolvency. When a company is insolvent—meaning it is not able to pay its creditors in full—directors continue to owe fiduciary duties to the company, but creditors replace stockholders as the primary beneficiaries of those duties. Generally speaking, creditors of solvent companies are protected by financial and other covenants in their contractual arrangements. However, once the corporation becomes insolvent, creditors are at risk of not being repaid notwithstanding their contractual rights, and are entitled to additional protection. The interests of stockholders upon insolvency are subordinate to the rights of creditors and, therefore, the fiduciary duties of directors shift to creditors. Creditors have standing to bring derivative claims (not direct claims based upon a particularized harm) against directors and officers for breach of fiduciary duty when the company is insolvent.

Zone of insolvency. A number of courts have suggested that directors' fiduciary duties actually expand to include creditors at an indeterminate point in time before the actual insolvency of the corporation when a business is in financial distress. The Delaware Supreme Court, however, has found that the key inflection point is actual insolvency and that only stockholders (not creditors) can bring derivative claims against directors when a company is in the zone of insolvency. Yet it is often impossible, or at least very difficult, to pinpoint the moment when a corporation actually becomes insolvent, triggering a shift in fiduciary duties from stockholders to creditors. Directors therefore should also consider the interests of creditors once the corporation is in financial distress or approaching insolvency. Directors often confuse their loyalties when the enterprise begins to struggle, particularly in cases where directors are also stockholders, officers, or guarantors of the company's debt.

Business judgment rule. In making decisions, directors are protected by the business judgment rule, provided that they comply with the fiduciary duties of care and loyalty. The business judgment rule presumes that the board acted on an informed, good-faith basis and in the honest belief that the decision was made in the best interests of the corporation and relevant stakeholders. In Delaware, the presumption of due care can be overcome by a showing that the directors were grossly negligent in failing either to stay informed of relevant facts or to act in good faith or in the best interests of the company. Courts should not judge a director's actions in hindsight or second-guess decisions if the director acted rationally after informing him or herself of relevant facts and placing the interests of the company first.

Exercising fiduciary duties to avoid personal liability. In times of crisis and financial distress, it is especially important to act diligently and give increased attention to proper corporate governance. Understanding that a director risks personal liability for breaches of fiduciary duties, and that the stakeholders to whom those duties are owed may shift based on the financial health of the business, a director should:

- take care to keep informed (even more than normal) of all material information reasonably available and devote adequate time to reviewing and considering alternatives before making a decision;
- understand the company's financial statements, cash flows, liquidity, business plan projections, credit arrangements, leases, and covenants, and assess its ability to access sources of funding, including government funding, under current market conditions;

- participate in and hold frequent board meetings for which minutes of every meeting are carefully prepared to document deliberations with respect to material issues and board approvals and, in this environment, establish a process for remote communications that is consistent with state law and the company's charter documents;
- provide active oversight that challenges management and not become simply a rubber stamp;
- adopt, implement, and monitor an oversight system at the board level that results in an effective and increased flow of information, particularly with respect to overseeing pandemic issues and their impact on the company;
- assess all aspects of the company's business, including business risks and workplace health and safety issues posed by covid-19, the competitive landscape, and the various rights of lenders and creditors;
- focus on value preservation and enhancement, without taking unjustifiable risks, in order to maximize recovery for creditors and other stakeholders;
- retain and rely upon qualified and experienced professionals to help discharge the duty of care for areas in which the director has no particular expertise, including with respect to legal, valuation, medical, accounting, and financial matters;[5]
- give heightened attention to capital-raising transactions and asset sales that may later be criticized in light of the board's expanding duties to creditors, and carefully consider how such transactions may impact creditors and stockholders;
- avoid incurring additional unsecured credit that the company does not have the ability to repay;
- examine the value of the company's assets using realistic market values and the ability of the company to engage in one or more value maximizing transactions—which, in difficult situations, may mean continuing operations to preserve going concern value or selling or winding down the company;
- increase transparency and open communications with the company's lenders, employees, and other key stakeholders, particularly those whose assistance or forbearance may be critical to preserving value;
- review restructuring and shutdown alternatives, which may include whether a key employee retention plan should be developed;
- confirm that all tax and payroll obligations are satisfied and assess the applicability of the WARN Act for employee terminations, ERISA for benefit plan obligations, and other requirements particular to the business that may need to be addressed;
- evaluate whether the company has sufficient D&O insurance coverage in place and whether there are exclusions that would vitiate coverage in the event that the company ceases operations or files for bankruptcy protection;
- abstain, when appropriate, from voting on and participating in the deliberations relating to matters that could give rise to a conflict of interest;
- consider the benefit of establishing an independent committee of directors where warranted, or adding independent directors to the board of directors to increase the disinterestedness of the board;
- avoid conflicts and even the appearance of being on both sides of a transaction;
- ensure that there is no preferential treatment for insiders, particularly those who are stockholders, executives, guarantors, or lenders of the company;
- give increased attention to transactions with insiders to ensure fairness and create adequate records to support approval;
- understand that private equity firms holding a controlling position in a company through their contractual rights, roles in the governance, and debt and equity holdings will receive heightened scrutiny and be subject to increased risks when an enterprise is troubled; and
- use caution when considering whether to resign due to the financial distress of a company in order to ensure that no harm will follow and that such resignation will not later be viewed as an abdication of the director's duties.

The uncertainty and disruption to the economy created by the covid-19 pandemic is without comparison in recent history. Exercising increased oversight and monitoring the company's business viability, legal compliance, and financial performance, and reviewing available alternatives is imperative for a board to ensure that it is fulfilling its fiduciary duties. All decisions should be based on a thorough and informed review of material information and may require a proactive approach with respect to fundamental business decisions. ▲

Notes

[1] A couple of data points underscore the depth of the economic crisis we are experiencing: (1) the unemployment rate was recently reported at 14.7% (compared to 3.5% in February), which is the highest rate reported since the Great Depression, *see* The NY Times, *U.S. Jobs Report Shows Clearest Data Yet on Economic Toil* (5/8/2020); and (2) many economists are now predicting a 30-40% decline in second quarter GDP, *see* Forbes, *JPMorgan Forecasts 20% Unemployment and 40% Hit to Second-Quarter GDP* (4/10/2020).

[2] *See* Minn. Stat. §302A.251 subd. 1.

[3] *See* Minn. Stat. §302A.251 subd. 4; 8 Del. General Corporation Law §102(b)(7).

[4] *See, e.g.,* Minn. Stat. §302A.251 subd. 5.

[5] Directors are entitled to rely on information, opinions, reports and statements from legal counsel, public accountants, officers and employees of the corporation who are reasonably believed to be reliable and competent in the matters presented. *See* Minn. Stat. §302A.251 subd. 2; 8 Del. Gen. Corp. L. §141(e).

***GEORGE SINGER** is a partner in the Minneapolis office of Ballard Spahr LLP and concentrates his practice on corporate and commercial law. He also currently serves as an adjunct professor of law at the University of Saint Thomas School of Law.*

SINGERG@BALLARDSPAHR.COM

***CHAD STEWART** is a partner in the Minneapolis office of Ballard Spahr LLP and concentrates his practice on corporate and securities matters with an emphasis on mergers and acquisitions.*

STEWARTC@BALLARDSPAHR.COM

Pandemic family stress equals pandemic family law stress

By Christopher Vatsaas and Kendal O'Keefe

Since the World Health Organization declared covid-19 a global pandemic in the second week of March, new and frequently unexpected effects of the crisis have continued to make themselves known. As the pandemic wears on, it has become increasingly apparent that the family unit is facing a uniquely comprehensive combination of stressors. Parents with school-aged children are being asked to manage and facilitate "distance learning," often while working their own fulltime jobs, and working parents with younger children and infants are forced to make the difficult choice between sending their child to daycare (assuming daycare is still available) or keeping their child home and caring for all of their needs while simultaneously attempting to meet all of their professional obligations (from personal experience, a Herculean undertaking). Other parents have been furloughed or laid off or may be anticipating such a change in the near future, adding significant financial stress during what is already a stressful time. Families are also struggling with issues related to medical care, which is being deferred in many cases to prevent the spread of the virus and the risk of exposure.

Families in transition as a result of a pending divorce face even more uncertainty as parents struggle to divide a marital estate that may be experiencing substantial losses as a result of the downturn in the market, and many parents who have already separated are struggling with how to maintain "social distancing" while abiding by existing court orders that require children to transition back and forth between households.

"Families in transition as a result of a pending divorce face even more uncertainty as parents struggle to divide a marital estate that may be experiencing substantial losses as a result of the downturn in the market."

***KENDAL O'KEEFE** is a senior associate attorney at Arnold, Rodman & Kretchmer PA in Bloomington, Minnesota, where she focuses her practice exclusively on family law. Ms. O'Keefe has been named a Rising Star attorney by Super Lawyers, and is a co-editor of Minnesota CLE's Divorce Practice Deskbook.*
KENDAL@ARKMN.COM

***CHRISTOPHER VATSAAS** is a partner at Chestnut Cambronne PA in Minneapolis, MN. Mr. Vatsaas is an Adjunct Professor at the University of St. Thomas School of Law, where he teaches Advanced Family Law, and he has been named a Rising Star by Super Lawyers.*
CVATSAAS@CHESTNUTCAMBRONNE.COM

The impact of covid-19 has put additional stress on virtually every component of a family's day-to-day life. Unsurprisingly, the stress has already begun to manifest itself in an influx of activity in our family law systems, including the courts and all forms of alternative dispute resolution.

The ticking time bomb

Already, anecdotal data coming out of China's court system suggests that China saw a surge in divorce filings and domestic abuse cases in March,[1] and here in the United States, there are numerous reports of perpetrators of domestic violence using stay-at-home orders to exert additional control over their victims.[2] It is reasonable to assume that a surge in divorce filings and domestic abuse cases is on the horizon here in Minnesota, and, with no clear indication as to when it will be safe for the court system to resume business as usual, this surge will likely come at a time when the courts' ability to address this influx is limited as a result of continuing precautions to prevent the spread of covid-19.

Currently, by order of the Minnesota Supreme Court, only cases involving emergency change of custody requests and personal safety concerns (i.e., orders for protection) are required to be held in the courtroom, with all other cases being heard using remote technology, or on the basis of written submissions.[3] In many cases, courts are tasked with analyzing nuanced and difficult fact patterns and balancing competing interests in the face of unprecedented circumstances. For example, should an otherwise excellent parent's parenting time with her children be suspended because she is a medical professional on the front lines of the pandemic? Alternatively, how should the court address the immediate furlough of both parents as it relates to child support, knowing that its decision could easily affect the ability of one or both parents to pay their rent or mortgage the following month? These sorts of issues are becoming more prevalent by the day in our own state.

Many of these challenges require immediate or expedited solutions that family court is not readily equipped to offer under the best of circumstances. The unique stressors placed on families right now, coupled with the court's inherent inability to operate with immediacy and nuance—especially in the midst of a pandemic—demand that the family law bar explore opportunities for procedural creativity in an effort to solve these more immediate problems for families during this crisis. Given the high likelihood that the court system will be heavily taxed upon its return to more normalized operations, the demand for such creativity is likely to continue for the foreseeable future.

Responding to the demand for creativity

Fortunately, the family law bar is responding. Many ADR providers are now offering their services via Zoom and other remote video-conferencing platforms, and shortly after the impact of the pandemic began to show itself in Minnesota family courts, a number of members of the local bar, the ADR community, and the judiciary set out to establish the Remote Expedited Temporary Relief (RETR) program. The program, in its fledgling stages across many metropolitan counties, is designed for parties who are represented by counsel. The RETR program is a Rule 114.02(a)(10)[4] ADR process, created and utilized by agreement of the parties and their counsel, and offers the temporary motion process in a modified and abbreviated format. Parties who agree to use this process may select a provider from existing Moderated Settlement Conference rosters, or they may select another qualified professional with adjudicative training or other similarly relevant experience who agrees to work within the requirements of the RETR program.

Once a provider has been selected and has agreed to serve, he or she will hold a brief video or telephone conference with counsel for both parties. The parties then make temporary submissions to the provider, and a second video or telephone conference is subsequently held to give counsel the opportunity to make arguments and explore settlement. The provider will then issue a simple (no-findings-required), non-appealable order within seven days of the second video or telephone conference.[5] This streamlined

Notes

[1] Sheridan Prasso, *China's Divorce Spike is a Warning to Rest of Locked-Down World,* Bloomberg Businessweek, 3/31/2020.

[2] Melissa Godin, *As Cities Around the World Go on Lockdown, Victims of Domestic Violence Look for a Way Out*, Time, 3/18/2020.

[3] *Continuing Operations of the Courts of the State of Minnesota Under Emergency Executive Order 20-33,* No. ADM20-8001 (Minn. filed 4/9/2020).

[4] Minn. Gen. R. Prac. 114.02(a)(10).

[5] A comprehensive description of the RETR program can be found on the Minnesota Courts website: *http://www.mncourts.gov/Find-Courts/Scott/covid-19-Information.aspx*

[6] Minn. Gen. R. Prac. 114.02(a)(2).

process was specifically designed with temporary motion hearings in mind and is not available to modify previously issued court orders of any kind, unless the parties and counsel specifically agree.

For cases in which a court order has already been issued, or cases that are otherwise not a good fit for the RETR program, attorneys are more frequently engaging in negotiations to appoint special masters or consensual special magistrates (CSMs) as authorized by Rule 114.02(a)(2) to address family law issues of all types in a more nuanced, adaptive, and timely fashion than the court system can offer right now. The CSM process is an adjudicative process that authorizes the appointed CSM to issue a binding decision.[6] While these appointments have historically been used predominantly in divorce cases involving sophisticated financial issues, the family law bar has appropriately sought to adapt the use of these appointments to address immediate issues involving custody, parenting time, and other miscellaneous issues. The use of parenting consultants (PCs) is also becoming more common, and practitioners are becoming increasingly creative in specifically tailoring the scope and/or term of such appointments to fit the unique needs of families during this difficult time.

These fast-paced developments in family law processes and ADR structures undoubtedly have some imperfections. But they are offering the more immediate solutions that families so desperately need and deserve. Our local bar should be incredibly proud of its responsiveness to the demands of the covid-19 crisis related to the stress it has placed on the family unit; our family law systems may actually improve on a long-term basis as a result. The critical and time-sensitive nature of many of these issues require the creativity currently being mustered, but the byproducts of that mandate could very well result in new ideas, new methods, and new practices that permanently enhance our ability to be adaptable, nuanced, and timely in responding to the issues that families in transition face moving forward, even after the pandemic has ended. ▲

Tenant rights in the era of covid-19

By Andrea Palumbo and Karmen McQuitty

Do you remember what you thought when you realized the magnitude of the covid-19 pandemic? Did you worry about whether you'd be able to pay your rent or mortgage? Or that you would suffer financially? For millions of people the financial impact was, and continues to be, a significant result of this pandemic. For renters in particular, the pandemic has presented unique challenges—both in paying rent and seeking relief under current (and future) leases.

The law governing landlords and tenants is codified in Minnesota statutes and city ordinances. Evictions are one part of landlord/tenant law, and certainly the most contentious. An average of 17,000 evictions are filed every year in Minnesota.[1] Hennepin and Ramsey counties account for the lion's share of filings and more than a third of the evictions in the state. Evictions can be filed for nonpayment of rent, breach of the lease, or holding over after a notice to vacate. The majority of cases filed are against tenants who have not paid rent under their lease.

By design, most eviction cases move quickly. Minnesota law requires that the first appearance in a case occur between seven and 14 days after a summons is issued.[2] Expedited cases, brought on the basis that a renter is causing a nuisance, engaging in illegal activity, or endangering the safety of other residents or the landlord's property, move even faster. These are summary proceedings and a tenant's first appearance is often their only appearance in the case.

Evictions in the era of covid-19

The coronavirus outbreak brought the eviction process to a screeching halt. On March 23, 2020, Gov. Tim Walz signed Executive Order 20-14 placing a moratorium on evictions.[3] Minnesota is one of few states with such an order in place. The order was intended to forestall the inevitable eviction cases that were to come and, by stabilizing housing, to protect public health and safety.

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) federal stimulus package was passed in response to covid-19 on March 27, 2020. Among its many provisions, the Act includes a moratorium on evictions for non-payment of rent for tenants living in many types of subsidized housing.[4] Additionally, the Act prohibits fees and penalties related to nonpayment of rent. Finally, tenants may not be evicted for 30 days after the end of the moratorium, and must be given 30 days' notice. The CARES Act tenant protection provisions extend until July 24, 2020.

The immediate effect of both of these actions was to put the brakes on filing evictions for most types of cases. The category of cases that must start and finish within 14 days are in limbo. The only cases being heard by the courts right now are cases involving allegations that the tenant seriously endangers the safety of others or engages in illegal activity.[5] The executive order also suspended most lease terminations and the execution of most writs of recovery (orders requiring a tenant to move).

When businesses started closing due to the pandemic, employees began losing their jobs—severely impairing their ability to pay their rent. Although the order relieves the risk of eviction for most tenants for the time being,[6] the governor's order does not relieve a tenant's obligation to pay rent. This has created a conundrum in which a tenant must pay rent but cannot be evicted if they do not. It is unprecedented. And what lies ahead is unknown. We do not know what will happen to evictions cases filed prior to Order 20-14, cases filed after, or those that will be filed when the order is lifted.

Other significant issues affecting renters

Strictly speaking, the threat of eviction is not meant to be a tool to compel tenants to pay rent, and landlords may pursue additional tools to manage tenants who owe rent. Landlords often report tenants who do not pay rent to collections companies, which significantly affects a tenant's credit and ability to rent in the future. No court proceeding is required when reporting a tenant to collections, so it's often less expensive for landlords than bringing an eviction action in court. Currently, no order or statute exists to prevent landlords from reporting renters to collections or even to credit bureaus as a result of covid-19 hardship. Though a renter will not lose their home during this pandemic, the financial impacts for inability to pay rent are significant and persistent. Low-income people and people of color in Minnesota rent in high numbers[7] and will continue to be disproportionately affected by the pandemic.

Many renters worry about how to pay rent for apartments or houses they occupy. A portion of the renting population in Minnesota consists of college and university students. There are nearly 425,000[8] college and university students in the state, and while not all are renters, a large portion are. A further subset of these renters are paying rent for spaces they no longer inhabit. Many people who attend Minnesota colleges and universities live in off-campus housing near campus. Only a subset of students actually live on campus in university-provided housing. Colleges and universities throughout the state are abiding by Gov. Walz's stay-at-home orders, and have closed campuses and/or reduced campus operations. Learning is occurring remotely and campus services are largely being delivered online.

Students who rent, just like most renters in Minnesota, enter into year-long leases. Often, students who rent near their college campus are locked into 12-month leases that extend August to August. Many of these renters are now seeking relief from paying rent for the duration of their current lease, and are looking to cancel leases they have signed for the 2020-21 academic year. Whether colleges and universities across Minnesota will resume in-person instruction for fall 2020 remains one of many unknowns as this article is written.

As with other residential leases, students are bound by the language of the contract, and *force majeure* clauses do not allow for cancellation of leases due to coronavirus. Those students who chose to leave their off-campus apartment or house to stay with others during the pandemic are paying rent for places they are no longer live in. This compounds the financial strain on them and their families, who may be affected by layoffs, furloughs, or other factors associated with the nationwide effects of the pandemic. Many young renters rely on their families for financial support, and families are strained. Additionally, rents throughout the Twin Cities, including the University of Minnesota Twin Cities campus, average $700-1,300 per month per person. In these uncertain times, it's understandable why some people struggle with the idea of paying for an apartment in which they are not living. A lease is often one of the first legal contracts they enter into, compounding the confusion.

Little relief is being granted by landlords, who are admittedly experiencing their own set of challenges. In our experience, most landlords in the Twin Cities are not negotiating with students or their attorneys to change the termination date or agree to early buy-out or rent reduction. If they do offer relief, it is often by waiving late fees or allowing rent to be paid at a later date—an empty gesture because for many the issue is not when rent is due, but their ability to pay it at all.

No federal, state, or local government has issued specific relief for renters in the form of a moratorium on rent payments. While the CARES Act[9] gave trillions to small businesses and a one-time check to individuals, most young people—including college students—were excluded from receiving the $1,200 stimulus check. Further, parents are often guarantors on their children's leases. They are faced with the impossible decision of stopping rent payments to save April-August rent, or being reported to a collection agency.

A just path forward

One path under consideration is to provide relief for renters through local legislation in the form of a moratorium on rent payments, or, in the alternative, a fund specifically designated for those struggling to pay their rent due to coronavirus. As of the date this article was submitted, both chambers of the Minnesota Legislature have bills designed to assist renters and homeowners.[10] Grassroots calls for a rent strike have circulated on social media since the beginning of the pandemic. Such calls, and organizing, will only gather momentum the longer the crisis continues. A rent strike, whether by choice or necessity, will only further harm landlords and the economy. Creating a viable path for renters to stay in their homes will create healthier people, communities, and economies. ▲

Notes

[1] Minnesota eviction numbers see dramatic decline in past decade, Minneapolis Star Tribune, 2/17/2020.

[2] Minn. Stat. 504B.311 Subd. 1.

[3] Exec. Order No. Walz Executive Order 20-14 (3/23/2020). *https://mn.gov/governor/assets/EO%2020-14%20Filed_tcm1055-424508.pdf*

[4] The CARES Act applies to properties that participates in a "covered housing program" as defined by the Violence Against Women Act (VAWA), rural housing voucher programs under section 542 of the Housing Act of 1949, properties with federally backed mortgage loans or federally backed multifamily mortgage loans.

[5] Minn. Stat. 504B.171 Subd. 1.

[6] As of the date of this article, the MN Attorney General's Office has sued three landlords for evicting tenants despite the Executive Order. *https://www.ag.state.mn.us/Office/Communications/2020/04/17_LaPlant.asp*

[7] *https://www.hocmn.org/wp-content/uploads/2018/08/Patterson-Presentation.pdf*

[8] *https://www.ohe.state.mn.us/mPg.cfm?pageID=945*

[9] Coronavirus Aid, Relief, and Economic Security Act, S.F. 3548 (March 2020). *https://www.congress.gov/bill/116th-congress/senate-bill/3548/text?q=product+update*

[10] House Bill HF4541 allocates $100 million to prevent homelessness and would restrict evictions and foreclosures during the current and any additional coronavirus-related peacetime emergency declared before 1/15/2021. SF4495 allocates $30 million for housing assistance, stop foreclosures for 60 days, and bar evictions until 6/24/2020. The Senate Agriculture & Housing Finance Committee discussed the bill but did not vote on it. MSBA *Capital and Court Connection* 4/24/2020.

ANDREA PALUMBO joined HOME Line in 2019. She advises tenants on their rights in housing court proceedings, including eviction defenses, rest escrow actions, security deposit disputes, and emergency tenant remedy actions. Prior to working at HOME Line Andrea was a volunteer coordinator for Southern Minnesota Regional Legal Services, where she coordinated and staffed the Ramsey District Court housing clinic.

ANDREAP@HOMELINEMN.ORG

KARMEN MCQUITTY is a senior staff attorney at the University of Minnesota Student Legal Service. She specializes in criminal defense, expungement, harassment/cyber stalking, and landlord/tenant law. She is adjunct faculty at Mitchell Hamline and the University of MN Leadership Minor.

KMCQUITT@UMN.EDU

Understanding the tax impact of federal covid-19 relief laws

By Adam D. Schurle

Amid the covid-19 pandemic, Congress recently enacted two pieces of legislation, the Families First Act[1] and the CARES Act,[2] which are designed to provide economic stimulus and tax relief to businesses and employees affected by the pandemic. Together, the acts provide benefits to employees who are unable to work, incentives to employers who keep employees on staff, and tax relief to businesses to assist with cash flow issues. Following is a summary of some of the key tax provisions of the Families First Act and the CARES Act.[3]

FAMILIES FIRST ACT

Emergency FMLA expansion & paid sick leave

The Families First Act amends the Family Medical Leave Act (FMLA) to allow an employee who is unable to work to take paid leave to care for the employee's under-18 child if the child's elementary school, secondary school, or place of care has been closed due to a covid-19 "public health emergency" declared by a federal, state, or local authority.[4] The benefits apply to employers with fewer than 500 employees, and are capped at $200 per day and $10,000 in the aggregate.

Additionally, for qualified reasons related to covid-19, the Families First Act requires employers with fewer than 500 employees to make available (i) 80 hours of paid sick leave for each full-time employee, and (ii) for each part-time employee, the employee's average number of hours worked for a two-week period.[5] Paid sick leave must be paid at the employee's regular rate of pay, but is capped at (i) $511 per day and $5,110 in the aggregate in certain circumstances, and (ii) $200 per day and $2,000 in the aggregate in others.

Employer tax credits

New refundable tax credits against the 6.2 percent Social Security employer payroll tax help offset the cost to employers of providing the benefits described above.[6] Employers are entitled to a refundable tax credit equal to 100 percent of the wages required to be paid each calendar quarter under the FMLA expansion and paid sick leave provisions of the Families First Act.[7]

These credits are subject to limits. For credits in connection with paid sick leave benefits, if an employee takes leave because she is sick or quarantined, the amount of wages taken into account with respect to the employee is limited to $511 per day.[8] The limit is $200 per day for workers taking leave to care for another person or because of Health and Human Services-specified conditions. For credits claimed for providing the expanded FMLA benefits, the available credit is limited to $200 per day per employee.[9]

The Families First Act authorizes employers to receive additional payroll tax credits for the 1.45 percent Medicare payroll tax on wages paid to employees pursuant to the FMLA expansion and sick leave provisions described above.

Tax credits for self-employed

The Families First Act also provides a similar tax credit for sick leave for certain self-employed individuals that may be taken against the self-employment tax.[10] Self-employed individuals are generally eligible for the credit if they would be entitled to paid sick leave had they been an employee (rather than being self-employed). Subject to special limitations related to average daily self-employment income, the amount of the self-employment tax credit is similar to the employer paid sick leave credit described above (up to $511 per day for an individual who is sick or quarantined and up to $200 per day for an individual who cares for another person or is on leave due to a Health and Human Services-specified condition).

A credit is also available for an individual's "qualified family leave equivalent amount," which is equal to: (i) the number of days (up to 50) during the taxable year that the individual cannot work for reasons that would entitle the individual to the benefits of the FMLA expansion provisions of the Families First Act if the individual were an employee, multiplied by (ii) the lesser of (A) $200 or (B) 67 percent of the individual's average daily self-employment income for the year.[11]

THE CARES ACT

Employee retention credit for employers subject to closure

As an incentive for employers to keep employees on staff, the CARES Act provides a refundable credit against an employer's share of Social Security taxes for up to a maximum of 50 percent of the first $10,000 in qualified wages paid to each employee after March 12, 2020 and before January 1, 2021.[12] To be eligible, an employer must carry on a trade or business in calendar year 2020. Furthermore, with respect to any calendar quarter, either (a) the operation of that trade or business must be fully or partially suspended during the quarter due to orders from an appropriate governmental authority because of covid-19, or (b) the applicable calendar quarter is within a period running from (i) the first calendar quarter beginning after 2019 in which the business has suffered a more than a 50 percent decrease in gross receipts compared to the same calendar quarter for the prior year until (ii) the first subsequent calendar quarter in which the business's gross receipts are at least 80 percent of gross receipts for the same calendar quarter for the prior year. This means that certain employers may be eligible for the credit even if their business has not been shut down by a governmental order.

The refundable tax credit may only be taken against "qualified wages," and different rules apply depending on the employer's number of full-time employees. For employers with more than 100 full-time employees, the credit is only available with respect to wages paid to employees not providing services due to covid-19. However, for employers with 100 or fewer full-time employees, the credit is available with respect to any wages paid to an employee. In the case of employers with more than 100 full-time equivalent employees, qualified wages are also limited to the amount of wages the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the relevant period.

Qualified wages do not include amounts paid to employees pursuant to the paid sick leave and paid family and medical leave credit provisions in the Families First Act (described above). The credit is generally not available for government employers or employers receiving a small business interruption loan under other provisions of the CARES Act.

Deferral of employer Social Security payroll taxes

The CARES Act also permits employers to defer payment of the employer's share of Social Security taxes for the period beginning on the date of the enactment of the CARES Act and ending before January 1, 2021.[13] One half of the deferred taxes must be paid by the employer on or before December 31, 2021, and the remaining half must be paid by the employer on or before December 31, 2022. Self-employed persons are eligible for a comparable deferral of 50 percent of the Social Security portion of self-employment taxes.

For employers eligible for the Families First Act employment tax credit described above, that credit would reduce employment tax due and would reduce the amount of tax subject to deferral under this provision of the CARES Act. The deferral also is not allowed with respect to persons receiving loan forgiveness with respect to certain small business loans created under other provisions of the CARES Act.

Exclusions for 2020 employer payments of employee student loans

The CARES Act expanded the exclusion from income for certain educational assistance programs so that an individual may exclude from gross income up to $5,250 of payments made by an employer to the individual or directly to a lender of principal or interest on any qualified education loan of the employee.[14] Only payments made after enactment of the CARES Act and before January 1, 2021 qualify for the exclusion, and the exclusion does not apply to highly compensated employees (generally employees who received more than $125,000 in compensation from the employer in 2019).

ADAM SCHURLE is a tax partner in the Minneapolis office of Stoel Rives LLP. He counsels on a variety of federal and state tax issues, including entity formation, mergers and acquisitions, transactions involving pass-through entities, tax credit transactions, employment taxes, equity compensation arrangements, and cooperative tax matters.
ADAM.SCHURLE@STOEL.COM

Net operating loss changes

Congress also amended the net operating loss (NOL) rules to help ease cash flow for certain businesses.[15] The Tax Cuts and Jobs Act (TCJA),[16] enacted in 2017, limited the deductibility of NOLs generated after December 31, 2017 to 80 percent of the taxpayer's taxable income in the year in which the NOL is claimed. The CARES Act repeals the limitation for tax years beginning before December 31, 2020, allowing taxpayers to use NOLs to offset 100 percent of taxable income.

The TCJA also eliminated NOL carrybacks to prior years for NOLs generated after December 31, 2017. The CARES Act amends the NOL carryback rules to permit NOL carrybacks to each of the five taxable years preceding a loss for losses generated in 2018, 2019, and 2020, including tax years when the top marginal tax rate for corporations was 35 percent instead of 21 percent.[17] This allows some business taxpayers to carry back NOLs that were not permitted to be carried back before enactment of the CARES Act and, in some cases, receive cash payments for tax refunds attributable to prior tax years.

Business interest limitation

The TCJA imposed a limit on the amount of business interest a business may deduct.[18] Under the TCJA rules, a business interest deduction generally may not exceed business interest income, plus 30 percent of adjusted taxable income for the year. The CARES Act increases the percentage limitation for tax years 2019 and 2020 to allow a business to claim a business interest deduction up to its business interest income, plus 50 percent of its adjusted taxable income.[19] In addition, a taxpayer may elect to calculate its 2020 business interest limitation based on its 2019 adjusted taxable income. Special rules apply in the case of partnerships.

Loss limitation changes

The TCJA disallowed deductions for excess business losses (generally losses in excess of the taxpayer's aggregate gross income or gain plus $250,000) of noncorporate taxpayers for tax years beginning after December 31, 2017 and before January 1, 2026.[20] The CARES Act delays the effective date of this limitation, so that it applies to tax years beginning after December 31, 2020 and before January 1, 2026.[21]

Charitable contribution deduction changes

Under current law, an individual generally may deduct charitable contributions up to 50 percent of the individual's adjusted gross income, and a corporation generally may deduct charitable contributions up to 10 percent of its taxable income.[22] The CARES Act modifies these limitations by permitting individuals to deduct cash contributions up to 100 percent of adjusted gross income and by permitting corporations to deduct cash contributions up to 25 percent of taxable income.[23]

The CARES Act also provides an "above-the-line" deduction for individuals making cash charitable contributions up to $300 for tax years that begin in 2020.[24] The deduction is allowed for individual taxpayers who do not itemize deductions.

Conclusion

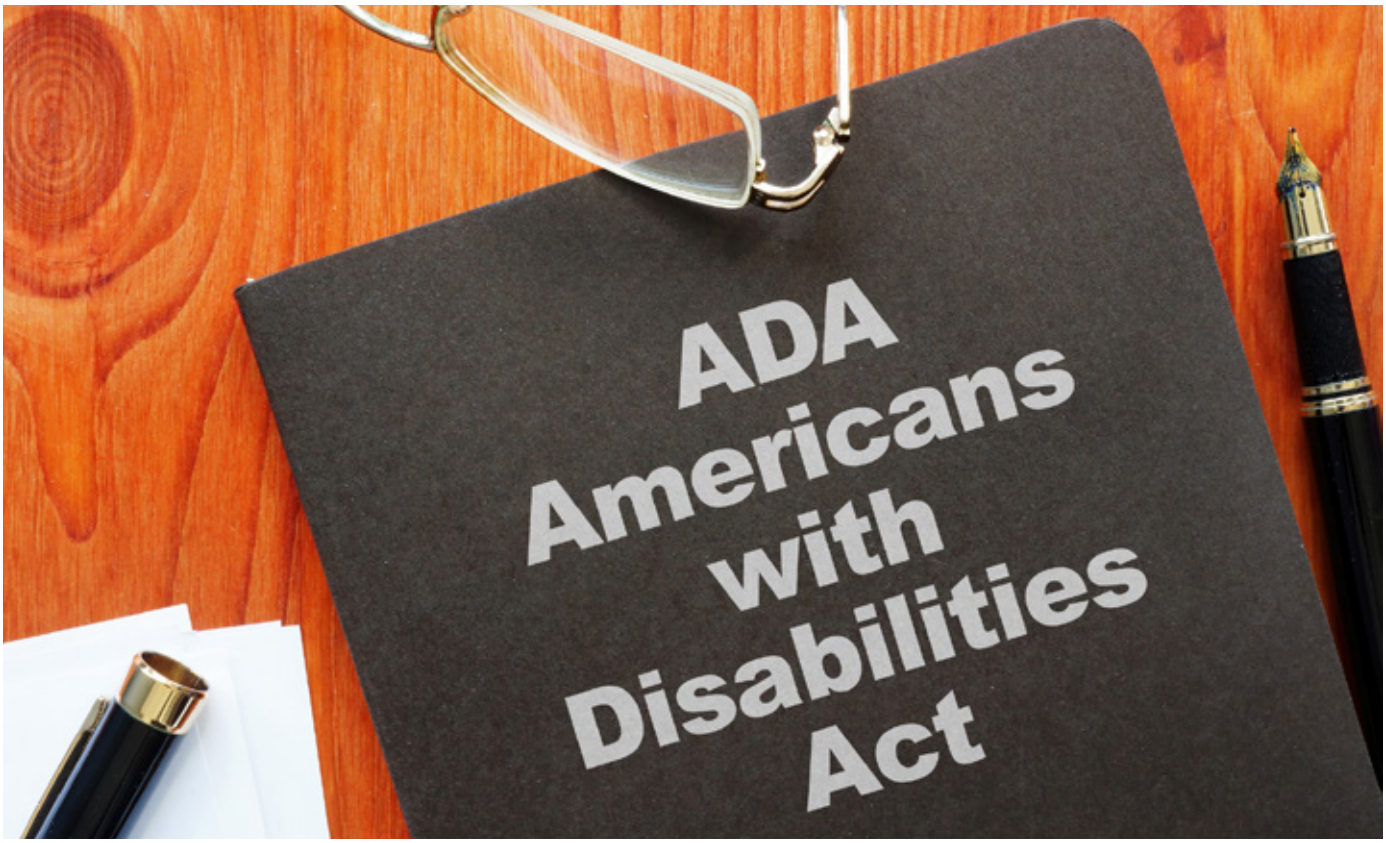
It remains unclear how effective these provisions will be in addressing the potential economic devastation wrought by covid-19. Nonetheless, together the Families First Act and CARES Act should provide some relief to employees who are unable to work and employers whose workforce and business operations have been impacted by the pandemic. ▲

Notes

[1] Families First Coronavirus Response Act, Public Law 116-127, 116th Cong. (3/18/2020) (the "Families First Act").
[2] Coronavirus Aid, Relief, and Economic Security Act, Public Law, Public Law 116-136, 116th Cong. (3/27/2020) (the "CARES Act").
[3] Although the $1,200 (or less) cash recovery rebates paid to certain individuals are technically tax credits, *see* CARES Act §2201, an in-depth discussion of those payments is beyond the scope of this article.
[4] Families First Act, §3102.
[5] Families First Act, §5102.
[6] Families First Act, §7001.
[7] Families First Act, §7003.
[8] Families First Act, §7001.
[9] Families First Act, §7003.
[10] Families First Act, §7002.
[11] Families First Act, §7004.
[12] CARES Act, §2301.
[13] CARES Act, §2302.
[14] CARES Act, §2206.
[15] CARES Act, §2303.
[16] Tax Cuts and Jobs Act of 2017, Public Law 115-97, 115th Cong. (12/22/2017) (the "TCJA"); IRC §172.
[17] CARES Act, §2303.
[18] IRC § 163(j).
[19] CARES Act, §2306.
[20] IRC § 461(l).
[21] CARES Act, §2304.
[22] IRC § 170.
[23] CARES Act, §2205.
[24] CARES Act, §2204.

How covid-19 may redefine "reasonable accommodation" under the ADA and MHRA

By Charles R. Shafer



Covid-19, the first pandemic in 100 years, is not only changing the lives of Americans right now, but may also change the legal landscape of disability discrimination under the Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act (MHRA) for years to come.

Generally, the ADA and MHRA prohibit employers from discriminating against employees because of a disability.[1] A cornerstone of disability discrimination revolves around the concept of "reasonable accommodation"—and whether an employee can perform the "essential function[s]" of their job with or without such accommodation.[2]

Whether an employee is disabled and/or discrimination[3] has occurred depends on what constitutes a "reasonable accommodation."[4] The MHRA defines a reasonable accommodation as "steps which must be taken to accommodate the known physical or mental limitations of a qualified disabled person."[5] A reasonable accommodation may include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modification of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.[6]

Although circuits are divided on the issue, a majority of them has held that an employee's physical presence at work is an essential function of most jobs.[7] Accordingly, if physical presence in the workplace is deemed an essential function, then employers are free to deny disabled employees' requests to work remotely.

Covid-19 may already be changing employers' physical attendance requirements. The pandemic has required companies to quickly enact drastic workplace policies to ensure the safety of their employees. Companies like Google, Microsoft, Twitter, Hitachi, Apple, Amazon, Chevron, Salesforce, Twitter, and Spotify have all changed their policies in light of covid-19 to allow employees to work from home.[8]

Although other national corporations opposed work-from-home policies amid the pandemic, some have since reconsidered.[9] Specifically, Charter and MicroStrategy originally disallowed employees to work from home in the days following the outbreak by claiming that their employees' work could not be completed remotely.[10] Charter and MicroStrategy have already reversed their stances—and so could other employers.[11] If employers allow their workforces to telecommute now, it can become the norm in the future. Now that employers are taking steps to create remote working environments, physical attendance may no longer be deemed an essential function after the pandemic ends. If employers install infrastructure to accommodate employees' requests to work remotely now, any arguments that telecommuting is not feasible will be severely undercut in future litigation.

Even before covid-19, telecommuting technology has existed to allow employees to work from home. For example, software like Microsoft Teams and Zoom Video are two of many examples that allow employees to remain productive while working from home. In fact, so many companies have relied on Zoom during the pandemic that its shares, as of early March, had "soared over 85% in 2020 and are up 45% in the last month."[12] Covid-19 has illuminated many weaknesses in America's infrastructure; however, surprisingly, it has demonstrated employers' ability to use technology to quickly adapt to accommodate the health and safety of its employees.

The end of the pandemic remains uncertain, but one thing is clear—employers that have previously deemed physical attendance an essential function are now allowing their workforces to telecommute. Perhaps it is time for courts construing the ADA and the MHRA to follow suit. ▲

Covid-19 has illuminated many weaknesses in America's infrastructure; however, surprisingly, it has demonstrated employers' ability to use technology to quickly adapt to accommodate the health and safety of its employees.

CHARLES R. SHAFER is a Wisconsin native who practices general civil litigation, with a focus in employment law, at Collins, Buckley, Sauntry & Haugh, P.L.L.P.
CSHAFER@CBSH.NET

[1] Minn. Stat. §363A.08, subd. 2; 42 U.S.C. § 12112(a); *Weber v. Strippit, Inc.*, 186 F.3d 907, 912 (8th Cir. 1999); *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1205 (8th Cir. 1997); *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001).

[2] *See* 29 C.F.R. §1630.2 (defining "essential functions" as "the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position." A function may be considered essential if such functions are: (1) the reason the position exists is to perform the function; (2) a limited number of employees can perform the function; and (3) the function is highly specialized and the individual is hired for his or her ability to perform the function. 29 C.F.R. §1630.2(n)(2). *See also McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 230 (Minn. 2019) (for purposes of the MHRA, "essential functions" are those functions "required of all applicants for the job in question" and is defined by referring to the ADA) (citing Minn. Stat. § 363A.03, subd. 36(1)).

[3] *See* 42 U.S.C. §§12112(5)(5) (defining "discrimination" to include an employer's failure to provide a "reasonable accommodation" to an employee with a disability) and 12111(9) (defining what constitutes a "reasonable accommodation"); 29 C.F.R. §1630.2(o)(1) (explaining the EEOC's definition of "reasonable accommodation"); *see also* Minn. Stat. §363A.03, subd. 36.

[4] Under the ADA, employers are required to engage in an "interactive process" to determine an appropriate reasonable accommodation for the employee. 29 C.F.R. § 1630.2(o)(3) (2019); *Faulkner v. Douglas County*, 906 F.3d 728, 733 (8th Cir. 2018). However, such a requirement is not required under applicable Minnesota Law. *McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 229 (Minn. 2019) (holding that the MHRA "does not mandate that employers engage employees in an interactive process to determine whether reasonable accommodations can be made") (citations omitted).

[5] Minn. Stat. §363A.08, subd. 6(a); *McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 230 (Minn. 2019).

[6] 42 U.S.C. §12111(9); *see also* 29 C.F.R. §1630.2(o)(1) (the EEOC's interpretation of what further constitutes a reasonable accommodation); Minn. Stat. §363A.08, subd. 6(a).

[7] *See Vande Zande v. State of Wis. Dept. of Admin.*, 44 F.3d 538, 8 A.D.D. 159, 3 A.D. Cas. (BNA) 1636, 133 A.L.R. Fed. 713 (7th Cir. 1995) ("Generally… an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home"); *see also Rask v. Fresenius Med. Care N. Am.*, 509 F.3d 466, 469-70 (8th Cir. 2007) (the 8th circuit has "consistently held that regular and reliable attendance is a necessary element of most jobs") (citations omitted); *see also Heaser v. Toro Co.*, 247 F.3d 826, 832 (8th Cir. 2001), abrogated by *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) (holding that allowing an employee to work from home via remote-access computer software was not a reasonable accommodation because purchasing and installing such software was not feasible).

[8] Bryan Lufkin, "Companies Around the Globe Have Rolled out Mandatory Remote Work. Whether You're a Newbie or WFH Veteran, Here's What You Need to do to Stay Productive," BBC Worklife (3/12/2020), *https://www.bbc.com/worklife/article/20200312-coronavirus-covid-19-update-work-from-home-in-a-pandemic*. (Global companies have "rolled out mandatory work-from-home policies amid the spread of Covid-19").

[9] Mike Snider, *Charter, MicroStrategy Reverse Policies, Allow Work at Home During Coronavirus Outbreak*, USA Today (3/19/2020), *https://www.usatoday.com/story/money/business/2020/03/19/coronavirus-work-home-policies-reversed-charter-microstrategy/2877839001/*.

[10] *Id.*

[11] *Id.*

[12] Benjamin Rains, "Buy Soaring Zoom Video (ZM) Stock to Fight Coronavirus Market Fears?", Nasdaq.com (3/5/2020), *https://www.nasdaq.com/articles/buy-soaring-zoom-video-zm-stock-to-fight-coronavirus-market-fears-2020-03-06*.

Government transparency during the pandemic

A guide to Minnesota data practices, open meetings, and covid-19

By Taya Moxley-Goldsmith and Katherine Bealka

In Minnesota, government entities are adapting to Gov. Tim Walz's stay-at-home order[1] and social distancing recommendations to ensure the delivery of necessary services during the covid-19 state of emergency. The Data Practices Office has compiled the following guidance to assist government entities and their legal representatives in fulfilling their ongoing obligations under the Minnesota Government Data Practices Act[2] (MGDPA) and the Open Meeting Law[3] (OML) during the state of emergency.

Data practices

The MGDPA requires government entities to respond to requests for "government data."[4] As the MGDPA does not contain any emergency provisions, the obligation to respond to requests during the declared emergency remains the same. For public data requests, entity responses must be prompt, appropriate, and within a reasonable time.[5] The required response time for data subjects is 10 business days.[6]

The reasonable and appropriate standards for public requests are flexible enough to accommodate changes in circumstances due to the state of emergency. What constitutes "reasonable" will depend on a variety of factors, including access to government buildings, location of records, storage vendor closures, and the size and complexity of the request, among other considerations.

Government bodies should review their data access policies and internal procedures to determine where changes need to be made to accommodate current working conditions. For example, if the responsible authority, data practices compliance official, or any designees become unable to perform their data practices duties, the affected entities should consider assigning those roles to other individuals during this time. Their procedures must ensure appropriate responses.

Entities may need to find creative ways to facilitate requests for inspection and paper records and should work with data requesters while complying with the Minnesota Department of Health and CDC guidelines to keep employees and members of the public safe.

Open meetings

During a state of emergency, public bodies must still comply with the OML. Unlike the MGDPA, the OML includes a provision to accommodate emergency circumstances. Minn. Stat. §13D.021 permits public bodies to hold meetings via telephone or other electronic means during a health pandemic or declared state of emergency.[7] The term "other electronic means," which is not defined, is broad enough to include various meeting options, including video-conferencing and interactive television.

To hold a meeting under this provision, the presiding officer, chief legal counsel, or chief administrative officer must first determine that an in-person meeting is "not practical or prudent because of a health pandemic or an emergency declared under chapter 12." As the governor has declared an emergency under chapter 12, such a determination would be reasonable.

The requirements for holding a meeting via telephone or other electronic means include:

1. All participating members can hear one another;
2. members of the public at the physical meeting location can hear all discussion "unless attendance at the regular meeting location is not feasible due to the health pandemic";
3. at least one member of the public body is present at the meeting location, "unless unfeasible due to the health pandemic"; and
4. all votes are taken by roll call.

To the extent practical, public bodies must allow the public to monitor the meeting remotely and the public body may charge for documented additional costs of monitoring connection.[8]

Many public bodies are using this section for the first time. As a result, they are currently troubleshooting and identifying practical issues concerning technology, public comments, and meeting materials that will be valuable for the Legislature to consider in the future.

Public bodies may also hold emergency meetings.[9] "Emergency" is not defined within the statute, but emergency meetings can be called when the circumstances "require immediate consideration by the public body."[10] For an emergency meeting, the only notice required is a good faith effort to contact media who have requested notification in writing. As a best practice, public bodies could provide additional notification to the public. Public bodies may hold emergency meetings by telephone or other electronic means, so long as all requirements for that provision are met.[11]

Public bodies may also close meetings to the public to discuss emergency response procedures.[12] This is a permissive closing; public bodies are not required to close meetings to discuss these procedures. Public bodies must follow all requirements to close a meeting.[13] In addition, public bodies must identify the specific emergency procedures to be considered in their statement on the record. This closed meeting must be recorded and the recording must be maintained for at least four years—or longer if required by the public body's retention schedule.

Conclusion

Government entities and public bodies must continue to provide access to government information and the decision-making of elected and appointed officials during these challenging times by utilizing the provisions available to them and adjusting their operating procedures.

As always, the Data Practices Office is available to provide technical assistance and answer questions on these topics. Please visit our website at *https://mn.gov/admin/data-practices/* or email us at *info.dpo@state.mn.us*. ▲

Notes

[1] Emergency Executive Order 20-20. See also EO 20-33, extending EO 20-20.
[2] Minn. Stat. Chapter 13.
[3] Minn. Stat. Chapter 13D.
[4] "Government data" are all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use. Minn. Stat. §13.02, subd. 7.
[5] Minn. Stat. §13.03, subd. 3 and Minn. R. Part 1205.0300, subp. 3.
[6] Minn. Stat. §13.04, subd. 3.
[7] Minn. Stat. §13D.021, subd. 1.
[8] Minn. Stat. §13D.021, subd. 3.
[9] Minn. Stat. §13D.04, subd. 3.
[10] *Id.*
[11] Minn. Stat. §13D.021.
[12] Minn. Stat. §13D.05, subd. 3(d).
[13] See Minn. Stat. §13D.01, subd. 3 (requiring a statement on the record prior to closing a meeting) and Minn. Stat. §13D.05, subd. 1(d) (requiring most closed meetings to be recorded).

DEPARTMENT OF ADMINISTRATION

TAYA MOXLEY-GOLDSMITH, JD, is the acting director for the Data Practices Office at the Minnesota Department of Administration, where she has worked since 2008.
TAYA.MOXLEY-GOLDSMITH@STATE.MN.US

KATHERINE BEALKA, JD, is a policy analyst for the Data Practices Office at the Minnesota Department of Administration.
KATHERINE.BEALKA@STATE.MN.US

REMOTE MEDIATION

I'm 62. I wasn't looking to Zoom. I'm glad I did.

By Mike McKnight

There is a lot that I will hope to purge from my memory about the early days of the covid-19 pandemic. But while anyone who knows me knows that I am a die-hard pessimist, let me tell you of a possible silver lining to this mess: Each of us can do many of the tasks related to the practice of law by making better use of available technology. Let me explain.

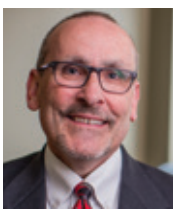
These days I am a mediator—and working on developing that practice as best I can. I am also 62 years old with some underlying health issues that place me in the dreaded higher-risk category for the virus. You can see my dilemma: How do I effectively mediate when I need to "shelter in place" and "social distance"? In the past I had participated in a weather-spawned telephone mediation or two with limited success. But when I learned that one of the party participants in a recent mediation was not willing to travel and wished to participate by telephone, I had to figure out some way to keep this mediation on schedule. I immediately thought of Skype. I think I had used it once, but I really had no clue how it might work for me for a mediation. I also had FaceTime and figured we could make that work if need be. Then one of the mediation groups I belong to mentioned a program called Zoom (now, suddenly, a household name—but this was early on). I had used it before to participate in a webinar or two. The selling point for me was learning that it would allow for "breakout rooms," which sounded like just what I needed for mediations.

The swipe of a card and $150 later, I was a subscriber to Zoom Pro, which gives me unlimited time (the free version only allows 40 minute meetings) and accommodates up to 100 participants. My wife and one of my lovely daughters helped me with a test run—which, give or take a couple of minor glitches, worked perfectly. In my first week I mediated three cases using Zoom. After a short explanation to the group as a whole, I placed each side in their own private breakout rooms and went about my business. I shuttled between the rooms during the course of the mediation, just like I would in an in-person mediation. (Two of the lawyers actually said it was every bit as good as being in person.) One of the mediations was in a case venued 350 miles away. When we finished at 5:00, instead of going to my hotel or, worse, driving back home, I was able to shut down my computer and walk down the hall to dinner. You can't beat that commute!

I will tell you I was skeptical at first, but now I am sold. I see a lot of advantages to using this technology more even after this damn virus ends. It saves the parties and clients time and money. Scheduling remote mediations just became a lot easier. And most importantly to me, it saves wear and tear on my body. I think nearly every lawyer reading this can use this kind of technology to keep your practice going during this difficult time. Who knows, it just might make your life easier and make you a better lawyer. Quite a silver lining for this old pessimist to find. ▲

Originally from Silver Bay, MIKE MCKNIGHT joined the Minnesota bar in 2019. He retired from the Boyce Law Firm in 2020 after 34 years of practice to focus exclusively on mediation and arbitration. He currently lives in Sioux Falls, SD with his wife and his two Labrador retrievers.

MIKE@SDMEDIATOR.COM

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **ERISA; claim by trustees fails.** The trustees of three Minnesota-based employee benefits funds under the Employment & Retirement Income Security Act (ERISA) were unsuccessful in a lawsuit against the employer and its affiliates for unpaid pension contributions. Affirming a ruling of U.S. District Court Judge Paul Magnuson in Minnesota, the 8th Circuit Court of Appeals held that the evidence failed to show that the company's corporate affiliates were "alter- egos" or that there was a joint venture between them and the employer or a joint enterprise, either. Therefore, the trustees could not pursue claims against them for the unpaid contributions. ***Johnson v. Scharps Welding & Fabricating, Inc.***, 950 F.3d 510 (8th Cir. 2/7/2020).

■ **Sex harassment; not severe or pervasive.** The allegation of several isolated incidents of inappropriate conduct failed to establish actionable sexual discrimination or harassment. The 8th Circuit held that the allegations did not establish either the "severe or pervasive" standard for a hostile work environment claim, and could not state a *prima facie* claim of sex discrimination. Additionally, the claimant failed to exhaust remedies on a retaliation claim that was not asserted in the administrative complaint. ***Packert v. Kenna-Asa Auto Plaza, Inc.***, 950 F.3d 535 (8th Cir. 2/13/2020).

■ **ADA; *prima facie* case not required in complaint.** A dismissal of a claim of discrimination in hiring under the Americans with Disabilities Act (ADA) was reversed on grounds that the trial court improperly determined that the plaintiff failed to adjust the elements of her *prima facie* case of discrimination in the complaint. The 8th Circuit, overturning the decision, pointed out that the *prima facie* standard was "an evidentiary matter" rather than a "pleading standard," and there were sufficient facts alleged to state an ADA claim. A dissent by Judge David Stras of Minnesota would have upheld the dismissal on grounds that the complaint was "woefully inadequate" because it did not state that the plaintiff was "qualified" for the position. ***Cook v. George's, Inc.***, 2020 WL 11606673 (8th Cir. 3/11/2020) (unpublished).

■ **Racial discrimination; federal jurisdiction upheld.** An employee who sued for race discrimination was entitled to pursue his claim in federal court under the Labor Management Relations Act (LMRA). Affirming a lower court ruling, the 8th Circuit held that the suit invoked a federal question because of "complete pre-emption" of such claims under the LMRA. ***Johnson v. Humphreys***, 949 F.3d 413 (8th Cir. 2/4/2020).

■ **Unfair labor practice; failure to recognize bargaining representative.** An employer engaged in an unfair labor practice under the National Labor Relations Act (NLRA) by refusing to recognize the union as the exclusive collective bargaining representative for some of the facility's employees. Granting the petition for enforcement of the order by the National Labor Relations Board, the 8th Circuit held that the employee of the union did not have "apparent authority to act as its agent" and his "objectionable behavior" during a union election campaign did not invalidate the result or warrant failure to recognize the union as the prevailing party in the election. ***Dolgen Corp., LLC v. NLRB***, 950 F.3d 540 (8th Cir. 2/13/2020).

■ **Whistleblower retaliation; railroad ruling reversed.** A petition for review of an adverse determination of retaliation under the Federal Railroad Safety Act due to the suspension of a locomotive engineer under federal regulation by the Administrative Review Board and administrative law judge was granted. The 8th Circuit reasoned that the administrative process was tainted by legal error because it did not follow the precedent that an

employee must prove "intentional retaliation prompted by the employee engaging in protected activity" in order to maintain a retaliation claim under the Act. ***Dakota, Minnesota & Eastern Railroad Company v. U.S. Department of Labor Administrative Review Board***, 948 F.3d 940 (8th Cir. 1/30/2020).

MARSHALL H. TANICK
Meyer, Njus & Tanick
mtanick@meyernjus.com

ENVIRONMENTAL LAW

JUDICIAL LAW

SCOTUS clarifies Clean Water Act jurisdiction over groundwater discharges. On 4/23/2020, the U.S. Supreme Court issued a highly anticipated Clean Water Act decision, holding that the Act requires a National Pollutant Discharge Elimination System (NPDES) permit when there is a direct discharge from a point source into navigable waters or when there is the "functional equivalent" of a direct discharge.

The case involved a municipal wastewater treatment plant in West Maui, Hawaii, that pumped treated sewage (about 4 million gallons per day) into wells hundreds of feet underground for disposal to groundwater. The wells were located about half a mile from the Pacific Ocean, and there was a direct hydrological connection between the groundwater and the ocean, through which pollutants flowed into the ocean, as demonstrated by tracer dye studies. Under the Act, an NPDES permit must be obtained before any pollutant is "added" to "navigable waters" from a "point source." 33 U.S.C. §1311(a). In 2012 several environmental groups sued the county, which operated the plant, claiming it was adding pollutants to a navigable water from a point source without obtaining an NPDES permit. In February 2019, the 9th Circuit Court of Appeals agreed with the environmental groups, holding that discharges to groundwater, which is not a "navigable water" under the Act, are nonetheless subject to the Act where "the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water." *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018).

The Supreme Court, in a majority opinion written by Justice Breyer, affirmed the 9th Circuit's determination that the county's discharge was illegal under the Act without an NPDES permit. The four

wells, it concluded, were "point sources," and pollutants from the wells were "added" to the ocean, which is a "navigable water." The fact that the pollutants were added to the ocean indirectly after being conveyed there by groundwater, a non-point source, did not trouble the Court. But the Court did find that the 9th Circuit's "fairly traceable" test was too broad, writing: "Virtually all water, polluted or not, eventually makes its way to… groundwater. Given the power of modern science, the Ninth Circuit's limitation, 'fairly traceable,' may well allow EPA to assert permitting authority over the release of pollutants that reach navigable waters many years after their release (say, from a well or pipe or compost heap) and in highly diluted forms."

Interpreting the statutory term "from" a point source in this way was not reasonable. Plus, this broad interpretation would inevitably give the federal government significant authority over nonpoint sources, an approach that Congress deliberately rejected when drafting the CWA, the Court held.

Nonetheless, the Court also rejected Maui's and the federal government's arguments that the Act could never apply to discharges to groundwater, concluding this interpretation would "risk serious interference with EPA's ability to regulate ordinary point source discharges" and create "a large and obvious loophole" for dischargers to avoid NPDES permitting. The Court struck a middle ground, retaining the 9th Circuit's "functional equivalent" requirement but not the broader "fairly traceable" test: "We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge."

The Court acknowledged its new jurisdictional standard for groundwater-to-surface-water discharges lacked specificity and left significant room for interpretation, observing that "there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language." Rather, the Court indicated the standard would have to be developed through court decisions in individual cases and through potential EPA guidance. The Court did, however, provide a list of nonexclusive factors that "may prove relevant" depending upon the circumstances of a particular case: transit time; distance traveled; the nature of the material through which the pollutant travels; the extent to which the pollutant is diluted or chemically changed as it travels; the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source; the manner by or area in which the pollutant enters the navigable waters; and the degree to which the pollution (at that point) has maintained its specific identity. The Court noted that "time and distance will be the most important factors in most cases, but not necessarily every case."

Notably, the Court did not clearly deny Maui's and the government's claim that its holding could "vastly expand the scope of the statute, perhaps requiring permits for each of the 650,000 wells like petitioner's or for each of the over 20 million septic systems used in many Americans' homes." The Court simply noted that EPA had managed in the past to require permits for some but not all groundwater-to-surface-water discharges and that EPA and the states have tools at their disposal to address potential broad application of the new standard, including issuing general NPDES permits.

Justice Kavanaugh wrote a concurring opinion, emphasizing that the majority's holding is consistent with former Justice Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), that the Act encompasses indirect discharges to navigable water as well as direct discharges. Justice Kavanaugh also offered a preemptive defense of the majority's failure to provide a "bright-line" standard, asserting, "The source of the vagueness is Congress' statutory text, not the Court's opinion."

Justices Thomas and Alito both wrote dissenting opinions. Justice Thomas interpreted the statutory requirement of an "addition" of pollutants from a point source as being limited to an addition of pollutants *directly* from the point source, not indirectly via a nonpoint source such as groundwater. Likewise, Justice Alito concluded that for an addition of pollutants to be "from" a point source, it must be directly from the point source, in this case the wells, not "from" the intervening groundwater.

Notably, the Supreme Court's decision moots a 4/23/2019 U.S. Environmental Protection Agency interpretative statement, 84 Fed. Reg. 16810, in which the agency concluded that "the Act is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage… regardless of a hydrologic connection between the groundwater and a jurisdictional surface water." ***County of Maui v. Hawai'i Wildlife Fund***, 590 U. S. ____ (2020).

■ **Supreme Court addresses CERCLA jurisdictional issues.** On 4/20/2020, the United States Supreme Court issued its opinion in *Atlantic Richfield Company v. Gregory A. Christian, et.al.* This case addressed the scope of state court jurisdiction over claims made under state common law concerning "Superfund" sites under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* (CERCLA), as well as the authority of the Environmental Protection Agency (EPA) over cleanups of Superfund sites.

CERCLA requires that any removal or remedial action proposed by a potentially responsible party (PRP) must first be approved by the EPA. Under CERCLA, United States district courts have exclusive jurisdiction over all controversies arising under CERCLA, 42 U.S.C. §9613(b), although once EPA has approved a cleanup plan, federal courts' ability to review challenges to such a plan are very limited. *Id.* §9613(h).

At issue in the case is a Superfund site of roughly 300 square miles located near Butte, Montana and owned by the Atlantic Richfield Company (ARCO). In 1983, the EPA designated the site as a Superfund site under CERCLA. Since its designation, ARCO and the EPA have been working together to remediate the site under an EPA-approved cleanup plan.

In 2008, a group of 98 surrounding property owners brought suit against ARCO in Montana state court, alleging that the smelter had caused damage to their properties, and asserted trespass, nuisance, and strict liability claims under state common law. The landowners sought restoration damages, among other forms of relief. Under Montana law, in order to collect restoration damages, a plaintiff must show that "[t]he ability to repair [the] injury must be more than a theoretical possibility." *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 165 P. 3d 1079, 1086 (2007). In response to this, the landowners proposed a restoration plan that went beyond what the EPA's own cleanup plan provided. The EPA's cleanup plan had been deemed sufficient because it met the standard of being "protective of human health and the environment." EPA, Community Soils Operable Unit, Record of Decision (1996), App. 62. *See also* 42 U.S.C. §9621(d)(1).

The Montana Supreme Court upheld the state district court's holding that the landowners' claim for restoration was not precluded by CERCLA because the claims made by the landowners were not challenges to the EPA cleanup plans and would therefore not stop, delay, or change the work the EPA is doing. The court also rejected ARCO's argument that the landowners were PRPs and were

thus prohibited from taking remedial action without approval from the EPA.

On review, the U.S. Supreme Court addressed two key issues: (1) Are state courts stripped of jurisdiction under the Act for claims made under state common law involving a Superfund site? and (2) are the landowners considered PRPs and thus subject to the Act's requirement to seek approval from the EPA prior to undertaking remedial actions on the Superfund site?

In addressing the first issue, the Court found that the Act does not strip state courts of jurisdiction over lawsuits concerning state common law. The Court opined that the Act gives federal courts the exclusive jurisdiction over controversies *arising under* the Act; however, it does not deprive state courts of jurisdiction over lawsuits concerning state common law. The Court held that "a suit arises under the law that creates the cause of action" (citing *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)), meaning in this circumstance, federal courts would have exclusive jurisdiction over controversies that arise under the Act due a specific cause of action created by the Act. Here, the landowners were asserting claims created by state common law (trespass, nuisance, and strict liability claims under Montana common law), not the Act. Therefore, the Court held that because the claims asserted by the landowners arose from state common law, and not the Act, the Montana courts had appropriate jurisdiction over the lawsuit.

In addressing the second issue, the Court found that the Montana Supreme Court erred in not finding the landowners to be PRPs under the Act and thus not requiring the landowners to seek approval from the EPA prior to taking remedial action. In making this determination, the Court relied on the list of "covered persons" provide for in the Act, which, the Court concluded, provided an unambiguous definition of potentially responsible parties. The Court found that because the pollutants created by the ARCO smelter have "come to be located" on the landowners' properties, the properties meet the definition of a "facility"' under the Act, and therefore the landowners, as owners of the facilities, are PRPs.

Accordingly, the Court held that the landowners were required to seek approval by the EPA prior to taking remedial actions in order to comply with the Act's objective of developing a single, comprehensive EPA-led cleanup effort at a site, as opposed to multiple

individual efforts that may compete with one another. The Court noted that its holding did not mean the landowners' proposed restoration plan was inappropriate; it simply meant that before implementing the plan, the landowners must obtain EPA approval. ***Atlantic Richfield Company v. Gregory A. Christian, et al.***, 590 U.S. ___ (2020).

JEREMY P. GREENHOUSE
The Environmental Law Group, Ltd.
jgreenhouse@envirolawgroup.com
JAKE BECKSTROM *Vermont Law School, 2015*
ERIK ORDAHL *Flaherty & Hood, P.A.*
AUDREY MEYER *University of St. Thomas School of Law, J.D. candidate 2020*

FAMILY LAW

JUDICIAL LAW

Following a jury trial in Ramsey County, defendant Jennifer Ann Culver was found guilty of felony deprivation of parenting rights in violation of Minn. Stat. §609.26, subd.1(3) (2018). Defendant appealed her conviction on the grounds that the evidence presented at trial was insufficient to establish she had the subjective intent to substantially deprive the child's father of his parenting time and that certain relationship evidence should not have been admitted at trial. The court of appeals reversed her conviction on her first argument, discussed below, and did not reach a decision on the relationship evidence argument.

As the response to the state's appeal to the Minnesota Supreme Court, defendant stated that her conviction must be reversed because "the circumstances provided support[ed] the reasonable inference that [she] did not intend to substantially deprive [father] of his parental rights."

The Minnesota Supreme Court analyzed two issues in interpreting and applying Minn. Stat. §609.26. First, it interpreted the phrase "where the action manifests an intent substantially to deprive that parent of rights to parenting time," determining whether it is appropriately analyzed through an objective or subjective standard. Using the canons of construction for statutory interpretation, the Court concluded that when applying the dictionary definitions to the words "intentional," "where," "manifest," and "an;" and when reading the statute as a whole, the only reasonable interpretation of the stator language is that the Legislature intended the Court to view a defendant's actions objectively.

Next, the Court considered the meaning of "substantial" with regard to parenting time. Adopting the parties' concessions, the Court agreed that "substantial" means "considerable in importance, value, degree, amount or extent." However, in this context, the Court adopted the state's argument that "substantial" also includes consideration of qualitative and quantitative factors related to parenting time, including both the nature of the days and number of days. For example, the Court noted that the importance or value of parenting time might be different depending on a child's age or the type of day involved, weighing an overnight as more "substantial" than an evening-only visit because overnights help develop the bond between parent and child, and include more opportunities to share the tender moments that arise during daily routines.

Once the Court established the analytical framework for evaluating cases arising out of Minn. Stat. §609.26, it analyzed defendant's evidentiary argument. Defendant argued that her uncontradicted evidence that she sent multiple messages to reschedule the parenting time established that the deprivation was not substantial. Viewing evidence in the light most favorable to the jury verdict, the Court found the jury's verdict was supported by the evidence because the jury could find defendant not credible.

Concluding that mother's actions were objectively intentional and substantial, the Court reversed the court of appeals' decision regarding Minn. Stat. §609.26, and remanded the matter to the court of appeals for consideration of the relationship evidence issue that was not properly before the Court on appeal. ***State of Minnesota v. Jennifer Ann Culver***, 941 N.W.2d 134 (Minn. 2020).

AMY M. KRUPINSKI
Collins, Buckley, Sauntry & Haugh, PLLP
akrupinski@cbsh.net

FEDERAL PRACTICE

JUDICIAL LAW

■ ***Res judicata*; defense preclusion; defense not barred.** Where the parties engaged in a series of litigations, but the latter litigation did not arise from a "common nucleus of operative facts," the Supreme Court unanimously held that the defendant was not barred from asserting a defense that it had not pursued in an earlier action. ***Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.***, ___ S. Ct. ___ (2020).

■ ***Daubert;* exclusion of slip and fall expert affirmed.** The 8th Circuit affirmed the exclusion of testimony from the plaintiff's alleged expert where there was nothing in the record that indicated the expert "used reliable principles and methods or applied them reasonably to the facts of this case." ***Ackerman v. U-Park, Inc.***, 951 F.3d 929 (8th Cir. 2020).

■ **Removal; amount in controversy; judgment vacated *sua sponte.*** Where the parties to an action removed on the basis of diversity jurisdiction conceded at oral argument that the amount in controversy was less than $75,000, the 8th Circuit vacated the underlying judgment and remanded the case with instructions that the action be remanded to state court. ***Mensah v. Owners Ins. Co.***, 951 F.3d 941 (8th Cir. 2020).

■ **Fed. R. App. P. 3(c)(1)(B); deficient notice of appeal; request to dismiss appeal denied.** Where the notice of appeal identified the judgment and a memorandum and order granting the defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), but did not identify that part of the motion and judgment premised on Fed. R. Civ. P. 12(c), the 8th Circuit "liberally" construed the notice of appeal to include that portion of the order and judgment where "the intent was apparent" and the opposing party was "not prejudiced." ***State Farm Mut. Auto. Ins. Co. v. Merrill***, 952 F.3d 941 (8th Cir. 2020).

■ **Fed. R. Civ. P. 12(b)(6); ADA; pleading elements of claim; dismissal reversed.** Finding that the elements of an ADA claim are an evidentiary matter rather than a pleading standard, the 8th Circuit reversed the dismissal of an ADA claim where the plaintiff "plausibly alleged" that he was not rehired because of his disability. Judge Stras dissented, arguing that the plaintiff's claims were "woefully inadequate." ***Cook v. George's, Inc.***, 952 F.3d 935 (8th Cir. 2020).

■ **Fed. R. Civ. P. 41(a)(2); dismissal without prejudice; fee-shifting statute.** Affirming a district court's grant of the plaintiff's motion to voluntarily dismiss its Lanham Act action without prejudice, the 8th Circuit rejected the defendant's argument that dismissal without prejudice would necessarily cause prejudice because it would eliminate the possibility of the defendant recovering attorney's fees. ***SnugglyCat, Inc. v. Opfer Communications, Inc.***, 953 F.3d 522 (8th Cir. 2020).

■ **Argument not raised in opening brief waived.** Where the appellant listed the elements of one of his claims in his opening brief, but offered no argument in support of that claim until his reply brief, the 8th Circuit held that the absence of "meaningful argument" in the opening brief resulted in the waiver of that claim. ***Liscomb v. Boyce***, 954 F.3d 1151 (8th Cir. 2020).

■ **Lanham Act; request for attorney's fees; no exceptional case.** Affirming Chief Judge Tunheim, the 8th Circuit found that the defendants' Lanham Act violations were not so "exceptional" as to warrant an award of attorney's fees. ***Safeway Transit LLC v. Discount Party Bus, Inc.***, 954 F.3d 1171 (8th Cir. 2020).

■ **Personal jurisdiction; multiple cases.** Affirming Judge Wright, and rejecting the plaintiff's attempt to rely on the so-called *Calder v. Jones* "effects" test, the 8th Circuit affirmed the dismissal of claims for lack of personal jurisdiction where the defendants directed hundreds of phone calls and emails to the plaintiff in Minnesota, but were not alleged to have ever visited Minnesota or to have "purposefully availed themselves" of the state's "benefits and protections." ***Pederson v. Frost***, 951 F.3d 977 (8th Cir. 2020).

Relying in part on *Pederson*, Judge Brasel granted the individual defendants' motion to dismiss for lack of personal jurisdiction, finding that they were not subject to general or specific jurisdiction. ***CH Robinson Worldwide, Inc. v. House of Thaller, Inc.***, 2020 WL 1442856 (D. Minn. 3/24/2020).

Chief Judge Tunheim denied the defendant's motion to dismiss for lack of personal jurisdiction, finding that a forum selection clause constituted consent to jurisdiction. ***St. Jude Medical S.C., Inc. v. Suchomel***, 2020 WL 1853653 (D. Minn. 4/13/2020).

Judge Tostrud denied German defendants' motions to dismiss for lack of personal jurisdiction despite the absence of significant direct contacts with Minnesota, finding that the plaintiff had offered sufficient evidence of conspiracy-based personal jurisdiction to withstand the motions to dismiss. ***DURAG, Inc. v. Kurzawski***, 2020 WL 2112296 (D. Minn. 5/4/2020).

■ **Fed. R. Civ. P. 43(a); covid-19; testimony by videoconference; bench trial.** In mid-March 2020, Judge Nelson ordered that the two remaining witnesses in a bench trial would be permitted to appear by videoconference pursuant to Fed. R. Civ. P. 43(a), while acknowledging that the result might be different if this had been a jury trial. ***ResCap Liquidating Trust v. Primary Res. Mortgage, Inc.***, 2020 WL 1280931 (D. Minn. 3/13/2020).

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

IMMIGRATION LAW

JUDICIAL LAW

Family membership not a central reason for persecution. On 2/12/2020, the 8th Circuit Court of Appeals upheld the Board of Immigration Appeals' denial of withholding of removal under INA §241(b)(3)(A) to the petitioner, concluding there was substantial evidence to support the board's finding that her family membership was not a central reason for the persecution she feared in Guatemala. "On this record, a reasonable factfinder could conclude Silvestre-Giron's family membership is not a central reason for the threat posed by the extortionists but is only 'incidental or tangential to the [extortionists'] motivation'—money." *Garcia–Moctezuma*, 879 F.3d at 868 (quoting *J–B–N– & S–M–* , 24 I & N Dec. at 213). Nor, for that matter, had the petitioner proven that it is more likely than not that she would be tortured if removed to Guatemala. ***Silvestre-Giron v. Barr***, 949 F.3d 1114, 1118 (8th Cir. 2020).

Inadmissibility and public charge grounds: An update. On 8/14/2019, the Department of Homeland Security (DHS) published its final rule amending regulations addressing inadmissibility, on public charge grounds, of foreign nationals seeking admission or adjustment of status. The rule was scheduled to go into effect on 10/15/2019. **84 *Fed. Reg.*, 41,292-508** (8/14/2019). *https://www.govinfo.gov/content/pkg/FR-2019-08-14/pdf/2019-17142.pdf*

As noted in the November 2019 issue of *Bench & Bar*, litigation ensued across the nation that involved various states (including Minnesota), organizations, and individual plaintiffs. On 10/11/2019, the U.S. District Court in the Southern District of New York issued a nationwide order enjoining and restraining the government from "enforcing, applying, or treating as effective, or allowing persons under their control to enforce, apply, or treat as effective, the Rule" until such time as the order is terminated and the rule goes into effect.

On 1/27/2020, the Supreme Court issued a stay of the 10/11/2019 nationwide injunction, thereby allowing the final rule to go into effect pending disposition of the appeal before the Court of Appeals for the 2nd Circuit Court. The sole exception was an injunction issued in the state of Illinois, which was allowed to remain in place. ***Department of Homeland Security, et al. v. New York, et al.,*** 589 U.S. ____ (2020). *https://www.supremecourt.gov/opinions/19pdf/19a785_j4ek.pdf*

On 2/21/2020, the Supreme Court issued a stay of the 10/14/2019 injunction issued in the state of Illinois pending disposition of the government's appeal in the United States Court of Appeals for the 7th Circuit. ***Wolf, et al. v. Cook County, Illinois, et al.***, 589 U.S. _____ (2020). *https://www.supremecourt.gov/opinions/19pdf/19a905_7m48.pdf*

On 2/22/2020, USCIS announced the final public charge rule would go into effect, including Illinois, for those relevant applications or petitions postmarked or electronically filed on or after 2/24/2020. *https://www.uscis.gov/news/news-releases/dhs-implement-inadmissibility-public-charge-grounds-final-rule-nationwide*

ADMINISTRATIVE ACTION

President Trump bans immigrants from the United States. On 4/22/2020, President Trump issued a proclamation, in view of the covid-19 pandemic, suspending the entry of certain immigrants into the United States for 60 days. The proclamation (Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak) went into effect on 4/23/2020 at 11:59pm (EDT). It affects those individuals seeking entry into the United States as immigrants who: 1) are outside the United States on the effective date of the proclamation; 2) do not have a valid immigrant visa on the effective date of the proclamation; and 3) do not have a valid official travel document other than a visa (such as a transportation letter, boarding foil, or advance parole document) on the effective date of the proclamation, or issued on any date thereafter, that permits travel to the United States to seek entry or admission.

The proclamation does not apply to the following: 1) lawful permanent residents of the United States; 2) individuals, and their spouses or unmarried children under the age of 21, seeking to enter the United States on an immigrant visa as a physician, nurse, or other healthcare professional; to perform medical research or other research intended to combat the spread of covid-19; or to perform work essential to combating, recovering from, or otherwise alleviating the effects of the covid-19 outbreak (as determined by the secretaries of State and Department of Homeland Security (DHS), or their respective designees); 3) individuals applying for a visa to enter the U.S. pursuant to the EB-5 Immigrant Investor Visa Program; 4) spouses of U.S. citizens; 5) children of U.S. citizens under the age of 21 and prospective adoptees seeking to enter on an IR-4 or IH-4 visa; 6) individuals who would further important U.S. law enforcement objectives (as determined by the secretaries of DHS and State based on the recommendation of the Attorney General (AG), or their respective designees); 7) members of the U.S. Armed Forces and their spouses and children; 8) individuals and their spouses or children eligible for Special Immigrant Visas in the SI or SQ classification; 8) individuals whose entry would be in the national interest (as determined by the secretaries of State and DHS, or their respective designees).

Other key points: 1) Nonimmigrant visa holders are not affected by the proclamation but the proclamation requires that within 30 days of the effective date, the secretaries of Labor and DHS, in consultation with the Secretary of State, shall review nonimmigrant programs and recommend to the president other appropriate measures to stimulate the U.S. economy and ensure "the prioritization, hiring and employment" of U.S. workers. 2) The proclamation expires 60 days from its effective date but may be continued as necessary. Within 50 days from the effective date, the secretary of DHS shall, in consultation with the secretaries of State and Labor, recommend whether the president should continue or modify the proclamation. 3) The proclamation states that it does not limit the ability of individuals to apply for asylum, refugee status, withholding of removal, or protection under the Convention Against Torture. **85 *Fed. Reg.*, 23,441-444** (4/27/2020). *https://www.govinfo.gov/content/pkg/FR-2020-04-27/pdf/2020-09068.pdf*

R. MARK FREY
Frey Law Office
rmfrey@cs.com

INDIAN LAW

JUDICIAL LAW

State court has jurisdiction over civil claims brought against a tribal-member-founded nonprofit corporation organized under Minnesota state law. A non-tribal member former employee of Honor the Earth nonprofit corporation filed suit against the organization under the Minnesota Human Rights Act. The Minnesota Court of Appeals rejected the nonprofit's motion to dismiss for lack of subject matter jurisdiction, finding that because no tribal member was a party to the litigation and at least some of the allegations in the complaint occurred

outside the White Earth Reservation, the restrictions of Public Law 280 were not implicated in the case. The court of appeals specifically rejected the argument that the nonprofit was "merely a tool owned by" its tribal-member founder, and emphasized that while the White Earth Tribal Court did not have exclusive jurisdiction over this civil litigation between two non-Indian parties, it did share concurrent jurisdiction over the claims with the state court. ***Campbell v. Honor the Earth***, No. A19-1232, 2020 WL 1909717 (Minn. Ct. App. 4/20/2020).

■ **Adoptive placement petitions of tribal member children domiciled off-reservation following voluntary suspension of parental rights could not be transferred to tribal court.** In this unpublished case from the Minnesota Court of Appeals, the court held that although Minn. Stat. §260.771, subd. 3(b) requires the transfer of preadoptive and adoptive placement proceedings involving Indian children domiciled off-reservation to tribal courts absent good cause to the contrary, this state statute could not be interpreted to expand the jurisdiction of tribal courts beyond what Congress dictated in the federal Indian Child Welfare Act (ICWA). Relying on a prior Minnesota Supreme Court opinion that interpreted the ICWA, the court of appeals reversed the district court's determination that an adoption proceeding involving Indian children domiciled outside the White Earth reservation should be transferred to the White Earth Tribal Court following a petition by the children's birthmother to reinstate her voluntarily suspended parental rights. ***In re A.M.G.***, No. 19-1389, 2020 WL 1488345 (Minn. Ct. App. 3/23/2020).

LEAH K. JURSS
Hogen Adams PLLC
ljurss@hogenadams.com

INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Patents: Denial of motion to amend for lack of diligence and good cause.** Judge Menendez recently denied plaintiff Cardiovascular Systems, Inc.'s motion to amend its complaint. Cardiovascular Systems sued Cardio Flow, Inc. for breach of a settlement agreement. In 2012, Cardiovascular Systems entered into a settlement agreement with Lela Nadirashvili dividing the rights to certain rotational device patents. Ms. Nadirashvili then assigned the patents to Cardio

Flow, which contends it is not bound by the 2012 agreement. Cardiovascular Systems sought to amend its complaint to add a tortious interference of contract claim related to Cardio Flow inducing Ms. Nadirashvili to transfer her rights in the patent portfolio without requiring Cardio Flow to be bound by the restrictive terms of the settlement agreement. Cardiovascular System's motion to amend came seven months after the deadline to amend and a month after the close of discovery. Because Cardiovascular's motion to amend was outside the time permitted by the scheduling order, Cardiovascular Systems was required to show good cause for the amendment. Cardiovascular Systems argued that it failed to learn of the tortious interference until it took Cardio Flow chairman Gary Petrucci's deposition because of Cardio Flow's discovery misconduct in delaying its document production. In rejecting Cardiovascular System's argument, the court found Cardiovascular Systems should have pursued additional discovery through interrogatories, requests for admission, and depositions of other witnesses. The court further found Cardio Flow's interrogatory response would have triggered a diligent attorney to gather additional evidence on the tortious interference claim prior to the amendment deadline. The court denied Cardiovascular System's motion for failure to show diligence and good cause. ***Cardiovascular Sys. v. Cardio Flow, Inc.***, No. 18-cv-1253-SRN-KMM, 2020 U.S. Dist. LEXIS 33658 (D. Minn. 2/27/2020).

■ **Patents: Waiver of attorney-client privilege requires voluntary disclosure.** Judge Nelson recently overruled plaintiffs Grupo Petrotemex, S.A. de C.V. and DAK Americas LLC's objections to the magistrate's order on plaintiffs' motion to compel. Plaintiffs sued Polymetrix AG for patent infringement in July 2016. In March 2018, Polymetrix's parent Bühler Holding, AG negotiated the sale of 80% of the shares in Polymetrix to Beijing Sanlian Hope Shin-Gosen Technical Service Co. Plaintiffs moved to compel July 2017 communications that were exchanged between Polymetrix and Bühler, which were then shared with Sanlian, which publicly revealed certain information from an email. Plaintiffs moved to compel the opinion of counsel provided to Polymetrix, arguing Polymetrix waived attorney-client privilege to "all documents and communications related to the subject matter" of the July 2017 email. Polymetrix argued that Sanlian's disclosure was a waiver of the particular statement but the waiver did not extend beyond that statement. The magistrate ruled that Polymetrix had not waived attorney-client privilege in the July 2017 email because Polymetrix and Bühler shared a common interest and that the disclosure to Sanlian did not waive attorney-client privilege because it was not authorized by Polymetrix. In its objections, plaintiffs argued that privilege is "automatically waived on the entire underlying opinion… irrespective of context." The court rejected plaintiffs' contention. Neither of plaintiffs' cases "automatically" extended a waiver to the underlying opinion once a portion of the communication was disclosed. Rather, the case law indicates that where a client voluntarily discloses a portion of confidential information to advance commercial interests, the privilege is waived. Here, Polymetrix did not voluntarily disclose the July 2017 email, and Polymetrix did not stand to benefit financially from the public release of the statement. Absent Polymetrix's consent to the disclosure, Polymetrix never waived privilege, so an analysis of subject-matter waiver was not required. ***Grupo Petrotemex, S.A. De C.V. v. Polymetrix AG***, No. 16-cv-2401 (SRN/HB), 2020 U.S. Dist. LEXIS 72995 (D. Minn. 4/26/2020).

■ **Copyright: Protection of database affirmed.** A panel of the United States Court of Appeals for the 8th Circuit recently affirmed the district court's denial of a motion for judgment as a matter of law. Infogroup, Inc. sued DatabaseLLC and other defendants alleging copyright infringement of its database. Vinod Gupta founded Infogroup, which compiles a database of business information. In 2008, Gupta left Infogroup and within two years formed DatabaseUSA, which also compiles a database of business information. A jury returned a verdict for Infogroup, finding DatabaseUSA infringed its copyrights in its database. The district court denied the motion for judgment as a matter of law. To prevail on copyright infringement, a plaintiff must prove ownership of a valid copyright and copying of original elements of the work. DatabaseUSA argues Infogroup's database is a compilation of facts and does not have the necessary creativity to support a valid copyright. The court held that while copyright in a factual compilation is thin, protection exists as to the selection and arrangement of facts so long as they are made independently by the compiler and entail a minimal degree of creativity. The court also found Infogroup submitted its certificate of registration, which is entitled to a rebuttable presumption of validity, and that DatabaseUSA did not submit evidence rebutting this presumption. The court also held a reasonable juror could have found copying based on witness testimony and the fact that DatabaseUSA's database contained Infogroup's "seed data"—fake data in Infogroup's database to detect copying. The district court was affirmed. ***Infogroup, Inc. v. DatabaseLLC***, No. 18-3723, 2020 U.S. App. LEXIS 13365 (8th Cir. 4/27/2020).

JOE DUBIS
Merchant & Gould
jdubis@merchantgould.com

TAX LAW

JUDICIAL LAW

■ **Petitioner seeks equitable estoppel; court applies mandatory disclosure rule to petitioner's property.** Petitioner filed a property tax petition alleging that the estimated market value of the subject property as of the 2018 assessment date exceeded its actual market value. The petition refers to two properties: one income-producing, the other not income-producing. On 5/30/2019, the Assistant Nicollet County Attorney sent petitioner a letter requesting information on the two subject properties. Receiving no information, on 8/14/2019 the county filed an initial motion to dismiss pursuant Minn. Stat. section 278.05, subd. 6 (2018). On 9/6/2019, petitioner responded to the county's motion to dismiss, stating she was not aware of the requirement to provide data, and including the information sought by the county in the May 2019 letter. On 12/24/2019, the county amended its motion to dismiss to supplement correspondence between the parties. Petitioner maintained she was unaware of her obligation to provide income-producing information to the county and claims the county should be equitably estopped from obtaining dismissal of petition.

Minn. Stat. section 278.05, subd. 6, sometimes called the "mandatory disclosure rule," specifies that, in cases where the petitioner contests the valuation of income-producing property, certain information must be provided to the county assessor no later than August 1 of the taxes-payable year. Failure to submit the required documentation by the August 1 deadline results in automatic dismissal of the petition unless an exception applies. Two exceptions exist: (1) if the failure to provide the required information was due to its unavailability at the time; or (2) the petitioner "was not aware of or informed of the requirement

to provide the information." Failure to prove that the petitioner was not aware requires dismissal of the petition. The mandatory disclosure rule ensures the taxing authority receives all information a petitioner actually possesses to arrive at a reliable market value for tax purposes.

To establish equitable estoppel against a governmental entity, four elements must be met: (1) the party must establish "wrongful conduct" on the part of an authorized government agent; (2) the party must reasonably rely on the wrongful conduct; (3) the party must incur "a unique expenditure" in reliance on the wrongful conduct; and (4) the balance of equities must weigh in favor of estoppel.

The county asserts the 8/1/2019 deadline to comply with the mandatory disclosure rule applies, because on 5/30/2019, the county provided petitioner with notice of the requirement to provide information concerning income-producing property to the county assessor. Petitioner does not deny receiving the May 30 letter, but stated the letters were unclear and that she called the Assistant County Attorney for clarification.

The court agreed with the county that its letter dated 5/30/2019 sufficiently informed petitioner of the requirement to provide information to the county assessor concerning income-producing property, and the 8/1/2019 deadline applied. The court also agreed with the county that petitioner did not completely disclose the information required by the mandatory disclosure. The court concluded that petitioner did not met her burden of proof concerning reasonable reliance on communications with the Assistant County Attorney, or the incurrence of a "unique expenditure" based on such reliance and, therefore, equitable estoppel did not apply. ***Huffer v. Nicollet Cty.***, 2020 WL 1891183 (Minn. TC 3/26/20).

■ **Income tax: Charitable deductions of property in excess of $5,000 must be individually itemized and fully documented to sustain the deduction.** Complex charitable deductions—and sometimes even less complex ones—require detailed information obtained at the time of donation. Internal Revenue Code §170(f)(11)(E) requires a "qualified appraisal" of charitable contributions of property in excess of $5,000. For an appraisal to be qualified, it must appraise items of property individually, rather than together, if they are donated individually. An item must be valued standing alone, rather than as attached to a home or other real estate, if donated as a detached item.

Documentation for a charitable contribution of property includes "such information regarding such property and such appraisal as the Secretary may require." IRC §170(f)(11)(c). Required information includes a description of the property, how it was acquired, the date of acquisition, and the cost or other basis of the property. IRC § 1.170(A)13(c)(4)(ii)(B),(D),(E). Failure to provide all of the information for each detached item results in a disallowed deduction if the taxpayer does not provide a reasonable explanation for the lack of information.

In *Loube v. Comm'r,* the tax court held that when a taxpayer fails to disclose "cost or adjusted basis" on an appraisal summary, it does not meet the substantial compliance necessary to satisfy the regulation. Taxpayers are required to enter the information on Form 8283 in order to make the process manageable, and the IRS is not required to search the return for information to sustain the deduction. Attachment of an appraisal without required signatures and detail will invalidate the deduction.

Petitioners in this case appraised a home with a qualified appraiser. The appraisal was attached to petitioners' tax return. After the appraisal was complete, petitioners hired a charitable group to remove individual items of value from the home. Petitioners relied on the full appraisal of some items listed in the home to document the charitable deduction. In denying the entire $297,000 charitable deduction taken for the appraisal amount, the tax court noted that required information on Form 8283 to substantiate petitioner's cost basis and acquisition date of the property was not provided. ***Loube v. Comm'r***, 119 T.C.M. (CCH) 1011 (2020).

■ **Badges of fraud; taxpayer-attorney liable for deficiency and civil fraud for failure to report income and failure to maintain proper recordkeeping.** Taxpayer-attorneys are subject to labeling, recordkeeping, and anti-commingling requirements for client funds received by the lawyer. If funds are treated as "belonging to the [attorney]," funds in client accounts, less amounts paid out to clients, are reportable as income. *Healy v. Comm'r,* 345 U.S. 278, 282 (1953).

At time of receipt, client funds can be deposited in an account labeled "Client Trust Account." Placing client advances and settlements into accounts separate from the firm's operating accounts provides a record that the advances are deposits and not income.

Maintaining a client trust account reduces the risk of commingling the lawyer's funds with client funds. Bills for firm services and expenses authorized by the scope of work can be paid from the client trust account. A detailed ledger of deposits and authorized expenses for each client demonstrates that the amounts held on behalf of clients are deposits for future services rather than income.

When settlement or other funds are received on behalf of the client, funds should be disbursed when they are not subject to limitations or restrictions. Constructive receipt of client fee income occurs when amounts that are not subjected to substantial limitations or restrictions are received for lawyers who report income using cash basis accounting. Deferring disbursement of earned fee amounts from a client trust account will not defer the lawyer's obligation to include the earned fee in taxable income. The timing of such transfers is at the discretion of the lawyer because there is an unrestricted right to access the funds.

In this dispute, the tax court detailed circumstances that led to the presumption of earned income: (1) failure to follow client direction regarding settlement funds, (2) failure to segregate earned fee from client settlement funds, (3) use of earned interest on client funds for personal expenses (including a personal trainer), and (4) manipulation of the investments in the non-IOLTA account to demonstrate personal liquidity.

Further, underpayment of tax due to fraud is subject to a 75% penalty. Certain "badges of fraud" prove fraudulent intent, including (1) consistently understating income, (2) failing to maintain adequate records, (3) offering implausible/inconsistent explanations, (4) concealing income or assets, (5) failing to cooperate with authorities, (6) filing false documents, and (7) providing false testimony. *Parks v. Comm'r,* 94 T.C. 654, 664-665 (1990).

Petitioner in this case established a separate, unreported bank account for settlement funds received on behalf of four clients. Petitioner failed to keep records, kept control over the funds, and did not remove fees from the account when earned. The tax court found that all relevant badges of fraud supported fraudulent intent. A deficiency of $2,583,374 and a civil fraud penalty of $1,937,531 under IRC §6663 were upheld. ***Isaacson v. Comm'r***, 119 T.C.M. (CCH) 1107 (2020).

MORGAN HOLCOMB
Mitchell Hamline School of Law
morgan.holcomb@mitchellhamline.edu

SHEENA DENNY
Mitchell Hamline School of Law
sheena.denny@mitchellhamline.edu

TORTS & INSURANCE

JUDICIAL LAW

■ **Insurance; defense costs.** In 2016, defendant contracted with plaintiff to haul a bulk tank. While transporting the tank, defendant's vehicle rolled over and damaged the tank. Plaintiff sued defendant to recover the damages, and defendant filed a third-party complaint against its insurer. Defendant and its insurer ultimately settled all coverage issues except one—whether or not the insurer was required to reimburse defendant for defense costs incurred in responding to plaintiff's complaint. The policy language at issue stated: "We have the option to defend any suit brought against you as a result of damage to covered property caused by a covered loss. We may investigate and settle a claim or suit." The defense cost provision went on to state: "We do not have to provide a defense after we have paid the limit as a result of a judgment or written settlement." The provision further indicated that defendant could not "admit liability for a loss, settle a claim, or incur expense without [insurer's] written consent[.]" The district court granted summary judgment in favor of the defendant, finding the language at issue ambiguous.

The Minnesota Court of Appeals affirmed the decision of the district court. The insurer argued that the defense language at issue was unambiguous because it simply provided an "option to defend" to the insurer, and, in this case, it chose not to defend. While the court agreed that the word "option" meant "[t]he power or freedom to choose," the court still held the policy provision to be ambiguous. In so holding, the court emphasized that the insurer's interpretation was inconsistent with the subsequent policy language: "it is inconsistent to interpret paragraph 2a as allowing [the insurer] to refuse to defend, and also interpret paragraph 2c as requiring [insured] to obtain [insurer's] consent before it undertakes a defense. [The Insurer] cannot have it both ways." The court concluded: "Reading [insurer's] 'option to defend' in light of the other paragraphs in the defense costs provision, as Minnesota law says we must, we conclude that [insurer's] 'option to defend' is ambiguous." ***Mississippi Welders Supply Co., Inc. v. Flueger Crane, LLC***, No. A19-1590 (Minn. Ct. App. 5/11/2020).

JEFF MULDER
Bassford Remele
jmulder@bassford.com

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MOEHRLE


WELTE

Gov. Walz appointed Laura Moehrle and Nathaniel Welte as district court judges in Minnesota's 7th Judicial District. Both appointments will be chambered in St. Cloud. Moehrle is a civil trial attorney, shareholder, and chief financial officer of Quinlivan & Hughes, PA. Welte currently serves as an assistant county attorney for the Becker County Attorney's Office.


FRISCH

Gov. Walz appointed Assistant Chief Judge Jennifer Frisch to the Minnesota Court of Appeals. Judge Frisch will fill the vacancy occurring upon the retirement of Chief Judge Edward J. Cleary. This seat is designated for Minnesota's 4th Congressional District.


SEGAL

Gov. Walz appointed the Honorable Susan Segal as chief judge of the Minnesota Court of Appeals. Judge Segal will serve the remainder of Chief Judge Edward J. Cleary's term, which will expire on October 31, 2022. Judge Segal will be the second woman to serve as chief judge in the court's 36-year history.


DONLEY

Gov. Walz appointed Amber Donley as a district court judge in Minnesota's 1st Judicial District. Donley's appointment will fill a vacancy occurring upon the retirement of Hon. Timothy J. Looby. She will be chambered in Sibley County. Donley is currently an attorney at Melchert Hubert Sjodin.

Justice Ericson Lindell was named partner and co-chair of the litigation department at Greenstein Sellers.


BARNETTE

Judge Toddrick S. Barnette will take over as chief judge on the Hennepin County District Court. Barnette, the first person of color to win that post, was elected by his 4th Judicial District peers to a two-year term on May 4. He will replace current Chief Judge Ivy S. Bernhardson, who retires from the bench on June 30. Barnette has served on the 4th District bench since 2006 and as assistant chief judge since 2016.


THOMAS

Gov. Walz appointed Laura Thomas as a district court judge in Minnesota's 4th Judicial District. Thomas will fill the vacancy occurring upon the retirement of Hon. Ivy S. Bernhardson. Thomas currently serves as a clinical professor of law and Director of Law Clinics at the University of Minnesota Law School.

IN MEMORIAM

John Harold Ramstead, age 92, of Edina, MN, passed away February 28, 2020. He graduated from William Mitchell College of Law in 1956 and was a trial attorney for over 50 years.

Tom Malone passed away on March 5, 2020. Malone was shareholder in Barna, Guzy & Steffen's litigation department and retired in 2013. Malone was a Vietnam vet (US Navy), MN Army National Guard, MP, a member of the Minnesota Ice Men Karate Team, and an avid birder who had a column in the Star Tribune for many years.

James Clifford Noonan died on April 8, 2020 at the age of 91. He received his JD from William Mitchell College of Law in 1962. He was a partner in the law firm of Firestone, Fink, Krawetz, Miley, Maas & Noonan, until starting Magistad & Noonan in 1971, then James C. Noonan and Associates in 1975. He continued practicing law, arbitration, and mediation in the St. Paul area until his retirement.

Hon. Margaret Seelye Treuer, Minnesota's first Ojibwe judge, died on March 18, 2020. She was 76. In 1981, she was appointed an assistant U.S. attorney for the district of Minnesota. She eventually became a federal judge. She also worked as a tribal judge for the Bois Forte Band of Chippewa in the 1980s and then for the Red Lake Nation in the 1990s. In 2012, the National Association of Women Judges awarded her a Lifetime Achievement Award.

Jerome (Jerry) Jallo of Edina, MN died on January 27, 2020. He received his law degree from the University of Minnesota and, after a brief stint with Norwest Bank, began a 30-year career with the Minneapolis City Attorney's Office.

Richard G. "Dick" Lareau passed away on Saturday, February 22, 2020, at the age of 91. He received his JD from the University of Minnesota Law School in 1952. In 1956 he joined the Oppenheimer Law Firm, becoming partner in 1960. Lareau retired from his law firm in 2014.

Peter Holmes Berge, age 63, of St. Paul, passed away of brain cancer on February 25, 2020 after three years' struggle. Previously, Berge was web director for Minnesota Continuing Legal Education.

Michael A. Tracy, age 61, of Minneapolis, MN, passed away March 31, 2020. He graduated from University of Minnesota Law School and practiced in San Francisco before returning to Minnesota, where he worked for West Group and Kelly Law Registry.

Hon. Steven A. Anderson died on April 17, 2020, after a short battle with coronavirus. In 2006, after nearly 30 years in private practice, Anderson was appointed district court judge in the 7th Judicial District of Minnesota, which spans the entirety of northwest Minnesota.

MOORE

Gov. Walz appointed Judge Gordon Moore to serve as the next associate justice of the Minnesota Supreme Court. Moore will fill the vacancy created upon the retirement of Justice David Lillehaug, who has served on the Supreme Court since 2013. Moore brings 30 years of legal experience to the Court.

TREVINO

Gov. Walz appointed Catherine Trevino as a district court judge in Minnesota's 10th Judicial District. She will be chambered in Chisago County. Trevino currently serves as a part-time assistant public defender and a court-appointed counsel in Sherburne County.

Judge David Doty will be receiving a Professionalism Award from the American Inns of Court. Doty is a Sr. U.S. District Judge, District of Minnesota. He served as president of the MSBA from 1984 to 1985.

PATTEE

Randall J. Pattee was appointed as managing partner of Fox Rothschild LLP's Minneapolis office. Pattee also serves as co-chair of the firm's product liability & mass torts practice group.

RUCKDASCHEL-HALEY

Kim Ruckdaschel-Haley has joined Best & Flanagan as a partner in the firm's litigation and private wealth planning practice groups.

Nilan Johnson Lewis has expanded its labor and employment law offerings by adding the members of the corporate immigration law firm Myers Thompson Medeiros. Joining the firm are attorneys John Medeiros, Sam Myers, Elizabeth Thompson, Jesse Goldfarb, Mike Sevilla, and Rebecca Desnoyers, along with five immigration case managers.

Matthew Sorensen has joined Messerli Kramer with the commercial real estate group.

STOFFERAHN

Brian Stofferahn has joined Halunen Law to lead their new personal injury practice. Stofferahn brings more than 30 years of experience.

Connor B. Burton has joined Fitch, Johnson, Larson & Held, PA and will be practicing in the areas of workers' compensation and insurance defense.

QUINBY

Aaron D. Quinby has joined Fredrikson & Byron in the real estate, family & closely held businesses, and bank & finance groups.

URSU

John Ursu has joined Faegre Drinker as a partner in the business litigation group.

Family law attorneys Kathleen M. Newman and Barbara J. Seibel joined DeWitt LLP.

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