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Final approval for Center for the Study of Black Life and the Law

BY TOM WEBER

The Center for the Study of Black Life and the Law gained faculty approval in October, officially making it the newest center at Mitchell Hamline School of Law.

Founding Director T. Anansi Wilson has been developing the center since 2020 and convening lectures, academic symposia, and community events in furtherance of its mission—to be a national repository for both theory and policy on how laws and legislative proposals affect Black life.

A symposium earlier this year featured experts from South Africa and across the United States, and the events have included noted scholars, including New York Times best-selling author and Princeton Professor Imani Perry.

The center will also offer curriculum to both Mitchell Hamline students and the wider community; host speakers and events; and be a gathering place for community members and artists. A gala celebrating the official launch of the center is being planned for February 2023.

"This center is unquestionably unique, if not historic, among law schools," said Wilson, an associate professor at Mitchell Hamline. "We'll be the first—but hopefully not the only—center specifically focused on the study of Black life and the law.

"If you look across the country, you'll see a racial justice center here, a social justice center there, a race law and sexuality center here. But nothing audacious enough to be specific about the needs of Black folk. About the lives of Black folk. About the deaths and striving of Black folk."

"Our goal is to create a focus on the Black light that undergirds black letter law to make this world—make this community—a bit more habitable for the Black folks that live here and for those who love us," said Wilson, who joined the Mitchell Hamline faculty in the summer of 2021 after earning their Ph.D. from the University of Texas at Austin. They previously taught at the University of California at Hastings College of Law, The Center for Racial and Economic Justice, and Middle Tennessee State University and have delivered lectures at Harvard and Berkeley law schools.

The Center for the Study of Black Life and the Law is the seventh center and institute at Mitchell Hamline, joining the Center for Law and Business; the Dispute Resolution Institute; Health Law Institute; Institute to Transform Child Protection; the Intellectual Property Institute; and the Native American Law and Sovereignty Institute.

SAVE THE DATE
Center for the Study of Black Life and the Law Gala
Thursday, Feb. 2, 2023

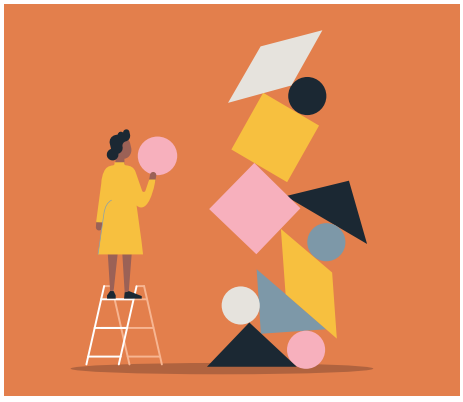
MITCHELLHAMLINE.EDU/BB

MINNESOTA STATE BAR ASSOCIATION DECEMBER 2022

BENCH + BAR of Minnesota

VOLUME 79, NO. 10

columns



features

BENCH+BAR
of Minnesota

Official publication of the
MINNESOTA STATE BAR ASSOCIATION
www.mnbar.org | (800) 882-6722

EDITOR
Steve Perry
sperry@mnbars.org

ART DIRECTOR
Jennifer Wallace

ADVERTISING SALES
Pierre Production & Promotions, Inc.
(763) 497-1778

Bench + Bar of Minnesota (ISSN 02761505) is published Monthly, except Bi-Monthly May/June and Jan/Feb by the Minnesota State Bar Association, 600 Nicollet Mall STE 380, Minneapolis, MN 55402-1641. Periodicals postage paid at St Paul, MN and additional mailing offices. **POSTMASTER:** Send address changes to Bench & Bar of Minnesota, 600 Nicollet Mall STE 380, Minneapolis, MN 55402-1641. Subscription price: $25.00 for members which is included in dues. Nonmembers $35.00 per year. Some back issues available at $5.00 each. Editorial Policy: The opinions expressed in *Bench + Bar* are those of the authors and do not necessarily reflect association policy or editorial concurrence. Publication of advertisements does not constitute an endorsement. The editors reserve the right to accept or reject prospective advertisements in accordance with their editorial judgment.

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

'TIS THE SEASON *OF GIVING*

BY PAUL D. PETERSON

PAUL PETERSON represents families in personal injury and wrongful death cases. His office is in Woodbury and he is licensed in both Minnesota and Wisconsin. He is the proud papa of four above-average children and one outstanding dog.

As I write we are on the eve of the holiday season, and this will be reaching you before the end of 2022. I don't know about you, but this is always an interesting time of year for me. It is a time when I try to focus more than usual on all I am grateful for in my life. It is the time for a solo/small firm business owner to go through the necessary steps to close out one business year and begin another. It's also a time of year when I try to review the contributions I've been able to make toward charitable causes and see what more I can do before the end of the calendar year.

In the coming months I will be sharing with you more of my thoughts on leadership and how we in the MSBA have people throughout the organization who are leading every day. One thing I am grateful for as president is my opportunity to see the broad spectrum of work and giving by our members. I consider all our members to be leaders. I consider all our members ambassadors for our profession and for our organization. In the coming months we are going to speak frankly about our organization, its goals, its membership, and all of you, our leaders/ambassadors. Today, however, I want to focus on one aspect of giving that our state, county, and district bar associations and foundations do every year: giving based on monetary donations by our individual members.

One of the leaders in my community growing up was my mother, Patte Peterson. It was an honor and inspiration to watch her undertake myriad volunteer activities. Her experience ran the gamut from chairing boards and foundations to volunteering for one-on-one counseling with teens and young adults in need. We are all familiar with fables and stories that demonstrate how a small contribution by an individual can have a remarkable impact on the person they help. I remember in particular the story of the child tossing starfish back into the sea after a storm had washed them ashore. When an observer commented that there was no way to save all the starfish, so why make the effort, the child responded wisely that her actions made all the difference in the world to every starfish she returned. My mentors in giving, including my mother, taught me by their actions how true this parable is.

As you know, our profession is now tracking the amount of giving lawyers and judges do every year both through pro bono legal activity and monetary contributions to organizations serving the legal needs of under-served populations. If everyone were to contribute just a little, the overall impact would be remarkable.

If you are reading this, I'm asking you to act. Take a few moments and give a small amount to one or more of these organizations we've identified. We have approximately 14,000 members. If each member contributed just $10-$25 before the end of the year, hundreds of thousands of dollars would be raised. If everyone gave $100, our contributions would be in the millions. If we can all commit to acting, right now, within that small range, it will be amazing what we can achieve. It will also be consistent with what I know is a great culture of giving on the part of our members, our leaders, our ambassadors. When we all report our contributions as a profession, we will have data on the positive contributions our members make every day, every year. Please take a moment, act, and let's see what remarkable good we can achieve together. Let's end 2022 with our whole organization making small but significant contributions. I wish you all a wonderful holiday season! ▲

GREAT WAYS TO SUPPORT LEGAL AID (AND HOW TO GET IN TOUCH)

Minnesota State Bar Foundation, Hennepin County Bar Foundation, Ramsey County Bar Foundation: *Contact Erikka Ryan (eryan@mnbars.org)*

Anishinabe Legal Services (ALS): *alslegal.org/donate.html*

Central Minnesota Legal Services (CMLS): *www.centralmnlegal.org/ways-to-help*

Legal Aid Service of Northeast Minnesota (LASNEM): *lasnem.org*

Legal Service of Northwest Minnesota (LSNM): *lsnmlaw.org/donate*

Mid-Minnesota Legal Aid (MMLA): *mylegalaid.org*

Southern Minnesota Regional Legal Services (SMRLS): *smrls.org/donate*

For a more complete list of Minnesota legal aid organizations, you can also visit bit.ly/3AgKXtL (case-sensitive).

Seeking private and in-house attorneys for Pro Bono Council

The MSBA's Pro Bono Council works collaboratively to advance pro bono engagement within the private bar by developing solutions to ensure that all people, and particularly people with lower incomes or limited access to legal assistance, have the legal help they need.

Made up of attorneys and pro bono professionals from legal aid, government, and the private bar, the council is committed to a diversity of perspectives—which it deems essential to lasting and effective solutions to growing pro bono in Minnesota. The council is currently seeking several members from the ranks of private practice or in-house counsel, and at least one attorney from greater Minnesota.

The Pro Bono Council meets five times per year via Zoom, with additional meetings for workgroups and events as necessary. Past initiatives include annual Pro Bono Week programming, pro bono recognition efforts, advancing partnerships with legal aid, and statewide pro bono policy advocacy.

If you are interested in joining or learning more about the Council, please reach out to MSBA Access to Justice Director Katy Drahos (***kdrahos@mnbars.org***). ▲

Minnesota State Bar Association

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Upcoming exams

The MSBA's Certification Program will be offering four certification exams in 2023.

- Real Property Law: April 29, 2023
- Criminal Law: Spring 2023
- Civil Trial Law: Spring 2023
- Labor & Employment Law: Fall 2023

MSBA Certified Legal Specialists stand out. The certified specialist designation is one way the public can identify those attorneys who have demonstrated proficiency in their specialty area and find an attorney whose qualifications match their legal needs. Any questions regarding certification can be directed to Kari White (*kwhite@mnbars.org* or 612-278-6318). ▲

North Star LAWYER

Reminder: START COMPILING YOUR PRO BONO HOURS!

With the end of the calendar year approaching, it's time to tally up your pro bono hours for the year so you are ready for two things: North Star Lawyer certification and lawyer registration pro bono reporting.

As when you completed your lawyer registration in 2022, next year's registration will again ask how many hours of pro bono you completed in this calendar year. If you skipped that question last year, you got a free pass, but not so in 2023. All attorneys will be required to answer the question to renew their law licenses. If you are already gathering your hours for registration, why not also send them to us for the North Star Lawyer program?

North Star certification opens on December 12 for the 2022 calendar year and remains open until mid-March. MSBA members who have completed at least 50 hours of pro bono work can visit ***www.mnbar.org/Northstar*** to enter their pro bono hours—and thereby join an amazing group of lawyers dedicated to improving access to justice in our community. More than just providing individual recognition, it shows that pro bono is highly valued in our state.

If you fell short of the North Star minimum this year, we're happy to help you up your game for next year. Visit ***www.projusticemn.org*** for a full listing of pro bono opportunities, or email us at ***kdrahos@mnbars.org***. ▲

Pro bono spotlight CATHERINE AHLIN-HALVERSON

Catherine Ahlin-Halverson currently works for Maslon LLP as part of their Public Interest Council, but her resume also includes organizations like Advocates for Human Rights, UPLIFT Legal Institute for Teens, the ACLU of Minnesota, the ABA Death Penalty Representation Project, the Volunteer Lawyers Network, and the Children's Law Center of Minnesota. Her pro bono work for the last several years has involved representing asylum seekers with Advocates for Human Rights.

"Pro bono and access to justice work is important because it is the right thing to do," she notes. "We have many neighbors in our community who cannot find a lawyer when they need one, and proceeding without one can be devastating."

And it's not just her clients who have benefited from her volunteer work—her pro bono work has included highlights in her own career. "One of my favorite career moments was helping a former asylum client obtain his green card," she recalls. "I met this client shortly after he had fled his home country because of severe persecution by his own community and government [because] of his sexuality. Walking with him through those difficult years when he was living in limbo and having to build a new life in the United States to now, when he has an established home, job, and community, has been incredibly rewarding."

Ahlin-Halverson hopes to inspire the rest of the legal community to make pro bono work a part of their journey. "Pro bono work is accessible wherever you work and whatever your expertise," she says. "It is a privilege to walk alongside a person going through difficult challenges and support them through that journey. It also makes our system better—if we do not take on this work, that person might otherwise go unrepresented."

To learn more about how you can get involved in pro bono opportunities, please visit ***www.projusticemn.org*** and begin your volunteer journey today. ▲

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COMMENTS
Comments are due by December 30, 2022, and must be filed electronically in Supreme Court File No. ADM10-8042.

MORE ON THE ABA CONSULTATION REPORT

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

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

The November professional responsibility column ("ABA issues consultation report on Minnesota's discipline system") provided an introduction to the September 2022 ABA consultation report on Minnesota's lawyer discipline system. In addition to a general overview, the column focused briefly on three recommendations (Nos. 19, 21, and 23), and the potential impact that adopting these recommendations would have on the current private versus public discipline distinction. Because there are several additional recommendations, I thought it beneficial to continue to explore the consultation report. For this column, my focus is on recommendations that require additional resources or change responsibility for tasks currently performed within the discipline system to other organizations.

Funding

As a refresher, Minnesota's attorney discipline system is funded by your annual registration fees. Of the $263 annual registration fee you pay as an active lawyer, $128 is allocated to attorney discipline. The Minnesota Supreme Court has worked hard over the years to keep the annual registration fee largely steady. As a result, Minnesota compares quite favorably to annual registration fees paid in other jurisdictions generally.

For example, Tennessee has a similar lawyer population and is a voluntary bar state like Minnesota (meaning that lawyers need not be members of the state bar association as part of licensure). In Tennessee, the annual registration fee is $570 and $140 is dedicated to attorney discipline. Colorado is also a voluntary bar jurisdiction, with an annual registration fee of $325; it is unknown what portion of that amount is dedicated to discipline because Colorado combines all regulatory responsibilities under one umbrella. Iowa's annual registration fee is $270, very comparable to Minnesota, but $200 of that fee is allocated to attorney discipline. Wisconsin is a mandatory bar state, so the trade association bar performs the lawyer regulation tasks. Wisconsin's annual lawyer registration fee is $504, of which $150 is allocated to attorney discipline. Of the 18 voluntary bar associations, Minnesota ranks 10th in terms of its annual required fee. Of 23 jurisdictions that report funds earmarked for discipline, Minnesota ranks 14th.

Our office also does a lot for that $128 per active lawyer. In addition to investigating and prosecuting ethics complaints (the majority of our workload), the Office has several additional responsibilities. For example, staff attorneys frequently speak at ethics CLEs. We staff an ethics hotline that answers approximately 2,000 calls annually. We administer a large probation department. We train, support, and review the work of the district ethics committees (which provide tremendous assistance to the Office in the investigation of cases). We administer the Professional Firms Act's annual and first reports, a required annual compliance task for every entity organized in Minnesota for the provision of legal services on a for-profit basis.

We provide administrative and investigative support to the Client Security Board. We obtain and collect on discipline judgments. We act as trustee, when appointed, over client files and trust accounts if a lawyer dies, abandons their practice, or through disability becomes unable to return client files and close their client trust account. We respond to written requests for disciplinary history and track legal employment of suspended and disbarred lawyers. We provide administrative support to the Lawyers Professional Responsibility Board. We administer the discipline expunction rules. We administer a trust account overdraft program and provide guidance to lawyers regarding use of and compliance for their trust account. Finally, we administratively handle attorney resignations, reinstatements by affidavit, and conduct reinstatement investigations and hearings. Given the breadth of work performed by this Office, the annual fee paid by lawyers in Minnesota as part of a self-regulating profession is a very good value.

Recommendations

The ABA generally recommends against discipline offices providing ethics advice.* The primary reasons for that recommendation are the significant time commitment required and the risk of the OLPR attorney who provided the advice being a witness in a later discipline or other proceeding. Because Minnesota has a long-standing tradition of providing ethics advice, the ABA did not recommend elimination of this service but encouraged the Court to take this staffing commitment into consideration in setting goals for case processing, and also recommended the Court explore whether the bar association could take on this task (recommendation 2(B)).

This is one area in which you may wish to provide comment to the Court during the comment period. Is this a valuable service? Do you believe attorneys in the OLPR should provide this service? What is its value to you? Would you support an increase in attorney registration fees if needed to keep this service available, or do you wish to keep it but not at additional cost?

The ABA also recommended additional investments in resources. Specifically, the ABA recommended the Lawyers Professional Responsibility Board (and a new Administrative Oversight Committee) have a staff person, and that referees be provided with additional staff assistance (recommendation 4). Right now, the OLPR provides staff support for the Board, and the Court's commissioner's office provides some clerical assistance to referees. The ABA recommended the OLPR hire an additional investigator and noted that it may need an additional paralegal to support case-processing objectives (recommendation 5).

The ABA recommended that the Court invest in additional technology tools for use in the discipline system, including enhancements to our database management system, document production tools, and forensic auditor tools, to name a few (recommendation 6). The ABA recommended the creation of a lawyer discipline decision database that is searchable, which would require resources to create and maintain (recommendation 7). The ABA recommended that the OLPR and the Board maintain separate websites, which would require additional resources to create and keep up to date (recommendation 9). The ABA recommended that paid court-appointed referees instead of board volunteers conduct reinstatement hearings (recommendation 13), a recommendation that will increase expenses for referees.

These are great ideas, worth exploring to understand the cost and likely return on investment that the additional allocations would provide. What are your thoughts on these various recommended additional investments? Before you say "none," because you want to keep the annual registration fee low, please work with me for a minute. What would you like to see the Court prioritize if they were going to provide some additional resources or look to reallocate existing resources? Can we also agree that doing more with the same resources is not in the best interest of a sustainable and optimized system?

The ABA also recommended that the Court consider having the Office do less in another area, such as taking on fewer trusteeships (recommendation 17). As the report indicates, this function can be quite time-consuming. Is there another entity that could take on this role? Is it important that the Office perform this function if another entity is unable to do so?

One additional area that requires exploration is who will create practice management programs if they are to be used as part of a disciplinary diversion program (which, as I noted last month, is a central recommendation (recommendation 19)). The ABA report specifically provides that "[t]he organized bar's active role in this process via programming to which the lawyer can be referred is vital to the success of the diversion process." (Report at 74.) If others are unable to step forward to create the programming necessary to support the diverted lawyer, and the creation of a diversion program is a priority, does the OLPR have sufficient resources to undertake this task? Where in the list of resource priorities should this fall, in your estimation? Budgets are in part statements of values. How would you weigh in?

Conclusion

As I stated last month, we have a solid system that can always be improved, including—potentially—in some fundamental ways if we think the changes are in the best interest of Minnesota. At its center, a lot of the ABA consultation report focuses on re-examining the policy choices reflected in current resource allocations, including suggestions on where the Court may wish to invest further to optimize the system. The questions presented are important.

I hope those of you with an interest in the subject have had an opportunity to read the report or at least review the recommendations. If you have comments, I would love to hear them, as would the Court, through your participation in the public comment period. Comments are due by December 30, 2022, and must be filed electronically in Supreme Court File No. ADM10-8042. ▲

* ABA Model Rules for Lawyer Disciplinary Enforcement 4(C) provides "Advisory Opinions Prohibited. Disciplinary counsel shall not render advisory opinions, either orally or in writing."

RANSOMWARE *and counteracting the interconnected risks of the IoT*

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

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

This past fall, Crystal Valley, a farming co-op in southern Minnesota, was targeted by a ransomware attack that left its employees using paper tickets to take orders.[1] The attack was one of many this year that have targeted critical infrastructure, with the agriculture sector being particularly at risk. Legacy technologies, apathetic leadership, and a lack of cybersecurity training and best practices can create a perfect storm. In fact, the FBI issued a warning this past spring, urging the agriculture sector to be aware of ransomware groups timing their attacks for maximum gain: "ransomware actors may be more likely to attack agricultural cooperatives during critical planting and harvest seasons, disrupting operations, causing financial loss, and negatively impacting the food supply chain."[2] Nevertheless, the agriculture sector is not unique in its heightened risk for ransomware, as attacks against critical infrastructure and organizations have continued to cause damage across the nation.

In all sectors, utilizing the internet of things (IoT) is a business requirement. Yet despite its ubiquitous nature, IoT cybersecurity is not always regarded as a top priority. Outside of organizations and companies, the average consumer often encounters roadblocks to both controlling how their personal information is protected and being assured of the basic security of their devices. Notifications are received in the mail when our private information has been part of a breach, we hear about largescale cyberattacks in the news, and there's the hope that the devices we purchase are as secure as possible. For organizations and individuals alike, it requires diligence to keep up with best practices and stay aware of current threats—but even the best of efforts do not create a perfect security posture when managing IoT devices.

To begin moving toward standardization and improved transparency for consumers, the White House has recently provided details on a new labeling initiative it expects to roll out in the spring of 2023, noting that "A labeling program to secure such devices would provide American consumers with the peace of mind that the technology being brought into their homes is safe, and incentivize manufacturers to meet higher cybersecurity standards and retailers to market secure devices."

According to the White House, "Government and industry leaders discussed the importance of a trusted program to increase security across consumer devices that connect to the Internet by equipping devices with easily recognized labels to help consumers make more informed cybersecurity choices (e.g., an 'EnergyStar' for cyber). These conversations build on the foundational work that has been pioneered by the private sector and the National Institute of Standards and Technology (NIST)."[3] Creating a labeling system standardizes basic cybersecurity needs and streamlines the buying process for consumers, recognizing security as a basic necessity.

The program further signifies a growing emphasis on information-sharing and cooperation between the private and public sectors and serves as an actionable step toward implementing the Biden administration's goals for cybersecurity on a national level—one goal being to combat the types of ransomware campaigns that target critical infrastructure internationally.

In October, The International Counter Ransomware Initiative (CRI) met in Washington, DC to reestablish its commitment to counteracting the worldwide threat of ransomware. Quoting again from a White House release: "CRI members are

committed to taking action, in line with national law and policy, to disrupt and degrade the ransomware ecosystem and hold accountable criminal ransomware actors based on our collective knowledge, expertise, authorities, and capabilities."[4] This initiative is tasked with better understanding the tactics of cybercriminals, and the circumstances that allow for their successful attack campaigns. From enforcing laws against financial crimes and holding cybercriminals accountable to organizing effective collaboration between nations, the members have adopted a global perspective on reducing the impact of ransomware.

As ransomware campaigns and the risks to critical infrastructure and organizations proliferate, it is encouraging to see that the objectives set forth in President Biden's 2021 Executive Order[5] are beginning to materialize. President Biden recently reiterated the importance of reaching these goals at the beginning of Critical Infrastructure Security and Resilience Month: "cyberattacks... have ripple effects, threatening global stability and disrupting supply chains everywhere."[6] Improving the security postures of government agencies, creating a labeling system to prioritize cybersecurity in technology, and launching international efforts to combat the growing dangers of ransomware are all positive signs. Within our own organizations, security is everyone's responsibility. Given the far-reaching potential for damage caused by cyberattacks, such as supply chain disruptions and dire business continuity problems, the same can be said on a national and even global scale. Cybersecurity measures are still sometimes seen as "optional," especially when convenience is impacted. The human element of security, from strong leadership to the proper management of legacy technologies, is a critical component of mitigating risk. ▲

NOTES

[1] *https://www.keyc.com/2021/09/27/business-resumes-crystal-valley-co-op-following-ransomware-attack/*

[2] *https://www.ic3.gov/Media/News/2022/220420-2.pdf*

[3] *https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/20/statement-by-nsc-spokesperson-adrienne-watson-on-the-biden-harris-administrations-effort-to-secure-household-internet-enabled-devices/*

[4] *https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/01/international-counter-ransomware-initiative-2022-joint-statement/*

[5] *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/12/executive-order-on-improving-the-nations-cybersecurity/*

[6] *https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/31/a-proclamation-on-critical-infrastructure-security-and-resilience-month-2022/*

FOR TRIAL LAWYERS, THE GENERALIST IS THE BEST SPECIALIST

BY JUSTICE G. BARRY ANDERSON AND JEVON BINDMAN

Almost 50 years ago, Chief Justice of the United States Warren Burger rang the alarm bell regarding the "quality of advocacy in our courts."[1] He argued that the increasing complexities of the legal system required increased specialization, and in particular he called for a specialized unit of trial practitioners.[2] Chief Justice Burger envisioned a "system whereby students or new graduates who have selected, even tentatively, specialization in trial work can learn its essence under the tutelage of experts, not by trial and error at clients' expense."[3] In other words, he believed a lawyer could become a subject matter expert or a trial expert, but not both.

Chief Justice Burger may have foreseen the dramatic shift toward specialization in American legal work over the past two generations, but it has occurred in nearly every legal field *except* trial practice. And what he may not have foreseen was the equally dramatic decline of trial work in general. As a result, civil litigators are siloed into discrete practice areas, yet are all expected to *simultaneously* master the skills of presenting their cases to factfinders at trial, despite having little opportunity to develop those skills.

Rather than complain about declining civil trial work or point to some earlier, more propitious time, this article recognizes the current legal landscape and discusses how attorneys can develop trial skills in an increasingly specialized world. Contrary to Chief Justice Burger, in a legal landscape of ultra-specialization coupled with scarcity of trial opportunities, it may well be the *generalists* who hold the key to unlocking essential trial skills. The authors approach this topic from two different perspectives. One author maintained a general practice for 20 years predominantly in greater Minnesota—with civil trial experience in personal injury, insurance, contract, and mechanic's lien litigation and was certified by the MSBA as a civil trial specialist in the early days of that program—followed by almost 25 years as an appellate court judge hearing cases from across the legal spectrum. The other author practices general commercial litigation with areas of emphasis in construction, insurance coverage, and appeals, and has participated in three jury trials in his seven years of practice. His perspective is looking forward to the coming decades and learning how to develop trial skills that attorneys in prior generations would have routinely acquired.

Attorney specialization: More than a trend?

In a 1984 opinion that disciplined an attorney for (among other things) refusing to handle a criminal matter, the U.S. Court of Appeals for the Eighth Circuit stated that any civil attorney should be capable of conducting a criminal trial, stating that "it is no more difficult to conduct a criminal trial than it is to conduct an intricate 10b–5 securities case or a complicated products-liability case."[4] This position would be unthinkable today—specialization has resulted in a clear demarcation between criminal and civil practitioners that is virtually uncrossable.

Even within the realm of civil law, an attorney is no longer a "litigator"; instead, she practices "construction law," "employment law," or "products liability," or perhaps subspecialties such as "OSHA compliance," "noncompete and trade secrets," and "medical devices." The trend toward specialization is nothing new—Justice Byron White noted more than 40 years ago the "gradual change in the character of law practice from a generalist skill to an increasingly specialized one," resulting in the "emergence of lawyers regarded and operating as... specialists... equipped to cope with problems that transcend jurisdictional boundaries and the legal competence of local generalists."[5] Countless articles in this and other publications have lamented the demise of the generalist attorney for years and have cited the following reasons (among many others) for this trend:

- ***Proliferation of law:*** Codified and common law have seen exponential expansions in the past generation, and the resulting body of law is simply too broad for any one attorney to master.
- ***In-house counsel:*** Nearly all large (and many midsized) businesses now have in-house legal departments that serve as generalists for the company. Outside counsel are hired to handle particular problems rather than furnish considered judgment and advice on a broad array of issues.
- ***Rise of mega-firms and boutiques:*** Mergers have resulted in mega-firms that boast hundreds of attorneys working in every conceivable practice area and thus have little need for generalists. As a result, small and mid-sized firms have trended toward focusing on niche practices to remain competitive.

There is little doubt that specialization brings tangible benefits to both the attorney and the client. Specialization encourages attorneys to learn an area of law in great depth and to stay up to date with new developments, thus creating greater competence in the bar in general (and perhaps justifying higher billing rates). And clients are more able to choose an attorney with significant experience in the applicable industry. This results in less time spent "boning up" on a subject matter and higher quality legal services overall.[6]

G. BARRY ANDERSON is an associate justice of the Minnesota Supreme Court. Prior to his appointment to the bench, he maintained a general law practice in Fairmont and later in Hutchinson, where he also served as city attorney.

Trial: The generalist's final frontier?

There is one major feature of civil litigation, however, that still benefits from a generalist perspective. The jury trial is the great equalizer—in theory, it allows each of us to be evaluated by our peers and treated equally irrespective of background or other characteristics. A jury trial is also an equalizer of sorts for attorneys—it requires technical prowess, communication skills, and perhaps some theatrical ability, and is only loosely connected with the attorney's subject-matter expertise.

A trial is a highly structured proceeding governed by complex rules of procedure and evidence. A trial attorney is expected to develop and refine a set of skills that are separate and distinct from her knowledge and understanding of topical areas of the law. These include examining witnesses, a thorough understanding of the rules of evidence, and persuading the factfinder through argument to interpret the evidence in favor of the client's position. These skills are unique to the trial setting. Successful trial lawyers certainly include subject-matter experts, but it is important to recognize that generalists have built-in advantages as civil trial lawyers.

A generalist is more likely to focus on aspects of trial practice rather than the intricacies of the subject matter, which can make for a more effective presentation. A lawyer with a broad legal background may also have more experience in distilling a case to its fundamentals to determine the most compelling narrative to present to the factfinder; put another way, a generalist may be less likely to lose the forest for the trees. This is obviously an essential skill when communicating with a jury, which is unlikely to have any background in the subject at hand. But this skill is equally important in bench trials. Judges "are, on the whole, a body of generalists."[7] Courts have frequently criticized specialized lawyers who "fail[] to appreciate generalist judges' often limited understanding of esoteric [subjects]."[8] The Seventh Circuit Court of Appeals articulated the issue as follows:

> "[T]he appellate advocate must not count on appellate judges' being intimate with his particular legal nook—with its special jargon, its analytical intricacies, its commercial setting, its mysteries. It's difficult for specialists to write other than in jargon, and when they don't realize the difficulty this poses for generalist judges[,] neither do they realize the need to write differently."[9]

This criticism applies equally to trial work. A generalist can more easily identify concepts with which the factfinder may be unfamiliar and explain those concepts in an easily digestible way. It is similar to learning a language—a nonfluent speaker, having recently learned the language herself, is sometimes better at teaching it to somebody else.

A generalist may also tend to spot issues that specialists may miss. A specialist's skill set is premised on identification of patterns and common issues that arise with frequency in a given area of the law. But a generalist is better able to see the whole picture and draw connections to other areas of the law that may be missed by an attorney who is siloed in a specific area. For example, shareholder, construction, and employment disputes almost always involve interpretation of a contract. A generalist might be more adept at applying knowledge from one area to another in order to craft a creative argument.

Finally, a generalist knows when she is out of her element and needs to loop in an attorney with deeper subject-matter experience. In the trial setting, this may take the form of allowing another attorney to cross-examine the opposing party's technical expert. A subject-matter expert, by contrast, may be more reluctant to call in a trial specialist (or less likely to recognize that assistance is needed).

Where have all the trials gone?

The characteristics that make generalists uniquely suited to trial work are only going to increase in importance as trial work itself becomes more scarce. Thirty years ago, any litigator could gain meaningful trial experience, because a full-time practice would inevitably result in at least a few trials each year. Not anymore. The past generation has seen a precipitous drop in the number of matters that culminate with a hearing before a tribunal—particularly with respect to civil jury trials. According to 40 years of data compiled by the Minnesota Judicial Branch, civil jury trial practice peaked in Minnesota state courts in the early 1990s, with approximately 900 major civil jury trials per year (and over 1,000 such trials in 1993). This number steadily declined over the next 25 years, however, and by 2019, the number of civil jury trials had dropped to less than 200 per year. That number may still be falling—2020 and 2021 each saw fewer than 100 civil jury trials in Minnesota district courts—although that decline was also influenced by the covid-19 pandemic.

There are many reasons for this trend, including increased costs of civil litigation, the voluminous amount of electronically stored information and its effect on discovery, and the rise of private dispute resolution such as mediation and arbitration.[10] But the net result is an emerging generation of litigators that has had little opportunity to gain meaningful trial experience. And if an attorney's focus (perhaps justifiably) is on mastering a particular subject matter, these trial skills will fall more and more by the wayside. The result is a generation of civil "trial lawyers" with virtually no trial experience and little opportunity to hone those skills.

Is this really a problem?

A natural critique follows from the above discussion: If trials are so infrequent, why does it matter if most lawyers don't have significant trial experience? Indeed, the increase in specialization and decrease in number of trials have resulted in many firms employing trial specialists who will jump into a matter as it nears trial (making Chief Justice Burger's vision a reality, though in a roundabout way). But there are business reasons why it is advantageous for all litigators to be well versed in trial skills. The short version of the rationale is that although most cases don't go to trial, some do, and an attorney who can comfortably handle an entire matter from investigation to jury verdict—as opposed to incurring the expense of onboarding a new trial team—provides a value-add to the client.

The longer version is that trials are the culminating event of a civil action and provide an invaluable insight into other aspects of pretrial practice. Trial practice informs everything a litigator does, from pleading to discovery to dispositive motion practice. The overarching questions surrounding all these activities is (1) what are the elements of the claim, (2) what evidence is needed to prove those elements, and (3) how do I persuade the factfinder that the elements are satisfied? Until a lawyer has cross-examined a witness at trial, she cannot appreciate the importance of boxing in that witness at the deposition to prevent surprise answers. If an attorney has never presented a closing argument, it is difficult to understand the importance of fulsome interrogatory answers to disclose all potential evidence.

Finally, trials are the ultimate lawyer experience! They are why many of us became lawyers in the first place. Perry Mason and Atticus Finch are not revered for their well-crafted discovery deficiency letters. Moreover, trials are the most visible aspect of our profession and necessary to maintain the legitimacy of our profession. The ability to air grievances in public is essential to a free and fair society, and trial attorneys are the gatekeepers for that access.

Where do we go from here?

Although there's no substitute for the real thing, alternative methods do exist to obtain trial experience. Trial skills courses offer a great opportunity to hone skills in a simulated yet professional setting. These week-long courses provide multiple standup opportunities in areas such as opening and closing statements and witness examination, and usually culminate in a full trial presentation. The National Institute for Trial Advocacy (NITA) and Trial Lawyers College are two well-known examples, and many state and local bar associations also offer trial advocacy programs as well.

Pro bono work offers another great opportunity to practice trial skills. Matters related to housing and orders for protection frequently go to trial, and parties in these matters are often in desperate need of pro bono representation. These trials typically involve fast schedules and one-day proceedings, making them easy to fit into a busy practice.

Lawyers lucky enough to work for a firm with a municipal apprenticeship program should take advantage of it. These programs are intended to provide meaningful trial experience to less experienced civil litigators. Another alternative: If a firm client has a large number of less serious tort cases, arrange to take those cases to trial at a steep discount as a learning opportunity.[11]

Finally, appellate lawyers are perhaps the last true generalists, as they are called upon to handle cases involving all manner of legal issues. And although it's not the same as direct trial experience, appellate litigation necessarily exposes lawyers to civil trial work. Many appeals deal with issues that occurred at trial, including procedural, substantive, and evidentiary issues, providing insight into judicial review of a variety of trial issues.[12]

Conclusion

Attorney specialization is here to stay, and it provides numerous benefits to both clients and the bar. But specialists still have something to learn when it comes to trial practice and, like Mark Twain,[13] perhaps the reports of the demise of the general civil practice lawyer are premature. ▲

JEVON BINDMAN is an attorney at Maslon LLP and focuses his practice on insurance, construction, and appellate litigation. He is co-author of several Minnesota Practice volumes published by West/Thomson Reuters, including Civil Rules Annotated and Minnesota Handbook of Courtroom Evidence.

THE NEW WORLD OF NIL IN MINNESOTA

How student-athletes can navigate the system of name, image, and likeness rights in high school and beyond

BY MICHAEL T. BURKE AND AMBER D. CROW mtburke@foxrothschild.com amber-crow@uiowa.edu

The NCAA shocked the nation in July 2021 when it shifted away from its traditional amateurism model and began allowing nearly half a million student-athletes across the country to profit from their name, image, and likeness (NIL).[1] Twenty-nine states have already passed legislation that regulates or addresses how student-athletes can profit from NIL, and 10 states currently have pending legislation.[2] Because there is no uniform legislation for amateur athletes across the country, states and various organizational bodies are left to prescribe rules for student-athletes' NIL deals, which creates nuances and challenges depending on the state, especially as NIL continues to evolve.

College sports generate significant revenue and are often the pride and joy of many states. The NCAA, for example, generated $1.16 billion in 2021 alone.[3] NIL has caused many state legislatures to consider the importance of staying competitive with other states given that some student-athletes may not want to limit their earning potential, and as a result, may decide which school to attend based on the permissive or restrictive scope of a given state's NIL law.[4] The NCAA has requested that Congress address the current fragmented NIL system by way of national legislation, though Congress has yet to express real interest in the issue.[5]

Thus, student-athletes across the country must pay close attention to state laws and regulations in place when engaging in NIL deals and determining where they will continue their athletic careers. In some states, including Minnesota, the ability to profit from one's NIL can begin in high school. While this is an exciting change for young athletes, there may be several pitfalls along the way. Student-athletes should pay close attention and consult professionals to ensure their contracts contain fair terms and comply with state and federal laws, as well as their school's regulations, policies, and contractual obligations.

Recent Minnesota developments regarding high school NIL rules

In June 2022, the Minnesota State High School League (MSHSL) premiered a newly approved NIL policy—MSHSL Bylaw 201—for high school students participating in MSHSL sports and activities while also protecting their status as amateurs.[6] Alaska, California, Colorado, Kansas, Louisiana, Maine, Nebraska, New Jersey, New York, and Utah have implemented similar policies that allow high school student-athletes to engage in NIL opportunities and partnerships.[7] However, other states such as Texas, Florida, and Georgia have specifically prohibited high school student-athletes from engaging in NIL opportunities and partnerships.[8]

MSHSL Bylaw 201 outlines specific regulations that student-athletes must abide by to avoid falling out of good standing or eligibility within their athletic programs. As a result of MSHSL Bylaw 201, Minnesota high school student-athletes may now earn compensation from the use of their NIL consistent with the following policy regulations:

- The compensation is not contingent on specific athletic performance or achievement.
- The compensation is not provided as an inducement to attend a particular school for recruiting efforts or to remain enrolled at a particular school.
- The compensation is commensurate with market value.
- The compensation is not provided by the school or an agent of the school.
- NIL activities must not interfere with the student-athlete's academic obligations.
- A student cannot miss an athletic practice, competition, travel, or other team obligations to participate in an NIL opportunity.[9]

High school student-athletes face several limitations under the MSHSL policy. For example, student-athletes are prohibited from selling items from the school while eligible; referencing school involvement during non-school advertisements; endorsing equipment companies or manufacturers to publicize the school's use of that equipment; promoting gaming, gambling, alcohol, tobacco, cannabis, or related products; or promoting illegal substances, adult entertainment products and services, contraceptive and sexual enhancement products, or weapons.[10]

Minnesota's first high school athlete NIL partnership

High school senior Bayliss Flynn, a goalkeeper for Edina High School's soccer team, is the first known Minnesota high school student-athlete to have taken advantage of MSHSL Bylaw 201 by signing an NIL deal.[11] Flynn struck an endorsement deal with TruStone Financial, though the specifics of the deal are unknown. Flynn will be endorsing the company's Aurora-branded debit card while promoting financial literacy education. While this is Flynn's first known endorsement deal, additional deals may arise in her future, as she verbally committed to continue her soccer career at the University of Montana.

Minnesota is no stranger to producing high-profile student-athletes. For example, Minnesota native and artistic gymnast Sunisa "Suni" Lee won six world championships in addition to her multiple Olympic medals during the 2020 Olympic Games and was leading the Auburn University gymnastics team as a college freshman.[12] Had NIL been in existence while Lee was still in high school, it seems likely that she could have profited from significant NIL-related opportunities.

Historically, many young gymnasts and athletes have struggled with the decision to attend college or continue to ride off their Olympic success with endorsement deals. With NIL, these athletes now have the option to have their proverbial cake and eat it, too. For example, Lee can now maximize her Olympic success into financial security without forgoing her college experience, education, and collegiate athletic career.[13] She has already capitalized on these opportunities by appearing on popular shows like *Dancing with the Stars* and also started a leotard line with GK Elite and a clothing line with Pretty Little Thing, among other NIL partnerships.[14]

Another Minnesota native, UConn women's basketball star Paige Bueckers, performed extraordinarily well as a guard at Hopkins High School and collected several awards along the way, including being named Gatorade Player of the Year.[15] Perhaps not coincidentally, Bueckers became the first NCAA athlete to strike an NIL deal with Gatorade (in addition to other deals that highlight social issues). Bueckers was of one of the most sought-after prep stars in history, leading many to speculate she would have benefited significantly from NIL deals while still in high school.

The onus is on high school student-athletes and families

To be sure, the NIL landscape presents an exciting opportunity for Minnesota high school student-athletes, especially in terms of influence and finance. With that being said, the burden to understand and follow various policies within organizations like the MSHSL, NCAA, as well as state (and potentially future federal) law is placed squarely on student-athletes and, oftentimes, their families. This can pose real challenges. For example, certain partnerships may have lasting impacts on participation eligibility, and other tax or financial repercussions may arise.

Moreover, while such deals can be very lucrative, that often imposes sudden and significant financial responsibilities on young athletes. For example, Nijel Pack, a college basketball player who transferred from Kansas State to Miami, received an NIL package from billionaire booster John Ruiz that included earning $800,000 over the course of two years as well as a car.[16] While Pack credits his parents with teaching him financial responsibility and the power of saving and investment, not every student-athlete will have that understanding, discipline, and skillset.[17] The aid of financial advisors may be beneficial for many student-athletes presented with NIL deals.

Student-athletes may also struggle to determine what their fair market value is when negotiating deals with brands and companies. Several factors may come into play when determining a student-athlete's market value such as the conference they play in, the revenue of the team, and the student-athlete's social media presence and audience reach.[18] Because student-athletes may be unable to see their peers' valuations, they are reliant upon themselves, certain administrators, compliance officers, and professionals in determining their fair market value.[19]

MICHAEL T. BURKE is a business litigator with Fox Rothschild LLP. He can be reached at (612) 607-7124.

AMBER D. CROW is a law student at the University of Iowa College of Law and will be graduating in May 2023.

Given the fragmented, state-by-state patchwork of NIL laws and policies, compliance can be difficult to navigate. While the NCAA and other athletic organizations have implemented policies, state laws ultimately supersede those policies. Moreover, sometimes conflicting state laws have an impact on student-athletes who move out of state for school and their athletic careers.

For example, Alaskan native Lydia Jacoby—a Team USA swimmer in the 2020 Olympic Games—committed to the University of Texas and had significant endorsement deals at her doorstep. Because the state of Texas prohibited high school students from engaging in NIL deals, Jacoby felt it was necessary to hire an agent, who worked closely with the University of Texas's compliance director to ensure that all of Jacoby's deals were lawful.[20] Jacoby was left navigating compliance with two states' laws, the NCAA policies, and the University of Texas's existing contracts with various brands. This required Jacoby's close attention to detail and professional assistance when entering new contracts to avoid contractual breaches and compliance issues.

Negotiating and signing contracts can be exciting but can also expose many young student-athletes to liability. At times, certain provisions within a contract may be blatantly unfair. But there may also be less obvious aspects of a contract that student-athletes should be aware of when partnering with brands and companies. For example, student-athletes should ensure their contracts comply with the Federal Trade Commission's (FTC) various rules, including the guidelines regulating endorsements and testimonials found in 15 U.S.C. §45.[21] Student-athletes who are posting paid advertisements on their various social media platforms should, for example: (1) ensure they are using the product or service they are promoting; (2) make statements about the product or service that are true and that reflect their actual opinions; and (3) disclose any relationship between the student-athlete and advertiser.[22]

Furthermore, advertising is often susceptible to litigation when false statements are made, trademarks are infringed upon, or FTC guidelines are not followed. Student-athletes should be cautious of indemnification clauses that some brands or companies may include in their contracts, which shift the burden of risks and expenses in the event of a breach, default, or alleged misconduct by a party. Because brands and companies are often more financially secure than a student-athlete, it may be in a student-athlete's best interest to negotiate an indemnity clause that requires the company to indemnify them if a claim is made.

In every case, student-athletes should read their contracts closely and seek help from an attorney when entering NIL partnerships to protect their interests. Student-athletes should also be sure to understand the tax consequences of their NIL deals and, because there is no uniform guidance across the country, pay close attention to the ever-changing state laws governing these deals. Student-athletes should further consider connecting with their respective academic institutions before agreeing to an NIL deal to ensure compliance with the rules and regulations of their institutions, and potentially, the existing contracts of those institutions. This is an exciting time for many student-athletes, but diligence at the deal's inception is crucial to protect their interests for both the near and the long term. ▲

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SOMETHING TO CHEW ON

How newly legal THC edibles interact with Minnesota employment laws

BY SHAWN J. WANTA AND SUSAN E. ELLINGSTAD
sjwanta@baillonthome.com seellingstad@locklaw.com

Minnesota has one of the most restrictive drug and alcohol testing statutes in the country. It also has a statute protecting the rights of Minnesota employees to consume all legal food and beverages outside of working hours with very few limitations by employers. Most employment drug panels include a test for cannabis use. By virtue of a recent change in state law, employees can legally consume food and beverages that would cause them to fail such drug tests. This article discusses the intersection of Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA), Lawful Consumable Products Act (LCPA), and the state's recent legalization of food and beverages containing certain types and quantities of THC.

On July 1, 2022, Minnesota legalized the sale of products containing hemp-derived cannabinoids with delta-9-tetrahydrocannabinol (delta-9 or delta-9 THC), subject to certain packaging and dosing restrictions.[1] Delta-9 is the primary cannabinoid that serves to impart the psychogenic "high" feeling associated with marijuana. The law limits products containing hemp-derived THC to 5 milligrams or less of THC per serving, or 50 milligrams per package.[2] The law also removed THC derived from industrial hemp from Minnesota's list of Schedule I drugs.[3] Both hemp and marijuana are types of cannabis, and both contain delta-9 THC. Industrial hemp is a federally legal product, provided it contains less than 0.3 percent delta-9 by dry weight.[4] Under the federal drug schedules, THCs are Schedule I drugs, *except* when derived from industrial hemp.[5] This means that products containing hemp-derived THC (in certain amounts) are legal under both Minnesota and federal law. Marijuana, however, is still illegal in Minnesota except for certain medical purposes,[6] and it remains illegal under federal law.

The chemical compound in hemp-derived delta-9 is the same as marijuana-derived delta-9. That poses an issue for employers who require employees or job applicants to take a drug test seeking to detect marijuana use: The test will produce a false positive in applicants or employees who have consumed hemp-derived THC if it is only looking for delta-9 and its metabolites. There is currently no commercially available way to differentiate between the type of product consumed (hemp-derived THC versus marijuana), nor is there a reliable testing method for marijuana intoxication, or to measure the time since consumption.

Testing prospective or current employees for delta-9 THC implicates Minnesota's LCPA and DATWA statutes. Because the recent change in the law came without guidance regarding existing drug-testing policies, many Minnesota employers are scrambling to balance their interest in maintaining a drug-free workplace, particularly in safety-sensitive positions, with avoiding legal liability for drug testing.

The statutory framework

Lawful Consumable Products Act (LCPA)

The LCPA prohibits an employer from refusing to hire, disciplining, or discharging an employee because "the applicant or employee engages in or has engaged in the use or enjoyment of lawful consumable products" if they do so out of the workplace and during non-working hours.[7] The statute defines "lawful consumable products" as products "whose use or enjoyment is lawful and which are consumed during use or enjoyment," including "food, alcoholic or nonalcoholic beverages, and tobacco."[8] The statute excepts *bona fide* occupational requirements "reasonably related to employment activities or responsibilities of a particular employee or group of employees...."[9] Employers may also restrict employee consumption of lawful consumable products if such a restriction is necessary to avoid an actual or perceived conflict of interest with any responsibilities owed by the employee to the employer.[10]

While the Minnesota Legislature legalized hemp-derived THC products, it did not revise the LCPA to clarify whether those products are or are not considered "lawfully consumable products," so employers should presume they are. California, in contrast, passed legislation (effective in 2024) that expressly prohibits discrimination against employees who consume marijuana legally outside of work hours.[11]

Drug and Alcohol Testing in the Workplace Act (DATWA)

DATWA provides that employers may perform tests for "drugs," defined as controlled substances under the Minnesota Controlled Substances Act.[12] This includes any "drug, substance, or immediate precursor in schedules I through V of section 152.02."[13] Employers who comply with very specific statutory requirements regarding policies, notice, and testing protocols may require drug and alcohol testing for job applicants and

MINNESOTA HAS ONE OF THE MOST RESTRICTIVE DRUG AND ALCOHOL TESTING STATUTES IN THE COUNTRY. IT ALSO HAS A STATUTE PROTECTING THE RIGHTS OF MINNESOTA EMPLOYEES TO CONSUME ALL LEGAL FOOD AND BEVERAGES OUTSIDE OF WORKING HOURS WITH VERY FEW LIMITATIONS BY EMPLOYERS.

THE RESULTS OF ANY DRUG TESTS CANNOT INDICATE WHETHER AN EMPLOYEE CONSUMED DELTA-9 DURING WORKING HOURS OR ON WORK PREMISES, OR WHETHER THE EMPLOYEE WHO USED PRODUCTS OUTSIDE OF WORK COULD STILL BE IMPAIRED DURING WORKING HOURS.

employees in certain circumstances: routine physicals, random selection, reasonable suspicion for drug or alcohol impairment, and after an employee returns from a chemical dependency treatment program.[14] Testing laboratories conduct an initial screening test for drugs or alcohol, and then must conduct a confirmatory test on all samples that produce a positive result.[15] Subject to DATWA's strict requirements, employers may take adverse action, including discharge, against an employee who tests positive for use of a controlled substance—a category that now excludes hemp-derived THC.[16]

When metabolized, delta-9 breaks down into 11-hydroxy-THC (hydroxy-THC) and 11-nor-delta-9-tetrahydrocannabinol-carboxylic acid (THC-COOH). Hydroxy-THC is psychoactive[17] and causes impairment, but does not stay in the body long before being converted to a secondary metabolite of THC called THC-COOH. THC-COOH is not psychoactive but stays in the body for much longer—usually around one month. Most urine tests screening for marijuana detect only THC-COOH.

Two main types of urine drug testing are utilized by employers: an initial screening test using an immunoassay, and a confirmatory gas chromatography/mass spectrometry (GC-MS) test. Immunoassays generally use antibodies to detect the presence of drug metabolites or classes thereof and are typically sensitive to several THC metabolites. Confirmation testing is specific to the THC-COOH compound.

Because THC-COOH remains in a person's system long after any psychoactive compounds have been metabolized, the test is unreliable as an indicator of recent marijuana use or impairment. Testing for delta-9-tetrahydrocannabivarin (THCV), a plant cannabinoid, did not prove helpful for distinguishing oral dronabinol (an FDA-approved synthetic THC drug) users from illicit plant marijuana users. Researchers have also considered using hydroxy-THC as a biomarker for recent marijuana consumption or impairment. Unfortunately, researchers found that hydroxy-THC can remain in heavy cannabis users' urine for up to 24 days after cessation in use, undermining its effectiveness at testing recency of use or impairment.

Because of those difficulties, it is currently impossible to test for marijuana without also testing for legal consumable products that contain hemp-derived THC. The results of any drug tests cannot indicate whether an employee consumed delta-9 during working hours or on work premises, or whether the employee who used products outside of work could still be impaired during working hours.

Delta-9 THC under Minnesota employment laws

Notably, considering H.F. 4065's authorization of "edible cannabinoid products"—such as gummies and seltzers—the LCPA applies to food and beverages.[18] If an applicant or employee consumes hemp-derived delta-9, they would test positive for marijuana. While the test would be positive for the chemical compound delta-9, the result is false if it fails to differentiate between the sources of delta-9, one of which is legal while the other is not. In this situation, if the employer chooses not to hire, to discipline, or to discharge the individual based on this test, it risks taking an adverse employment action based on lawful consumption, a violation of the LCPA.

Given that THC compounds derived from industrial hemp are no longer scheduled drugs under schedules I to V, a test for delta-9 THC that does not differentiate between hemp- and marijuana-derived compounds falls within the scope of DATWA because marijuana-derived THC remains a scheduled drug, despite the removal of hemp-derived THC from the schedules.[19]

An employee also has a right under DATWA to relay information to the employer to explain or question the reliability of a positive drug test.[20] Employees "must be given written notice of the right to explain the positive test, and the employer may request that the employee or job applicant indicate any over-the-counter or prescription medication that the individual is currently taking or has recently taken and any other information relevant to the reliability of, or explanation for, a positive test result."[21] The employee may then "submit information to the employer, in addition to any information already submitted... to explain that result."[22] That said, it may be just as difficult for an employee to prove their consumption was lawful as it is for the employer to prove the opposite.

Practical considerations for employers

In light of the recent change in state law, Minnesota employers who screen job applicants for marijuana may find increasingly more candidates testing positive for low levels of THC than previously. That screening undoubtedly will capture applicants who legally consume hemp-derived THC. If such test results are used to screen out applicants from proceeding in the hiring process, not only will they eliminate a pool of candidates during a labor shortage, but not hiring individuals who partake in legal consumable products runs afoul of the LCPA. Employers must also take care not to discriminate in hiring against qualified applicants who lawfully use THC products for a specific medical reason.[23]

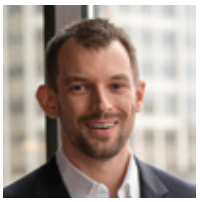
Employers who conduct random or safety-sensitive drug testing should also be mindful of the new law. Employers have the right to prohibit employees from using, possessing, and being under the influence of THC during work hours and in the workplace, which is particularly critical for safety-sensitive roles.[24] But the legalization of some THC products highlights the shortcomings of these tests. As described above, they do not inform the employer when the employee consumed the substance or whether the employee is impaired. Employers are already navigating these challenges in the context of medical marijuana use. Now Minnesota employers must also balance the benefits of testing employees against the risk of liability under LCPA.

At a minimum, following a positive test result in the context of a random or safety-sensitive drug test, employers should not unreasonably dismiss the employee's explanation of the result—which employers are statutorily required to consider.[25] This will require educating those in the company who evaluate such test results that there is a chemical distinction between hemp-derived and marijuana-derived THC, and that drug tests cannot distinguish between the two. Employers should also consider whether random testing provides a benefit that outweighs the risks, or whether to limit testing to safety-sensitive positions. Employers should, in turn, revisit their job descriptions to ensure that positions subject to drug testing under the safety-sensitive provision of DATWA are properly classified as safety-sensitive to prevent overly broad testing.

Employers must ensure all decisions to discipline or discharge an employee following mandatory drug testing not only comply with DATWA and the medical marijuana statute, but now the LCPA as well. ▲

NOTES

[1] *See* Minn. H.F. No. 4065.
[2] *Id.*
[3] *Id.*
[4] 7 U.S.C. §1639o.
[5] 21 U.S.C. §812(c)(c)(17).
[6] Minn. Stat. §152.32 subd. 3(c). ("Employers may not discriminate against an employee based on their status on the Minnesota Medical Cannabis Registry.")
[7] Minn. Stat. §181.938 subd. 2.
[8] *Id.*
[9] *Id.* subd. 3.
[10] *Id.*
[11] California AB-2188 Discrimination in employment: use of cannabis.
[12] Minn. Stat. §181.950 subd. 4.
[13] Minn. Stat. §152.01 subd. 4.
[14] Minn. Stat. §181.951.
[15] Minn. Stat. §181.953 subd. 3.
[16] The amendment to the tetrahydrocannabinols drug schedule section reads: "except that tetrahydrocannabinols do not include any material, compound, mixture, or preparation that qualifies as industrial hemp as defined in section 18K.02, subdivision 3." H.F. 4065 at 367.25.
[17] A psychoactive drug acts primarily on the central nervous system, altering brain function and resulting in temporary changes in perception, mood, consciousness, and behavior.
[18] Minn. Stat. §181.938.
[19] Minn. Stat. §181.951 subd. 1. *Cf. Williams v. Nat'l Football League*, 794 N.W.2d 391, 397 (Minn. Ct. App. 2011) ("Because bumetanide is not a drug within the meaning of DATWA, the statute does not apply to require notice of test results confirming the presence of bumetanide"').
[20] Minn. Stat. §181.953 subd. 6.
[21] Id.
[22] Id.
[23] Minn. Stat. §152.32 subd. 3(c).
[24] *See* Minn. Stat. §181.950 *et seq.*
[25] Minn. Stat. §181.953 Subd. 6.



SHAWN J. WANTA is a founding partner of the employment law firm Baillon Thome Jozwiak & Wanta LLP. He represents employees in cases of discrimination and retaliation, including claims under Minnesota DATWA.

SUSAN E. ELLINGSTAD is a partner with Lockridge Grindal Nauen P.L.L.P. and heads the firm's employment law department. She represents employers in cases involving employment discrimination and harassment under federal and state employment statutes.

The authors wish to thank Katja D. Lange (University of Minnesota Law School, 2023) for her assistance on this article.

Have no fear, HYPHENS ARE HERE

BY IAN LEWENSTEIN ian@capyourpenconsulting.com

Lawyers, whether or not by their own admission, aren't the best punctuators. True, this lawyerly difficulty extends to other professionals. But because drafting and editing sit at the core of a lawyer's work, proper punctuation skills are a must. If lawyers better understand and use punctuation, they will reap great dividends through clarity, persuasiveness, and overall readability in their work. Furthermore, some punctuation marks (such as the comma) engender mountains of litigation, so proper punctuation skills can minimize legal risk.

Perhaps the most polarizing punctuation mark—the hyphen—functions as a great example of how a lawyer's punctuation habits can serve the reader or, alternatively, inhibit the reader's understanding.

But first, an ode to punctuation generally.

Punctuation was once frowned on, but no more

Lawyers' propensity to dismiss punctuation traces to 17th-century England, where punctuation was primarily used for rhythmical and elocutionary purposes,[1] not for syntactic functions, in which punctuation structures the sentence and guides meaning. In addition to its limited purposes, punctuation was relegated to scribes, who each had different training and preferences.[2] Scribes—and later engrossing clerks in the U.S.—were responsible for punctuating, while legislators voted orally on bills and had no need to "see" punctuation marks.[3]

Yet if a legislator today opined punctuation to be trivial, the legislator would have to be living under a rock like Patrick the starfish from *SpongeBob SquarePants*. Only a sea creature living under a rock would be caught unaware that punctuation—for some time now—has been seen by the courts as a permissible indicator of meaning.[4] Although courts (consisting of lawyers) have "hedged their bets on punctuation,"[5] they still have given punctuation its due and examined it when interpreting legal documents; thus poor punctuation can confuse and serve to heighten legal ambiguity.

Generally, courts treat punctuation as a part of their legal analysis, not as a definitive answer to ambiguous and vague drafting. So if five factors support one conclusion and contradict a sixth factor of punctuation, a court won't (or shouldn't) automatically defer to punctuation usage to support a different conclusion—in fact, the Supreme Court followed this holistic-analysis principle in a 1993 case involving errant quotation marks.[6] The Court held that a 1916 statutory provision had not been repealed despite missing quotation marks surrounding legislative language.

But occasionally punctuation, or its omission, can generate a legal surprise, as was the case in *O'Connor v. Oakhurst Dairy*,[7] in which a missing serial comma resulted in Oakhurst Dairy owing dairy-truck drivers about $10 million for overtime back pay (they later settled for $5 million). Although other factors such as a nonparallel list supported the ruling, the omitted serial comma was the main attraction.

Because *Oakhurst* showed how a tiny mark can engender such legal havoc, one wonders why lawyers—and writers generally—neglect to take out an insurance policy by always using a serial comma instead of guessing when it's safe to omit it.

Punctuating for clarity

In addition to functioning as legal insurance, punctuation guides the reader by (1) providing signposts for when to stop, start, and pause; (2) indicating where to draw logical connections; and, crucially, (3) helping the reader easily find, understand, and use the presented information.

Try reading this Minnesota constitutional provision without punctuation:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed which county or district shall have been previously ascertained by law In all prosecutions of crimes defined by law as felonies the accused has the right to a jury of 12 members In all other criminal prosecutions the legislature may provide for the number of jurors provided that a jury have at least six members The accused shall enjoy the right to be informed of the nature and cause of the accusation to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defense.[8]

Kind of difficult, no? Tough to read. Confusing. Garbled. Now let's add punctuation back in (including some left out of the original):

> In all criminal prosecutions**,** the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed**,** which county or district shall have been previously ascertained by law**.** In all prosecutions of crimes defined by law as felonies**,** the accused has the right to a jury of 12 members**.** In all other criminal prosecutions**,** the legislature may provide for the number of jurors**,** provided that a jury have at least six members**.** The accused shall enjoy the right to be informed of the nature and cause of the accusation**,** to be confronted with the witnesses against him**,** to have compulsory process for obtaining witnesses in his favor**,** and to have the assistance of counsel in his defense**.**

Although the constitutional provision is not a paragon of writing excellence, the punctuation at least helps the reader, well, read; that's because it makes up for the loss of verbal cues that we gain from speaking. And readers expect punctuation, as aptly stated by David Mellinkoff, a strident critic of incoherent legal writing:

"Judges and lawyers and everyone else are accustomed to reading punctuated writing. If you don't punctuate, a reader will do it for you, in places you never wanted. Sense can be reversed by punctuation or the lack of it..."[9]

Don't hyperventilate, hyphenate

So because proper punctuation is important for legal reasons, clarity, and reader expectations, let's have the hyphen talk. A multiuse punctuation mark, a hyphen serves many purposes: In fractions and two-word numbers, for dividing elements at the end of a line, in proper names, for accentuating syllables, etc.[10] But the hyphen function that strikes up so much debate and discord is that of the phrasal adjective.

A phrasal adjective, or compound modifier, combines various parts of speech together as a cohesive unit that modifies a noun. For example, in *hyphen-happy editor*, *hyphen* (noun) and *happy* (adjective) join to modify *editor* (noun). The editor is hyphen happy (hooray!). Other variations include but are not limited to:

- number + noun (five-page filing);
- ordinal number + noun (1st-degree murder);
- adjective + noun (high-quality brief); and
- adjective + participle (nervous-looking defendant).

The emotional dispute on hyphens stems from phrasal adjectives that writers may not think are needed for clarity or to prevent ambiguity. So, for example, is there a chance that the orange juice salesman has bad sunburn and is selling juice, not necessarily orange juice? Or how about if you've had a bad hair day: a day of bad hair, or a bad day of hair? Yes, these are comical examples, but hyphenating phrasal adjectives here and in similar phrases (high-school teacher, assisted-living facility, etc.) would save readers from pausing or possibly misinterpreting.

If a reader starts to slow down, more likely that the reader will get confused, become frustrated, and, ultimately, stop reading. Like the serial comma, the hyphen is a low-cost insurance policy for preventing ambiguity and reader revolt.

And hyphenating phrasal adjectives is more common than you think. For example, publications such as the *New Yorker*, *Economist*, *Atlantic*, and the *Wall Street Journal* all hyphenate their phrasal adjectives. They do so because hyphenating allows the reader to read faster and easier. Hyphens also prevent miscues. Instead of trying to do the impossible and predict miscues, these publications reduce their editors' stress levels when questioning "should we or shouldn't we hyphenate" by following a constant rule.

As the foremost defender of hyphens, Bryan Garner notes that a flat rule is better than a case-by-case decision because "almost all sentences with unhyphenated phrasal adjectives will be misread by *someone*."[11]

The courts consist of hyphen-happy justices

Specific to the legal profession, hyphenated phrasal adjectives are prominently featured in both Minnesota courts and the U.S. Supreme Court. The courts not only look to punctuation as a permissible indicator of meaning but also seem to appreciate what a well-hyphenated phrasal adjective can accomplish for readability and clarity in their own writing. The following examples are taken from Minnesota courts and the Supreme Court:

- judicial-bias issue
- temporary-injunction motion
- contested-case hearing
- black-letter rule
- free-speech rights
- state-action question
- felon-in-possession-of-a-firearm statute (nice!)
- dual-sovereignty doctrine
- common-law rights
- founding-era understanding
- run-of-the-mill felon-in-possession charges
- public-policy exception
- subject-matter jurisdiction
- ineffective-assistance-of-counsel claim.

IAN LEWENSTEIN has worked for the Minnesota Legislature in the Office of the Revisor of Statutes and for several state agencies, helping write clear regulations in plain language. He serves on the board of the Center for Plain Language and has a master's degree from the University of Chicago and a paralegal certificate from Hamline University.

And look to the lawyer's dictionary, *Black's Law*. Many of its entries consist of hyphenated phrasal adjectives: *excessive-liability damages*, *prosecution-history estoppel*, *no-fault divorce*, and many more.

Common arguments against hyphens—and the rebuttals

The arguments against hyphenating phrasal adjectives are feeble. Here are the most common arguments against and the rebuttals:

1. **Against:** I don't like how the hyphen looks.

   Rebuttal: I don't like how the semicolon looks, but it's a useful punctuation mark. Subjective preferences for "looks" shouldn't govern clarity and punctuation usage.

2. **Against:** I've determined that no one will find any ambiguity.

   Rebuttal: Unless you are omniscient or the Oracle of Delphi, it's impossible for you alone to determine ambiguity. Better to stick to Garner's flat rule and not a subjective–and at times hairpulling–case-by-case decision.

3. **Against:** They aren't necessary for readability.

   Rebuttal: They are, actually. Many writers fall into the dreaded habit of noun stacking, in which multiple nouns are stacked on top of each other. But hyphens can make noun stacking more readable: Compare "peace officer discipline grievance arbitrations" to "peace-officer discipline-grievance arbitrations." The hyphens make the noun stacking readable and clarify what is modifying what. Although noun stacking should be minimized, sometimes we can't rewrite because it's impractical or too clunky.

4. **Against:** Hyphenating could lead to ambiguity and change meaning.

   Rebuttal: Yes, it can. That's why we should carefully and consistently hyphenate. Additionally, there are no Minnesota or federal cases that I can find in which an added hyphen single-handedly changed a legal result.[12] But for readability, one court wrote that it was hyphenating *risk-adjustment program* because the missing hyphen had "the effect of making difficult-to-read materials even more difficult, as the reader has to sort through each such set of words to ascertain which words are modifiers and what words they modify."[13]

Overall, lawyers can't be guaranteed that a court will properly interpret every punctuation mark, including hyphens. But lawyers can also never be sure that a court will interpret their arguments and writing as they want them to. This constant doesn't preclude proper hyphenation.

When not to hyphenate

Hyphenation standards concern not just when to hyphenate, but when *not* to hyphenate as well. For phrasal adjectives, we don't generally hyphenate when the phrasal adjective occurs after the noun: "The court wasn't hyphen happy." Or "The brief was well written."

Don't hyphenate the phrasal adjective if it is a non-English phrase such as *de novo* review. And if the phrasal adjective includes an *ly* adverb, no need to hyphenate phrases such as *extremely convincing evidence* or *the habitually hyphenating attorney*. The *ly* adverb modifies the adjective and also provides a visual clue that the adverb is separate.

For more on when not to hyphenate, including rules on money, prefixes, and proper nouns, consult the *Chicago Manual of Style*.

Hyphens aren't ornaments

The best rebuttal to hyphen skeptics rests with the great H.W. Fowler, who said that the hyphen "is not an ornament but an aid to being understood."[14] If your duty as a lawyer is to best represent your client, why not use every available tool when advocating? Don't present a chance for your writing to be misinterpreted or misapplied. Be clear, accurate, and concise. And use hyphens as you would any other punctuation mark: to guide your reader, ensure clarity, and guarantee reader bliss. ▲

NOTES

[1] Richard Wydick, *Should Lawyers Punctuate?*, 1 Scribes Journal of Legal Writing 14-15 (1990). Wydick also notes that lawyers' distrust of punctuation extended to the U.S.

[2] *Id.* 16.

[3] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 161 (2012).

[4] *Punctuation canon*, Black's Law Dictionary (10th ed. 2014).

[5] Michèle M. Asprey, *Plain Language for Lawyers* 108 (3rd ed. 2003).

[6] *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 113 S. Ct. 2173 (1993).

[7] *O'Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. 2017).

[8] Minn. Const. art. I, §6.

[9] David Mellinkoff, *Legal Writing: Sense and Nonsense* 57 (1982).

[10] *Chicago Manual of Style* 396 (17th ed. 2017).

[11] Bryan A. Garner, *Garner's Modern English Usage* 692 (4th ed. 2016).

[12] A rare example comes from *Adamov v. PricewaterhouseCoopers LLP*, 2018 WL 6421286 (C.D. Cal. 12/6/2018), in which a plaintiff alleged that he worked overtime and that the company had violated California labor laws. The plaintiff attempted to argue that the phrase *first year associate* referred to a period spent working instead of a category of a specific group of associates (*first-year associate*).

[13] *Minuteman Health, Inc. v. U.S. Dept't of Health and Human Services*, 291 F. Supp.3d 174, 214 n.1 (D. Mass. 1/30/2018).

[14] H.W. Fowler, *A Dictionary of Modern English Usage* 255 (Sir Ernest Gowers ed., 2nd ed. 1965).

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EMPLOYMENT PRACTICES LIABILITY INSURANCE DEMYSTIFIED

What employers and their lawyers need to know

BY BRITTON D. WEIMER bweimer@weimerweeding.com

Employment Practices Liability (EPL) insurance funds most judgments and settlements in employee suits against small and mid-sized employers. Thus, it is crucial for both plaintiff's attorneys and defense counsel to understand the scope of the typical EPL insurance policy.

EPL policies with limited coverages have been in existence since the 1980s. However, the demand for EPL coverage increased significantly in the early 1990s. The Americans with Disability Act (ADA) passed in 1990. The Civil Rights Act was amended in 1991 to include substantial damages. The Clarence Thomas confirmation hearing in 1991 increased public awareness of sexual harassment issues. And the Family and Medical Leave Act (FMLA) passed in 1993.

Commercial General Liability (CGL) insurance is the most common business liability policy, and some business attorneys hoped they would cover employment lawsuits. But CGL policies have excluded bodily-injury claims "arising out of and in the course of" employment since 1966, and courts have broadly construed this employment exclusion. Since its language focuses on the place of the injury, not the place of the negligent conduct, the exclusion extends to off-hours conduct between employees that creates a hostile work environment.[1]

CGL coverage for employment claims became even scarcer in 1993, with the commonly used Employment-Related Practices (ERP) exclusion endorsement. This exclusion bars coverage for bodily injury and personal injury arising out of a wide range of employment-related "practices, policies, acts or omissions," including harassment, discrimination, demotion, and wrongful discharge. The ERP exclusion extends to post-employment defamation claims that arise out of the employment relationship.[2]

There have been "standard" Insurance Services Office (ISO) EPL policies since 1998, but few insurers have used them. Most insurers continue to use their own custom language. Thus, it is essential to analyze the specific provisions in the employer's particular EPL policy.

Some "common law" coverage principles apply in EPL cases, especially on claims-made issues and language common to other liability insurance policies. But most courts ignore common-law principles when contrary to policy's plain language.[3] The analysis set forth below should be seen in this light—as a guide to common EPL coverage triggers and exclusions that can be overridden by contrary policy language.

COVERAGE TRIGGERS

"Wrongful Acts"

Most EPL policies cover a finite number of "wrongful acts." This coverage for specific torts is similar to CGL Coverage B for Advertising and Personal Injury.[4]

Most EPL insurers have their own custom lists of "wrongful act" triggers. Common wrongful acts include (1) discrimination, (2) harassment, (3) wrongful termination, (4) failure to hire and promote, (5) defamation, (6) invasion of privacy and confidentiality, (7) negligent hiring and supervision, and (8) retaliation and reprisal. Other policies cover variations like wrongful denial of training, wrongful breach of career opportunity, or breach of employment contract.[5]

Insurers sometimes use specially defined terms, which can complicate the analysis. For example, one Chubb EPL policy covered "workplace torts," which was defined to include negligent training and failure to enforce corporate policies and procedures.[6]

Thus, some employment-related claims can fall through the cracks. For example, in *Woo v. Fireman's Fund Ins. Co.*,[7] a dental assistant sued a dentist for negligent infliction of emotional distress, for embarrassing her with an unflattering picture taken under anesthesia. The EPL policy covered "wrongful termination" that inflicted emotional distress. But it had no separate coverage for employment-based emotional distress. Thus, there was no EPL coverage for the claim.

Some EPL policies limit coverage for wrongful acts to an individual insured acting "solely in an insured capacity." This will preclude coverage for an insured principal acting for a separate business, engaging in self-dealing, or acting in a dual capacity. But such an inquiry can be "fact-intensive and inappropriate to resolve on a motion to dismiss."[8]

"Loss"

Most EPL policies require a covered "loss" or "damage." The term "loss" is generally defined in monetary terms such as compensatory damages, punitive damages, attorney's fees, settlements, and judgments. This seldom includes equitable relief.[9] In a frequently cited Texas case, the court explained why restitution is conceptually distinct from damages: "An insured... does not sustain a covered loss by restoring to its rightful owners that which the insured, having no right therein, has inadvertently acquired."[10]

More recently, the Seventh Circuit applied this principle to D&O insurance. In *Level 3 Communications Inc. v. Fed. Ins. Co.*,[11] the court found a claim for restitution is not the same as loss or damage: "An insured incurs no loss within the meaning of the insurance contract by being compelled to return property that it had stolen, even if a more polite word than 'stolen' is used to characterize the claim for the property's return."

In *U.S. Bank Nat. Ass'n v. Indian Harbor Ins. Co*.,[12] Judge Magnuson cited with approval the *Level 3* rule that restitution claims are generally uninsurable. "An insured incurs no loss when it unlawfully takes money or property and is forced to return it. Asking the insurance company to pick up the tab would only bestow an unjustified windfall on the insured." However, the court distinguished *Level 3* because the particular policy had a "final adjudication" clause, and there had only been a settlement.

"Claim"

Most EPL policies are written as claims-made policies. Thus, a "claim" made during the policy or its retroactive date is a basic coverage trigger. Most claims-made policies set a retroactive date as the insured's first policy period with the insurer. "This renewal retroactivity explains the unfortunate reality that claims-made insureds cannot change insurers except at significant risk."[13]

The challenge for insureds is that no coverage exists if the claim was first made before current policy period or the retro date. "Claim" is often broadly defined to include pre-litigation demands or administrative proceedings. Such a broad definition of "claim" can create coverage problems if the initial demand or administrative claim occurred before the relevant policy periods.

In most claims-made policies, a "claim" simply requires a third party's assertion of a legal right. It does not require litigation, a formal legal demand for monetary relief, or even a threat of litigation.[14] In analyzing whether a "claim" was made, the court looks to the substance of the communications, not semantics. Even friendly negotiations may suffice.[15]

Most EPL policies broadly define "claim" to include administrative charges, even though charges do not seek monetary damages.[16] Depending upon policy language, a subsequent lawsuit based upon the same facts may be a separate "claim."[17]

A broad definition of "claim" in a claims-made policy protects the insured by permitting the "reporting of acts not yet in litigation."[18] "This provides additional protection for the insured, because coverage could extend to a suit not brought until long after the policy has expired, as long as the insured provides notice to the insurer of potential claims."[19]

Coverage under most claims-made policies is triggered for policy in effect when the claim is made against the insured and reported to the insurer. By contrast, traditional "occurrence" coverage is triggered for policy in effect at the time of the underlying accident. The timing of the report/notice to an occurrence insurer is generally irrelevant, unless delayed notice prejudices the insurer.[20]

With most claims-made policies, the timely reporting of claims is a condition precedent to coverage. It is an absolute requirement—a threshold that must be crossed before coverage can exist. So any delay in reporting claims is risky with EPL insurance.[21]

The issue of prejudice or absence of prejudice to the insurer is "not relevant to the determination of coverage under a claims-made policy."[22]

While prejudice is only eliminated if notice is a condition precedent to coverage, the term "condition precedent" need not be used. The requirement is met if prompt notice is a condition for coverage. "No special terms are necessary to create a condition precedent, but there must be some language that indicates the agreement... [is] conditioned upon *some event*."[23]

While Minnesota is strict about requiring timely notice of claims with claims-made policies, it is flexible about the content of the notice. As long as the insured provides "notice of facts that would raise a likelihood of a claim," the insured is deemed to have provided sufficient notice.[24]

EXCLUSIONS

The most common EPL exclusions are for (1) fraudulent, malicious, and criminal acts; (2) contractual liability; (3) workers compensation; (4) ERISA; (5) bodily injury; (6) property damage; and (7) FLSA (wage and hour).

Less-common EPL exclusions include (1) strikes and walkouts; (2) prior or pending litigation; (3) WARN Act; (4) OSHA; (5) COBRA; (6) FMLA; (7) nonpecuniary and injunctive relief; and (8) punitive damages.

As with the EPL coverage triggers, it is essential to read the individual EPL policy to verify the particular exclusions involved.

WAGE-AND-HOUR CLAIMS

Wage-and-hour claims against employers have become increasingly common. But most EPL policies do not cover wage-and-hour claims because (1) they are not covered "wrongful acts," (2) they are a form of restitution that do not satisfy the "loss" or "damage" coverage trigger, and (3) most EPL policies expressly exclude them.

The lack of wage-and-hour coverage is consistent with the moral-hazard doctrine, which limits coverage when insureds could knowingly precipitate the insured event. "Insurance against a violation of an overtime law, whether federal or state, would enable the employer to refuse to pay overtime and then invoke coverage so that the cost of the overtime would come to rest on to the insurance company."[25]

Many EPL insurers now offer wage-and-hour endorsements for an additional premium. Normally such endorsements are limited in scope:

- They generally have lower sublimits than the remainder of the policy. (For example, a $1,000,000 EPL policy may have a $100,000 wage-and-hour sublimit.)
- Many endorsements provide defense-costs-only coverage, with no indemnity for judgments or settlements.

Thus, even when EPL wage-and-hour endorsements are available, they generally do not provide significant indemnity protection.

CONCLUSION

EPL insurance provides essential coverage for most employment lawsuits. However, counsel needs to review the employer's particular policy to confirm the specific coverages and exclusions.

NOTES

[1] *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 420 (Minn. 1997).

[2] *Capitol Indem. Corp. v. Wonder Years Pre-school, Inc.*, 2009 WL 57044 (D. Minn. 2009).

[3] See *Thommes v. Milwaukee Ins. Co.,* 641 N.W.2d 877, 880-84 (Minn. 2002) (ignoring common-law business-risk doctrine because contrary to policy's "clear and unambiguous" language).

[4] See *Hamlin v. Western Nat. Mut. Ins. Co.*, 461 N.W.2d 395, 398 (Minn. Ct. App. 1990) (Coverage B is "limited expressly" to "a variety of listed torts").

[5] See *Employment Practices Liability*, *Second ed.,* pp. 18-20 (National Underwriter).

[6] See *KidsPeace Corporation v. Lexington Insurance Co.,* 2009 WL 10678280 (D. Minn. 2009).

[7] 164 P.3d 454 (Wash. 2007).

[8] *Carlson & Lyter Distributing. v. U.S. Liability Ins. Co.*, 2014 WL 2864815 (D. Minn. 2014).

[9] See e.g. *Royal Indem. Co. v. C.H. Robinson Worldwide, Inc.*, 2009 WL 2149637 (Minn. Ct. App. 2009) (EPL policy defined "loss" to mean "damages (including back pay and front pay), judgments (including an award of pre-judgment and post-judgment interest) and settlements").

[10] *Nortex Oil & Gas. Corp. v. Harbor Ins. Co.*, 456 S.W.2d 489, 494 (Tex. Civ. App. 1970), cited with approval in *Inland Const. Corp. v. Continental Cas. Co.*, 258 N.W.2d 881, 885 (Minn. 1977) (conversion does not constitute CGL "property damage").

[11] 272 F.3d 908, 911 (7th Cir. 2001) (Posner, J.).

[12] 2014 WL 3012969 (D. Minn. 2014), aff'd 68 F.Supp.3d 1044 (D. Minn. 2014) (Del. law).

[13] *NKK by Knudson v. St. Paul Fire & Marine Ins. Co.,* 555 N.W.2d 21, 25 (Minn. Ct. App. 1996).

[14] See *Ritrama, Inc. v. HDI-Gerling America Ins. Co.*, 796 F.3d 962, 968-69 (8th Cir. 2015) (Minnesota law) ("a mere request for information is generally insufficient to constitute a claim, whereas a demand for relief generally constitutes a claim").

[15] See *Cargill, Inc. v. Evanston Ins. Co.*, 642 N.W.2d 80, 85 (Minn. Ct. App. 2002) (refusing to rely on a "technicality of [the] policy language" in order to require a more clear demand to satisfy "claim" trigger).

[16] *LodgeNet Entertainment Corp. v. American Intern. Specialty Lines Ins.*, 299 F.Supp.2d 987, 991 (D. S.D. 2003).

[17] *Id.* at 992-93.

[18] *F.D.I.C. v. St. Paul Fire and Marine Ins. Co.*, 993 F.2d 155, 158 (8th Cir. 1993) (Minnesota law).

[19] *Id.*

[20] See 22 *Minnesota Practice: Insurance Law & Practice*, *Second ed.* §3:4 (Thomson West).

[21] See e.g. *American Railcar Industries, Inc. v. Hartford Insurance Company of the Midwest*, 847 F.3d 970, 973 (8th Cir. 2017) (Ark. law) (EPL coverage denied because employer breached duty to "[p]romptly give [insurer] all notices, demands, and legal papers related to the injury, claim, proceeding or suit").

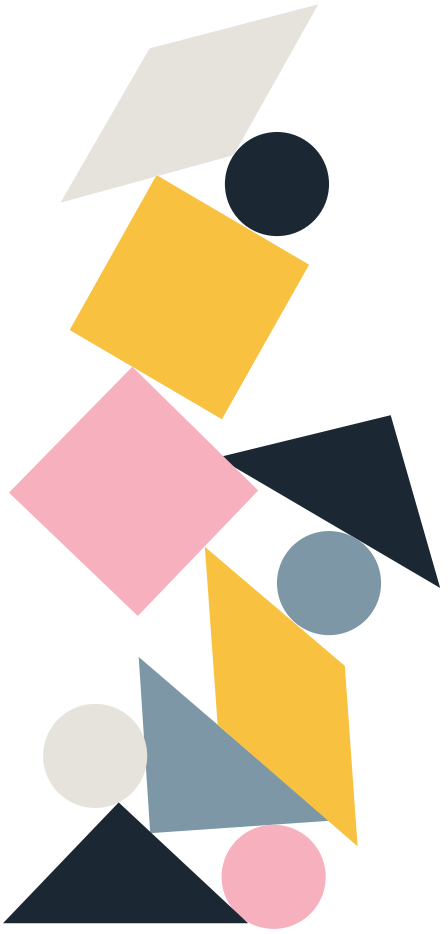
[22] *Winthrop and Weinstine, P.A. v. Travelers Casualty and Surety Co.*, 993 F.Supp. 1248, 1255 (D. Minn. 1998), aff'd 187 F.3d 871 (8th Cir. 1999).

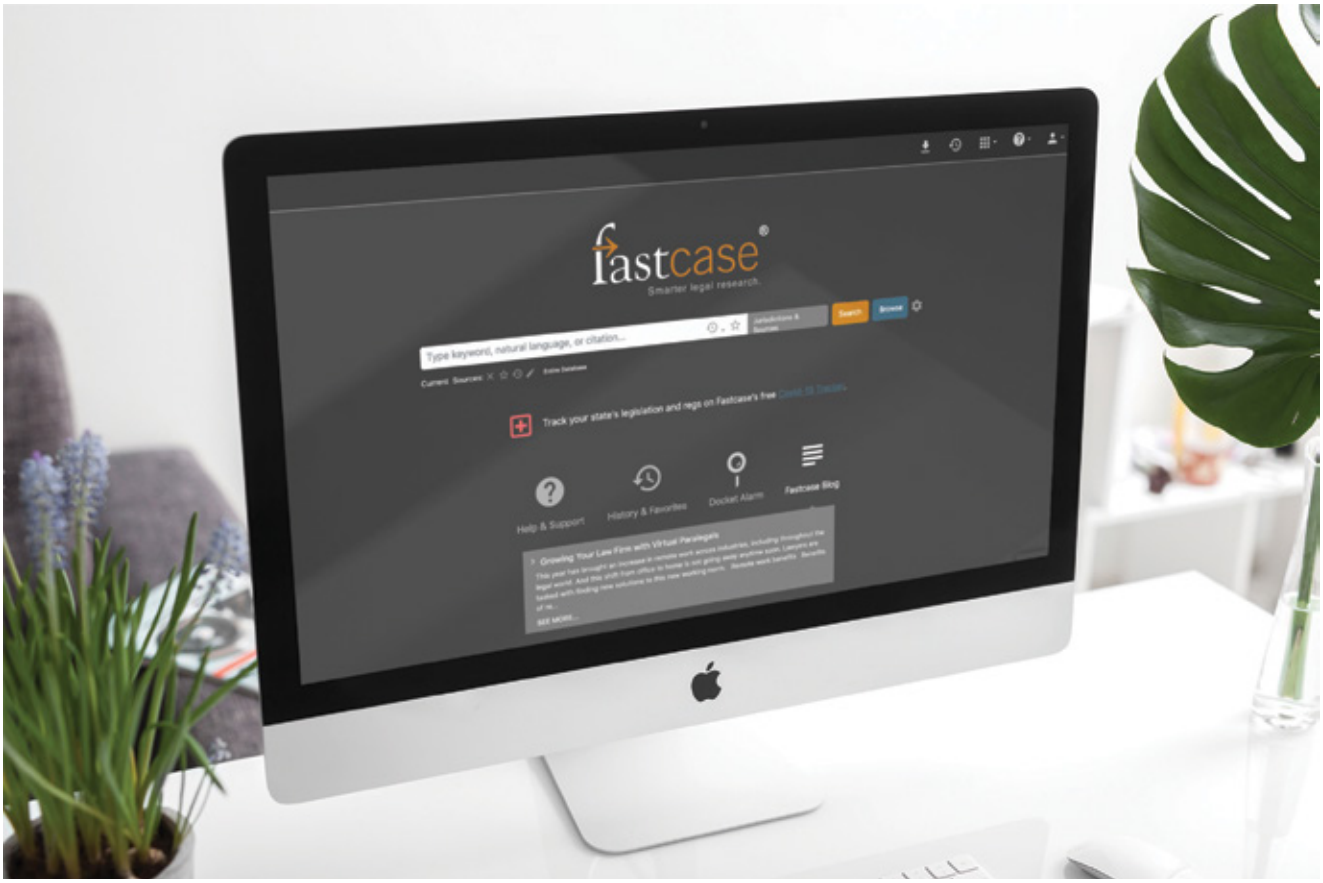
[23] *Citizens Insurance Co. of America v. Assessment Systems Corp.,* 2019 WL 4014955 (D. Minn. 2019) (claims-made policy required notice of claim "as soon as practicable").

[24] *UnitedHealth Group, Inc. v. Columbia Cas. Co.*, 941 F.Supp.2d 1029, 1042 (D. Minn. 2013).

[25] *Farmers Auto. Ins. v. St. Paul Mercury Ins. Co.*, 482 F.3d 976, 978-79 (7th Cir. 2007) (Posner, J.).

BRITTON WEIMER is senior partner with the commercial insurance defense firm of Weimer & Weeding PLLC in Bloomington, Minnesota. He is co-author of *Employment Practices Liability, Second Edition* (National Underwriter 2012) and *22 Minnesota Practice: Insurance Law and Practice, Second Edition* (Thomson West 2010).





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LANDMARKS IN THE LAW

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

Criminal Law
JUDICIAL LAW

Right to counsel: No right to counsel when interrogation is merely imminent. Appellant was detained as a person of interest in an arson and murder investigation. He was handcuffed and taken to an interview room at the police station. While in the interview room, appellant was not asked any questions but twice asked police, "Where's my lawyer?" Appellant was eventually taken to jail and held on unrelated assault and robbery charges. The next day, appellant was brought back to the interrogation room. Police told appellant he was not under arrest for the arson and murder, but because he was under arrest for assault and robbery, police wanted to ask him questions about the arson and murder. Appellant was Mirandized, said he understood his rights and would talk to police, and then talked with police for 30 minutes before saying the interview was over and that he wanted a lawyer. Appellant was charged with and ultimately convicted of both arson and second-degree murder. In his postconviction petition, he argues the district court erred by denying his pretrial motion to suppress his statements in the 30-minute interview with police. His petition was denied and the Minnesota Court of Appeals affirmed.

The Supreme Court accepted review to consider whether appellant had a 5th Amendment right to counsel on the night before his interview–the night he asked, "Where's my lawyer?" The right to counsel attaches when a suspect is both in custody and subjected to interrogation. Appellant was in custody when he asked for a lawyer, but he was not interrogated at that time. The Supreme Court rejects appellant's request to create a new rule of law, holding instead that suspects cannot invoke their right to counsel when custodial interrogation is merely "imminent." While the Court recognizes that the U.S. Supreme Court has recognized that interrogation need not be presently underway for a person to validly invoke their right to counsel, the U.S. Supreme Court has not expressly adopted an "imminent interrogation" rule. The Court is not inclined to adopt such a rule on its own, given the "serious practical difficulties" the rule would pose.

The Court does reject the state's argument that the right to counsel may be invoked only after questioning by police begins. Interrogation in the 5th Amendment context is not limited to formal questioning, but includes actions by law enforcement likely to elicit an incriminating response. Here, appellant was not subjected to any compulsion or coercion the night before his 30-minute interview. On that night the arson and murder were not even mentioned and appellant made no incriminating statements. Therefore, appellant was not subjected to custodial interrogation that night and did not have a right to counsel at that time. His statements the next day, given after a valid *Miranda* warning and waiver of his rights, were not obtained in violation of *Miranda*. The court of appeals is affirmed. ***Charette v. State***, A20-1476, 908 N.W.2d 310 (Minn. 10/5/2022).

Double jeopardy: Jeopardy attaches for failing to register as a predatory offender upon initial assignment of a corrections agent. Appellant is required to register as a predatory offender and, between 2004 and 2018, was convicted seven times for failing to register. He was assigned a new corrections agent in 2019 and twice refused to sign the required registration paperwork, once in August and once in September. He was charged with one count of failing to register for each refusal. The district court denied appellant's motion to dismiss on double jeopardy grounds and the court of appeals affirmed.

The Supreme Court considers whether double jeopardy limits the number of times the state may charge a defendant for failing to register. The double jeopardy clause does not serve to impose limitations on the Legislature's power to define offenses. Once the Legislature has done so, the statutory definition determines the extent of double jeopardy protection. Whether double jeopardy permits the state to simultaneously charge a defendant with numerous

violations of the same statutory provision depends on the statute's "unit of prosecution." The state cannot repeatedly charge a defendant for the same crime, but violations of the same provision may be charged more than once in a single prosecution if the Legislature "intended the facts underlying each count to make up a separate unit of prosecution."

Minn. Stat. §243.166, subdivision 3(a) requires a person to register "with the corrections agent as soon as the agent is assigned." The Court holds that the Legislature authorized one "unit of prosecution" for each assignment of a corrections officer under subdivision 3(a). Thus, the state may charge defendants one time for each failure to register following the "assignment" of a corrections agent.

Here, appellant's convictions from 2004 to 2018 did not bar prosecution of the 2019 offenses, because they involved a different corrections agent assignment. However, the August 2019 offense bars prosecution for the September 2019 offense, because it involves the same corrections agent assignment. Thus, the court of appeals did not err when it affirmed the denial of appellant's motion to dismiss the August 2019 offense, but did err when it affirmed the denial of appellant's motion to dismiss the September 2019 offense. ***State v. Larson***, A21-0220, 980 N.W.2d 592 (Minn. 10/12/2022).

■ **Interference with the privacy of a minor: State must prove defendant knew or had reason to know a person under 18 years of age was present.** Appellant was charged with a felony violation of interfering with a minor's privacy, under Minn. Stat. §609.746, subd. 1(e)(2), based on allegations he used a cell phone to secretly record a 15-year-old in a public bathroom stall. The state conceded it could not prove appellant knew or had reason to know the person was under the age of 18, but the district court found the state was required to prove only appellant's knowledge of the presence of a person, not the age of the person present. After a stipulated facts trial, appellant was found guilty. The court of appeals affirmed.

Section 609.746, subd. 1(e)(2), makes it a crime to secretly install or use a device to record or photograph a person in a place "where a reasonable person would have an expectation of privacy and has exposed or is likely to expose their intimate parts," and the offense becomes a felony if the defendant knew or had reason to know that a minor was present. The Supreme Court concludes that the plain language of section 609.746, subd. 1(e)(2), requires the state to prove a defendant knew or had reason to know a person under the age of 18 was present when they committed the offense.

The Supreme Court notes that "know" in section 609.746, subd. 1(e)(2), is specifically defined in section 609.02, subd. 9(2), and requires "that the actor believes that the specified fact exists." Applying this definition to the ordinary meaning of the other words in section 609.746, subd. 1(e)(2), the Court finds that the statute requires that the defendant "know or have reason to know that a minor under the age of 18 (the victim) is present when the offense is committed." The court of appeals decision and the district court's pretrial denial of appellant's motion to dismiss are reversed. ***State v. Galvan-Contreras***, A20-0366, 980 N.W.2d 578 (Minn. 10/12/2022).

■ **Sentencing: District court properly denied request for downward durational departure for second-degree intentional murder.** Appellant pleaded guilty to second-degree intentional murder for shooting and killing a man after a verbal argument and physical altercation at a mall. Appellant and the victim started arguing after the victim cut in front of appellant in a line. The victim kicked appellant, the two fought and the victim punched appellant, and appellant drew his licensed firearm and shot at the victim 15 times. Appellant walked away, then returned and shot the victim again. The court denied appellant's motion for a downward durational sentencing departure and sentenced him within the guideline range.

The Minnesota Court of Appeals finds the district court did not abuse its discretion when it denied appellant's departure request. A downward durational departure is permitted only if there are identifiable, substantial, and compelling circumstances showing the defendant's conduct was significantly less serious than that typically involved in the commission of the offense. A district court errs in refusing to grant a departure if it fails to consider legitimate and significant reasons for the departure.

Here, appellant argues the district court focused only on weighing a lack of a valid self-defense claim against a genuine display of remorse, and failed to consider that his crime was significantly less serious than typical, because the victim was the aggressor, his actions were consistent with a heat-of-passion killing, and his mental health issues mitigated the seriousness of the offense. Based on appellant's sentencing pleadings and the district court's order, the court of appeals is satisfied that the district court did, in fact, consider and reject appellant's proffered grounds for a departure. The district court's sentence is affirmed. ***State v. Musse***, A22-0121, 2022 WL 9627205 (Minn. Ct. App. 10/17/2022).

■ **Restitution: District court in postconviction proceedings may order the refund of restitution paid as part of a sentence for a conviction that is later vacated.** Appellant was convicted of coercion (threat to expose a secret or disgrace) and was ordered to pay restitution. In a postconviction proceeding, her conviction and sentence were vacated, but the district court denied appellant's request for a refund of restitution payments made. The court of appeals affirmed and determined that the Minnesota Incarceration and Exoneration Remedies Act (MIERA) provided the only procedures for appellant to receive a refund of restitution.

In *Nelson v. Colorado*, 137 S. Ct. 1249, 1252 (2017), the U.S. Supreme Court held that "[w]hen a criminal conviction is invalidated by a reviewing court and no retrial will occur... the State [is] obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction." The U.S. Supreme Court found Colorado's Exoneration Act did not comport with the 14th Amendment, because the act imposed "more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated." *Id.* at 1258.

The Minnesota Supreme Court does not decide whether there is a constitutional right to a refund of restitution, finding that the postconviction statute itself permits a district court to order a refund. A convicted person may petition the district court "to vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or *make other disposition* as may

be appropriate." Minn. Stat. §590.01, subd. 1 (emphasis added). The Court finds that this language grants a district court the authority to grant a remedy such as the refund of restitution a petitioner paid because of a conviction that is later invalidated. Such a disposition is appropriate, as it returns the parties to the positions they were in before the judgment.

The case is remanded to the district court to determine the proper amount of any refund due to appellant. ***Byington v. State***, A20-1441, 2022 WL 14701093 (Minn. 10/26/2022).


Samantha Foertsch
Bruno Law PLLC
samantha@brunolaw.com


Stephen Foertsch
Bruno Law PLLC
stephen@brunolaw.com

Employment & Labor Law
JUDICIAL LAW

Federal Tort Claim Act; no claim against non-employees. A lawsuit by homeowners whose house was destroyed by a flood soon after they purchased it was not maintainable under the Federal Tort Claims Act. The 8th Circuit Court of Appeals, affirming a lower court ruling, found that the lawsuit could not be maintained because the defendants who were alleged to have concealed the flood zone status of the property were not employees of the federal government, which is a predicate to a claim under the statute. ***Christopherson v. Bushner***, 33 F.4th 495 (8th Cir. 05/02/2022).

Disability discrimination; testimony allowed, fees upheld. The verdict for an employee for disability discrimination under the American Disabilities Act (ADA) was upheld on appeal over the objection of the employer regarding the testimony of a witness for the plaintiff who was not an expert. The 8th Circuit upheld the trial court's ruling that the witness could testify as a "treating practitioner," which did not constitute abuse of discretion, and an award of attorney's fees also was upheld for the prevailing plaintiff. ***Gruttemeyer v. Transit Authority***, 31 F.4th 368 (8th Cir. 04/14/2022).

Noncompete claims; injunction reversed. A preliminary injunction pertaining to the alleged breach of a noncompete agreement was reversed on grounds that the claimant was unlikely to prevail on the merits. The 8th Circuit, reversing the judgment of the trial court, held that the trial court abused its discretion in issuing the preliminary injunction on a separate claim of civil conspiracy, which also was not actionable under state law. ***Progressive Technologies, Inc. v. Chaffin Holdings***, 33 F.4th 481 (8th Cir. 05/02/2022).

Breach of employment agreement; claim not actionable. A nurse practitioner lost his lawsuit for breach of contract with the hospital that employed him and doctors who worked there was not maintainable. The Minnesota Court of Appeals, affirming a ruling of the Hennepin County District Court, upheld summary judgment dismiss-

ing the claimant's lawsuit for breach of contract, breach of covenant of good faith and fair dealings, defamation, and other allegations on grounds that there was no breach of the employment agreement and that the report submitted by the hospital to the licensing agency was not grounds for an improper purpose. ***Harper v. Tessmer-Tuck***, 2022 WL 3348646 (Minn. Ct. App. 05/02/2022) (unpublished).

■ **Duty of loyalty; lack of damages bars claim**. A lawsuit by a distributor against two of its former employees who had resigned and begun working with a company's former sole supplier was not maintainable on grounds of breach of contract, breach of duty of loyalty, and misappropriation of trade secrets. The claims, including breach of loyalty, were not actionable because there was no evidence that the former employer suffered any damages due to the departure of the employees or their work with the former supplier. ***CH Bus Sales, Inc. v. Guldin***, 2022 WL 1751064 (Minn. Ct. App. 05/31/2022) (unpublished).

■ **Unemployment compensation; 'misconduct' cases.** An employee with the Minnesota Department of Agriculture who was fired for inappropriate use of his state vehicle and computer, as well as disrespectful communication and behavior and deficient performance, lost his claim for benefits. Affirming the decision of an unemployment law judge (ULJ) with the Department of Employment & Economic Development (DEED), the appellate court ruled that there was substantial evidence supporting the ULJ's credibility determinations and the factual findings that the employee engaged in "disqualifying misconduct." ***Ballman v. Minnesota Dept. of Agriculture***, 2022 WL 1751185 (Minn. Ct. App. 05/31/2022) (unpublished).

An applicant for unemployment benefits lost a battle of credibility with her employer and lost her claim for unemployment compensation benefits. Affirming a decision of the ULJ, the appellate court held that the employer's testimony that the employee may have violated reasonable policies was more credible and, therefore, the employee was disqualified from receiving benefits. ***Ferdig v. Northwest Minnesota Juvenile Center***, 2022 WL 1763619 (Minn. Ct. App. 05/31/2022) (unpublished).

An employee who was fired for being intoxicated at work lost his claim, also on grounds that testimony from the employer's chief executive officer was more credible than that of the employee. The appellate court ruled that the record substantially supported the ULJ's findings, rendering the employee ineligible for benefits. ***Larsen v. First State Bank Southwest***, 2022 WL 1615857 (Minn. Ct. App. 05/23/2022) (unpublished).

A technician who was the subject of "ribald" complaints from a client about his performance was denied unemployment benefits. The appellate court held that the employee's conduct constituted disqualifying "misconduct." ***Rosenberger v. South-Town, Inc.***, 2022 WL 1297610 (Minn. Ct. App. 05/02/2022) (unpublished).

But one employee who was fired for "alleged misconduct" prevailed. Reversing a ULJ determination, the appellate court held that an interaction between an employee and his supervisor did not constitute a serious violation of acceptable norms and, therefore, permitted the employee to receive unemployment benefits. ***Moss v. Masterson Personnel, Inc.***, 2022 WL 1298128 (Minn. Ct. App. 05/02/2022) (unpublished).

A doctor's report that an employee was temporarily unable to do any type of work because of problems with his knee resulted in denial of unemployment benefits because the employee was not actively searching for suitable work, which is required for receipt of benefits. The appellate court upheld that a ULJ's determination that the employee was not relieved from seeking suitable work because of any executive orders by the governor during the pandemic. ***Williams v. Schmitty & Sons School Buses, Inc.***, 2022 WL 1132270 (Minn. Ct. App. 04/18/2022) (unpublished).

An employee who quit because he was denied a personal loan was denied unemployment benefits. The court of appeals held that the reason the employee quit did not constitute "good cause" attributable to his employer, and, therefore, the employee was not entitled to receive unemployment compensation benefits. ***Hubbard v. Preferred Concrete Construction, Inc.***, 2022 WL 1613286 (Minn. Ct. App. 05/23/2022) (unpublished).

Marshall H. Tanick
Meyer, Njus & Tanick
mtanick@meyernjus.com

Environmental Law
JUDICIAL LAW

■ **Minnesota Supreme Court affirms Limbo Creek is public water, requires environmental assessment.** In late September the Minnesota Supreme Court affirmed a state court of appeals decision that the upper reach of Limbo Creek is a public water under the statutory definition, and therefore requires an environmental assessment worksheet (EAW) prior to a proposed ditch-drainage project.

Minnesota Statutes provide a definition of public water that includes "watercourses with a total drainage area greater than two square miles." Minn. Stat. §103G.005, subd. 15(a)(9). Limbo Creek, consisting of an upper reach and a lower reach, is a tributary of the Minnesota River located in Renville County, and has a watershed spanning over 9,330 acres (approximately 14.5 square miles).

In 1979, the Minnesota Legislature passed a law requiring the Department of Natural Resources (DNR) to identify, count, list, and map the waterbodies of the state. In 2005, the water law was amended and currently directs the DNR to "maintain a public waters inventory map" that shows the waters designated as public water during the 1979 inventory process. Minn. Stat. §103G.201(a) (2020).

During the initial 1979 inventory draft, the entire reach of Limbo Creek was recorded as public water on both the inventory list and map. However, in 1985, when the DNR finalized the inventory list and map, the upper reach of Limbo Creek was not included on the inventory list but did appear on the inventory map as a heavy-dashed line which represented *both* a public water and a public ditch.

In 2016, landowners petitioned Renville County to approve a ditch-drainage project that would transform more than a mile of the upper reach of Limbo Creek. The Minnesota Center for Environmental Advocacy (MCEA) petitioned the county to complete an EAW prior to the ditch project. The county determined that the upper reach of Limbo Creek was not a public water because it was not listed on the 1985 public water inventory list, and therefore denied the EAW petition and approved the ditch-drainage project.

The MCEA brought suit in the court of appeals challenging the county's decision. The court held that the county erred in determining the upper reach of Limbo Creek is not a public water because it is not on the inventory list, rather than applying the statutory definition of public water, and therefore remanded to the county to complete a mandatory EAW, which brings us to this Supreme Court case.

The Supreme Court noted that the narrow dispute in this case is the question as to what classification of waters should control whether the upper reach is or is not public water. On the one hand, MCEA argues that the statutory definition of public waters under §103G.005 subd. 15 controls, and on the other hand, the county argues that the public water inventory list is the controlling factor.

In its analysis, the Supreme Court agrees with the county that the upper reach of Limbo Creek does not appear on the inventory list, but the Court points to the fact that the upper reach of Limbo Creek does appear on the inventory map. The Court then details the Renville County inventory map showing the upper reach of Limbo Creek as a heavy-dashed line which represents a watercourse that is a protected public water as well as a public ditch. Therefore, the Supreme Court held that the appeals court did not err when relying on the statutory definition of public waters in §103G.005 subd. 15, and not on whether the water body was included on the inventory list, when determining whether the upper reach of Limbo Creek is a public water. As such, the proposed ditch-drainage project that would alter the public water requires an EAW.

Finally, the Supreme Court noted that this case only answered the narrow question regarding Limbo Creek, and not the broader question of whether the inventory or the statutory definition should control classification of public water statewide, stating that "[i]t is the duty of the Legislature to clarify the relationship between the inventory in the statutory definition of public waters." ***Matter of: Petition of MCEA for commencement of an environmental assessment worksheet,*** No. A20-1592, 2022 WL 4488498 (N.W.2d 9/28/2022).

Minnesota Court of Appeals rejects tort claims against Water Gremlin. On 9/19/2022, the Minnesota Court of Appeals issued an opinion affirming the district court's summary judgment dismissal of a White Bear Township resident's negligence and statutory nuisance claims against Water Gremlin, a manufacturer of lead and metal products. In 2018, the Minnesota Pollution Control Agency (MPCA) imposed penalties upon Water Gremlin for exceeding the company's air-permit emissions limit for trichloroethylene (TCE), a hazardous air pollutant. As a result of the enforcement action, Water Gremlin, in early 2019, shut down its operations that used TCE and committed to permanently discontinuing the use of TCE. The resident's house was located within the "area of concern" on a map MPCA prepared in 2019 for local TCE exposure from Water Gremlin; on MPCA's 2020 updated map, the resident's home was no longer in the TCE area of concern. The resident sued Water Gremlin claiming negligence, statutory nuisance pursuant to Minn. Stat. §561.01 (2020), and two other causes of action. Water Gremlin moved to dismiss and for summary judgment on all four claims.

The court of appeals held that Water Gremlin had demonstrated that no genuine issue of material fact existed showing that TCE contaminated the resident's property, and that the resident had produced no evidence that his property was contaminated by TCE. The "area of concern" maps were not evidence of actual harm, the court noted, especially given the undisputed fact that TCE does not stay in the air at a location very long or build up because TCE breaks down in a matter of days to weeks. The court also rejected the resident's arguments that stigma-caused property-value diminution is a recognized injury in tort. Accordingly, the resident could not establish an injury for purposes of negligence.

As for statutory nuisance, the court held that the resident's claim was missing a critical element, wrongful conduct ("absent wrongful conduct there can be no nuisance"), because, as discussed previously, the court found that to the extent TCE was airborne over Sharot's property, it quickly dissipated. Even if there were wrongful conduct, the court continued, no reasonable factfinder would be able to conclude that the resident's discomfort was reasonable or that an interference with his use and enjoyment occurred, because the record contained no evidence that it is connected to existing contamination. ***Sharot v. Water Gremlin Company***, 2022 WL 4295381 (unpublished) (Minn. Ct. App. 2022).


Jeremy P. Greenhouse
The Environmental Law Group
jgreenhouse@envirolawgroup.com


Jake Beckstrom
Vermont Law School, 2015
jbmnusa@gmail.com


Vanessa Johnson
Fredrikson & Byron P.A.
vjohnson@fredlaw.com


Erik Ordahl
Barna, Guzy & Steffen
eordahl@bgs.com

Federal Practice
JUDICIAL LAW

Dismissal of states' action affirmed lack of standing. The 8th Circuit affirmed the dismissal of a challenge by 13 states to an Executive Order by President Biden related to climate change, agreeing with the district court that the states' challenge to "interim estimates" was "highly attenuated" and not sufficiently "concrete," and that the states had failed to establish that their alleged injuries were caused by the estimates. ***Missouri v. Biden***, ___ F.4th ___ (8th Cir. 2022).

Fed. R. Civ. P. 59(e); L.R. 7.1; motion for relief from judgment distinguished from motion for reconsideration. Where the plaintiff brought a motion for relief from judgment pursuant to Fed. R. Civ. P. 59(e), and defendants argued that plaintiff's motion was actually a motion for reconsideration that had been filed without leave of court and because the plaintiff had not engaged in the required meet and confer process before filing its motion, Judge Davis determined that because the plaintiff was seeking a substantive change in a judgment, the motion was governed by Rule 59(e) and leave of court was not required prior to filing. ***P Park Mgmt. v. Paisley Park Facility, LLC***, 2022 WL 14882465 (D. Minn. 10/26/2022).

Denial of motion to amend scheduling order affirmed. Distinguishing his previous diligence analysis in *Portz v. St. Cloud State Univ.* (2017 WL 3332220 (D. Minn. 8/4/2017)), Judge Tunheim affirmed an order by Magistrate Judge Thorson that had denied defendants' motion to amend the scheduling order to allow them to assert an additional affirmative defense,

finding that Magistrate Judge Thorson's determination that defendants were not diligent was not clearly erroneous. ***Taqueria El Primo LLC v. Illinois Farmers Ins. Co.***, 2022 WL 14004844 (D. Minn. 10/24/2022).

Fed. R. Civ. P. 12(f); motion to strike class allegations denied. Rejecting defendants' argument that plaintiffs had proposed a "fail-safe" class, Judge Brasel denied a motion to strike plaintiffs' class allegations, finding that the motion was "premature." ***Adams v. U.S. Bancorp***, ___ F. Supp. 3d ___ (D. Minn. 2022).

Motion for expedited handling of motion denied. Magistrate Judge Wright denied plaintiffs' motion for expedited handling of their motion to obtain warrant application materials, declining "to expedite a Motion to Compel when there is no apparent reason it could not have been filed earlier." ***Lindell v. United States***, 2022 WL 5250138 (D. Minn. 10/6/2022).

Standing; action seeking access to warrant materials dismissed. Chief Judge Schiltz dismissed an action that challenged district practices related to the sealing of certain search warrant materials, finding that the Reporters Committee's alleged "interest in observing and understanding the work of the federal trial courts" was "exactly the kind of generalized, abstract interest in the proper application of the law that the Supreme Court repeatedly held does *not* suffice to establish injury-in-fact." ***In re: Amended Application of the Reporters Committee for Freedom of the Press to Unseal Certain Surveillance Orders and Related Materials***, 2022 WL 6701785 (10/11/2022).

Fed. R. Civ. P. 45(d)(2)(B)(i)-(ii); subpoena; cost-shifting; order affirmed. In August 2022, this column noted an order by Magistrate Judge Docherty that required the plaintiffs to bear a portion of the costs of a non-party's document production.

Judge Tostrud recently rejected the non-party's appeal from the portion of Magistrate Judge's Order that argued that cost-shifting is "mandatory," finding that the costs were not so "significant" as to make Magistrate Judge Docherty's order "clearly erroneous or contrary to law." ***Rochester Drug. Co-op. v. Mylan Inc.***, 2022 WL 1598377 (D. Minn. 5/20/2022), *aff'd*, 2022 WL 8032746 (D. Minn. 10/14/2022).

Motion for temporary restraining order denied. Rejecting the defendant's request that he abstain in light of a pending administrative appeal, Judge Tunheim nevertheless denied the plaintiff's motion for a temporary restraining order, finding that three of the four TRO factors favored the defendant. ***Partners in Nutrition v. Minnesota Dept. of Education***, 2022 WL 5114461 (D. Minn. 10/4/2022).

Submission of exhibits; court not obligated to "scour" record. Granting defendants' motion for summary judgment in a copyright action, Judge Frank criticized the plaintiff for submitting approximately 3,800 pages of exhibits in her opposition to the motion, while citing to only a few hundred pages of those exhibits. Judge Frank stated that "[t]he Court will not do counsel's work for them and scour the remaining thousands of pages of documents in search of additional evidence of discrimination." ***Cooley ex rel. N.O.C. v. Target Corp.***, 2022 WL 4540091 (D. Minn. 9/28/2022).

Fed. R. Civ. P. 12(b)(6); fraudulent joinder; motion to remand denied. Where the plaintiff commenced an MHRA action in the Minnesota courts, the defendant removed on the basis of diversity jurisdiction, the plaintiff amended his complaint to add a non-diverse defendant and then moved to remand, and the non-diverse defendant moved to dismiss, Judge Montgomery dismissed the allegations against the non-diverse defendant pursuant to Fed. R. Civ. P. 12(b)(6) and denied the motion to remand. ***Garrett v. Boston Scientific Corp.***, 2022 WL 4803121 (D. Minn. 10/3/2022).

28 U.S.C. §1332(a); amount in controversy; motion to remand granted. Where one defendant removed an interpleader action on the basis of diversity jurisdiction but failed to specify the amount in controversy, and a document attached to the complaint set the amount in controversy at $65,843.80, Judge Tunheim rejected the removing defendant's argument that taxes and fees would make the overall amount in controversy greater than $75,000 and remanded the action to the Minnesota courts. ***Edward Jones Trust Co. v. Knapp***, 2022 WL 4465919 (D. Minn. 9/26/2022).

28 U.S.C. §1404(a); motion to transfer non-resident's claim denied. Where a plaintiff who resides in Hudson, Wisconsin filed his action in the Minnesota courts and the defendant removed the action and then sought to have the action transferred to its headquarters in the Eastern District of Michigan or the Western District of Wisconsin, Judge Tunheim acknowledged that the plaintiff's choice of forum was entitled to "less deference" because the plaintiff did not reside in the district, but nevertheless denied the motion to transfer where the plaintiff resided very close to the Twin Cities, and none of the other factors "strongly" favored transfer. ***Rock v. Rathsburg Assoc., Inc.***, 2022 WL 4450418 (D. Minn. 9/23/2022).

Treating healthcare providers; non-expert testimony properly admitted. Denying defendants' motion for a new trial, Judge Nelson found that the non-expert testimony of the plaintiff's treating healthcare providers did not constitute undisclosed expert testimony, and that defendants also failed to establish that any possible error in the admission of that testimony would have resulted in a different outcome at trial. ***Jacobson v. County of Chisago***, 2022 WL 15776699 (D. Minn. 10/28/2022).

28 U.S.C. §1292(b); request to certify for interlocutory appeal denied. Judge Wright denied defendants' request that she certify an award of partial summary judgment to the plaintiff for interlocutory appeal pursuant to 28 U.S.C. §1292(b), finding that defendants met none of the three elements necessary to support their request. ***Target Corp. v. ACE Am. Ins. Co.***, 2022 WL 4592094 (D. Minn. 9/30/2022).

L.R. 5.6; motion for continued sealing granted. Where the parties disagreed as to whether certain documents should remain sealed, Magistrate Judge Leung granted the plaintiff's motion to continue the sealing of "highly sensitive... competitive material." ***Taylor Corp. v. Georgia-Pacific Consumer Prods. LP***, 2022 WL 4533797 (D. Minn. 9/28/2022).

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

Immigration Law
JUDICIAL LAW

DACA: The saga continues. As noted in the October 2022 edition of *Bench & Bar of Minnesota*, the Department of Homeland Security (DHS) published its final rule on 8/30/2022 implementing its proposed rule (with some amendments) seeking to establish regulations to "preserve and fortify" the Deferred Action for Childhood Arrivals (DACA) program. The rule was scheduled to go into effect on 10/31/2022. On 10/14/2022, U.S. District Court Judge Andrew Hanen (Southern District of Texas), following a remand by the 5th Circuit Court of Appeals to review the final rule, issued an order partially blocking the regulations from going into effect while allowing USCIS to continue accepting and adjudicating DACA renewal applications filed by those DACA recipients with DACA status on or before the court's 7/16/2021 permanent injunction. Given ongoing litigation, USCIS may nonetheless accept initial DACA applications but not process them. ***State of Texas, et al. v. United States, et al.***, No. 1:18-CV-00068 (S.D. Tex. 10/14/2022). *https://www.nilc.org/wp-content/uploads/2022/11/2022.10.14-Order-J.-Hanen.pdf*

ADMINISTRATIVE ACTION

Designation of Ethiopia for TPS. On 10/21/2022, the Department of Homeland Security (DHS) announced its designation of Ethiopia for temporary protected status (TPS) for 18 months. According to Secretary of Homeland Security Alejandro N. Mayorkas, "Ethiopian nationals currently residing in the U.S. who cannot safely return due to conflict-related violence and a humanitarian crisis involving severe food shortages, flooding, drought, and displacement, will be able to remain and work in the United States until conditions in their home country improve." Eligibility for TPS under the designation requires continuous residence in the United States since 10/20/2022. The designation will go into effect once the notice is published in the *Federal Register*. **U.S. Department of Home Security, *News Release*** (10/21/2022). *https://www.dhs.gov/news/2022/10/21/dhs-designates-ethiopia-temporary-protected-status-18-months*

DHS announces new parole process for certain Venezuelans. On 10/19/2022, the Department of Homeland Security (DHS) published notice of a new parole process for certain Venezuelans who agree to enter the United States by air at an interior port of entry (POE) rather than a land port of entry while arranging for someone in the United States to provide them with housing and other support as needed. Such individuals must: 1) be outside the United States; 2) be a national of Venezuela or a non-Venezuelan immediate family member of and traveling with a Venezuelan principal beneficiary; 3) have a U.S.-based supporter who filed an Affidavit of Support (Form I-134) on their behalf and has been vetted and confirmed by USCIS; 4) possess a passport valid for international travel; 5) provide for their own commercial travel to an air POE and final U.S. destination; 6) undergo and pass required national security and public safety vetting; 7) comply with all additional requirements, including vaccination requirements and other public health guidelines; and 8) demonstrate that a grant of parole is warranted based on significant public benefit or urgent humanitarian reasons and that a favorable exercise of discretion is otherwise merited.

DHS emphasized that, after 10/19/2022, "Venezuelans who do not avail themselves of this process, and instead enter the United States without authorization between POEs, will be subject to expulsion or removal." Likewise, "those who enter irregularly into the United States, Mexico, or Panama will also be found ineligible for a discretionary grant of parole under this process." The program is fashioned, in part, on the *Uniting for Ukraine* parole process that was implemented following Russia's invasion of Ukraine. DHS began accepting online applications for the process on 10/18/2022. **87 Fed. Reg. 63507-17** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-10-19/pdf/2022-22739.pdf*

H-2B cap supplemented with additional visas. On 10/12/2022, the Department of Homeland Security (DHS), in consultation with the Department of Labor (DOL), announced it will soon issue a regulation adding 64,716 H-2B temporary nonagricultural worker visas for fiscal year 2023 (commencing 10/1/2022), to the existing 66,000 H-2B visas normally allotted each fiscal year. At the same time, DHS and DOL are working on strengthening protections for U.S. and foreign workers—"ensuring that employers first seek out and recruit American workers for the jobs to be filled, as the visa program requires, and that foreign workers hired are not exploited by unscrupulous employers"—by way of the recently created H-2B Worker Protection Taskforce.

This H-2B supplement will include 20,000 visas allocated to Haiti, Honduras, Guatemala, and El Salvador, with the remaining 44,716 visas made available to those returning workers who received an H-2B visa, or were otherwise granted H-2B status, during one of the last three fiscal years.

The H-2B visa system is a program allowing employers to temporarily hire noncitizens to perform nonagricultural labor or services in the United States. Key aspects of the program include the following: 1) the employment must be temporary in nature, such as a one-time occurrence, seasonal need, or intermittent need; 2) employers must certify that there are insufficient numbers of U.S. workers who are able, willing, qualified, and available to perform the temporary work for which they seek a prospective foreign worker; and 3) employers must certify that the employment of H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. **Department of Homeland Security, *News Release*** (10/12/2022). *https://www.dhs.gov/news/2022/10/12/dhs-supplement-h-2b-cap-nearly-65000-additional-visas-fiscal-year-2023*

Final rule amending H-2A regulations published. On 10/12/2022, the Department of Labor (DOL) published its final rule amending the regulations devoted to the certification of agricultural labor or services performed by temporary foreign national workers in the H-2A nonimmigrant visa program as well as enforcement of employers' contractual obligations to those nonimmigrant workers. These changes will, according to the DOL, "strengthen protections for workers, modernize and simplify the H-2A application and temporary labor certification process, and ease regulatory burdens on employers." At the same time, the changes will remain consistent with the department's responsibility to certify

there are insufficient able, willing, and qualified workers to fill employers' job opportunities and the employment of H-2A workers will not adversely affect the wages and working conditions of workers similarly employed in the United States. The rule will go into effect on 11/14/2022. **87 Fed. Reg. 61660-831** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-10-12/pdf/2022-20506.pdf*

Extension and redesignation of Burma for TPS. On 9/27/2022, the Department of Homeland Security (DHS) published notice of its extension of the designation of Burma (Myanmar) for TPS for 18 months, from 11/26/2022 through 5/25/2024, for those who currently hold that status and continue to meet the eligibility requirements. The period for reregistration runs from 9/27/2022 through 11/26/2022. In addition, DHS redesignated the country for TPS given the "ongoing violence and the resulting displacement in Burma [which] have caused major vulnerabilities related to 1) shelter; 2) food security and nutrition; 3) water, sanitation and hygiene (WASH); 4) health; and 5) education." Eligibility requirements for those filing for the first time under the redesignation include, among others, continuous residence in the United States since 9/25/2022 and continuous physical presence in the United States since 11/26/2022, the effective date of the redesignation of Burma for TPS. The period for first-time registration runs from 9/27/2022 through 5/25/2024. **87 Fed. Reg. 58515-24** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-09-27/pdf/2022-20784.pdf*

R. Mark Frey
Frey Law Office
rmfrey@cs.com

Intellectual Property
JUDICIAL LAW

Patent: Voluntary dismissal of safe harbor claim in declaratory action. Judge Frank recently granted plaintiff Corning Inc.'s motion to dismiss Count Ten of its complaint. Corning filed a declaratory judgment action against Wilson Wolf Manufacturing Corporation and John Wilson seeking adjudication of questions of patent infringement and invalidity related to it and its customers. In Count Ten of its suit, Corning sought a declaration that the safe harbor defense immunized Corning's customers from Wilson Wolf's claims of patent infringement. Corning moved to voluntarily dismiss Count Ten of its amended complaint.

Under Federal Rule of Civil Procedure 41, after the opposing party serves either an answer or a motion for summary judgment, an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. A court is not required to dismiss a claim upon request. Instead, courts take a variety of factors into account, including whether the party has presented a proper explanation for its desire to dismiss, whether a dismissal would result in a waste of judicial time and effort, and whether a dismissal will prejudice the defendants. In Count Ten, Corning sought a declaration that Corning's customers and end-users of its HYPERStack product did not infringe defendants' patents because the alleged infringing conduct was exempted under the FDA "safe harbor" created by 35 U.S.C. § 271(e)(1). Corning stated that it asserted the safe harbor defense because the defense had been raised in two of the three lawsuits against Corning's customers, but that in view of the discovery in the instant case, the application of the "safe harbor" defense turned on facts that were unique to each customer.

Thus, Corning argued that the "safe harbor" defense was best litigated (if necessary) in the context of each of the customer lawsuits. Defendants did not oppose the dismissal but argued that due to the prejudice and waste caused by litigating Count Ten, the dismissal should be with prejudice. Upon review, the court found that voluntary dismissal of Count Ten without prejudice was warranted, but the court reserved the right to have Corning reimburse defendants for costs and fees directly related to the litigation of Count Ten in the action should circumstances warrant. ***Corning Inc. v. Wilson Wolf Mfg. Corp.***, No. 20-700 (DWF/TNL), 2022 U.S. Dist. LEXIS 201042 (D. Minn. 11/4/2022).

Joe Dubis
Merchant & Gould
jdubis@merchantgould.com

Real Property
JUDICIAL LAW

Removing a bridge was not a taking. The Minnesota Court of Appeals affirmed a district court's dismissal of appellants' inverse-condemnation claim because it upheld the district court's determination that the property owners retained reasonably convenient and suitable access to their property following the township's decision to remove a bridge. In *Matter of Kuk*, the property owners argued that they lost reasonably convenient and suitable access to their property because (1) they only have access via a southern easement rather than a public road; (2) the southern easement does not accommodate regular vehicles and would require extra winter maintenance; and (3) accessing the homestead site from the southern easement requires traversing a ravine and steep hillside. The property owners further argued that even if the southern easement provides reasonably convenient and suitable access to the southern portion of the property, it does not provide reasonably convenient and suitable access to the homestead site.

The court found that the evidence sustains the district court's findings that the property owners maintain reasonably convenient and suitable access. The southern easement provides ingress and egress to a nearby street. The court noted that even before the property owners recorded the southern easement, previous owners accessed the property from the south and that the southern easement has been the property's primary access. Further, the southern easement continued to provide suitable access to the property for agricultural purposes. With respect to the bridge, the court added that the property owners suspected in 1995 that the bridge had limited capacity and could not be relied on to provide permanent access. The property owners secured the southern easement because they anticipated problems with the bridge, and have always used the southern easement, rather than the bridge, to access the property to farm. The court discerned no clear error in the district court's determination that the property owners maintain reasonably convenient and suitable access, and as such, concluded as a matter of law that the township's removal of the bridge did not constitute a taking. ***Matter of Kuk***, No. A22-0180, 2022 WL 4682932 (Minn. Ct. App. 10/3/2022).

Clear and definite terms required to expressly abrogate the doctrine of equitable conversion. A handwritten representation in a purchase agreement failed to expressly abrogate the doctrine of equitable conversion, and thus the appellant had no legal right to unilaterally burden a property with an easement after the execution of a purchase agreement. In *Howard*, Sun Trust Financial, LLC argued that the plain language of handwritten representations added to the purchase agreement are sufficient to show that the parties intended to abrogate the doctrine of equitable conversion and allow Sun Trust to convey an easement to Gulf Holdings after the purchase agreement had been executed. The court, however, determined the handwritten language to be too vague and indefinite to have any meaning at all. The representation added to the purchase agreement that the sale was "[s]ubject to telecommunications easement lease rights thereafter to Gulf Holdings LLC and its assigns" was found to lack any of the terms necessary to validly show an intent of the parties to abrogate the doctrine of equitable conversion. The language of the agreement shows no intent by the parties to allow Sun Trust to convey a new nearly 100-year easement to Gulf Holdings without involving the buyers. The representation failed to include any details describing how long the easement would be burdening the property and failed to provide any clarity on the scope of the easement or how the property would be burdened. Further, the easement did not exist when the purchase agreement was drafted. The court held that those are material details that one would include in any representation that purported to abrogate the rights of a buyer following the execution of a purchase agreement and that no amount of extrinsic evidence could rectify the omission of those material details. Thus, the representation added to the purchase agreement was too vague, indefinite, and uncertain to interpret and was therefore void and unenforceable.

The court held that because no other language in the purchase agreement expressly abrogates the doctrine of equitable conversion, Sun Trust had no legal right to unilaterally burden the property with an easement after the execution of the purchase agreement and affirmed the district court's grant of summary judgment to the buyers on their quiet-title claim. The court also reversed the dismissal of the buyers' slander-of-title claim and remanded it to the district court for further analysis. ***Howard v. Sun Trust Fin. LLC***, No. A21-1634, 2022 WL 6272038 (Minn. Ct. App. 10/10/2022).

Mike Pfau
DeWitt LLP
mjp@dewittllp.com

Tax Law
JUDICIAL LAW

Addition to bankruptcy law constrains tax court in issuing automatic stays. A taxpayer had a petition pending in tax court. The taxpayer then filed a chapter 11 bankruptcy petition, which automatically stayed the tax court proceeding pursuant to 11 U.S.C. §362(a)(8). The bankruptcy court issued an order confirming the taxpayers' Chapter 11 plan, and the taxpayers then moved to lift the stay. The tax court held that although such an order might have previously been granted under case law, a change to the bankruptcy code limited the tax court's prior holding. In particular, the tax court reasoned that the additional statutory language clearly provided that debt is not discharged until "(i) the bankruptcy court grants a discharge on completion of all payments under the plan or (ii) a bankruptcy court grants a discharge before that time after notice and a hearing." In this case, since neither of those events had occurred, the tax court determined it did not have discretion to lift the automatic stay. ***Cochran v. Comm'r***, No. 21002-16, 2022 WL 6957390 (T.C. 10/12/2022).

Refund not binding on IRS. In a memorandum opinion, the tax court reminded individual taxpayers that tax refunds are not final determinations that preclude subsequent adjustments. A married couple was assessed a deficiency relating to their advanced premium tax credits (APTC). The APTC has proved challenging to taxpayers, in part because the advance nature of the credit combines with taxpayers' changing financial circumstances throughout the year. As the court explains, "At year end a taxpayer who received an APTC must reconcile the amount of the APTC already received with the entitlement amount.... If the APTC is greater than the entitlement amount, the taxpayer owes the Government the excess APTC, which will be reflected as an increase in tax." In this dispute, the taxpayers received more in premium than amounts to which they were ultimately entitled. To compound the taxpayers' confusion, their refund was first frozen; then, after supplying additional requested information, the taxpayers received the refund. Later, however, the taxpayers were audited, and a deficiency was assessed. The taxpayers made a preclusion argument, which the court rejected based on long settled case law. "A refund is not binding on the Commissioner in the absence of a closing agreement, valid compromise, or final adjudication.... It is well settled that the granting of a refund does not preclude the Commissioner from issuing a notice of deficiency merely because he accepted a taxpayer's return and issued a refund." ***Manzolillo v. Comm'r***, T.C.M. (RIA) 2022-107 (T.C. 2022) (internal citations omitted).

Testimony given under oath and subject to cross-examination amounts to "newly discovered evidence" in an innocent spouse case. Judge Holmes issues a bench opinion following a trial in which a taxpayer sought innocent spouse relief. The opinion explained that the court is "to look only at the administrative record, with two exceptions; and those two exceptions are for evidence that is newly discovered or evidence that was previously unavailable." The court considered the taxpayer's testimony as fitting into one of those exceptions for the purposes of the instant case. The court cautioned, however, that the court was "not deciding this for all cases in the future. I am assuming that I can look at the evidence that took the form of her testimony. So I will look at both the administrative record in this case and at the testimony of [the petitioning spouse]." ***Bacigalupi v. Comm'r***, No. 20480-21, 2022 WL 15427141 (T.C. 10/27/2022).

Morgan Holcomb
Mitchell Hamline School of Law
morgan.holcomb@mitchellhamline.edu

Brandy Johnson
Mitchell Hamline School of Law
brandy.johnson2@mitchellhamline.edu

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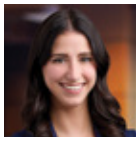


Maslon LLP announced the addition of **Carmen Carballo** and **Abigail Maier** to the firm's litigation group, **Yemaya Hanna** to the estate planning group, and **Jessica Karp** to the corporate & securities group.

David Tanabe was selected by the National Conference of Bankruptcy Judges for the 2022 Blackshear American College of Bankruptcy Presidential Fellowship. Tanabe is an associate at Winthrop & Weinstine, PA.

Martha Snipstad has joined Meagher + Geer in the catastrophic loss, commercial litigation, construction, intellectual property, and products liability practice groups.


Merchant & Gould PC announced that **Christian J. Hansen** has joined as a partner and **Heather S. Chatterton** has joined as an associate.

Stinson LLP announced seven new associates have joined the firm's Minneapolis office: **Sharon (Maher) Beck, Mark Ficken, Doug Lewis, Desiree McDowell, Natalie Nelson, Billy Price,** and **Zach Wright.**

Jill L. Strodthoff has joined Moss & Barnett as a member of the firm's real estate and real estate finance teams.

Kutak Rock announced the addition of four associates to its Minneapolis office: **Nathan Froemming, Benjamin Kramer, Spencer Riegelman,** and **Madaline Simon.**

Fredrikson & Byron announced the addition of 12 attorneys to its Minneapolis office: **Claire E. Beyer, Andrea S. Boeckers, Eric D. Buss, Nate Converse, Eve P. Durand, L. Adam Mowder, David J.T. Salmon, Tarun Sharma, Noah J. Stommel, Sarah Theisen, Brooke C. Trottier, Schuyler G. Troy,** and **Thomas Wheeler.**

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