OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

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Bench&Bar OF MINNESOTA

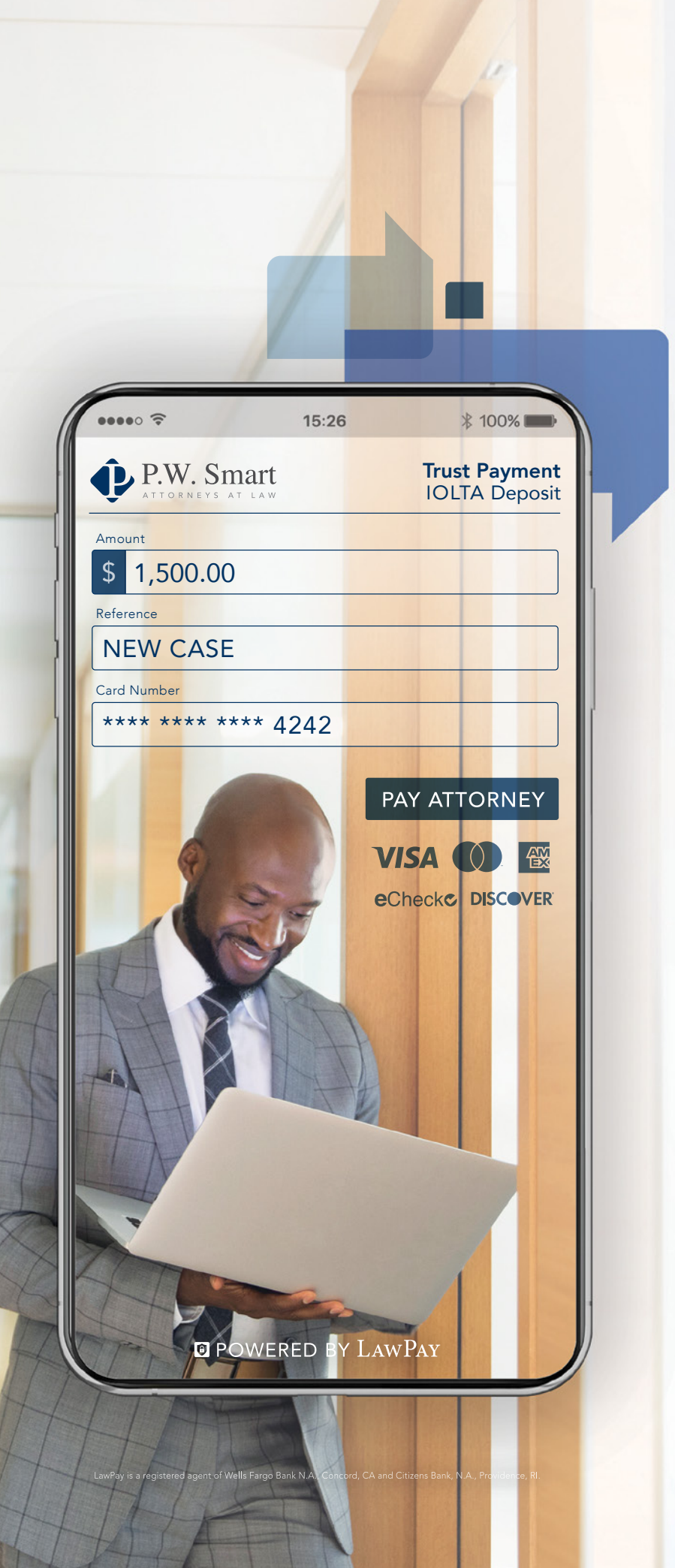
Covid-19 liability legislation

Force majeure *Hitz* home, excuses rent obligation

***Bostock v. Clayton County* and the future of the MHRA**

One Size Does Not Fit All

Estate planning for blended and nontraditional families



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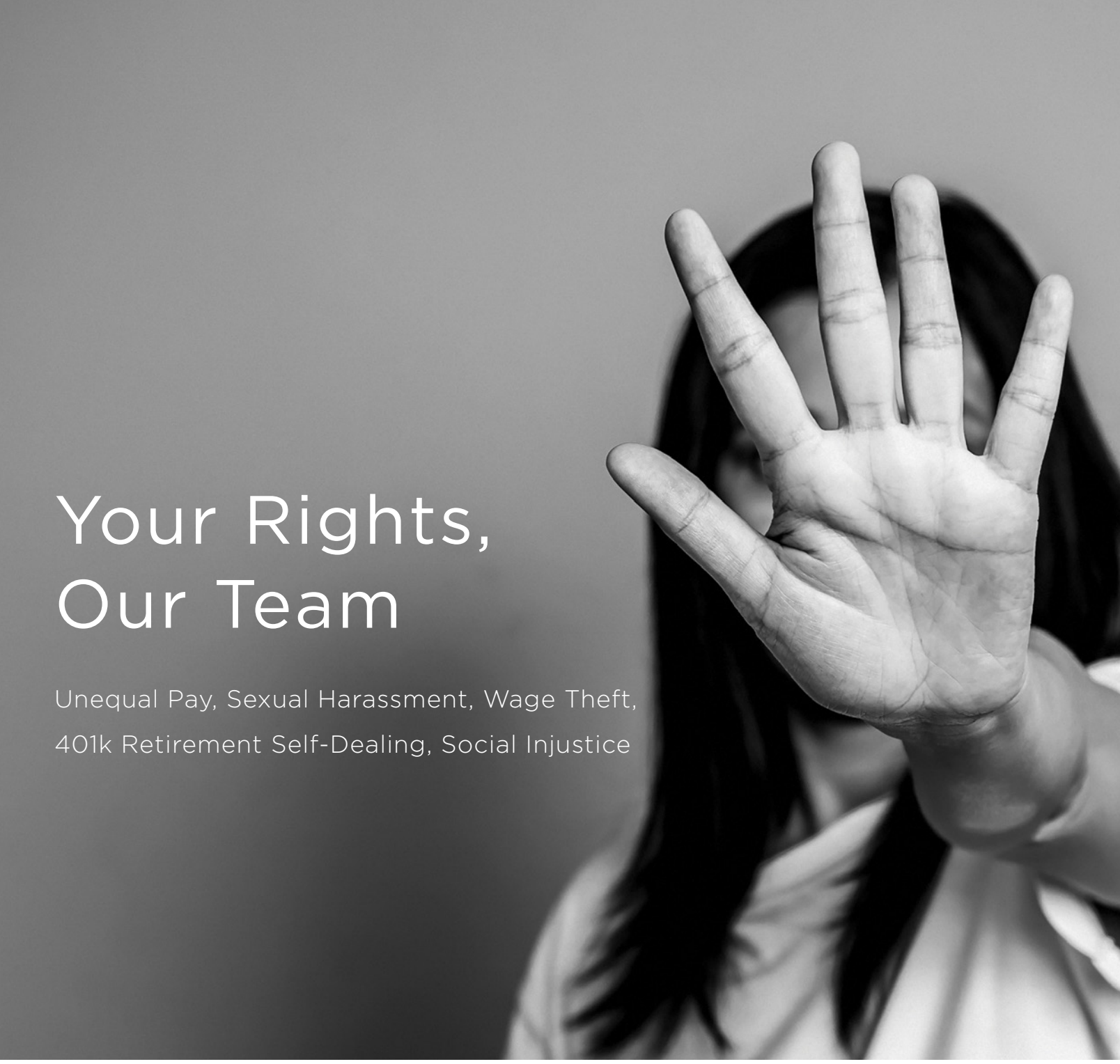

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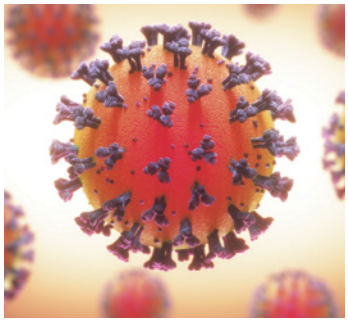

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Assess, reflect, renew

One of the things I enjoy most about living in Minnesota is the change of seasons. The transition from one to the next always re-energizes me. Many see the transition from our seemingly endless winters to spring as the quintessential time of reawakening. But I always feel the most inspiration as the hot, humid days of summer turn into the cool, crisp mornings and evenings of fall. Even though I have not been a student for many years, I think the fondness I hold for the fall is linked to the start of the school year. Because both my parents were educators, every August the entire family was required to adjust to a new, more structured schedule after the lazy days of summer. With each new school year, my parents encouraged us to set goals and find ways to make it more successful than the last. This tradition is something I continued through law school, and even long after my school days have passed, each fall I critically evaluate where I have been and where I would like to go over the next year.

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As attorneys we all know that ongoing education is extremely important. Our professional rules require us to provide "competent representation" to our clients. Accordingly, my annual review includes an assessment of the changing legal landscape and the identification of continuing legal education courses that I should attend.

There continues to be a wide variety of educational resources available to ensure my professional competency in the coming year. The MSBA, of course, offers several practical tools (including FastCase, practicelaw, and CourtOps) that help with our day-to-day practices. Additionally, in the wake of covid-19, the number of online CLE seminars on any substantive area of the law seems limitless. I've been particularly impressed with the quality of new offerings by the MSBA over the last several months, including the "Business as Usual" and "Back to School" series of programs, which have covered a wide range of topics of interest and importance to our members. As such, identifying the programs I want to attend to ensure I am up to speed on the latest developments in the law will likely not be much of challenge.

But after more than 25 years of practice, I have learned that staying educated on legal developments is not enough to fulfill my professional obligation—true competency requires so much more. It requires us to critically evaluate the way we have always done things and to be open to change. To me, this means keeping up with other things impacting my practice, including technology, challenges facing my clients and colleagues, and local and world events. This year, for example, I am continuing to educate myself on video conference etiquette and tools. It's amazing how quickly we were able to adapt to Zoom and Webex platforms to conduct depositions and mediations. I've also been reading and spending time listening to podcasts to get a better understanding of racial bias and other kinds of bias—unconscious and conscious—that permeate our society.

This year, given the significant limitations on in-person interactions, my sights are also set on figuring out how to maintain my meaningful relationships with colleagues and clients, and establish new ones. While at first blush this seems like a daunting task, I know intuitively that even little things can make a big difference and help me to accomplish this goal. Something as simple as picking up the phone or scheduling a virtual meeting, instead of defaulting to email, is actually one of the easiest ways to show someone just how important they are to you and can leave a lasting positive impression. The same is also true of handwritten notes or cards—to show appreciation, offer support, or confer congratulations on a job well done.

I am also interested in expanding my circle of colleagues and friends. While this would have been easier without covid-19, I nevertheless plan to reach out to individuals I see on video conferences whom I do not know well, and set up one-on-one calls with them. To increase my cultural intelligence, I also plan to make sure to get to know people from backgrounds that are different from mine.

So as the trees start changing colors, I wish all of you the excitement a new school year typically brings, even as we all work to continue to navigate more online, distance learning, and hybrid schedules. Oh, and in keeping with back-to-school traditions, I also found a new bag. It's not a backpack, but it sure comes in handy for carrying my laptop and hauling files.

Happy fall, happy renewal, have a great year. ▲

Bench/bar initiative to improve legal access for low-income Minnesotans

The Minnesota Judicial Branch has launched a new initiative, the Civil Justice Subcommittee, charged with increasing the number of low-income and disadvantaged people receiving civil legal assistance as well as reducing barriers to access in Minnesota state courts through collaborative projects of the Judicial Branch and the MSBA. The subcommittee functions as part of the court's existing Committee on Equality and Justice.

During its first year, the subcommittee will focus on (1) expanding the successful housing court clinic model, which primarily serves low-income tenants, to one or more jurisdictions in greater Minnesota; (2) increasing pro bono recognition and outreach while exploring court projects to streamline pro bono representation; and (3) providing education to the bench and bar regarding the 2018 amendments to Minn. R. Civ. P. 23, which modify distribution of residual funds in a class action.

The MSBA members appointed to the Civil Justice Subcommittee are Jennifer Thompson, MSBA president-elect; Christopher Pham, a shareholder at Fredrikson & Byron; Drew Schaffer, executive director of Mid-Minnesota Legal Aid; Dori Streit, executive director of Legal Aid Service of Northeastern Minnesota; and Sherri Knuth, MSBA access to justice director. Schaffer and 4th Judicial District Judge Juan Hoyos will serve as co-chairs of the subcommittee.

Transition to the new Fastcase 7

Starting in September, users of Fastcase—the premier legal research tool that's available free to MSBA members—began transitioning to Fastcase 7. Fastcase brings big data analytics, visualization, and work-flow tools to online legal research, empowering attorneys to quickly identify the most important cases and reduce the time wasted on repetitive tasks. This newest version of Fastcase provides a greater variety of tools and results with improved speed, expanded search options, and more intuitive functionality. Through September, Fastcase is offering free, live training sessions with a reference attorney, who'll provide a guided walk-through of new features, layouts, and search basics. Sign up for Fastcase 7 training and view Fastcase's CLE offerings at *www.fastcase.com/webinars*.

MSBA practicelaw conference coming next month

Ready to build your practice, build new connections—even build documents and apps? Join your MSBA colleagues for our virtual practicelaw conference, featuring 40+ online CLEs and sessions throughout October. Choose as many sessions as you'd like from three learning tracks of the Delta Model: Legal/Tech will focus on building your practice; Business Operations will focus on building your business; and Personal Effectiveness will focus on building relationships. Alyson Carrel, associate professor at Northwestern Pritzker School of Law and the developer of the Delta Model, will deliver the keynote on Oct. 6, discussing this new client-driven lawyering model that recognizes the importance of technology fluency and emotional intelligence in the delivery of legal services. The conference includes roundtables, workshops, and social events. You can even build your fantasy Minecraft law office.

The conference is $99 for MSBA members ($495 for nonmembers). "Builders" can attend for just $75 if they contribute content—such as trial books, briefs, and forms—to practicelaw. Learn more at: *my.mnbar.org/build*.

MSBA court petitions update

In August, the MSBA filed comments supporting a petition filed by the Legal Services Advisory Committee (LSAC) proposing a *pro hac vice* process and fee for out-of-state attorneys appearing in Minnesota courts. The $450 fee would support civil legal aid programs. Currently Minnesota is one of only three states without a *pro hac vice* fee. The Court's Advisory Committee on the General Rules of Practice submitted a report and recommendation to the Court regarding the LSAC petition and proposing specific amendments to Rule 5. The public hearing on this issue (Court File ADM09-8009) is scheduled for September 15.

On the same day, the Court will hold a public hearing on the MSBA's petition (ADM10-8002) for amendments to the Rules on Lawyer Registration. The petition requests that attorneys be required to report the number of pro bono hours they complete each year. (Any answer, including zero, would be acceptable.) In addition, lawyers would be required to complete a yes/no checkbox indicating whether they contributed to civil legal service programs for low-income Minnesotans in the past year. There is currently no mechanism to track the number of pro bono hours lawyers across the state are contributing.

Caution is warranted; scams are afoot

During the recession of 2008, lawyers lost jobs and suffered economic loss. Some lawyers, due to their own economic straits, poor judgment or a combination of both, found themselves embroiled in improper loan modification schemes and other debt-relief actions that were basically consumer scams. Several lawyers were disciplined as a result. The 2020 pandemic is again creating economic havoc for lawyers and consumers. With economic strife come more scams and more opportunities for lawyers to get caught, both wittingly and unwittingly, in schemes that serve no purpose but to defraud. Please be cautious.

Nationwide regulatory counsel are already seeing covid schemes, the first wave of which has comprised targeted phishing attempts directed at lawyers and law firms. Other than an increase in frequency, however, such attacks should be well-known to lawyers and law firms, and hopefully your guard is already up. It is never too late to brush up on your cybersecurity practices, but that is not the purpose of this article.

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The ABA Center for Professional Responsibility recently sent an alert to regulatory counsel warning of a potential increase in money laundering schemes. This caught my attention. For the last couple of years, efforts to combat money laundering have focused on the role lawyers may be playing (or not playing, as the case may be) in such transactions. Due to client confidentiality and the legal nature of the transactions, it is not surprising that lawyers are involved in such activity. The last thing you want to be involved with is anyone's criminal conduct, whether knowingly or unknowingly. How do you avoid this? Let's review the rules and a recent ABA opinion on point.

Rule 1.2(d), Minnesota Rule of Professional Conduct, is pretty straightforward:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determinate the validity, scope, meaning, or application of the law.

You should note the word "knows" is doing a lot of lifting in the rule. Per Rule 1.0(g), "knows" "denotes actual knowledge of the fact in question," and, more broadly, "knowledge may be inferred from circumstances." The first part is easy: When the facts before you demonstrate "actual knowledge" of criminal or fraudulent activity, your obligation is clear. You must explain to your client that professional ethics do not allow you to assist in such conduct, and you must withdraw if the client persist in the course of conduct.[1]

Clients rarely confide their criminal or fraudulent intent, however. What does it mean for knowledge to be inferred from the circumstances? In April 2020, the ABA issued Formal Opinion 491, entitled "Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings." In the opinion, the ABA cautions lawyers to inquire when known facts indicate a *high probability* that a client is seeking to use the lawyer's services for criminal or fraudulent activity. The duty to inquire is important because a lawyer's conscious, deliberate failure to inquire (willful blindness) can amount to knowing assistance of criminal or fraudulent conduct. The ABA opinion cites noted ethics scholar Charles Wolfram in this regard: "[A]s in the criminal law, a lawyer's studied ignorance of a readily ascertainable fact by consciously avoiding it is the functional equivalent of knowledge of the fact…. As a lawyer, one may not avoid the bright light of a clear fact by averting one's eyes or turning one's back."[2]

Opinion 491 takes care to explain that the ethical duty is not "reasonably should have known," but does reject a standard that imposes no duty of inquiry as contrary to well-settled ethics principles. Thus, you cannot avoid "knowledge" by not looking too closely. A duty to inquire in high-probability situations is an important safeguard—and a wise course of action even if it were not ethically required. The last thing a lawyer wants to do is get caught up in allowing a client to use their legal services to further a client's potentially criminal or fraudulent conduct. There are pitfalls enough in the practice of law to add the risk of flying that close to sun.

Opinion 491 provides some examples of situations that would impose a duty of inquiry, and refers to another good ABA resource: a 2010 guide entitled "Voluntary Good Practice Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing." The latter resource includes a description of numerous red flags that suggest your client may be engaged in money laundering. If you engage in transaction work, particularly involving cross-border transactions, you should review these resources to refine your ability to spot red flags, particularly as they relate to money laundering.

As in-house counsel for a corporation that engaged in international sales of highly controlled goods, I'm no stranger to due diligence or red flags, both by training and natural skepticism.

I'm frequently surprised in my current position to find that is not universally true. I have seen too many lawyers who either do not have good instincts for when a transaction may be "off," or more frequently, choose not to care if there is something "off" about a transaction, due to their own financial interest in being retained for the work. Do not be that person. Do not let economic pressures—from the pandemic or otherwise—cause you to ignore your instincts or to set aside your natural skepticism that something that is too good to be true. Liability for ethical misconduct is the least of a lawyer's worries in these situations, because law enforcement is often involved, looking to hold individuals accountable. (Or, if you are a victim, you can suffer significant losses not covered by insurance.)

There is no doubt that tough economic times are likely ahead for the profession due to the pandemic. Prior experience has taught us that during such times lawyers are vulnerable, as targets of scams or witting or unwitting participants in the scams of clients. These scams continue to grow in sophistication, and more and more are involving lawyers outside of large cities. Ethically, you cannot assist a client in any fraudulent or criminal activity, and you cannot close your eyes to evidence of such activity. The ABA is pursuing a website to consolidate known pandemic schemes targeting or involving lawyers, and we will be sure to include a link to the site on our website if it gets up and running. Economic uncertainly brings out the scammers. Caution is warranted. ▲

Notes

[1] Rule 1.4(a)(5), MRPC ("A lawyer shall… consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."); Rule 1.16, MRPC.

[2] ABA Opinion 491 at 4 fn. 13.

The Twitter breach and the dangers of social engineering

This past July, Twitter fell victim to a wide-scale cyberattack that compromised the accounts of some of its highest-profile users. It was soon determined that the attack was largely orchestrated by a 17-year-old boy, who apparently had a history of online scams—including some perpetrated on Minecraft—that amassed him a huge bitcoin fortune.[1] Twitter posted details about the attack on its blog: "The social engineering that occurred on July 15, 2020, targeted a small number of employees through a phone spear phishing attack… Not all of the employees that were initially targeted had permissions to use account management tools, but the attacks used their credentials to access our internal systems and gain information about our processes."[2] The post goes on to say that the attack focused on exploiting the human vulnerabilities that contributed to its success.

This episode underlines a simple truth that most cybersecurity experts acknowledge: The human element is what ultimately determines the strength of an organization's security posture. No degree of compliance or security budgeting can eliminate the potential for an attack on employees or staff themselves. As in the case of Twitter, once credentials were willingly offered up, the cybercriminals were able to access critical assets and compromise accounts.

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.

Human vulnerabilities are always going to be much easier to hack than technology. In this instance, a 17-year-old boy was able to trick a number of employees at one of the largest tech companies in the world. And the scary thing about it is that it was relatively easy to do. So how do we mitigate some of this continuing, inescapable human risk?

One step that Twitter is taking is to more carefully manage access controls. Twitter has pledged that the company will be improving its procedures and policies to better monitor and restrict access to internal assets. Access controls are a critical piece of an organization's overall security posture. Limiting access to critical data, systems, and networks is a surefire way to mitigate some of the potential risk. The more an employee is able to access, the greater the liability that employee poses in the event of a compromise. Restricting and auditing access controls do not make employees immune to spear phishing attacks, but these measures definitely limit the damage if and when employees become victims.

Second, training and education are always going to strengthen organizational security, but in particular, employees should be reminded that avoiding hastiness is always important when dealing with digital communications. The Twitter hackers conducted their social engineering attack via phone, by convincing an employee that they were calling from the technology department and required their credentials to access a customer service portal.[3] It is important to communicate to employees how personal information will be requested, and to establish that following up in person is encouraged (or required) when a request for personal information has been received. While email is the standard phishing method, it is important to remember that phone calls and texting can also be used to gather information. If anything appears suspect or out of the ordinary, make sure that reporting procedures are in place and that all employees know the designated communication channels. Taking a moment to slow down before acting on a request may make all the difference.

Like all high-profile breaches and cyber events, the Twitter breach should inspire organizations, firms, and companies to take a closer look at their own security postures and implement positive change. Security cultures thrive with top-down management support and a company-wide awareness that security is everyone's responsibility. ▲

Notes

[1] *https://www.businessinsider.com/twitter-hacker-florida-teen-past-minecraft-bitcoin-scams-2020-8*

[2] *https://blog.twitter.com/en_us/topics/company/2020/an-update-on-our-security-incident.html*

[3] *https://www.nytimes.com/2020/07/31/technology/twitter-hack-arrest.html*

▶ UPDATE

Covid-19 Liability Legislation

A short review of federal and Minnesota legislative proposals

By Courtney Ernston

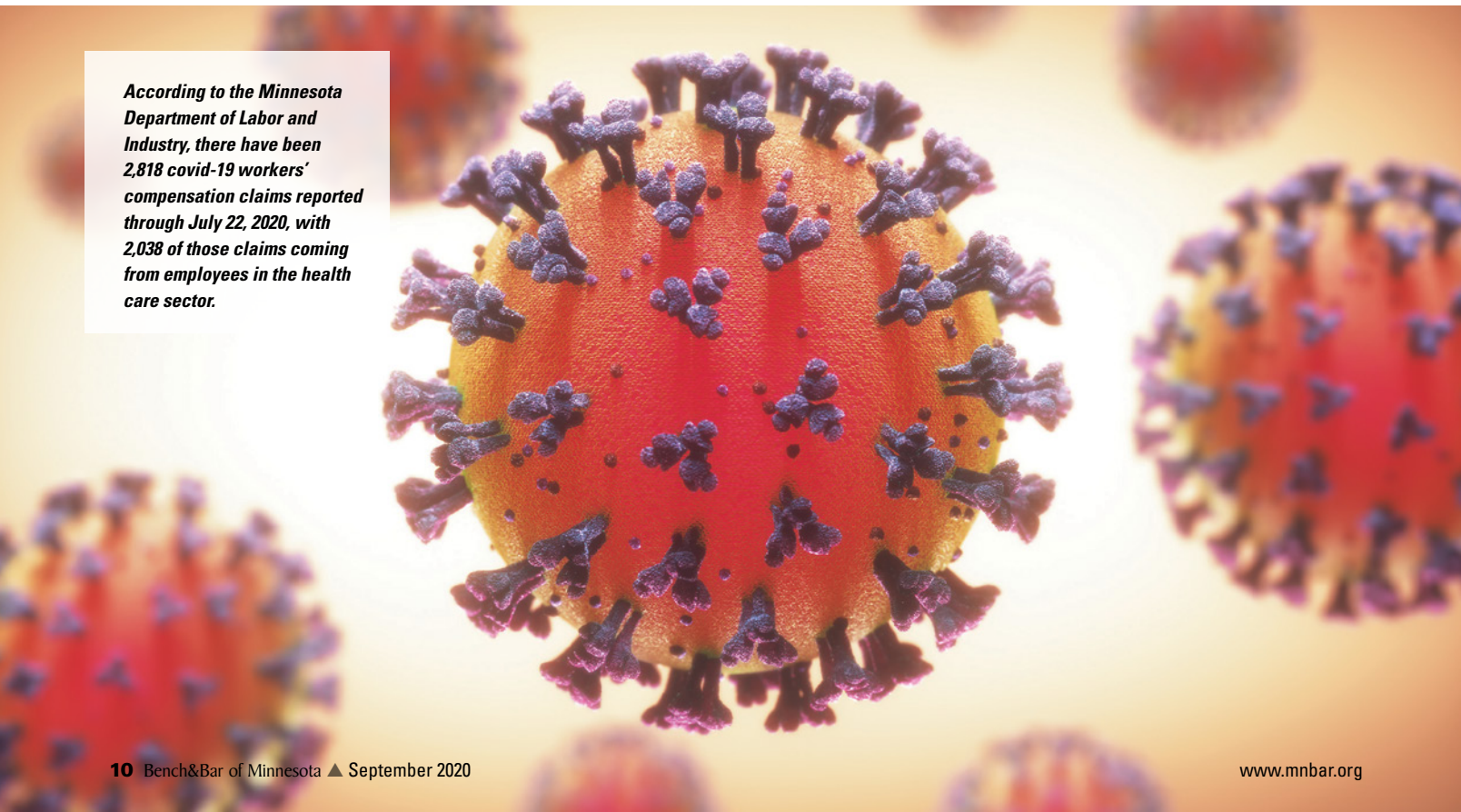
The question of liability as it relates to contracting covid-19-related illness has been at the forefront of many state and federal discussions and legislation. The United States Senate has introduced the Safe to Work Act, which seeks to limit "coronavirus exposure action[s]" unless the individual or entity is "engaged in gross negligence or willful misconduct."[1] The Act, which was referred to the Committee on the Judiciary on July 27, 2020, also seeks to preempt any state laws that would offer greater recovery to a plaintiff in the action or create a lower standard for establishing liability, but would allow state law to provide greater protection for a defendant, limit damages, or limit liability.[2]

Proposed or enacted legislation

Several states have taken action, either through their legislatures or via executive order, to quell lawsuits arising from any potential exposure to covid-19 as a result of physical presence at a business.[3] Minnesota is one of 12 states with legislation pending.[4] The Minnesota bill would establish that an owner of a property or establishment owes no duty to persons on their premises to warn them of, or protect them from, the risks of covid-19, absent intentional or reckless exposure.[5] The proposed bill has a retroactive application for causes of action accruing on or after March 13, 2020.[6] It also removes liability so long as the business complied with any recommendations, policies, procedures, etc. issued by a federal, state, or local governmental agency.[7] The bill specifically exempts claims made under workers' compensation, so any potentially injured employee still has an available remedy if an employee is injured as a result of their employment.[8] According to the Minnesota Department of Labor and Industry (DLI), there have been 2,818 covid-19 workers' compensation claims reported through July 22, 2020, with 2,038 of those claims coming from employees in the health care sector.[9]

Employer protection ≠ Easy Street

While it appears that employer protections are being prioritized, it doesn't mean that employers are off the hook entirely. It is still possible for liability to be pointed back at employers if they are not adequately prepared for the realities of current work conditions. That liability can be seriously narrowed with the small amount of effort that a well-organized preparedness plan requires.



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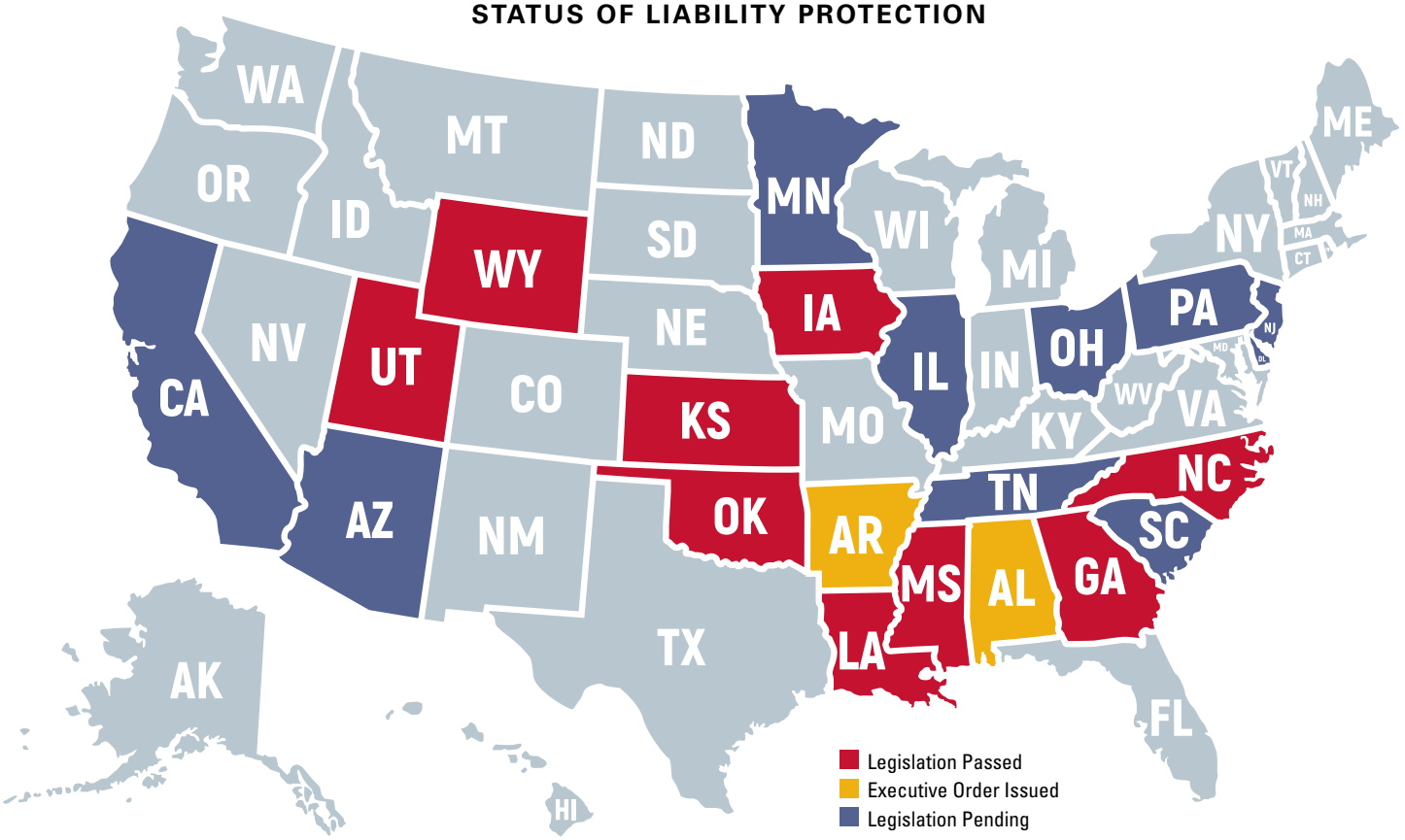
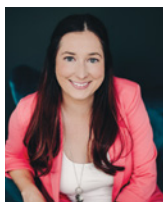


But insulation from civil liability is not a blanket endorsement allowing businesses to ignore the precautions they have been asked or required to put in place. There are still several regulatory agencies that have investigated and will continue to investigate complaints and issue citations, where appropriate. As of August 3, 2020, for example, OSHA has received a total of 28,276 COVID-19 related complaints, 7,526 at the federal level and 20,750 at the state level.[10] To date 19,593 have been closed and 8,683 remain open.[11]

The question that has not yet been answered is what type of citation and/or fine will result from a business's failure to comply. The DLI has the power to issue citations, civil penalties, or closure orders for unsafe work environments.[12] Regardless of any additional enforcement action that may be taken, what is clear is that employers still have an extremely high burden of complying with the myriad new laws and policies, including the preparedness plans,[13] mask mandates,[14] the FFCRA,[15] the amendment to the FMLA,[16] and more.

Should the Safe to Work Act pass prior to the Minnesota Legislature going back in session, the pending Minnesota legislation will likely be moot, since it contains language substantially similar to that of the Safe to Work Act. ▲



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Notes

[1] *https://www.congress.gov/bill/116th-congress/senate-bill/4317/text#toc-id368E3064D88542E7A1FDE5C618B58155* , Sec. 3(4)(A)
[2] *https://www.congress.gov/bill/116th-congress/senate-bill/4317/text#toc-id368E3064D88542E7A1FDE5C618B58155* , Sec. 162(c)
[3] "COVID-19 Liability Shield." *Ogletree Deakins, https://ogletree.com/app/uploads/covid-19/COVID-19-liability-shield-50-state-survey.pdf?Version=10* .
[4] *https://www.revisor.mn.gov/bills/text.php?number=HF4664&session=ls91&version=latest&session_number=0&session_year=2020*
[5] *Id.* Sec. 3 Subd. 2
[6] *Id.* Sec. 2 Subd. 2
[7] *Id.* Sec. 4 Subd. 2
[8] *Id.* Sec. 3 Subd. 3
[9] Minnesota Department of Labor and Industry PowerPoint Presentation: COVID-19 Workers' compensation claims statistics (7/30/2020) accessed via: *https://www.dli.mn.gov/updates*
[10] *https://www.osha.gov/enforcement/covid-19-data#summary_data*
[11] *Id.*
[12] *https://mn.gov/governor/assets/EO%2020-74%20Final_tcm1055-437539.pdf* , Para. 7(b)
[13] *https://mn.gov/governor/assets/EO%2020-74%20Final_tcm1055-437539.pdf* , Para. 7(e), "For Businesses: Safely Returning to Work." *MN Employment and Economic Development, https://mn.gov/deed/newscenter/covid/safework/business/* .
[14] *https://mn.gov/governor/assets/EO%2020-81%20Final%20Filed_tcm1055-441323.pdf*
[15] *https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave*
[16] *Id.*

Force Majeure *Hitz* Home, Excuses Rent Obligation

By George H. Singer

In nearly every state, public officials have issued stay-at-home and other closure orders to stem the spread of coronavirus. As a result, businesses across the country have been unable to operate, generate revenue, or satisfy obligations, including rent due under commercial real estate leases. Confronted with the risk of liability for breaching their obligations, companies have increasingly looked to *force majeure* provisions in contracts as a defense to claims of non-performance.

A *force majeure* is an event that can neither be controlled nor anticipated, such that performance under the contract becomes impossible or impracticable. *Force majeure* clauses in agreements generally suspend a party's obligation to perform during the event and rarely provide for termination of the contract. Most notably, these clauses typically include some reference to unforeseen governmental action or regulation.

The United States Bankruptcy Court for the Northern District of Illinois recently issued one of the first decisions applying a *force majeure* clause to excuse a commercial tenant's rental obligations in the wake of a covid-19 government-mandated shutdown. The court in *In re Hitz Restaurant Group*, 2020 WL 2924523 (Bankr. N.D. Ill. 6/3/2020), found that an executive order issued by the governor of Illinois limiting restaurants to carryout, curbside pickup, or delivery triggered the language of the lease, which specifically excused lease obligations in the event performance was "delayed, retarded, [or] hindered by… laws, governmental action or inaction [or] orders of government." As a result, the court partially excused the tenant from its obligation to pay rent.

Hitz Restaurant Group operated a restaurant in Chicago and leased its space. Hitz did not pay its rent for February 2020 and, at the end of the month, filed a Chapter 11 bankruptcy petition. Hitz then did not pay any of its postpetition rent for March, April, May, or June, notwithstanding the fact that section 365(d)(3) of the Bankruptcy Code requires a debtor to timely perform all rental obligations under a lease arising after the filing. The landlord moved the bankruptcy court to order Hitz to pay postpetition rent and "to timely perform all future rent obligations."

The *force majeure* clause in Hitz's lease provided that the "Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by… laws, governmental action or inaction, orders of government…. Lack of money shall not be grounds for Force Majeure." The bankruptcy court found that the "shelter in place" order "unambiguously" triggered the *force majeure* clause in the lease, as it constituted both "governmental action" and an "order of the government."

The landlord argued that rent was still payable since the tenant's failure to perform was simply due to a lack of money, which was expressly carved out of the *force majeure* clause. The court rejected the argument and agreed with the tenant that the executive order, as well as subsequent orders extending the limitation on restaurant activity, was the proximate cause of the tenant's inability to pay rent, since it impeded the tenant's ability to fully operate and generate revenue.

Since the tenant was not forced to completely shut down, the court found that the tenant's "obligation to pay rent is reduced in proportion to its reduced ability to generate revenue due to the executive order." The tenant was required to pay only 25 percent of the rent for the periods during which restrictions applied since the tenant was limited to carryout, curbside pickup, and delivery, which comprised approximately 25 percent of the premises. Notably, the court wanted to reduce the amount of rent owed by the amount of revenue lost, but the parties failed to provide that information to the court.

The *Hitz* decision is significant. It is not only a case of first impression in a developing area of law, but also stands for the proposition that covid-19 closure orders are the type of "governmental action" that excuses performance under a *force majeure* provision. Most states' governors have issued similar orders restricting or prohibiting business activities for tenants. Some of the other key takeaways from the decision include the following:

■ **The language of the lease matters.** The court based its ruling on the specific language of the agreement, underscoring the need for carefully drafted leases. Like any other contract provision, the specific terms of the *force majeure* clause controls, and the lease in *Hitz* did not have language providing that the payment of rent is required notwithstanding a *force majeure* event. It only stated that a "lack of money" would not be grounds for *force majeure*. Additionally, landlords should ensure that leases include a provision that makes the obligation to pay rent an obligation independent of all other covenants in the contract.

■ **The tenant was afforded temporary relief under broad language.** It is noteworthy to observe that the *force majeure* event in *Hitz* was not the pandemic itself but the government shutdown order, as the lease defined an excuse event to consist of "governmental action" or "orders of government." From the landlord's perspective, explicit qualifiers (not broad categories) should be used in leases to narrowly detail the circumstances under which performance may be excused. It is also worth noting that the rent relief afforded the tenant applied only for so long as the government order precluded full use of the premises.

■ **Force majeure clauses are (and remain) strictly and narrowly construed.** The substance of the *Hitz* ruling does not depart from principles that have been applied in the pre-covid era, namely that *force majeure* clauses are strictly and narrowly construed. Language matters, and drafting provisions that have historically been viewed as "boilerplate" now require increased attention.

■ **A partial excuse of performance may be found appropriate if limited uses are allowed.** The *Hitz* court found that the restaurant tenant's "obligation to pay rent is reduced in proportion to its reduced ability to generate revenue due to the executive order." The court might have reached a different result if the lease was an office lease, depending on the language of the applicable order and permitted use. The concept of tying rent amounts to allowable tenant use could prove to be a serious point of contention in future litigation, as courts confront the practical effects of various state orders.

■ **Courts may be willing to go to extraordinary lengths to fashion equitable remedies to deal with the unprecedented restrictions created by covid-19.** The court in *Hitz* rejected the landlord's attempt to reframe tenant's argument as an inability to pay rent due to a "lack of money," which would have been excluded as a viable excuse pursuant to the *force majeure* provision. In doing so, the court embraced the tenant's position that the proximate cause of its inability to pay rent stemmed from the executive order and its impact on the business. Similarly, recent decisions in other cases, such as *Pier I Imports, Inc.*, Bky Case No. 20-30805 (Bankr. E.D. Va. April 2020), have permitted the tenant to defer the payment of rent to certain landlords, emphasizing that "Covid-19 presents a temporary, unforeseen and unforeseeable glitch in the administration of the Debtors' Bankruptcy Cases."

Prior to the pandemic, *force majeure* clauses were viewed as boilerplate provisions buried in contracts and worthy of little attention. The historic enormity of covid-19 and its economic impact has placed these clauses at issue. Now lawyers are spending a significant amount of time parsing the language of these provisions to guide clients on the impact of the pandemic on their business agreements. Courts will undoubtedly continue to be required to address the specific language of the *force majeure* clauses in addressing requests for relief under leases and other agreements. ▲

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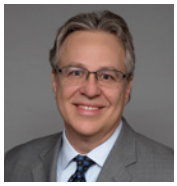

One Size Does Not Fit All

Blended and nontraditional families raise the stakes for creating and managing estate plans

By Jennifer S. Santini and B. Steven Messick

In the spirit of full disclosure, we started this article in the beginning of the year before the coronavirus forced a global shutdown and the fear of catching, and potentially dying from, covid-19 became a top-of-mind worry. But as one can imagine, a global pandemic adds a lot of urgency the question of "What happens when I die?" People quickly realize how important it is to ensure their estate passes properly to their loved ones. Given how dramatically the makeup of American families has changed, relying on the intestacy statutes can be disastrous. In 1960, 73 percent of children were born into households with two married parents in their first marriage.[1] As of 2015, that number was 43 percent.[2] For the first time in American history, children are more likely to live in a household with one or two unmarried parents, with half-siblings, or with parents who have had prior spouses.

In light of these changing family demographics, particular attention must be paid to the family estate plan. Failure to do so may result in unintended and detrimental consequences for the survivors.

Intestacy basics

Everyone has an estate plan. The difference lies in whether you choose the plan, or the state does. If you die without a will, trust, or other transfer-on-death designations (hereinafter, "testamentary plan"), the intestacy statutes found in Article 2 of Chapter 524 of Minnesota Statutes govern the distribution of your estate.

For the average American family, the intestate statutes govern the distribution of one's estate in the manner they most likely would want. In simplistic terms, if there is a surviving spouse and all of the decedent's children are all children of the surviving spouse (and the surviving spouse does not have any children from outside the marriage to decedent), then the surviving spouse takes it all (with the exception of the homestead).[3] When it comes to contemporary family situations, however, there are numerous drawbacks to intestacy. This article explores some of the more prominent issues and planning techniques to avoid them.

Exempt assets

Minnesota statutes carve out a certain amount of assets from the top of an individual's estate that are exempt from creditors, whether the testamentary plan is governed by a will, intestate succession, or by way of elective share.[4] These exempt assets are designated in Minn. Stat. §524.2-402 – Descent of Homestead, Minn. Stat. §524.2-403 – Exempt Property, and Minn. Stat. §524.2-404 – Family Allowance.

If the decedent leaves a surviving spouse, the spouse is entitled to property not to exceed $15,000 in value (typically satisfied in household goods or cash) and one automobile, regardless of value.[5] If there is no surviving spouse, then the same exempt property is protected for the decedent's children[6]—except, if the children are adults, the exempt property is subject to claims such as Medical Assistance, General Assistance, costs of administration, funeral expenses, and claims under federal law.[7]

In addition to the homestead (which will be explored in more detail below) and the exempt property, a surviving spouse is entitled to a family allowance as maintenance for a period of time depending on whether or not the estate is solvent.[8] The amount of allowance is not to exceed $2,300 per month and is determined by the personal representative.[9] The allowance is paid for a period of 12 months if the estate is insolvent and 18 months if the estate is solvent.[10] The family allowance is also protected from creditors, again regardless of whether the testamentary plan is governed by a will, intestate succession, or by way of elective share.[11] If there is no surviving spouse, the family allowance is extended to the decedent's "minor children whom the decedent was obligated to support, and children who were in fact being supported by the decedent…"[12]

The protections of the exempt property and family allowance, however, are dependent on the legal relationship of a surviving spouse and/or children. These protections are not afforded, for example, to individuals who have been living together for a decade or more, who are engaged to be married, or other descendants and heirs.

Descent of homestead

The other asset that receives significant protection is the decedent's homestead. Minn. Stat. §524.2-402 protects the homestead from creditors, in the event there is a surviving spouse and/or descendants of the decedent, but for "valid charges on it at the time of decedent's death…" or claims for state hospital care or Medical Assistance benefits.[13] While the homestead protection is extended to the decedent's descendants and not just children, the statute does limit the disposition to the surviving spouse to a life estate if there are any descendants of the decedent, regardless of whether the descendants are also descendants of the surviving spouse.

A situation that frequently occurs is when only one spouse owns title to real property. Often this occurs when one spouse owns real property before marriage. Take, for example, the following scenario: Pat owns Purple Acre[14] as a homestead and later marries Kris.[15] Pat has one child from a prior relationship, and Kris has two children from a prior marriage.

Pat, for all practical purposes, is the only other parent that Kris's children know. Pat and Kris refinance Purple Acre after the marriage to obtain a better interest rate. During this process, Pat does not grant a deed to Kris in Purple Acre and does not have a testamentary plan. In most refinance situations, the lender does not require, nor advise, the fee owner to add the spouse as a fee owner, as fee ownership is not required to commit oneself to be an obligor on a promissory note and the lender cannot dispense legal advice.

Pat attends a Green Bay Packers game at Lambeau Field, slips on a mixture of spilled Miller Lite and brandy Manhattan, and dies from head trauma.

Because Pat does not have a testamentary plan, Kris has only a life estate in Purple Acre, and only Pat's child has a remainder interest in Purple Acre. Kris's children do not have an interest in Purple Acre, and Kris, as a life tenant, cannot readily sell or otherwise encumber Purple Acre.[16] Further, Kris must maintain Purple Acre in reasonable repair and must maintain payments on the existing mortgage.[17]

This scenario also applies to a situation where neither Pat nor Kris had children prior to their marriage, and later have a joint child(ren). In this event, Kris would still have only a life estate in Purple Acre, and their children would have the remainder interest.[18]

There are several ways to keep this from happening. The simplest is for Pat to execute a conveyance deed to Kris granting Kris joint tenancy with rights of survivorship.[19] This would allow Kris to be the sole fee owner of Purple Acre upon the recording of an affidavit of survivorship.[20]

If Pat wanted Pat's natural child or Pat's stepchildren to share in the ownership of Purple Acre with Kris, Pat could have executed a transfer-on-death deed naming the Kris and the children as beneficiaries.[21] Pat could also have made a specific devise of Purple Acre to Kris and the children in a last will and testament or could have placed Purple Acre in a revocable or irrevocable[22] trust naming Kris and the children as transferees.[23]

Share of the spouse

After the exempt assets—homestead, exempt property and family allowance—are carved out, the intestate statutes outline how the remainder of the estate is distributed. When a decedent has surviving descendants who are not also descendants of the surviving spouse, the surviving spouse is limited to the first $225,000, plus one-half of any remaining balance of the decedent's intestate estate.[24] The award to the surviving spouse is not based upon the length of marriage, nor any other precondition.

Using the facts in the example of Pat and Kris above, assume that Pat had several bank and brokerage accounts solely in Pat's name with no payable-on-death designations, and the balance of said accounts was in excess of $400,000. Kris would be entitled to the first $225,000 of the accounts, plus $87,500, with the other $87,500 going to Pat's child born prior to Pat's marriage to Kris.[25]

If Pat wanted Kris to inherit the entire estate upon Pat's death, then the proper beneficiary designations (or pay-on-death/transfer-on-death designations) should have been made on the accounts.

Will executed during previous marriage

An issue that may arise is when one spouse executed a last will and testament when married to their previous spouse and did not later revoke or otherwise amend the will to reflect the new marriage.

According to Minn. Stat. §524.2-804, any bequest to the former spouse in a will, so long as a decree of divorce or annulment is entered, is revoked.[26] However, the will is still valid as to the bequests made to anyone other than the former spouse.

Continuing the use of Kris and Pat, assume that Kris and Pat were married for only one year, and Pat executed a will several years ago naming Pat's former spouse primary devisee, and Pat's child with the former spouse as the sole remainder devisee.

In this scenario, Pat's child from Pat's prior marriage would be the sole beneficiary of Pat's estate. For Kris to have any share in Pat's estate, Kris would have to make an election as surviving spouse under Minn. Stat. §524.2-202. Kris would be limited to receiving only 3 percent of Pat's estate. Section 524.2-202 provides increasing percentages based upon years of marriage. Additionally, it is the augmented estate that is divided—meaning all assets of the decedent, regardless of whether the decedent made payable-on-death designations to some or all the assets.[27]

To avoid this scenario, Pat should have drafted a new will revoking the former one, or simply revoked the prior will so Kris, as surviving spouse, could inherit certain assets under the intestacy laws.

Dissolution severs joint tenancy

Another issue that can arise with a past dissolution of marriage is a scenario in which real property continues to be owned by the former spouses and/or sold following the dissolution and one of the parties dies before the sale. It is important that the divorce decree address how the property should be titled during such time. However, it is also important to understand that under Minn. Stat. §500.19, "A decree of dissolution of a marriage severs all joint tenancy interests in real estate between the parties to the marriage,

except to the extent the decree declares that the parties continue to hold an interest in real estate as joint tenants."[28] If the property is to continue to be held as joint tenancy, the divorce decree should explicitly declare such ownership. Failure to properly address this issue under the divorce decree can have significant and unintended consequences in the event either party dies before the transfer or sale of such property—because in that event the property is held as tenants-in-common and each party can decide how to leave their one-half interest. If there is no further planning, the decedent's one-half interest will be governed by the intestacy laws, which can complicate the ownership of the property and force a costly administration to clean up the title.

No common law marriage

As noted previously, the protections afforded by the intestate statutes are predicated on the legal relationship of a surviving spouse and/or children. Minnesota does not recognize common law marriage, so it doesn't matter if a couple has been living together or in a relationship for many years. Conversely, though, the laws also do not provide for automatic revocation of bequests or beneficiary designations if the individuals are no longer in a relationship at the time of someone's death. If a couple provided for one another under a will or beneficiary designations, but never legally married, and the relationship is terminated without updates to their estate plans, the former partner will not automatically be cut out of the plan if one of the individuals passes away.

Who are the heirs?

The determination of children or heirs is also becoming more complex due to changes in relationships within families as well as the use of assisted reproductive technology. When spouses both bring children to a marriage from previous relationships (and especially when the children are young and all raised in the same household), they tend to view all the children equally. However, a stepchild does not inherit from a stepparent's estate under the intestacy laws. In our example of Pat and Kris, if Kris passes away first and leaves everything to Pat through a testamentary plan but Pat does not do any proper planning, Kris's children would not inherit from Pat's estate upon Pat's passing. Pat would have to include Kris's children under beneficiary designations in a will or a trust to ensure the assets are divided equally among Pat's one child and Kris's two children.

Matters get more complex still when you are dealing with multiple generations and inheritances through grandparents or more remote ancestors—particularly when it comes to children born from assisted reproduction. Minn. Stat. §524.2-120 outlines the identification of a parent-child relationship for children conceived from assisted reproduction. While the statute attempts to cover variations, one scenario that can be imagined (albeit extreme) is the following.[29]

Man dies and leaves a surviving spouse and frozen sperm. Before the man's passing, the marriage was going through turmoil and the parties were considering separating and potentially divorcing, but no divorce proceeding was pending at the time of his death. After several years of grief, the surviving spouse uses the frozen sperm to conceive another child on her own. Would that child be a descendant of the deceased man's parents?

Minn. Stat. §524.2-120 subd. 5 states that a "parent-child relationship is presumed to exist between a child of assisted reproduction and a man who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child." It goes on to lay out how the individual can "consent" and that consent is deemed to have occurred if the man "intended to function as the other parent of the child no later than two years after the child's birth but was prevented from carrying out that intent by death, incapacity, or other circumstances, if that intent is established by clear and convincing evidence."[30] Minn. Stat. §524.2-120 subd. 7 states that for purposes of satisfying consent under subdivision 5, clause (2), "If the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending, in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies subdivision 5, clause (2), item (ii)."[31]

If the man's parents then pass away intestate, would this child now be included

as one of their heirs? The man and his spouse had been married before the man passed away and there was no divorce proceeding pending. Presumably he had consented to the use of his sperm by his spouse. But was that only during his lifetime? Given the turmoil in his marriage, would he have consented during his lifetime to his spouse's conceiving a child with the use of his sperm at that time?

Furthermore, Minn. Stat. §524.2-120 subd. 10 excludes children who are posthumously conceived if the child was not in gestation before the death of the person.[32] In the example above, the grandparents could believe that the grandchild conceived by assisted reproduction after their son had died was their heir and therefore that the intestate statutes would provide for that grandchild. But in fact, that grandchild would not be an heir for purposes of the statutes.

DNA NPE[33]

The availability of at-home DNA tests raises additional issues related to the determination of heirs. As more people trace their ancestry through DNA tests, family ties are being tested and family secrets are being exposed.[34] Access to these tests is revealing in some cases that the people they thought were their parents or relatives are not. When people rely on intestate statutes, they can encounter unintended consequences—leaving assets to the "wrong" people and disinheriting the "right" people.

Obviously, the answer to the problem is to draft and implement a proper testamentary plan to address any issues. But it is important to go even further and review/update testamentary plans over time to ensure that they reflect the testator's wishes given the changes in our societal definitions of "family" and ways to "create" a family. While it is often said that an old will or trust is not invalid just because of its age, it can fall short depending on its terms and definitions. When leaving a bequest under a will or trust, it might be made to a class of people such as children, descendants, or heirs determined according to the intestacy statutes. But according to Minn. Stat. 524.2-123, if the will or other instrument was executed before January 1, 1996, "the laws to be applied shall be in accordance with the laws of intestate succession in effect on the date of the will or other instrument, unless the will or instrument directs otherwise."[35] Those laws may not include individuals that the testator might otherwise want to include in his or her plan.

People plan for many things in their lives that may never happen. As the old cliché goes, death is one of two certainties in life. Yet most American adults still do not have a plan in place.[36] The intestate statutes may work for many families, but especially where blended or nontraditional families are concerned, relying on them can have significant consequences to surviving loved ones. Encouraging families to plan and to review those plans often is the best way to ensure surviving loved ones are provided for and protected. ▲

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Notes

1 Pew Research Center, *Parenting in America*, 12/15/2015: *https://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/*
2 *Id.*
3 See Minn. Stat. §524.2-102.
4 See Minn. Stat. §524.2-403 subd. (e).
5 See Minn. Stat. §524.2-403 subd. (a)(1) & (2).
6 See Minn. Stat. §524.2-403 subd. (b).
7 See Minn. Stat. §524.2-403 subd. (f).
8 See Minn. Stat. §524.2-404.
9 See Minn. Stat. §524.2-404 subd. (b).
10 See Minn. Stat. §524.2-404 subd. (a)(1) & (2).
11 See Minn. Stat. §524.2-404 subd. (d) & (e).
12 See Minn. Stat. §524.2-404 subd. (a).
13 See Minn. Stat. §524.2-402 subd. (c).
14 While our Vikings failed to pull off the "Minneapolis Miracle" this season, we are eternally hopeful 2020-21 will be the year for post-season glory!
15 Characters are intentionally gender-neutral.
16 In this scenario, Kris could only sell the life estate, which is generally not marketable.
17 *Younggren v. Younggren*, 556 N.W.2d 228 (Minn. Ct. App. 1996).
18 See Minn. Stat. §524.2-402(a)(2). This statute does not have an exception for descent of homestead to surviving spouse, even if all descendants of decedent are also descendants of the surviving spouse.
19 See Minn. Stat. §500.19.
20 See Minn. Stat. §507.092.
21 Although, it would be inadvisable to suggest putting four people on the title to the property (Kris, Pat's child, and Kris' two children).
22 While Pat could deed the homestead to an irrevocable trust, there are several factors to consider to determine whether this is advisable and to ensure it is done properly, such as tax consequences and future control of the property.
23 Any grant, whether partial or full, to persons other than the grantor's spouse is still subject to the surviving spouse's elective share as stated in Minn. Stat. §524.2-201 to 215.
24 See Minn. Stat. §524.2-102.
25 This assumes that the bank and brokerage accounts were Pat's only assets, and that there are no debts or claims against Pat's estate, which would be paid out by priorities listed in Minn. Stat. §524.3-805, and subject to exceptions in Minn. Stat. §§524.2-403 and 524.2-404.
26 Section 524.2-804 treats the former spouse as predeceasing decedent.
27 See Minn. Stat. §524.2-203.
28 See Minn. Stat. §500.19.
29 This scenario will identify genders to follow the statute more easily.
30 See Minn. Stat. §524.2-120 subd. 5(2)(ii).
31 See Minn. Stat. §524.2-120 subd. 7(c).
32 See Minn. Stat. §524.2-120 subd. 10.
33 NPE stands for "'not parent expected' or the "genetic genealogy term 'nonpaternity event'"). See *https://www.theatlantic.com/science/archive/2018/07/dna-test-misattributed-paternity/562928/*
34 *https://www.theguardian.com/lifeandstyle/2018/sep/18/your-fathers-not-your-father-when-dna-tests-reveal-more-than-you-bargained-for*
35 See Minn. Stat. §524.2-123.
36 *https://www.aarp.org/money/investing/info-2017/half-of-adults-do-not-have-wills.html*

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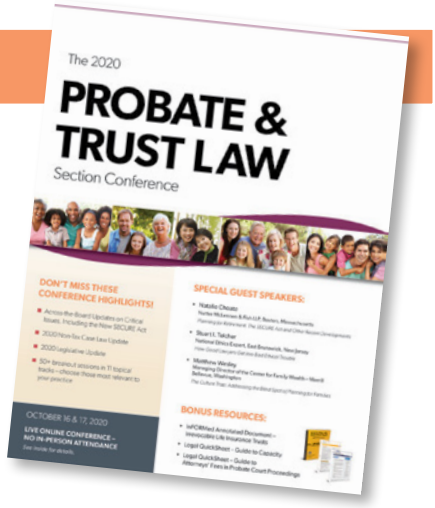

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TOWARD EQUALITY

Bostock v. Clayton County and the future of the MHRA

By Laura Farley

On June 15, 2020, the United States Supreme Court clarified the breadth of workplace protections under Title VII of the Civil Rights Act of 1964: An employer cannot fire or discriminate against an individual because of their sexual orientation or gender identity. The importance of *Bostock v. Clayton County* cannot be understated, and its nationwide impact is immediate and profound.

But here in Minnesota, those protections already exist under the Minnesota Human Rights Act (MHRA). Indeed, Minnesota was one of the first states to statutorily recognize a claim for "sexual orientation" discrimination in the workplace.

So does *Bostock* really matter in Minnesota?

Absolutely.

Although *Bostock* secures protections against discrimination because of an individual's sexual orientation and gender identity under Title VII, it also highlights the complications underlying the MHRA's once-progressive approach to the same protections.

Under the MHRA and Minnesota Supreme Court precedent, "sex discrimination" is distinct from "sexual orientation discrimination," which includes claims of discrimination because of one's gender identity. This artificial separation, however, is called into question by *Bostock*'s holding that sex discrimination undeniably encompasses discrimination based on gender identity and sexual orientation.

The Supreme Court's decision in *Bostock* is a massive win for civil rights, and it should encourage Minnesota to take another step toward equality by amending the MHRA to reflect a more contemporary understanding of sex, sexual orientation, and gender identity.

Statutory protections against sexual orientation and gender identity in the workplace: Title VII and the MHRA

Both federal and Minnesota laws provide protections against workplace discrimination. The statutory protections, though similar, have undergone different judicial interpretations, largely because Title VII does not expressly define "sex," whereas the MHRA defines "sex" separately from "sexual orientation." Analyzing the text of the statutes and their respective interpretations illustrates the importance—for better or worse—of the MHRA's definition of "sexual orientation."

Sex discrimination under Title VII before *Bostock*

Title VII makes it "unlawful… for an employer to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual… because of such individual's… sex."[1] Accordingly, an employer violates Title VII when it discriminates against an employee based in part on that individual's sex. But Title VII does not define "sex." Whether "sex" under Title VII includes gay or transgender individuals was widely debated, ultimately resulting in the circuit split that led to the Supreme Court's grant of *certiorari* in *Bostock*.[2]

Although judicial analysis of this question is complex, there are essentially two theories that courts employed to decide whether gender identity or sexual orientation are protected under Title VII: the "plain meaning" theory and the "sex-stereotype" theory of discrimination.[3]

Under the plain meaning theory of sex discrimination, courts considered whether Title VII's prohibition of sex discrimination contemplates the prohibition of gay or transgender discrimination as sex discrimination. This theory rests on an interpretation of the ordinary meaning of Title VII. Most federal circuit courts concluded that neither gay nor transgender individuals are a protected class under the plain meaning of Title VII.[4]

Under the sex-stereotype theory, courts considered whether gay or transgender discrimination is sex discrimination because it is based on gendered stereotypes. The sex-stereotype theory is derived from *Price Waterhouse v. Hopkins*,[5] in which a female senior manager was denied partnership because she was not "feminine" enough.[6] A plurality of the Supreme Court agreed that such stereotypical attitudes constitute sex discrimination under Title VII.[7] Despite this landmark decision, federal courts largely failed to extend this theory to gay or transgender individuals, often reasoning that a "gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII."[8]

Minnesota's divided approach: Sex discrimination and sexual orientation discrimination

The MHRA takes a different approach. Originally passed in 1955, the MHRA was amended in 1969 to protect employees from employment discrimination "because of" sex.[9] The MHRA's definition of sex is inclusive: "'Sex' includes, but is not limited to, pregnancy, childbirth, and disabilities related to pregnancy or childbirth."[10]

The Minnesota Legislature amended the MHRA again in 1993 to expressly prohibit discrimination on the basis of "sexual orientation." Using a now-outdated definition, the MHRA defines "sexual orientation" as "having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."[11]

Notwithstanding the dated language of the statute, the MHRA's definition of "sexual orientation" includes sexual orientation *and* gender identity, which conflates and confuses the two distinct concepts.[12] Although the fact that the Legislature prohibited sexual orientation and gender identity discrimination was groundbreaking in 1993, its language has proven problematic over time, with the effect of sidestepping (beneficial though long overdue) judicial scrutiny of the definition of "sex" under either a plain meaning or sex-stereotype theory of sex discrimination.

To illustrate these problems, one need look no further than *Goins v. West Group*.[13] Plaintiff Julienne Goins was a transgender woman whose assigned sex at birth was male. Before Goins began working for West Group's Minnesota office, a group of women complained to their supervisor that they were uncomfortable with Goins using the women's restroom because they believed Goins was biologically male.[14] Goins's supervisor immediately told her that she could not use the women's restrooms. Goins voiced her opposition to her supervisor's directive, but what followed was an incredibly difficult working environment for Goins, who refused to use the male-designated restrooms and went so far as to refrain from eating or drinking during the day to avoid using the restroom altogether. She occasionally used the women's restroom, though doing so resulted in a warning for violating the restroom policy. Goins complained that she felt harassed as a result of the policy but ultimately resigned from her employment, citing the unwelcome, stressful environment created by West Group's restroom policy.

Goins sued her former employer, alleging intentional sexual orientation discrimination and hostile work environment under the MHRA. Her claims were dismissed at summary judgment.

Goins appealed, and the Minnesota Court of Appeals reversed and remanded the district court's holding.[15] Recognizing that the MHRA prohibits discrimination on the basis of gender identity, and "does not require an employee to eliminate [such] inconsistency" between their gender identity and assigned gender at birth, the court of appeals held that Goins established her *prima facie* case of sexual orientation discrimination under the MHRA because "she was denied the use of a workplace facility based on the inconsistency between her self-image and her anatomy."[16]

The Minnesota Supreme Court accepted review and reinstated the district court's dismissal on summary judgment.[17] The Court—sidestepping fundamental principles of statutory interpretation—avoided a substantive evaluation of the MHRA's definitions of "sex" and "sex discrimination" under either the sex-stereotype or plain meaning theory. Instead, the Court decided that the restroom policy, based on an employee's "physical anatomy," was legal because it was based on "biological sex," not on "sexual orientation," which includes gender identity.

Put another way, *Goins* essentially used the MHRA's sexual orientation provision against those it was meant to protect. *Goins* thus resulted in a judicially created divide between "biological sex" and sexual orientation discrimination under the MHRA, without regard for the federally adopted plain meaning or sex-stereotype theories to interpret the term "sex."[18] This divide remains under the MHRA, but is called into question in light of the U.S. Supreme Court's June ruling in *Bostock*.

Bostock v. Clayton County

In *Bostock*, the Supreme Court granted *certiorari* on three cases to decide whether an employer can fire an individual because of their sexual orientation or gender identity.[19] Each of the cases involved an employer that admittedly fired a long-time employee for no other reason than the employee's sexual orientation or transgender status.

The first case involved Gerald Bostock, who was fired for conduct "unbecoming" of an employee shortly after he began participating in a gay recreational softball league. The 11th Circuit affirmed the dismissal of his claims, holding that Title VII does not prohibit employers from firing employees for being gay, based on a plain meaning theory.

In the second case, Donald Zarda was fired days after he mentioned to his employer that he was gay. The 2nd Circuit allowed his claims of discrimination on the basis of sex regarding his sexual orientation to proceed, relying on a theory of sex stereotyping.

The third case involved Aimee Stephens, who presented as male when hired, but was promptly fired after informing her employer that she planned to "live and work full-time as a woman." The 6th Circuit allowed her claims of discrimination on the basis of sex as a transgender woman to proceed, relying on a theory of sex stereotyping.

The Supreme Court, relying on the plain meaning theory, held that an employer who fires an individual merely for being gay or transgender violates Title VII. The Court then bolstered its analysis and explained why its holding was consistent with prior precedent.

Reliance on the ordinary meaning of Title VII

In concluding that gay and transgender individuals are protected from discrimination under Title VII, the Court found that it need only rely on "the straightforward application of legal terms with plain and settled meanings."[20] The Court considered the meaning of three key terms at the time they were included in Title VII back in 1964: "sex," "because of," and "discriminate."

While the contested definition of "sex" was central to the prior judicial debate over whether Title VII protected against sexual orientation and gender identity discrimination, the Court noted it need not elaborately define sex to reach its decision.

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Indeed, for the purposes of argument, the parties and the Court conceded that "sex" referred only to biological distinctions between male and female.

So rather than focusing on the definition of sex, the Court shifted its analysis to what Title VII says *about* sex. Leaning on prior definitions, the Court concluded that "because of" sex means "by reason" or "on account" of sex. This definition invokes the "simple and traditional" concept of but-for causation in disparate-treatment sex discrimination cases, which, as the Court explained, "is established whenever a particular outcome would not have happened 'but for' the purported cause." Put simply, if the plaintiff's sex was one but-for cause of discrimination, that is enough to trigger Title VII's protections.

Finally, turning to the term "discriminate," the Court noted that its definition in 1964 was the same as it is today: treating an individual worse than others who are similarly situated.

These definitions led the Court to conclude that the plain meaning of the statute creates a straightforward rule: An employer violates Title VII when it fires an individual employee based in part on sex.[21] Applied here, an employer violates Title VII when it fires an employee based on their sexual orientation or gender identity precisely because these concepts are "inextricably bound up with sex."

Bostock's lessons gleaned from three leading precedents

Although the Court takes great care to ensure the reader understands that its decision is based on the plain meaning of Title VII, the Court goes further and bolsters its analysis with three "familiar" lessons learned from three prior cases:[22]

First, "it's irrelevant what an employer might call its discriminatory practice." Second, "the plaintiff's sex need not be the sole or primary cause of the employer's adverse action." Third, "an employer cannot escape liability by demonstrating that it treats males and females comparably as groups."

These three lessons—though not new under *Bostock*—are incredibly helpful to litigants in analyzing discriminatory practices. Paired with *Bostock*'s ultimate holding, these lessons leave little room for disagreement. As the Court explained, "Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee," and "the consequence of that legislative choice" is clear: "An employer who fires an individual merely for being gay or transgender defies the law."

Impacts of Bostock *on Minnesota litigants and the MHRA*

The national impact of *Bostock* is immediate and far-reaching. The millions of individuals who live in the nearly 30 states without explicit protections for LGBT employees are now protected from discrimination under Title VII.[23] But *Bostock* begs a more difficult question for Minnesota: is it time to revisit the MHRA's definitions of "sex" and "sexual orientation"?

Put simply, the answer is yes.

Consider if Julienne Goins brought her claim now, under Title VII *and* the MHRA. Using *Bostock*'s guiding principles, the case should come out differently, which magnifies the aforementioned issues in the *Goins* interpretation of sexual orientation claims under the MHRA.

In *Goins*, the Minnesota Supreme Court concluded that an employer's policy designating restrooms based on "biological gender" is not discrimination against a transgender woman under the MHRA. But the Court made no significant effort to evaluate the plain meaning of "sex" or "sexual orientation" under the MHRA. *Bostock* fills in this judicial gap. Applying *Bostock*'s conclusion that gender identity is "inextricably bound up with sex" under the word's plain meaning, any policy discriminating against a transgender woman based on "biological sex" is plainly sex discrimination, arguably under both Title VII and the MHRA.

An employer may argue that the *Goins* Court dismissed Goins's claim because the restroom policy was based on "sex," not "sexual orientation," which includes gender identity under the MHRA, so the restroom policy couldn't be discriminatory. But this, too, is inconsistent with *Bostock*—discrimination against an individual because they are transgender *is* sex discrimination under the plain meaning of sex.

Further, consider an employer's possible pushback: The "restroom policy" is not discriminatory, as it simply requires men to use one bathroom, women another. But this argument does not hold under *Bostock*, which reminds us that "labels and additional intentions or motivations d[o]n't make a difference," because "it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it."

This simplified illustration depicts some of the complications *Goins* creates for claimants who bring a sexual orientation claim under the MHRA simultaneous with a sex discrimination claim under Title VII.

Despite the fact—or perhaps because of the fact—that Minnesota was an early adopter of civil rights protections on the basis of sexual orientation, Minnesota jurisprudence has come up demonstrably short in applying these protections to the workplace. Still, "[t]he MHRA is to be construed liberally [] with reference to federal law," and there is always hope for progress.[24] Indeed, despite *Goins*'s failure to address the argument, the MHRA's definition of "sex" should be interpreted as a broad, inclusive definition, similar to Title VII as articulated in *Bostock*.

Nevertheless, it is incumbent upon the Minnesota Legislature to amend the MHRA and eliminate the problematic division between "sex" and "sexual orientation" in favor of a new definition of "sex" that also includes protections against discrimination based on sexual orientation, gender identity, and gender expression.[25]

Regardless of what claim is brought under which law, this much is clear after *Bostock*: It is impossible to discriminate against a person for being gay or transgender without discriminating against that individual based on sex, because sexual orientation and gender identity are "inextricably bound up with sex."

The best path forward for the MHRA is to amend its definitions of sex and sexual orientation to align with the statute's purpose—to broadly protect individuals against discrimination. Hopefully, in the wake of *Bostock*, the Minnesota Legislature will take another necessary step on the long road toward equality. ▲

Notes

[1] 42 U.S.C. §2000e-2(a)(1).

[2] Most cases involve an individual who is discriminated against because of their sexual orientation or because they are transgender. The 2nd and 7th Circuits have recognized protections for individuals based on their sexual orientation and the 6th Circuit has recognized protections for transgender individuals. While separate claims, the Supreme Court analyzed discrimination against gay and transgender individuals jointly, as each status is "inextricably bound up with sex" under Title VII "because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

[3] *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) (explaining the "*per se*" or "plain meaning" theory versus the "sex stereotype" theory).

[4] *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2007); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir.1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F.Supp.2d 653, 658 (S.D. Tex. 2008) (collecting cases); Sweet v. Mulberry Lutheran Home, No. IP02–0320–C–H/K, 2003 WL 21525058, at *2 (S.D. Ind. 6/17/2003) ("discrimination on the basis of sex means discrimination on the basis of the plaintiff's biological sex, not sexual orientation or sexual identity, including an intention to change sex").

[5] 490 U.S. 228 (1989).

[6] 490 U.S. at 235.

[7] *Id.* at 251. Therefore, "an adverse employment decision based on 'gender non-conforming behavior and appearance' is impermissible under Price Waterhouse." *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1039 (8th Cir. 2010).

[8] *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) (affirming dismissal of a Title VII claim and rejecting gay male plaintiff's sex-stereotyping arguments); *Bibby v. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001) (rejecting a possible sex-stereotyping theory and holding that gay male plaintiff had no claim under Title VII).

[9] Minn. Stat. §363A.08.

[10] Minn. Stat. §363A.02 subd. 42.

[11] Minn. Stat. §363A.02 subd. 44. In an independently problematic clause, the MHRA also states that "'[s]exual orientation' does not include a physical or sexual attachment to children by an adult." The MHRA also includes a variety of exemptions to allow certain entities, like scouting organizations, to discriminate against individuals based on their sexual orientation.

[12] For further discussion, see *https://www.mnbar.org/hennepin-county-bar-association/resources/hennepin-lawyer/articles/2020/03/04/the-groundbreaking-minnesota-human-rights-act-in-need-of-renovation* . "Sexual orientation" can be understood as "an inherent or immutable enduring emotional, romantic or sexual attraction to other people," whereas gender identity can be understood as "one's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth." *https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions* .

[13] 635 N.W.2d 717 (Minn. 2001).

[14] There was no evidence that any of the women had been in the restroom at the same time as Goins.

[15] *Goins v. West Group*, 619 N.W.2d 424 (Minn. Ct. App. 2000).

[16] *Id.* Likewise, the court of appeals reversed the district court's grant of summary judgment on the hostile work environment claim, as it "was based primarily on the erroneous conclusion that Goins failed to make a prima face case of sexual orientation discrimination."

[17] *Goins v. W. Grp.*, 635 N.W.2d 717 (Minn. 2001).

[18] The Minnesota Supreme Court, of course, is not bound by federal interpretations of Title VII for purposes of its own interpretations under the MHRA. That said, "[t]he MHRA is to be construed liberally [] with reference to federal law." *Id.* at 726.

[19] *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). The Court refers to sexual orientation discrimination as discriminating against gay or homosexual individuals and refers to gender identity discrimination as transgender discrimination. *Id.*

[20] Although the Court did not rely on a sex-stereotype theory, *Price Waterhouse* is reinforced by *Bostock*, which rearticulated that an individual employee's sex "is not relevant to the selection, evaluation, or compensation of employees."

[21] In reasoning otherwise, the dissent argued for a different definition of discrimination, one that is categorical rather than individual. But, as the Court explained, Title VII's focus on the word "individual" throughout the operative language is dispositive.

[22] *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Los Angeles Dept of Water and Power v. Manhart*, 435 U.S. 702 (1978); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

[23] As Justice Alito's dissent pointed out, the Court's logic in *Bostock* should apply to over 100 federal statutes that bar sex discrimination—including crucial provisions in education, housing, and health care.

[24] *Goins v. W. Grp.*, 635 N.W.2d 717, 726 (Minn. 2001).

[25] In so doing, amendments should eliminate language stating the State of Minnesota "does not condone[] homosexuality" under Minn. Stat. §363A.27; the offensive language relating to sexual attraction to children under Minn. Stat. §363A.03; and the arbitrary exemptions for nonpublic service organizations, which allows certain entities to discriminate based on sexual orientation. Minn Stat. §363A.20 subd. 3.

Landmarks in the Law

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

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CRIMINAL LAW

JUDICIAL LAW

Implied consent: Whether an advisory sufficiently informs a person that refusal to submit to a breath test is a crime depends on whether the advisory, considered in its context as a whole, is misleading or confusing. Appellant was arrested for DWI and read a breath test advisory that stated: "This is the breath test advisory… Minnesota law requires you to take a test to determine if you are under the influence of alcohol. Refusal to take a test is a crime…" Appellant was then offered and submitted to a breath test, revealing a BAC over the legal limit, and his driving privileges were revoked. Appellant sought judicial review of the revocation, arguing the officer did not properly inform him of his rights and the consequences of taking or refusing a test, because Minn. Stat. §169A.51, subd. 2, provides that "refusal to submit to a *breath* test is a crime," but the officer told appellant refusal to submit to "a test" is a crime. The district court sustained the revocation and appellant appealed.

Section 169A.51, subd. 2, unambiguously requires officers to "inform" a person "that refusal to submit to a breath test is a crime." To "inform" a person requires that officers make the person aware that refusal to submit to a breath test is a crime. In the context of advisory given in this case, the court of appeals concludes the officer did sufficiently inform appellant that refusing to take a breath test would be a crime. The officer called the advisory a "breath test advisory," asked appellant to submit to only a breath test, and did not mention or request blood or urine tests. Moreover, no legal authority requires officers to give a verbatim recitation of section 169A.51, subd. 2. The district court properly sustained the revocation of appellant's driving privileges. ***McCormick v. Comm'r of Pub. Safety***, A19-1466, 2020 WL 2108103 (Minn. Ct. App. 5/4/2020).

Firearms: Whether a flare launcher is a firearm depends on whether the defendant used or intended to use it as a weapon. Respondent was charged with possession of a firearm by an unauthorized person after police responded to a theft report and found respondent with a loaded flare launcher. The district court granted respondent's motion to dismiss the firearm charge, concluding a flare launcher is not a firearm because it is not designed to be used as a weapon.

The court of appeals holds that whether a flare launcher is a firearm is a question of fact for trial and depends on the defendant's use or intended use of the flare launcher. Respondent was charged under Minn. Stat. §624.713, subd. 1(2), which prohibits a person previously convicted of a crime of violence from possessing a "firearm." "Firearm" is not defined, but case law makes clear that it is a "weapon that uses explosive force."

The district court properly determined that a flare launcher meets the "explosive force" requirement, because it propels a projectile by the combustion of gunpowder or other explosive. A flare launcher is not designed as a weapon, but may become one depending on how it is used. The record does not make clear how respondent intended to use the flare launcher, so a fact issue remains for resolution at trial. Reversed and remanded. ***State v. Glover***, A19-1656, 2020 WL 2108108 (Minn. Ct. App. 5/4/2020).

Sentencing: Sentences permitted for both drive-by shooting at an occupied vehicle and second-degree assault of a victim outside the vehicle. During an argument with C.L.G., appellant fired a handgun in C.L.G.'s direction, but hit the vehicle next to C.L.G., containing two adults and a child. Appellant pleaded guilty to drive-by shooting at an occupied vehicle, second-degree assault against C.L.G., and reckless discharge of a firearm. He was sentenced to 48 months for the drive-by shooting and 36 months for the assault. On appeal, the

question is whether the drive-by shooting and assault offenses arose out of a single behavioral incident and, therefore, whether the district court erroneously imposed multiple sentences. The court of appeals affirmed appellant's sentences, concluding that the offense of drive-by shooting at an occupied vehicle does not constitute an offense against each occupant of the vehicle, so sentences for both the drive-by shooting and assault convictions were not prohibited, even if both arose out of a single behavioral incident involving the same victim.

Minn. Stat. §609.035, subd. 1, states that a person may be punished for only one offense if their "conduct constitutes more than one offense under the laws of this state." Case law has clarified that "a person may be punished for only one of the offenses that results from acts committed during a single behavioral incident and that did not involve multiple victims." The Supreme Court previously held in *Ferguson*, 808 N.W.2d 586 (Minn. 2012), that section 609.035 does not prohibit multiple sentences for drive-by shooting when the same conduct (the shooting) also constitutes assault. *Ferguson* involved counts of second-degree assault and drive-by shooting at an occupied building. The court held that a single count of drive-by shooting at an occupied building does not constitute a crime against each building occupant.

Here, the Supreme Court extends *Ferguson*'s holding to the offense of drive-by shooting at an occupied vehicle. Drive-by shooting at an occupied building and drive-by shooting at an occupied vehicle share essentially identical elements and the drive-by shooting statute does not distinguish between the two offenses. Appellant's "sentences comply with [the] holding in *Ferguson* that a single count of drive-by shooting is effectively a victimless crime." Thus, appellant received one sentence for his victimless offense and one for his offense against C.L.G. The district court properly sentenced appellant for both offenses. ***State v. Branch***, 942 N.W.2d 711 (Minn. 5/6/2020).

■ **Sentencing: When determining whether a prior conviction has decayed, the current offense date must be established by the factfinder or through the defendant's admission.** Appellant pleaded guilty to one count of first-degree criminal sexual conduct in 2019 for conduct the complaint alleged occurred between 2012 and 2018. Appellant argued it occurred in 2015. He had a prior first-degree criminal sexual conduct conviction from 1994, for which he received a stay of imposition that expired on 3/11/2014, and for which he received three criminal history points. On appeal, appellant argues that he is entitled to resentencing, because a change in the sentencing guidelines regarding when a prior conviction decays reduces his criminal history score.

The sentencing guidelines were amended in 2019, before appellant's case was final. The decay factor section now provides that, when computing the criminal history score, "a prior felony sentence or stay of imposition following a felony conviction must not be used if all of the following, to the extent applicable, occurred before the date of the current offense: (1) the prior felony sentence or stay of imposition expired or was discharged; (2) a period of 15 years elapsed after the date of the initial sentence following the prior conviction; and (3) if the prior felony sentence was executed, a period of 15 years elapsed after the date of expiration of the sentence." Minn. Sent. Guidelines 2.B.1.c. Requirement (3) does not apply to appellant, as his sentence for the 1994 conviction was not executed, and requirement (2) is met. The parties disagree as to whether appellant's stay of imposition in 1994 was discharged before the date of the current offense.

Appellant pleaded guilty to a single offense occurring sometime between 1/1/2012, and 3/26/2018, but he did not specifically admit to committing an act between 1/1/2012, and 3/11/2014, the time period before he was discharged from probation on his 1994 conviction. A specific offense date is necessary to complete the decay factor analysis. No jury made a finding as to the specific offense date, nor did appellant admit to an offense date. The case is reversed and remanded for a determination of appellant's current offense date and resentencing. ***State v. Woods***, A19-1061, 2020 WL 2517077 (Minn. Ct. App. 5/18/2020).

■ **Search and seizure: Examination of a hotel registry is a search that must be supported by a reasonable, articulable suspicion of criminal activity.** Without a warrant or any individualized suspicion of criminal activity, police obtained a hotel guest list from the hotel's clerk and learned appellant had rented a room for six hours and paid with cash. This prompted police to check appellant's criminal history, where they discovered numerous drug, firearms, and fraud arrests. Appellant allowed police to enter his room, and police observed a large amount of cash, two printers, and several envelopes. After obtaining a search warrant, police found several suspicious paychecks, a large amount of cash, and check-printing paper. The district court denied appellant's motion to suppress evidence obtained from his hotel room and convicted appellant of check forgery and offering a forged check after a stipulated evidence trial. The court of appeals affirmed, holding appellant could not challenge the police's examination of the guest registry because he did not have a reasonable expectation of privacy in it.

First, the Supreme Court determines that law enforcement's suspicionless examination of a guest registry is a search. A person's very presence at a hotel may be a sensitive piece of information, information that affords that person a reasonable expectation of privacy in the hotel's guest registry. Although the registry includes seemingly public information, such as a guest's name and address, the act of recording that information in the registry "creates sensitive location information."

Second, the Court holds that law enforcement must at least have a reasonable, articulable suspicion to search a guest registry's sensitive location information. This standard strikes the appropriate balance between an individual's privacy rights and "the government's significant interest in proactively addressing the serious criminal behavior that often takes place in hotels."

Third, the Court examines Minnesota's hotel guest registry statutes to determine whether they give law enforcement unfettered access to guest registries in violation of the Constitution. Minn. Stat. §327.12 requires that registries be "open to the inspection of all law enforcement officers," but is silent as to what standard law enforcement must meet to search a registry. Section 327.10 requires that registries "be… always accessible for inspection by proper authorities," which the Court interprets to mean that the registries be accessible at any time of day, not on every occasion regardless of law enforcement's suspicion. Thus, the Court finds the guest registry statutes, sections 327.10-.13, constitutionally valid.

Finally, the Court addresses the admissibility of the evidence seized from appellant's hotel room. It is undisputed that law enforcement had no individualized suspicion when they examined the guest registry at appellant's hotel, making the search of the registry in this case illegal. The Court finds the evidence subsequently found in appellant's hotel room to be fruit of the poisonous tree. If police had not illegally searched the registry, they could not have run a background check, would not have been able to find

appellant's room and perform a "knock and talk," and could not have applied for a search warrant, all of which was done immediately after the guest registry search. Therefore, the district court erred in admitting the evidence found in appellant's hotel room. As this evidence was "the foundation of [appellant's] conviction," the district court's error was not harmless beyond a reasonable doubt. The case is reversed and remanded to the district court. ***State v. Leonard***, 943 N.W.2d 149 (Minn. 5/13/2020).

■ **Competency: Court of appeals must defer to district court's factual findings made as part of a competency determination by applying clear error review to those findings.** A competency hearing was held in appellant's fleeing a peace officer case, at which three experts testified that appellant suffered from cognitive impairment but disagreed as to its effect on his competency. Relying on the court-appointed evaluator, the district court found appellant competent. The district court found the court-appointed evaluator's opinion most convincing because she had performed three forensic evaluations, thoroughly explained her reasoning, and focused her evaluations on appellant's ability to rationally consult with his attorney, comprehend court proceedings, and participate in his defense. Appellant was convicted after a bench trial.

The primary issue is how the appellate court is to review the district court's finding regarding appellant's competency. The Minnesota Supreme Court previously established the following standard (the "*Ganpat* standard"): "We independently review the record to determine if the district court gave 'proper weight' to the evidence produced and if 'its finding of competency is adequately supported by the record.'" The court of appeals concludes that this standard requires the appellate court to accept the district court's factual findings after a hearing, unless they are clearly erroneous.

The *Ganpat* standard creates a bifurcated analysis, which the court of appeals characterizes as follows: (1) Did the facts require the district court to inquire further into a defendant's competency? (2) Did the district court's inquiry uncover facts sufficient to support its findings? The second question in the analysis highlights a clear error review of the district court's factual determination made after a hearing on disputed evidence. However, no deference is given to the district court's decision as to the first question, because this preliminary determination is made as a matter of law and based on undisputed facts.

Applying this standard of review to appellant's case, the court concludes that the record adequately supports the district court's competency decision. ***State v. O'Neill***, No. A19-0803, 2020 WL 2643648 (Minn. Ct. App. 5/26/2020).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Class action; certification reversed.** Certification of a class action of railroad employees challenging their employer's fitness for duty policy under the Americans with Disabilities Act (ADA) was overturned. The 8th Circuit Court of Appeals held that the predominantly "individualized" issues in the litigation precluded class treatment under Rule 23 of the Federal Rules of Civil Procedure. ***Harris v. Union Pacific Ry. Co.,*** 953 F.3d 1030 (8th Cir. 3/24/2020) (unpublished).

■ **Replaced employees; age and sex claims rejected.** Claims of age and sex discrimination by a discharged manager of radiology at a medical facility were rejected. The 8th Circuit affirmed dismissal on grounds that the employee's termination was based on rude and insubordinate behavior, and her replacement by a younger male was not sufficient to establish grounds for liability. ***Main v. Ozark Health, Inc.,*** 959 F.3d 319 (8th Cir. 5/11/2020).

■ **Employee treatment; not similarly situated.** A claim by a dismissed lab technician of race and national origin discrimination after he was fired for an altercation with a co-worker was dismissed. The 8th Circuit, affirming a ruling of U.S. District Court Judge Joan Ericksen in Minnesota, held that the comparison with the treatment given other co-workers who were not African-American was not compelling because they engaged in different types of misconduct and, therefore, were not "similarly situated," which negated the claim of disparate treatment on racial and national origin grounds. Further, the plaintiff failed to present sufficient evidence of pretext to overcome the legitimate issues for her termination. ***Findlator v. Allina Health Clinics***, 2020 WL 2745549 (8th Cir. 5/27/2020) (unpublished).

■ **ERISA claims affirmed and reversed.** The 8th Circuit partially affirmed and partially reversed a trio of cases brought by employees under the Employees Retirement & Income Security Act (ERISA). A group of employees were entitled to challenge partial denial of claims for air ambulance benefits under the employer's health care plan, but even though they had standing, their claims were rejected on the merits by the 8th Circuit. ***Mitchell v. Blue Cross Blue Shield of North Dakota***, 953 F.3d 529 (8th Cir. 3/20/2020).

A suit by participants in a university retirement plan, claiming that the funds were mismanaged, was not actionable. Reversing summary judgment, the 8th Circuit, in a decision written by Judge David Stras from Minnesota, held that participants could proceed on a breach of duty of prudence claim, but another assertion that the plan should have dropped certain investment options because they were overly expensive and performed poorly was properly dismissed because the allegations could not be meaningfully evaluated. ***Davis v. Washington University in St. Louis***, 2020 WL 2609865 (8th Cir. 5/22/2020) (unpublished).

A nurse with a religious affiliate hospital could not pursue his claim that the plan was unfunded because it was a church-related plan that was not subject to ERISA. The 8th Circuit, however, reversed and remanded for determination of whether the exemption of the religious institution constituted violation of the establishment clause of the First Amendment. ***Sanzone v. Mercy Health Circuit***, 954 F.3d 1031 (8th Cir. 3/27/2020).

■ **Interference claim; noncompete clause.** A trucking company could maintain a lawsuit against a competitor for allegedly wrongfully recruiting and hiring away long-haul drivers in violation of a noncompete agreement. The 8th Circuit reversed summary judgment on grounds that there were genuine issues of material fact concerning the claim of intentional interference and the noncompete agreement was not void as a matter of law. A dissent by Judge Stras would have upheld dismissal of the lawsuit on grounds that "the court should not put the brakes on legitimate competition." ***CRST Expedited, Inc. v. TransAm Trucking, Inc.***, 2020 WL 2745547 (8th Cir. 5/27/2020) (unpublished).

■ **Sex harassment; 'severe and pervasive' remanded.** The Minnesota Supreme Court reiterated the "severe and pervasive" standard for adjudicating sex harassment claims under the Minnesota Human Rights Act, but remanded a case for reconsideration in light of changes in societal attitudes toward what is acceptable behavior in the workplace. Reversing rulings of the Hennepin County District Court and the court of appeals, the Court did not address the substance of the claims in the lawsuit, but stated that the claimant had provided sufficient evidence to overcome summary judgment and proceed to trial in order to show that the claimed impropriety was "both objectively and subjectively offensive [to] the person… and the victim, in fact, perceived it to be so." The case will help claimants in pursuing sexual harassment cases and make it more difficult for employers to obtain summary judgment in many cases. ***Kenneh v. Homeward Bound***, 2020 WL 2893352 (S.Ct. 6/3/2020).

■ **Sick leave; Minneapolis ordinance upheld.** A Minneapolis ordinance requiring employers to provide sick leave and safe time off to employees working within the city was upheld. The Supreme Court, affirming the court of appeals, rejected a preemption claim by a business group challenging the measure. ***Minn. Chamber of Commerce v. City of Minneapolis***, 2020 WL 3067712 (S.Ct. 6/10/2020).

■ **Sheriffs' salaries; board decision upheld.** A decision by the Freeborn County Board of County Commissioners setting the salary for the county sheriff was proper. The Minnesota Court of Appeals, overruling the Freeborn County District Court, held that the board did not act arbitrarily or without sufficient basis in setting the sheriff's salary, which the district court had ruled was too low and should be increased. ***In re Year 2019 Salary of Freeborn County Sheriff***, 2020 WL 2643728 (8th Cir. 5/26/2020) (unpublished).

■ **Wage claim; corporate veil pierced.** A rare instance of piercing the corporate veil in an employee's wage claim action was upheld by the court of appeals. Affirming a ruling of the Hennepin County District Court, it held that the employer had improperly withheld wages from an employee, approved double damages under Minn. Stat. §181.03, and permitted the piercing of a corporate veil to pursue and seek to hold personally liable the individual owner. ***Mallberg v. Gustafson***, 2020 WL 2643393 (8th Cir. 5/26/2020) (unpublished).

■ **Unemployment compensation; refusal to do work.** A staff accountant for a hotel management company was denied unemployment compensation benefits because he refused to provide a financial statement for one of the company's facilities. The court of appeals held that the failure to do the work constituted disqualifying "misconduct." ***Grew v. Island Investors, Inc.***, 2020 WL 2644493 (8th Cir. 5/18/2020) (unpublished).

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FAMILY LAW

JUDICIAL LAW

■ **Parent's execution of a recognition of parentage required notice to father of any adoption, even where the recognition was signed after mother's consent to the adoption became irrevocable.** Five days after the birth of D.J.R., mother consented to the child's adoption. Father did not join the consent,

and instead registered with the Minnesota Father's Adoption Registry. Shortly thereafter, mother and father executed a recognition of parentage, establishing father as D.J.R.'s parent. Adoptive parents first sought to terminate father's parental rights, and when that proceeding was dismissed, they attempted to finalize the adoption without father's consent. The district court dismissed the adoption petition, holding that father's consent was required either based on his execution of a recognition of parentage or his substantial compliance with the requirements of the Minnesota Father's Adoption Registry. Adoptive parents appealed, arguing mother lacked the authority to sign the recognition of parentage after consenting to the child's adoption. Additionally, adoptive parents argued the district court should not have excused father from strict compliance with the Father's Adoption Registry requirements.

The court of appeals affirmed, finding no statutory impediment to mother executing a recognition of parentage after consenting to the adoption. Instead, the court held that ongoing adoption proceedings do not prevent biological parents from executing a valid recognition of parentage, citing to the Minnesota Supreme Court's recent decision in *T.G.G. v. H.E.S.* 946 N.W.2d 309 (Minn. 2020). Because the parties' recognition of parentage was valid, the statute mandated that the adoption be dismissed in the absence of father's consent. Minn. Stat. §259.49, subd. 1(b)(7), §25924, subd. 1(a). Because the court determined father was entitled to notice based on a valid recognition of parentage, it did not reach adoptive parents' arguments regarding the adoption registry.

Note: The court of appeals notes that a recognition of parentage "created a presumption of father's paternity," citing Minn. Stat. § 257.55, subd. 1(e). However, subd. 1(e) addresses acknowledgments of paternity under Minn. Stat. §257.34, not recognitions of parentage under Minn. Stat. §257.75. Though similarly named, these two devices should not be confused. Recognitions of parentage differ from acknowledgements of parentage (which can no longer be used) in that recognitions have "the force and effect of a judgment… determining the existence of a parent child relationship." ***In re the Petition of M.J.R. and C.L.R. to Adopt D.J.R***, No. A20-0202, — N.W.2d — (Minn. Ct. App. July 20, 2020). [Disclosure: Author Michael Boulette served as counsel for one of the parties in this case.]

Cohabitation criteria in Minn. Stat. §518.552, subd. 6 must be considered in determining whether the maintenance recipient's cohabitation renders maintenance unreasonable or unfair. The parties divorced in 2014 after 23 years of marriage, and stipulated wife would receive spousal maintenance of $4,800 per month until husband reached age 65. Husband moved to terminate or reduce his maintenance obligation in 2018, based on wife's increased income and cohabitation. The district court granted husband's motion in part, decreasing maintenance by $1,270 per month (the amount by which wife acknowledged her housing expenses had been reduced due to cohabiting). Husband appealed, arguing maintenance should have been reduced further or terminated entirely. On appeal husband assigned two principal errors: first, mistaken findings as to wife's increased income since the divorce; second, an error of law in the district court's application of the cohabitation provisions of Minn. Stat. §518.552.

The court of appeals rejected both arguments and affirmed. With respect to wife's income, the court agreed that the district court incorrectly determined wife's income. Instead of an 11.5% increase as found by the lower court, the appellate court agreed with husband that the increase was closer to 21%. But the court of appeals declined to reverse the district court, holding that a 21% increase alone was insufficient to render husband's obligation unreasonable and unfair.

The appellate court then turned to husband's cohabitation arguments under Minn. Stat. §518.552, subd. 6. After noting the absence of any published case law regarding the interplay of Minn. Stat. §518.552, subd. 6 and Minn. Stat. §518A.39, subd. 2, the court of appeals sought to reconcile the two statutes. To do so, the court held that long-term cohabitation arising after the decree may constitute changed circumstances akin to the other enumerated changes in Minn. Stat. §518A.39, subd. 2. However, changed circumstances alone are insufficient to support a modification. Courts must also determine whether the change results in an unreasonable or unfair maintenance obligation. Where cohabitation is at issue, the four factors in Minn. Stat. §518.552, subd. 6 guide a court's analysis of this second prong.

Note: *Sinda* marks the second case in 2020 to apply the presumptions in Minn. Stat. §518A.39, subd. 2(b)(5) to a maintenance modification. *See also In re Marriage of Warrington*, No. A19-0482, 2020 WL 1501972, at *1 (Minn. Ct. App.

3/30/2020). But neither case directly addresses the language in subdivision 2(b) limiting the presumptions only to a "current support order" as distinguished from a spousal maintenance order. *Compare* Minn. Stat. §§518A.39, subd. 2(a) (addressing the terms of an "order respecting maintenance *or* support") *with* 518A.39, subd.2(b) (addressing only the terms of a "current support order"); *see also Li-Kuehne v. Kuehne*, No. A17-1462, 2018 WL 3014670, at *2, n. 3 (Minn. Ct. App. 6/18/2018) (refusing to apply subdivision 2(b) presumptions to a maintenance modification). ***In re the Marriage of Sinda vs. Sinda***, No. A19-1291, ___N.W.2d ___ (Minn. Ct. App. 8/10/2020).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **Fed. R. Civ. P. 12(b)(6); "plausibility" of allegations.** A recent 8th Circuit decision reversing Judge Frank's dismissal of a defamation claim pursuant to Fed. R. Civ. P. 12(b)(6) includes an analysis of the "plausibility" element of *Iqbal*, with the majority of the panel finding that the plaintiff had "pled just enough to proceed beyond the motion to dismiss stage."

Judge Erickson dissented, concluding that the complaint failed to cross the line between "possibility" and "plausibility." ***Tholen v. Assist Am., Inc.***, ___ F.3d ___ (8th Cir. 2020).

■ **Sanctions; inherent powers.** The majority of an 8th Circuit panel affirmed a district court's imposition of inherent powers sanctions against the plaintiff, even where the district court had failed to consider whether sanctions could be imposed under the Federal Rules of Civil Procedure. Judge Stras dissented from that portion of the panel's opinion, concluding that the use of inherent powers sanctions "should always be a last resort," and would have vacated and remanded the sanctions issue for further consideration. ***Schlafly v. Eagle Forum***, ___ F.3d ___ (8th Cir. 2020).

■ **Removal; subject matter jurisdiction; lack of standing; remand required.** While agreeing with Judge Nelson that the plaintiff in a previously removed ADA action lacked standing to pursue his claims, meaning that the district court lacked subject matter jurisdiction, the 8th Circuit reiterated that when subject matter jurisdiction is lacking in a removed action, it must be remanded to state court rather than being dismissed. ***Dalton v. JJSC Props., LLC***, ___ F.3d ___ (8th Cir. 2020).

■ **Presidential election-related litigation.** In a series of July 2020 opinions in a case challenging Minnesota's "ballot order" statute:

Judge Nelson denied a motion brought by the Trump campaign and related parties to intervene as of right pursuant to Fed. R. Civ. P. 24(a), and granted their motion for permissive intervention pursuant to Fed. R. Civ. P. 24(b). ***Pavek v. Simon***, 2020 WL 3960252 (D. Minn. 7/12/2020).

Judge Nelson granted plaintiffs' and defendants' joint motion to stay further proceedings pending the conclusion of the 2021 legislative session. ***Pavek v. Simon***, 2020 WL 4013982 (D. Minn. 7/16/2020).

Judge Nelson denied a motion by the Trump campaign and related intervenors pursuant to Fed. R. Civ. P. 62(d) to stay a previously entered preliminary injunction that had enjoined enforcement of the ballot order statute, finding that the intervenors had failed to make the "strong showing" that they were likely to prevail on the merits or that other relevant factors merited a stay. ***Pavek v. Simon***, 2020 WL 4013984 (D. Minn. 7/16/2020).

Barely two weeks later, the 8th Circuit issued a stay of the preliminary injunction, finding that the intervenors would be "irreparably injured" absent a stay, and that—based on a "preliminary review"—the intervenors were likely to prevail on the merits. ***Pavek v. Simon***, ___ F.3d ___ (8th Cir. 2020).

■ **28 U.S.C. §1292(b); motion to certify denied; request for stay denied.** Last month this column noted Chief Judge Tunheim's denial of a motion to dismiss an action arising out of the receipt of unsolicited text messages and the denial of a motion to compel arbitration.

Chief Judge Tunheim recently denied the defendant's request to certify his order for interlocutory appeal under 28 U.S.C. §1292(b), finding that there not a "substantial ground for difference of opinion" on either of the legal issues identified by the defendant.

Chief Judge Tunheim also denied the defendant's requests for mandatory and discretionary stays pending resolution of its interlocutory appeal of its motion to compel arbitration, finding that the appeal did not divest the district court of jurisdiction, meaning that a mandatory stay was not required, and that the relevant factors did not favor a discretionary stay. ***Pederson v. Donald J. Trump for President, Inc.***, 2020 WL 4288316 (D. Minn. 7/26/2020).

■ **Motions to dismiss for lack of personal jurisdiction denied.** Chief Judge Tunheim denied defendants' motion to dismiss for lack of personal jurisdiction, finding that their attendance at multiple conventions in Minnesota was sufficient on its own to establish specific personal jurisdiction. ***Ahlgren v. Fejes***, 2020 WL 3839810 (D. Minn. 7/8/2020).

Judge Nelson denied a motion to dismiss for lack of personal jurisdiction brought by two defendant guarantors, finding that agreements they executed included valid forum selection clauses. ***Hitachi Capital Am. Corp. v. McCollum***, 2020 WL 3977229 (D. Minn. 7/14/2020).

■ **First-filed doctrine does not apply to cases pending in the same district.** While denying a motion for settlement approval without prejudice in an FLSA action, Judge Magnuson denied an

intervenor's motion to dismiss the action under the first-filed rule, finding that the rule does not apply when both actions are pending in the same court. ***Gray v. CJS Solutions Grp., LLC***, 2020 WL 4476440 (D. Minn. 8/4/2020).

■ **Fed. R. Civ. P. 12(f); motion to strike portion of complaint denied.** While agreeing with the defendant that a portion of the plaintiff's complaint contained "irrelevant and immaterial matter," Judge Brasel denied the defendant's motion to strike where the defendant made "no attempt to demonstrate how" the disputed portion of the complaint was "prejudicial to it." ***Bishop v. St. Jude Med. S.C., Inc.***, 2020 WL 4352682 (D. Minn. 7/29/2020).

■ **Fed. R. Civ. P. 11 AND 37; motion for sanctions denied.** While criticizing plaintiff's counsel's conduct, Judge Frank denied the defendant's motion for sanctions under Rule 11 for failure to comply with the rule's safe harbor provision, and also denied the defendant's request for Rule 37 sanctions where the defendant had "not identified any discovery order with which the Plaintiff has failed to comply." ***Marshall v. Smith & Nephew, Inc.***, 2020 WL 4339221 (D. Minn. 7/28/2020).

■ **Objections to order compelling video depositions overruled.** Describing video depositions as the "new normal" in the face of covid-19, Judge Nelson overruled the plaintiff's objections to an order by Magistrate Judge Bowbeer that required depositions to be conducted remotely. ***Grupo Petrotemex, S.A. DE C.V. v. Polymetrix AG***, 2020 WL 4218804 (D. Minn. 7/23/2020).

■ **Fed. R. Civ. P. 30(e); motion to strike untimely deposition errata sheet.** While finding that the defendant's motion to strike errata sheet "lack[ed] a basis in the rules," Magistrate Judge Thorson recommended that the third-party defendant's request to extend the deadline to submit the errata sheet be denied where the third-party defendant waited more than six months before raising the issue with the court. No objections were filed to the report and recommendation, and it was adopted by Judge Davis. ***Anderson v. NAES Corp.***, 2020 WL 3848107 (D. Minn. 6/8/2020), *Report and Recommendation adopted*, 2020 WL 3839803 (D. Minn. 7/8/2020).

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IMMIGRATION LAW

JUDICIAL LAW

■ **Dream on: DACA, the Supreme Court, and more.** On 6/18/2020, the U.S. Supreme Court rejected the government's effort to end the Deferred Action for Childhood Arrivals Program (DACA) and remanded the case for further consideration, not because the Department of Homeland Security (DHS) had no authority to do so, but because it failed to provide a reasoned explanation for this. In a 5 to 4 majority opinion authored by Chief Justice John G. Roberts, Jr., the Court ruled that the Court held jurisdiction to review DHS's rescission of DACA under the Administrative Procedure Act (APA). The majority ruled that DHS's action violated the APA by being "arbitrary and capricious," specifically by its failure to consider whether to continue only the deferred action part of the DACA program without benefits and that "omission alone renders Acting Secretary Duke's decision arbitrary and capricious." In addition, the Court found DHS had failed to address the considerable reliance interests created by the DACA program on those DACA applicants and their families if DACA was ended. "It [DHS] was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." ***DHS v. Regents of the University of California***, 590 U.S. _____, No. 18-587, *slip op.* at 23, 26 (2020). *https://www.supremecourt.gov/opinions/19pdf/18-587_5ifl.pdf*

On 7/17/2020, Judge Paul W. Grimm (U.S. District Court for the District of Maryland), following the U.S. Supreme Court's DACA decision, vacated DHS's rescission of DACA and returned DACA policy to its pre-9/5/2017 status. He further enjoined DHS from implementing or enforcing the rescission and from taking any other action to end DACA not in compliance with applicable law. ***Casa de Maryland, et al., v. DHS, et.al.***, No. 8:17-cv-02942-PWG (D. Md. 7/17/2020). *https://www.courtlistener.com/recap/gov.uscourts.mdd.403497/gov.uscourts.mdd.403497.97.0.pdf*

On 7/28/2020, DHS Acting Secretary Chad Wolf issued a memorandum ("Reconsideration of the June 15, 2012 Memorandum Entitled 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children'") that rescinded the 2017 and 2018 memoranda revoking DACA. Acting Secretary Wolf noted that while DACA policy is under review, DHS will reject all first-time DACA requests; adjudicate all pending and future properly submitted DACA renewal requests (and associated applications for employment authorization) from current beneficiaries; limit the period of any deferred action granted to one year; and reject all pending and future applications for advance parole from beneficiaries of the DACA policy. *https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf*

ADMINISTRATIVE ACTION

■ **President Trump suspends entry of immigrants and nonimmigrants alike.** On 6/22/2020 (and 6/29/2020), President Trump issued Proclamation 10052 (and an Amendment) ("Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak"), continuing his 4/22/2020 Proclamation 10014 that suspended entry of immigrants into the United States while, at the same time, expanding it to include nonimmigrants. The proclamation went into effect on

6/24/2020 at 12:01am (EDT). Those affected include the following individuals seeking entry:

1. H–1B or H–2B visa holder, and any foreign national accompanying or following to join;
2. J visa holder, to the extent that (s)he is participating in an intern, trainee, teacher, camp counselor, au pair, or summer work travel program, and any foreign national accompanying or following to join; and
3. L visa holder, and any foreign national accompanying or following to join.

The suspension applies only to those:

1. outside the United States on the effective date of the proclamation;
2. not in possession of one of the aforementioned nonimmigrant visas that is valid on the effective date of the proclamation and through which the foreign national seeks entry; and
3. without an official travel document other than a visa (such as a transportation letter, an appropriate boarding foil, or an advance parole document) that is valid on the effective date of the proclamation or issued on any date thereafter permitting him or her to travel to the United States and seek entry or admission.

The proclamation does not apply to:

1. lawful permanent resident of the United States;
2. foreign national who is the spouse or child of a United States citizen;
3. foreign national seeking to enter the United States to provide temporary labor or services essential to the United States food supply chain; and
4. foreign national whose entry would be in the national interest as determined by the secretaries of State and Homeland Security.

Other key points:

1. The Secretary of State shall implement the proclamation as it applies to issuance of nonimmigrant visas, with consular officers determining, in their discretion, whether a nonimmigrant has established eligibility for an exception;
2. The Secretary of Homeland Security shall implement the proclamation as it applies to the entry of nonimmigrants;
3. The Secretary of Health and Human Services shall, as necessary, provide guidance to the secretaries of State and Homeland Security for implementing measures that could reduce the risk that foreign nationals seeking admission or entry to the United States may introduce, transmit, or spread SARS–CoV–2 within the United States;
4. The Secretary of Labor shall, in consultation with the Secretary of Homeland Security and consistent with applicable law, consider promulgating regulations or take other appropriate action to ensure that the presence of foreign nationals who have been admitted or otherwise provided a benefit, or who are seeking admission or a benefit, pursuant to an EB–2 or EB–3 immigrant visa or an H–1B nonimmigrant visa, does not disadvantage United States workers in violation of section 212(a)(5)(A) or (n)(1) of the INA (8 U.S.C. 1182(a)(5)(A) or (n)(1));
5. The Secretary of Homeland Security shall take steps, consistent with applicable law, to prevent certain foreign nationals with final orders of removal; inadmissible or deportable from the United States; or arrested for, charged with, or convicted of a criminal offense in the United States, from obtaining eligibility to work in the United States; and as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action regarding the efficient allocation of visas pursuant to section 214(g)(3) of the INA (8 U.S.C. 1184(g)(3)) and ensuring that the presence in the United States of H–1B nonimmigrants does not disadvantage United States workers.
6. Nothing in the proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, consistent with the laws of the United States.
7. The proclamation shall expire on 12/31/2020, and may be continued as necessary. Within 30 days of the effective date, and every 60 days thereafter, while the proclamation is in effect, the Secretary of Homeland Security shall, in consultation with the secretaries of State and Labor, recommend any modifications as may be deemed necessary. **85 Fed. Reg. 38,263-267** (6/25/2020). *https://www.govinfo.gov/content/pkg/FR-2020-06-25/pdf/2020-13888.pdf.* **85 Fed. Reg. 40,085-086** (Amendment) (7/2/2020). *https://www.govinfo.gov/content/pkg/FR-2020-07-02/pdf/2020-14510.pdf*

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INTELLECTUAL PROPERTY

JUDICIAL LAW

Trademark: TRO barring use of plaintiff's trademarks in sale of N95 respirators. Judge Nelson recently granted 3M Company's motion for a temporary restraining order against defendants Matthew Starsiak, AMK Energy Services LLC, and John Does 1 through 10 related to the use of 3M's trademarks in the sale of 3M N95 respirators. 3M sued defendants alleging defendants falsely claimed to represent 3M and used 3M's name and trademarks without authorization in a false and deceptive scheme to sell 3M N95 respirators during the global covid-19 pandemic. During the outbreak of covid-19, 3M increased its production of 3M-brand respirators to ensure that an adequate supply was available while also pledging to not increase prices on its N95 respirators and to work to eliminate fraud and price-gouging by third parties. Defendants contacted 3M to purchase N95 respirators. Defendants claimed that Sir Richard Branson, founder of the Virgin Group, and the Gates Foundation wished to purchase 900 billion respirators for underserved populations in the world. While defendants were trying to purchase billions of 3M-branded N95 respirators from 3M, they were simultaneously trying to find buyers willing to purchase them at a higher price. Defendants identified themselves as 3M's "number one sales team" and as a "3M authorized distributor," claiming to have "hundreds of millions of [N95 respirator] stock available." To determine whether injunctive relief, in the form of a TRO, is warranted, a court weighs: (1) the likelihood of success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm injunctive relief would cause to the other litigants; and (4) the public interest. The court found 3M was likely to

succeed on its Lanham Act and related state law claims based on the presented evidence of the validity and strength of 3M's trademarked name and marks and defendants' conduct. The court further found plaintiff established irreparable harm; defendants, who had no affiliation with 3M, were unlikely to be harmed by issuance of a TRO; and the public has a strong interest in protecting trademarks. Accordingly, a TRO was issued enjoining defendants from using the standard character "3M" mark and 3M design mark, and any other word, name, symbol, device, or combination thereof that is confusingly similar to the 3M marks. ***3M Co. v. Starsiak*, No. 20-cv-1314 (SRN/TNL)**, 2020 U.S. Dist. LEXIS 112387 (D. Minn. 6/26/2020).

■ **Trademark: Default judgment.** Judge Tostrud recently entered default judgment and awarded plaintiff attorneys' fees and costs. Allied Medical Training sued Knowledge2SaveLives LLC and Monique Doward, alleging defendants infringed Allied's registered mark KNOWLEDGE SAVES LIVES. Allied provides training to current and aspiring emergency medical responders to maintain or obtain Emergency Medical Responder (EMR) or Emergency Medical Technician (EMT) certification. Defendant Doward enrolled in one of Allied's training courses. She subsequently formed and registered a business organization named Knowledge2SaveLives LLC that offers services identical to those offered by Allied under its KNOWLEDGE SAVES LIVES mark to the same types of consumers. In adjudicating a default-judgment motion, the factual allegations of the complaint, except those relating to the amount of damages, are taken as true. Then, the court must determine whether the taken-as-true factual allegations of the complaint constitute a legitimate cause of action. The court found the taken-as-true allegations constitute a legitimate action of infringement of the Lanham Act and violation of the Minnesota Deceptive Trade Practices Act. The court found Knowledge 2 Save Lives is for all practical purposes equivalent to Knowledge Saves Lives. In seeking an injunction, Allied established a likelihood of success, irreparable harm, that the balance of harms favors Allied, and that the public disfavors infringing activity. Accordingly, the court entered a permanent injunction enjoining defendants from use of Knowledge 2 Save Lives or any mark confusingly similar to Knowledge Saves Lives. ***Allied Med. Training, LLC v. Knowledge2SaveLives LLC***, No. 19-cv-3067, 2020 U.S. Dist. LEXIS 114658 (D. Minn. 6/30/2020).

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TAX LAW

JUDICIAL LAW

■ **Summary judgment denied where commissioner could not establish taxpayer had an "opportunity" to challenge liability.** In a dispute stemming from unpaid employment taxes, the tax court rejected the Service's request for summary judgment because the court was not persuaded Mr. Barnhill had an opportunity to challenge his liability. Mr. Barnhill was a director at a company called Iron Cross. The company failed to file any returns, and the company failed to remit either the employer share or the employee share required to withhold from employee wages and pay over. The commissioner argued that Mr. Barnhill was precluded from challenging his liability, because his previous receipt of Letter 1153 concerning that liability afforded him a prior "opportunity," for purposes of section 6330(c)(2)(B), to challenge that liability. In the course of its decision, the tax court wrestled with the term "opportunity" in this context. Viewing any factual material and inferences in the light most favorable to the nonmoving party, the court reasoned that although taxpayer filed a protest with IRS Appeals Office in response to Letter 1153, he did not receive IRS's ensuing Letter 5157, which both explained next steps and scheduled his Appeals Office conference. Rather than reschedule the case, the Service closed it. The court construed these facts as creating an incomplete appeal, which did not qualify as prior opportunity to dispute his underlying liabilities under IRC §6330(c)(2)(B). Summary judgment that the taxpayer was precluded from disputing that liability at his CDP hearing was therefore inappropriate. ***Barnhill v. Comm'r***, No. 10374-18L., 2020 WL 4194614 (T.C. 7/21/2020).

■ **Emails and Marine Corps manual constitute "written separation agreement" for purposes of alimony deduction.** Prior to the Tax Cuts & Jobs Act (TCJA) of 2017, alimony payments were deductible to the payor and included in the gross income of the recipient (these rules still apply to most divorce agreements that were entered into prior to the effective date of the TCJA). To qualify for the deduction, however, the payments must be made pursuant to a written separation agreement—a term that is not defined in the Code. In this dispute, taxpayer-husband claimed he was entitled to a deduction for payments made to his former spouse. The Service disagreed, arguing that emails and the couple's intention to accept the Marine Corps Manual family support policy constitute a written separation agreement for purposes of section 71(b)(2)(B). ***Winslow v. Comm'r***, No. 8755-18S., 2020 WL 4456606 (T.C. 8/3/2020).

■ **Additional conservation easement decisions.** The Service continues to prevail in challenges to charitable deductions made for donations of conservation easements. *E.g.*, ***Red Oak Estates, LLC v. Comm'r***, T.C.M. (RIA) 2020-116 (T.C. 2020) (holding that because "the deed granting the conservation easement reduces the donee's share of the proceeds in the event of extinguishment by the value of improvements made by the donor," the contribution "does not

satisfy the perpetuity requirement of section 170(h)(5)(A)" and further rejecting the challenge to the validity of the proceeds regulations) (citing *Oakbrook Land Holdings, LLC v. Comm'r*, 154 T.C. at —— (slip op. at 26–33)); ***Cottonwood Place, LLC v. Comm'r***, T.C.M. (RIA) 2020-115 (T.C. 2020) (holding that the easement does not satisfy the perpetuity requirements because "[t]he deed granting the conservation easement reduces the donee's share of the proceeds in the event of extinguishment by the value of improvements made by the donor" and granting partial summary judgment to commissioner); ***Belair Woods, LLC v.Comm'r***, T.C.M. (RIA) 2020-112 (T.C. 2020) (noting that petition in this case proffers in support of its position several arguments not previously addressed but rejecting those novel arguments).

Property tax: Several dismissals for failure to comply with mandatory disclosure rules. In a series of cases out of Washington County, the tax court dismissed petitions for failure to comply with the mandatory disclosure rules set out in Minnesota Statutes section 278.05, subdivision 6. ***Wal-Mart Real Estate Bus. Tr. v. Washington Co.***, No. 82-CV-18-1654, 2020 WL 4527894 (Minn. T.C. 7/31/2020) (granting county's motion to dismiss the petition for failure of the trust to comply with mandatory disclosure rules); ***Wal-Mart Stores, Inc. v. Washington Co.***, No. 82-CV-18-1593, 2020 WL 4528476 (Minn. T.C. 7/31/2020) (similarly dismissing petition for failure to comply with mandatory disclosure); ***Wal-Mart Real Estate Bus. Tr. v. Washington Co.***, No. 82-CV-18-1588, 2020 WL 4496032 (Minn. T.C. 7/30/2020); ***Wal-Mart Real Estate Bus. Tr. v. Washington Co.***, No. 82-CV-18-1587, 2020 WL 4496058 (Minn. T.C 7/30/2020); ***Wal-Mart Real Estate Bus. Tr. v. Washington Co.***, No. 82-CV-18-1587, 2020 WL 4459041 (Minn. T.C. 7/29/2020). In a separate case, the tax court denied Walmart's petition to transfer a property valuation dispute to district court. ***Walmart Inc. v. Anoka Co.***, No. 02-CV-20-721, 2020 WL 4459044 (Minn. T.C. 7/29/2020).

Property tax: Pipeline dispute results in overstated valuation. Minnegasco, a division of the natural gas distribution business of CenterPoint Energy Resources Corp., owns and operates a natural gas distribution pipeline system, which consists of pipelines, mains, and related equipment located in 40 Minnesota counties. The Commissioner of Revenue estimated the subject property's unit value as of 1/2/2017 at $994,717,400. Minnegasco filed an administrative appeal with the commissioner, who affirmed her assessment. Minnegasco's appraiser estimated a unit value of $760,000,000 using the income and cost approaches to value. The commissioner's appraiser estimated a unit value of $1,213,000,000, also using the income and cost approaches. Neither appraiser relied on a market or sales comparison approach.

The parties disagreed about the composition of the income figure to be capitalized under the income approach. Minnegasco contends that deferred income tax (DIT), Conservation Improvement Program (CIP) incentive payments, and off-system sales should be *excluded* from net operating earnings, the figure to be capitalized under Minnesota Rule 8100.20. Minnegasco argues that because these three items are not earnings of the pipeline system, and/or are not included in Minnegasco›s regulatory rate base (the assets on which it can earn a return), the earnings should not be included. Minnegasco further reasons, under the income capitalization approach, that if potential purchasers focus on future cash streams, and items excluded from rate base do not contribute to cash stream, then including them in net operating earnings improperly inflates its value. The commissioner disagrees and contends that all three items must be included in net operating earnings.

Minnesota Rule 8100's cost approach is based on net book value, which is the original cost of a pipeline's operating assets, less book depreciation. *See* Minn. R. 8100.0300, subp. 3. Regulatory rate base, however, is net book value *minus* accumulated deferred income tax (ADIT). As a result of the MPUC›s regulatory decision to exclude ADIT from rate base, Minnegasco may not earn a return on the ADIT portion of its net book value. Minnegasco contends that this regulatory prohibition on its ability to earn a return on ADIT (or assets purchased with ADIT) causes external obsolescence under the cost approach. The commissioner disagrees.

The commissioner assesses "[t]he personal property, consisting of the pipeline system of mains, pipes, and equipment attached thereto, of pipeline companies and others engaged in the operations or business of transporting products by pipelines." Minn. Stat. §273.33, subd. 2 (2018). A utility property is valued using the unit method set forth in Rule 8100.0200. The rule relies primarily on the income and cost approaches to value and affords the commissioner and the courts the authority "to exercise discretion whenever the circumstances of a valuation estimate dictate the need for it." *See* Minn. R. 8100.0300. *See also*, *Comm'r of Revenue v. Enbridge Energy, LP (Enbridge I)*, 923 N.W.2d 17, 21 (Minn. 2019).

In a lengthy analysis, the court determined that the CIP incentive payments received by Minnegasco are not earnings from Minnegasco's system plant. Additionally, the court determined that revenues from Minnegasco's off-system sales and exchanges are not earnings from Minnegasco's system plant. The court further stated that the MPUC's exclusion of ADIT from Minnegasco's rate base caused the subject property to suffer from external obsolescence of $232,390,100 as of 1/2/2017. Therefore, the court found that the commissioner overstated the unit value of Minnegasco's pipeline operating system, and the unit value shall be reduced to $771,511,000. ***CenterPoint Energy***

Resources Corp. v. Comm'r of Revenue, 2020 WL 4045620 (Minn. T.C. 7/15/20).

■ **Petitioner fails to meet requirements of appeal; court grants commissioner's motion to dismiss.** On 9/14/2018, the Commissioner of Revenue denied Mr. Abdullahi's claim for the Minnesota Working Family Credit for tax year 2016. Mr. Abdullahi subsequently requested a 30-day extension to the tax court to appeal the commissioner's denial. The court granted Mr. Abdullahi's request.

Mr. Abdullahi initially submitted an appeal by U.S. mail, which the court received on 12/10/2018. The next day, the court returned the submission together with a deficiency notice indicating that Mr. Abdullahi had filed the appeal without the necessary filing fee. On 12/21/2018, Mr. Abdullahi hand-delivered his appeal documents, with the filing fee, but without proof of service on the commissioner.

On 8/26/2019, the commissioner filed a motion to dismiss Mr. Abdullahi's appeal, but the case was temporarily stayed. After the stay was lifted, the commissioner filed an amended motion to dismiss, arguing that the court does not have jurisdiction to hear the matter because 1) the appeal was untimely filed, and 2) Mr. Abdullahi did not serve the commissioner. The commissioner's motion was accompanied by an affidavit from a paralegal in the Minnesota Department of Revenue Appeals and Legal Services Division attesting to the lack of service on the commissioner. Mr. Abdullahi did not file a written response. A hearing was scheduled on 4/29/2020, but because Mr. Abdullahi was not present, the court continued the hearing to 5/11/2020 to allow Mr. Abdullahi the opportunity to argue against the motion.

In relevant part, Minn. Stat. §271.06, subd. 2 (2018) states that within 60 days following a notice date of an order of the Commissioner of Revenue, the appellant shall serve a notice of appeal upon the commissioner and file the original, with proof of such service, with the tax court administrator—provided that the tax court, for cause shown, may extend the time for appealing for an additional period not exceeding 30 days. Additionally, the appellant shall pay to the court administrator of the tax court an appeal fee upon filing. *Id.*, subd. 4.

Failure to timely file an appeal deprives the court of subject matter jurisdiction. *See Langer v. Comm'r of Revenue*, 773 N.W.2d 77, 80 (Minn. 2009). Because Mr. Abdullahi failed to meet the requirements of the appeal set by Minn. Stat. §271.06, subd. 2, the court was required to grant the commissioner's motion to dismiss the appeal. ***Abdullahi v. Comm'r of Revenue***, 2020 WL 4380970 (Minn. T. C. 7/28/20).

■ **Party-imposed deadlines are not enough to hold petitioner in contempt of court.** On 5/13/2019, the court granted the county's motion to compel discovery and gave the county 30 days to file and serve a declaration setting forth its expenses, including attorney fees. *See IRC Riverdale Commons, LLC v. Cty. of Anoka*, No. 02-CV-17-2007, 2019 WL 2167324, at *1 (Minn. T.C. 5/13/2019). On 9/17/2019, the court granted the county's request for expenses, including attorney fees, incurred in connection with its motion to compel in the amount of $9,460. *See IRC Riverdale Commons, LLC v. Cty. of Anoka*, No. 02-CV-17-2007, 2019 WL 4607064, at *1 (Minn. T.C. 9/17/2019). On 4/22/2020, the county filed a motion to hold IRC Riverdale Commons in contempt of court for its failure to pay the awarded expenses.

One of the factors to be considered in evaluating a contempt motion is that "[t]he decree of the court clearly defined the acts to be performed." *Hopp v. Hopp*, 279 Minn. 170, 174, 156 N.W.2d 212, 216 (1968). The county asserted that the September 2019 order was unambiguous and plainly ordered IRC to pay a defined amount of attorneys' fees. The court, however, stated that although the order plainly created a liability in favor of the county, it did not *expressly* command IRC to pay the amount awarded; it did not order the act of payment. Additionally, the order did not command IRC to pay the amount by any particular date. Although the county has attempted to impose several payment deadlines, IRC's violations of party-imposed deadlines are not contempt of court. Therefore, the court denied the county's motion. ***IRC Riverdale Commons, LLC v. Anoka Cty***, 2020 WL 4669433 (Minn. T. C. 8/7/20).

ADMINISTRATIVE ACTION

■ **Final Regs on workarounds for contributions to charities in lieu of state and local taxes.** The Tax Cuts & Jobs Act (TCJA) limited, but did not eliminate, taxpayers' ability to deduct state and local real estate, personal property, and either income or sales taxes. The TCJA capped the total SALT deduction at $10,000 for tax years 2018 through 2025. In response to this limitation, some taxpayers considered tax planning strategies to avoid or mitigate the effect of the limitation. For example, some jurisdictions offer SALT credit programs under which states provide tax credits in return for contributions to certain charitable entities. The contributions are then deducted by the payor as charitable deductions authorized by Section 170. The Final Regs address these workarounds, and supplant proposed regs from 2018. The Service characterizes the import as follows: These Final Regs "require taxpayers to reduce their charitable contribution deductions by the amount of any state or local tax credits they receive or expect to receive in return… taxpayers may treat payments they make in exchange for these credits as state or local tax payments. This allows some taxpayers to deduct certain of the payments as taxes." **TD 9907; Reg §1.162-15, Reg §1.164-3, Reg §1.170A-1, Reg §1.170A-13.**

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GRAVES

Katy Graves was elected chair of the Board of Marriage and Family Therapy, a state agency that protects the public through enforcement of the statutes and rules governing the practice of marriage and family therapists. Graves is a shareholder at Henson Efron.


KROLL

Kyle Kroll was elected assistant treasurer of the Federal Bar Association Minnesota Chapter. Kroll is an attorney at Winthrop & Weinstine in the business & commercial litigation practice.


TOZER

Benjamin R. Tozer was elected to serve as president of International Right of Way Association North Star Chapter 20. Tozer is a shareholder at Fredrikson & Byron and focuses his practice on a broad range of litigation and real estate work.

Michael Klutho was elected to the ACA International, Inc. Board of Directors. He was also recently elected president of the Great Lakes Credit and Collection Association. Klutho is a shareholder at Bassford Remele and has more than 30 years of experience defending clients and helping them prevent consumer law and professional liability disputes.


SKOGE

Julie K. Skoge was promoted to partner at Merchant & Gould PC. Skoge is a registered patent attorney who practices intellectual property law.


MOREAU

Jennifer C. Moreau was named a shareholder of Barna, Guzy & Steffen, Ltd. She joined the firm in 2013 and focuses her practice in litigation and business law.


HOUGH

Molly Hough was elected to the board of directors of Minnesota Women Lawyers. Hough is an attorney at Bassford Remele and practices in commercial litigation, general liability, employment litigation/advice, consumer law defense, and real estate litigation.


ERFFMEYER

Steven J. Erffmeyer was named to the Minnesota Defense Lawyers Association Board of Directors. Erffmeyer is an attorney at Arthur, Chapman, Kettering, Smetak & Pikala, PA and concentrates his practice in areas of commercial and residential construction litigation, general liability litigation, railroad liability, and insurance coverage.


JACKSON

Mercedes McFarland Jackson was elected chair of the EMERGE Community Development board of directors. Jackson is an officer in Fredrikson & Byron's private equity and bank & finance groups.


HOPPE

Lousene M. Hoppe, a shareholder at Fredrikson & Byron, was named president-elect of the National LGBT Bar Association Board of Directors. Hoppe will serve as president-elect for one year and as president for a two-year term ending in June 2023. Hoppe is a litigator and criminal defense attorney.


WILL

April L. Will has joined Moss & Barnett in the firm's family law department. Will received her JD from the University of Minnesota Law School.

Lommen Abdo elected new board members: Marc Johannsen has been reelected to a two-year term as president. Cameron Kelly has been elected to a two-year term on the board, and Kathleen Loucks and Mike Glover were re-elected to serve a second two-year term on the board. Jason Engkjer, Bryan Feldhaus, and Brent Johnson continue their two-year terms.

MARK BRADFORD was accepted into the American Board of Trial Advocates. ABOTA members must have tried a minimum of 10 civil jury trials to conclusion. Bradford is a shareholder at Bassford Remele.


BROMAN

STACY BROMAN, a partner at Meagher & Geer PLLP, was awarded the 2020 Diversity Award from the Federation of Defense & Corporate Counsel.

The Hennepin County Bar Association recognized eight attorney members with its 2020 HCBA Excellence Awards. The awards honor members for their service to the local legal profession, the community, and the association. Those recognized: EVAN BERQUIST (Cozen O'Connor) for Providing Pro Bono Service; KATHRYN JOHNSON and KIRSTEN SCHUBERT (Dorsey & Whitney) for Providing Pro Bono Service; RACHEL HUGHEY (Merchant & Gould) for Mentoring in the Profession; SATVEER CHAUDHARY (Chaudhary Law Office) for Mentoring in the Profession; LUKE GRUNDMAN (Mid-Minnesota Legal Aid) for Improving Access to Justice; CHERI TEMPLEMAN (Templeman Law) for Improving Access to Justice; and ALLISON PLUNKETT (Henson & Efron) for Serving the Association/Foundation.

David Anthony O'Connor, age 89 of St. Paul, passed on August 2, 2020. He followed his passion and practiced as a trial lawyer for nearly 40 years. Once he retired, he worked as a realtor for 10 years.

David T. Bishop, age 91, a lawyer and former legislator representing the City of Rochester in the Minnesota House of Representatives, died August 3, 2020.

Craig E. Lindeke, age 74 of St. Paul, died August 5, 2020. He worked in the Minnesota Revisor's Office drafting legislation for over 30 years.

Edmund Charles Meisinger Jr. died August 12, 2020. Edmund worked as an attorney in West St. Paul for over 40 years. In addition, he served as mayor of West St. Paul.

Ralph Schneider, age 91, passed away on July 10, 2020. He practiced business law in Minneapolis for many years, specializing in tax and real estate. In 1960, he was appointed special assistant attorney general by then-Attorney General Walter F. Mondale to work on a matter involving management of the Sister Kenny Foundation. Later in his career, he provided legal counsel in connection with several high-profile real estate projects. He also enjoyed volunteering his time to serve as a municipal conciliation/small claims court referee.

Judith Martin died on March 25, 2020 at age 68. She graduated from the University of Minnesota Law School as a single mom with three kids and began a successful law practice.

Adam Phillip Janet, a partner in a Baltimore law firm who was regarded as a gifted young attorney, died of adrenocortical cancer on June 29. He was 30.

Bradley Dean Lance, age 60, died August 6, 2020. He received his JD from William Mitchell College of Law. Lance started his legal career in Chicago before moving with his family to Minnesota in 1992.

Mark Andrew Mitchell passed away on August 18, 2020. He was an attorney for over 20 years, practicing law most recently at the Crow Wing County Attorney's Office.

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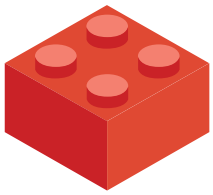

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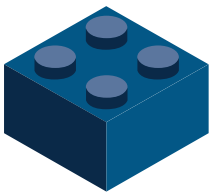

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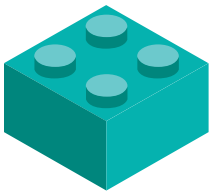

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Tuesday, October 6
12:00 PM - 1:00 PM

Lawyers as Leaders and Advocates for Change
Wednesday, October 7
12:00 PM - 1:00 PM

Webcast: Business as Usual
Thursday, October 8
7:45 AM - 9:00 AM

David Fligor and DNA Confidential
Thursday, October 8
12:00 PM - 1:00 PM

Community.Lawyer Workshop
Thursday, October 8
1:00 PM - 2:00 PM

Justice Over Technology: Why Lawyers Need to Lead Technologists
Friday, October 9
12:00 PM - 1:00 PM

De-Mystifying Artificial Intelligence
Monday, October 12
1:00 PM - 2:00 PM

Developments in AI for Lawyers with Damien Riehl
Tuesday, October 13
1:00 PM - 2:00 PM

Community.Lawyer Workshop
Tuesday, October 13
3:00 PM - 4:00 PM

Persuasive Writing with Faris Rashid and Aaron Knoll
Wednesday, October 14 12:00 PM - 2:00 PM

Webcast: Business as Usual
Thursday, October 15
7:45 AM - 9:00 AM

Legal Research Techniques: Administrative Law
Thursday, October 15
12:00 PM - 1:00 PM

Community.Lawyer Workshop
Thursday, October 15
1:00 PM - 2:00 PM

Intro to practicelaw
Friday, October 16
8:30 AM - 9:30 AM

Effective Writing with Karin Ciano
Monday, October 19
2:00 PM - 3:00 PM

Legislative History Research with Liz Reppe
Tuesday, October 20
12:00 PM - 1:00 PM

Community.Lawyer Workshop
Tuesday, October 20
1:00 PM - 2:00 PM

Ethical Visualizations with Manjeet Rege
Wednesday, October 21
12:00 PM - 1:00 PM

Data Analytics in Practice with Faris Rashid & Aaron Knoll
Wednesday, October 21 1:00 PM - 2:00 PM

Law of Virtual Worlds and the Minecraft Build Competition Judging
Thursday, October 22
4:30 PM - 6:00 PM

Research: Boolean, Natural Language, and AI
Monday, October 26
8:30 AM - 9:30 AM

Community.Lawyer Workshop
Monday, October 26
2:00 PM - 3:00 PM

Roundtable with Alyson Carrel
Tuesday, October 27
8:00 AM - 9:00 AM

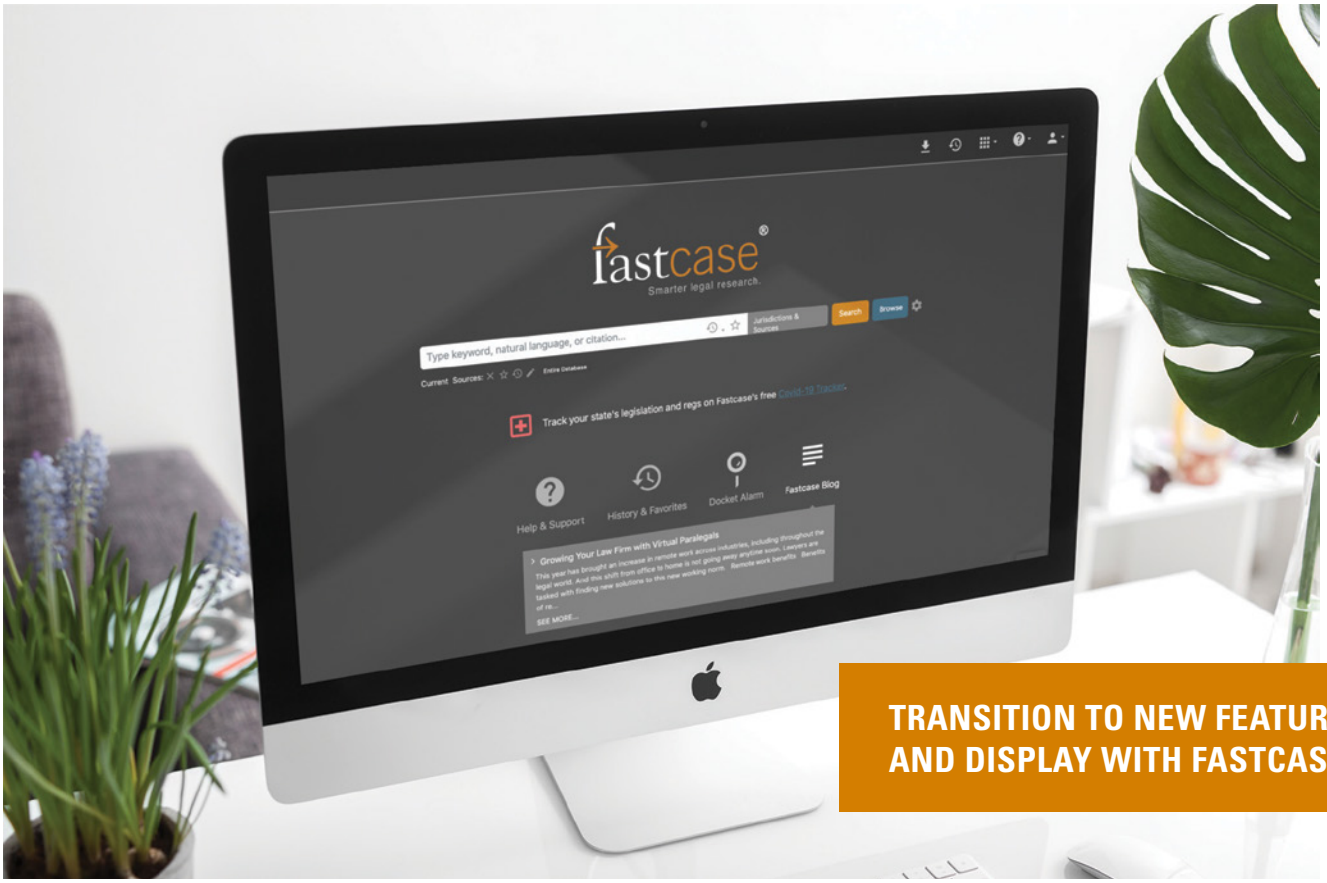
Thinking Like an Entrepreneur
Tuesday, October 27
12:00 PM - 1:00 PM

Public Records Research and Compliance
Wednesday, October 28
12:00 PM - 1:00 PM

Zapier for Lawyers with Jess Birken
Thursday, October 29
12:00 PM - 1:00 PM

+ BONUS LIBRARY OF ON-DEMAND PROGRAMMING

We're still building! More events coming soon.
Details and registration: my.mnbar.org/build



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Questions? Contact Mike Carlson at the MSBA at 612-278-6336 or mcarlson@mnbar.org