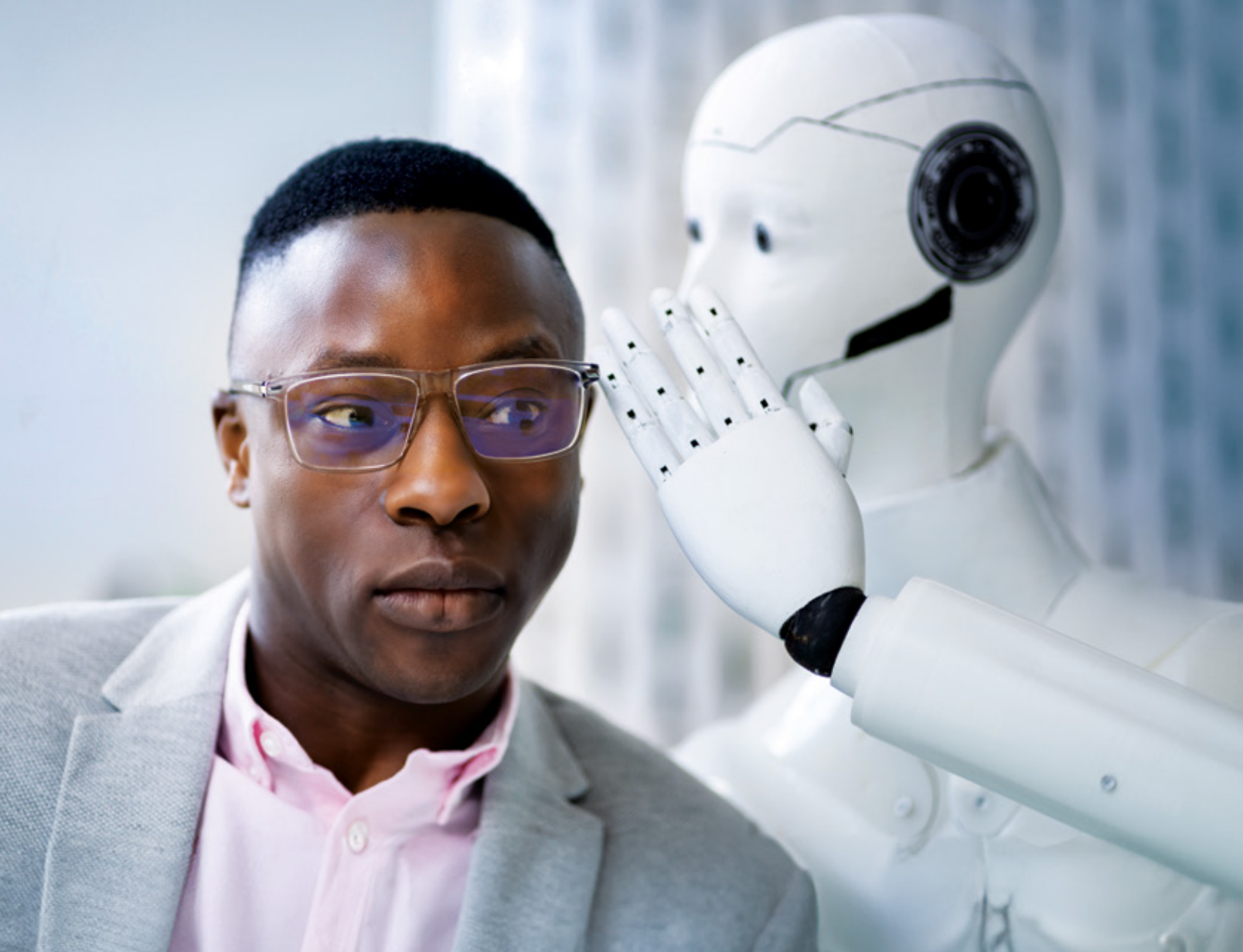
MINNESOTA STATE BAR ASSOCIATION

APRIL 2024

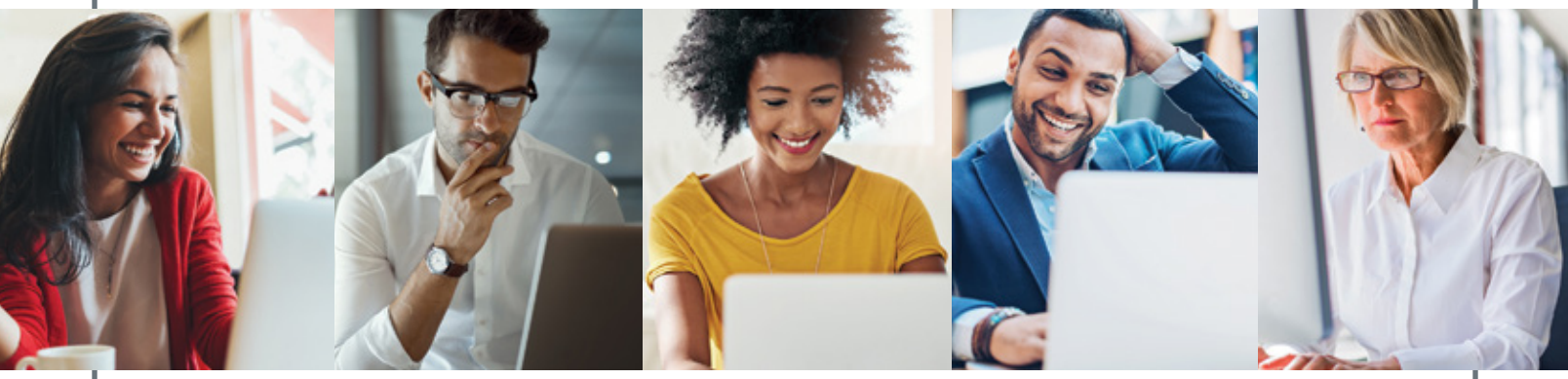
BENCH+BAR of Minnesota

AI, UPL, AND THE JUSTICE GAP

A PROFESSION AT THE CROSSROADS



MSBA Communities

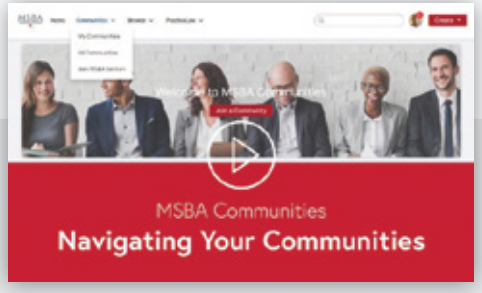


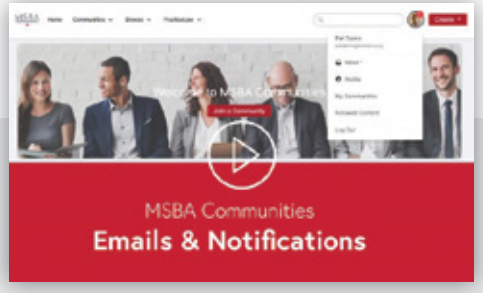
Start reading. Start posting. Start connecting.

Your online Communities are waiting for you. Connect with members of your Section, your district bar, and other groups. **MSBA Communities** are exclusively for members. Ask questions, answer questions, join the conversation.

www.mnbar.org/communities

Have questions? Check out our new tutorial videos.





Need help navigating MSBA's legal tech resources? Schedule a one-on-one virtual walk-through.

Mary Warner, MSBA Legal Technologist
mwarner@mnbars.org

MITCHELL HAMLINE NAMES NEW PRESIDENT AND DEAN

The board of trustees of Mitchell Hamline School of Law has announced the appointment of Camille M. Davidson, dean and professor of law at Southern Illinois University School of Law, as the school's new president and dean. Davidson, who has served as dean at SIU Law since July 2020, will begin her duties at Mitchell Hamline on July 1, 2024.

"I am thrilled to be leading Mitchell Hamline. The school's record of innovation and adaptability—including launching the first-in-the-nation Blended Learning program—speaks to its independence and forward-looking approach."

MH
MITCHELL | HAMLINE
School *of* Law

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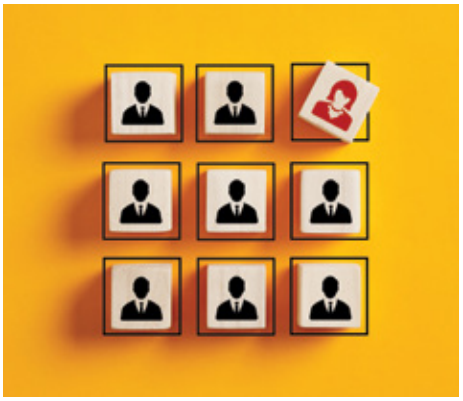

columns

features

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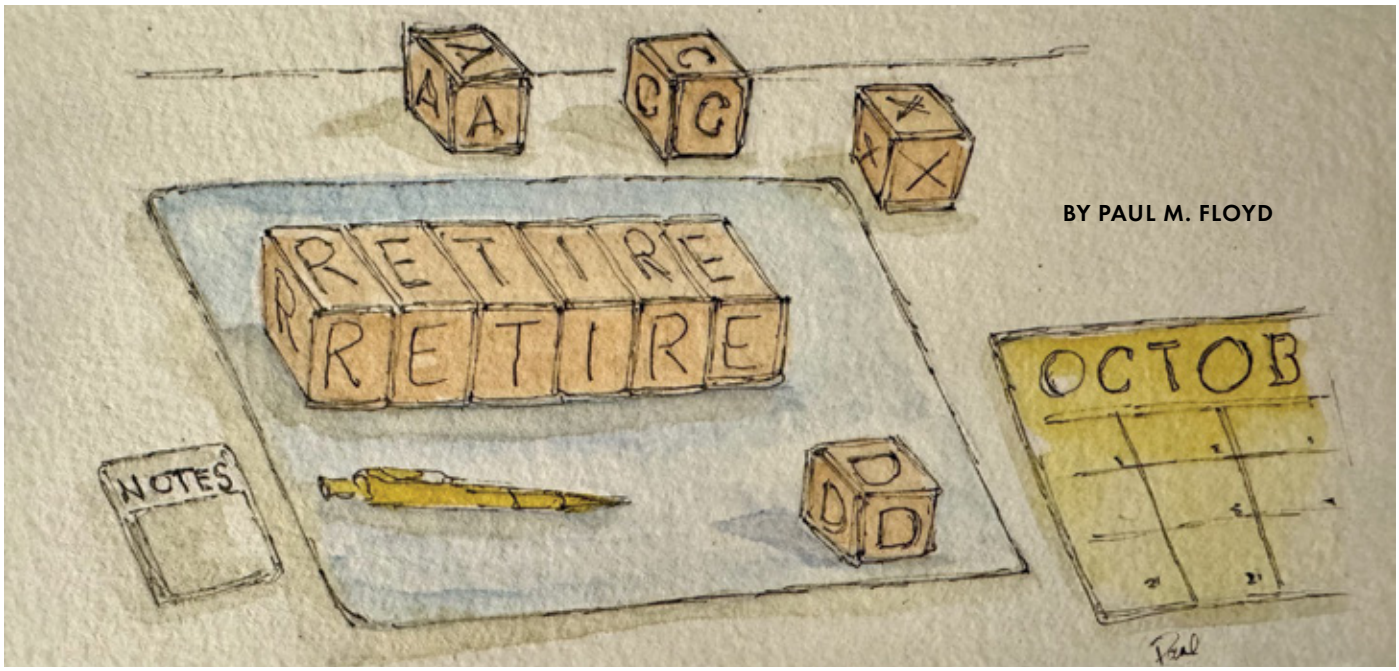
WHAT, ME RETIRE? NEVER!



BY PAUL M. FLOYD

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

Sooner or later, all practicing lawyers face the inevitable question: "Should I stop practicing law and do something else with my time?" For some, the question arises in our 30s or 40s. For others, it comes in their 60s and 70s. For still others, it comes up repeatedly every 7-10 years. In short, the question of retirement is not just for the older or senior attorney but one for each of us to reflect on throughout our careers.

Following both of my law partners' recent retirements, questions about my own retirement plans have naturally surfaced, making the topic not only timely but deeply relevant to my personal and professional life.

Fortunately, in my law practice I regularly advise and represent numerous attorneys who are at or near the age when many consider retiring. When the topic comes up, their responses fall into three categories:

- I will never retire. I can't see myself doing anything else. Dying in court or at my desk is the way I want to go. Can you make sure the firm's partnership agreement has no set retirement age?
- I must retire now and I mean *now*. This minute, not tomorrow, not in a few weeks. Now. I am done. Can you help me notify my clients and help them find another attorney?
- The firm says I need to retire now, but I would like to transition my practice for another five or so years. Can you help me work through the next season of my law practice?

Each of these responses raises its own set of concerns.

THE "I'LL NEVER RETIRE" ATTORNEY

While this response may sound magnanimous to some and a nightmare to others, not planning for one's transition out of the practice of law is naïve and short-sighted. Be honest: After one turns 60, all bets are off regarding one's good health. An unexpected stroke, cancer, heart attack, long-term illness, Parkinson's disease, dementia, or plain poor health can strike any of us, bringing an end to practicing law. Less expected, but just as real, is that a lawyer may become the primary caregiver for a loved one with a debilitating illness, which can also end a law practice. Not planning for retirement just leaves the burden of closing down your practice to law partners and family members. Avoiding discussion of the hard issues surrounding planning for your retirement may be the path of least resistance in the short term but carries a high risk in the long term. Hope is not a strategy. This is not an ideal way to consider how and why to retire.

THE "I HAVE TO RETIRE RIGHT NOW" ATTORNEY

Pre-covid, a middle-aged attorney who had practiced over 20 years met with me and declared that, given his current mental state (in large part exacerbated by the pressures of his practice), he needed to quit practicing law immediately. When I asked him to clarify his timing, he said that he had just left his therapist's office, and upon the therapist's sound advice, he needed to retire right now. Fortunately, he brought along his senior associate, who was capable and willing

to step in and continue representation of his clients; I advised them about the transition. What I remember most about that occasion was the palpable change in the client's physical posture, words, mood, and emotional state from the time he entered my office to the time he left. He clearly had struggled with the demons of his law practice but for any number of reasons could not until that day let go. This is also not an ideal way to consider how and when to retire, because he had clearly lived unhappily for many years until he broke.

THE "I AM PLANNING FOR RETIREMENT" ATTORNEY

For most of us, thoughts about when and how to retire evolve throughout our practice and help to shape each lawyer's formal (or more likely informal) plan for retirement, as it should. No matter how many years you have been practicing law, planning for retirement will help your eventual move to be less of a chaotic and disruptive surprise to you, your law partners, and your family. Hopefully, this will allow you to retire more on your terms than on the terms of your law partners or your mental or physical health.

The MSBA has a number of succession planning resources. (You were wondering where this was all going, right?) One such tool is the Minnesota Lawyers Mutual (MLM) booklet "Succession Planning," available to members on the Law Practice Management page of the MSBA website *(www.mnbar.org/succession*). There is also an On-Demand MSBA CLE entitled "Successful Succession: Make a Plan for Your Firm." And there are several trained coaches, capable of guiding you through the process, who advertise in the classified section of *Bench & Bar*.

In addition, all lawyers who have been admitted to practice before the Minnesota Supreme Court for at least 37 years or are over 62 years old are automatically enrolled in the MSBA's Senior Lawyers & Judges Section, which regularly meets to discuss navigating the before, during, and after questions of retirement. As more and more of us retire from the practice, being active with other senior attorneys and judges from the profession is a viable and helpful option.

So the next time you hear a lawyer say they will never retire, kindly remind them that they will save everyone a lot of grief if they plan ahead for retirement. ▲

NOT PLANNING FOR RETIREMENT JUST LEAVES THE BURDEN OF CLOSING DOWN YOUR PRACTICE TO LAW PARTNERS AND FAMILY MEMBERS.

Bar exam update: NEW COURT COMMITTEE FORMED

In the summer of 2021, the Minnesota Board of Law Examiners (BLE) began a two-year comprehensive review of the state's bar examination process. The study analyzed not just the bar exam, but also alternative models for evaluating competency to practice, including a curriculum-based pathway and a supervised-practice-based pathway.

The BLE filed its report with the Court on June 1, 2023, containing four recommendations:

- *Minnesota should adopt the NextGen exam.*
- *The Board will file a petition to propose modest changes to the supervised practice rules.*
- *Create an Implementation Committee to further explore and develop a curriculum-based pathway for assessment.*
- *Table the proposal to create a supervised practice-based pathway for assessment, and revisit that proposal following further study and experience with the curriculum-based pathway for assessment.*

On March 12 of this year, the Court issued an order (ADM10-8008) adopting all of the BLE's recommendations with a few minor modifications—and one change: The Court's newly formed Implementation Committee will continue to explore a supervised-practice-based pathway to licensure, albeit secondarily to its study of a curriculum-based means of licensure.

The Implementation Committee includes a broad range of stakeholders and the MSBA has nominated three members for the Court's consideration. The committee's report and recommendations are due on July 1, 2026 for the curriculum-based assessment path, and July 1, 2027 for the supervised-practice method of evaluation. ▲

Congratulations to Watertown-Mayer High!


1ST PLACE COURTROOM ARTIST

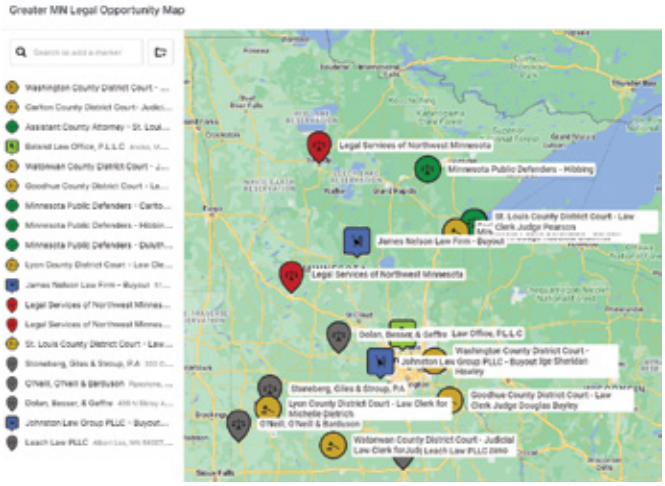
Last month 16 teams from around the state met and competed in the MSBA High School Mock Trial Program's 39th state tournament at the U.S. District Courthouse in St. Paul. Watertown-Mayer High School claimed its second state championship and will represent Minnesota at the national tournament in May. Judges also selected the top eight courtroom artist submissions from the mock trial season to compete for the opportunity to represent Minnesota at nationals; a student from Nova Classical Academy was selected as winner. Please visit *www.mnbar.org/mocktrial* to see the submissions or contact Mock Trial Director Kim Basting (*kbasting@mnbars.org*). ▲

Greater Minnesota Practice Section to receive free dues for 2024-25 bar year and beyond

At its January 25 meeting, the MSBA Board of Governors reviewed and accepted a proposal from the Greater Minnesota Practice Section Council to make the section free for any member that elects it for the 2024-25 bar year and beyond. The proposal was presented by Council member Janna Borgheiinck and came about after the section's membership declined and engagement began to wane in recent years, likely because most CLEs are provided through sections linked to particular practice areas.

In considering ways to combat these issues, the section's purpose was taken into consideration: "to enhance the viability of attorneys practicing in Greater Minnesota and to identify and work toward solutions for the problems shared by those attorneys."

In response the section took two actions.



For more information, visit: www.mnbar.org/greater-minnesota

1. Enhance the viability of their practice by identifying problems and creating solutions. One problem identified was the difficulty of finding jobs and/or finding applicants to fill legal positions in greater Minnesota. To address this problem, the Greater Minnesota Legal Opportunity Map was created. This new tool (see image) will be housed on the section's community page.

2. Membership support to attorneys. How can the association reach more members practicing in smaller cities, towns, and rural areas? By offering section membership for free, the section will seek to expand its reach to more members. ▲

Lessons from private discipline in 2023

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

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

Private discipline is nonpublic discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are isolated and nonserious. Several lessons can be learned from reviewing the mistakes and situations that led to private discipline last year.

Contact with a represented party

Every year lawyers are disciplined for contacting represented parties in violation of Rule 4.2, MRPC. Rule 4.2 is generally referred to as the no-contact rule; it states:

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

Last year, Zoom hearings brought a new twist to this age-old rule.

Courts often have large court calendars, and use online breakout rooms for parties to discuss matters before the court or, particularly in calendars involving lots of unrepresented parties with ancillary issues, such as in housing court, financial assistance or other services might be available.

In one matter, a tenant was represented by a legal services provider in a housing matter. It's clear the lawyer for the landlord knew of this representation, because the parties had been attempting to negotiate a resolution of the dispute. At one point, the client chose to attend the financial assistance breakout room, while her attorney assisted another client in a matter before the court. The lawyer for the landlord, however, chose to join the financial assistance breakout room and proceeded to ask the tenant substantive questions to gather information without the tenant's lawyer being present. The tenant's lawyer returned to the breakout room to join her client to find opposing counsel speaking with her client on matters relating to the dispute. This is a straightforward violation of Rule 4.2, MRPC, and the lawyer received an admonition.

The lesson is to be mindful of the different ways in which court hearings are taking place and the different ways in which you might encounter a represented party unaccompanied by their lawyer. Saying hello to a represented party is not prohibited, nor is asking that individual where their lawyer may be or if they will be joining soon, or discussing the weather if you cannot handle silence, but communicating about the subject of the representation—even if you don't think the communication is material—is off-limits.

In another Rule 4.2 admonition, co-defendants in a criminal matter (a burglary) were separately represented by defense counsel. Although the state had made a motion to try the cases together, the court denied the joinder, and the cases proceeded to trial separately. One day, one co-defendant called counsel for his co-defendant to discuss the upcoming trial of the co-defendant. Counsel discussed the facts and circumstances surrounding the alleged crime for which both individuals had been charged, and determined she wanted to call the co-defendant in the upcoming trial of her client. Counsel reached out to counsel for the co-defendant and acknowledged the prior contact. Opposing counsel brought a complaint and a Rule 4.2 admonition was issued.

Counsel appealed the admonition, arguing that the co-defendant reached out to her, and she was not talking about the co-defendant's matter but rather her client's matter. After an evidentiary hearing, a panel of the Lawyers Professional Responsibility Board affirmed the admonition. Because the representations arose out of the same facts and circumstances, the fact that they resulted in two separate court files was not dispositive. Because of the interrelated nature of the facts, you cannot discuss one matter without discussing the other. And whether the opposing party reaches out or you do is not material to the rule violation; the main inquiry is whether there is communication regarding the subject of the representation.

The lesson here is that if someone is represented in the same or related proceedings, just work through counsel and don't take the represented party's calls. Trying to parse "matters" might make sense to you, but it often results in your thinking too narrowly about the subject matter of the opposing party's representation (the key part of the rule), and forgetting that the point of the rule is protecting the opposing lawyer-client relationship and preventing the uncounseled disclosure of information.

Conflicts

Each year a few lawyers receive admonitions for conflicts that were nonconsentable, or in which no informed consent was obtained.

Rule 1.8(c) is not a rule that most lawyers run into frequently, but it is an important rule to remember. It is one of a series of rules that address transactions with clients. Rule 1.8(c) prohibits a lawyer to "prepare an instrument giving the lawyer... any substantial gift from a client, including a testamentary gift, except where the lawyer is related to the donee." Rule 1.8(k) provides that "[w]hile lawyers are associated in a firm," the prohibition of Rule 1.8(c) "that applies to any one of them shall apply to all of them."

At his client's request, a lawyer asked an associate in his firm to draft a will for a long-time firm client that left 25 percent of the remainder of the client's estate after taxes, expenses, and payment of debts to the lawyer. Among other defenses the lawyer raised, one was that although he was familiar with Rule 1.8(c), he thought having another attorney represent the client and staying out of the matter was sufficient to address the conflict concerns raised. Unfortunately, the lawyer had not read the entirety of Rule 1.8 when making this decision, because the associate in his firm was also prohibited. In many instances, lawyers have been publicly disciplined for this rule violation. In this matter, private discipline was imposed because the lawyer repudiated the gift and had attempted to convince his client to do something different over the years on numerous occasions, indicating a lack of self-interest and harm. The lesson here is obvious: If a client wishes to give you a substantial gift, whether testamentary or otherwise, neither you nor anyone in your firm should represent the client in that transaction.

Rule 1.7, MRPC, defines concurrent conflicts of interest. There are two kinds of concurrent conflicts: direct adversity under Rule 1.7(a)(1), and substantial risk conflicts under Rule 1.7(a)(2). Both kinds of conflicts can be consented to under most circumstances unless the requirements of Rule 1.7(b) cannot be met. The key, however, when there is a concurrent conflict that is consentable, is that "each affected client gives informed consent, confirmed in writing." As many lawyers who simultaneously represent corporations and individuals as well as generations of family members know, this is an important part of advising clients, and it can be overlooked when things are going well. Several lawyers received admonitions in 2023 for failing to get informed consent in circumstances where informed consent was required.

In one matter, for example, a lawyer who had represented several family members in various estate planning and real estate transactions over the course of a decade agreed to represent siblings in the sale of property from one to the other. The lawyer represented both parties in the transaction, giving both tax and corporate structure advice. Although it is tempting to think of oneself as a scrivener in these types of largely amicable transactions, that is rarely the case, as lawyers ultimately end up providing advice to both parties regarding transaction details. This conflict was consentable, although the lawyer did not obtain informed consent from each party in writing. Sibling relationships being what they are, adversity did arise between the siblings regarding their parents' trust, and a complaint was filed, resulting in an admonition for lack of informed consent confirmed in writing.

The lesson is to remember that if you are representing multiple parties in a matter, you must analyze for conflicts and whether consent can be obtained, and then obtain that informed consent confirmed in writing. A corollary to this lesson is to make sure you have properly identified who is and who is not your client, and that this is clear to the individuals you are interacting with on the matter. And remember, clients never consent to an actual conflict—that is, where you put the interest of one party before the other; rather, they consent to the risk that a conflict might arise and the lawyer-client relationship might fail.

Other common mistakes

The most common reasons for private admonitions year over year are lack of diligence (Rule 1.3) and lack of communication (Rule 1.4). Every year, several lawyers are also admonished for errors in withdrawing under Rule 1.16(d). The mistakes that lead to discipline when withdrawing include failure to refund unearned fees promptly, failing to provide reasonable notice or to take steps necessary to protect the client's interest, or failing to promptly provide the client's file upon request.

Collecting fees or subsequently suing your client can lead to discipline. In one case, a lawyer sought a harassment restraining order against a former client for conduct that occurred after the representation concluded. The lawyer was perfectly within his rights to do so, and the motion was warranted by the client's harassing post-termination conduct. But when providing evidence in support of the harassment motion, the lawyer disclosed significant confidential information relating to the representation that was not relevant to the motion the lawyer was making. Rule 1.6(b) includes exceptions to the confidentiality rule, including one that allows a lawyer to disclose information the lawyer reasonably believes is necessary to establish the claim in issue, with one of the key words being *necessary*.

Conclusion

Most attorneys care deeply about compliance with the ethics rules. Please take some time each year to reread the Minnesota Rules of Professional Conduct. They can be found on our website and in the Minnesota Rules of Court. You will find the time well spent. And remember, we are available to answer your ethics questions: 651-296-3952. ▲

NETWORK DOWN

Cybercrime or human error?

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

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

This past month, people across the country were impacted by a severe AT&T network disruption.[1] Though the company encouraged people to make calls using Wi-Fi, the outage still affected many customers' ability to access the internet or even contact emergency services. It made it difficult for some non-AT&T customers to reach out to individuals who had been impacted, and some police departments reported an increase in 911 calls from people looking for answers about what was going on.[2] The outage caused a lot of confusion and created undeniable hurdles for customers.

In the immediate aftermath of the outage, many feared that a cyberattack was to blame. But within a few days, human error was revealed as the more probable culprit, though this may change—the event is still being investigated. According to AT&T's statement, "Based on our initial review, we believe that today's outage was caused by the application and execution of an incorrect process used as we were expanding our network, not a cyberattack."[3] At the time of this writing, it is not entirely clear what process was applied incorrectly, but it seems that this error is the suspected cause of the outage. As with any company or organization, network expansions are often fraught with technological difficulties. In this case, the consequences were severe.

Though a cyberattack is not currently thought to be the source of the AT&T outage, the company's public response was similar to its response if an attack had occurred. Given the severity of the event (full restoration of the network took 12 hours and the outage affected a reported 70,000 customers[4]), the company issued a statement apologizing for the outage. Additionally, AT&T stated that it will provide $5 credits to affected accounts.[5] While reactions to AT&T's response have been mixed, some were generally displeased with AT&T's communications during the event and felt that the credit was unsatisfactory.[6] Some observers have noted that contacting the company directly with their concerns seemed to be beneficial.[7] The company has also tried to assure customers that improvements are being made to its operations to prevent any similar future occurrences.

The ripple effect of technological errors can be disastrous; in this case, "cyber risk" doesn't necessarily relate to cybercrime. Human errors can cause just as much damage, and restoring public faith can be just as difficult. Apart from the immediate financial damages caused by the outage, AT&T may face ongoing losses in the long term that are more difficult to quantify. For example, it was recently announced that New York Attorney Letitia James would be investigating the outage in an effort to protect consumers, acknowledging that a disruption to service can be more than just an inconvenience.[8]

In a digital world that greatly relies on the communication afforded by our devices, even a brief disruption can have devastating consequences. Business continuity plans are as critical as incident plans that seek to minimize the damages incurred through a successful cyberattack; restoring business operations as quickly as possible and providing clear communication throughout an event are imperative to minimize damages and reputational harm. Being aware of potential sources of human error, such as during periods of growth or the implementation of new technologies, can also help in reducing errors. ▲

NOTES

[1] *https://www.cnn.com/2024/02/22/tech/att-cell-service-outage/index.html*

[2] *https://www.cnn.com/2024/02/22/tech/outage-att-cell-phone-service-cause/index.html*

[3] *https://www.cnn.com/2024/02/22/tech/outage-att-cell-phone-service-cause/index.html*

[4] *https://www.nbcnews.com/news/us-news/t-give-5-credits-customers-affected-widespread-service-outage-rcna140443*

[5] *https://www.nbcnews.com/news/us-news/t-give-5-credits-customers-affected-widespread-service-outage-rcna140443*

[6] *https://www.businessinsider.com/att-outage-5-credit-bill-reimbursement-customer-reaction-2024-2*

[7] *https://www.cnbc.com/2024/02/28/in-wake-of-att-outage-consumer-advocate-urge-customers-to-ask-for-money-back-.html*

[8] *https://www.nbcnews.com/news/us-news/t-nationwide-outage-investigation-nys-attorney-general-rcna141201*

Cultivating emotional intelligence in the legal profession

BY KENDRA BRODIN

KENDRA BRODIN is the founder & CEO of EsquireWell, a leading lawyer well-being and performance consulting firm, providing education, strategic guidance, coaching, and online learning tools to help lawyers be happier, healthier, and more successful.

The concept of emotional intelligence (EQ) has its roots in the early 20th century, but it was psychologists Peter Salovey and John D. Mayer who first coined the term in 1990. They defined it as "the ability to monitor one's own and others' feelings and emotions, to discriminate among them, and to use this information to guide one's thinking and actions."

But it was Daniel Goleman's 1995 book *Emotional Intelligence: Why It Can Matter More Than IQ* that brought the concept into the mainstream, highlighting its importance in personal and professional success. Since then, the study of EQ (sometimes referred to as EI) has expanded rapidly; research has shown its impact on various aspects of life, including workplace performance, leadership, and mental health.

For lawyers, the relevance of emotional intelligence and emotional regulation cannot be overstated. The legal profession is inherently emotional—we deal with clients facing stressful and life-changing situations, work in fast-paced and deadline-driven practices, interact with bright and intense colleagues on a daily basis, and feel that we need to be at the top of our game all the time. Lawyers must navigate these emotional landscapes with skill and empathy, all while maintaining their own emotional balance.

High EQ allows lawyers to understand and manage their emotions and those of their clients and colleagues, leading to more effective communication, better decision-making, and stronger relationships. The capacity to regulate one's own emotions, an important component of EQ, is particularly crucial in high-stakes situations such as courtroom battles, intense negotiations, strategic conversations, or emotional interpersonal exchanges where the ability to remain calm and focused can make the difference between a positive and a negative outcome.

Emotional intelligence and emotional regulation are vital skills for lawyers, enabling them to navigate the complexities of their profession with resilience and effectiveness. In such a high-stress environment, understanding and managing emotions is not just advantageous; it's crucial to success and well-being.

EQ: The four quadrants

EQ comprises four primary components, often referred to as the four quadrants:

- **Self-awareness:** This is the ability to recognize and understand one's own emotions, strengths, weaknesses, and values. For lawyers, self-awareness is essential for recognizing internal triggers and biases that can impact decision-making and client/colleague interactions. For example, a lawyer who is aware of their tendency to become angry or defensive in certain situations can work on strategies to remain open and receptive to feedback. Self-awareness also includes accurately identifying the emotion one is feeling as well as gauging the intensity of that emotion.
- **Self-management:** This is also called "emotional regulation," and it involves "right-sizing" one's emotions, thoughts, and behaviors, particularly in stressful situations. Lawyers with strong self-management skills can maintain their composure and think clearly under pressure, enabling them to make rational decisions and avoid impulsive actions and reactions. A lawyer who can manage their frustration during a difficult negotiation, for instance, is more likely to remain focused and find constructive solutions.
- **Social awareness:** This is sometimes called "empathy" for short, and it encompasses understanding the emotions and perspectives of others. In the legal field, social awareness is crucial for empathizing with clients, working effectively with and leading colleagues, understanding the motivations of opposing parties, and effectively navigating courtroom dynamics. A lawyer who can accurately read the emotions of a jury, for example, can tailor their arguments to resonate more effectively.
- **Relationship management:** This component focuses on fostering and maintaining positive relationships, using self-awareness, self-management, and social awareness to build strong, healthy relationships and interact effectively with others. For lawyers, relationship management skills are essential in building trust with clients, collaborating with colleagues, and negotiating successfully with adversaries. A lawyer who can communicate empathetically is more likely to build strong, lasting professional relationships.

NEED SOMEONE TO TALK TO?

One great option is Lawyers Concerned for Lawyers (LCL), which provides free, confidential support and services to Minnesota lawyers, judges, law students, and their immediate family members on any issue that causes stress or distress.

CONTACT LAWYERS CONCERNED FOR LAWYERS

www.mnlcl.org
651-646-5590
866-525-6466 toll-free

Developing emotional regulation skills

Emotional regulation, an integral part of EQ, is the ability to pause between experiencing an emotion and responding to it. This skill enables lawyers to control their thoughts, feelings, and actions in alignment with their long-term objectives and values. Given the demanding nature of legal work, emotional regulation is particularly vital for maintaining composure and making rational decisions under pressure.

Lawyers and legal professionals can develop effective emotional regulation skills through various strategies.

Cultivate self-awareness. Recognize and label your emotions without judgment. Understanding how your emotions influence your thoughts and actions is crucial for effective regulation. Reflecting on past emotional experiences can help identify patterns and triggers, enabling you to anticipate and manage your emotional responses more effectively.

Practice mindfulness. Engage in mindfulness practices such as meditation or deep breathing exercises to calm your mind and stay present. Mindfulness enhances emotional awareness, allowing you to choose how to respond to your emotions consciously and intentionally. It helps in reducing stress and improving focus, both of which are essential for lawyers.

Consider other perspectives. Step back and try to view a situation from different angles. This can provide a broader understanding and help you respond more thoughtfully. Considering how others might interpret the situation can offer valuable insights and improve your ability to empathize and communicate effectively.

Practice adaptable thinking. Challenge your initial reactions and consider alternative interpretations of events. This flexible approach can help you respond more effectively and avoid jumping to conclusions. It encourages open-mindedness and adaptability, both of which are crucial in the ever-changing legal landscape.

Seek support. If you find it challenging to regulate your emotions, consider seeking help from a mental health professional or reaching out to Lawyers Concerned for Lawyers (LCL). Therapy and professional support can provide you with strategies and tools to manage your emotions effectively. Confiding in trusted friends, family, or colleagues can also offer valuable perspectives and emotional relief. Building a support network is essential for emotional well-being.

Emotional intelligence and emotional regulation are truly essential skills for lawyers, enabling them to navigate the complexities of their profession with resilience and effectiveness. By developing these skills, lawyers can enhance their self-awareness, manage stress more effectively, and build stronger relationships. These capabilities are not just tools for sustainable professional success; they are vital components of well-rounded and emotionally healthy lawyers and leaders. ▲

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(LEFT) Attorney Robert Huber received the 2024 Mock Trial Volunteer of the Year Award. **(ABOVE)** 2024 State Champions Watertown-Mayer High School. Coaches: Lori Sieling and Sarah Soley; Attorney Coach: Patrick Neaton. Panel of Judges: Hon. Kate Menendez, Hon. William Fisher, Hon. Jim Dehn, Randy Sparling, Nick Hydukovich, and Lauren Johnson. **(RIGHT)** Nova Classical Academy student artist champion with MSBA President Paul Floyd who served on the courtroom artist judging panel.

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BY IAN LEWENSTEIN

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COMMON BUT NOT FORGOTTEN

My father, mercifully, edited all my college papers. So when I was given the honor by my son to do the same—with a mandated same-day deadline—I was struck by his problems with commas and the irony that I had the same issues in college. But while my son, a first-year college student, can be excused, it's much harder to forgive journalists and professionals for making basic comma mistakes that confuse the reader and can engender ambiguity. When it comes to basic comma mistakes, two are predominantly recurring: (1) missing commas between independent clauses and (2) commas used unnecessarily in compound predicates.

Commas as connectors

Commas can be used in multiple ways and for different purposes, but one important use is to serve as connective tissue between independent clauses. A clause contains a subject and a verb (*I write*); an independent clause can stand by itself as a complete sentence:

I walked to the courthouse. I was late to my hearing.

In the example, both sentences are independent clauses because both clauses (1) have a subject and a verb, and (2) can stand by themselves as complete sentences. But we want to connect the clauses and show a logical relationship between them. To do this, we use coordinating conjunctions: "I walked to the courthouse**, so** I was late to my hearing."

Along with the comma, the conjunction *so* connects the two independent clauses. *So* is part of a rock/sports group called FANBOYS (**F**or, **A**nd, **N**or, **B**ut, **O**r, **Y**et, **S**o). When you have two independent clauses, you connect them using one of the FANBOYS.[1] Neglecting to use this connective tissue can easily stump readers because they expect a break between two sentences, each of which is expressing a distinct idea. This break is also known as the "pause test." While not always reliable, the pause test illustrates how readers naturally expect breaks in writing. When the break isn't there, expect your readers to slow down and stumble, negating your message.

Here are some examples from the *Star Tribune* that show how we need more FANBOYS in our lives:

ORIGINAL	REVISION
Nicks unveiled the doll during a Sunday night concert at New York's Madison Garden and it debuted on Mattel's site Monday morning.	Nicks unveiled the doll during a Sunday night concert at New York's Madison Garden**, and** it debuted on Mattel's site Monday morning.
Several people called 911 to report gunfire and the calls led officers to the 1200 block of Hazelwood where police found the three victims.	Several people called 911 to report gunfire**, and** the calls led officers to the 1200 block of Hazelwood**,** where police found the three victims.
The indignities the girls face range from the terrifying to the absurd but Green knows that ...	The indignities the girls face range from the terrifying to the absurd**, but** Green knows that ...

If the two clauses are short and closely connected, we can politely excuse the commas and FANBOYS: "Ian cooked and Cindy cleaned." (But don't tell Microsoft Word, which is scolding me for omitting the comma after *cooked.*) Or if you are writing fiction, you can be more loosey-goosey. But remember that the goose shouldn't be loose in professional writing.

Beware the compound predicate

Although using commas with FANBOYS is important, you don't want to make the mistake of adding a comma where one is unnecessary. One example is when you have a compound predicate—that is, the same subject in two or more clauses, with the subject omitted after the first clause (stay with me!). A predicate is the verb plus other information.

In a compound predicate, you wouldn't add a comma as such: "The judge waved his hands furiously and spitefully threw his gavel at the witness." The judge is the subject for both independent clauses, so we don't need to repeat them in the second clause.

By dissecting why the judge was so animated (commas, perhaps?), you can understand why you would be mistaken to insert a comma with a compound predicate.

Normally: independent clause + comma + FANBOYS + independent clause

The judge waved his hands furiously, and the judge spitefully threw his gavel at the witness.

But compound predicate: independent clause ~~+ comma~~ + FANBOYS + independent clause (same subject)

The judge waved his hands furiously~~,~~ and ~~the judge~~ spitefully threw his gavel at the witness.

And if you add another verb, you have a series and must punctuate accordingly (serial comma, of course): "The judge waved his hands furiously, spitefully threw his gavel at the witness, and left the bench with a quick sweep of his cloak." For the last two items in the list, you could insert "the judge." But we don't because we want to avoid sounding stilted and interrupting the sentence's natural flow.

When you have a series of three or more items, ensure that you are using a parallel construction with both the subject and verb. For example, if you say, "I sing, dance, and cook," the subject (*I*) is the same for each item in the series, and each item in the series is a verb. Here are some common mistakes (also from the *Star Tribune*) with parallel constructions:

	✗	✓
MULTIPLE SUBJECTS	**Yusuf and his friends** bought a mattress, furniture, and **someone** donated a bed frame.	Yusuf and his friends bought a mattress~~,~~ and furniture, and someone donated a bed frame.
MULTIPLE VERBS	Mack is best known for its semitrucks, though it also **produces** construction equipment, firetrucks, and **has** a defense division that makes military-grade construction vehicles.	Mack is best known for its semitrucks, though it also produces construction equipment~~,~~ and firetrucks~~,~~ and has a defense division that makes military-grade construction vehicles.

Use but don't abuse

Commas are good for organizing information in sentences. As with other punctuation, commas help readers navigate writing, understand it, and, ultimately, use the information. Misplacing a comma may seem trivial, but once you make it a habit, the reader stops reading and instead looks—or winces—for the next misplaced comma. Also, poor mastery of commas makes you vulnerable to being schooled by a judge, who may use a lengthy footnote and multicolor highlighting to explain basic grammatical concepts.[2]

Have other comma questions or topics you want covered? Feel free to email me. ▲

NOTES

[1] You can also exchange the comma and FANBOYS for a semicolon: "I walked to the courthouse; I was late to my hearing." The courts have recognized this semicolon use, too, even citing Strunk and White, authors of *The Elements of Style*. *See In re Welfare of D.J.F-D.*, 986 N.W.2d 17, 25 (Minn. Ct. App. 2023). Oddly, the court misdiagnosed that the clauses were independent and also the reason for the semicolon.

[2] *See, e.g.*, *In re Annexation of Certain Real Property to the City of Waconia from Waconia Township*, OAH 84-0330-32991, 12 n.33 (Minn. Office Admin. Hearings 1/19/2016).

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

AI, UPL, AND THE JUSTICE GAP

A PROFESSION AT THE CROSSROADS

BY DAMIEN RIEHL damienriehl@gmail.com

Since November 2022, when ChatGPT raised the world's consciousness of the power of generative AI tools such as large language models (LLMs), the legal profession has debated a particular question: Might LLMs—and the companies that run them—be performing the unauthorized practice of law (UPL)?

In many states, including Minnesota, the UPL statutes prohibit "prepar[ing] legal documents" and giving "legal advice."[1] Central to the UPL debate is the distinction between two concepts: "legal information" and "legal advice." The caveat is familiar—but does the distinction make sense anymore?

Historically, "legal information" has included primary law (statutes, regulations, case law, administrative opinions) as well as secondary materials (treatises, articles, commentaries on the law). Legal information encompasses abstract legal concepts (such as the elements of a breach of contract claim), as well as the particulars of black-letter law—all as provided by legislators, judges, and regulators.

Legal information is the foundation of our legal system; it must be accessible to all. We're all *bound* by the law—so we all must have *access* to it. As the Supreme Court noted in 2020, "Every citizen is presumed to know the law, and... 'all should have free access' to its contents."[2] That access to legal information is provided by various free resources, such as Google Scholar (for cases) and Cornell's Legal Information Institute (for statutes).

In contrast, "legal advice"—that certain something that only lawyers are authorized to provide—has traditionally been viewed as applying legal information to *specific facts*. Throughout human history, the only entities that could apply law to specific facts have been humans. But with the advent of LLMs, machines are increasingly capable of applying the law to specific facts (or, if you prefer, applying specific facts to law). As such, we now must confront novel questions about whether LLMs providing "legal information" might also be supplying "legal advice." Indeed, if you upload a statute into an LLM and ask it to consider how *your* specific facts apply to that statute, the LLM will provide a response. And that response might be shockingly similar to the words that a lawyer would write. Maybe even better.

Those LLMs are also likely to provide the same types of disclaimers that you provide in offering details about your firm and its practice areas on your website: "This is not legal advice." Of course, these disclaimers help keep lawyers from creating attorney-client relationships. Do they *also* keep consumers from believing that any attorney-client relationship exists when those consumers use tools like LLMs?

Beauty is in the eye of the beholder; legal advice is in the eye of the consumer. Would any consumer think that Google or Microsoft, when their tools expressly announce "I am not a lawyer," is acting as their lawyer?

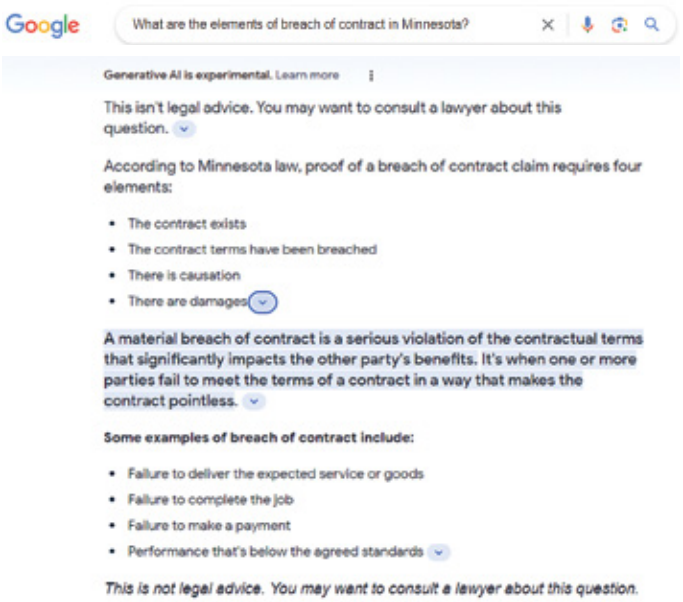
LLMs' role in providing legal information

The newfound ability of LLMs to provide more useful legal information potentially challenges traditional notions of "legal advice." For decades, millions of consumers (and, if we're being honest, most lawyers) have turned to Google and Google Scholar to answer legal questions. "What are the elements of a breach-of-contract claim in Minnesota?" Has anyone believed that all these years, Google has been providing "legal advice"? Of course not.

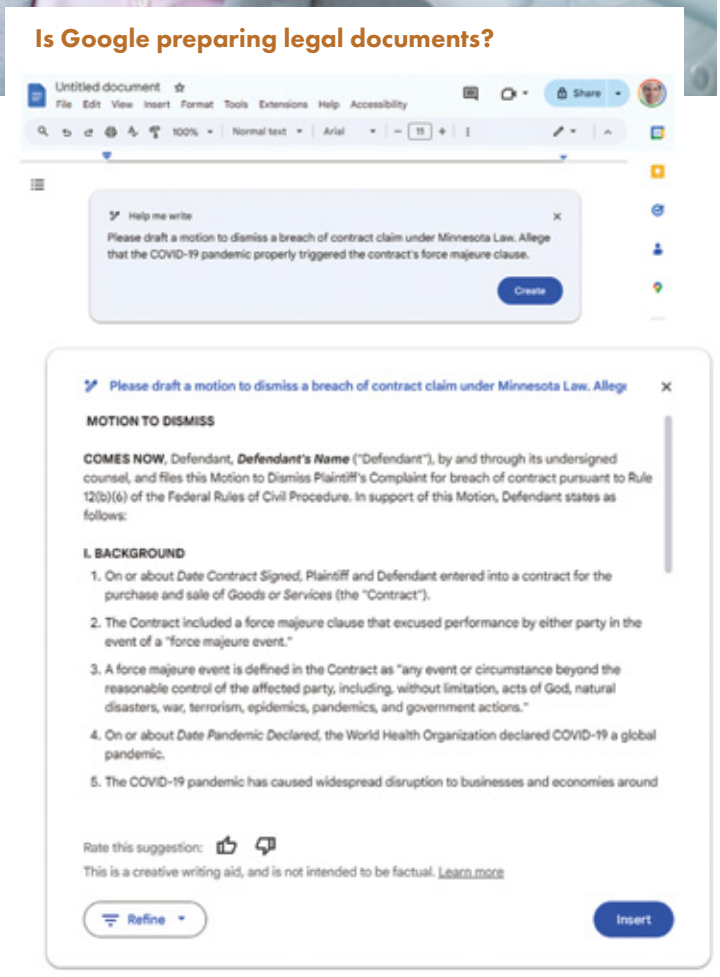
Google is often the tool of first resort for lawyers and consumers alike. Unlike lawyers, low-income and middle-class consumers often rely on Google as their *only* source of legal information. The role of "legal information" is so important—and our help of low-income persons has been so poor—that Google has, for decades, been the primary way that consumers find and interpret legal information.

Today, in addition to pointing users to primary law, Google also provides generative AI answers. For example, if you ask Google the question, "What are the elements of breach of contract in Minnesota?" – Google can now provide a narrative answer:

Note Google's prominent disclaimers: "This isn't legal advice," "You may want to consult a lawyer about this question"—on *both sides* of the answer.



An important question: Given those disclaimers (or even without them), would *consumers* view Google's output as legal advice? Or mere legal information? If you were to poll consumers, what percentage do you think would say that Google is acting as their lawyer—performing the unauthorized practice of law? This is almost certainly "legal information." Especially given Google's clear disclaimers.



Now let's go a step further: Consumers ask the same company (e.g., Google) to draft a motion to dismiss using that legal information, applied to specific facts (covid-19, say). Would any consumer consider this "legal advice"—or would they continue thinking that they were just "Googling it"—that is, obtaining legal information?

Here, is Google giving "legal advice"? Is it "prepar[ing] legal documents"? Minn. Stat. §481.02, subds. 1–2 (2023).

If your answer is, "Yes, Google is either providing 'legal advice,' 'prepar[ing] legal documents,' or both," what then? Prosecute Google? Keep Google's service from low-income consumers?

Chief Justice John Roberts, in his *2023 Year-End Report on the Federal Judiciary*, provided these words regarding the power of AI to help low-income individuals: "For those who cannot afford a lawyer, AI can help. It drives new, highly accessible tools that provide answers to basic questions, including where to find templates and court forms, how to fill them out, and where to bring them for presentation to the judge—all without leaving home. These tools [AI] have the welcome potential to smooth out any mismatch between available resources and urgent needs in our court system."[3]

Those words seem pretty clear: Chief Justice Roberts appears to favor using LLMs to help the low-income population bridge the access-to-justice gap. We should, too.

Imagine the converse: "Sorry, poor people, you don't get the good tools. Despite Justice Roberts's words, your reasonable, Google-created motion is prohibited as the unauthorized practice of law, so you're stuck with 'plain old Googling' to draft your more awful motions (that will be more easily dismissed). It's for your own good!"

Or would it be better to interpret the Google tool's output, as shown above, as "legal information" and not "legal advice"?

Of course, we are weighing this decision even as *lawyers themselves* can use LLMs—in products like Westlaw, LexisNexis, and vLex (Fastcase)—to make the practice of law faster and more effective. When a lawyer uses Westlaw or CoCounsel to draft a legal document, is the legal-research company performing the unauthorized practice of law? Of course not. Legal research tools have always been mere "legal information."

What does this mean for equal justice under the law? Do rich people who can afford lawyers get access to the best LLM-based tools while poor people are stuck with Google search? Access to justice, indeed.

The "legal information" well goes deep. The law consists solely of words. Words are information. And LLMs can now reason with that information, applying facts to law. But that seemingly magical application does not magically convert "legal information" into "legal advice."

UPL or free speech?

Might all the talk about "unauthorized practice of law" implicate another legal concept, "freedom of speech"? Plaintiffs in two cases, *Upsolve* and *Nutt*, have successfully argued that constraints on professional assessments (legal advice and engineering opinions) constitute unconstitutional constraints on free speech.

In *Upsolve v. James*, the Southern District of New York granted Upsolve a preliminary injunction, using an "as applied" standard to hold that Upsolve's argument (that New York's UPL statute unlawfully constrains Upsolve's ability to provide low-income persons information, thereby constraining Upsolve's freedom of speech) is likely to succeed on the merits. The case is currently being appealed to the Second Circuit.[4]

In a similar case from North Carolina, *Nutt v. Ritter*, a federal court recently held that the North Carolina Board of Examiners for Engineers and Surveyors violated a retired engineer's free-speech rights. In December, the federal court held that the regulators' attempt to prohibit the retired engineer from providing an engineering report constituted an unconstitutional violation of free speech. The court reasoned that the engineering guild's "interests must give way to the nation's profound national commitment to free speech."[5]

Looking to the *Nutt* case, is "unauthorized practice of engineering" distinguishable from "unauthorized practice of law"?

From a public policy perspective, which is more dangerous: bad legal advice or a bridge collapse? Yet the *Nutt* court still held that the "unauthorized practice of engineering" constrained free speech unconstitutionally. How might Minnesota's UPL statute, or any state's, fare under this standard?

These two cases raise similar, difficult questions: Can states continue asserting UPL statutes without impinging on free speech rights? Upsolve is before the Second Circuit, and North Carolina federal courts appeal to the Fourth Circuit. Will they both be upheld on appeal? Or are we looking at a circuit split of the sort that the Supreme Court—led by apparent LLM sympathizer John Roberts—will have to resolve? For advocates of crying UPL, these case law developments will likely dampen their optimism.

Big Tech and the unauthorized practice of law

If you are among the legal professionals who believe Google is performing the unauthorized practice of law and that the district courts have wrongly held that UPL restrictions thwart freedom of speech, what should we do next? Should prosecutors or bar associations prosecute Google for UPL?

If your answer is yes, then we should probably also prosecute Microsoft, which is baking LLMs into Microsoft Word and Outlook. And while we're at it, we should probably also prosecute Meta (Facebook), whose open-source LLaMA model answers legal questions similarly. And since nearly 100 percent of the largest technology companies are laser-focused on generative AI, we should also probably do blanket UPL prosecutions of every single Big Tech company—including Amazon, since its AWS hosts LLaMa, Claude, and other LLMs.

On the other hand, if we decline to prosecute Big Tech, then do we similarly decline to prosecute smaller players? Or do we prosecute just the small players and not Big Tech? What does that "punching down" demonstrate? That states are unwilling to assert UPL statutes against the *biggest* players in tech for fear of losing legal battles with Big Tech's Big Law firms, but we're happy to try taking down smaller players?

If we truly seek to use UPL laws to prevent "consumer harm," wouldn't we go after the world's *largest* companies — Google, Microsoft, Meta — whose wildly popular LLMs are the *most likely* to be used by our would-be consumer clients?

In the end, if we decline to prosecute the world's largest companies for UPL, then that decision might well nudge us toward LLMs' most-promising potential benefits, which involve helping bridge the access-to-justice gap.

WHAT IF BAD THINGS HAPPEN?

Of course, the purpose of UPL statutes is to protect the public. So what will happen if unscrupulous people or companies give bad advice, taking advantage of consumers? There's a law for that! Actually, there are many laws to address unscrupulous people taking advantage of others. They include laws pertaining to:

- Negligence. "Providing this bad legal information, you failed to fulfill your duty of care."
- Product liability. "Your legal product lacked sufficient warnings about its limitations."
- Misrepresentation. "Your legal information and claims of being a 'robot lawyer' were false."
- Unfair or deceptive trade practices. "You deceived me, saying that you were a lawyer."
- False advertising. "Your advertisement falsely said that you were a lawyer."
- Breach of contract. "Your terms of service said your coverage included 'all courts,' which was false."
- Consumer protection laws. "This legal product failed to secure client data, resulting in consumer harm."
- Fraud. "Your representation — that you're a lawyer — was false, and you knew that it was false."
- Breach of warranty. "You guaranteed a result, but you failed to deliver."
- Probably many others. (Plaintiffs' lawyers, get your thinking caps on!)

Over 200 years, the case law surrounding each of the common-law and statutory claims above is abundant. UPL prosecution is astonishingly rare. But laws regarding "bad people doing bad things" are bountiful.

Given the paucity of UPL caselaw, and the practical impossibility of distinguishing "legal advice" from "legal information" under the new technological regime, the common-law and statutory claims above can sufficiently protect the public from unscrupulous actors. And because the case law is more developed (millions of cases over centuries), the public is more likely to be protected.

Additionally, under each regime, who can sue? A UPL action arguably can be brought *only* by prosecutors or the attorney general's office. The 10 civil claims listed above can be brought by anyone. Any member of the public who is wronged can sue; there is no need to convince a prosecutor, to wrangle a case based on the weak and minimal UPL case law, or to form a UPL working group. Civil claims democratize suing bad people doing bad things. Anyone can simply sue for negligence, fraud, product liability, or so on—without needing to even utter the term "UPL."

Do UPL laws thwart access to justice?

At the heart of this discussion is access to justice (A2J). For years, 80 percent of consumers' legal needs have been unmet.[6] As Chief Justice Roberts has noted, today's LLM-based tools might offer a solution. LLMs can augment the capabilities of legal aid organizations. And they can help consumers for whom paying a legal bill for even 15 minutes is impossible.

For decades, low-income and middle-income people's *de facto* source of legal information has been Google. Today, their *de facto* source of legal information is an LLM like ChatGPT. Which is better?

If the legal profession stands on the claim that LLM-based tools are performing UPL, then it risks perpetuating the status quo. We're failing badly. And if we do nothing, we'll continue failing the highest goal of our profession: equal justice for all. If we instead embrace the promise of LLMs to serve broad swaths of the public that we have left unserved for decades, then perhaps we can help to bridge the massive justice gap.

Potential solutions to address the A2J gap

AI can improve access to justice. Legal Aid organizations can and should leverage LLM tools, effectively expanding their reach. If legal services transition from traditional methods to more efficient, LLM-driven approaches, they could serve more constituents—and provide even more tailored services to people who need them most. *Pro se* litigants can evolve from "Google-assisted" cannon fodder for lawyers into LLM-enabled parties for whom "equal justice for all" can be referenced with a straight face.

If lawyers increase their productivity with LLMs, they could expand their services by going down-market—and thereby help address that 80 percent of legal needs that are currently unmet. Economists call that an "untapped market." Today, that low-income latent market is willing to pay what it can for reliable legal services, and with LLM-enabled efficiencies, lawyers could serve that market and make more money in the aggregate.

By embracing this potential future, lawyers could make more money, serve more people, and provide wider societal benefits.

COURTS CAN ACHIEVE MORE EFFICIENT WORKFLOWS

When I clerked for the Minnesota Court of Appeals, and subsequently the U.S. District Court for the District of Minnesota, I had a front-seat view of our courts' litigation firehose. Judges and their clerks work tirelessly, but over time judicial caseloads have nonetheless become more voluminous.

What if LLMs were to help courts with that workload, allowing human judges to better serve justice? Some possible applications:

- **Bench memos.** What if an LLM could draft judicial clerks' bench memos, performing in minutes what would normally take clerks all day? For each claim, summarize the parties' positions (which may be spread over many documents): "Plaintiff argues X, defendant argues Y, the law appears to support __." With LLMs, building that tool is trivial (I've already built one), and it can create a bench memo in seconds.
- **Clerks for the clerkless.** For those judges who lack law clerks (such as ALJs and some rural judges), the LLM-backed tools could help in more efficiently processing their caseloads.
- **Substantive analyses.** What if an LLM could programmatically identify weak or missing elements of claims? For example: "For the breach-of-contract claim, plaintiff lacks evidence supporting Element 3 (causation)." This is the work that human clerks do today, but slowly. If LLMs can expedite it (with no sacrifice in quality, likely even an improvement), humans will be able to more quickly identify cases' strengths and weaknesses.

This future should consist not of machines deciding cases, but of tools *aiding* judges and their clerks. Just as e-discovery eased the crushing burden of millions of client documents, LLMs can help judges and their clerks sift through their hundreds of cases. These LLM-backed tools can help separate the litigants' wheat from the chaff more quickly, enabling the human jurists (and their clerks) to more quickly exercise their human judgment.

When I clerked for Chief Judge Michael J. Davis, he would often repeat the maxim: "Justice delayed is justice denied." LLMs can effectively expedite justice.

Conclusion: Where do we go?

The legal profession stands at a crossroads. Embracing generative AI tools such as LLMs can significantly improve legal practice and access to justice. If we're able to assess potential concerns about free speech and guild protectionism, we might move forward with using tools to benefit the public.

The line between "legal information" and "legal advice" has *always* been blurry. And with LLMs, it has become virtually nonexistent. Legal tools can incorporate facts into law, providing legal information that can be indistinguishable from the work of human lawyers. But paradoxically, the technology that can do this near-magical work could also provide lawyers with *additional* work if corporations leverage LLM-enabled lowered costs by giving lawyers more legal work. (One example might be regulatory work that, pre-LLM, was simply too expensive to undertake.) These tools can also enable lawyers and allied professionals to serve a low-income population that has traditionally been unserved.

If lawyers, judges, prosecutors, and bar associations decline to raise the UPL alarm and instead embrace LLMs' benefits to both the public and to the profession as encouraged by Chief Justice Roberts, our profession will continue to have ample work, while also providing improved access to justice. We can do well by doing good. ▲

NOTES

[1] Minn. Stat. §481.02, subds. 1–2 (2023).

[2] *Georgia v. Public.Resource.org, Inc.*, 140 S. Ct. 1498 (2020).

[3] Chief Justice John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary* (12/31/2023), *available at https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf*

[4] *Upsolve, Inc. v. James*, Case No. 1:22-cv-00627-PAC (S.D.N.Y. 5/24/2022), *available at https://www.docketalarm.com/cases/New_York_Southern_District_Court/1–22-cv-00627/Upsolve_Inc._et_al_v._James/68/*, *appealed to* Case No. 22-1345 (2d Cir.), *available at https://www.docketalarm.com/cases/US_Court_of_Appeals_Second_Circuit/22-1345/Upsolve_Inc._v._James/*

[5] *Nutt v. Ritter*, Case No. 7:21-cv-00106 (E.D.N.C. 12/20/2023), *available at https://www.docketalarm.com/cases/North_Carolina_Eastern_District_Court/7–21-cv-00106/Nutt_v._Ritter_et_al/63/*

[6] Legal Services Corporation, *The Unmet Need for Legal Aid*, *available at https://www.lsc.gov/about-lsc/what-legal-aid/unmet-need-legal-aid*

DAMIEN RIEHL is a lawyer, vLex employee, and chair of the Minnesota State Bar Association's working group exploring the access-to-justice potential of generative AI and examining whether AI constitutes the unauthorized practice of law—but any views in this article are his own, not those of his employer, the MSBA, or the working group.

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The Eighth Circuit needs more women on the bench

An advocate's experience

BY STEPHANIE ANGOLKAR

One October morning in 2021, I prepared to return to in-person oral arguments before the Eighth Circuit in St. Paul, Minnesota. After checking in for my argument, I entered the courtroom and quickly saw that I was the only woman in the room. That only changed when the court clerk entered at the start of arguments. The panel clearly had been looking forward to returning to in-person arguments and was very active.

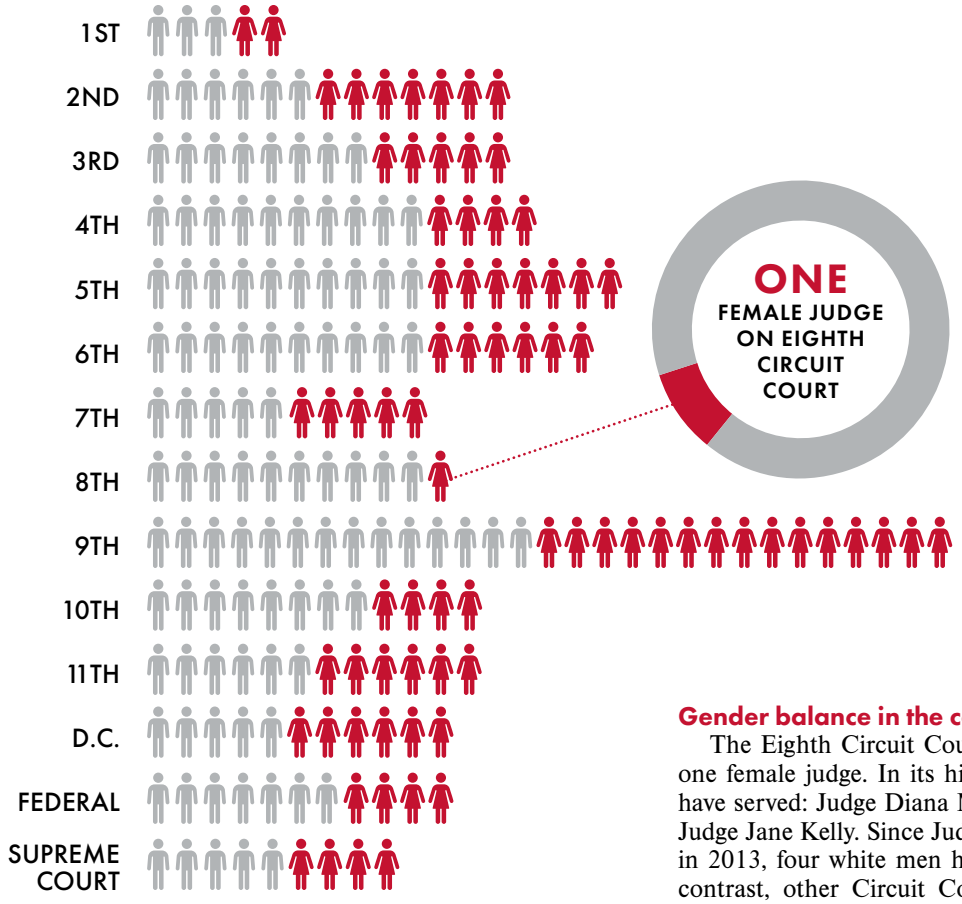
Appellate attorneys often sit in the gallery during the arguments of other cases. One of the cases argued was the appeal of a sex trafficking conviction, *United States v. Taylor*.[1] The engaged panel asked questions about the meaning of a "happy ending."[2] These questions, which can be listened to online, addressed such details as the placement of a hand towel and other hypotheticals. I do not need to tell you the panel was all-male because you know the odds of that in the Eighth Circuit—where we have only one female judge.

So there I sat, trying to identify this feeling I was experiencing. It was a sensitive case, so of course they would need to ask some sensitive questions about the details, right? But I could not help wondering, would the makeup of this audience before the court change the way the questions were asked? The very detailed hypotheticals? Then I started to wonder how these questions might change if there were a woman arguing. Would they be asked the same way? And what if there was a woman among the three judges? Would the questions change? Would they be asked differently? Then my thoughts turned even bolder: What if there were three women on the panel?

The argument ended, and it was time to leave. I pushed the thoughts and questions about more women on the bench aside. But the argument that morning started me on a quest to join a long-standing argument regarding the need for more women on the Eighth Circuit.

FIGURE 1:

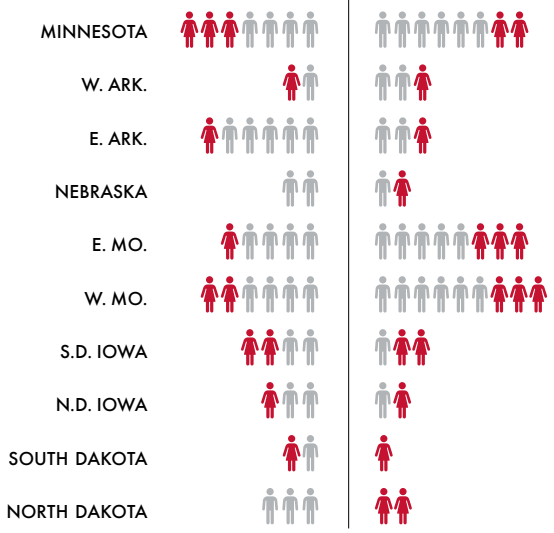
Gender Balance in Circuit Courts and Supreme Court



Eighth Circuit

FIGURE 2: ARTICLE III DISTRICT COURT JUDGES

FIGURE 3: MAGISTRATE JUDGES



(figures excluding Senior status, as of 1/15/24)

Gender balance in the courts

The Eighth Circuit Court of Appeals has only one female judge. In its history, only two women have served: Judge Diana Murphy (deceased) and Judge Jane Kelly. Since Judge Kelly's appointment in 2013, four white men have been appointed. In contrast, other Circuit Courts of Appeal reflect more gender balance (SEE FIGURE 1).

The Eighth Circuit Court of Appeals serves the region including North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, and Arkansas. Within those states' federal district courts, too, there is still work to be done to improve gender balance (SEE FIGURE 2).

At the magistrate judge level, gender balance in the states within the Eighth Circuit is progressing (SEE FIGURE 3).

In some cases, a woman's perspective can influence the result. In *Safford Unified School District v. Redding*,[3] a case involving the strip-search of a 13-year-old-girl, the Supreme Court justices questioned the seriousness of the charge during oral arguments. Only Justice Ruth Bader Ginsburg expressed deep concern. Justice Ginsburg is believed to have influenced the eventual 8-1 vote, and she later explained, "They have never been a 13-year-old girl."[4]

There are many studies and resources analyzing the impact of gender on decisions of the courts.[5] A diverse bench also improves public confidence in the courts. There is something powerfully affirming for the public in seeing judges that look like them or have a relatable background.

THE INFINITY PROJECT BELIEVES IT IS NECESSARY TO HAVE A BENCH REFLECTING SOCIETY AS A WHOLE SO THAT JUDICIAL DECISIONS TAKE INTO ACCOUNT VARIED LIFE EXPERIENCES AND POINTS OF VIEW. IF YOU ARE CURIOUS TO LEARN MORE, VISIT WWW.THEINFINITYPROJECT.ORG/MINNESOTA.

The Infinity Project

The argument for more women in the Eighth Circuit was amplified in 2007. That year, Judge Mary Vasaly, Marie Failinger, Lisa Brabbit, and Sally Kenney founded The Infinity Project in Minnesota. Their mission was to increase gender diversity on the Eighth Circuit bench. The Infinity Project believes it is necessary to have a bench reflecting society as a whole so that judicial decisions take into account varied life experiences and points of view.

The Infinity Project has a busy Applicant Support Committee, recently honored with a Minnesota Lawyer Attorneys of the Year award for diversity, equity, and inclusion efforts. This committee assists women applying for judicial positions, whether it be brainstorming sessions, application and cover letter feedback, or mock interviews.

The committee works with women and diverse candidates applying for judgeships at state and federal levels in multiple states within the Eighth Circuit. The Infinity Project hopes its efforts supporting women at multiple levels will grow the pipeline to the Eighth Circuit–and that these efforts could be more formally replicated in other states. This is particularly important since federal judges often have prior judicial experience. For example, the Hon. Wilhelmina Wright served at all levels of the judiciary in Minnesota before her appointment by President Biden to the United States District Court of Minnesota, and she was a strong contender when he considered an appointment to the United States Supreme Court.

Let's think, too, about the demographics of who is appearing before the court. Are there concerns about the legitimacy of courts and the ethics of judges? How does it feel to appear in a judicial system that more accurately reflects the diversity of our communities? When there is more balance, it feels like a system working for all of us, resulting in more trust from all of us.

I speak from my own perspective as a female attorney. I treasure a moment from a jury trial several years ago in which I, female co-counsel, female opposing counsel, and Judge Ann Montgomery were addressing a trial matter outside the presence of the jury. I do not even remember what it was about. What stands out to me is that we were all women in the courtroom at that time. It is a moment I have yet to replicate in practice. When I appear before a woman judge or am working with other women attorneys in my heavily male-dominated practice area, there is a boost in my self-esteem that affirms and validates my presence in this profession and practice area.

Lived experiences have an impact on judicial philosophies. And the makeup of our bench has an influence on those appearing before it, their trust in the system, and their own feelings of self-worth and possibility.

At a time when diversity, equity, and inclusion efforts are under attack, it is important to reflect on why these efforts are important. It is not about evening out numbers or meeting a ratio, though certainly data points help. Rather, if we view a judicial branch that more closely reflects the diversity of our society, we add legitimacy, buy-in, and ownership by the public in this system.

How you can help

If you are curious to learn more about the Infinity Project, visit *www.theinfinityproject.org/minnesota*. The Infinity Project is a nonpartisan organization that relies on donations from granting agencies, law firms, and individuals to cover expenses for the volunteer-based organization. ▲

STEPHANIE ANGOLKAR is a partner at Iverson Reuvers in Bloomington, Minnesota, who regularly handles appeals before the Eighth Circuit and trials in federal and state court in civil rights and complex civil litigation matters. She is president of The Infinity Project, based in Minnesota. She is also an MSBA-certified civil trial law specialist.

NOTES

[1] 44 F.4th 779 (8th Cir. 2022).

[2] This was one of the issues raised in the appeal. The court affirmed the jury's conviction of sex trafficking offenses.

[3] 557 U.S. 364 (2009).

[4] Hayes, Hannah, *Diversity on the Bench: Why It Matters in a Polarized Supreme Court*, American Bar Association, (8/17/2022), (available at: *https://www.americanbar.org/groups/diversity/women/publications/perspectives/2022/august/diversity-the-bench-why-it-matters-a-polarized-supreme-court/*).

[5] See, e.g. Haire, Susan and Laura Moyer, *Gender, Law, and Judging*, Oxford Research Encylopedias, (4/26/2019) (available at: h*ttps://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-106#:~:text=In%20an%20analysis%20of%20sex,recent%20cohorts%2C%20the%20effect%20disappears*.

LANDMARKS IN THE LAW

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

Criminal Law

JUDICIAL LAW

Indecent exposure: A woman's intentional display of breasts is exposure of private parts. Police encountered appellant, a woman, in a convenience store parking lot with her breasts fully exposed. The store was open and others were present. She was arrested and charged with indecent exposure and drug possession, after a search of her purse revealed cocaine. After a stipulated facts trial, appellant was convicted. On appeal, she argues that the evidence was insufficient to convict her of indecent exposure, because female breasts are not "private parts," and that the indecent exposure statute violates equal protection because it penalizes the exposure of only female breasts.

Minn. Stat. §617.24, subd. 1(1) criminalizes willful and lewd exposure of one's body, or the private parts thereof, in a public place. The Minnesota Court of Appeals holds that a woman's fully exposed breasts are "private parts" under this section. While the term is not defined in the statute, the court finds the Legislature must have intended it to include a woman's fully exposed breasts, pointing to the statute's exclusion of breasts exposed for breastfeeding purposes, an exclusion that would be unnecessary if a woman's breasts were not considered "private parts." Because appellant fully exposed her breasts in a public area, one where nude exhibitionism is "shockingly out of the ordinary," the evidence was sufficient to convict her of indecent exposure.

The court also rejects appellant's equal protection argument, given prior case law establishing that exposure of male breasts is distinct from the exposure of female breasts. ***State v. Plancarte***, A23-0158, 2024 WL 413442 (Minn. Ct. App. 2/5/2024).

Escape from custody: At trial for failing to return following a temporary leave from custody, court should instruct jury that the state must prove the failure to return was intentional and voluntary. Appellant was in custody awaiting trial on other charges when he was granted an eight-hour furlough to attend his mother's funeral. He failed to return from the furlough and was arrested almost three weeks later. At the conclusion of his trial for the escape offense, the district court denied appellant's request that the escape instruction include a general intent requirement, as the statute and model instructions do not include such a requirement.

As is relevant to this case, Minn. Stat. §609.485, subd. 2(1), prohibits an "escape [] while [being] held pursuant to a lawful arrest [or] in lawful custody on a charge or conviction of a crime." "Escape" includes failing to return to custody following temporary leave. Minn. Stat. §609.485, subd. 1. While the statute does not include a general intent element, the court of appeals emphasized that "[a]n unbroken line of precedential cases has recognized that the crime of escape includes the element of general, volitional intent." These cases established the requirement that the escape be intentional and voluntary.

Therefore, appellant was entitled to an instruction that the state is required to prove appellant's failure to return from custody was intentional and voluntary. The district court's error was not harmless and appellant is entitled to a new trial on the escape charge. ***State v. Garza***, A23-0128, A23-A0129, 2024 WL 413436 (Minn. Ct. App. 2/5/2024).

Criminal sexual conduct: Infliction of bodily harm alone constitutes "force." Appellant was convicted of first-degree criminal sexual conduct, both for using force and acting against a physically helpless victim. Appellant argues on appeal the evidence is not sufficient to sustain the convictions.

First, the court of appeals finds there was sufficient evidence to support the jury's conclusion that appellant was physically helpless, because the victim testified she was heavily intoxicated and went in and out of consciousness. Next, the court finds the evidence was also sufficient to support the finding that appellant knew or had reason to know the victim was physically helpless.

As to the force charge, the state was required to prove

appellant sexually penetrated the victim, caused injury to the victim, and used force or coercion to accomplish the sexual penetration. Minn. Stat. §609.342, subd. 1(e)(i). Appellant argues the state failed to prove the force element because there was no evidence showing he used the infliction or threat of infliction of bodily harm to cause the victim to submit.

"Force" is defined as "the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit." Minn. Stat. §609.341, subd. 3. The court finds that the structure of the statute indicates it is divided into two parts, separating the bodily harm portion from the remainder. The "causes the complainant to submit" requirement applies only to the second portion, or the "any other crime" portion, of the definition. Thus, the state was not required to prove that appellant's infliction or threatened infliction of bodily harm caused the victim to submit. The evidence here was sufficient to prove appellant inflicted harm upon the victim, given her testimony that she felt pain during the assault.

The district court erred, however, by convicting and sentencing appellant on both first-degree criminal sexual conduct offenses. Case law prohibits convicting and punishing an offender for two counts of the same crime stemming from the same conduct. ***State v. Williams***, A23-0200, 2024 WL 413474 (Minn. Ct. App. 2/5/2024).

Procedure: Requirement that offenses punishable by life imprisonment be prosecuted by indictment does not apply to lifetime conditional release. Appellant was charged by complaint with third- and fourth-degree criminal sexual conduct offenses relating to an incident in 2019. He was convicted and, due to a 2016 conviction for third-degree criminal sexual conduct, under Minn. Stat. §609.3455, the district court sentenced appellant to 140 months and ordered that he be placed on lifetime conditional release following his release from custody. On appeal, appellant argues Minn. R. Crim. P 17.01, subd. 1 ("An offense punishable by life imprisonment must be prosecuted by indictment") required the state to charge him via indictment, not complaint. The court of appeals affirmed.

Appellant advocates for overturning *State v. Ronquist*, 600 N.W.2d 444 (Minn. 1999), which held that a conviction for an offense which, when coupled with a conviction for a prior offense, required an enhanced sentence of life imprisonment, did not "create an offense punishable by life imprisonment which must be prosecuted by indictment." *Id.* at 449. Decisions of the U.S. Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), "raised the bar for what must be put before a jury when a sentence is enhanced." But these cases do not affect the holding in *Ronquist*. *Apprendi* and *Blakely* affirmed that a sentence other than the fact of a prior conviction must be put before the jury. It is such a prior conviction that triggers the lifetime conditional release.

After concluding *Ronquist* is still good law, the court determines its holding also applies to lifetime conditional release. An indictment was not needed to charge appellant here. ***State v. Snyder***, A22-0318, 2 N.W.3d 302 (Minn. 2/7/2024).

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Employment & Labor Law

JUDICIAL LAW

Race, gender discrimination; legitimate reason to discharge. A prison employee who was fired for failing to secure an office that an inmate broke into and stole money lost her claim of race and gender discrimination. The 8th Circuit Court of Appeals affirmed a lower court ruling that the employer had a "legitimate, non-discriminatory reason" to fire her for her laxity in not securing the premises. ***Ingram v. Arkansas Department of Corrections***, 2023 WL 5838798 (8th Cir. 2024).

Sick time backpay award upheld. The award of nearly $33,000 for past sick time owed to an employee under the St. Paul Earned Sick & Safe Time Ordinance was upheld. The Minnesota Court of Appeals affirmed a ruling of the city's Department of Human Rights. ***St. Paul Department of Human Rights v. Caremate Home Health Care***, 2024 WL 323339 (Minn. Ct. App. 1/29/2024) (unpublished).

Unemployment compensation; quarrelsome employee loses. An employee who swore at his manager and quarreled with a co-worker, exchanging vulgarities overheard by customers while threatening to injure him, was denied unemployment benefits. The appellate court affirmed a decision by an unemployment law judge with the Department of Employment & Economic Development (DEED) that the employee committed disqualifying misconduct that barred him from receiving unemployment benefits. ***Freeman v. Kellberg Catering***, 2024 WL 323451 (Minn. App. 1/29/2024) (unpublished).

Unemployment compensation; cop's use of force bars benefits. A Duluth police officer was denied unemployment compensation benefits for violating the department's use of force policy. Upholding a decision by an unemployment law judge with DEED, the court of appeals held that firing two shots through an apartment door after pleas from inside to stop shooting constituted disqualifying misconduct. ***Leibfried v. City of Duluth***, 2024 WL 160097 (Minn. App. 1/16/2024) (unpublished).

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Environmental Law

ADMINISTRATIVE ACTION

MPCA issues implementation procedures for wild-rice sulfate standard in wastewater permits. In January 2024, the Minnesota Pollution Control Agency (MPCA) released its Procedures for Implementing the Class 4A Wild Rice Sulfate Standards in NPDES Wastewater Permits in Minnesota, *available at https://www.pca.state.mn.us/sites/default/files/wq-wwprm2-109.pdf*. The release of the WR implementation procedures followed MPCA's December 2023 release of its Framework for Developing and Evaluating Site-Specific Sulfate Standards for the Protection of Wild Rice. The framework and WR

implementation procedures are the agency's latest steps in its work to fully implement the Minnesota Class 4A 10 mg/L sulfate water quality standard, adopted in 1973, "applicable to waters used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels." Minn. R. 7050.0224, subp. 2.

Minnesota has approximately 2,400 waters that MPCA has determined are "waters used for the production of wild rice." And although sulfate levels across the state have not been measured as thoroughly as other pollutants, sulfate levels in surface waters generally are lower in north-central and northeastern Minnesota, and higher in the western and southwestern portions of the state. In 2021, the U.S. Environmental Protection Agency added 32 wild rice waters to Minnesota's 2020 Impaired Waters List due to measured sulfate levels in excess of 10 mg/L, and in 2022, MPCA updated its Impaired Waters List to include three additional wild rice waters, bringing the total to 35 impaired wild rice waters.

MPCA's WR implementation procedures document reviews MPCA's four-step procedure for evaluating and developing surface water quality-based effluent limits for wastewater treatment facility (WWTF) National Pollution Discharge Elimination System (NPDES) permits. Notably, the Class 4A sulfate standard only applies to "waters used for production of wild rice"—a phrase whose meaning has been and continues to be debated—whereas most Class 4 water quality standards apply to almost all waters of the state. Also, of the approximately 2,400 waters that produce wild rice, only about 10% (244) are impacted by WWTFs with water discharge permits, according to MPCA, and some wild rice waters have multiple WWTFs discharging upstream (e.g. the lower Mississippi receives discharges from about 576 WWTFs). Some WWTF permittees upstream from wild rice waters have sulfate monitoring prescribed in their NPDES permit, but most have not been monitoring sulfate in their discharge.

The WR implementation procedures establish a four-step procedure that will be initiated when a facility's NPDES permit is reissued or the facility undertakes a major modification. The first step, determining whether sulfate monitoring is required, tasks MPCA's effluent limit (EL) staff with determining if there are any wild rice waters downstream of the WWTF's outfall(s). If sulfate is known or suspected to be present in the facility's discharge as a result of its operations or processes, then effluent monitoring will be required. There is no "distance cut-off" between the facility and wild rice water; if the facility is upstream from a wild rice water, the facility will be eligible for sulfate monitoring. A vast majority of the state is covered by watersheds that are upstream from wild rice waters. The sulfate effluent monitoring frequency prescribed by the WR implementation procedures will vary depending on the type of WWTF but generally will range between once per quarter and once per half-year. As more data is gathered, frequency of monitoring may change.

The WR implementation procedures' second step is to examine the sulfate effluent data from the WWTF to determine appropriate sulfate limits. If the facility is upstream from a wild rice water and does not have sulfate effluent data, the next NPDES permit issuance will include sulfate monitoring requirements.

The third step requires EL staff to determine if the facili-

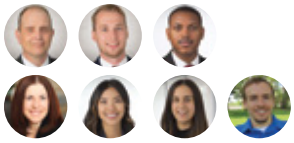
ty has the reasonable potential to cause or contribute to the exceedance of the 10 mg/L sulfate limit in any wild rice water located downstream of the facility. However, EL staff will also determine if there is any "boundary condition" between the facility outfall and wild rice waters that would separate the facility and the downstream wild rice waters. A boundary condition is established when data shows that intervening waters between the facility outfall and downstream wild rice waters are consistently at or below the 10 mg/L sulfate standard. If a boundary condition is established, the upstream WWTF will be determined not to have the reasonable potential to cause or contribute to the exceedance of sulfate standards in the downstream wild rice waters. The facility will follow NPDES wild rice sulfate monitoring guidance and will be reissued its NPDES permit.

If a boundary condition is not found, EL staff will determine if the facility has the reasonable potential to cause or contribute to downstream exceedances of the wild rice sulfate standard. Generally, if a WWTF discharges upstream from a wild rice water that exceeds the sulfate standard, and the discharge has an effluent concentration greater than the standard, the facility will be found to have the reasonable potential to cause or contribute to the downstream impairment. When there is sufficient sulfate monitoring data available, staff will estimate sulfate transport losses from facilities to downstream wild rice waters on a case-by-case basis.

If a WWTF's discharge is determined to have reasonable potential to exceed the wild rice sulfate standard downstream, then the fourth step of the WR implementation procedures will take place, which requires EL staff to calculate a sulfate effluent limit for the facility. This limit is determined by first calculating the wasteload allocation (WLA) of the facility. However, evaluating WLAs is dependent on whether the average baseline sulfate concentration of the downstream wild rice water is greater than or less than the 10 mg/L sulfate standard. If the baseline sulfate concentration is above the standard, EL staff will calculate the WLA individually for the facility. If the baseline sulfate concentration is below the applicable standard, EL staff will evaluate WLAs through a watershed analysis, which would result in a greater sulfate load reduction at larger WWTF sulfate sources, and may allow for less restrictive limits for smaller WWTF sulfate sources, so long as the total permitted mass does not exceed the gross WLA.

The resulting individual WLAs would be converted to individual sulfate effluent limits, calculated based on statistics in EPA guidance documents, factoring in the variability and frequency of sampling in the upcoming permit. Generally, the results will establish a calendar monthly average sulfate effluent limit, to align with standardized monthly data reporting requirements, which will result in attainment of the WLA on an annual basis. These concentration limits will be expressed in units of mg/L and mass limits will be expressed as kg/day. Although MPCA has not yet established any Total Maximum Daily Loads (TMDLs) for impaired wild rice waters, the WR implementation procedures indicate that MPCA is likely to do so in the future and that the agency's goal in the interim is to establish WLAs and sulfate permit effluent limits that will be compatible with future TMDLs.

During the limit-setting process, additional considerations will be reviewed, including mass freeze options (for facilities that only have reasonable potential when operating at full design flow, but typically operate below that, unless the WWTF expects actual increases in its effluent flows); sulfate limits for lakes that are wild rice waters (which will be analyzed on a case-by-case basis); TMDLs that are developed for waters that are on Minnesota's Impaired Waters List; and requests to review new or expanded permit proposals (the WR implementation procedures indicates MPCA receives only 10 to 15 new or expanded permit proposals per year).



Jeremy P. Greenhouse, Cody Bauer, Ryan Cox, Vanessa Johnson, Molly Leisen, and Shantal Pai – Fredrikson & Byron P.A. Jake Beckstrom – Vermont Law School 2015

Federal Practice

JUDICIAL LAW

Attorney's fees; district court's failure to calculate the lodestar. Where a district court awarded attorney's fees without first providing a lodestar calculation, the 8th Circuit vacated the award and remanded the case to allow the district court to calculate a lodestar, and also instructed the district court to consider which portion of the more than $1.1 million in costs it had awarded were recoverable under 28 U.S.C. §1920. ***Jet Midwest Int'l Co. v. Jet Midwest Grp., LLC***, ___ F.4th ___ (8th Cir. 2024).

Standing; no "imminent and substantial harm;" no "traceability." In an action brought by parents of students with disabilities, which challenged an Iowa law prohibiting masking in public schools, the 8th Circuit followed decisions by the 1st, 5th, and 6th Circuits in finding that the plaintiffs lacked standing because the risk of harm was not "imminent and substantial," and also agreed with the 4th Circuit that any potential injury was not "fairly traceable" to defendants' conduct. ***ARC of Iowa v. Reynolds***, ___ F.4th ___ (8th Cir. 2024).

Fed. R. Civ. P. 25(c); motions to substitute affiliate of litigation funder as plaintiff denied. Magistrate Judge Docherty denied motions to substitute an affiliate of a litigation funder, finding that the substitution would do "violence to the Federal Rules of Civil Procedure" by "allow[ing] a financier with no interest in the litigation... to override decisions made by the party that actually brought suit." ***In Re: Pork Antitrust Litig. and In Re: Cattle & Beef Antitrust Litig.***, 2024 WL 511890 (D. Minn. 2/9/2024).

Fed. R. Civ. P. 12(b); effect of partial motion to dismiss. Following the prevailing view in the federal district courts nationally, Judge Menendez held that a defendant filing a partial motion to dismiss under Fed. R. Civ. P. 12(b) is not required to file an answer to the remaining claims until after the court rules on the motion. ***Menze v. Astera Health, f/k/a Tr-County Health Care***, 2024 WL 776773 (D. Minn. 2/26/2024).

Removal by third-party defendant rejected; action remanded. Where a third-party defendant purported to remove a Minnesota state court action on the basis of diversity jurisdiction, Judge Magnuson rejected its argument that the Supreme Court's decision in *Home Depot* (*Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019)) was limited to those cases where the original

claims were not removable, and instead held that the "inescapable" conclusion of *Home Depot* is that only the defendant or defendants to the complaint can remove. ***U.S. Bank N.A. v. Copy Center of Topeka, Inc.***, 2024 WL 551292 (D. Minn. 2024).

Fraudulent joinder argument rejected; motion to remand granted. On a motion to remand a Texas action that had been removed to federal court on the basis of fraudulent joinder and then transferred to an MDL pending in the District of Minnesota, Judge Erickson assumed without deciding that a plaintiff's "lack of real intention" to pursue claims against a nondiverse defendant may provide a basis to establish fraudulent joinder, but found that the defendant had not established the plaintiff's lack of real intention, and remanded the action to the Texas court in which it was originally filed. ***In re: Bair Hugger Forced Air Warming Devices Prod. Liab. Litig.***, 2024 WL 152512 (D. Minn. 1/15/2024).

Motion to compel arbitration granted; no waiver found. Despite the defendants' previous filing of a Rule 12(b)(6) motion and their participation in the drafting of a Rule 26(f) report, Judge Tostrud, acknowledging that it was a "close call," found that defendants had not waived their right to arbitration. ***Maggie King, Inc. v. ABC Bus Cos.***, 2024 WL 323585 (D. Minn. 1/29/2024).

Forum *non conveniens* motion granted. In a tort action by a British citizen who resides in Japan against two defendants, one of which was formerly headquartered in Minnesota, Judge Doty granted the defendants' motion to dismiss on the grounds of forum *non conveniens*, finding that most of the facts underlying the case occurred outside of Minnesota, and that the United Kingdom was an adequate and available forum. ***Dibble v. Torax Med., Inc.***, 2024 WL 328965 (D. Minn. 1/29/2024), *appeal filed* (8th Cir. 2/26/2024).

Fed. R. Civ. P. 12(b)(2); action dismissed for lack of personal jurisdiction. Granting the defendant's motion to dismiss for lack of personal jurisdiction, Judge Tostrud found that the defendant's Minnesota contacts "cannot reasonably be construed to support the exercise of personal jurisdiction" where it was a Virginia corporation with no operations in Minnesota, was not registered to do business in Minnesota, did not regularly ship products to Minnesota, and did not direct marketing efforts toward Minnesota. ***Elliott Auto Supply Co. v. Fisher Auto Parts, Inc.***, 2024 WL 555139 (D. Minn. 2/12/2024).

Requested attorney's fees reduced. Finding that a request for more than $12,000 in attorney's fees arising out of a default judgment was "somewhat overstated," and that an already reduced hourly rate of $465 was "very high for relatively simply matters," Judge Menendez awarded $10,000 in fees as "rough justice." ***Farnam Street Fin., Inc. v. Nabati Foods, Inc.***, 2024 WL 261290 (D. Minn. 1/24/2024).

Fed. R. Civ. P. 58(a)(3); attorney's fees; request for entry of judgment denied. Judge Menendez denied plaintiffs' request for entry of judgment on her order granting in part their motion for attorney's fees, finding that Fed. R. Civ. P. 58(a) does not require a separate document, and is appealable even in the absence of a judgment. ***Woodward v. Credit Serv. Int'l Corp.***, 2024 WL 733660 (D. Minn. 2/22/2024).

Fed. R. Civ. P. 54(d); costs awarded for necessary real time and daily trial transcripts. Rejecting the defendant's challenge to the clerk's award of costs for real time and daily trial transcripts, Judge Tunheim found that the transcripts were "necessarily obtained for use in the case," and denied the defendant's motion to review clerk's action. ***Steady State Imaging, LLC v. Gen. Elec. Co.***, 2024 WL 453806 (D. Minn. 2/6/2024).

Fed. R. Civ. P. 56; *sua sponte* grant of summary judgment to plaintiff. Denying the defendant-insurers' motion for summary judgment on the plaintiff's equitable estoppel claim in a coverage dispute, Judge Tunheim granted summary judgment *sua sponte* to the plaintiff on that issue. ***Taylor Corp. v. XL Ins. Co.***, 2024 WL 453826 (D. Minn. 2/6/2024).

Request for reduction in judgment; excessive fines clause. Where judgment had been entered against *qui tam* defendants for more than $487 million, and defendants brought a motion arguing that statutory penalties of more than $352 million, which were roughly eight times actual damages, violated both the excessive fines clause and the due process clause, Judge Wright relied on the excessive fines clause in reducing the statutory penalties to less than $87 million, which was twice the amount of actual damages. ***United States ex rel. Fesenmaier v. Cameron-Ehlen Grp., Inc.***, ___ F. Supp. 3d ___ (D. Minn. 2024).

"Excessive" compensatory damages; *remittitur*. Where a jury awarded the estate of the decedent $10 million in compensatory damages and $1.5 million in punitive damages in an excessive force/wrongful death action, Judge Doty found that the compensatory damage award "shock[ed] the conscience," was "patently excessive" and "highly speculative," and offered the plaintiff the option of a *remittitur* to $2.5 million or a new trial on compensatory damages. ***Jones ex rel. Handy v. City of St. Paul***, 2024 WL 489705 (D. Minn. 2/8/2024).

Fed. R. Civ. P. 22; interpleader; attorney's fees. Judge Blackwell significantly reduced an insurer's request for attorney's fees in an interpleader action, finding that it was entitled to fees for its preparation and initiation of the action, but not for fees incurred over the next year while it failed to bring a discharge motion and instead defended a counterclaim, which "unnecessarily increased" its fees. ***Banner Life Ins. Co. v. Bultman***, 2024 WL 689754 (D. Minn. 1/18/2024).

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Intellectual Property
JUDICIAL LAW

Patents: Failure to designate United States in PCT does not trigger §102(e) priority date. Judge Tunheim recently granted plaintiff Regents of the University of Minnesota's motion for summary judgment that the asserted patent was not invalid because the asserted reference was not prior art under pre-AIA 35 U.S.C. §102(e). Regents sued multiple cellular network companies alleging infringement of several patents related to cellular data transmission technology. Defendants argued that an international application, the Ming PCT (filed under the Patent Cooperation Treaty), invalidated two of the asserted patents. Under §102(e)(2), "an international

application filed under the [Patent Cooperation Treaty] shall have the effects for the purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language." Whether the Ming PCT invalidated the asserted patents turned on whether the Ming PCT "designated the United States" and qualified as prior art under §102(e). Regents argued that the Ming PCT application designated a number of countries but not the United States. Defendants argued that the statutory definition of "designated" is more "capacious." Because the Ming PCT claimed priority to a United States application, defendants argued it necessarily implied that a patent is sought in the United States. The court rejected defendants' argument and found that defendants bear the burden of proving invalidity, and a PCT application is relatively weak evidence of designation when the actual designation section of the application excludes the United States. The court further found that accepting the defendants' argument would undermine the notice function of the designation. Accordingly, the court found defendants could not rely on the Ming PCT as prior art. Separately, the court found defendants could substitute the United States application that the Ming PCT claimed priority to in defendants' invalidity challenges. ***Regents of the Univ. of Minn. v. AT&T Mobility LLC***, Nos. 14-4666, 14-4669, 14-4671, 14-4672 (JRT/TNL), 2024 U.S. Dist. LEXIS 31027 (D. Minn. 2/23/2024).

Patents: Original patent rule satisfied by description incorporated by reference. Judge Tunheim recently granted plaintiff Regents of the University of Minnesota's motion for summary judgment that the asserted patent was not invalid under the original patent rule and denied defendants' inverse motion. Regents sued multiple cellular network companies alleging infringement of several patents related to cellular data transmission technology. Regents asserted U.S. Patent No. RE45230, which is a reissue of U.S. Patent No. 7,292,647. When a patent is defective, the patentee may apply for a reissued patent that cures the error. Under the "original patent rule," the original specification must clearly and unequivocally disclose the newly claimed invention in the reissue. Due to the "fairly significant alterations from the claims in the '647 patent," defendants argued that the reissue was invalid for violation of the original patent rule. First, Regents argued that the original patent rule only applied to broadening reissues. The court rejected this argument, finding that 35 U.S.C. § 251(d), which establishes the rules for reissues, does not distinguish between broadening and narrowing reissues and that no identified cases state that the rule only applies to broadening reissues. Second, defendants argued that the original '647 patent specification did not disclose the claims of the '230 reissue patent in a clear enough fashion to satisfy the original patent rule. Defendants challenged the incorporation of material by reference. The court noted that neither party cited cases directly on point of whether material incorporated by reference satisfies the original patent requirement. The court found that a proper citation on the face of the reissue application satisfies the original patent rule, as the only real difference would be whether the applicant wrote a proper citation to the source material instead of copying and pasting that content into the specification. The court found the '230 reissue patent valid. ***Regents of the Univ. of Minn. v. AT&T Mobility LLC***, Nos. 14-4666, 14-4669, 14-4671, 14-4672 (JRT/TNL), 2024 U.S. Dist. LEXIS 31027 (D. Minn. 2/23/2024).

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Probate & Trust Law

JUDICIAL LAW

Attorney testimony relevant in determining omitted spoused status; spouse entitled to *select* exempt property. A decedent created a will in late 2020. One month later, the decedent married his longtime girlfriend. The will did not contain a provision for the decedent's new wife, and the decedent did not revise his will after his marriage. Instead, the decedent named his new wife as the beneficiary of his retirement account and added her to the title of his Volkswagen Jetta. After the decedent passed away, his wife filed a petition asking the district court to determine that she was an omitted spouse entitled to a share of the estate and ordering the personal representative to turn over possession of a Ford F350 pickup truck as exempt property. Following testimony from the decedent's estate planning attorney, the district court denied both requests.

On appeal, the district court's denial of the wife's request to be treated as an omitted spouse was affirmed. Specifically, the Minnesota Court of Appeals credited the district court's findings that the decedent provided for his wife outside of his will by making her the beneficiary of his retirement account and that the decedent's estate planning attorney credibly testified that the decedent consistently stated throughout the planning process that he intended to make his wife the beneficiary of his retirement account while leaving everything else to his sister. For these reasons, the wife was not to be considered an omitted spouse pursuant to Minn. Stat. §524.2-301(a)(4).

But the court of appeals reversed the district court's finding as it related to exempt property. Specifically, the district court found that the transfer of the Jetta on the decedent's death satisfied the statutory provision allowing for one automobile. The court of appeals, however, found that because the wife was named on the title of the Jetta, she became the sole owner of the Jetta on the decedent's death and the Jetta never became a part of the decedent's estate. Moreover, the court of appeals noted that a surviving spouse is entitled to "select" property from the estate to qualify as estate property. Because the wife was already the owner of the Jetta, she did not select it for the purposes of claiming exempt property. The court went further and found: "[E]ven if the decedent's will provided that a surviving spouse would receive an automobile, the spouse would still be entitled to select an automobile under the exempt-property statute." ***In re the Estate of Joseph Andre Reis****, No. A23-0413, 2024 WL 912625 (Minn. Ct. App. 3/4/2024).*

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State Appellate Practice

MN SUPREME COURT

Notable petitions granted. The Supreme Court has agreed to review an individual taxpayer's lawsuit seeking de-

claratory and injunctive relief to prevent the expenditure of public funds on a collective bargaining agreement that allegedly violates the Minnesota Constitution's equal protection guarantee. The district court dismissed the lawsuit after determining that the individual taxpayer lacked standing to challenge the collective bargaining agreement and on ripeness grounds. The court of appeals reversed, finding that the individual taxpayer had standing based on specific allegations that the plaintiff paid property taxes, which comprised a significant amount of the public funds available to implement the collective bargaining agreement, and that there was a concrete risk of a violation of the equal protection clause. The court of appeals also determined that the district court improperly dismissed the declaratory relief claim on ripeness grounds because the complaint alleged "an actual future controversy" that was justiciable under the Declaratory Judgment Act.

The Minnesota Supreme Court granted review to answer the following questions: (1) Did the court of appeals err by holding that merely alleging that a governmental entity will utilize public funds to implement the terms of a collective bargaining agreement meets the requirements of a specific and unlawful disbursement of public funds for purposes of the taxpayer-standing doctrine, as required under *McKee v. Likins*, 261 N.W.2d 566 (Minn. 1977) and its progeny? (2) Did the court of appeals err in concluding that there is no requirement for ripeness because the respondent sought declaratory judgment related to a contract to which respondent is not even a party? ***Deborah Jane Clapp vs. Rochelle Cox, in her official capacity as Interim Superintendent of Minneapolis Public Schools, et al.***, – A23-0360 (PFR granted 2/28/2024).

MN COURT OF APPEALS

■ **Notable precedential decision: The Minnesota Court of Appeals applied Minn. Stat. §65A.10, subd. 1 to reform a policy to provide coverage for the cost of bringing undamaged portions of a roof into compliance with applicable building codes during repairs occasioned by a covered loss.** A hailstorm damaged the insured's roof in May 2022. The homeowners' insurance policy provided replacement cost coverage for loss or damage to "the outer most layer of roof material," and the insurer accordingly approved removal and replacement of shingles damaged during the hailstorm. During the repair, however, the contractor discovered certain portions of the underlying roof decking—which was not damaged by the storm—to be noncompliant with state building codes. The contractor proceeded to bring the decking into compliance with applicable codes as part of the repair. The insurer later disclaimed coverage for the building-code-related repair costs, and brought an action seeking a declaration that the insured was not entitled to coverage for such costs. The court of appeals affirmed the district court's award of summary judgment to the insured in favor of coverage. The court relied upon Minn. Stat. §65A.10, subd. 1—which, it determined, "requires replacement cost insurance to cover the cost of repairing any loss or damaged property in accordance with the minimum state or local codes." Because the repairs to the roof decking were mandated by the state building code, the damaged shingles could not be repaired without first bringing the roof decking into compliance with the code. As a result, the court of appeals concluded that the "cost of repairing the damaged shingles in accordance with the state building code included the cost of repairs" to the roof decking. ***Great Nw. Ins. Co. v. Campbell***, No. A23-0519 (Minn. Ct. App. 2/5/2024).

■ **Notable precedential decision: The court of appeals rejected the invitation to adopt provisions of the Restatement (Third) of Property, which would have afforded greater discretion to property owners to make "reasonable changes" to easements affecting their property.** Certain property owners in a Plymouth subdivision challenged a real estate developer's proposal to "relocate, widen, and extend" a private roadway easement affecting their parcels. The relevant easement was created through a declaration, recorded in 1981, which expressly stated that "nothing shall be planted, altered, constructed upon, or removed by an owner from the roadway easement." Nevertheless, the developer sought to relocate the roadway easement and prevailed following a trial in the district court. The district court applied Section 4.8 of the Restatement (Third) of Property: Servitudes (2000) to permit a property owner affected by the easement—in this case, the developer—to "make reasonable changes to an easement... including by reasonably relocating it." The court of appeals reversed, holding that the district court's reliance upon the Restatement was in error. In doing so, the court reaffirmed longstanding Minnesota case law stating that where an easement is created by a written instrument, the "specific width, length, and location" of the easement is controlled entirely by the terms of such instrument. Under this precedent, a court may not intervene to "create any reasonable easement" unless the written instrument "is sufficiently vague to permit the inference that any reasonable easement was intended." The court of appeals determined that the 1981 declaration was not "sufficiently vague" to permit the district court to relocate the roadway easement under Minnesota law, relying primarily upon the declaration's language expressly prohibiting any alterations to the easement. Ultimately, the court of appeals concluded

that "given the plain language of the easements declaration, the location and scope of the... roadway easement may not be changed without the unanimous agreement of the property owners who are bound by the easements declaration." ***Willenberg v. Frye***, No. A23-0441 (Minn. Ct. App. 2/5/2024).

■ **Notable special term order: The court of appeals reaffirmed that the 60-day appeal period for an order "relating to registered land" begins to run when the order is filed by the district court.** The court of appeals determined that it lacked jurisdiction to hear an appeal from a district court order determining boundary lines of registered Torrens land because of the appellant's untimely notice of appeal. Minn. Stat. §508.671, which governs appeals from orders affecting registered land, provides that an appeal may be taken from such an order within 60 days from the date the order was filed. The district court filed the underlying order on 11/30/2023, and the court of appeals determined that the 60-day appeal period expired on 1/29/2024. Because the appellant did not file the notice of appeal until 1/30/2024, the court of appeals dismissed the appeal as untimely. In doing so, the court rejected the argument that the December 4 "notice of filing of the order" issued by the court administrator controlled the beginning of the 60-day appeal period under Section 508.671 over the filing of the order itself. ***In re Petition of Larry Sampson & Lisa Sampson***, No. A24-0160 (Minn. Ct. App. 2/20/2024).

■ **Notable special term order: The Minnesota Court of Appeals rejected the Lower Sioux Indian Community's petition for a writ of *certiorari* to prevent a tribal employee from being compelled to testify via subpoena in a state criminal proceeding.** The state of Minnesota subpoenaed a social worker employed by the Lower Sioux Indian Community to testify in their official capacity at a state criminal trial. After the district court rejected a motion to quash the subpoena, the Lower Sioux sought a writ of prohibition. The court of appeals declined to issue the writ, noting that a writ of prohibition may only issue to prevent the exercise of judicial power threatening an injury "for which there is no adequate remedy." Because the order denying the motion to quash the subpoena constitutes a final appealable order from a "special proceeding," the order is appealable pursuant to Minn. R. Civ. App. P. 103.03. In addition, the court of appeals observed that the order was subject to appeal under the collateral-order doctrine adopted by the Minnesota Supreme Court in *Kastner v. Star Trails Ass'n*, 646 N.W.2d 253. Accordingly, the Lower Sioux was not entitled to a writ of prohibition preventing enforcement of the subpoena because the Lower Sioux retained an "adequate remedy" through the regular processes of appeal. ***In re Lower Sioux Indian Community of Minnesota***, No. A24-0211 (Minn. Ct. App. 2/16/2024).

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Tax Law

JUDICIAL LAW

■ **Sales tax, covid, and insurance.** The City of Richmond Heights, in St. Louis County, Missouri, purchased commercial property insurance to protect against losses of sales tax revenue. When St. Louis County closed "all non-essential businesses" in 2020 due to the spread of covid-19, there were sales tax losses and the city submitted a claim. Arguing the language of the policy required "direct physical loss of or damage to property," the insurer sued for declaratory judgment that it was not required to pay. The city counterclaimed. The district court dismissed the counterclaims and granted declaratory judgment to the insurer, and the city appealed.

The 8th Circuit rejected the city's three arguments. First, the city argued that while both parties acknowledged that the losses due to covid-19 were not "physical" losses, the "additional covered property endorsement" catch-all in the policy effectively removed the "physical damage or loss" requirement. The court disagreed, since under that interpretation the catch-all would then directly conflict with other coverage provisions. Second, the city asserted that there was fraud in the inducement and fraudulent misrepresentation, but the court affirmed the district court's dismissal of these claims, pointing out that these claims were not "independent from the City's breach of contract claim." Finally, the city argued that it should have been allowed to amend its complaint to argue that the covid-19 virus was "present on the premises" and that the virus's presence itself was "physical damage." The court, citing other cases that rejected this argument, affirmed the district court's decision to deny leave to amend. ***Mt. Hawley Ins. Co. v. City of Richmond Heights, Missouri***, 92 F.4th 763 (8th Cir. 2024).

■ **Calling it "insurance" doesn't make it so: Taxpayer not entitled to 831(b) election for microcaptive arrangement.** Like other businesses, insurance companies must pay tax on income from premiums and investments. Section 831(b), however, permits some small insurance companies to pay tax only on investment income, and not premiums. This section was enacted in 1986, and one goal was to extend the benefits of self-insurance to small insurance companies. A lot rides on the 831(b) election, because insurance is deductible, but amounts set aside by businesses in a loss reserve as a form of self-insurance are not. The Service explains in a news release that tax law generally allows businesses to create "captive" insurance companies to protect against insurance risks and provides that certain small non-life-insurance companies can choose to pay tax only on their investment income under Internal Revenue Code section 831(b) (microcaptives). The Service considers microcaptive structures that lack many of the attributes of genuine insurance to be abusive.

Despite the importance of defining insurance for 831(b) purposes, the IRS Code does not define the term, and, as the tax court remarked in this dispute between a taxpayer claiming deductions of just shy of $10 million, "[w]hen the insurer and the insured are related (including in the case of captive or microcaptive insurers), the line between insurance and self-insurance blurs." Here, the court agreed with the commissioner and held that the microcaptive arrangement was not insurance because it did not involve risk distribution and did not fall within "commonly accepted notions of insurance."

Captive insurance arrangements such as this one made the IRS's annual "dirty dozen" list of tax scams in 2015, and in Notice 2016-66, the Service advised that mi-

crocaptive insurance transactions have the potential for tax avoidance or evasion. The tax court in this case notes that although it is possible for a captive insurer to establish risk distribution solely by insuring commonly owned brother-sister entities, most "[m]icrocaptive insurers have not fared as well with respect to showing risk distribution" and in fact in "all of our previous cases have found compliance with this requirement lacking." ***Swift v. Comm'r***, T.C.M. (RIA) 2024-013 (T.C. 2024).

Deduction for conservation easement disallowed; gross valuation penalty upheld. In 2015, as part of a syndicated conservation easement, Oconee Landing Property, LLC claimed a $20.67 million charitable deduction for donating a conservation easement over land in Greene County, GA. The IRS disallowed the deduction and this case followed. The IRS made three arguments for disallowing the deduction: that the charitable gift was not made with charitable intent; that the syndicate failed to attach a "qualified appraisal" as required by law; and that the property donated was "ordinary income property" and therefore the deduction was restricted to the property's basis. The court rejected the first argument and upheld the other two.

First, the IRS argued Oconee was not entitled to a charitable deduction because the exchange was not motivated by charitable intent but was, instead, a "quid pro quo exchange." While not disagreeing with the IRS's characterization of the motivations of the syndicate, the court rejected this argument. Case law thus far only disallows deductions when the "quid pro quo" is between the two exchanging entities–the donee and the donor. Because the actual transfer of property was between Oconee and a valid 501(c)(3) organization not involved in the broader syndicate, the exchange had proper charitable intent under the law. The court pointed out that there currently are not any cases where the "tax benefits associated with a charitable contribution deduction have been deemed a 'quid pro quo' that negates the donor's charitable intent."

Second, the court found that Oconee failed to attach a "qualified appraisal" as required by section 170(f)(11)(D). A "qualified appraisal" is an appraisal done within "generally accepted appraisal standards." §170(f)(E)(i)(II). There's an important exception: A person is not considered a qualified appraiser "if the donor had knowledge of facts that would cause a reasonable person to expect the appraiser falsely to overstate the value of the donated property." §1.170A-13(c)(5)(ii). There was significant evidence in this case that there was a "meeting of the minds" between the appraisers and Oconee, and that the property would be valued at $50.4 million despite the owners of Oconee knowing the property was worth less than $10 million.

Third, the court found the property at issue was "ordinary income property," so any charitable deduction was limited to the property's basis. "Ordinary income property" is property "held for sale to customers in the ordinary course of business." §170(e)(1). Oconee was controlled by real estate developers who held the property at issue for sale to customers. And since Oconee provided no evidence to suggest that the basis of that property was higher than zero, the law set the charitable deduction to zero dollars for 2015.

Finally, the court found that the FMV of the easement was "less than $5 million," making the charitable deduction Oconee claimed more than 400% over FMV. As such, Oconee was liable for the 40% "gross valuation misstatement penalty" under section 6662(a). ***Oconee Landing Prop., LLC v. Comm'r***, T.C.M. (RIA) 2024-025 (T.C. 2024).

Trustee removal affirmed. The Minnesota Supreme Court affirmed the district court's removal of Brian Lipschultz from his role of trustee for the Otto Bremer Trust. Lipschultz was removed for actions that the district court found "collectively constitute[d] a serious breach of trust" under Minn. Stat. §501c.0706(b)(1)." After an extensive 20-day bench trial, the district court found a pattern of Lipschultz "placing his personal priorities over the duties he owed to the Trust." The Supreme Court affirmed.

The Court here found the district court did not abuse its discretion in removing Lipschultz. Under Minn. Stat. §501C.0706(b)(1), "The court may remove a trustee if... the trustee has committed a serious breach of trust." A "serious breach of trust" can be one single act of immense harm or a "series of smaller breaches, none of which individually justify removal when considered alone, but which do when considered together." Unif. Tr. Code §706 cmt. The Supreme Court found the actions of Lipschultz fell well within the range of what would qualify under the second clause.

First, the Court held that Lipschultz engaged in self-dealing by using the trust's resources for personal purposes, breaching a duty of loyalty and violating the Charitable Trust Act. His assistant, employed by the trust, spent one to two hours per day "performing non-Trust tasks for him" and he used the trust's address for his own personal business. Second, Lipschultz displayed a pattern of behavior that the district court found "had no place in the charitable world" during a conflict between Bremer Bank board members and the three trust trustees around a potential sale or merger of the bank. The district court found this constituted a breach of loyalty by "putting his own frustration, aggression, and personal interest in revenge ahead of the important interests of the Trust." Third, Lip-

schultz made two phone calls to the CEO of a trust grantee that made the CEO feel "disrespected and bullied." The district court found the content of these calls to be a "serious breach of the duty of loyalty" and "egregious misconduct." Fourth and finally, Lipschultz breached the duty of information by naming his first cousin as his successor but repeatedly telling the Attorney General's Office that he did not have a successor. ***Matter of Otto Bremer Tr.***, No. A22-0906, 2024 WL 462587 (Minn. 2/7/2024).

Retroactive track maintenance deductions permitted. The Minnesota Commissioner of Revenue ordered Soo Line Railroad Company to adjust its corporate franchise tax for tax years 2013 and 2015-2017. At the federal level, Soo Line Railroad claimed the federal Railroad Track Maintenance Credit, a provision that permits credits for "qualified railroad track maintenance expenditures paid or incurred by an eligible taxpayer during the taxable year." 26 U.S.C. §45G(a). In determining state tax liability, Minnesota allows a subtraction from federal taxable income for "the amount of expenses not allowed for federal tax purposes due to claiming the railroad track maintenance credit... effective for taxable years beginning after December 31, 2012." The issue in this case was whether, for the purposes of establishing their Minnesota tax liability, Soo Line Railroad was allowed to subtract from federal taxable income the amount of depreciation expenses on assets purchased *before* 2013. The MN Commissioner of Revenue only allowed the subtraction on assets purchased on or *after* 1/1/2013. Both parties moved for summary judgment.

The court granted Soo Line Railroad's motion for summary judgment, since the statute did not specify when expenses had to have been incurred, and the court observed that if the Legislature wanted to exclude pre-2013 expenses, the statute would have been explicit. ***Soo Line R.R. Co. v. Comm'r***, No. 9557-R, 2024 WL 481289 (Minn. T.C. 2/7/2024).

Property tax; classifications upheld. A taxpayer raised two challenges to an assessment of his land in the city of Carver (just south of Chaska). First, the taxpayer argued that the land was not class 2b rural vacant land but was agricultural land. That challenge failed. The taxpayer also argued that the subject land was eligible for a homestead classification. In this argument, the taxpayer succeeded in overcoming the presumptive validity of the assessor's conclusion that the subject was nonhomestead. He did not, however, present sufficient credible evidence to show the elements to qualify for the homestead designation—whether agricultural or residential—were met. ***Brad Janssen v. Carver County***, No. 10-CV-20-143, 2024 WL 697119 (Minn. T.C. 2/20/2024).

Property tax; appraisal method for unique property. The taxpayer owns a unique, waterfront parcel on the Whitefish Chain of Lakes in Crow Wing County. The parcel is small and triangular, with no improvements. The taxpayers also own a nearby parcel that is improved. Bisecting the parcels is undeveloped public land owned by the Army Corp of Engineers. The taxpayer and the county have disputed the valuation of the parcel in previous litigation. In this round, the court settled the parties' principal dispute: which appraisal method to use when valuing the subject property. In particular, the parties disputed whether to appraise the property as a stand-alone parcel, or whether the parcel should be appraised in conjunction with the adjoining developed parcel (the "house parcel" in the opinion). The court held that appraisal in conjunction with the developed parcel was appropriate under Minnesota law and appraisal theory. ***Lindholm-Nelson v. Crow Wing County***, No. 18-CV-21-1458, 2024 WL 481476 (Minn. T.C. 2/5/2024).



Morgan Holcomb, Adam Trebesch, Leah Olm
Mitchell Hamline School of Law

Torts & Insurance

JUDICIAL LAW

First party insurance; replacement cost. Plaintiff owned a home that was insured by defendant. The insurance policy covered direct physical loss or damage to "the outer most layer of roof material." During a May 2022 storm, hail damaged the shingles on plaintiff's roof. After plaintiff reported the damage to defendant, it confirmed the damage and approved removal and replacement of the shingles. But when plaintiff's contractor removed the shingles, the contractor discovered that the roof decking had gaps exceeding one-fourth of an inch in some places. To comply with the state building code, the contractor was required to repair the gaps before installing the shingles. After the contractor issued an invoice to defendant for the roof repairs, including charges to resolve the decking issues that were not caused by the hail damages as well as the contractor's overhead and profit, defendant disclaimed coverage for the additional repairs and the contractor's overhead and profit. Defendant then brought a declaratory judgment action concerning its coverage obligations. The district court determined that defendant was required to cover the cost of the repairs in addition to the work related to the shingles but not the contractor's overhead or profit.

The Minnesota Court of Appeals affirmed. The court first acknowledged that a roof damage limitation endorsement contained in the policy "plainly excludes coverage" for the additional work required to remedy the decking issue because the decking was not damaged by hail. But the court held that the endorsement to the policy violated Minn. Stat. §65A.10, which provides: "Subject to any applicable policy limits, where an insurer offers replacement cost insurance... the insurance must cover the cost of replacing, rebuilding, or repairing any loss or damaged property in accordance with the minimum code as required by state or local authorities...." The court reasoned that coverage must be provided because "to replace the damaged shingles in accordance with the state building code, the decking had to be repaired."

The court went on to affirm the district court's second holding—that plaintiff could not recover the contractor's overhead and profit—because coverage for such costs was excluded under an "overhead and profit" exclusion in the policy, and that exclusion did not violate Minn. Stat. §65A.10. ***Great Nw. Ins. Co. v. Campbell***, No. A23-0519 (Minn. Ct. App. 2/5/2024). *https://mn.gov/law-library-stat/archive/ctappub/2024/OPa230519-020524.pdf*

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PEOPLE + PRACTICE

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

Thomas Oja has become a shareholder at his firm. The new firm name is Webber Arredondo Oja, LLC. Oja continues to practice immigration law with a focus on U.S. visa strategies for skilled professionals.

Bill Pentelovitch was sworn in on February 26 as a member of the Minneapolis Civil Rights Commission. He was appointed to the commission by Mayor Jacob Frey and his appointment was confirmed by the City Council. In his of counsel role at Maslon LLP, Pentelovitch consults with colleagues on litigation and trial strategy.

CB Baga and **Jeffrey Underhill** have joined Maslon LLP. Baga represents clients on pro bono legal matters and supports the firm's DEI efforts. Underhill joined the firm's litigation group and focuses on construction, real estate, and general commercial disputes.

Christine Lindblad has rejoined Fox Rothschild as a partner in the litigation department. She will be based in Minneapolis.

Stephen P. Lucke has joined JAMS in Minneapolis after nearly 40 years as a business litigation associate and partner at Dorsey. Lucke will serve as an arbitrator and mediator, handling business/commercial litigation, health care, class action/mass tort, employment, banking and finance, insurance, and securities cases.

Selma Demirovic joined Arthur, Chapman, Kettering, Smetak & Pikala, PA as an attorney in the workers' compensation practice group.

Christopher (Chris) Larus has become a fellow of the American College of Trial Lawyers. Larus is a partner at Robins Kaplan and chair of the firm's national intellectual property & technology litigation practice.

Spencer Fane LLP announced that **Ian M. Rubenstrunk** has joined the financial services practice group as an of counsel attorney, and **Kathleen (Kaela) Brennan** joined the litigation and dispute resolution practice group as an of counsel in the firm's Minneapolis office.

Adam J. Kaufman and **Kelly M. Eull** have been promoted to shareholder status at Henningson & Snoxell, Ltd. Kaufman focuses on estate planning and the creation of wills, trusts, and incapacity plans. Eull is chair of the family law department and aids in matters concerning dissolution of marriage, paternity, custody, and child support.

Gov. Walz appointed **Viet-Hanh Winchell** as district court judge in Minnesota's 10th Judicial District. Winchell will be replacing Hon. Richard C. Ilkka and will be chambered in Stillwater in Washington County. Winchell is a solo practitioner at United Rivers Law Firm.

In memoriam

Thomas Holloran, a lawyer and former Medtronic executive, died February 15, 2024 at age 94. He left his legacy on the University of St. Thomas as an instrumental part of opening the college's law school in 2001 and founding the Holloran Center for Ethical Leadership in 2006.

Lt. Colonel Edward A. Zimmerman, age 80, passed away on February 3, 2024. Former attorney and army veteran (28 years).

Amelia Rose Hartman, age 37, died February 4, 2024. She attended the University of St. Thomas School of Law. Her passionate, selfless approach to life made her a perfect fit for her chosen profession. She spent as much time at home talking about her paid work as she did her pro bono clients.

Charles "Herman" C. Jensch, of St. Paul, passed away on February 18, 2024, at the age of 94. During Charlie's long career, he was the vice president of Staley Company, president of Sunstar Foods, and a partner at Petersen, Tews, and Squires.

Robert L. Thompson, Jr. of Minneapolis died on February 25, 2024 at the age of 79. He was retired from a 40-year career as a lawyer and business executive, which was preceded by three years of active duty as a U.S. Army officer.

Terry Alan Karkela, age 69, died on March 9, 2024. He successfully managed the Karkela, Hunt & Cheshire Law Firm. He was an active member of the Minnesota State Bar Association's Real Property Section and was elected into the American College of Real Estate Lawyers in 2011.

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