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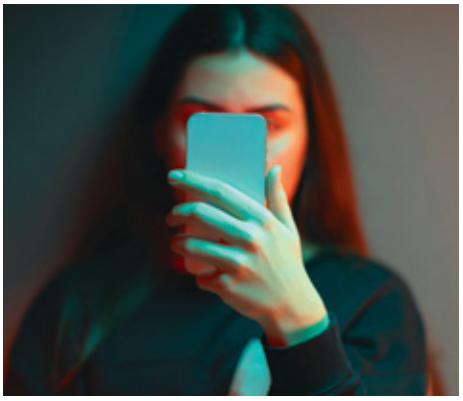

features

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I HATED BEING A LAWYER!

BY PAUL M. FLOYD

PAUL 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.

One day, 15 years into being a litigator, I was driving down 35W with my wife, Donna, when I blurted out, "I hate being a lawyer!" To which my wife responded, "You don't have to be one." To which I replied, "Oh, yes I do. You don't understand." Donna said, "Well, you don't have to be *that* kind of lawyer." After a long pause, she asked, "What would you rather be doing?" I immediately said: "Teaching and counseling professionals instead of litigating." She said: "Let's talk about how we could make that happen."

In talking over the years with mentors, peers, and younger colleagues, I have heard this refrain numerous times from lawyers who are stressed, frustrated, and on the verge of throwing in the towel. It grows louder after receiving a terrible decision from a judge, being stiffed by a client, or getting an ethics complaint.

For me, "I hate being a lawyer!" was an epiphany and a turning point in my career. Tired of the games some litigators play, all I could see ahead of me was dreary years of arguing with opposing counsel and bringing motions in response to delay tactics. It was not for me. I was depressed and seriously considering leaving the profession. I dreaded going to work. My acute but low-grade stress showed up as high blood pressure at my annual physical. It also was coming out sideways in my closest relationships—where I was grumpy, tired, sad, and in general not pleasant to be around.

My wife's words of encouragement, followed by some helpful therapy, prompted me to move in a new direction. I left my litigation job and started a new firm with a law school classmate. My practice evolved over time from litigation to transactional work, especially serving lawyers and other professionals and their firms. More importantly, I began to teach college and law school. It made all the difference to my mental health, personal relationships, and outlook. It's wise to pause every so often and take account of the pros and cons of our practices and then act.

For many of us (assuming good health), our law practices will span four decades. Each of those decades is characterized by different life and practice stressors, with ebbs and flows in work-life balance. In the first decade, you find your own style of practice and focus on becoming competent. Some lawyers, perhaps in a search for work/life balance, move from firm to firm and even in and out of law practice, trying to find the setting that best aligns with their values or personal goals. This is a time for building relationships with peers and mentors, which can be enhanced through bar association socials, CLEs, and section, committee, or task force involvement. Writing an article for Bench & Bar or a district bar publication can help to establish your competence in your practice area.

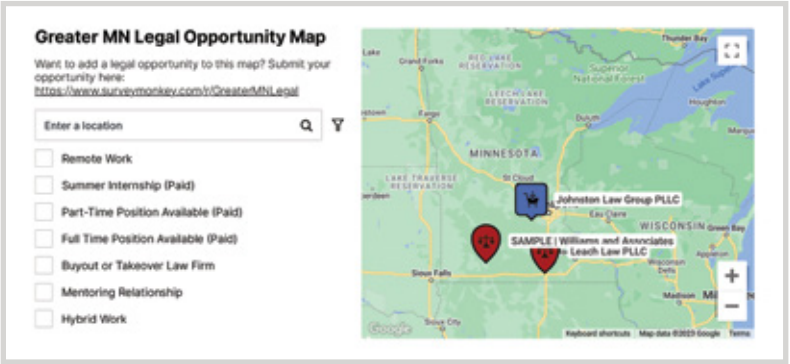
The second decade is generally focused on doing what you do well and developing a good reputation among peers and referral sources. For those in private practice, the focus moves from becoming a law firm shareholder or partner to marketing and building a book of clients. Client relationships and referrals are pivotal here. Again, bar associations' resources and member benefits can support your growing practice. Becoming certified as a civil trial, criminal law, real estate, or labor & employment specialist can further burnish your reputation and solidify your legal competence in the marketplace.

The third decade can be one of major change: going in-house, becoming a judge, starting your own firm, or joining a new firm and establishing a professional brand for yourself. Here, volunteering in bar associations' sections, committees, boards, DEI and pro bono initiatives, and leadership tracks can help a lawyer to stand out to another law firm when considering a move, to their corporate client when looking to go in-house, or to the governor's office when seeking a judgeship.

The fourth decade is different for each attorney. Figuring out how you want to spend the last years of your practice before retirement is essential for mental well-being. For many, the last decade of practice is the most enjoyable. You don't have to prove your "value-add" to your firm or clients. You can say yes or no to client matters and volunteer projects. Being active in your bar association before you retire can be rewarding. Consider joining the Senior Attorneys Section and enjoying the support of your fellow senior attorneys before and after you retire.

Be intentional and seize control of each decade of your career. The practice of law is not about getting a job and putting your life and career on autopilot until you're miserable or you finally retire. And don't wait until you're yelling into the wind about hating being a lawyer before you figure out what kind of lawyer you want to be. Thankfully, it's a career, not a sentence. ▲

IN THE NEWS



Connecting Greater Minnesota lawyers with job seekers

This past bar year, the Greater Minnesota Section Council has been focused on identifying and overcoming barriers that law students and metro attorneys face in choosing to practice in rural areas. One challenge section members felt they could face head-on was making connections for the individuals struggling to find opportunities.

We are happy to introduce an easy-to-access, easy-to-use mapping tool for legal opportunities in rural Minnesota. At present, this tool will reside on the Greater MN Legal Opportunity Network Community at ***www.mnbar.org/greater-minnesota-practice***, where it is available for all MSBA members. The map can show a variety of available opportunities, including full-time work, part-time work, paid summer internships, mentoring, and firm buyout opportunities. It will also indicate whether those opportunities are hybrid, remote, or in-person, and whether benefits and housing options are available. The map will serve as a stand-alone web-based tool but also will be used at law school and other bar association events to highlight opportunities. The first event at which the tool was made available was a November 6 Meet the Market event at the U of M Law School.

Do you have a legal opportunity to submit? You can share it via the survey link at ***www.surveymonkey.com/r/GreaterMNLegal.***

Special thanks to Greater Minnesota Section Council member Janna Borgheiinck of Wornson Goggins PC (New Prague) for her work on developing this tool. ▲

ATJ committee's report examines debt litigation in MN

On October 10, the MSBA Access to Justice Committee issued a comprehensive report on debt collection lawsuits in Minnesota, Minnesota Consumer Debt Litigation: A Statewide Access to Justice Report. Based on a thorough analysis of nearly 700,000 court cases from 2011-2021, it highlights the dominance of debt collection cases in the state's civil courts, where they make up over half of all civil cases. It also points out that the complexity of the legal system can be particularly burdensome for unrepresented Minnesotans.

Over 97 percent of individuals facing debt litigation represent themselves, as they often fall into a financial gap where they earn too much to qualify for legal aid yet can't afford private attorneys. This situation underscores the need for accessible and effective means for all Minnesotans to participate in the legal process. Currently, 82 percent of debt lawsuits filed in district court result in automatic wins for the plaintiffs, potentially leading to court-authorized garnishments of wages and bank accounts.

The report also uncovers disparities, both racial and income-related, in debt lawsuit filings. Black and Latino Minnesotans face debt claims at a rate more than twice that of non-Hispanic white Minnesotans, even at higher income levels. While the court cannot control who gets sued, the disparities highlight the urgent need to improve the justice system to ensure that all Minnesotans have a path to participate effectively in the legal process.

The report's recommendations are aimed at addressing these issues:

- Develop specialized procedural rules for debt cases to better manage consumer debt cases.
- Create and enhance resources to empower self-represented litigants.
- Preserve economic stability for debt-burdened individuals to meet their basic needs while repaying debts.
- Expand services for lower- and moderate-income individuals struggling with debt.

The report was a joint effort between the MSBA Access to Justice Committee, Legal Services State Support, the Pew Charitable Trusts, and the data analytics firm January Advisors. You can read the full report at ***www.mnbar.org/atj***. ▲

Drawing the line on ethical witness preparation

BY SUSAN M. 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.

Earlier this year, a former Fox News employee filed an employment lawsuit against Fox.[1] I was interested in this lawsuit due to its allegations regarding improper witness coaching before a deposition. In fact, the alleged actions of counsel had their own section of the complaint with this heading: To Thrust Exposure for Its Wrongdoing Away from Fox Corp and onto Others, Fox News's Legal Team Coerces Ms. Grossberg to Distort the Truth and Shade Her Deposition Testimony Against Her Personal and Professional Best Interest in the *Dominion* Litigation.[2] What was alleged against both in-house and outside counsel?

The complaint alleged, among other things, that Ms. Grossberg (1) was discouraged from mentioning understaffing or workplace stress and how it interfered with her ability to stay current on tasks; (2) understood she was to respond with "I do not recall" whenever she had the opportunity; and (3) counsel "scowled" or shook their head "no" when she answered hypothetical questions in ways that were truthful but implicated others or put information in context.

My first thought was, who hasn't made a face on occasion when prepping a witness? Sometimes you cannot help cringing when you listen to a witness, not because you want the witness to testify untruthfully but because you know how the witness's words would be misconstrued. My second thought was, telling a witness to truthfully answer "I don't know" is not problematic, but I also found it fascinating what the complainant heard the lawyers to be communicating based upon the allegations. Effectively preparing witnesses to provide testimony is an essential litigation skill. To do so competently and ethically requires a lot of work and forethought, because you must not only understand where the ethical lines lie but also keep in mind how the nonlawyer witness is hearing what you are saying.

With this backdrop, I was pleased to see a recent ethics opinion by the ABA.[3]

Permissible witness preparation

The opinion provides a helpful list of preparatory conduct that is ethical. That list includes:

- reminding the witness that they are under oath;
- emphasizing the importance of telling the truth;
- explaining that telling the truth can include a truthful answer of "I do not recall;"
- explaining case strategy and procedures, including the nature of the testimonial process or the purpose of the deposition;
- suggesting proper attire and appropriate demeanor and decorum;
- providing context for the witness's testimony;
- inquiring into the witness's probable testimony and recollection;
- identifying other testimony that is expected to be presented and exploring the witness's version of events in light of that testimony;
- reviewing documents or physical evidence with the witness, including the use of documents to refresh a witness's recollection of the facts;
- identifying lines of questioning and potential cross-examination;
- suggesting choice of words that might be employed to make the witness's meaning clear;
- telling the witness not to answer a question until it has been completely asked;
- emphasizing the importance of remaining calm and not arguing with the questioning lawyer;
- telling the witness to testify only about what they know and remember and not to guess or speculate; and
- familiarizing the witness with the idea of focusing on answering the question, i.e., not volunteering information.

This list not only delineates ethical witness preparation but also provides a good roadmap for how to competently prepare a witness to be deposed or to testify. Diligence and competent representation of your client generally requires that you approach witness preparation by covering the above topics and doing so in the manner described.

Impermissible witness preparation

The opinion also outlines unethical efforts to improperly influence witness testimony (described in the opinion by various phrases such as coaching, horseshedding, woodshedding, or sandpapering). This list includes:

- counseling a witness to give false testimony;
- assisting a witness in offering false testimony;
- advising a client or witness to disobey a court order regulating discovery or trial process;
- offering an unlawful inducement to a witness; or
- procuring a witness's absence from a proceeding.

Obvious, right? But what about gray areas?

The opinion provides the following guidance regarding "I don't recall." It is appropriate to tell a witness that "I don't recall," when true, is an acceptable answer. The opinion contrasts this with impermissibly telling a witness, "The less you recall, the better." The former is permissible, while the latter encourages a witness to lie under oath about what is remembered.[4] Turning to the allegation in the Fox lawsuit, encouraging a witness to respond "I don't recall" when true is permissible; it may cross the line if the guidance is to respond that way even if it's not true or to respond that way categorically to certain types of questions, regardless of the truth. A nuance to keep in mind here is thinking about your guidance from the perspective of the witness. Are you being clear in your guidance by reiterating that "I don't recall" is acceptable only if true, without suggesting that is a preferable answer notwithstanding its accuracy? Judicial proceedings (which include deposition testimony) are truth-seeking exercises, and it is generally true that the facts are the facts, as they say. Similarly, take care in suggesting word choice. Is your focus on making the witness's testimony clear, or are you assisting a witness in providing false or misleading testimony? The former is permissible, the latter is not. Are you clear with your witness on the distinction?

The ABA opinion discusses examples in which lawyers are implicitly and impermissibly encouraging false testimony, such as telling a witness to "downplay" the number of times prep sessions occurred, encouraging a client to misrepresent the location of a slip-and-fall accident to have a viable claim, or "programming a witness's testimony."

The opinion is somewhat equivocal on scripting testimony.[5] The opinion calls "programming" witness testimony unacceptable but suggests question-and-answer scripts may be permissible, and provides an analogy to drafting witness affidavits. The Restatement has long taken the position that witness preparation can include rehearsal of testimony.[6] The key is that the testimony must be truthful. I've never known anyone to script questions and answers (and it seems like a bad idea and extremely difficult to do), but I have seen witnesses perform poorly because they try to testify the way they think the lawyer wants them to answer questions instead of speaking clearly about how they recall and understand the facts. Again, the bullet-point list of permissible witness preparation actions not only provides good guidance for staying on the right side of the ethical line but also shows the best way to assist the witness in authentically and accurately sharing the information they possess.

Remote proceedings

An important focus of the recent opinion is impermissible coaching during testimony, particularly given the prevalence of remote proceedings, where it is possible to attempt to influence testimony mid-deposition or trial. The opinion starts with the obvious prohibitions—winking at a witness during trial testimony, kicking a deponent under the table, passing notes or whispering to the witness mid-testimony—and then progresses to other forms of signaling that are often impermissible, such as spoken objections that suggest the answer. Basically the opinion provides that what doesn't fly in person does not fly remotely, just because it is easier to do and harder to prevent. And there is very little tolerance for such coaching even if the "coached" testimony is true, given how often it runs afoul of procedural rules and the myriad ways it undermines the credibility of the witness and the proceedings.

The opinion does note one caveat relating to deposition testimony, namely, "openly asking a witness to correct an inadvertent misstatement when the witness obviously misunderstood a question or simply misspoke." The opinion notes this is not impermissible coaching, and in some instances, may be an appropriate remedial measure to correct false testimony.[7] The best way to handle this is in real time, or through limited re-direct at the end of the deposition.

Conclusion

Effectively preparing a witness to offer testimony is a required litigation skill and I hope that newer lawyers are getting the training they need to do so competently and ethically. Becoming proficient is more challenging than it may appear. Actions that interfere with the opposing party's ability to gather information relating to the matter are generally not consistent with the ethics rules and add to the stress of an already stressful situation and practice. I hear from so many that lawyers are losing the ability to be adversarial in a professional manner, and I see that in the complaints that we receive. Further, more courts are sanctioning such conduct, which is often in violation of the court's procedural rules but can also run afoul of several ethics rules. No matter your level of experience, a review of the recent ABA opinion is a helpful reminder of the ethics of witness preparation. ▲

NOTES

[1] Complaint, *Grossberg v. Fox Corp, et. al.*, No. 1:23-cv-02368 (SDNY 3/20/2023), ECF No. 1.

[2] Para. 132-171, at 31-39.

[3] ABA Formal Opinion 508, "The Ethics of Witness Preparation" dated 8/5/2023.

[4] *Id.*, fn. 10.

[5] *Id.*, fn. 19.

[6] The Restatement (Third) of the Law Governing Lawyers, §116 (2000).

[7] Opinion 508, fn. 29.

The CSRB weighs the lessons of Lapsus$

BY MARK LANTERMAN ✉ mlanterman@compforensics.com

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

In August the Cyber Safety Review Board (CSRB)[1] put forth its second report, "Review of the Attacks Associated with Lapsus$ and Related Threat Groups."[2] Lapsus$ was an organized hacking group, unique for its members and motivations. Beginning in 2019, the group targeted multiple organizations and entities using tactics that ranged from simple social engineering to advanced technological tools.[3] The group seemed to have a number of reasons for their attacks, from political ideologies to simply showing off. Recently, a court found that an 18-year-old from Oxford was a member of Lapsus$, even having leaked clips of an unreleased game online while violating his bail conditions.[4]

According to a BBC report, "The gang—thought to mostly be teenagers—used con-man like tricks as well as computer hacking to gain access to multinational corporations such as Microsoft, the technology giant, and digital banking group Revolut. During their spree the hackers regularly celebrated their crimes publicly and taunted victims on the social network app Telegram."[5] The string of attacks offered insight into the security vulnerabilities existing within even the best-defended organizations; the CSRB report provides an in-depth analysis of the attacks and strategies for dealing with the most successful methods of intrusion.

The CSRB found that typical multi-factor authentication (MFA) methods were largely insufficient for protecting most organizations and consumers. "In particular," the report noted, "the Board saw a collective failure to sufficiently account for and mitigate the risks associated with using Short Message Service (SMS) and voice calls for MFA."[6] SIM swapping attacks were frequently used by Lapsus$ to bypass MFA protections, and information obtained via "underground markets" was used to get access to victims, sometimes through their own third-party vendors.

Having reviewed what made this group's attacks so successful (and why some organizations were able to effectively defend themselves), the CSRB made several recommendations on how to improve cybersecurity postures and stay resilient against similar attacks. Its summary of the types of organizations best able to defend themselves or mitigate damages is worth bearing in mind:

1. organizations with mature, defense-in-depth controls;
2. organizations that used application or token-based MFA methods and network intrusion detection systems;
3. organizations that effectively followed their incident response plans; and
4. organizations that were able to communicate safely with incident response professionals without being monitored by threat actors.

While Lapsus$ may have disbanded—or rebranded—similar cybercrime groups can easily materialize. Security methods should always be assessed for optimal protection, such as standard MFA practices. The episode is also a reminder that third-party vendor relationships are critical pieces of an overall security posture and that clear contract language is important in managing data. As the CSRB report demonstrates, attackers will often attack a target through its vendors. Resiliency, smooth incident response procedures, and clear communication with necessary external parties can help organizations recover as quickly as possible when cyberattacks do occur.

While Lapsus$ as it once existed may or may not be finished, organized cybercrime groups will continue to pose significant risks. The report describes a need for additional law enforcement involvement as well as intervention programs for young offenders. Though recommendations are given for individual organizations to improve internally, overarching changes to what we consider "basic" cybersecurity are proposed as well:

"We need better technologies that move us towards a passwordless world, negating the effects of credential theft. We need telecommunications providers to design and implement processes and systems that keep attackers from hijacking mobile service. We need to double down on zero trust architectures that assume breach. We need organizations to design their security programs to cover not only their own information technology environments, but also those of their vendors that host critical data or maintain direct network access."[7]

The Cyber Safety Review Board's most recent review is important for organizations looking to gain a fresh perspective on their current practices, especially in light of cybercrime groups capable of bypassing even the strongest security measures. The group's next report will delve into cloud computing and keeping data secure regardless of where it is stored. ▲

NOTES

[1] *https://www.cisa.gov/resources-tools/groups/cyber-safety-review-board-csrb*

[2] *https://www.cisa.gov/sites/default/files/2023-08/CSRB_Lapsus%24_508c.pdf*

[3] *https://www.forbes.com/sites/emilsayegh/2023/03/15/teenagers-leveraging-insider-threats-lapsus-hacker-group/?sh=5b859ba64e43*

[4] *https://www.bbc.com/news/technology-66549159*

[5] *Id.*

[6] Supra note 2.

[7] *Id.*

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Understanding Seasonal Affective Disorder

and how it can affect your practice

BY SHEINA LONG ✉ *sheina.long.vaar73@statefarm.com*

SHEINA LONG is a licensed attorney practicing in Minnesota and Wisconsin who also holds active licenses in Missouri and Illinois. She is currently based in St. Paul, Minnesota, working within the Claim Litigation Counsel Section of the Law Department of State Farm Mutual Automobile Insurance Company.

Have you ever suffered from the seasonal blues? You likely were dealing with seasonal affective disorder. The Mayo Clinic defines seasonal affective disorder (SAD) as "a type of depression that's related to changes in seasons—seasonal affective disorder [] begins and ends at about the same times every year."[1]

Symptoms

We all know how dreary and cold the Minnesota winters can be. They start early in the fall and seem to end late in the spring. The sun tends to hide behind the dark clouds, and we find darkness creeping in during the early evening.

Could the symptoms of the winter blues be something more? The Mayo Clinic lists symptoms of fall and winter SAD, which include "feeling listless, sad or down most of the day, nearly every day; losing interest in activities you once enjoyed; having low energy and feeling sluggish; having problems with sleeping too much; experiencing carbohydrate cravings, overeating and weight gain; having difficulty concentrating; feeling hopeless, worthless or guilty; having thoughts of not wanting to live."[2]

The Mayo Clinic further lists symptoms of spring and summer SAD, which include "trouble sleeping; poor appetite; weight loss; agitation or anxiety; increased irritability."[3]

How can SAD affect our practice?

SAD affects our moods and can leave us feeling hopeless, listless, and unmotivated to work or to complete the daily tasks on our to-do lists. Despite the change in seasons, our lists of reports, motions, briefs, and other work keep growing.

If our mindset prevents us from being able to fully focus on our work, that can affect our work product and the ability to fully and properly represent our clients. Minnesota Rules of Professional Conduct Rule 1.1 states "a lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

SAD can affect an attorney's ability to be thorough in representation, or to prepare reasonably for the representation, in ways we may not even realize.

What improves SAD?

In a word, sunshine.

Sunshine is underrated in the numerous benefits that it can bring to the mind and body. According to a Forbes article on the benefits of sunlight, "it elevates mood; it improves sleep; it promotes bone growth; it helps strengthen the immune system; it lowers blood pressure; it may reduce the risk of melanoma; it promotes weight loss."[4] Try to get as much sunlight as possible by going outside or sitting in the sunlight in front of a window.

Despite sunshine's being a mood elevator, there are many days during the winter months when it's hard to get adequate sunshine—the weather is often coldest on sunny days in winter, and the sun frequently vanishes for many days at a time.

Light therapy is another way to improve SAD-related mood problems. In the words of the UK National Health Service, light therapy "involves sitting by a special lamp called a light box, usually for around 30 minutes to an hour each morning."[5] Light therapy lamps can be found on Amazon or various stores online. It is said that the "light produced by the light box simulates the sunlight that's missing during the darker winter months."[6]

The Mayo Clinic also identifies some self-care methods we can use to help fight effects of SAD: "[M]ake your environment sunnier and brighter, get outside, exercise regularly, and normalize sleep patterns."[7]

Many individuals may suffer from the winter blues yet fail to recognize the symptoms of seasonal affective disorder. If you think you may be one, try taking advantage of some of these methods for combating the effects of seasonal affective disorder and to abide by the ethical rules of our practice.

My views expressed herein do not necessarily reflect the view and position of State Farm and they are given in my individual capacity. ▲

NOTES

[1] *https://www.mayoclinic.org/diseases-conditions/seasonal-affective-disorder/symptoms-causes/syc-20364651*
[2] *Id.*
[3] *Id.*
[4] *https://www.forbes.com/sites/nomanazish/2018/02/28/why-sunlight-is-actually-good-for-you/?sh=1a5e466e5cd9*
[5] *https://www.nhs.uk/mental-health/conditions/seasonal-affective-disorder-sad/treatment/#:~:text=more%20about%20antidepressants-,Light%20therapy,lamps%20and%20wall%2Dmounted%20fixtures.*
[6] *Id.*
[7] *https://www.mayoclinic.org/diseases-conditions/seasonal-affective-disorder/diagnosis-treatment/drc-20364722*

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Mitchell Hamline Alumni Association names three newest winners

BY TOM WEBER

A recently retired judge who served on the bench for more than a quarter century, the director of the Safe Harbor program at Minnesota's health department, and the director of the Prison to Law Pipeline at the Legal Revolution were recipients of this year's alumni awards from the Mitchell Hamline Alumni Association.

Outstanding Alumni Award

Senior Judge Denise Reilly '83

Denise Reilly is a 1983 graduate of William Mitchell College of Law and served nine years on Mitchell Hamline's board of trustees, from 2012-2022. She was a district court judge for nearly 17 years before being named to the Court of Appeals in 2014 and recently retired as she approached the mandatory retirement age. She will soon take senior judge status.

In 2009, Reilly was one of three judges to serve on a panel that heard the trial in the recount of the U.S. Senate election between Norm Coleman and Al Franken. The panel eventually unanimously ruled that Franken won. Before becoming a judge, she was an assistant U.S. attorney for eight years and an attorney at Lindquist & Vennum before that. She started her career as a law clerk to the late U.S. District Judge Robert Renner.

Distinguished Alumni Award

Caroline Palmer '98

Caroline Palmer is the Safe Harbor director at the Minnesota Department of Health, where she focuses on building collaboration across government and private sectors on behalf of survivors of human trafficking. She is responsible for policy development, grantee oversight, project management, and data/evaluation management.

Before joining the state, Palmer was the policy and legal affairs manager at the Minnesota Coalition Against Sexual Assault for more than a decade. She has also served as the pro bono development director at the Minnesota State Bar Association; was a staff attorney at the Minnesota AIDS Project; and has a long history in arts journalism.

Recent Alumni Award

Maya Johnson '20

Maya Johnson joined the organization All Square and its subsidiary, the Legal Revolution, in 2022 to direct its Prison to Law Pipeline. The program works with currently incarcerated people in Minnesota who are seeking legal education opportunities. The work includes a partnership that resulted in Mitchell Hamline becoming in 2022 the first ABA-approved law school in the country to educate currently incarcerated individuals.

Johnson previously worked as a staff attorney for Southern Minnesota Regional Legal Services and clerked during law school for the Minnesota state appellate public defender's office, the ACLU of Minnesota, and the Hennepin County Public Defender's Office. She also was a certified student attorney with the Mitchell Hamline LAMP and Reentry clinics.

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Q: WINTER'S COMING. TELL US ABOUT YOUR DREAM VACATION GETAWAY.

Grace Bowman

Grace Bowman is an assistant public defender in Minnesota's Ninth Judicial District. She obtained her JD from Mitchell Hamline School of Law in 2022. ✉ *grace.bowman@pubdef.state.mn.us*

I know that in the dead of winter, most Minnesotans want to escape to somewhere warm. Florida, or Aruba, or Fiji, could sound good to a lot of people, and I get it. But I really, really want to get colder.

I live in northern Minnesota, but Bemidji's average January low of -5F isn't enough. I dream about North Ice, Greenland; or Oymyakon, Russia; or the Vostok Research Station in Antarctica. If the weather is warm enough to allow my car to start, I'm not interested.

I'd rather read in front of a fire on a miserably cold day than overheat on a beach somewhere. I want to knit an incredibly thick sweater while sitting under an insane number of blankets. I want to see a penguin while snowshoeing, and then go inside and drink my weight in hot chocolate. If I have to lose a couple of fingers to frostbite, then so be it.

Essentially, I think Herman Melville was right when he wrote that, "To enjoy bodily warmth, some small part of you must be cold, for there is no quality in this world that is not what it is merely by contrast." The best way to be warm is to be cold.

William Murray

William Murray is an attorney at Schatz Law Firm in Rochester, MN. william@schatzlawmn.com

My dream vacation is a sun-soaked stay on the island of Bali. I've always found joy in the ocean and everything it has to offer. Probably because I grew up in a land-locked state.

My time in Bali would start in some of the world's best diving locations, such as the Tulamben Coral Gardens, which is home to abundant species of marine life. There, I could see ribbon eels, reef sharks, manta rays, humphead parrotfish, and blue-ringed octopus. I could also explore the USAT Liberty shipwreck. It was a United States Army cargo ship torpedoed by a Japanese submarine in 1942. Now it's full of coral formations from top to bottom, with its highest point at a depth of about 5 metres (16 ft) and its lowest point at about 30 metres (100 ft).

After a fair share of diving, I'd explore the island. I'd start by hiking Mount Batur at sunrise, a popular hike that leads to the top of an active volcano. I'd also check out the Ubud Monkey Forest. The forest has three 14th century Hindu temples designed to create harmonization between humans and the environment. I'd wrap up my vacation with a bike tour through the rice fields and a day at the beach.

Cassandra (Cassie) Jacobsen

Cassandra Jacobsen is an associate at Cozen O'Connor, focusing on complex commercial litigation and advising employers on a variety of employment issues. ✉ *cjacobsen@cozen.com*

While I'm always open to a beach getaway, I much prefer vacations that balance cultural immersion, natural beauty, and moments of relaxation. With unlimited time and resources, my ultimate dream vacation would entail a multi-week journey through the enchanting landscapes of Italy and Greece. The adventure would commence at Lake Como in Italy, where we would hike Mount Magnodeno and Monte Generoso while enjoying accommodations in the charming towns of Nesso or Bellagio. Following our Italian escapade, we would hop on a southbound train to explore the picturesque coastal villages of Cinque Terre, concluding our Italian leg of the trip with another train ride to the romantic city of Venice (note: since I am a theater enthusiast, this journey is serenaded by the tune "We Open in Venice" from *Kiss Me Kate*).

After savoring the natural wonders, delectable cuisine, and fine wines of Italy, we would catch a flight to the mesmerizing island of Santorini in Greece. Here, we would delve into the rich history and captivating vistas of Pyrgos, indulge in the rejuvenating hot springs, and embark on adventures to the volcanic islands that dot the Aegean Sea.

Now excuse me while I go book those tickets...

Going to Trial

THREE TIPS FOR JUNIOR LAWYERS

BY CIANNA GUERRA HALLORAN

Most cases never make it to trial. This axiom is repeated incessantly throughout the legal community, yet my own experience would say differently. In just over a year since I became licensed to practice, I have gone to trial in two complex civil litigation cases. This may be a rare experience overall, but as a new civil litigator I can attest that one should be prepared for the potential of a trial anyway. The problem is, how can you be prepared for trial when you are entirely new to the practice of law?

One of my two cases was a bench trial that lasted over two weeks in state court and involved the sale of a business as well as fiduciary duties claims. The second was a jury trial involving a distributor-manufacturer contract and trademark issues; it lasted a week in federal court. The two cases were vastly different in subject matter, strategy, and style, but the lessons gained were largely the same.

In my experience, the role of a junior lawyer on a trial team is as distinctive as the roles of lead counsel and second chair. Senior lawyers frequently assume it will be an added stressor to bring an inexperienced lawyer to trial. But as the saying goes, "You can't get a job without experience and you can't get experience without a job." So how do you add value and prove yourself worthy of being on a trial team even if you don't have much experience? I have three tips.

1 Triple-check everything.

Triple-check your work. This is obvious advice, I know, but critical. As a newer lawyer you are already prone to making more mistakes than others. Many of them may not even be properly categorized as mistakes, but rather nuances you missed simply because you have never performed a particular task before. This is especially true if you are preparing for trial for the first or second time. Consequently, it's imperative that you do everything in your power to check your work—which means fixing the mistakes that you can catch and raising questions about the things you do not know. This way, when your work is being reviewed, the only things that should need to be corrected, added, or deleted are the things that it makes sense for you not to understand at this point in your career. I believe that this thoroughness builds trust between you and the other lawyers on the case, which is essential for my next two tips.

2 Listen with intention.

Litigation is a strategic process and it becomes increasingly complex as you close in on trial. It is easy for junior lawyers to feel that they should not be involved in strategy because they are too inexperienced to have any strategic insights. But this state of affairs gives junior lawyers the unique opportunity to listen with intention. And junior lawyers should definitely spend more time listening than speaking. If you add your two cents on every call, meeting, or email chain, you may just find that it adds up to less than you'd hoped. I'm someone who generally hates to be told not to share what's on my mind. But if you can accept this as a temporary role, it can help to secure your place on a trial team.

My suggestion to you is that you do not tune out the portions of team meetings that do not immediately involve you; take note of what the concerns are, what the options are, and the strategies that are ultimately adopted. Stay tuned into the case and try to grasp the issues. By listening intentionally and absorbing details you are not even expected to master, you will prove that you are attentive, tracking all issues, and capable of jumping in if you are needed.

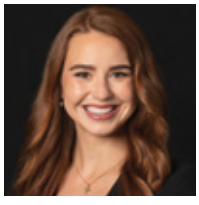
3 Contribute meaningfully.

In a perfect world, you are asked your opinion every time it might prove useful. Unfortunately, that is not the case. I have noticed that some senior attorneys do not want to ask for opinions and put junior lawyers on the spot. I think most junior lawyers appreciate that gesture, but at the same time junior lawyers are still tracking the case in detail—reviewing documents, researching case law, and analyzing the evidence against the elements of the claims. Your knowledge is more of a gold mine than you may realize. You have knowledge of details that will come up in trial preparation, witness preparation, and the trial itself.

It's hard to know when to speak up and when not to, so my two micro-tips in this area are as follows. First, speak up more often than not with the person who is next in seniority to you—most likely a senior associate or junior partner, at least in complex civil litigation cases. This person knows the details of the case as well, but has more capacity to engage in specific case-management discussion. This is the best way I have found to contribute all my ideas, thoughts, worries, comments, and questions, without taking up the time of the entire team. This person should then act as a filter to explain to you why you may be wrong or to elevate your idea to the rest of the team.

Second, read the room and try to speak up last. When a question comes up, listen to what the rest of the team thinks—and if you have a thought that has not been addressed already, then speak up and contribute that idea. What I have found is that you can often avoid sharing something that is unhelpful by waiting to hear what others think. And you get the added bonus of expressing a potentially good idea after everyone else already shared theirs.

Lack of experience can feel like a crippling condition that we all have to work past before getting a seat at the table. But I believe that you can be extremely valuable without that experience if you focus on the quality of your work, listening intentionally, and contributing meaningfully. At the end of the day, your trial team and the clients that you work with benefit when you add the most value possible, no matter your experience level. △



CIANNA GUERRA HALLORAN is a litigation attorney at Winthrop & Weinstine, PA, practicing in all aspects of commercial litigation with an emphasis in shareholder and contractual disputes, insurance, and employment defense.

BETTER TOGETHER

Toward a mutual-care approach to practicing law

BY NATALIE NETZEL

I entered law school with a clean bill of mental health. By my second year of practice, I clearly had the symptoms of what I would learn—much later —was an anxiety disorder. I obsessively checked my email. I woke up in the middle of the night worried about my clients' well-being. Fear of missing a deadline or a hearing prompted me to check my schedule so frequently I had it memorized weeks out. Every morning was filled with dread that today was the inevitable day when those around me would finally realize I was too dumb to be in my job. I magnified every criticism. But praise or confirmation that I was doing well? No way would I let that seep in. I didn't want to become complacent. I couldn't afford to lose my edge.

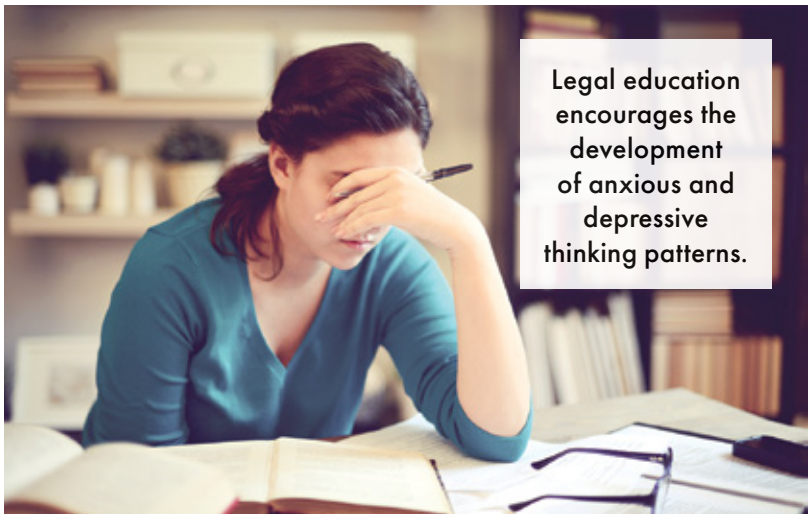
Through this time, I withdrew from other attorneys. They appeared to have it all figured out. They could handle it. They seemed busy, and I didn't want to be a burden. Plus, if I admitted how hard things were for me, it would confirm what I believed others thought of me—I wasn't good enough. My anxious thought patterns didn't seem so much a problem as a trusted friend. I had anxiety about losing my anxiety. Living in a perpetual state of worry kept me on my A-game, or so I thought.

I'm a statistic—part of the 19 percent of attorneys who struggle with anxiety and the 71 percent for whom anxiety is a concern at some point in their career.[1] Lawyers suffer disproportionately compared to other similarly situated professions.[2] Moreover, as an ABA Journal article averred, "law practice may be the loneliest profession."[3] Positive relationships have a protective effect on mental health, yet as a profession we struggle to connect with each other in meaningful ways, which only adds to the problem.

The seeds for my own anxiety disorder were sown in law school, which scholars have called the "catalyst" for the crisis of well-being in law.[4] As a law professor, I have a front-row view of the impact legal education has on students. And while exploring my own anxiety, I have spent a lot of time grappling with my role as a legal educator and the norms I reinforce that may exacerbate mental health issues in students who become lawyers. It is undeniable that the legal profession is in an ongoing crisis of well-being.

As a profession we have become better at acknowledging that self-care practices are part of the solution to the crisis of well-being in law. As a movement, we recognize that individual law students and lawyers are fighting individual mental health and substance use battles. We tend to focus on individual struggles through an individualistic lens. The diagnostic terms we use to describe them have become dispiritingly familiar: adjustment disorder, generalized anxiety disorder, depressive disorder, substance use disorder, and post-traumatic stress disorder, to name a few. The focus on the individual is not all bad. It creates paths for individual interventions proven to help alleviate symptoms. Therapy helps lawyers examine maladaptive thought patterns and maladaptive behaviors. Medication helps regulate and reel in our overactive brains. Meditation helps increase lawyers' compassion for self and others and avoid needless suffering in the wake of systems that cause tremendous pain.

But it's not enough. Systemic change is necessary and long overdue, yet systems don't change overnight and our current focus on fixing individual problems through self-care can cause additional harm to those who suffer. We need a different solution. In this article, I explore how mental health issues are exacerbated, even created, by the norms of our profession starting in law school, and then explore how individual lawyers can work together to promote mutual care as a new norm to counteract our damaging status quo.



Legal education encourages the development of anxious and depressive thinking patterns.

How the sausage gets made

Legal education encourages the development of anxious and depressive thinking patterns. Throughout law school, "thinking like a lawyer" is conveyed to students as the "new and superior way of thinking."[5] Students are rewarded for issue spotting, critical analysis, and being able to defend any position. This new way of thinking is often "fundamentally negative... critical, pessimistic, and depersonalizing."[6] As a result, those who excel at thinking like a lawyer strengthen thought patterns that also underlie mental health issues. Law students are taught to see the world through a lens of risk, which lends itself to hypervigilance—focusing on the worst-case scenarios and anticipating negative outcomes to better prepare oneself. Critical analysis skills necessary to succeed as a lawyer lend themselves to overthinking—ruminating on past events or worrying excessively about future possibilities. Law students are taught to consider liability, which lends itself to catastrophizing—magnifying the potential negative consequences of a situation, imagining the worst possible outcomes, and struggling to see more optimistic or realistic perspectives. Law students are taught to scrutinize every detail, which lends itself to hyper-focusing on the negative.

To be clear, thinking like a lawyer is a necessary part of the profession and there are many personal and professional benefits to the development of the skill. But the skills need to be taught as "an important but strictly limited legal tool," with attention paid to helping students understand how thinking like a lawyer can spiral into more problematic thought patterns if not contained.[7]

Even as law school builds up potentially dangerous thought patterns in students, we add fuel to the fire in other well-intentioned yet harmful ways. Most attorneys carry a heavy workload and strictly adhere to many competing deadlines. The demands on lawyers are unrealistic if we want to achieve any semblance of balance in our lives. Yet as lawyers we meet the demands because the cost of failing to do so is high; clients' livelihoods, liberty, families, and even lives may be on the line. Falling short in ways big and small can result in personal and professional consequences.

Because we know what our students will face when they become lawyers, we recreate demanding circumstances, thinking we are doing them the favor of preparing them for what is to come. We glorify *busy*. We inundate them with work and impose severe consequences for missing deadlines. We point out that if they think missing points on an assignment is bad, imagine how they will feel when the consequences impact a real client. And we make sure to let them know that if they really want to have a great career, excelling academically is not enough. They must also network, find experiential opportunities, build their resumes, demonstrate their leadership potential—all while serving their communities—*and don't forget* to further prove their excellence by gaining legal journal experience. We care about our students. We want them to succeed. So we give them this well-meaning advice.

Perfectionism is celebrated. Never mind the fact that it is structurally impossible in law school. Students arrive at our doorstep on the heels of academic success—enough, anyway, to get them admitted. They enthusiastically greet the challenges of law school and expect their hard work and effort to be rewarded with the same good grades they received in under-

graduate and other graduate programs. Of course, the reality of the grading curve makes this an impossibility for most students—by its nature, the curve overvalues individual work and undervalues collaborative group work. As a result, students feel they must stand on their own. Students who come to understand the curve recognize that they have to constantly outperform their peers to secure better grades and enhance their future career prospects. Students who do not understand the nature of the curve are often left demoralized by feelings of inadequacy, even when they are performing adequately. And for some of these students, the general issues with thinking like a lawyer—hypervigilance, overthinking, and catastrophizing—turn inward. They engage in excessive self-criticism, constantly worry about meeting high standards, and experience a fear of failure. All of this is exacerbated by peers who work at projecting success outwardly while handling problems privately, leaving all students to feel more alone.

How to grow an anxiety disorder

As a legal educator who wants the world for my law students, and at the bare minimum wants to do no harm, I have spent countless hours ruminating, catastrophizing, and overthinking about how much harm I may be causing in my role upholding norms of the profession. When I open the door to conversations about well-being in law school with students, they pull no punches in sharing how various pedagogical practices and messaging styles hurt them. I wish I could tell them their struggles will improve when law school is over. I can't.

I have friends who are lawyers who genuinely love their jobs and are thriving. Yet as a lawyer who speaks openly about my own challenges with mental health in law, I am privy to countless stories of others who are struggling in the shadow of harmful norms. I hold all these stories in confidence, yet their common threads have led me to question the validity of my own "anxiety disorder." I wonder whether my diagnosis is less an individual failing of my own mental health and more a learned response to a problematic system.

The thinking patterns that give rise to my diagnosis are, perhaps, better described as maladaptive coping mechanisms to adjust to the culture of the legal profession. When a disproportionate number of us struggle with so-called "mental illness" as a profession, we must be willing to consider that it could be the system and not merely troubled individuals that are the root of the problem. We must examine the ecosystem in which we exist, participate, and co-create. For the 71 percent of us who struggle with some form of anxiety at some point in our careers, it is fair to wonder how the seeds planted in law school could grow into thorny, unmanageable thickets.

Hallmarks of generalized anxiety disorder include "excessive anxiety or worry" that is "out of proportion to the actual likelihood of or impact of the anticipated event."[8] It does not take much of a stretch to say that these criteria mirror "thinking like a lawyer" as it is taught in law school.

Additional diagnostic criteria necessary to meet a diagnosis for generalized anxiety disorder include that the worry is "difficult to control." It is accompanied by symptoms like restlessness, muscle tension, and sleep disturbance, and causes clinically significant distress in important areas of functioning.[9] In short, when the thought patterns we learned in law school begin to take their toll on us, it's a diagnosable condition. Overwhelming workloads and unduly harsh consequences for messing up lead to more things to worry about. It follows that the more things we have to worry about as lawyers, the more difficult it will be to control our worrying and, in turn, the more difficult it will be to function in our careers and lives.

As I have dealt with my own mental health issues, I have spent time trying to understand the issues on a systemic level. Invaluable research has helped me understand that my experience with mental health issues in law is closer to the rule than to the exception. Thankfully, in recent years, there has been increased attention to the mental health and well-being of lawyers.[10] The problems are both systemic and endemic. What's more, mental health issues like anxiety and depression can cause those who suffer to withdraw from relationships with others. The tragedy in all of this, of course, is that supportive relationships with others help to protect mental health. It's a shame, though not a surprise, that lawyers outrank other professions on the loneliness scale.[11] As a baseline, we are busy. Add struggle to the mix and we are even more likely to deprive ourselves of the human connections we need to heal and thrive.

IF WE WANT TO IMPROVE MENTAL HEALTH OUTCOMES IN OUR PROFESSION, LAWYERS MUST START BEHAVING AS IF OUR COLLEAGUES' WELL-BEING IS OUR BUSINESS. WE MUST GRAPPLE WITH THE FACT THAT LAWYERS' MENTAL HEALTH PROBLEMS ARE NOT INDIVIDUAL BUT COLLECTIVE.

Our colleagues' well-being is our business

Despite the awareness that lawyers are at increased risk to experience adverse mental health outcomes by virtue of membership in the profession, "Many in the legal profession have behaved, at best, as if their colleagues' well-being is none of their business. At worst, some appear to believe that supporting well-being will harm professional success. Many also appear to believe that lawyers' health problems are solely attributable to their own personal failings for which they are solely responsible."[12]

If we want to improve mental health outcomes in our profession, lawyers must start behaving as if our colleagues' well-being is our business. We must grapple with the fact that lawyers' mental health problems are not individual but collective; the failings are not personal but systemic. We all have a choice about whether to uphold the norms that contribute to systemic harms or to actively work to reshape them.

The current approach to solving this well-being crisis in law is skewed heavily toward promoting the micro-level intervention of self-care. This is, perhaps, because it is easier to blame the individual than it is to face the deeply entrenched systemic nature of the norms upheld by the legal profession that all but ensure the crisis of well-being will continue. I can treat my "anxiety disorder" through therapy, medication, and other individual practices that promote well-being. But, if I am correct in my belief that the norms of our profession sometimes mimic anxiety disorders, self-care measures will only get me so far.

In short, by participating in the legal profession and upholding the status quo, we are harming each other. This can be a hard pill to swallow (certainly harder than a Lexapro), so perhaps we avoid acknowledging this because it's too hard to face the harm we inadvertently cause each other. We must be morally courageous enough to acknowledge our individual roles in reinforcing problematic norms.

COMMUNITIES OF MUTUAL CARE CAN BE INFORMAL IN NATURE. THEY DO NOT REQUIRE THE PERMISSION OF ANY PERSON ATOP A HIERARCHY TO BE SUCCESSFUL. THEY CAN BE FORMED BY ANY GROUP OF TWO OR MORE LEGAL PROFESSIONALS WHO WANT TO BE PART OF ONE.

Insights from systems theory

As the profession considers ways to improve well-being, systems theory—a framework borrowed from social work—is a helpful tool. It recognizes there is a reciprocal relationship between people and their environments. This framework is useful in reimagining how legal professionals can intervene to create a culture of well-being in law.

Systems theory helps us recognize that "[t]hough our profession prioritizes individualism and self-sufficiency, we all contribute to, and are affected by, the collective legal culture. Whether that culture is toxic or sustaining is up to us. Our interdependence creates a joint responsibility for solutions."[13] If interventions focus solely on one level, to the exclusion of the others, then the interventions will be ineffective. All of the self-care practices in the world cannot—on their own—fix a crushing caseload or a toxic law firm.

Yet broad systemic change is often slow. Fighting against systems can be overwhelming and demoralizing. And many lawyers are simply too busy with the demands of work and life to also fight for systemic change within the legal profession. So I offer an intermediate level intervention—building communities of mutual care—to further the lawyer well-being movement.

Mutual care as the new norm

When I have struggled, I have survived my own most hopeless moments not through sheer grit or resilience, but through the compassion and care of others. Meaningful, authentic, and supportive relationships are fundamental to well-being and healing. Our lonely profession needs more of this. We must recognize that self-care alone is not enough. With urgency, we must shift our mindset to one of mutual care. Self-care only works when the need for it is respected and valued such that circumstances allow for self-care to occur. When we collectively work together to make space for self-care, we practice mutual care.

As a professor, I am on a mission to help law students embrace the concept of mutual care. I want the experience of becoming a lawyer to be better for them than it was for me. When I have opened the door to conversations about well-being in law and the harmful norms that interfere with it, law students are grateful and eager to share their experiences. I view it as part of my role as an educator to engage in these conversations. In turn, I have seen students feel empowered to work together to provide each other with the support they need.

One benefit of these conversations is that I get to learn from students in the process. One group of law students took the initiative to present to other students about mutual care. Their work deepened my own understanding of the idea I hold so dear. They explained, "Mutual care embraces reciprocal and supportive relationships, values authentic connection with others, and understands that giving what you can and receiving what you need in support/ resources/ time/ energy is central to be able to counter power structures that are larger than any one individual."[14]

Building off the wisdom of my students, lawyers can band together in informal groups with a commitment to support each other's well-being. In these communities of mutual care, attorneys can actively work together to create the circumstances that allow their members to make space for self-care. Those of us who have internalized harmful norms of the profession and attributed our successes to them—in other words, nearly all of us—may need to do some unlearning. The success of mutual care efforts depends on a willingness to prioritize embracing the concept. It takes intentionality, vulnerability, and a commitment to acting as if our colleagues' well-being is our business.

Communities of mutual care can be informal in nature. They do not require the permission of any person atop a hierarchy to be successful. They can be formed by any group of two or more legal professionals who want to be part of one. A community of mutual care could be formed based on a common practice area (e.g., criminal defense or prosecution, medical malpractice, immigration, probate), shared employment, similarity of status or position (e.g., associates or partners in big firms, solo practitioners, legal aid lawyers, law students or professors), or shared identity (e.g., racial or ethnic group, gender, sexuality, disability status, familial role, point in lifespan of career). Once the community forms, they intentionally focus on how members can give what they can to each other and receive what they need from each other.

For many lawyers, giving comes easier than receiving. Giving is often a driving force in pursuing a career in law. Many attorneys are motivated by a sense of justice, a passion for advocating for those who are marginalized or disadvantaged, and a commitment to upholding the values of fairness and equality. Indeed, a recent study revealed many law students are drawn to the legal profession because they have experienced some form of trauma or injustice in their own lives, and they want to use their skills and knowledge to make a difference in the world.[15] This innate desire to give back and contribute to positive change is a commendable aspect of the legal profession. Communities of mutual care build on this inherent desire to help others.

For some lawyers, the second part of the equation, receiving what they need, is harder. Receiving involves acknowledging the validity of one's own needs, sharing them, and accepting help. Lawyers who have internalized the kind of rugged individualism encouraged in the traditional law school experience may view needing help as either a sign of weakness or a burden to others. Communities of mutual care validate and normalize lawyers' need for help. A hallmark of communities of mutual care is reciprocity and the symbiotic relationship between giving and receiving. As Paul Wellstone famously said, "We all do better when we all do better."[16]

Building community

Building a community

There is no single way to build a community of mutual care. The idea is meant to be flexible—and to coalesce around our collective need for support and connection. My community has morphed over time. It grows in the moments I fall apart a little and a colleague steps into help—or when I see another lawyer struggling and they give me the opportunity to lean in and care for them. It also grows in the moments where we celebrate each other's humanity and worth outside of accomplishment and production.

For anyone interested in trying to build on the concept: First and foremost, trust your gut about your own mutual care needs and get curious about the mutual care needs of those around you. Without being overly prescriptive, I humbly offer the following advice.

■ **Normalize struggles in the practice of law.** Competitive norms of our profession encourage us not to let our guard down. Or to show weakness. Yet we do ourselves and each other a disservice when we pretend that we have it all together. We miss out on the opportunity to connect with others and feel less alone. Talking about mental health struggles in law is not easy. My own vulnerability in this regard has made other lawyers feel uncomfortable, yet I keep sharing because we must move through the discomfort to make meaningful change. And yes, I have experienced stigma, judgment, criticism, and misconceptions due to my openness, especially when my approach is unpolished. The pain I have felt in those moments has been real and scary. Yet on balance, the connection, compassion, understanding, and grace that have been returned to me when I share my struggles privately and publicly have far outweighed the pain.
Communities of mutual care can serve as a safe space for open dialogue about struggles with self-care and mental health and about experiences and challenges in the profession. Moving past mere commiserating, lawyers deserve spaces to provide each other emotional support and to help each other develop healthier strategies to cope with our profession's harmful norms.

■ **Encourage leading by example.** It takes courage to prioritize self-care as a lawyer, even more to acknowledge it openly. Lawyers are often valued most for their accomplishments. While many lawyers' achievements are laudable, it can also be dehumanizing when lawyers are only celebrated for what they are able to produce and not for who they are outside of their accomplishments. Communities of mutual care can celebrate lawyers' value in other aspects of their lives and serve as cheerleaders when someone makes a valid choice *not* to, say, join a board, seek a promotion, or take on a new big client because they are prioritizing other aspects of their humanity. My own biggest accomplishment this year is figuring out how to achieve a bit less– without losing my sense of self-worth. I hope the same can be true for other lawyers.

IF THIS ARTICLE RESONATES WITH YOU, I ENCOURAGE YOU TO SHARE IT WITH SOMEONE YOU TRUST AND ASK WHICH PARTS, IF ANY, RESONATE WITH THEM.

NATALIE NETZEL is an associate professor of law and the director of clinics at Mitchell Hamline School of Law, where she is deeply committed to the well-being of her clients, her students, and her colleagues.

■ **Shared workload management.** Many kinds of legal cases run on timelines. Judges must manage busy dockets, clients have immediate needs, bosses have expectations, and modern technology rarely lets us be *truly* out of reach. As such, the reality of the current state of lawyering is that rest is often only possible when workloads are manageable, when attorneys know someone else has their back and can handle issues that arise when they are away, or when people and systems honor boundaries—not all of which is within the control of individual attorneys. Communities of mutual care can champion the power and necessity of rest and provide each other with support to make periods of rest possible.[17] And, because breaks from work only work when there is an opportunity to actually take a break, communities of mutual care create pathways to allow each other to have breaks truly be breaks, by providing support where they can in managing each other's workloads.

■ **Foster compassion.** Compassion and self-compassion are undervalued traits in our profession, which rewards imperviousness and perfectionist tendencies. Thinking like a lawyer can spiral into anxious and depressive thinking patterns and increase our tendency to be critical and judgmental toward ourselves and others. But I have faith in the ability of attorneys to work together to foster compassion as an antidote—which includes strengthening our own self-compassion. That "entails being warm and understanding toward ourselves when we suffer, fail, or feel inadequate, rather than ignoring our pain or flagellating ourselves with self-criticism."[18]

Indeed, mutual care is both self-centered and selfless in that it honors the individual need for self-compassion and self-care while trusting that lawyers who have their self-compassion and self-care needs met will have the capacity and ability to show compassion and care to others. The reciprocal nature of care and compassion, without forced expectation, is what causes communities of mutual care to flourish.

Building your own community

If this article resonates with you, I encourage you to share it with someone you trust and ask which parts, if any, resonate with them. I hope it serves as a catalyst for conversation among lawyers who desire to engage in collective work to improve our individual and collective well-being. We heal in community. Together we have the power to reshape our norms. May we find each other and create a healthier profession. ▲

NOTES

[1] Amanda Robert, "Mental health initiatives aren't curbing lawyer stress and anxiety, new study shows," ABA Journal (May 2023) *https://www.abajournal.com/news/article/mental-health-initiatives-arent-curbing-lawyer-stress-and-anxiety-new-study-shows#google_vignette*

[2] Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871, 874 (1999). Available at: *https://scholarship.law.vanderbilt.edu/vlr/vol52/iss4/2*

[3] Debra Cassens Weiss, *Lawyers Rank Highest on 'loneliness scale,' Study Finds*, ABA Journal, (4/3/2018) *https://www.abajournal.com/news/article/lawyers_rank_highest_on_loneliness_scale_study_finds*.

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[5] Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. Legal Educ. 112, 117 (2002).

[6] *Id.*

[7] *Id.*

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[9] *Id.* at 250-51.

[10] Nat'l Task Force on Lawyer Well-Being, The Path to Lawyer Well-Being: Practical Recommendations for Positive Change 7 (Aug. 2017). [*https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf*

[11] Weiss, *supra* note 3.
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[12] Nat'l Task Force on Lawyer Well-Being, *supra* note 10 at 12.

[13] *Id.* at 9.

[14] Hannah Burton, Grace Hoffman & Amanda Shepard, Presentation at Mitchell Hamline School of Law Clinic Kick Off: Mutual Care (8/12/2022) (on file with author).

[15] David Jaffe et al., *"It Is Okay to Not Be Okay": The 2021 Survey of Law Student Well-Being*, 60 U. Louisville L. Rev. 439, 496 (2022).

[16] Gary Cunningham, *We All do Better When We All do Better*, Star Tribune, 9/22/2010. *https://www.startribune.com/we-all-do-better-when-we-all-do-better/103588254/* (quoting Sen. Wellstone).

[17] *See* Cathy Krebs, *Rest Is Radical: Self-Care for Lawyers*, American Bar Association - Litigation Section, 5/2/2023 *https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2023/spring2023-rest-is-radical/*.

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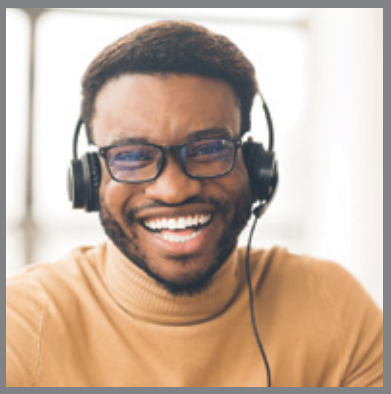

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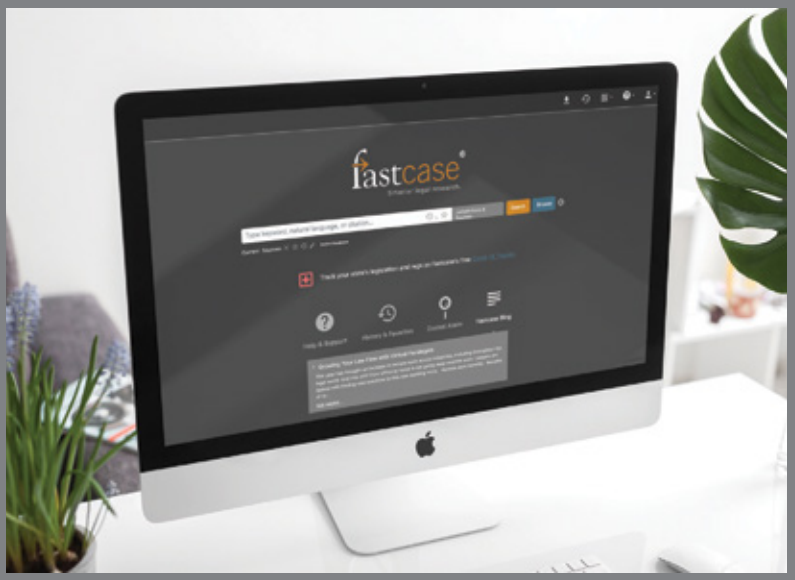

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Trust us
Antitrust is back

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And it's coming for Big Tech

TRUST US: ANTITRUST IS BACK

And it's coming for Big Tech

More than a century ago, the critical industries of the day in the United States—railroads, electricity, oil, and gas—rested in the hands of a few powerful corporations. Rather than competing with one another as expected under our innovative, capitalistic system, these powerful entities realized that they could extract above-market profits from American consumers with their market power or concerted action. As a result, collusion and consolidation became the mantra of the day as these companies sought to increase their unchecked economic power. This anticompetitive behavior resulted in "exorbitantly high prices on essential goods"[1] for millions of American consumers, reduced output of products and services, lessened the quality of those products and services, and raised unfair barriers for those wanting to compete in the marketplace. Despite significant public outcry against these abuses, there was very little the American people could do about it.

But in 1890, Senator John Sherman of Ohio proposed, and Congress enacted, the Sherman Antitrust Act.[2] The goal of the Sherman Act was to ensure that markets worked for consumers and companies fairly competing for business, rather than for dominant companies and monopolies. Specifically, the law prohibits trusts, monopolies, and cartels from dominating a market and likewise bans the use of contracts, the formation of business conspiracies, and other business practices that amount to a "restraint of trade."[3] Some common restraints of trade include "price-fixing," dividing markets (commonly referred to as "market allocation"), and "bid-rigging."

In 1914, Congress strengthened the Sherman Act by adopting the Clayton Act. That legislation added several important tools to the law for antitrust enforcers and specifically addressed anti-competitive mergers, monopolies, and price discrimination.[4] Particularly important, the Clayton Act created a private right of action for violations of the Sherman Act and the Clayton Act that granted aggrieved parties a federal cause of action to protect themselves from harmful, anticompetitive practices across the country. By creating this private right of action, and providing for the imposition of treble damages and attorneys' fees, the Clayton Act added a powerful *private* incentive to complement government enforcement actions.

ECONOMY NUMBERS

75%
of U.S. industries have experienced significant market concentration since the 1970s, leading to a series of consumer, business, and labor problems

7%
increase in consumer prices (relative to European Union residents) for the same goods

17%
decrease to wages from industry-specific consolidation

Following 1914, enforcement of the Sherman Act, the Clayton Act, and their progeny has generally taken two forms: (1) public enforcement through the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC), and (2) private party enforcement through (predominantly) class-action antitrust litigation. Like a bicycle, antitrust enforcement works best when *both* wheels of enforcement—public and private—are adequately and properly used. From about 1900 to 1940, both wheels were working fairly well. During that time, the DOJ routinely brought actions to preserve competition, and private parties brought money-damages actions against companies for their anticompetitive conduct.

For example, in *Northern Securities Co. v. United States*,[5] the United States Supreme Court held that a railroad holding company's ownership of several other subsidiary competitor railroad companies violated the Sherman Act, and ordered the break-up of the holding company, requiring that each respective railroad company operate separately and independently of each other. Similarly, in *Standard Oil Co. of New Jersey v. United States*,[6] the Court, affirming the lower court, held that the oil company's holding companies—which, in turn, owned nearly all petroleum companies and oil refining companies in the United States—violated the Sherman Act, and the Court broke up the company. As those cases illustrate, the DOJ and the federal courts had a strong appetite for ridding our economic system of anticompetitive behavior or anticompetitive market circumstances.

But following that initial era of robust public and private enforcement, the appetite for *public* enforcement waned. Since the 1970s, public enforcement of the antitrust laws has entered a period of relatively "rare"[7] enforcement—owing in part to the rise of the laissez-faire Chicago school of economics in antitrust law. And what has been the result? Excessive market concentration and dominant firms, which has resurrected many of the same concerns that faced Americans prior to Congress's enactment of the Sherman Act.

According to NYU economist Thomas Philippon, a world-renowned scholar on competition, 75 percent of U.S. industries have experienced significant market concentration since the 1970s,[8] leading to a series of consumer, business, and labor problems. From a consumer standpoint, Americans have experienced a 7 percent increase in prices (relative to European Union residents) for the same goods, a difference estimated to cost the median American household $5,000 per year.[9] From a business growth standpoint, new business formations have declined as a share of the economy since the 1970s.[10] And from a labor standpoint, industry-specific consolidation is estimated to decrease wages by as much as 17 percent.[11]

Excessive market cowncentration hurts consumers in our economy. These statistics, and so many more, paint a clear picture: Consistent antitrust enforcement is essential to maintain a vibrant American economy for competing businesses and consumers. And after decades of relative inertia, it appears that the tide may be turning. Two years ago, the Biden Administration issued an executive order, "Promoting Competition," that included 72 antitrust and competition initiatives to be implemented by 14 federal agencies.[12] This enforcement activity looks hardest at the core industries of today—Big Tech.

DOJ's head for antitrust, Assistant Attorney General Jonathan Kanter, recently spoke about the threat of tech monopolization to our free markets. In those remarks, he noted that the "digital economy has enabled monopoly power of a nature and degree not seen in a century"—in other words, since the days of *Northern Securities* and *Standard Oil*.[13] "The digital age is not only characterized by the presence of monopoly power, but by new means of its exploitation more threatening to individual freedom than ever before."[14] These remarks, signaling a resurrection of robust public antitrust enforcement, were not simply hollow words; they were a clear mandate—one that has led to real action.

First, the DOJ has returned to prosecuting *criminal* antitrust violations. Although the Sherman Act has provided for criminal prosecution since its inception, criminal enforcement has generally been non-existent. From the 1970s until 2020 or so, the DOJ had not prosecuted a single criminal antitrust case.[15] But by the end of 2021, the DOJ had "21 indicted cases against 42 individuals, including 9 CEOs and corporate presidents under indictment."[16] Moreover the DOJ ended 2021 with "146 pending grand jury investigations, which is the most in 30 years."[17]

And second, the DOJ and FTC have returned to engaging in robust investigations and *civil* enforcement. Since 2018, the DOJ and FTC—under both Democratic and Republican administrations—have brought *dozens* of investigations and enforcement actions against some of the largest tech companies, including Apple, Amazon, Google, Meta, and Microsoft. In December 2022, for example, the FTC filed an administrative action against Microsoft's proposed acquisition of video game developer Activision Blizzard, Inc., alleging that the acquisition would "result in harm to consumers, including reduced consumer choice, reduced product quality, higher prices, and less innovation."[18] In September 2023, an antitrust monopolization trial against Google began in Washington D.C. federal court.[19] In that trial, the DOJ hopes to prove that Google illegally abused its power over online search functionality to throttle competition.

Although the results of this increased criminal and civil public enforcement have been mixed, the *scope*, *pace,* and *appetite* for robust public enforcement—regardless of which political party controls the Executive branch— is an indication that these recent trends are not an aberration; they are the beginning of a robust new era.

This resurrection is a welcome arrival for private class-action enforcers. For the first time in over three decades, private enforcers are confident that we can again get back on the bicycle and properly ride again, knowing that the public wheel is pumped up and ready to roll.

That's why antitrust is back. ▲

NOTES

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[2] 15 U.S.C. §1, *et seq.*

[3] *Id.*

[4] 15 U.S.C. §12 *et seq.*

[5] *Northern Securities Co. v. United States*, 193 U.S. 197 (1904)

[6] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

[7] Maurice E. Stucke and Ariel Ezrachi, "*The Rise, Fall, and Rebirth of the U.S. Antitrust Movement,*" Harvard Business Review (12/15/2017).

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[10] Supra note 6.

[11] Jose Azar, Ioana Marinescu, and Marshall Steinbaum, "*Labor Market Concentration*," the Journal of Human Resources (May 2020).

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[14] *Id.*

[15] Carsten Reichel, "US DOJ Files First Criminal Charge Under Sherman Act Section 2 in Nearly 50 Years," Norton Rose Fulbright (November 2022), *https://www.nortonrosefulbright.com/en-us/knowledge/publications/14f4c7e7/us-doj-files-first-criminal-charge-under-sherman-act-section-2-in-nearly-50-years*, accessed 9/1/2023.

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[17] *Id.*

[18] *In the Matter of Microsoft/Activision Blizzard, Inc.*, FTC No. 2210077, Dkt. No. 9412 (7/7/2023).

[19] *U.S., et al. v. Google*, No. 1:20-cv-03010 (D.D.C. 2020).

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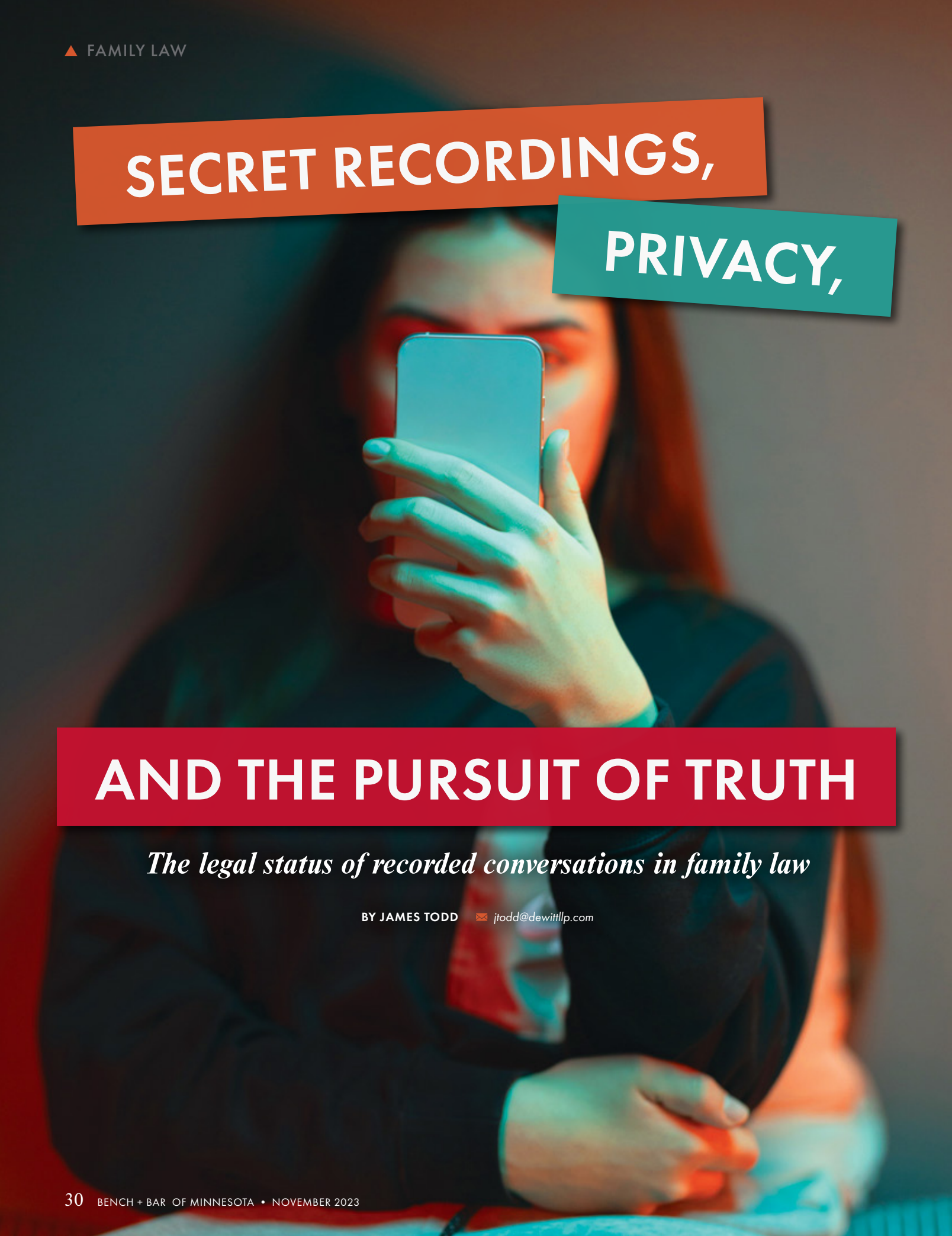
SECRET RECORDINGS, PRIVACY, AND THE PURSUIT OF TRUTH



The legal status of recorded conversations in family law

BY JAMES TODD ✉ *jtodd@dewittllp.com*

Wiretapping has been around since before the telephone. During the Civil War, soldiers on both sides routinely cut into telegraph lines, using copper wires and a receiver to intercept messages and send out disinformation. Wiretapping has since been used for everything from corporate espionage and insider trading to organized crime and, of course, criminal investigations. Even in the domestic sphere, the topic is nothing new.

The question for family-law practitioners is how to advise clients when it comes to secret recordings—whether to gather them and, when presented with secret recordings, whether to use those recordings as evidence in a family court proceeding.

In Minnesota, the problem for a too-eager domestic investigator is Minn. Stat. §626A.02, Minnesota's anti-wiretapping statute. Along with its virtually identical federal counterpart—Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2511—the statute prohibits the intentional interception and use of "any wire, electronic, or oral communication."[1] The good news for amateur sleuths is that there is an exemption from prohibition where one of the parties to the communication has given prior consent to such interception.[2] This is what is known as the "one-party consent" exception to the federal anti-wiretapping statute and the majority of state statutes (including Minnesota's).[3] And it generally means that recordings of conversations to which the person recording is a party do not violate the federal or Minnesota's anti-wiretapping statute.

But what about a custodial parent's recording of their minor child's conversation with an unaware third party, where the recording parent is not also a party to the conversation? Conventional examples might include recordings by custodial parents of telephone or FaceTime conversations between a minor child and the other parent, baby monitors that link to smartphones through an app, smartwatches worn by children with remotely accessible recording functions, or a recording made by a parent, say, from a different part of the house, of the other parent screaming at their child. Can these secret recordings be used as evidence?

Generally, the answer appears to be (probably) yes—but with caution. Every federal district and appellate court, and virtually every state appellate court,[4] interpreting essentially identical versions of the federal and state anti-wiretapping statutes (including Minn. Stat. §626A.02 itself), has adopted the doctrine of "vicarious consent," holding that a guardian can provide vicarious consent on behalf of their minor children and intercept a recording of their minor children's conversations with another person without violating either state one-party consent statutes or the federal anti-wiretapping statute as long as the guardian has a good-faith, objectively reasonable belief that the interception of such a recording is necessary for the best interests of the children in their custody.[5]

Family law practitioners should be aware (and should advise their clients) that Minnesota state courts have never addressed the issue nor explicitly adopted the vicarious consent doctrine. In *Wagner,* 64 F. Supp. 2d at 896 (D. Minn. 1999), though, the U.S. District Court for the District of Minnesota did adopt the vicarious consent doctrine as to both the federal *and* Minnesota anti-wiretapping statutes. The court squarely addressed the issue of whether a custodial parent's secret recording of their minor child and the other parent would violate either the federal or Minnesota anti-wiretapping statute—and found in a 1999 opinion that such a recording would not violate either statute if the custodial parent had an objectively reasonable, good-faith belief that such a recording was necessary for their minor child's best interests.[6]

In *Wagner*, Lesa Wagner sued her former husband, Robert, for Robert's recording of Lesa's telephone conversations with the parties' two minor children, and his use of those recordings in their dissolution proceeding.[7] Robert admitted to intercepting those telephone calls and using them in the dissolution matter but argued that he had vicariously consented to the recording on behalf of the minor children.[8] Lesa moved for summary judgment against Robert based on his admission.[9] The *Wagner* court denied summary judgment, and its decision is worth quoting at length since it provides an excellent analysis of the vicarious consent doctrine and why the Eighth Circuit adopted it:

"The Court is now confronted with an issue upon which the Eighth Circuit has not spoken, specifically, whether the exemption permits a custodial parent to 'vicariously consent' to the recording of the minor child's telephone conversations.

"Although the issue has not been explicitly addressed by the Eighth Circuit, federal courts in other circuits have examined the issue of the vicarious consent doctrine. *See*, *e.g.*, *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998); *Thompson v. Dulaney*, 838 F. Supp. 1535 (D. Utah 1993).

"Most recently, the Sixth Circuit analyzed the vicarious exception doctrine in *Pollock*. *Pollock*, 154 F.3d at 607 – 10. The *Pollock* case, in which a non-custodial parent sued the custodial parent for recording telephone conversations between the non-custodial parent and their 14-year-old child, involved facts substantially similar to those in the present matter. As the Sixth Circuit noted, the basis of the case 'occurred in the context of a bitter and protracted child custody dispute,' and the custodial parent maintained that the non-custodial father was subjecting the child to emotional abuse and manipulation by pressuring the child regarding custodial matters. *Pollock*, 154 F.3d at 603 – 04.

"After an in-depth analysis of the issue, including a thorough examination of the relevant case law from other jurisdictions, the Sixth Circuit adopted the vicarious consent doctrine and held as follows: 'As long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.' *Pollock*, 154 F.3d at 610.

"The court held that the issue of material fact as to the defendant's motivation in taping the telephone conversations precluded summary judgment. *Pollock*, 154 F.3d at 612.

"In addition, another district court in the Eighth Circuit addressed the vicarious consent doctrine in *Campbell v. Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998). In analyzing the issue, the court recognized that the 'Eighth Circuit has not addressed whether parents may vicariously consent to the recording of their minor children's conversations' and noted that the court had 'uncovered no cases rejecting a vicarious consent argument, and, furthermore, finds persuasive the cases allowing vicarious consent.' *Campbell*, 2 F. Supp. 2d at 1189. The court thus adopted the vicarious consent doctrine, holding that the custodial parent's 'intercepting the telephone conversations must have been founded upon a good faith belief that, to advance the child's best interests, it was necessary to consent on behalf of his minor child.'

Campbell, 2 F. Supp. 2d at 1191. In reaching its decision, the court noted that it 'merely applied what it concludes to be the majority law on the subject...' *Campbell*, 2 F. Supp. 2d at 1192.

"Indeed, the only case in which the court explicitly declined to adopt the vicarious consent doctrine in connection with Title III was that of *Williams v. Williams* ("*Williams I*"), 581 N.W.2d 777 (Mich. App. 1998). In rejecting the doctrine, the Michigan court recognized that it was deviating from the majority. *Williams*, 581 N.W.2d at 780-81. The Sixth Circuit, in *Pollock*, observed of the *Williams* court that, 'in declining to adopt the doctrine of vicarious consent, it was departing from the path chosen by all of the other courts that have addressed the issue.' *Pollock*, 154 F.3d at 609.

"In fact, the Michigan Supreme Court later remanded the *Williams* case back to the Michigan Court of Appeals for reconsideration in light of *Pollock*. *Williams v. Williams* ("*Williams II*"), 593 N.W.2d 559 (Mich. 1999). On remand, the Michigan Court of Appeals reversed its earlier ruling regarding the vicarious liability exception to Title III liability. The court recognized that, 'because the Sixth Circuit Court of Appeals has now spoken on the issue and no conflict among the federal courts exists, we are bound to follow the *Pollock* holding on the federal question in the case.' *Williams v. Williams* ("*Williams III*"), 603 N.W.2d 114, 1999 WL 692342 (Mich. App. 9/3/1999). Accordingly, the only case which had explicitly rejected the vicarious consent exception was subsequently reversed, and its decision was brought into conformity with all other federal decisions that have addressed the issue.

"Finally, therefore, as the Court has uncovered no cases explicitly rejecting the vicarious consent doctrine, as there appears to be no conflict among the federal courts, and as the Court finds persuasive the cases adopting the vicarious consent doctrine, the Court determines that the vicarious consent doctrine should apply in the present matter."[10]

While virtually every federal and state court addressing the issue has adopted the vicarious consent doctrine in one-party consent states like Minnesota, family-law practitioners should still exercise caution because it is still the case that Minnesota never explicitly adopted it. Clients should be advised accordingly. It is *technically* still possible that clients who secretly record their children's conversations, to which the clients themselves are not a party, could be found in violation of Minn. Stat. §626A.02 and subjected to criminal and civil penalties.

But it seems unlikely that Minn. Stat. §626A.02 was "intended to subject parents and guardians to criminal and civil penalties when, out of concern for the best interests of their minor children, they record their children's conversations."[11] If clients possess unassailable recordings of their children experiencing abject abuse, for example, one would be hard-pressed *not* to use that evidence to protect the children. ▲

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NOTES

[1] Minn. Stat. §626.02, subd. 1(1); *see also* 18 U.S.C. §2511(1)(a).

[2] Minn. Stat. §626A.02, subd. 2(d); *see also* 18 U.S.C. §2511(2)(d).

[3] Eleven states require the consent of all parties to a telephone conversation before it can be recorded: California, Delaware, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. The remaining states, except for Vermont (which has no statutory prohibition on secret recordings), only require the consent of one party to the conversation.

[4] The only state court to have considered and rejected the doctrine was the Michigan Court of Appeals, which was subsequently reversed and has since brought its decision into conformity with all other decisions to have addressed (and adopted) the vicarious consent doctrine as applied to the federal statute. *See Williams v. Williams*, 581 N.W.2d 777 (Minn. Ct. App. 1998) (rejecting the vicarious consent doctrine); *Williams v. Williams*, 593 N.W.2d 559 (Mich. 1999) (remanding the *Williams* case back to the Michigan Court of Appeals in light of the 6th Circuit's adoption of the vicarious consent doctrine in *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998)); *Williams v. Williams*, 603 N.W.2d 114, 1999 (Mich. Ct. App. 9/3/1999) (adopting the vicarious consent doctrine as to the federal statute, but declining to adopt the doctrine to Michigan's anti-wiretapping statute).

[5] *See*, *e.g.*, *Wagner v. Wagner,* 64 F. Supp. 2d 895, 896, 899 – 901 (D. Minn. 1999); *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998); *State v. Spencer*, 737 N.W.2d 124, 128 – 34 (Iowa 2007); *State v. Whitner*, 732 S.E.2d 861, 863 – 65 (S.C. 2012); *Campbell v. Price*, 2 F. Supp. 2d 1186, 1189, 1191 – 92 (E.D. Ark. 1998); *People v. Badalamenti*, 54 N.E.3d 32, 37 – 40 (N.Y. 2016); *Griffin v. Griffin*, 92 A.3d 1144, 1152 (Me 2014); *Commonwealth v. F.W.*, 986 N.E.2d 868, 873 – 75 (Mass. 2013); *Lawrence v. Lawrence*, 360 S.W.2d 416, 418 – 20 (Tenn. Ct. App. 2010); *Alameda v. State*, 235 S.W.3d 218, 221 – 23; *Smith v. Smith*, 923 So.2d 732, 740 (La. Ct. App. 2005); *State v. Morrison*, 56 P.3d 63, 65 (Ariz. Ct. App. 2002); *In re Marriage of Radae*, 567 N.E.2d 760, 763 – 64 (Ill. Ct. App. 1991); *State v. Diaz*, 706 2d 264, 269 – 70 (N.J. Ct. App. 1998); *Silas v. Silas*, 680 So.2d 368, 370 – 72 (Ala. Ct. App. 1996).

[6] *Id.* at 900.

[7] *Id.* at 895 – 97.

[8] *Id.* at 897.

[9] *Id.* at 895.

[10] *Id*. at 899 – 901.

[11] *Spencer*, 737 N.W.2d at 128 – 34.

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LANDMARKS IN THE LAW

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Criminal Law

JUDICIAL LAW

Restitution: Court is not required to consider collateral sources. Appellant was convicted of murder and ordered to pay $2,362 to the Crime Victims Reparations Board (CVRB) for cremation expenses the CVRB paid as reparations to the victim's daughter. The district court rejected appellant's argument that the court needed to consider the approximately $14,000 the victim's daughter received from a GoFundMe campaign.

Minn. Stat. §611A.54 dictates how the CVRB may award reparations to crime victims and requires that reparations "be reduced to the extent that economic loss is recouped from a collateral source." Minn. Stat. §611A.54(1). Reparations and restitution are distinct forms of relief. Reparations are payments made by the CVRB, while restitution is payment by a defendant to a victim for qualified economic losses. Restitution is governed by sections 611A.04 and 611A.045, which provide that the court may consider only the amount of loss sustained by a victim as a result of the offense and the defendant's ability to pay. Unlike reparation determinations, restitution does not involve consideration of "collateral sources."

Thus, here, the district court did not err in failing to consider collateral sources when calculating restitution. But the district court did err by not including a payment schedule or structure in its final restitution order, as required by section 611A.045, subd. 2a. Remanded for the district court to amend its order to include a payment schedule or structure. ***State v. Cotton***, A23-0213, 2023 WL 5689332 (Minn. Ct. App. 9/5/2023).

4th Amendment: Probable cause for vehicle search exists where a reliable informant personally observed unlawful conduct and police corroborated details of the report. Police received a report from a confidential reliable informant (CRI) of a man with a firearm in a vehicle who was selling marijuana. The CRI described the man, the firearm, the man's vehicle, and the vehicle's location. Police explained that the CRI was observing the man and his illegal activity in real time while speaking with police, that police had previously worked with this CRI multiple times, and that the CRI had always provided accurate information. Police went to the location described by the CRI and located a vehicle matching the CRI's description. When the vehicle began to drive away, police made a traffic stop, searched the vehicle, and found a firearm, a digital scale, and marijuana inside. The driver, respondent, was charged with being a prohibited person in possession of a firearm. The district court granted respondent's motion to suppress the evidence from the vehicle search, finding that, although the CRI was reliable, the CRI's tip "lacked sufficient detail and range to establish the [CRI's] basis of knowledge." That is, the CRI's tip "lacked details to be corroborated" by police. The state appealed and the court of appeals affirmed.

The Supreme Court reverses. A threshold issue is whether respondent's vehicle was sufficiently connected to unlawful activity to support probable cause for the search. The court of appeals found the CRI did not specify that the gun was in the vehicle, as opposed to on respondent's person. However, the Supreme Court notes that the tip described respondent as both selling drugs and possessing a firearm, and the CRI specifically reported personally observing respondent with a firearm inside the vehicle. For probable cause purposes, the possession of a firearm in a vehicle is sufficient to create some probability that unlawful activity is occurring.

The parties also dispute the reliability of the CRI and whether police corroborated the tip sufficiently to establish the CRI's basis of knowledge. Based on the CRI's track record with police, the court finds the CRI was reliable. As for the CRI's basis of knowledge, the CRI personally observed a male in possession of a firearm. A tip based on a CRI's personal knowledge need only be corroborated by minor details—"enough to lend credence to the [CRI's] tip..." The Court finds the record here supports a finding that the source of the CRI's

knowledge was reliable. Reversed and remanded to the district court. ***State v. Mosley***, A22-1073, 944 N.W.2d 883 (Minn. 9/6/2023).

Odor of marijuana is one fact to consider in totality of the circumstances analysis for determining if a vehicle search was lawful. Respondent was pulled over by police for a vehicle equipment violation. His wife and child were also in the vehicle. During the traffic stop, police smelled an odor of marijuana emanating from the vehicle. Police told respondent the odor gave them probable cause to search the vehicle. During the search, police found methamphetamine and drug paraphernalia. Respondent sought to suppress the evidence, and the district court granted his motion and dismissed the complaint. The court of appeals affirmed.

One exception to the warrant requirement is for automobile searches. Police may search a vehicle without a warrant if there is probable cause to believe the search will result in the discovery of evidence or contraband. At the time of the offense, under Minnesota law, there were various methods of lawful possessing of marijuana (such as medical marijuana, a "small amount" of marijuana, and "industrial hemp").

The Supreme Court rejects the state's request to create a bright-line rule that the odor of marijuana emanating from a vehicle, on its own, will always create the requisite probable cause to search the vehicle. The Court reiterates that the totality of the circumstances test for probable cause "is meant to be applied anew in each case based on the unique circumstances present." This analysis requires that the odor of marijuana be considered as just one circumstance among all others.

In this case, the only indication that evidence of a crime or contraband might be found in respondent's vehicle was the odor of marijuana. Police did not articulate any other circumstance contributing to the probable cause analysis. Therefore, there was not probable cause for the search of the respondent's vehicle and the district court properly suppressed evidence obtained during that search. ***State v. Torgerson***, A22-0425, 2023 WL 5944620 (Minn. 9/13/2023).

Indecent exposure: "Any place where others are present" is any place capable of being viewed by others. Appellant was standing nude in the backyard of his home when he was observed by a neighbor from her open back deck door across a public alley. Appellant's property was partially fenced in, but there were no fences obstructing appellant's backyard from his neighbor's deck or from the alley. Appellant was charged with gross misdemeanor indecent exposure, due to a prior indecent exposure violation. He was convicted after a jury trial. He argued in postconviction proceedings that the state had not proved the "public place" element of the offense. The district court denied his petition and the court of appeals affirmed.

Minn. Stat. §617.23, subd. 1, prohibits indecent exposure "in any public place, or in any place where others are present." Given the statute's disjunctive "or," the Supreme Court does not consider whether appellant's partially

enclosed backyard is a "public place." Instead, the court finds the "place" element of the offense is satisfied because appellant was in a place where others were present. The Court notes that "present" is ambiguous. However, given the statute's purpose of remedying the mischief of people lewdly exposing themselves to others, the statute's object of preventing offense or annoyance caused by being exposed to another's lewd conduct, and the consequences of the possible interpretations of the statute, the Court holds that the Legislature intended section 617.23, subd. 1, "to prohibit lewd behavior that is reasonably capable of being viewed by others, in light of the totality of the circumstances."

The Court finds the state presented sufficient evidence to prove appellant exposed himself in a place reasonably capable of being viewed by others. ***Fordyce v. State***, A21-1619, 994 N.W.2d 893 (Minn. Sept 2023).

■ **Falsely reporting crime.** Appellant falsely reported to police that the father of her child abused the child. She was in Blue Earth County when she made the report, but the report was made to the Waseca Police Department. Appellant was prosecuted and convicted of falsely reporting a crime in Waseca County, and she argued on appeal that venue in Waseca County was improper. The court of appeals affirmed her conviction.

Minn. Stat. §627.01, subd. 1, requires that criminal cases be tried in the county where the offenses were committed, while subd. 2 explains that this means "any county where any element of the offense was committed." Thus, the state needed to prove that at least one element of the false report of a crime offense was committed in Waseca County.

Minn. Stat. §609.505, subd. 1, makes it a crime when a person "informs a law enforcement officer that a crime has been committed... knowing that [the report] is false and intending that the officer shall act in reliance upon" it. While "inform" has differing dictionary definitions, section 609.505 itself expressly provides that, to commit the crime, the defendant must inform a specific type of person—law enforcement. Thus, the Legislature intended to include a police officer's report of the false information as part of the offense. As such, the state can meet its burden of proving venue by showing an officer was in the county of trial when they received the false report.

Here, the state presented sufficient evidence to prove law enforcement received appellant's false report in Waseca County, so appellant's conviction is affirmed. ***State v. Johnson***, A21-1360, 2023 WL 5944263 (Minn. 9/13/2023).

■ **Maltreatment reporting: Mandated reporter must report maltreatment within preceding three years regardless of child's age at the time of the report.** Appellant was charged with third-degree criminal sexual conduct following a report to police from appellant's therapist that appellant told his therapist he had sexual intercourse with his children's 17-year-old babysitter. The babysitter had turned 18 by the time the report was made. Appellant moved to suppress the therapist's report and testimony, arguing they were based on privileged statements. The district court denied the motion, finding the therapist-patient privilege does not apply to information the therapist was required to report as a mandated reporter. Appellant was convicted after a jury trial.

The mandated reporter statute, Minn. Stat. §260E.06, subd. 1(a), partially abrogates the statutorily created therapist-client privilege, as it requires a mandated reporter "who knows or has reason to believe a child is being maltreated... or has been maltreated within the preceding three years shall immediately report the information" to the authorities. Section 260E.04 also allows disclosure of maltreatment information in legal proceedings that follow the reporting. Case law has clarified that the mandated reporter statute "abrogate[s] privilege only to the extent that it would permit evidentiary use of the information required to be contained in the maltreatment report," which includes the identity of the child, the alleged perpetrator, and the nature and extent of the maltreatment. Appellant argues, however, that his therapist's report was not mandatory because the babysitter was an adult at the time of the report.

The court of appeals finds section 260E.06 ambiguous, but the court notes that section 260E.4 anticipates evidentiary use of mandated child maltreatment reports in criminal proceedings and construes the mandated reporter statute with the criminal statute prohibiting appellant's conduct and the relevant statute of limitations. The court holds that the word "child" in the mandated reporter statute "refers to an individual who is a child at the time of the maltreatment." Therefore, the district court properly concluded appellant's therapist's report was mandatory and properly denied appellant's motion to exclude the therapist's report and testimony. ***State v. Martens***, A22-1349, 2023 WL 6052543 (Minn. Ct. App. 9/18/2023).

Firearms: Group of disassembled and incomplete shotgun parts can be a "firearm." Police found in a backpack belonging to appellant a disassembled shotgun, which police were able to assemble and fire using a bolt and washer from a similar firearm. At the time, appellant was ineligible to possess a firearm. The court of appeals affirmed his conviction for possession of a firearm by an ineligible person. The Supreme Court also affirms.

Minn. Stat. §609.165, subd. 1b(a), states that a person commits a felony if they were previously convicted of a crime of violence and ship, transport, possess, or receive a firearm or ammunition. "Firearm" is not defined. The Court previously defined a firearm, in the context of Minn. Stat. §624.713, as "a weapon, that is, an instrument designed for attack or defense, that expels a projectile by the action or force of gunpowder, combustion, or some other explosive force." Both sections 624.713 and 609.165 criminalize *possession* rather than *use* of a firearm, and both prohibit those convicted of a crime of violence from possessing firearms. Thus, the Court applies the same definition of "firearm" to this case.

The question then becomes whether taking away two parts of a shotgun (here, the bolt and washer) changes the design of the firearm. The Court finds that possessing "the integral parts unique to a firearm in an unassembled state in the same container" does not change the fact that the parts were designed to be a weapon, even though a part may be missing. The Court holds "that a disassembled and incomplete shotgun can be a firearm under section 609.165, subdivision 1b(a), so long as it is an instrument designed for attack or defense that expels a projectile by some explosive force." Here, the state presented sufficient evidence to prove beyond a reasonable doubt that the shotgun parts in appellant's backpack were a firearm under this definition. ***State v. Stone***, A21-1648, 2023 WL 6280234 (Minn. 9/27/2023).

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Employment & Labor Law

JUDICIAL LAW

Time rounding-off; dismissal reversed. An employer's practice of rounding off time worked by employees at the beginning and end of their work shifts was actionable under the Federal Fair Labor Standards Act, 29 U.S.C. §301, *et. seq*. Reversing summary judgment dismissal of the lawsuit, the 8th Circuit Court of Appeals held that expert evidence raised a genuine issue of whether the rounding-off had *de minimus* effect because it averaged out over time, as the district court erroneously concluded as a matter of law. ***Houston v. St. Luke's Heath Systems, Inc.***, 76 F.4th 1145 (8th Cir. 8/11/2023).

Union dues; refusal to pay. A challenge by union members to a deduction of union dues from their paycheck failed. The 8th Circuit, affirming a lower court ruling, rejected the 1st Amendment claim against the employer and the union on grounds that the employees voluntarily agreed to the deduction policy when they joined the union. ***Burns v. School Service Employees Union Local 284***, 75 F.4th 857 (8th Cir. 7/28/2023).

Failure to promote; agreement requires arbitration. An employee's claim of race and age discrimination due to failure to promote her to an open position was barred by an arbitration clause in her union's collective bargaining agreement. The 8th Circuit Court of Appeals, in a decision written by Judge David Stras of Minnesota, affirmed the lower court's determination that arbitration was required because the dispute involved "interpretation" of the bargaining agreement. ***Avina v. Union Pacific Railroad Co.***, 72 F.4th 839 (8th Cir. 7/3/2023).

Battery, harassment, and other claims affirmed and remanded. A contract attorney for a legal staffing company is entitled to pursue a battery claim against a co-worker, but her discrimination, harassment, and other claims against another co-worker and their employer were dismissed. The 8th Circuit affirmed the three lower court rulings by Judge Nancy Brasel in Minnesota dismissing all the claims, except remanding the sole battery claim. ***Yang v. Robert Half International, Inc.***, 2023 WL 5356624 (8th Cir. 8/22/2023).

Retaliation, discrimination verdict; reversal because no "protected activity." A school district employee's verdict for discrimination and retaliation when passed over for a superintendent position was vacated and denied. The 8th Circuit ruled that the claimant did not engage in "protected activity" under Title VII of the Federal Civil Rights Act in vacating the award of damages, including punitive damages. ***Warren v. Kemp***, 2023 WL 5356630 (8th Cir. 8/22/2023) (unpublished).

Veterans preference; detention disparities elimination upheld. The elimination of detention deputies by Winona County during a construction project reducing the facility's capacity was upheld. Affirming the trial court, the Minnesota Court of Appeals held that the action was made in "good faith" by the county, which defeated the veterans preference claim under Minn. Stat. §197.46. ***Wemette v. County of Winona***, 2023 WL 5198736 (Minn. Ct. App. 8/14/2023) (unpublished).

Unemployment compensation; disqualifying "misconduct." An employee who committed numerous behavioral improprieties was denied unemployment compensation benefits. Upholding a disqualifying decision by the Department of Employment & Economic Development (DEED), the court of appeals held that the inappropriate comments to female customers, a verbal dispute with a co-worker, threats to another co-worker, and leaving work early, among other deficiencies, warranted a determination of "misconduct" barring benefits. ***Vang v. Mo's Tropical Market***, 2023 WL 5743393 (Minn. Ct. App. 9/5/2023) (unpublished).

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Federal Practice
JUDICIAL LAW

28 U.S.C. §1441(b)(2); so-called "snap" removal rejected. The 8th Circuit rejected a so-called "snap" removal for the second time in recent months, finding that the removal "does not cure a lack of complete diversity among the named parties." ***Cagle v. NHC Healthcare Maryland Heights, LLC***, 78 F.4th 1061 (8th Cir. 2023).

Fed. R. Civ. P. 50(b); failure to preserve issue for appeal; question of law versus sufficiency of the evidence. Where the defendant's motions for judgment as a matter of law at the close of the plaintiff's case and at the close of all evidence were denied, but the motion was not renewed after judgment was entered for the plaintiff, the 8th Circuit agreed with the plaintiff that the defendant was challenging the sufficiency of the evidence rather than raising a question of law, meaning that the defendant failed to preserve the issue for appeal. ***Turner v. Faulkner Cnty.***, 78 F.4th 1025 (8th Cir. 2023).

Fed. R. Civ. P. 11(c); sanctions award affirmed. The 8th Circuit affirmed Judge Wright's award of almost $17,000 in sanctions, finding no error in failing to impose a lesser sanction, and also rejecting the argument that monetary sanctions were not appropriate where the attorney's fees were not "incurred" because they were covered by insurance. ***Kezhaya v. City of Belle Plaine***, 78 F.4th 1045 (8th Cir. 2023).

Fed. R. Civ. P. 26(a)(2)(B); treating physician's causation opinion excluded. Affirming a district court's exclusion of a treating physician's expert testimony on causation due to his failure to provide the written report required by Fed. R. Civ. P. 26(a)(2)(B), the 8th Circuit held that a treating physician who is offered to provide expert testimony as to causation, but who did not make that determination in the course of treatment, is required to submit a report that meets the requirements of Fed. R. Civ. P. 26(a)(2)(B). ***Johnson v. Friesen***, 79 F.4th 939 (8th Cir. 2023).

Fed. R. Civ. P. 6(b) and 59; Fed. R. App. P. 4; untimely notice of appeal. The 8th Circuit held that the time for the plaintiff to file his notice of appeal was not tolled by his filing of an untimely motion for a new trial despite the defendants' failure to object to the untimeliness of the motion in the district court, finding that while Fed. R. Civ. P. 6(b) is a non-jurisdictional claim-processing rule, Fed. R. App. P. 4 barred review of the district court's denial of the new trial motion. ***Gonzalez v. Shahin***, 77 F.4th 1183 (8th Cir. 2023).

IDEA; 28 U.S.C. §1441(a); "defendants;" removal. Affirming a district court's denial of a motion to remand, the 8th Circuit held that the parents of a student were "defendants" entitled to remove a school district's appeal of an IDEA award to federal court. ***Steckelberg ex rel. AMS v. Chamberlain School Dist.***, 77 F.4th 1167 (8th Cir. 2023).

Fed. R. Civ. P. 26(e); denial of motion for new trial affirmed. Affirming a district court's denial of the plaintiff's motion for a new trial, the 8th Circuit held that even if one defendant did not supplement its expert disclosures as required Fed. R. Civ. P. 26(e), the plaintiff was unable to articulate how he was prejudiced by this failure. ***Wallace v. Pharma Medica Research, Inc.***, 78 F.4th 402 (8th Cir. 2023).

Fed. R. Civ. P. 56(d); no abuse of discretion. The 8th Circuit found no abuse of discretion in a district court's refusal to stay summary judgment to allow for additional discovery, finding that the plaintiff's "unspecified assertions" regarding his alleged need for discovery "failed to meet the requirements of Rule 56(d)." ***Marlow v. City of Clarendon***, 78 F.4th 410 (8th Cir. 2023).

28 U.S.C. §636; *res judicata* effect of magistrate judge's denial of motion to amend. Affirming Judge Wright's dismissal of certain claims and award of summary judgment to the defendants on other claims on the basis of *res judicata*, the 8th Circuit rejected the plaintiff's argument that Magistrate Judge Brisbois's denial of its motion to amend could not have preclusive effect, finding that the order denying the motion to amend constituted a "final judgment on the merits" for purposes of *res judicata*. ***Satanic Temple v. City of Belle Plaine***, 80 F.4th 864 (8th Cir. 2023).

Diversity jurisdiction; admission of fact not binding. Where the plaintiff limited liability company filed an action in state court, the defendant removed on the basis of diversity jurisdiction, the plaintiff agreed the parties were diverse, the defendant prevailed on its motion to dismiss, and the plaintiff appealed and then asserted for the first time that the parties were not diverse, the 8th Circuit rejected the defendant's argument that the plaintiff's "admission of a jurisdictional fact" was binding, and remanded the action to the district court for a determination of subject matter jurisdiction. ***Great River Entertainment, LLC v. Zurich Am. Ins. Co.***, ___ F.4th ___ (8th Cir. 2023).

Fed. R. Civ. P. 10(a); John Doe plaintiffs; adults' motion to proceed pseudonymously denied. Judge Blackwell denied adults' motion to proceed as Doe plaintiffs in an action challenging the placement on "Black Lives Matter" posters in Lakeville schools, rejecting their claims that they "fear reprisal from political activists," and finding that "in only a very few cases challenging governmental activity can anonymity be

justified." ***Cajune v. ISD #194***, 2023 WL 5348833 (D. Minn. 8/21/2023), *appeal filed* (8th Cir. 9/19/2023).

Motion for stay of discovery pending resolution of motion to dismiss granted. While acknowledging the defendant's "heavy burden," Magistrate Judge Wright granted the defendant's motion to stay the Rule 26(f) conference and discovery pending resolution of its pending motion to dismiss, finding that the plaintiff would not be prejudiced by the stay, and that potential hardship to the defendant, the conservation of judicial resources, and the "likelihood" of the defendant's success on the merits all favored a stay. ***Huff v. Canterbury Park Holding Corp.***, 2023 WL 5403472 (D. Minn. 8/22/2023).

Alleged breach of nonsolicitation agreement; no irreparable harm. Chief Judge Schiltz denied the plaintiff's motion for a preliminary injunction prohibiting violation of a nonsolicitation agreement, again finding that the Minnesota law that presumes irreparable harm does not apply in federal court. ***Piper Sandler & Co. v. Gonzalez***, 2023 WL 5426000 (D. Minn. 8/23/2023).

L.R. 7.1(f)(1)(D); request for leave to exceed word limit denied. Judge Menendez denied the plaintiff's request to exceed the word count limitation of L.R. 7.1(f)(1)(B) on its motion for summary judgment, finding that the plaintiff had "without justification" delayed making its request until well after it filed two memoranda totaling 11,449 words, and after the defendant had filed its opposition memorandum. ***Little Giant Ladder Sys., LLC v. Tricam Indus., Inc.***, 2023 WL 5447283 (D. Minn. 8/24/2023).

Fed. R. Civ. P. 26(a)(2); plaintiff allowed to amend inadequate expert disclosures. Denying several defendants' motion for partial summary judgment in a negligence case, Judge Menendez agreed with the defendants that the plaintiff's expert disclosures were inadequate on the issue of causation, but exercised her "broad discretion" and allowed the plaintiff 30 days to submit new expert disclosures. ***Krasne v. Mayo Clinic***, 2023 WL 5487388 (D. Minn. 8/24/2023).

Denial of motion to amend complaint affirmed. Reviewing *de novo*, Chief Judge Schiltz affirmed Magistrate Judge Foster's denial of the plaintiff's motion to amend her complaint for a fourth time, where the motion was filed 11 months after the deadline to amend set forth in the scheduling order, there was no good cause for the delay, and any error was due to the "inexcusable neglect" of her attorney. ***S.A.A. v. Geisler***, 2023 WL 5533344 (D. Minn. 8/28/2023).

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Intellectual Property
JUDICIAL LAW

Copyright: Copyright to architectural design does not prevent sale of building in bankruptcy. A panel of the United States Court of Appeals for the 8th Circuit recently held in a *per curiam* decision that the Architectural Works Copyright Protection Act of 1990 (AWCPA) extended copyright protection to "architectural works." McQuillen Place Company, LLC, retained Cornice & Rose International, LLC (C&R), an architectural firm,

to design a building to be built in Charles City, Iowa. C&R obtained copyright protection under the AWCPA for its technical drawings and for the building itself. First Security Bank & Trust Company was the primary construction lender to McQuillen and obtained a first mortgage on the building. With the building approximately 90% complete, McQuillen halted construction and filed for bankruptcy. The bank sought to sell the building to the highest bidder free and clear of all liens.

C&R entered an appearance and objected that such a sale violated C&R's intellectual property rights. The bankruptcy court approved the sale and included language that the purchaser may use and occupy the building so long as not using the plans or drawings owned by C&R. C&R filed a motion to reconsider arguing that the copyright prevented the building from being sold where the architect had not been paid in full. The motion was denied. C&R later filed a lawsuit against the bank, its president, and parties involved in the completion of the building. C&R alleged that all defendants infringed C&R's architectural works copyright by finishing the building because that is an infringing derivative work. The district court dismissed the copyright infringement claim, finding the claim was barred by issue and claim preclusion from the bankruptcy court's order and because the owner's right to finish the building was protected from a claim of copyright infringement by 17 U.S.C. §120(b). On appeal, the 8th Circuit panel held that C&R litigated the scope of its intellectual property rights in the bankruptcy proceeding. The bankruptcy court rejected the same claims and arguments regarding the AWCPA that C&R alleged in its lawsuit. Finding the claims barred, the panel did not further consider the argument under 17 U.S.C. §120(b). ***Cornice & Rose Int'l, LLC v. Four Keys, LLC***, No. 22-1976, 2023 U.S. App. LEXIS 20990 (8th Cir. 8/11/2023).

Trademark: Likelihood of confusion analysis is fact-specific even when mark is famous. Judge Tunheim recently denied Defendant Taco Chon Mexican Grill's motion for summary judgment of trademark infringement. Taco John's is a franchise of quick service Mexican restaurants that sells Mexican food in a causal setting. There are approximately 370 Taco John's establishments across 23 states, including 80 different locations in Minnesota since 1972. Taco Chon Mexican Grill is a set of restaurant-bars in Burnsville and St. Cloud, Minnesota that first opened in 2019. Plaintiffs Taco Johns International, Inc. and Spicy Seasonings, LLC sued Taco Chon Mexican Grill, Taco Chon Mexican Grill II, LLC, and the owner of Taco Chon, Juan Ramos, for trademark infringement, trademark dilution, unfair competition, and related state law claims. Defendants moved for summary judgment on each of plaintiffs' claims, arguing Taco Chon was not similar to Taco John's mark and that Taco John's had failed to show a likelihood of confusion. The court found each of these are highly fact-specific analyses. The court denied Taco Chon's motion for summary judgment on all claims because genuine disputes of material fact existed as to the likelihood of confusion and whether there is evidence of tarnishment or dilution. However, the court found that Taco John's mark is both strong and famous and indicated that the court would instruct the jury accordingly. ***Taco John's Int'l, Inc. v. Taco Chon Mexican Grill LLC***, No. 22-1050 (JRT/LIB), 2023 U.S. Dist. LEXIS 156934 (D. Minn. 9/6/2023).

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Probate & Trust Law

JUDICIAL LAW

Restricting the right to vote of a person subject to guardianship affirmed. In appointing a guardian for appellant, the district court revoked appellant's right to vote. On appeal, the appellant challenged the revocation and argued that revoking his right to vote, pursuant to Minn. Stat. §524.5-120(15) and Minn. Stat. §524.5-313(c)(8), violated equal protection and due process because neither statute provides specific guidelines for denying the right to vote. The Minnesota Court of Appeals highlighted the factual circumstances in the record that supported the district court's decision, such as factual statements in the visitor's report and the fact that appellant presented no contrary evidence. But the court declined to define the mental impairment required to restrict the right to vote and declined to articulate guidelines or criteria to be measured to determine the same as "[a]n appellate court 'may not add to a statute what the legislature deliberately or inadvertently omitted.'" The court of appeals then affirmed the district court's decision to revoke appellant's right to vote. ***In re Guardianship of Nguyen***, No. A23-0344, 2023 WL 6054285 (Minn. Ct. App. 9/18/2023).

District court precluded from enforcing a settlement agreement that touches on issues that are pending appeal. During the pendency of an appeal relating to numerous matters in an intrafamily dispute between two siblings, the parties agreed to participate in mediation in an effort to "reach a global resolution." After a 13-hour mediation, the mediator made a video recording of the terms discussed and directed the parties to work out a written settlement agreement. No written agreement was ever reached, and appellant later filed a motion to enforce the agreement. The district court determined that it did not have authority to enforce the agreement, because it would "necessarily affect [a] prior order which is appealed from," in violation of Minn. R. Civ. App. P. 108.01. The court of appeals agreed, finding that many of the facts relating to the settlement agreement were not different from the pending appeal. Because of this, the court affirmed the district court's order denying enforcement of the settlement agreement. ***In re Estate of Legred***, Nos. A23-0038, A23-0039, A23-0041, A23-0277, 2023 WL 6054279 (Minn. Ct. App. 9/18/2023).

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State Appellate Practice

MN SUPREME COURT

(***Editor's note:*** *Bench & Bar is happy to announce the debut of our State Appellate Practice case notes. The purpose of this section is to provide timely updates on developments at the Minnesota Supreme Court and Minnesota Court of Appeals by tracking notable decisions, cases accepted or rejected for review by the Minnesota Supreme Court, and significant special term orders from the Minnesota Court of Appeals.*)

Notable decisions: Actual malice standard applied to defamation claims arising out of #MeToo social media posts. The Minnesota Supreme Court determined that the actual malice standard applied to defamation claims based on a Facebook post that accused Johnson and two other individuals of sexual assault in the context of the #MeToo movement. The majority opinion, authored by Justice Chutich, clarified that defamation claims must be examined on a "case-by-case basis, apply[ing] the totality of circumstances test and balanc[ing] the content, form, and context of the speech, as well as any other pertinent factors, to determine whether speech involves a purely private matter or is a statement about a matter of public concern intended to influence public discussions about desired political or social change." Chief Justice Gildea dissented, concluding that the "mere fact Freborg made these allegations amid a social movement and included #MeToo in her post does not convert her otherwise private speech into speech on a matter of public concern entitled to heightened First Amendment protection." Justice Anderson and Justice Hudson joined the dissent of Chief Justice Gildea. ***Johnson v. Freborg***, A21-1531 (Minn. 9/20/2023).

Notable petitions granted/denied: Review granted in case involving sufficiency of expert testimony on the issue of causation for medical negligence claims. In a medical negligence action, the district court granted summary judgment on the issue of causation, finding that Rygwall failed to present sufficiently detailed expert opinions on the issue of causation. Rygwall appealed and the court of appeals affirmed. Rygwall successfully petitioned the Supreme Court for review. Issue granted: Whether courts may supplant the jury and hold as a matter of law that the evidence is insufficient to prove causation in a negligence action where medical expert testimony (1) details the precise course of action that the defendant should have followed, (2) explains why these interventions would have made a difference, and (3) opines that the failure to follow the standard of care caused the plaintiff to suffer harm. ***In re Rygwall v. ACR Homes, Inc. d/b/a ACR Homes***, A22-1376, petition for review granted on 9/19/2023.

Notable petitions granted/denied: Court to hear petition to exclude Trump from primary, general elections. In this elections administration proceeding, individual voters seek an order directing the Secretary of State to exclude Donald J. Trump from the ballot for the 3/5/2023 presidential nomination primary and from the ballot for the 11/5/2024 general election as candidate for the office of president of the United States. Numerous parties have intervened in the proceeding or been allowed to participate as *amici*. The Supreme Court has agreed to "address threshold and potentially dispositive legal issues of justiciability and the legal construction of Section 3 of the Fourteenth Amendment to the U.S. Constitution" prior to permitting any discovery. Oral argument is set for 11/2/2023. ***Growe et al. v. Simon***, A23-1354, statutory petition for review granted on 9/20/2023.

MN COURT OF APPEALS

Notable decision: Department of Education's statutory audit and reduction of state aid authority defined. In a *certiorari* challenge to a Department of Education audit that resulted in the reduction in state aid, the court of appeals determined that the Commissioner of Education has the authority, under Minn. Stat. §127A.41, when read in conjunction with Minn. Stat. §124E.16, to audit charter schools to verify pupil counts and state aid entitlements. Minn. Stat. §127A.14, subd. 3 also authorizes the commissioner to increase or decrease the amount of state aid based on the audit results. ***Minnesota Internship Center v. Minnesota Department of Education***, A23-0064 (Minn. App. 9/25/2023).

Notable decision: Personal jurisdiction proper over nonresident investment firm based on actions of employee. In a consumer fraud action, Pretium Partners LLC appealed from the denial of its motion to dismiss the state of Minnesota's complaint for lack of personal jurisdiction. A divided Minnesota Court of Appeals affirmed, determining that the state presented "specific evidence" which, taken as true, established a *prima facie* showing of specific personal jurisdiction, including evidence that (1) Pretium held itself out as the owner of the rental properties; (2) an employee traveled to Minnesota to "assess legal risks;" (3) that same employee communicated with Minnesota residents and government officials "many times via text, email, and phone;" and (4) that employee coordinated 22 rental property inspections while in Minnesota. Judge Connolly dissented, finding that there were insufficient contacts with Minnesota in light of the remedial nature of the Pretium employee's actions on the single visit to the forum. ***State v. HavenBrook Homes LLC et al., Pretium Partners LLC, et al.***, A23-0244 (Minn. App. 9/5/2023).

Notable special term orders: Final Order for Purposes of Appeal – Termination of Parental Rights. In an appeal from a district court order terminating parental rights, the respondents argued that the appeal was untimely because the order terminating appellant's parental rights was a non-appealable order. The court of appeals disagreed, noting that "[a]n order terminating parental rights is final and appealable." The court further observed that "[a] final order" for purposes of appeals from orders of a juvenile court

"ends the proceeding as far as the court is concerned or finally determines some positive legal right of a party relating to the action." An order terminating a party's parental rights fell well within this definition. ***In re Welfare of Children of K.F.***, No. A23-1285 (Order) (Minn. App. 9/25/2023).

Notable special term orders: Final Order for Purposes of Appeal – Denial of Motion to Amend. In an appeal from a district court order denying a motion to amend a marital dissolution property division, the appellant argued that the order denying the motion was an immediately appealable final order on the grounds that it constituted a final division of property resolving property allocation issues between the parties and conclusively determined appellant's positive legal rights related to marital property. However, the court of appeals noted that because the order ostensibly being appealed was the denial of a motion to amend a prior order, it determined that appellant actually sought "review of the district court's rulings on the property-division issues" in that prior order. The court further noted that "[a]n order for the recovery of money" is not appealable. As no final judgment had yet been entered on that prior order, the court dismissed the appeal seeking review of the district court's property division as premature. ***Blessing v. Blessing***, No. A23-1331 (Order) (Minn. App. 9/25/2023).

Notable special term orders: Final Order for Purposes of Appeal – Spousal Maintenance. In an appeal from a district court order regarding spousal maintenance, the appellant argued that the order was final and appealable because it terminated appellant's right to receive spousal maintenance. But the court of appeals observed that the appealed order did not fully resolve the issue of spousal maintenance because it provided for additional submissions to determine the amount of spousal maintenance arrearages that were owed to appellant. As the order did not "fully resolve the issue of spousal-maintenance arrearages, it is not a final, appealable order," and the court dismissed the appeal as premature. ***Locketz v. Locketz***, No. A23-1313 (Order) (Minn. App. 9/25/2023).

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Tax Law

JUDICIAL LAW

Property tax: To appeal a commissioner's notice of determination, the party seeking review must both serve and file the appeal within 60 days after the notice date of an order. A taxpayer filed an appeal to contest a 3/3/2023 order assessing taxes and interest for property located in Blue Earth County. The commissioner moved to dismiss the appeal for lack of subject matter jurisdiction because the appeal was filed past the maximum statutory window.

Minnesota Statute §271.06 allows a taxpayer to appeal an order regarding "any tax, fee, or assessment... including the imposition of interest..." Minn. Stat. §271.06, subd. 1. "[W]ithin 60 days after the notice date of an order of the commissioner of revenue, the appellant... shall serve a notice of appeal upon the commissioner and file the original, with proof of such service, with the Tax Court administrator...." Minn. Stat. §271.06, subd. 2. The taxpayer filed and was granted a 30-day extension. Though the parties agree on the facts regarding the date of the order, the taxpayer's filing of an extension, and the date of the appeal, the taxpayer argued that he did not include weekends or holidays in the calculation of the statutory 90-day window. The court applied Rule 6.01(a), finding that the appeal was filed outside the 90-day maximum statutory window, and granted the commissioner's motion to dismiss for lack of subject matter jurisdiction. ***Abdalle v. Commr. of Revenue***, No. COR-9598, 2023 WL 6134625 (Minn. TC 9/19/2023).

Petitions for redetermination and "person[s] outside [of] United States." The court granted respondent's motion to dismiss for lack of jurisdiction under section 6213(a). Section 6213(a), "Time for filing petition and restriction on assessment," lays out a 90-day filing period in which a taxpayer may petition the tax court for redetermination of deficiencies. 26 U.S.C.A. §6213. The statute allows an extended 150-day period "if the notice is addressed to a person outside the United States."

The taxpayers in this case filed their petition for redetermination 148 days after a notice of deficiency was mailed to their California residence. They did not dispute their petition was filed outside the normal 90-day period, but instead "allege[d] their absence from the United States during *part of the day*... the notice was mailed, entitled them to the extended 150-day period." (Emphasis added.) Because its jurisdiction is predicated "on a valid notice of deficiency and a timely filed petition," the court was faced with deciding whether the 150-day period applied under these facts. 26 U.S.C.A §6213, 7442 (West).

The court has previously held that the 150-day period applies "not only to persons outside the United States 'on some settled business and residential basis,' but also to persons temporarily absent from the country." (quoting *Levy v. Comm'r of Internal Revenue*, 76 T.C. 228 (1981)). However, the 150-day period also requires the temporary absence to have "result[ed] in delayed receipt of the deficiency notice." *See Levy* at 231.

While the taxpayers provided evidence they were abroad at the beginning of the day, they returned to their California residence the evening the

notice of deficiency was mailed. The taxpayers were present the day the notice was mailed. Their absence from the country on the morning of the mailing did not delay their receipt of the notice, and therefore the court found it lacked jurisdiction to hear the case as their petition for redetermination was not a "timely filed petition." ***Evenhouse v. Comm'r of Internal Revenue,*** T.C.M. (RIA) 2023-113 (T.C. 2023).

■ **Tax lien priorities, refunds, and "innocent spouse" relief from joint liability.** In a complex innocent spouse case, the court held that petitioner was entitled to a refund for overpayments of IRS lien payments.

In 2012, the petitioner and her husband purchased a home, which they held in joint tenancy with right of survivorship. Before the husband's untimely death in 2014, two mortgages were taken out–the WF mortgage in 2012, and the FB mortgage in 2013. Notices of deficiency and demands for tax years 2012 and 2013 were issued. In 2015, a notice of federal tax lien (NFTL) was filed against the home. Finally, in early 2015, petitioner requested innocent spouse relief (ISR). A final determination granting ISR in part for tax year 2012 and in full for tax year 2013 was awarded in 2017. Overall, the petitioner remained liable only for $3,340 (plus interest) of the previously determined $123,200 deficiency.

Facing economic difficulties following her husband's untimely death, the petitioner failed to make payments on the mortgages, resulting in the home's entering foreclosure. Prior to a foreclosure sale, the house was sold in 2015, and the proceeds were used to satisfy four obligations: (1) the closing costs, (2) the WF mortgage, (3) the FB mortgage, and (4) the tax liens.

In 2015, the tax liens on the petitioner's home were paid from the 2015 home sale proceeds. In 2017, it was determined the petitioner was eligible for ISR and within that determination was a denial of the petitioner's refund for overpayment. The petitioner argued that she was entitled to a refund. To be entitled to a refund, however, petitioner had to establish that the funds used to make the initial payment could be traceable to her separate portion of the property. *See Ordlock v. Comm'r of Internal Revenue,* 126 T.C. No. 4 (U.S. Tax Ct., 2006).

At issue here: whether the petitioner's payment of the 2015 tax liens was traceable to their separate property interest in the home sale proceeds, thus qualifying the petitioner for a refund of the 2015 tax liens following the determination for ISR.

Petitioners are entitled to refunds only if there was an overpayment, and only if that overpayment was made with funds that belonged to the taxpayer. Thus, the court had to determine if the portion of the proceeds used to satisfy the tax lien were funds that belonged to the petitioner or her late husband.

Ohio property law applied. The court addressed satisfying the liabilities that encumbered the home and their respective priorities. The first priority determined by the court was the closing costs of the sale. Ohio courts have previously held that priority is given to the costs of sale when property is subject to foreclosure. Although this sale was not a foreclosure sale, the court not only found it analogous for determining payment priority because the house was being foreclosed, but also found that such a determination would not affect its ultimate decision in this case. The closing costs, minimal in relation to the totals of this proceeding, were thus divided equally amongst the petitioner and her late husband's respective one-half interest in the proceeds.

In determining the next priority, the court determined whether the mortgages held priority over the tax liens. Pursuant to Section 6323(h)(1), which specifies conditions for purposes of determining priority, the court found the mortgages held priority over the tax liens. 26 U.S.C.A §6323(h)(1). Since the WF mortgage was first in time, it was given after closing cost, followed by the FB mortgage as the third priority. The tax liens were thus the lowest priority.

Further investigating the WF mortgage, the court determined the petitioner's husband was the primary obligor of the mortgage, and petitioner only had a surety relationship between her husband and the mortgagor. Since the late husband was the primary obligor, payment of the WF mortgage was taken entirely from petitioner's late husband's one-half interest in the proceeds.

Proceeding to the FB mortgage, the court determined the petitioner was either equally encumbered by the mortgage with her late husband or only residually encumbered with her late husband. No strict determination was necessary, however, as the husband's remaining one-half interest was insufficient to fulfill even one half of the FB mortgage. The late husband's one-half interest was thus exhausted, and the remaining FB mortgage was paid by the petitioner.

Since the tax liens were the last remaining encumbrance on the proceeds, the liens could only have been paid from the petitioner's one-half interest in the proceeds. Given that the petitioner requested ISR prior to payment of the tax liens, and the court determined that the tax liens were paid solely from the petitioner's one-half interest in the home sale, the court determined that the payment of the tax liens was an overpayment by the petitioner. As the ISR request reduced the petitioner's liability to $3,340 (plus interest), the court concluded the petitioner was entitled to a refund of the tax liens less the petitioner's ISR liability. ***O'Nan v. Comm'r of Internal Revenue***, T.C.M. (RIA) 2023-117 (T.C. 2023).

Morgan Holcomb, Adam Trebesch, Brandy Johnson, and Leah Olm (not pictured)
Mitchell Hamline School of Law

Torts & Insurance
JUDICIAL LAW

Defamation; matters of public concern. Plaintiff, a private figure, filed suit against defendant for defamation after a post on defendant's Facebook page accused plaintiff and two other dance instructors from the Twin Cities dance community of varying degrees of sexual assault. Plaintiff was one of defendant's dance teachers, and the two previously had a casual sexual relationship that lasted for about a year. The district court granted defendant's motion for summary judgment, finding that defendant's speech was true and, alternatively, that her speech involved a matter of public concern and was not made with actual malice. The court of appeals reversed. It held that the truth or falsity of defendant's statement presented a genuine issue of material fact. The court of appeals further held, in a divided opinion, that because the dominant theme of defendant's post involved a matter of private concern, plaintiff was not required to prove actual malice to recover presumed damages. The court of appeals remanded the case to the district court for further proceedings.

The Minnesota Supreme Court reversed in part and remanded. The only issue on appeal was whether or not the post related to a matter of public concern, as defendant did not appeal the court of appeals' ruling that a genuine issue of material fact existed as to the statement's falsity. On this issue, the Court held that to make this determination in a particular case, courts should consider the "totality of the circumstances," including "the content, form, and context of the speech." The Court noted that "as a general proposition," speech relating to sexual assault is a matter of public concern. The Court went on to hold that "[b]ecause the overall thrust and dominant theme of [defendant's] post–based on its content, form, and context–involved a matter of public concern, namely, sexual assault in the context of the #MeToo movement," it was entitled to constitutional protection through the actual malice standard. The Court reasoned: "even though [defendant] named, tagged, and admonished three specific instructors in her post, these personal messages do not outweigh the dominant theme of her speech–to discuss sexual assault in the dance community, a matter of public import." Because the Court determined it could not address the issue of actual malice without a determination of the truth or falsity of the statement, the Court remanded the case to the district court for further proceedings to determine the veracity of defendant's post and, if the post is found to be false, whether the making of the post meets the constitutional actual-malice standard.

Chief Justice Gildea filed a dissenting opinion that was joined by Justices Anderson and Hudson. The dissent embraced a narrower view of what constituted matters of public concern, emphasizing matters related to self-government, government officials, and government performance. ***Johnson v. Freborg***, No. A21-1531 (Minn. 9/20/2023). *https://mn.gov/law-library-stat/archive/supct/2023/OPA211531-092023.pdf*

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PEOPLE + PRACTICE

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


Maslon LLP has announced the addition of two attorneys: **Emilio Giuliani III**, who joins the litigation group, and **Laura Trahms-Hagen**, who joins the corporate & securities group.

Jake Holdreith became a fellow of the American College of Trial Lawyers. Holdreith is a partner at Robins Kaplan, where he is head of the health and life sciences industry group and a member of the firm's executive board.

Debra M. Bulluck was the inaugural recipient of the Violence Free Minnesota Alice O. Lynch Inspire Award. This award recognizes individuals who identify as Black, Indigenous, or Person of Color (BIPOC) who have exemplified resilience, passion, and unwavering commitment to creating a more equitable and just society. Bulluck is a member of Moss & Barnett's family law team.

Fredrikson announced a new president and leadership team. **Melodie Rose** was named the firm's first female president. **Kevin Goodno** and **Jamie Snelson** were appointed executive vice presidents. **Loan T. Huynh** was elected to the board of directors, the first lawyer of color elected to the board.

Amber Lee joined Stoel Rives as of counsel in the energy development group. Lee joins Stoel Rives from Alias Energy Consulting, where she served as president and assisted clients with all aspects of energy operations and regulations.

Mack A. Marrin joined Arthur, Chapman, Kettering, Smetak & Pikala, PA. Marrin's practice focuses on representing clients in construction liability.

Greta Bjerkness was named a shareholder at LeVander, Gillen & Miller, PA. She is a member of the real estate, eminent domain, and municipal practice groups.


Gov. Walz appointed **Adam Johnson** and **Lauren Johnson** as district court judges in Minnesota's First Judicial District. Adam Johnson, the deputy county administrator for Rice County, will be replacing Hon. Tim D. Wermager in a seat chambered in Dakota County. Lauren Johnson, an associate attorney with Melchert Hubert Sjodin, PLLP, will be replacing Hon. Mark C. Vandelist in a seat chambered in Scott County.


Matthew R. Burton has joined, and **Charles E. Jones** has rejoined Moss & Barnett as shareholders in its litigation and business law practice areas.

Caleb Nigrin joined Erickson, Zierke, Kuderer & Madsen, PA as an associate attorney practicing in the area of civil litigation.

Stephanie Laws and **Katie Maechler** joined the International Association of Defense Counsel, an invitation-only global legal organization for attorneys who represent corporate and insurance interests. Laws and Maechler are both partners at Maslon LLP.

Kevin Kennedy announced the creation of Kennedy Law Firm PC, a litigation firm specializing in property insurance, liability defense, subrogation, and mediation services. Joining Kennedy at the firm are attorneys **Kerry Trapp** and **Amanda Sperow**. The firm is located in Woodbury.

In memoriam

HON. TERENCE M. DEMPSEY, age 91, died on September 2, 2023. Dempsey joined the Somsen & Dempsey law office, where he practiced until 1992. He worked as a public defender and served as New Ulm city attorney for 10 years. In 1978, Terry was elected to the Minnesota House of Representatives. He was re-elected six times, eventually serving as minority leader. In 1992, he was appointed a district court judge for Watonwan County by Gov. Arne Carlson.

FRANCIS J. RHEINBERGER, age 73, died September 17, 2023. He graduated from Hamline School of Law and practiced in Stillwater for over 40 years and served on multiple Washington County committees.

NICK ROY HAY, age 74, died September 17, 2023. He attended law school at the University of Minnesota. Hay began his distinguished career as an attorney at law specializing in tax law and found a second calling in life working as an CPA for Myslajek, Spencer and Kemp

PATRICK MOORE, age 54, of East Bethel, died on October 9, 2023. After several years of international tax accounting, he returned to law practice by joining Clark A. Joslin Law (eventually Joslin & Moore Law Office, PA). He served on many nonprofit boards and started his own nonprofit organization, Silent Ability.

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