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OCTOBER 2022

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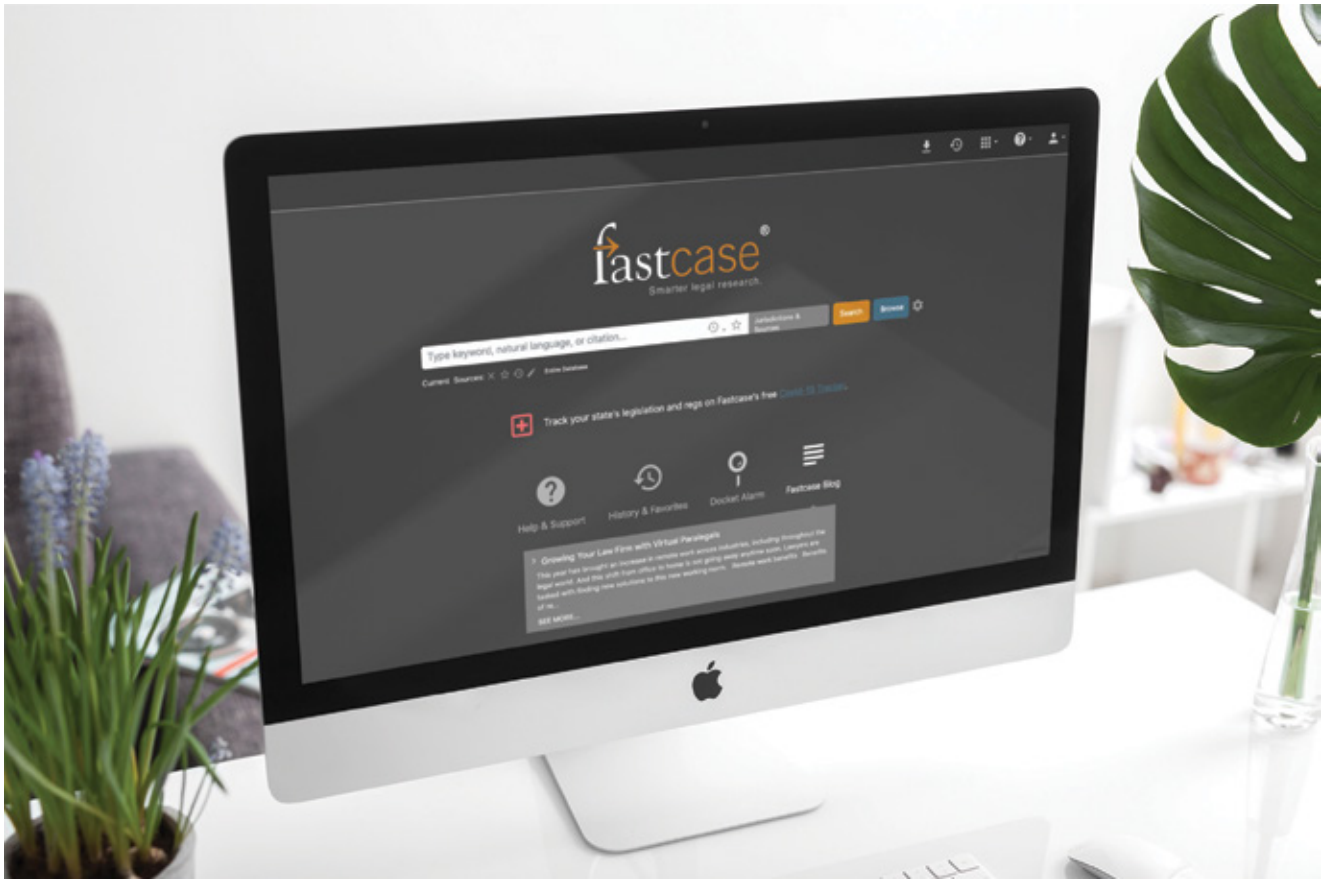

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features

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MAKE TIME FOR PRO BONO. *YOU WON'T BE SORRY.*

BY PAUL D. PETERSON

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

It is the summer of 1992. I am an associate attorney at the firm Murnane, Conlin, White and Brant in St. Paul. Most of my practice is devoted to the defense of insurance companies and their insureds. Not long after I start at the firm, and with their encouragement, it becomes one part of my practice to volunteer at a Southern Minnesota Regional Legal Services (SMRLS) evening clinic. I like this work, in part because it is the most direct, one-on-one experience I have had thus far as a lawyer. As I walk down Cedar Street to SMRLS's offices, I feel a sense of excitement. I have no idea of the people, issues, and questions the night will bring.

Tonight, I meet a very frail woman who appears to be in her early 80s. In speaking with her I learn she is in her early 60s. She has been diagnosed with terminal cancer and her prognosis is grim. She tells me her remaining life span will more likely be measured in months than years.

She has not been employed since her diagnosis. Despite the toll on her body, I am struck by her sharp mind and the life in her eyes. This is no quitter. Her problem tonight is disability insurance. She has it through her former job and she needs those payments for the short time she has left. But the payments aren't coming. So she devotes what little energy she has to fighting this company. She tells me she's spent and she can't carry on. She is fearful of becoming homeless. For the first time since we began our conversation, her lively eyes dim.

> IF WE ALL COULD UP OUR PRO BONO GAME JUST A LITTLE—AND GET A LARGER PERCENTAGE OF LAWYERS VOLUNTEERING—WE WILL BE AMAZED AT THE RESULTS.

She became my client that night, and with the help of the people at SMRLS we were able to get her some short-term relief and some additional concessions from her landlord. For the next six to eight weeks, I worked to figure out what was going on with this disability insurance. Looking back, it was not heavy-duty legal work. Calls and letters we do every day. I think maybe the best work I did was letting her know I cared. We got the situation fixed. We stayed in touch. About a year later, I learned she passed.

Representing her proved so professionally satisfying that she's one of the reasons I decided to represent individuals and families.

Fast forward to the summer of 2022. (Do not do the math, please.) I am filling out my attorney registration forms and, although I knew it was coming, it is the first time I see a line for reporting of pro bono hours. There is no requirement of pro bono, but it is an aspirational goal for all attorneys. I am surprised a bit by the feeling I had—like I feel when I see the "Your Speed" sign flashing. The form helped me to pause and reassess. What speed am I going right now?

Choose to serve

I got my start with volunteering at SMRLS, a great organization and one of many to assist volunteer lawyers with support and advice, but there are other opportunities to serve. If you have an interest in expanding your pro bono opportunities, the Legal Services Advisory Committee (LSAC) and the Volunteer Lawyers Network (VLN) are also great resources to match your skills with the overwhelming needs that our in our community. Finally, you can contact MSBA Access to Justice Director Katy Drahos (*kdrahos@mnbars.org*). Katy and her colleague, Sarah Etheridge, are excellent at helping us help others.

All efforts that we can give, great and small, will lessen those needs. If we all could up our pro bono game just a little—and get a larger percentage of lawyers volunteering—we will be amazed at the results. The rule of law and a strong community depend on access to justice for all. Pro bono work improves our society. Let's do this. ▲

10 Years of North Star Lawyers

In 2012, the MSBA created the North Star Lawyers program to recognize members who provided 50 or more hours of pro bono service (the standard in Rule 6.1(a), (b)(1) & (2)) in a given calendar year.

Since that time, thousands of MSBA members have donated over a million hours of pro bono time to our community. We thank everyone who has contributed to this collective effort to improve access to justice through pro bono. In honor of Pro Bono Week and to celebrate this decade of North Star Lawyers, we'd like to recognize the small group of lawyers who have achieved North Star status every year for the past 10 years. Your dedication to service and our community is valued and appreciated.

10 YEARS

North Star LAWYER

Landon Ascheman
Katherine Barrett Wiik
Thomas H. Boyd
David Bunde
Christopher J. Burns
Jonathan Bye
Angela Christy
Patrick J. Cole
Clinton Cutler
Annamarie Daley
John Degnan
Tammera Diehm
Michael Dolan
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Kellen Fish
R Leigh Frost
Kathryn Johnson
Elizabeth Juelich
James Long
Rhonda Magnussen
Keith Moheban
Adine Momoh
Joshua Natzel
Carole Pasternak
Katina Peterson
Roshan N. Rajkumar
Michael Reif
Rebecca Ribich
Brent Routman
Sally Silk
Geri Sjoquist
Mary J. Streitz
Tom Tinkham
Claire Topp
Alysia Zens

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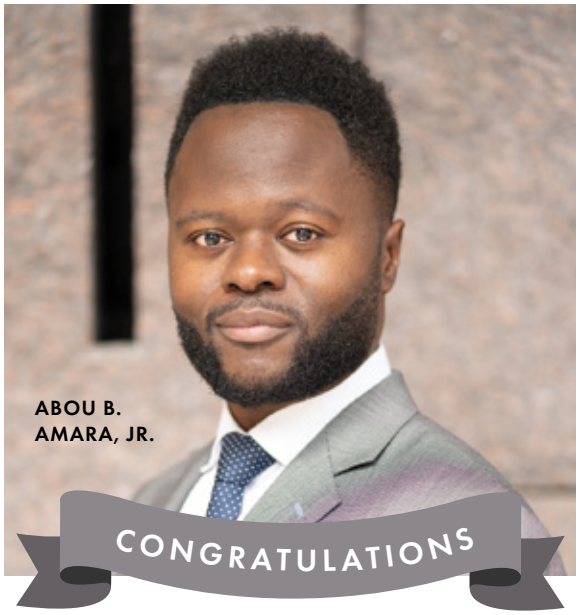
Join us for Pro Bono Week
October 24-28, 2022

Pro bono week is a time for us to celebrate Minnesota's dynamic pro bono community and an opportunity to grow our collective efforts to achieve access to justice in our state. Join the MSBA, RCBA, and HCBA for an outstanding series of three free CLE programs to learn about barriers women experience in achieving access to justice, best practices for serving clients through legal advice clinics, and how to overcome imposter syndrome when your pro bono passion lies outside your normal practice area. There is no cost to attend these online programs and CLE credit will be available for each.

Program details and registration information can be found at **www.projusticemn.org/calendar**



New Lawyer of the Year

The MSBA New Lawyers Section has awarded Abou B. Amara, Jr. the 2022 Outstanding New Lawyer of the Year Award. Amara, an associate at Gustafson Gluek PLLC, is also the vice-president of the Minnesota Association of Black Lawyers and a former clerk to Minnesota Supreme Court Justices Anne McKeig and Paul Thissen.

New Lawyers Section leadership is also in the process of planning this year's New Lawyers Leadership Conference, which will take place on Friday, November 4 at the Barrel Room at Urban Growler. This conference is for up-and-coming legal professionals looking to take their careers to the next level by learning what it means to lead in and outside the office.

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Do you need assistance uploading a photo to your profile in MSBA's online communities? Do you need to turn off email notifications from Fastcase? Are you looking for a specific form in the practicelaw library but can't find it? If you have any technology questions related to MSBA's member resources online, help is available. Book a 30-minute Practice Tech Walkthrough with MSBA Legal Technologist Mary Warner. Visit ***www.mnbar.org/walkthrough*** to schedule your walkthrough.

REPORT

Task force proposes bylaw changes

How can the MSBA modify its existing governance to foster member engagement while being efficient and effective? This was the charge given to the MSBA's Governance Task Force last year. To complete its mission, the task force took a deep dive into the MSBA Bylaws and recommended 11 changes. These changes range from the simple (for example, updating the term "outstate Minnesota" to "greater Minnesota") to the more complex. The two proposed changes most likely to pique members' interest are adding a fifth position to the officer track and allowing unclaimed Assembly seats to be filled by members appointed by the president (with MSBA Council approval).

Currently the officer track consists of the secretary, treasurer, president-elect, and president. The task force is proposing a new officer seat called vice-president to be inserted between treasurer and president-elect. This provides an additional opportunity for members who aspire to become president. However, it also increases the time commitment of members in the officer track to five years rather than four.

The Assembly, MSBA's policy-making body, includes designated seats for different sectors of our legal community. For example, each bar association section has a seat, and all the district bars have one or more seats depending on their proportional membership. In addition, there are seats for representatives from groups such as the Minnesota District Judges Association and the Minnesota Intellectual Property Lawyers Association, as well as Minnesota Women Lawyers and affinity bars such as Minnesota Association of Black Lawyers. Sometimes a group fails to nominate someone to serve on the Assembly. Following a set time period and after notice to the group, the task force recommends empowering the president to fill those empty seats with members who are interested in serving on the Assembly.

To read the full report and recommendations of the Task Force, visit ***www.mnbar.org/2022-task-force-recommendations.***

TO DO

Help us update practicelaw

One benefit of MSBA membership is access to practicelaw, an online library filled with legal forms in a variety of practice areas, practice management resources and videos, as well as eBooks, like *Minnesota Title Standards* and *Minnesota Legal Ethics*. Currently, practicelaw contains over 2,400 resources.

MSBA is in the process of auditing the resources in practicelaw to determine which ones need to be updated or archived and removed. During the audit, we are also rethinking the organization of practicelaw, examining ways to streamline the experience and make resources easier for members to find. In addition, we're looking for gaps in the resources offered. If there are resources you use in practicelaw that need to be updated or resources you would like to see added, please get in touch with Legal Technologist Mary Warner ***(mwarner@mnbars.org).***


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ETHICS NEWS
from around the country

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

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

The National Organization of Bar Counsel (NOBC) is a professional organization dedicated to enhancing the effectiveness of lawyer discipline counsel. Formed in 1965, before most states even had professional discipline counsel or operations, NOBC includes representatives from 75 state, federal, and international jurisdictions. The Office of Lawyers Professional Responsibility has long been a member of this valuable organization, and I and another lawyer in the Office recently attended the annual NOBC conference. I thought you might be interested to learn a bit about what is happening around the country in the area of attorney ethics.

Rule changes

Many jurisdictions are considering or have passed rule changes. While rule changes are always in play across the country, the volume of changes being pursued across various jurisdictions felt notable to many attendees. For example, effective July 1, 2022, Colorado significantly modified its Rule 3.8(d), relating to obligations of a prosecutor. Colorado's Rule 3.8(d) now states:

> (d) timely disclose to the defense all information known to the prosecutor, regardless of admissibility, that the prosecutor also knows or reasonably should know tends to negate the guilt of the accused or mitigate the offense, or would affect a defendant's decision about whether to accept a plea disposition, except when the prosecutor is relieved of this responsibility by statute, rule, or protective order of the tribunal. This information includes all unprivileged and unprotected mitigation information the prosecutor knows or reasonably should know could affect the sentence. A prosecutor may not condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused. A prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists by making timely disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecutor is unable to obtain it.[1]

COUNSEL FROM OKLAHOMA SHARED THE STARTLING STATISTIC THAT THERE ARE MORE LICENSED LAWYERS OVER 80 THAN UNDER 30 IN THE STATE!

Florida recently expanded its emergency suspension rules to more directly address incapacity unrelated to specific misconduct, an issue Minnesota should examine closely in my view.[2] Like Minnesota, Georgia is looking at adopting the ABA model rules to streamline lawyer advertising, and similarly Tennessee has adopted several advertising rule changes.[3] Louisiana, on the other hand, has gone in the opposite direction, expanding its lawyer advertising rules significantly, including the added requirement that lawyer advertisements, unless exempt, be approved by Louisiana's Professional Conduct Committee.[4] Kentucky amended its rules to eliminate private reprimands, making all attorney discipline public.[5] Missouri adopted a new requirement that lawyers convicted of any felony and certain misdemeanors have a duty to self-report their conviction to the Office of Discipline Counsel.[6]

The American Bar Association's Standing Committee on Ethics and Professional Responsibility is considering significant changes to Rule 5.5 relating to multijurisdictional practice. This review was prompted in part by a proposal from the Association of Professional Responsibility Lawyers (APRL) toward a more "national" license, and in part due to changes in the profession prompted by remote practices that cross jurisdictional borders.

The ABA is informally soliciting feedback on a working draft that would allow a lawyer licensed to practice in one state/jurisdiction to practice in any other state/jurisdiction as long as the lawyer discloses in writing to the prospective client where the lawyer is actually licensed and that the lawyer is not actively licensed to practice in the jurisdiction, and complies with any *pro hac* or other requirements of the jurisdiction. Multijurisdictional practices are often challenging because each state regulates the practice in their state, as do other "jurisdictions" (such as federal or tribal jurisdictions). As you might expect, lots of regulator concerns were expressed over a proposed draft rule that flips the licensing paradigm. This is only a small sampling of rule changes or proposed changes that were discussed, with lots of rule-making activity across the country.

High-profile cases and complaints

Several jurisdictions discussed the challenges arising from the volume of higher-profile cases they are seeing. Many arose from the 2020 election (matters concerning Rudy Giuliani, L. Lin Wood, and Sidney Powell, to name a few), but some of this is part of a trend that started before 2020. One legal scholar who presented at the conference calls it "The Ethics Resistance"[7] to denote the use of legal ethics complaints to hold lawyers to account for ethics failures in their professional capacity that affect the nation or the public as a whole rather than a specific client. Examples in this category include complaints against the former Attorney General William Barr or Kellyanne Conway, a special assistant to former President Donald Trump.

High-profile cases have not been limited to election or political issues. For example, South Carolina's legal community (and general population) has had one surprise after another due to the many criminal charges lodged against attorney Alex Murdaugh. Mr. Murdaugh's alleged crimes run the gamut from allegedly stealing money from clients and money-laundering with a client in a painkiller scheme to a recent indictment for the 2021 murders of his wife and son.

The South Carolina Supreme Court disbarred Mr. Murdaugh on July 12, 2022, having previously suspended him in September 2021. In its order, the court noted that since September 2021, Mr. Murdaugh "has been indicted on more than eighty criminal charges arising from various ongoing investigations. Additionally, Respondent has admitted in various court proceedings and filings that he engaged in financial misconduct involving theft of money from his former law firm; that he solicited his own murder to defraud his life insurance carrier; and that he is liable for the theft of $4,305,000 in settlement funds."[8] Mr. Murdaugh did not contest his disbarment.

Changing demographics and operations

Counsel from Oklahoma shared the startling statistic that there are more licensed lawyers over 80 than under 30 in the state! This is a stark example of the "aging" that has been widely discussed in recent years as fewer new lawyers join the profession. Illinois reported that over the last several years, annual complaints have dropped by approximately 40 percent, leading to a similar reduction in regulatory personnel. Many other jurisdictions reported a return to complaint filings similar to pre-pandemic levels, but still modestly down from prior-year highs, similar to Minnesota. A common theme of the conference was staffing turnover, with many jurisdictions experiencing a lot of turnover and most experiencing the challenge of hiring and training new employees over the pandemic. And it looks like Hawaii has become the first lawyer regulation office in the country to go fully remote and fully digital.

Conclusion

As you can see, a lot is happening around the country in attorney ethics. Before accepting this job in 2016, I had no idea what an interesting and dynamic area of law professional regulation is, and it remains interesting to me how much the jurisdictions differ and yet how much the jurisdictions are the same. If you have questions regarding your ethical obligations, please call our ethics help line at 651-296-3952, or visit our website at *www.lprb.mncourts.gov*. ▲

NOTES

1 Rule 3.8(d), Colorado Rules of Professional Conduct, Amended and Adopted by the Court, En Banc, 2/24/2022, effective 7/1/2022.

2 Rule 3-5.2, Rules Regulating the Florida Bar (RRTFB), effective 8/1/2022.

3 Tennessee Supreme Court Rule 8, Rules of Professional Conduct 7.1-7.5, effective 9/1/2021.

4 Rules 7.1-7.10, Louisiana Rules of Professional Conduct, with amendments through 1/1/2022.

5 Kentucky Supreme Court Rule 3.380, effective 4/1/2022.

6 Missouri Supreme Court Rule 5.21(a), adopted 5/31/2022, and effective 1/1/2023.

7 Brian Sheppard, *The Ethics Resistance*, 32 Georgetown Journal of Legal Ethics 235 (2019).

8 Order of the Court dated 7/12/2022, *In the Matter of Richard Alexander Murdaugh*, Respondent, Case No. 2022-000812.

SOCIAL ENGINEERING OR COMPUTER FRAUD?

In cyber insurance, the difference matters

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.

Many organizations view cyber-insurance policies as a final line of defense against the risks associated with cybercrime. Given the potential for damages, and the prevalence of cyberattacks, cyber-insurance policies are increasingly common. Even so, these policies can be confusing and difficult to dissect, sometimes resulting in unwanted surprises when it comes to filing a claim. Take for example *SJ Computers, LLC v. Travelers Casualty and Surety Company* (21-CV-2482 (PJS/JFD) (D. Minn. 8/12/2022)).

Essentially, SJ Computers fell victim to a social engineering scam in which a bad actor accessed its systems and sent fraudulent invoices appearing to originate from a known vendor. The CEO wired about $600,000 to the bad actor, and only realized what had happened once the transaction had cleared. Seeing that the emails were fraudulent, SJ Computers looked to its policy with Travelers Casualty and Surety Company of America.

This policy contained two separate agreements, one pertaining to computer fraud and the other to social engineering fraud. According to the order, *computer fraud* was defined as "intentional, unauthorized, and fraudulent entry or change of data or computer instructions directly into a computer system." *Social-engineering fraud* was defined as "the intentional misleading of an employee or authorized person by a natural person impersonating [a vendor, or that vendor's attorney, client, or that client's attorney, employee, or authorized person] through the use of a communication." When SJ Computers made its claim under the social-engineering fraud agreement, it quickly learned that coverage was capped at $100,000. Litigation ensued when Travelers would only provide coverage under this agreement, and not the computer-fraud agreement with its $1 million coverage limit.

This past August, U.S. District Court for Minnesota Chief Judge Patrick Schiltz granted Travelers' motion to dismiss, acknowledging the definitions of computer fraud and social engineering fraud contained within its policy with SJ Computers. Although SJ Computers attempted to argue that their policy did in fact cover their losses, the court ultimately favored Travelers:

> "Travelers offers several reasons why SJ Computers' loss is not covered under the computer-fraud agreement: First, the conduct in which the bad actor engaged was not computer fraud as that term is defined by the Policy. Second, even if the bad actor engaged in computer fraud, SJ Computers' loss was not 'directly caused by' that computer fraud. Third, Exclusion H of the Policy explicitly precludes computer-fraud coverage for SJ Computers' loss. And finally, the conduct in which the bad actor engaged meets the definition of social-engineering fraud, and social-engineering fraud is explicitly excluded from coverage under the computer-fraud agreement... [T]he Court agrees with Travelers on every point."

The court also distinguished this case from others that contend with the same issues of computer and/or social-engineering fraud, writing that "those cases are distinguishable in a crucial respect: None of them analyze an insurance policy that covers *both* computer fraud *and* social-engineering fraud—much less an insurance policy that makes clear that computer fraud and social-engineering fraud are mutually exclusive categories." Furthermore, "The Policy clearly anticipates—and clearly addresses—precisely the situation that gave rise to SJ Computers' loss, and the Policy bends over backwards to make clear that this situation involves social-engineering fraud, not computer fraud." The order concludes, "Because the fraud that caused SJ Computers' loss plainly meets the definition of social-engineering fraud, that fraud cannot also meet the definition of computer fraud. The Policy could not be clearer on this point: "*Computer Fraud* does not include *Social Engineering Fraud*" (emphasis in original).

The court's order is clear: Given the definitions included in the Travelers policy, SJ Computers could only make a claim under the social-engineering agreement. This is precisely the course of action which SJ Computers took when it made its claim to begin with, based on the circumstances of the case. SJ Computers only attempted to pursue a different course of action when it learned that

CYBER-INSURANCE POLICIES ARE VALUABLE COMPONENTS OF AN ORGANIZATION'S CYBERSECURITY PLAN, BUT IT IS CRITICAL TO UNDERSTAND THEIR LIMITATIONS AND THE SPECIFICS OF YOUR POLICY.

the social-engineering agreement provided far less coverage than the computer-fraud agreement.

Our current cyberthreat landscape makes cyber-insurance policies a necessity for many organizations. It should be noted that as cybercrime proliferates, policy language is becoming increasingly specific. "Due to rising cyber-related claims... insurers started to clarify cyber policy language further in 2019 for 'silent cyber' coverage, where the policy does not explicitly include or exclude cyber risk within a policy. Firms have addressed silent cyber issues by adopting language that specifically excludes or affirms coverage, or by adopting coverage sublimits, which reduces the benefits of the policies."* Insurers are prioritizing making cyber policies as clear as possible, including definitions that prevent ambiguously broad claims.

From a cybersecurity perspective, this case is a decisive example of both the limitations of cyber insurance and the importance of reviewing your policy. Social engineering attacks continue to abound, and organizations should look to proactive measures to safeguard themselves against the risks. Learning to spot fraudulent emails and taking the time to verify wire transfer requests are ways in which education and training can prevent phishing attacks. Cyber-insurance policies are valuable components of an organization's cybersecurity plan, but it is critical to understand their limitations and the specifics of your policy. Asking the right questions now can prevent problems down the road, and acknowledging the fact that a cyber-insurance policy is not a "fail safe" for bad security practices can help inform an organization's security goals. ▲

** www.fitchratings.com/research/insurance/russian-cyberattacks-may-test-insurer-war-exclusion-policy-language-01-03-2022*

Q: What tips/advice would you have for a 1L who's just getting started this fall?

Gabriel Ramirez Hernandez
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GABRIEL RAMIREZ-HERNANDEZ, an attorney in Maslon's litigation group, focuses on assisting clients in intellectual property disputes, insurance, construction, and general business litigation.

I would encourage any 1L to be actively curious in and out of the classroom. It might seem easiest to just sit at the back of the class, but participating by asking and answering questions will be so much more rewarding by confirming that your understanding of the lessons is correct—or by showing you where you might need more work. And it is just as important to be actively curious outside the classroom, because as daunting as three years of law school may seem, they go by quickly. To make sure that you are in a position to have all of the externships and internships that you need to decide on your career path, you will want to start by learning as much as you can about the type of practice you may want to have. Even if you have your mind set on a particular area, it never hurts to know what other practices are out there. This can be as simple as sending a cold email to an attorney where your only connection is you read their website bio and you want to learn more. Lawyers tend to be busy, so do not ever take it personally if someone does not get back you (to the lawyers reading this message: Please do not let this be you). I am not sure that I would have imagined my current career if I had not taken the risk of being curious and open to new possibilities.

One last piece of advice: Do not forget to take care of yourself. Law school is tough and you might find yourself feeling isolated, targeted by comments in class, or disturbed by certain realities of our legal system. Try to keep in mind that everyone is doing their best—even when their perspectives seem incompatible with your experiences. The legal profession has been historically (and continues to be) exclusive of many realities. If you are feeling that the law or your classmates' perspectives do not address certain realities, it is probably because we are here to change that. It can be tiring and unfair, but just know that you are not alone. Reach out to someone and you may be surprised to find genuine and kind people who just also happen to be lawyers, judges, faculty, and staff. I have always considered myself lucky to have the mentors that I do; yours are out there too!

Sarah Jewell
sjewell@rivervalleylaw.com

SARAH JEWELL, a graduate of Hamline University School of Law in St. Paul, practices at River Valley Law in Waite Park.

My advice is to connect with your peers, as they are your help in times of trouble—especially during finals. One tip I learned from my peers is a brain association game to memorize elements of a legal claim. For example, in torts class you will learn the basic elements of a claim of negligence.

To help remember the elements on an exam, it helps to associate the first letter of each element into a phrase you can remember more easily.

So if the elements of negligence are: 1) Existence of a legal Duty; 2) Defendant's Breach of that duty; 3) Plaintiff's sufferance of an injury or Damages; 4) Causal connection between defendant's breach and plaintiff's damages – create a word association using the letters "DBDCD"—or, "Did Bob Do [something] to Cause Damages?" While it seems strange, it works. I also recommend meeting with your profs in person. They are much less intimidating when you take time to meet them out of class.

Kenneth Kyuhan Oh
kyuhan.oh@usbank.com

KENNETH KYUHAN OH is a senior corporate counsel at U.S. Bank in Minneapolis, Minnesota.

If I could talk to my (much) younger self starting his first semester of law school, I would advise him to have an open mind and relax. Often, 1Ls place pressure on themselves to figure out the type of law they will ultimately dedicate their professional lives to practicing. Although I admire the focus and confidence some students have in knowing exactly what they want to do with their careers from day one, I think it is equally important to be patient and get exposed to a variety of subject matters before making such a big decision.

Finally, I would advise all law students to remember to have fun and enjoy being a student. For many of us, law school will be the last time we spend our days being a full-time student. It is a special time in our lives that we don't fully appreciate until it is no longer an option.

Hetal Dalal
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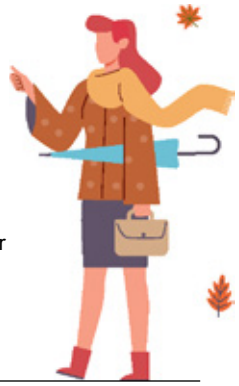
HETAL DALAL, assistant professor at Mitchell Hamline School of Law, teaches legal analysis and writing, contracts, and critical theory. Prior to teaching, she served as in-house counsel at the Center for Popular Democracy. She serves on the board of directors of Gender Justice and is chair of the board for Gender Justice Action.

Close, active reading of the assigned materials unlocks so many answers to questions and serves as an independent source of learning in law school. Lawyers read and write professionally, and law students are developing that capacity as well as their subject matter knowledge. When it comes to reading, be wary of shortcuts. In your first couple of weeks of law school, some of the harder cases may seem like gibberish. Commercial briefs and outlines tempt law students. Yet reading and learning how to decode the inscrutable texts builds those reading and analytical muscles. The professor's explanations and discussions in class add to that. After class discussion, review the case, your brief, and other notes, and notice whether you understand sections of a case you could not make sense of before.

Taking the time for a post-class review of the lecture notes and reading notes will cement your understanding. One strategy I love for the really hard subjects (all of 1L year, other hard classes later on) is to handwrite reading notes and lecture notes, and then type up a synthesized set of notes for the class. Those notes, plus a case brief, can function as a personalized casebook for the class. Another notetaking strategy: Draw a line in the middle of the page/screen. Take the reading notes on one side of a page, and then class notes on that case on the other side. The physical proximity invites comparison and synthesis of what you thought the case meant while you were reading, and what insights and information the class provided.

One final tip: Track the time you spend reading. Students often do far less deep work than they think they are doing. Scribble the start and stop times on your first page of notes and notice how the perception that you read cases half the night changes to 85 minutes for one class, and 35 for another. Plus you can enjoy seeing how much faster you get as the semester progresses, and perhaps gird yourself against digital distractions.



For myself, I divide types of reading between reading with a pen (and a notebook) and reading with a cat. Spend energy actively engaging with your law school reading, and your understanding of the cases and underlying doctrine will repay the investment.

A 'bright-line' rule: You will pay for violating bankruptcy stay

BY GEORGE H. SINGER singerg@ballardspahr.com

The Court of Appeals for the Second Circuit recently established a "bright-line rule" in a case of first impression: If the debtor is named as a defendant in a prepetition lawsuit, the automatic stay operates to halt further proceedings. The court in *Bayview Loan Servicing LLC v. Fogarty (In re Fogarty)*[1] issued a decision finding a willful violation of the automatic stay and emphasizing the expansive applicability of the automatic stay provisions of the Bankruptcy Code in a case where the debtor was named a defendant in underlying foreclosure proceedings even though the debtor's interest in property was merely possessory.

The automatic stay is a legal provision that temporarily prevents creditors from trying to collect money or seize property from debtors in bankruptcy.[2] It is self-effectuating in that it operates as an automatic injunction that, with certain exceptions, halts most civil lawsuits and collection activities involving the debtor and its property. A creditor that knowingly acts with knowledge of the bankruptcy case can suffer great consequences, because the Bankruptcy Code renders actions taken in violation of the automatic stay as void and permits the bankruptcy court to award actual damages, including costs and attorneys' fees, as well as punitive damages for willful violations.[3]

The debtor in *In re Fogarty* resided in a home in Long Island, New York; however, title to the property was held by a limited liability company. There were significant delays in getting to a foreclosure sale. In fact, it took over eight years to obtain a foreclosure judgment in state court. The original foreclosure action omitted the debtor as a defendant. The debtor was later added during the course of the state court litigation and merely named as an "interested party." After entry of the judgment in foreclosure and shortly before the scheduled foreclosure sale, the debtor filed a bankruptcy petition under Chapter 7 of the Bankruptcy Code. Servicer's counsel, being advised by the debtor's lawyer that the automatic stay precluded moving forward with

the foreclosure sale, was of the view that since the real estate owned by the LLC was not property of the bankruptcy estate–a fact not in dispute–the sale was merely an *in rem* action and not subject to protection by the bankruptcy case of the individual debtor.

The Second Circuit found that the servicer violated the automatic stay even though the property was owned by a non-debtor LLC because the debtor was named as a defendant.[4] The court rejected any distinction between *in rem* and *in personam* proceedings as the Bankruptcy Code does not require an inquiry as to *why* a debtor is named in legal proceedings. The fact that debtor was not personally liable did not matter. The appellate court also rejected the servicer's argument that moving forward with the foreclosure sale of real estate in which the debtor had no legal interest was a mere ministerial act. To the contrary, foreclosure affects ownership and possessory interests and requires the exercise of judicial discretion. The debtor had a "possessory" interest as a tenant that constituted part of the bankruptcy estate.[5] Since the appellate court found that the servicer willfully violated the automatic stay, the debtor was entitled to recover sanctions from the creditor as provided for by the applicable statute.

The case is a reminder that courts generally take an expansive view with respect to the restrictions imposed by the Bankruptcy Code's automatic stay provisions, particularly where the debtor's primary residence is implicated. As discovered by the servicer in *In re Fogarty* through painful experience, a bankruptcy filing can wreak havoc on carefully planned litigation, foreclosure, and collection strategies. A lack of understanding or insufficient attention to the implications of bankruptcy on various courses of action can have serious consequences. Servicers and other creditors should take careful note of the Second Circuit's bright-line rule regarding the automatic stay and seek stay relief from the bankruptcy court in cases that implicate any interest (possessory or otherwise) in property to avoid potentially costly issues.[6] ▲

GEORGE SINGER is a partner in the Minneapolis office of Ballard Spahr LLP and concentrates his practice on corporate and commercial law. Mr. Singer is a fellow of the American College of Bankruptcy and formerly served as an attorney on staff with the National Bankruptcy Review Commission.

NOTES

[1] 39 F.4th 62 (2d Cir. 7/6/2022).

[2] 11 U.S.C. §362.

[3] *Id.* §362(k).

[4] *Id.* §362(a)(1) and (a)(2) (staying the commencement or continuation of proceedings against the debtor as well as the enforcement against the debtor of a judgment).

[5] It did not appear to matter to the court that there was apparently no lease between the debtor and the LLC that owned the property entitling the debtor to legal possession and that the debtor was not paying rent.

[6] *Id.* §362(d) (permitting a creditor to obtain relief from the automatic stay for "cause" and other grounds set forth in the statute).

How FAR can covid-19 be claimed as an excusable delay for federal contractors?

BY RACHEL LANTZ rlantz@ecklandblando.com

The largest single purchaser of construction services in the world is the United States government, which spent an estimated $119 billion on construction contracts in fiscal year 2021.[1] As the covid-19 pandemic disrupted lives and the supply chain in early 2020, billions of dollars' worth of federal construction contracts were stalled as well, causing contractors great uncertainty—and fear that their federal contracts could be terminated for default. Recently contractors have been finally receiving answers regarding when and how covid-19 may be used as an excuse for delays in their federal contracts.

Federal contracts must contain certain provisions dictated by the Federal Acquisition Regulations (FAR), including FAR 52.249-14, the "excusable delay" clause.[2] An excusable delay occurs when the failure to perform arises from causes beyond the contractor's control and without the fault or negligence of the contractor. The FAR enumerates that "epidemics," "acts of the Government in its sovereign or contractual capacity," and "quarantine restrictions" are excusable delays, thus seeming to cover delays due to the covid-19 pandemic.

IT'S A WINNER

This article was the 2022 winner of the MSBA Construction Law Section's annual writing contest.

But this clause limits relief for contractors, as it only provides a time extension for excusable delays (it does not completely excuse such performance) and does not compensate contractors for expense caused by the delays.

Importantly, excusable delays are not excusable *per se*. Rather, a contractor has the burden to prove their excuse delayed their performance in fact, without their own fault or negligence.[3] Recent decisions by the Armed Services Board of Contract Appeals (ASBCA) and Civilian Board of Contract Appeals (CBCA) reveal the limits federal contractors face in using the pandemic as an excuse for delay when facing termination for default.

In *Central Company*, the ASBCA ruled in favor of the government's termination for default, despite Central Company's claim that covid-19 impacted its ability to perform.[4] Central contracted with the Air Force to design and construct a small storage facility at an Air Force base beginning in November 2019. In March 2020, four months into the six-month contract, the government realized that Central was failing to meet deadlines on pre-

SINCE THE PANDEMIC AND MARKET CONDITIONS ARE NOW FORESEEABLE, CONTRACTORS ARE FACING INCREASING DIFFICULTY CLAIMING THAT SUCH DELAYS ARE BEYOND THEIR CONTROL.

construction documents and getting approval for design schedules.[5] Central generally cited the pandemic as a concern for their ability to perform but never provided meaningful details. In a late-stage communication, Central reported that a subcontractor's positive test result had caused a quarantine in February, as well as a general statement that their "supplier had to shut down the factory." Then, when responding to a show-cause notice, Central explained they needed more time because their bank was only open by phone calls, which was extremely slow.

The board held that Central failed to contemporaneously communicate when delays due to covid-19 occurred and failed to show evidence of the actual impact on Central's performance. Even though Central reported the employee's positive covid test result, Central reported the event more than a month later and failed to show that the positive test caused a delay beyond Central's ability to mitigate.[6] The board recognized that while a lack of supplies may affect construction, it should not affect the design and submission of preconstruction paperwork, which Central had yet to achieve. Central's argument that it was delayed due to covid-19 failed because even if it underwent delays because of the pandemic, they failed to allege "that those problems actually delayed Central's preconstruction work." Consequently, Central's challenge to the government's termination for default was denied.[7]

In a pair of service contract decisions titled *ORSA Technologies, LLC* (ORSA), the CBCA considered the effect of covid-19 as an excuse.[8] The board held that the contractor failed to show that covid-19 was an excusable delay beyond their reasonable control because the effects of covid-19 were foreseeable when the contract was entered.

In the *ORSA* cases, the Veteran Affairs Offices requested bids in October 2020 for contractors to provide nitrile gloves, specifically requesting that the gloves be "on hand," "in-stock," and "available for immediate delivery."[9] Orsa won awards at two different locations in early 2021 but failed to produce the gloves on hand at the deadlines and was thereafter terminated for default on both contracts. Orsa argued covid-19 as an excuse for delay because the pandemic created a "perfect storm" of events that prevented their on-time delivery, including the shutdown of glove manufacturing facilities, labor concerns, and issues with raw materials, buying, shipping, and inspection. The board rejected Orsa's argument, finding that Orsa was already aware of the pandemic's effect on the supply chain and the nitrile glove industry when it entered the contract. Moreover, the contract clearly indicated the contractor's obligation to have the gloves in stock at the time of award. Orsa's covid-19 problems "were foreseeable when it entered into the contract," and therefore were not an excusable delay "beyond the reasonable control of the contractor."[10]

What are the key takeaways from *Central Company* and the *Orsa* decisions for federal construction contractors? The boards will not automatically consider covid-19 an excusable delay unless a contractor contemporaneously communicates specific evidence of their work delays that cannot be mitigated. Even then, since the pandemic and market conditions are now foreseeable, contractors are facing increasing difficulty claiming that such delays are beyond their control. Before entering into new federal contracts, for construction or otherwise, contractors must assess the current market conditions and potential covid-19 risks, as their ability to argue covid-19 as an excusable delay continues to dwindle. ▲

RACHEL LANTZ is an associate attorney at Eckland & Blando. She graduated from Mitchell Hamline School of Law in June 2022.

NOTES

[1] Bloomberg Gov't, BGOV200 – Federal Industry Leaders (2020), *https://assets.bbhub.io/bna/sites/3/2021/06/BGOV200_Federal-Industry-Leaders-2020.pdf?utm_campaign=BGOV_Confirmations_Report&utm_medium=email&utm_source=Eloqua*.

[2] FAR 52.249-14.

[3] *See Ace Electronics Assoc., Inc.*, ASBCA Nos. 11781, 11496, 67-2 BCA ¶ 6456.

[4] *Central Company*, ASBCA No. 62624, *slip op.* (2/2/2022).

[5] *Id.* at 4.

[6] *Id.* at 6.

[7] *Id.* at 8.

[8] *ORSA Tech., LLC*, CBCA No. 7141, *slip op.* (1/18/2022); *ORSA Tech., LLC*, CBCA No. 7142, *slip op*. (1/20/2022).

[9] No. 7141 at 10.

[10] *Id.* at 11.

RURAL MINNESOTA NEEDS PRO BONO LAWYERS.

It's easier than ever to help.

BY DANIEL MORRIS *dmorris@centralmnlegal.org*

THIS PIVOT TO TECHNOLOGY HAS INCREASED CAPACITY FOR LEGAL AID AND EXPANDED THE WAY PRO BONO WORK CAN BE DONE.

Thinking about expanding your practice area or widening your client market? Know you can make a difference but need a venue to prove it? Volunteering as a pro bono attorney with greater Minnesota legal aid organizations can help you meet your professional and personal goals while providing necessary legal representation to Minnesotans in areas where attorneys are few in number. And innovations in communication technology and court rules have made it possible for lawyers anywhere in Minnesota to answer the call.

Legal aid offices across the state are stretched thin. The St. Cloud office of Central Minnesota Legal Services, for example, provides legal services to folks in 21 total counties spanning the state, from the Wisconsin border (Chisago County) to the South Dakota border (Big Stone, Lac qui Parle, and Yellow Medicine Counties). Even with limited staff, legal aid seeks to ensure that each of the counties in our service area feels like they have their own local office available to them, whether we have a physical presence there or not.

Legal Services Corporation (LSC), the federally created entity that oversees legal aid funding from the federal government, has invested resources in identifying and addressing service gaps. The latest Justice Gap Report,[1] published in 2022 with surveys and interviews conducted throughout the pandemic year of 2021, noted that 77 percent of rural low-income households had experienced one or more civil legal problem in the past year. The study further noted that 92 percent of low-income Americans do not get any or enough legal help for their substantial civil legal problems—and that people living in rural areas are more likely than others to have low incomes and therefore less ability to hire private counsel.[2] (The most reported types of legal problems included consumer issues, health care, housing, family and safety, and income maintenance.) Existing legal aid organizations, pro bono attorneys and leaders, administrators, and judges have worked on addressing many of these issues over recent years, but the need continues.

With pro bono help, Minnesota has the capacity to meet the legal needs across the state. Minnesota has one of the highest numbers of active and resident lawyers per capita in the nation. The 2022 ABA National Lawyer Population Survey reported that Minnesota has 26,065 active attorneys as of 2021, up about 9.6 percent over the preceding 10 years, for a per capita rate of 45.67 attorneys per 10,000 people.[3] Minnesota has frequently ranked in the top 10 among states for highest number of attorneys per capita.[4]

Remote courts help rural clients

Besides the daunting ratio of legal needs to available attorneys, other complications in offering rural legal aid include conflicts of interest among a smaller and less diverse client pool, fewer support staff, and far-ranging travel needs.[5] A bigger pool of pro bono attorneys would ease these limits. Adapting changes implemented by the judicial system in response to the covid-19 pandemic, such as expanding remote or zoom hearings, can help to address the gap in legal services in rural Minnesota.

The Minnesota Supreme Court, under Chief Justice Gildea's supervision, has prioritized the legal needs of rural populations. And we now know that remote hearings are one of those changes that is here to stay under the Minnesota Supreme Court's one-CourtMN Hearings Initiative Policy. The policy outlines hearing locations (remote versus in person) going forward in Minnesota, including the continuation of many civil, non-evidentiary hearings in a remote format.[6] A lot of the work that comes up in pro bono matters, such as criminal expungement and housing expungement, requires one or two hearings that can now be held remotely. Nearly all the administrative appeals that civil legal service providers address, such as unemployment benefits and public benefits appeals, have been remote or by phone and will continue to be in the future.

This pivot to technology has increased capacity for legal aid and expanded the way pro bono work can be done. In years past, it was not unusual for a legal aid attorney in our office to spend two hours in a vehicle to appear for a short ICMC or pretrial hearing, and two hours in return. With remote hearings, legal aid is able to increase legal capacity by turning those four hours in the car into time spent advising clients, drafting motions, or performing legal research. There is also hope that remote hearings make it possible for private attorneys and law offices to be much more efficient, potentially freeing up more time for pro bono activities.

"There is room now for pro bono work in different counties because of remote hearings," says Alexander Gutnik, an associate attorney at the Heller & Thyen, P.A. law firm who practices in the areas of family law and criminal defense. Having been a former legal aid attorney and current volunteer attorney through the Volunteer Attorney Program, Mr. Gutnik has expanded his caseload to matters venued all over the state—from Beltrami to Olmsted counties, and Chisago to McLeod. "I've had four hearings in different counties all in one day, and there would be no way to do that if I had to drive to each hearing," he notes.

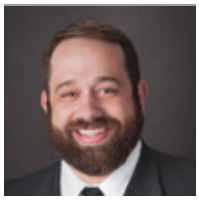
More ways to help low-income clients

The recent update to the Rules of Professional Conduct providing for mandatory reporting of pro bono time and financial support of pro bono and legal aid services has dual goals.[7] The first is to use the reporting data to craft targeted programs to devote more resources to underserved communities, typically in rural Minnesota. The second is to raise awareness among licensed attorneys about how close to the aspirational goal the profession is coming. When attorneys see that a few more hours of volunteerism can mean reaching that goal, the hope is that they take on that challenge.

IF ATTORNEYS ARE HESITANT TO JUMP INTO FULL REPRESENTATION CASES PRO BONO, THERE ARE MANY OTHER USEFUL SERVICES THEY MIGHT OFFER—SUCH AS ADVICE AND BRIEF SERVICES, COMPLETING FORMS, AND OUTLINING THE RULES FOR EVIDENCE ADMISSION AT CONTESTED HEARINGS.

The Legal Paraprofessional Pilot Project was created in part by the increased need for legal assistance. The pilot allows a legal paraprofessional to provide limited legal advice, and in some cases represent a client in court, under the supervision of a licensed Minnesota attorney. The project aims to focus on those proceedings in which one party typically appears in court without representation.[8] The pilot project thus far has focused on housing and family law cases.[9]

Judge Korey Wahwassuck,[10] a district court judge in the Ninth Judicial District (Itasca County), sees the opportunity for the Legal Paraprofessional Pilot Project to increase pro bono access for low-income Minnesotans in rural areas through the use of advice and brief services. "Brief services" can include help with filling out court forms for family law and/or child support cases and explaining the court process to *pro se* litigants—even if the legal paraprofessional does not ultimately represent the client in court.



DANIEL MORRIS, a 2010 graduate of the University of St. Thomas School of Law, is the managing attorney at Central Minnesota Legal Services in St. Cloud.

With her experience on the bench, Judge Wahwassuck says she sees the greatest need for pro bono representation in court in family law, specifically with the initiation and process of the case. Judge Wahwassuck noted that many low-income people face significant barriers in accessing the courts and understanding the legal process. "We see a lot of people trying to represent themselves [by using] the Self-Help Centers," she observes. Judge Wahwassuck notes that if attorneys are hesitant to jump into full representation cases pro bono, there are many other useful services they might offer—such as advice and brief services, completing forms, and outlining the rules for evidence admission at contested hearings.

Legal advice clinics, which are held in several different counties throughout the state, are another way to provide service to low-income clients without seeing cases through from start to finish. Many of the legal advice clinics have options for remote or telephone consultations, thereby allowing volunteers to help remotely in areas where the need is greatest. (And any documents discussed in these remote consultations can easily be forwarded to the attorney electronically.)

Mediations are another opportunity for a pro bono attorney to get involved in a case. Mediation is both high-impact and limited in scope and time. Pro bono attorneys can choose to volunteer a half day or full day of their time to provide free mediations to those who qualify. Mediation resolves cases efficiently, saves limited court resources, and reduces the need for pro bono attorneys to handle contested matters later. Volunteer mediations are often held remotely by Zoom, and using the breakout room feature provides confidentiality between attorney and client even when there are miles between the two.

Pro bono attorneys can also co-counsel a matter with a legal aid office. This type of service includes handling remote hearings, discovery, and litigation work while a local legal aid office attorney provides support and handles any necessary in-person hearings or meetings with the client. Legal aid provides training, counseling, and ongoing resources to pro bono attorneys regarding poverty law issues that a pro bono attorney practicing in a new area of law may not be familiar with.

The introduction of Legal Aid Kiosks (*www.legalkiosk.org*) at the beginning of the pandemic has also facilitated remote connections between low-income clients, their attorneys, and courts. Over 250 legal kiosks have been installed around the state. The kiosks give low-income clients the technology needed to remotely connect with a pro bono attorney, most often by Zoom. The kiosks also feature a screen-share capability that allows client and attorneys to review documents, complete forms, and access online resources. Clients can also print the legal documents they create at the kiosk. With this technology, a client in Hackensack, a northern Minnesota town with a population of 294, could drive 15 minutes to the nearest kiosk location and have a sit-down, face-to-face virtual consultation with an attorney who is sitting at their own desk 180 miles away in Bloomington.

Appearing in unfamiliar courts

Judge Wahwassuck readily acknowledges that it can be daunting for attorneys to appear in courts outside of their usual practice area; local courts in smaller jurisdictions sometimes project a level of familiarity between attorneys and the court that appears unfavorable to parties appearing for the first time. "As a judge, it's important to greet everyone equally and be aware of those perceptions," says Judge Wahwassuck. "If you go to a dance and don't know anyone, you are less likely to get on the dance floor."

Judges have some responsibility in addressing this issue, she says. She advises attorneys preparing for an appearance in an unfamiliar court to contact the law clerk or court administration and ask about a judge's preferences—and to consult any local practice manuals that may exist. Preparing your client properly for a Zoom hearing is also important. Prior to the hearing, test out a client's technology and make sure it works. Review the proper demeanor for court hearings with your client. "It is still court," says Judge Wahwassuck, "so the Zoom hearing should be respected as much." Mr. Gutnik says he often logs in to his Zoom hearings early to observe the court and become familiar with the judge's style and the pace of the hearing happening before his hearing is scheduled. "I'll also look at a judicial profile, talk to opposing attorneys, and look up recent district court opinions authored by the judge on Westlaw," he adds.

The demand for pro bono legal services statewide, and especially in greater Minnesota, has never been higher, and we all owe a duty to ensure that all Minnesotans have access to justice regardless of where they live. Judge Wahwassuck recognizes that many attorneys are already stretched thin, so any pro bono work they do is very appreciated by the bench. "A lot of personal satisfaction can be derived from pro bono work," she says. "You are serving people that don't have any other options and it makes a huge difference in people's lives." As a pro bono attorney, she stresses, "Your work has a [broad] impact.... It impacts the whole judicial system." ▲

NOTES

[1] *https://justicegap.lsc.gov/resource/executive-summary/*

[2] *https://justicegap.lsc.gov/resource/section-2-todays-low-income-america/*

[3] *https://www.americanbar.org/content/dam/aba/administrative/market_research/2022-national-lawyer-population-survey.pdf*

[4] In 2018, to take a recent survey year, Minnesota ranked eighth in the nation in lawyers per capita. *https://lawschooltuitionbubble.wordpress.com/original-research-updated/lawyers-per-capita-by-state/; https://www.lawyersofdistinction.com/lawyers-by-capita-per-state/*

[5] Introduction to Rural Pro Bono Project ABA *https://www.americanbar.org/groups/probono_public_service/projects_awards/rural_pro_bono_project/*)

[6] See Order Governing the Continuing Operations of the Minnesota Judicial Branch, ADM20-8001, Minn. Sup. Ct., 4/19/2022.

[7] Minn. Rul. Pro. Conduct, Rule 6.1.

[8] In RE Implementation Committee for Proposed Legal Paraprofessional Pilot Project, ADM19-8002, 3/8/2019.

[9] Order Implementing Legal Paraprofessional Pilot Project, ADM19-8002, September 29, 2020.

[10] Judge Wahwassuck was appointed to the district court bench in 2013, having previously served as an associate judge for the Leech Lake Band of Ojibwe Tribal Court, where she helped to initiate and presided over the first joint tribal-state wellness court in the nation.

REMOTE PRO BONO WORK CHANGES THE GAME

Three veteran attorneys share advice on building client bonds virtually

BY SARAH ETHERIDGE ✉ *setheridge@mnbars.org*

Opportunities to expand pro bono practice and legal aid service have exploded since the pandemic. And where one lives and practices has less than ever to do with attorneys' options in serving low-income clients. In both the metro area and greater Minnesota, the rise of virtual hearings has meant reduced drive time for clients and attorneys alike; less time parking and waiting around a courthouse; and a newfound ability to appear in multiple far-flung counties in one afternoon.

It has also changed the way we interact as humans. So how do you build trust and a strong professional relationship without meeting a client in person? Our contributors have some ideas.

SHILOH BUTE

In her role as managing attorney for Tubman's Chrysalis Center, Shiloh Bute provides legal representation to low-income survivors of domestic violence, sexual assault, and stalking in order-for-protection matters and in family court. Bute's work is difficult even when there isn't a remote component, and she focuses on relationship-building from the start.

"It can be very difficult for a client to just pick up a cold call from you and jump right into what are often complex and emotionally charged issues," she explains. "I prefer to schedule a time to talk when they are most able to focus and speak freely."

But how do you get clients to open up with the barrier of a phone or screen? Bute focuses on transparency. "I find that giving clients a brief roadmap of each conversation can [be] helpful," she notes. "Explaining the process and letting them know why you are asking the questions you are can help ease some of the anxiety and hesitancy. Some clients also just need more time to build rapport. Many take a few conversations before they are ready to open up. Be prepared to put in that time."

Transparent communication is key to Bute, but in remote attorney-client settings, it can also be her biggest barrier.

"When appearing in person," she observes, "you could pass a note, whisper to them, or ask the court to allow you a quick chat. I try to plan ahead of time with my clients. Some clients have multiple devices so they can be on the video hearing and send me an email. I [also] prepare them to ask the judicial officer for a moment to speak with me. Most judicial officers will give you time to meet in a breakout room if you ask."

Bute focuses heavily on the impacts of court outcomes for her clients. Doing so has helped her to build mutual trust in a deeply sensitive area of law. "I recently had a remote Social Early Neutral Evaluation in a family law matter," she remembers. "The client was very anxious about the process. We had multiple [remote] meetings to prepare [so the] client knew what to expect and we were able to take breaks to connect privately between each step. The results [were] in line with my client's proposal and we were able to fully settle the issues of custody and parenting time."

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Contact MSBA Access to Justice Director Katy Drahos **kdrahos@mnbars.org**

Find a mentor: at your firm, in your section, or with a pro bono provider.

One example: Legal Services of Northeast MN pairs metro attorneys with mentor attorneys in their region to help navigate the local courts.

STEPHEN RATHKE

Following his retirement from a civil litigation practice at Lommen Abdo in 2014, Stephen Rathke was not yet ready to give up the law entirely. Since then he has volunteered with Volunteer Lawyers Network (VLN) and Mid-Minnesota Legal Aid and worked part time at HOME Line, focusing his pro bono practice on criminal expungements and eviction expungements. At any given time, he is typically working five to six criminal expungement matters. This has proven to be a good fit for Rathke, a former county attorney, though a criminal law background is actually not needed for pro bono work in expungements.

Tools and training provided through ProJustice MN and VLN have helped him to automate parts of the process, particularly when hearings moved online. In particular, Rathke uses tools from ProJustice MN to assist in preparing the motions to request expungements and fee waivers.

But automated technology doesn't build relationships. To start off, Rathke schedules the initial phone call in advance so that clients can be prepared and set aside the time to talk to him. When the time comes to talk in person, he tries to be patient and not interrupt.

Rathke also believes it is important to set boundaries and expectations right away. Expungement work can be complicated and time-consuming for clients—they have to gather many documents, tell their story in detail, and sit through two 60-day waiting periods. When concerns arise, he encourages clients to email rather than call him so that each party can have a record of the conversations and go back to remember pieces if necessary.

Some of the clients Rathke works with are navigating as many as 20 court records in which they are seeking expungement, and these cases are rarely in one county. Prior to the pandemic, Rathke would appear before multiple district courts for each client while working with judges who may be well-versed in expungements or hearing one for the first time.

Rathke hopes the in-person dimension can return, at least in some of his client relationships. "I am not sure that expungement hearings or housing cases will ever be in person [again]," he says.

A note from OLPR:

ETHICAL CONSIDERATIONS IN REMOTE REPRESENTATION

Screenshare carefully when working with clients remotely to avoid inadvertent exposure of confidential information from your other clients. Your client needs to know their information is safe, too.

If your client is in an environment with other people when you connect remotely, ask who they are, greet them, acknowledge the relationships, express appreciation for their support—and then explain why it's necessary for you to talk with the client alone for a few minutes.

Technology might make communication with remote clients easier, but it is okay to set and enforce limits around your response time. Be upfront about what you can do. If you accept texts, tell your client that you will try to respond within a day but response times may vary. It can be tempting to let the immediacy of the medium control timing expectations, but "promptly" complying with a client's reasonable requests for information does not mean immediately or even the same day.

— Karin Ciano & Susan Humiston

"Zoom hearings are much more convenient for the attorney and the client. But the relationship suffers without an opportunity to meet face to face."

Rathke has learned how to build relationships with his remote clients, but he does hope to meet with them in person again someday, even if their hearings stay remote. "Clients may be put off by representation by an old white guy," he notes. "A friendly initial face-to-face meeting can make the client more comfortable, and I look forward to having that kind of meeting as the covid threat decreases."

EDUARDO ABURTO ORTIZ

For the past three years, Eduardo Aburto Ortiz has been participating in pro bono and low bono programs through Central Minnesota Legal Services and Legal Aid Service of Northeastern Minnesota, and he describes the work as a "very fulfilling, and sometimes challenging, experience."

Building trust in a remote relationship comes with its own set of obstacles that face-to-face contact may overcome more quickly. The key to Ortiz's success? It's simple. Listening. "I always try to take time to listen to my client's story," he says. "I try to understand what they want to accomplish and advise them on how to get there [by] managing their expectations."

Creating an open dialogue with clients is critical in building trust in a remote representation–but navigating differences in technological capabilities can prove a bigger obstacle. Many low-income individuals had to adapt rapidly to communicating in an online space during the pandemic, and the legal field experienced its share of difficulties. For example, says Ortiz, "I had challenges with clients providing documentation in picture format. Especially when it is a document that needs to be filed with the court. That presents challenges for low-income individuals who may not have access to scanners or don't know where to go to use one."

Small details like this can have critical impact on the flow of information and the speediness of representation, but Ortiz doesn't mind. "I'm pretty savvy with technology," he notes, "so if someone is having issues, I try to help resolve them. I provide them with alternatives [and] direct them to places where they can get help."

Providing resources is a service that Ortiz uses in relationship-building in the remote sphere, but his work has had critical impacts beyond technology skill development. For Ortiz, it's all about advocacy.

"I did have a client who felt disenfranchised by the legal system," he recalls. "That client also thought I was part of that system that had failed to meet the client's needs when I hadn't even started the representation. I was firm in making the client understand that I was an advocate and an adviser, and we needed to work together on this if we wanted to succeed.

"Being honest and transparent from the beginning has always worked out for me. This cannot be accomplished without taking the time to listen and understand the client's needs." ▲

SARAH ETHERIDGE is the MSBA's access to justice administrative coordinator.

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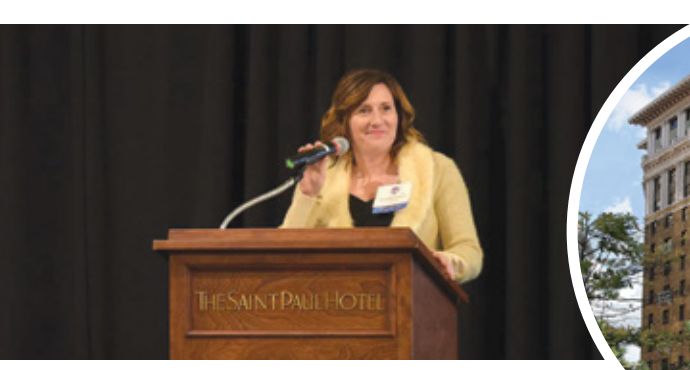

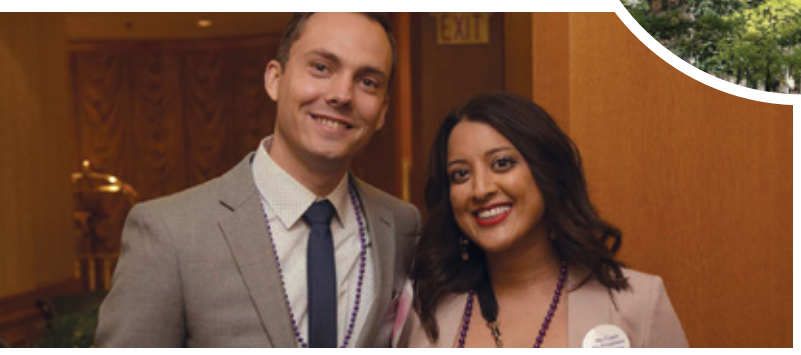

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Remote court proceedings are here to stay. What does that mean for lawyers, clients, and courts? What is gained? What is lost?

BY MIKE MOSEDALE *mjmosedale@gmail.com*

In the winter of 2021, with the world reeling from a surge in covid-19 infections, a Texas lawyer made a virtual appearance in a Presidio County court hearing and, in so doing, launched a thousand memes. You probably don't remember anything about the case (a routine forfeiture proceeding) or the name of the lawyer (Rod Ponton). But unless you lead an extremely off-line life, you likely do remember "Zoom Cat Lawyer." Ponton earned the moniker because, while Zooming on his secretary's computer, his image appeared on screen as a fluffy white kitten. Unable to turn off the cat filter, Ponton uttered the surreal explanation, "I'm here live. I am not a cat."

Naturally, the footage went viral, racking up millions of views by year's end. Ponton made a spate of good-humored TV appearances and "I am not a cat" T-shirts were sold. The whole episode seemed to capture the zeitgeist of the early Zoom court era as people everywhere found themselves befuddled by the pandemic.

At the time, of course, the use of Zoom in court proceedings was still new, or at least new-ish. Many in the legal profession still assumed that virtual court, like the virus that necessitated it, would soon be a thing of the past—a necessary improvisation to meet an anomalous moment in time.

A year and a half after Ponton's cat filter mishap, it looks like covid isn't going away anytime soon. Zoom court definitely is not.

In Minnesota, that reality became clear when the Judicial Council, the policymaking authority for the judicial branch, made it official that henceforth most civil proceedings in state court would be conducted remotely, with traditional in-person court reserved for evidentiary hearings, trials, and jury selection. (The future of Zoom court in criminal proceedings remains murkier. Each of the state's 10 judicial districts has established its own protocols as courts attempt to work through an enormous backlog of cases.)

The ratification of the new rules was a consequence of the many efficiencies created by the untethering of the justice system from the physical courthouse. The benefits have accrued to clients and practitioners but, critically, to the court system itself. By June, according to Chief Justice Lorie Gildea, between 80 and 90 percent of all court proceedings were being conducted virtually.

There is no precedent for this seismic shift in the legal landscape—neither in terms of the speed with which it has taken root nor its far-ranging consequences. Yes, courts have modernized practices in dramatic ways prior to covid. Legal documents once went from longhand to type. Then e-filing came along and upended a slew of other time-honored rituals.

"But those things happened slowly. Even now, some states don't have e-filing," notes David Slayton, the vice president for court consulting services at the National Center for State Courts. "What we saw here—where every court in the country shifted its practices—happened in a matter of months or weeks. There has never been anything like it."

Slayton, who until recently served as the executive director of the Texas Judicial Council, thinks most courts have adapted well. In the past, he says, instituting such monumental changes "would have taken 14 years and a dozen task forces.

"But here we didn't have a choice. We had to adopt the Nike motto: Just do it," Slayton adds. "It proved that we can move quickly when we need to."

Slayton acknowledges that the exact contours of the future of remote court are not clear. But he is sure about one thing: One way or the other, it is here to stay. "I'm not aware of any state that is leaning toward going back," he says. "There are judges who are interested in doing that. But it's not a large percentage. I think everybody recognizes we can't go back."

According to Slayton, Minnesota has been a leader in its embrace of Zoom court. States like Texas and Florida have gone further into the digital future, conducting jury selection, some civil trials, and even minor criminal trials (for non-jailable offenses) over Zoom. But Minnesota was the first state in the country to codify and make permanent its protocols for the use of remote court proceedings.

Slayton says he's quick to recommend that other states adopt Minnesota's "idea of presumptiveness."

"With a standard rule, there is a predictability. We think that's a good practice for other states to follow," says Slayton, who notes that Arizona, another leader in technological and procedural innovation, cited the Minnesota model in promulgating its own rules.

DORI RAPAPORT

EMILY COOPER

INTI MARTÍNEZ-ALEMÁN

STANFORD HILL

WHAT LAWYERS THINK ABOUT ZOOM COURT

As the executive director of Legal Aid Service of Northeastern Minnesota (LASNEM), Dori Rapaport has a lot on her plate. Her organization provides civil legal services to low-income people in a region that covers 27,000 square miles—an area that is mostly rural, bigger than Northern Ireland, and notably short on practicing lawyers. "We're the only act in town if you're in poverty and can't afford a lawyer," says Rapaport.

Historically, this reality often forced LASNEM staff to make difficult decisions. The logistics of appearing in court for one client in Duluth and for another the same day in Grand Marais, three hours away, was sometimes insurmountable. In practice, that meant that Legal Aid had to operate like an emergency room.

ACCORDING TO SLAYTON, MINNESOTA HAS BEEN A LEADER IN ITS EMBRACE OF ZOOM COURT—THE FIRST STATE IN THE COUNTRY TO CODIFY AND MAKE PERMANENT ITS PROTOCOLS FOR THE USE OF REMOTE COURT PROCEEDINGS.

Zoom court, Rapaport says, has all but eliminated the need for such triage-style lawyering. As an example, she points to housing court. After the eviction moratorium came to an end, many low-income people in northeastern Minnesota faced the prospect of becoming homeless. Remote court proceedings blunted that. "Because we had virtual courts, we could coordinate all the housing hearings in one calendar. It was one referee hearing all the cases and he became a subject matter expert," Rapaport says. "Instead of picking and choosing where we could drive to and pick which clients we could help, we could represent them all."

The result? "We have helped 50 percent more people than we would have otherwise," Rapaport says.

Clients are benefiting from virtual courts in other ways, too. In addition to making it easier to secure representation, Rapaport says, Zoom court takes less time out of clients' lives by eliminating major hassles, like taking a day off work and having to line up child care and transportation.

"I think when we first started, people thought: This doesn't feel like real justice. But why? That's an old-fashioned, archaic view of what justice is," she says. "Efficiency isn't a bad thing. It helps people move on with their lives and have closure. Efficiency is good for people, not just the business aspect of the courts."

For LASNEM, the rise of Zoom court has also made it much easier to acquire legal talent. "Hiring lawyers in greater Minnesota is the worst HR situation you can think of. We would post jobs and no one would apply. I couldn't hire people to work in our Grand Rapids or Pine City office," Rapaport says.

That's less of a problem now that LASNEM has begun to post virtual positions. Recently, Rapaport hired an attorney from Walker to fill the long-vacant position in Grand Rapids, an hour away. Remote court has also made it easier to retain staff, who love the autonomy of the work-from-home option—and, at the same time, has increased the availability of pro bono lawyers in greater Minnesota.

"Rural lawyers are tapped out in terms of pro bono. The need is greater than the resources available," Rapaport says. "Now we can bring in metro-area private attorney resources through the pro bono programs."

Rapaport does have one criticism of Minnesota's new remote court protocols: the presumption (albeit rebuttable) that hearings on orders for protection be conducted in-person. During the height of the pandemic, OFP hearings were remote and, according to Rapaport, her organization's clients benefited. "It was a great service for survivors to not have to face their abusers in person—to not worry about where they are in the courtroom hallways or to not have to look for them when they're going back to the car."

The rule on OFPs is in keeping with the Judicial Branch philosophy that evidentiary hearings are best held in-person. Rapaport questions the underlying assumption. "I've heard judges say that they can't determine credibility when people are testifying over Zoom," she says. "I hang out on Zoom all day. I see people's faces all day. I know when they're full of it. I can still judge their facial expressions and body language."

That said, Rapaport says that in her experience, judges are still granting requests to hold OFP hearings remotely when asked. It's that sort of flexibility that makes her such a fan of Zoom court.

"We've seen the value virtual provides and we can't unsee it," she adds.

Rapaport is hardly alone in such views. Emily Cooper, founder and principal at Cooper Law, LLC in Minneapolis, specializes in family law and caters to lower- and middle-income clients. "Going remote has really leveled the playing ground," says Cooper, noting that her firm is one of the only sliding-scale law firms in the state. In the pre-pandemic days, her services were mostly restricted to the seven-county metro area. "Now I can be in five counties on the same day from my house," she says.

Clients prefer remote court for numerous reasons. Sometimes that's because they don't want to interact in person with a hostile ex. Sometimes it is simply because they don't want to

KENYA BODDEN

VALERIE FIELD

SETH LEVENTHAL

JOAN BIBELHAUSEN

"I THINK WHEN WE FIRST STARTED, PEOPLE THOUGHT: THIS DOESN'T FEEL LIKE REAL JUSTICE," SAYS DORI RAPAPORT OF LASNEM. "BUT WHY? THAT'S AN OLD-FASHIONED, ARCHAIC VIEW OF WHAT JUSTICE IS. EFFICIENCY ISN'T A BAD THING."

spend hours in a courthouse cattle call, waiting for their case to be heard. And Cooper has found the pro-Zoom sentiment to be universal: "I've yet to have a client who has a preference to being in-person for anything."

Still, in-person court is the best option for the clients of some attorneys. Inti Martínez-Alemán, a solo practitioner in St. Paul, estimates about 90 percent of his clients are native Spanish speakers. He says he will occasionally accept a scheduling delay for the sole reason of avoiding Zoom court. "Having a Spanish-speaking client with a Spanish-speaking interpreter, it can really slow things down," says Martínez-Alemán. "When it's a sensitive subject—discrimination or sexual harassment—you don't want to rely on an interpreter, especially if they have unreliable internet."

Other attorneys say they simply feel they are more effective arguing in person. Stanford Hill, a veteran trial attorney at the Minneapolis firm of Bassford Remele, hasn't appeared in an actual courtroom since the onset of the pandemic. "It works," Hill says of Zoom court. "But it doesn't work as well for me. It cuts into my advantages. I'm 6 foot 5 and I like to be standing when I'm talking, not sitting at the dining table with my cat jumping on the kitchen counter." That said, Hill acknowledges the benefits to clients, including lower lawyer fees. As an example, he cites a case he is currently litigating in Carlton County. Instead of driving to Cloquet for a motion hearing, he made his arguments from home. That translated to one hour of billing, instead of eight.

Kenya Bodden, a veteran litigator at Thompson Coe who specializes in casualty, insurance defense, and product liability (and the current president of the Ramsey County Bar Association), says he has mixed feelings about Zoom court. The convenience for practitioners—and the increased access to justice for litigants—are undeniable. In cases involving out-of-state depositions, Bodden notes, remote technology is a practical boon. But there are downsides. "Sometimes when you're trying to lock someone into an answer, it's easier in person," Bodden says. "A lot of what makes depositions effective is nerves. People are more likely to give tells in person. You can see if someone is hiding something or holding something back."

Valerie Field, the litigation director for Anishinabe Legal Services in Cass Lake, has mixed feelings about remote court. Her organization provides civil services in tribal and state courts, mostly (but not exclusively) to members of the White Earth, Leech Lake, and Red Lake bands of Ojibwe. Many of her clients have spotty or no access to the internet. The tribal courts have developed different pandemic protocols, with White Earth courts almost exclusively remote, Red Lake mostly in-person, and Leech Lake somewhere in the middle. For clients who have difficulty accessing the internet, according to Field, the courts have generally been accommodating, allowing parties to appear by telephone.

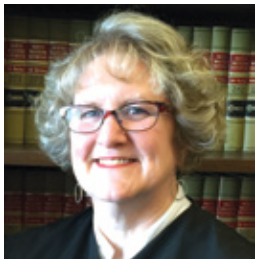
"I really like Zoom for the in-between stuff like pretrials and review hearings. If I have to argue a motion, I'm fine with Zoom," says Field.

But in Field's view, there are real drawbacks. She says it is frequently easier to settle a case in person, often right before a scheduled hearing or trial. In part, she theorizes, that's because Zoom court doesn't feel as real to some clients as physical court. And sometimes, she says, clients are more prone to disrupting virtual proceedings. "When you're sitting next to a client, it's easier to be reassuring. You can give the client a notepad and tell them to write down their thoughts. But if it's a Zoom hearing and they are not in the same room, they panic and say things at inappropriate times or interrupt the other party."

Seth Leventhal, a business litigator with a solo practice in Minneapolis, occasionally hears from fellow lawyers who grouse about remote court and yearn for a return to the pre-pandemic norms. "They like the off-the-record experience, both with opposing counsel and the court," Leventhal observes. But even if Zoom court eliminates the informal chit-chat that many find enjoyable (and useful), in Leventhal's view, the tradeoff is worth it. And it's not just time that is wasted by in-person court. Recently, Leventhal traveled to federal court in St. Paul for a 35-minute motion-to-compel hearing. The inconvenience to opposing counsel was considerably worse, with lawyers flying in from California, New York, and Louisiana. That 35-minute hearing had an immense carbon footprint.

EMILY COOPER HAS FOUND THE PRO-ZOOM SENTIMENT UNIVERSAL IN HER EXPERIENCE: "I'VE YET TO HAVE A CLIENT WHO HAS A PREFERENCE TO BEING IN-PERSON FOR ANYTHING."

HON. TAMARA YON



HON. KRISTA MARTIN

HON. MICHAEL CUZZO

PETER KNAPP

THE VIEW FROM THE BENCH

As the chief judge of the Ninth Judicial District, Tamara Yon presides over the largest district in Minnesota, one that sprawls over 17 counties in the northwest quadrant of the state. When covid hit, that proved to be an advantage because the district had experience using a remote court technology, ITV. "With our smaller population and big geography, it sometimes made sense to have a witness or a party appear by ITV, so many of our judges were already used to that," says Yon. Still, she adds, "Nobody could have imagined the way we are using remote technology now."

One of the first things that Yon noticed with the switch to remote court: There was less absenteeism, especially in child support cases but also in a variety of other case types in which one of the parties didn't have a valid driver's license or transportation. Over the course of the pandemic, Yon observed something else. Lawyers, judges, and others have become more adept at using remote technologies. She has yet to experience a cat filter mishap.

For the most part, in Yon's view, litigants and attorneys seem to prefer Zoom court, while opinions among her fellow judges are more varied. "Many of my colleagues really miss the in-person interaction you get in the courtroom, to speak to people face-to-face. I think there's a real grieving process," Yon notes. "On the flipside, I've had three judges who started after covid hit, so this is all they know. We all have different points of view."

"THERE ARE PLENTY OF ANECDOTES ABOUT THE CRAZY STUFF THAT HAPPENS IN ZOOM COURT. BUT I HAVE A LOT OF STORIES ABOUT THE CRAZY STUFF THAT HAPPENED IN THE COURTROOM," NOTES TENTH DISTRICT JUDGE KRISTA MARTIN. "PEOPLE DO DISRUPTIVE THINGS."

Tenth District Court Judge Krista Martin, who has been on the bench for 21 years, agrees with that assessment. "It's across the spectrum. I know there are judges who would like to return to the way things used to be and certainly there are judges who are very comfortable doing things remotely," Martin says.

Martin regards Zoom court as neither inherently worse nor better than physical court—just different. Consider the issue of courtroom decorum. "There are plenty of anecdotes about the crazy stuff that happens in Zoom court. But I have a lot of stories about the crazy stuff that happened in the courtroom," she notes. "People do disruptive things."

If a party shows up at a courthouse hearing wearing a hat, the bailiff handles that. If a party shows up shirtless or smoking a cigarette on Zoom, Martin says, she disables the video feed and makes her expectations clear. In general, she says, people are cooperative when given instructions.

The advent of Zoom court has also made it easier for rural judges to attract law clerks, who might live in the Twin Cities and not want to commute to Pine City or Mora, let alone International Falls. Rural courts can provide especially valuable experience for young lawyers, Martin says, because they tend to handle a great diversity of case types in a single day.

But there is one aspect of Zoom court that Martin has not grown entirely accustomed to. "When lawyers are arguing a motion, it feels the same, except it seems like they are closer to me on the screen. I can see them better," Martin says. "But I don't like seeing my own face. Sometimes, I go, 'Oh, my God, is that what my hair looks like?'"

Up on the North Shore, Judge Michael Cuzzo, who is chambered in Two Harbors, says he expects the protocols for remote court will change over time. "This is a testing process that we are going to refine," he says. "I'm not sure what those changes are going to be." But Cuzzo, like Yon and Martin, is certain that Zoom court is here to stay, one way or another. There are simply too many benefits to the core users of the courts to go back. "Some judges want everything remote, some want everything in person. But the vast majority understand the reason we made the transition," Cuzzo says.

A TOLL ON LAWYERS?

For some lawyers, the shift to remote court (and remote office work) has been great. The scheduling flexibility, the ability to work from home, and increased efficiency can lead to better work-life balance. The tradeoff is—or can be—greater isolation. "More lawyers are introverts than extroverts. We do a lot of our work alone. For someone who is an introvert, it's like, 'Bring it on.' But this is challenging for people who are energized by human contact," notes Joan Bibelhausen, the executive director of Lawyers Concerned for Lawyers, a nonprofit that provides support services to lawyers, law students, and others in the profession who struggle with substance abuse and mental health problems.

For some younger lawyers, the loss of mentors is another issue. But Bibelhausen says she's heard anecdotes about older lawyers who, rather than adapt to the remote protocols, have decided to give up the practice.

Bibelhausen points out that in-person interactions affect the brain. A handshake leads to the release of oxytocin, the so-called trust hormone associated with greater levels of happiness. Absent those positive interactions, some lawyers, like many others in society, have taken to self-medicating.

"We see different drinking behavior. More people are drinking during work hours," says Bibelhausen. "We've worked with some employers who are concerned that people who are working remotely might be under the influence. But how do you ask somebody if there is an issue if you're not present with them? It's harder to reach out when your whole interaction is over a screen."

Support groups like AA offer virtual meetings and, Bibelhausen says, that can work. But for lawyers struggling with addiction, it's not always enough, especially for those who are emerging from in-patient programs. "We've had some people who had a recurrence as soon as they got out of treatment because that support wasn't there," she notes.

The impacts of the profession's increased reliance on screen time are not spread equally. For women lawyers, who face more scrutiny over their physical appearance, all those hours spent on Zoom can take a toll. "With the close-up face on the screen, you feel more vulnerable and that can be uncomfortable," says Bibelhausen. She advises people with such concerns about some simple tactics to minimize the impacts, including moving the camera farther away and blurring the background.

The biggest change Bibelhausen has noticed regarding mental health in the profession: an overall increase in anxiety levels. Since 2019, Lawyers Concerned for Lawyers has seen about a 10 percent uptick in the number of people seeking help for anxiety compared to the 2019 numbers. Some of that stems from what Bibelhausen refers to as vicarious trauma that is absorbed via clients and, often, goes unrecognized. "People are kind of flailing. There's a concept called languishing. It's not depression but it's not thriving," she adds. "We're experiencing a lot more grief in our society."

It's not that there aren't silver linings. Bibelhausen says it's never been easier to ask for help and the stigma attached to such outreach seems to be receding, especially among younger people. That phenomenon confounds easy analysis: Are lawyers today really more troubled than they were before the pandemic? Or is it that more lawyers are willing to talk about their struggles?

It's hard to know. But Bibelhausen says Lawyers Concerned for Lawyers is looking at ways to grow its outreach. Last year, the organization expanded its offerings to include up to four free counseling sessions and, for the first time, is now providing services to nonlawyers who work in the legal field, including paralegals and secretaries.

A LEGAL SCHOLAR LOOKS TO THE FUTURE

Peter Knapp, a longtime professor at Mitchell Hamline School of Law, is bullish on the future of Zoom court. One reason: how well law students seem to be adapting to this new digital reality. In the second-year advocacy class he teaches, students learn how to do direct examination and cross examination. "When covid hit, we moved from doing those all live in classrooms to doing it all remote via Zoom," Knapp says. "We were surprised by how well students did in this new format. By and large, people are good at adapting when they have to."

Although Mitchell Hamline doesn't have any curricula specifically focused on Zoom court, students get a practical education in the use of the technology both through classes like Knapp's advocacy course and real-world experience in the school's various clinical programs.

Still, Knapp acknowledges that there are hurdles with remote advocacy. If the lawyer and client aren't in the same room, he notes, they still need to be able to communicate privately. And he says scholars and policy makers will need to closely track the ways in which remote court produces different outcomes than in-person court.

Will judges set higher bail for defendants who appear remotely than for those who appear in person? That was the finding of a study in Cook County, Illinois, where, for nearly a decade in the early 2000s, most bail hearings were conducted via closed circuit television.

"Anyone who has participated in Zoom meetings knows there is a warmth of contact that gets lost," says Knapp. "It's hard to predict how that plays out in the justice system. We don't want the system to become colder simply because it's done remotely."

Knapp expects the court system will continue to experiment and evaluate but, in the end, that there will be an increased tolerance for remote proceedings. And there will be some resistance along the way. "Every profession I have contact with—from the ministry to medicine to teaching—I've run into people who say this is a transition that I don't think I can make. What I'm losing is too great. For some folks, that's going to be the case for changes in the judicial system," Knapp adds.

That said, Knapp predicts that the Minnesota courts will ultimately move further into the digital future, with bench trials and some civil jury trials conducted in a remote or hybrid setting. In the criminal realm, Knapp sees a future where some defendants might waive their right to confrontation and the proceedings will be virtual.

In Knapp's view, this increased reliance on remote technologies was inevitable, even absent the pandemic. "We made 10 years of change in 18 months, but I think we would have gotten there sooner or later," he says, adding with a laugh: "I wish I bought stock in Zoom." ▲

MIKE MOSEDALE is a freelance reporter based in Minneapolis. Previously he worked as a staff reporter for Minnesota Lawyer, City Pages, and several other newspapers.

"ANYONE WHO HAS PARTICIPATED IN ZOOM MEETINGS KNOWS THERE IS A WARMTH OF CONTACT THAT GETS LOST," SAYS MITCHELL HAMLINE PROFESSOR PETER KNAPP. "IT'S HARD TO PREDICT HOW THAT PLAYS OUT IN THE JUSTICE SYSTEM. WE DON'T WANT THE SYSTEM TO BECOME COLDER SIMPLY BECAUSE IT'S DONE REMOTELY."

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LANDMARKS IN THE LAW

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

Criminal Law
JUDICIAL LAW

4th Amendment: Under private search doctrine, party seeking suppression bears burden of proving private party was acting on behalf of the government. Appellant had an online Dropbox storage account, the terms for which state the company may disclose information relating to the account for various reasons and prohibit the storage or sharing of unlawful pornographic files. A Dropbox employee submitted a tip to the National Center for Missing and Exploited Children with 63 images they believed to be child pornography found in a Dropbox user account. The Center forwarded the tip and images to the Minnesota Bureau of Criminal Apprehension, who reviewed the images and linked the Dropbox account to appellant. The BCA executed search warrants for the remainder of appellant's Dropbox account and appellant's electronic devices. The BCA found additional child pornography videos stored in appellant's Dropbox account. Appellant was charged with four counts of possession of child pornography. The district court denied appellant's motion to suppress evidence from his Dropbox account, finding that appellant did not have a reasonable expectation of privacy in his Dropbox account, and, even if he did, the private search doctrine applies. After a stipulated facts trial, the court found appellant guilty. On appeal, the Minnesota Court of Appeals affirmed, agreeing appellant did not have a reasonable expectation of privacy in his Dropbox account.

The private search doctrine permits government agents to duplicate searches performed previously by private parties without violating the 4th Amendment. The state must prove (1) a private actor conducted the initial search; and (2) the scope of the initial search and the scope of the subsequent search were the same. The evidence may still be subject to suppression if the private party who conducted the initial search was acting as an agent of the government. The Supreme Court holds that the burden of proving the private party was acting on behalf of the government falls on the party seeking suppression of the evidence.

The Supreme Court also holds that the district court did not clearly err when it found the state met its burden to prove the private search doctrine applies. The evidence shows an employee of a private company, Dropbox, manually reviewed appellant's files, and the BCA's subsequent unwarranted search was no more intrusive.

As appellant sought suppression of the Dropbox evidence, he was required to prove Dropbox acted as a government agent in searching his files. This determination focuses on (1) whether the state knew of and acquiesced in the search; and (2) whether the search was conducted to assist law enforcement's interests or the interest of the private party. Appellant did not make a sufficient showing on either of these points. As such, the Supreme Court finds the initial warrantless search of appellant's Dropbox did not violate the 4th Amendment. ***State v. Pauli***, A19-1886, 2022 WL 3640916 (Minn. 8/24/2022).

False reporting of a crime: Venue is proper in county where false report is made and county where false report is received. Appellant appealed her convictions in Waseca County District Court for deprivation of parental custodial rights by concealment and false reporting of a crime, claiming the evidence was insufficient to support the convictions. Appellant kept her child outside of her court-ordered parenting time, claiming the child was ill and needed medical attention, and reporting that the child's father abused the child to both medical staff and police.

First, the court of appeals finds the evidence is insufficient to prove appellant "concealed" the child from his father. Minn. Stat. § 609.26, subd. 1(1), states that "[w]hoever intentionally... conceals a minor child from the child's parent where the action manifests an intent substantially to deprive that parent of parental rights" is guilty of a felony. A conviction under this section requires proof that appellant intended to hide the child from his father. However, the circumstantial evidence does not preclude any rational hypothesis inconsistent with

guilt. While appellant kept the child from his father, kept him out of daycare, and did not answer calls from police, she told the child's father of her plans to keep the child at her home because he was sick. She also brought the child to multiple medical providers, which supports an inference that she intended to keep the child to obtain medical treatment for him, not to hide him from his father.

Next, the court finds sufficient evidence of venue for appellant's false report conviction. Appellant argues Minn. Stat. §609.505, subd. 1, allows for venue only in the county where the false report was made (Blue Earth County), not where the report was received (Waseca County). Venue is proper where any element of the offense was committed. Section 609.505, subd. 1, provides that "[w]hoever informs a law enforcement officer that a crime has been committed... knowing that the person is a peace officer..., [and] knowing that it is false and intending that the officer shall act in reliance upon it, is guilty of a misdemeanor."

The court holds this section provides for venue in both the county where a false report is made *and* the county where law enforcement received the false report. "To inform" means "to impart information to," which inherently requires affirmative communication to another and receipt of that information. Thus, the act of informing under section 609.505, subd. 1, includes two components—making a false report and the receipt of that false report. As such, venue is proper where the false report is made and also where it is received. The court finds sufficient evidence that appellant's false report was received by law enforcement in Waseca County.

Appellant's deprivation of parental custodial rights conviction is reversed, but her conviction for falsely reporting a crime is affirmed. ***State v. Johnson***, A21-1360, 2022 WL 3711386 (Minn. Ct. App. 8/29/2022).

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Employment & Labor Law
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Doctor's claim rejected; misconduct, not discrimination. An Egyptian Muslim physician lost his discrimination claim following his resignation from the Mayo Clinic in the wake of an investigation that led to a recommendation that he be fired. The 8th Circuit Court of Appeals, upholding a decision of U.S. District Court Judge Eric Tostrud, held that the physician committed misconduct including sexual harassment, which defeated his discrimination claim. ***Said v. Mayo Clinic***, 2022 WL 3440394 (Minn. Ct. App. 08/17/2022) (unpublished).

FLSA; Expert testimony improperly excluded. The faulty exclusion of expert testimony in a Fair Labor Standards Act (FLSA) wage case warranted further proceedings. The 8th Circuit vacated the exclusionary rulings in a class action brought by commercial truck drivers claiming they were not properly paid for off-duty time while participating in a student training program. ***Petrone v. Werner Enterprises, Inc.***, 42 F.4th 962 (8th Cir. 08/03/2022).

Unemployment compensation; not available for suitable employment. An employee with a 15-pound lifting restriction that prevented him from doing his plumbing work was not available for suitable employment and, thus, was denied unemployment benefits. The Minnesota Court of Appeals, affirming a ruling of an unemployment law judge (ULJ) with the Department of Employment & Economic Development (DEED), held that the six-week period of inability to work barred benefits for that period. ***In re Miezwa***, 2022 WL 3348571 (Minn. Ct. App. 08/15/2022) (unpublished).

Unemployment compensation; pandemic assistance denied. An employee was deemed ineligible for pandemic unemployment assistance (PUA). ***In re Chandler***, 2022 WL 3348646 (Minn. Ct. App. 08/15/2022) (unpublished).

Unemployment compensation; two misconduct rulings. The appellate court upheld a pair of ULJ denials of benefits due to misconduct. Failure to comply with the employer's COVID policy barred benefits for another employee for failure to adhere to a "reasonable" policy. ***Costello v. Fond du Lac Reservation***, 2022 WL 3348567 (Minn. Ct. App. 08/15/2022) (unpublished).

The actions of an employee who took air filters from his work without permission constituted disqualifying "misconduct." ***Christenson v. RIHM Motor Co.***, 2022 WL 3149257 (Minn. Ct. App. 08/08/2022) (unpublished).

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Environmental Law
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MN Court Of Appeals affirms pickle maker must close and clean wastewater ponds. In April the Minnesota Court of Appeals, in an unpublished opinion, affirmed that the Minnesota Pollution Control Agency (MPCA) did not exceed its authority in ordering that Gedney Food Company must close wastewater treatment ponds and remove contaminated sediment. The appeals court further affirmed MPCA's order denying Gedney's request for a contested-case hearing.

Pickle maker Gedney Food Company has been located in the southwest Chanhassen area since 1893. In 1957, the pickle factory was authorized to discharge its briny wastewater into three on-site treatment surface impoundment ponds that lie in the floodplain of the Minnesota River. In 2019, Gedney closed its facility and the MPCA requested the wastewater closure plan required by the permit and gave a two-year timeline for closing the ponds and removing the waste pond solids. Over the next 23 months, the MPCA requested updates on Gedney's discharge and cleanup plans and met with Gedney to discuss options for a closure plan. During that time, however, Gedney made no actual attempt to remove the waste solids.

In August 2021, the MPCA issued the two orders being challenged by Gedney on this appeal. Gedney argued that MPCA's order for a final closure (1) exceeded the agency's statutory authority because MPCA did not consider the impact of the closure plan order on the company's financial condition; (2) was unsupported by substantial evidence of reasonableness and feasibility because of MPCA's adherence to a strict timeline and its refusal to consider alternate cleanup methods; and (3) was arbitrary and capricious because MPCA had previously permitted Gedney's operation of the wastewater ponds and because access to the ponds and removal of waste solids was unfeasible and logistically difficult during the winter

months in which the final deadline was established.

In response to Gedney's three arguments, the court first held that MPCA did not exceed its statutory authority when dismissing Gedney's financial condition because "due consideration of a party's economic circumstances... does not equate to permitting that party to use whatever method of disposing of materials it has decided is within its financial capability."

Second, the court held that MPCA's strict timeline was supported by substantial evidence of reasonableness and feasibility, especially considering that Gedney had received an estimate saying that the removal work would only take 10 to 12 weeks, and that it could be "done in the winter, which might be preferable." Furthermore, the court agreed with MPCA that Gedney's proposal of alternate cleanup methods were prohibited under Minnesota statutes, which forbid disposing of waste in a floodplain or wetland, because the three wastewater ponds are in a wetland adjacent to the Minnesota River.

Finally, the court held that MPCA's order was not arbitrary and capricious and Gedney did not have previous reliance on MPCA's past permitting when the agency determined that the closure of the ponds and removal of waste in the floodplains of the Minnesota River was for the good of the environment. The court further held that MPCA's order for removal during the winter months was not arbitrary and capricious, even though there were logistical and feasibility difficulties in accessing the ponds during the winter. The court noted that MPCA first issued its order in June to allow for Gedney to "complete the work and take advantage of the warm summer months," that MPCA extended its deadline for the work to be conducted over many months during the winter, and that Gedney's own contractor stated definitively that "this work could be completed in the winter." Accordingly, the court found that there was no basis to reverse MPCA's closure order. ***In re Gedney Foods Co.***, No. A21-1156, 2022 Minn. App. Unpub. LEXIS 251 (4/25/2022).

ADMINISTRATIVE ACTION

EPA issues new PFAS advisories and rules. EPA recently unveiled long-anticipated action to address the chemical group known as per-and-polyfluoroalkyl substances (PFAS). Thousands of different PFAS have been used in industry and consumer products since the 1940s because of their useful properties. PFAS have received a lot of attention from the federal government and state environmental agencies in recent years due to concerns about their effects on the environment and human health. The problem is exacerbated by PFAS' propensity to accumulate and persist in the environment and the human body. The most widely used historically were perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) until they were voluntarily phased out for the most part by U.S. manufacturers. These two have been replaced in recent years with other PFAS like perfluorobutane sulfonic acid and its potassium salt (PFBS) and hexafluoropropylene oxide (HFPO) dimer acid

and its ammonium salt (GenX chemicals).

PFAS have been found throughout the environment in substances to which most people in the U.S. are exposed, like drinking water, soil, and food (mainly fish and dairy products). Most study results show exposure levels to be low, but some are concerningly high. Exposures over certain levels can lead to health problems such as cancer, decreased fertility, developmental effects or delays in children, reduced immunity, cardiovascular effects, liver damage, and risk of obesity. Studies have found harmful effects to animals as well.

The first of EPA's recent actions was the release of PFAS drinking water health advisories on 6/15/2022, consisting of interim advisories for PFOA and PFOS and final health advisories for PFBS and GenX chemicals. *See* 87 Fed. Reg. 36848 (6/21/2022). The advisories, which identify the concentration of chemicals in drinking water at or below which adverse health effects are not anticipated to occur, are: 0.004 parts per trillion (ppt) for PFOA, 0.02 ppt for PFOS, 10 ppt for GenX chemicals, and 2,000 ppt for PFBS.

The advisories are based on the latest scientific findings on the impacts of these PFAS and take into consideration lifetime exposure. EPA recommends that any detection of PFOA or PFOS in drinking water result in steps to reduce human exposure. For PFBS and GenX chemicals, the advisory levels are well above the level of detection. Detection above the advisory levels ideally would result in state agencies, tribes, drinking water utilities, and/or community leaders taking action to conduct additional monitoring, identify steps to reduce exposure, and inform the public.

Next, the EPA issued a final rule on 7/18/2022 updating the list of chemicals subject to toxic chemical release reporting under the Emergency Planning and Community-Right-to-Know Act (EPCRA) and the Pollution Prevention Act (PPA) to include five PFAS. *See* 87 Fed. Reg. 42651 (7/18/2022). This rule was issued without a public notice and comment period because EPA found good cause that that doing so would be unnecessary because the rulemaking was taken to comply with a mandate in the National Defense Authorization Act of 2020. This rule potentially affects companies that manufacture, process, or otherwise use any of the five PFAS on the list.

The third action by EPA was the 8/26/2022 release of a proposed rule to include PFOA and PFOS in the definition of "hazardous substance" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Doing so would establish a requirement to report releases of PFOA and PFOS over the reporting threshold of one pound. *See* 87 Fed. Reg. 54415 (9/6/2022). It would also allow the agency to order cleanups and recover costs without having to make the "imminent and substantial danger" finding that is required currently, and private parties could pursue other potentially responsible parties to contribute to the costs to investigate and remediate PFOA and PFOS.

The rule also raises questions about whether property owners could become liable under CERCLA for PFAS on their property even if they were there accumulating years prior to ownership from an unknown source or sources. Finally, the rule could have significant impacts on Superfund site cleanups because the addition of PFOA and PFOS may require changes in plans and/or additional work. In theory, this could even affect sites that have been closed without investigation and remediation of PFOA and PFOS, requiring sites to be reopened.

The proposed rule is subject to a 60-day comment period ending on 11/7/2022. Heavy commenting by industry is expected given that the Office of Management & Budget found the rule to be "economically significant" and the U.S. Chamber of Commerce estimated the rule would cost businesses as much as $800 million annually.

Next on EPA's list is the proposal for a National Primary Drinking Water Regulation with a maximum contaminant level for PFOA and PFOS, which EPA plans to release in the Fall of 2022. The final rule is expected by the end of 2023.


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Summary judgment; failure to specify damages; appeal dismissed for lack of jurisdiction. Where a plaintiff-employer prevailed on a motion for summary judgment, the district court awarded nominal damages and attorney's fees to the employer but did not specify the amount of nominal damages, and one defendant filed a notice of appeal, the 8th Circuit granted the employer's motion to dismiss the appeal for lack of jurisdiction, finding that the order was not a final judgment where the district court had yet to quantify damages. ***Perficient, Inc. v. Munley***, 43 F.4th 887 (8th Cir. 2022).

Failure to exercise discretion as abuse of discretion. On an appeal from the grant of the defendant's motion for judgment on the mandate following a prior remand by the 8th Circuit, the 8th Circuit found that the trial court's "failure to exercise discretion [was] an abuse of discretion," and again remanded the action to the district court. ***Petrone v. Werner Enters., Inc.***, 42 F.4th 962 (8th Cir. 2022).

Standing; multiple cases. The 8th Circuit affirmed Judge Magnuson's denial of a motion by neighboring parties to intervene in a long-running environmental dispute to challenge an amended consent decree, finding that the proposed intervenors lacked standing because they could not show that their injuries were addressed in the original consent decree or that the amended consent decree "significantly changed" their circumstances. ***United States v. Reilly Tar & Chem. Corp.***, 43 F.4th 849 (8th Cir. 2022).

While agreeing with Judge Brasel that the plaintiffs lacked state taxpayer and county resident standing to challenge contractual arrangements between the Anoka-Hennepin School District and its teachers' union, the 8th Circuit held that plaintiffs' allegation that they were school district taxpayers was sufficient to confer municipal taxpayer standing. ***Huizenga v. Indep. Sch. Dist. No. 11***, 44 F.4th ___ (8th Cir. 2022).

FCRA; multiple dismissals affirmed. An 8th Circuit panel affirmed two FCRA-related decisions by Judge Doty on the same day.

In the first decision, the 8th Circuit agreed with Judge Doty that the plaintiff had not asserted a viable FCRA claim

and that the plaintiff had "forfeited the ability to amend his pleadings" by failing to file a motion for leave to amend. ***Rydholm v. Equifax Info. Servs. LLC***, 44 F.4th ___ (8th Cir. 2002).

In the second decision, the panel affirmed an award of summary judgment on a FCRA claim where the plaintiff's claim of financial injury in a declaration were contradicted by her prior deposition testimony, and where her testimony regarding her alleged emotional distress was contradicted by her written admission that she had "not met with, or been examined by, any medical professional to treat or diagnose any condition caused by the events that form the basis of this litigation." ***Peterson v. Experian Info. Solutions***, ___ F.4th ___ (8th Cir. 2022).

■ **Attempt to raise new allegations in opposition to motion to dismiss rejected.** Where the defendant moved to dismiss an FCRA claim described by Judge Schiltz as "frivolous," the plaintiff amended his complaint raising a new FCRA theory, the defendant moved to dismiss the amended complaint, and the plaintiff responded to the motion by raising a third FCRA theory in opposition to the motion, Judge Schiltz found that that the amended complaint failed to state a claim, and that the plaintiff could not "keep throwing new theories up against the wall in the hope that one will stick." ***Towle v. TD Bank USA, N.A.***, 2022 WL 3448095 (D. Minn. 8/17/2022).

■ **L.R. 5.6(d); sealing; settlement discussions.** Granting defendants' motion to seal an email thread relating to settlement discussions that had been publicly filed by the plaintiff, Magistrate Judge Wright found that "the interest in encouraging frank settlement communications outweighs the public's interest in accessing the information at this stage of the case," and ordered that the document be sealed. ***Sleep Number Corp. v. Young***, 2022 WL 3045036 (D. Minn. 8/2/2022).

■ **28 U.S.C. §1927; sanctions; local counsel.** Having concluded that sanctions of almost $58,000 should be imposed against plaintiff's counsel personally, Judge Wright exempted plaintiff's local counsel from those sanctions, finding that local counsel did not "actively participate in vexatious conduct that the Court had found to be sanctionable," and that the "reputational consequences of... prior orders have provided adequate sanction" to local counsel. ***Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.***, 2022 WL 3701555 (D. Minn. 8/26/2022).

■ **Fed. R. Civ. P. 37; motion to compel granted in part; sanctions imposed.** Where government defendants produced redacted documents in violation of a previous court order, Magistrate Judge Leung ordered the production of unredacted documents and sanctioned government defendants $500 for their failure to comply with the previous order. ***Bakambia v. Schnell***, 2022 WL 3054296 (D. Minn. 8/3/2022).

■ **Motion for review of costs denied; deposition transcripts.** Rejecting a challenge to the clerk's award of costs for 13 deposition transcripts,

Judge Wright focused on whether each deposition "appeared reasonably necessary to the parties at the time it was taken." ***Nagel v. United Food & Comm. Workers Union, Local 653***, 2022 WL 2801179 (D. Minn. 7/18/2022).

■ **Diversity jurisdiction; no requirement to allege addresses of parties.** Denying the defendant's motion to dismiss for lack of diversity jurisdiction, Judge Brasel rejected the defendant's argument that the plaintiff was required to allege a specific address—rather than merely the citizenship—for each member of the defendant limited liability company. ***R.L. Mlazgar Assocs., Inc. v. Focal Point, LLC***, 2022 WL 3685388 (D. Minn. 8/25/2022).

■ **Fed. R. Civ. P. 37; failure to attend multiple depositions; sanctions imposed.** Where the corporate plaintiff's Fed. R. Civ. P. 30(b)(6) representative and another witness failed to appear at the noticed location for their remote depositions on multiple occasions, even after they were warned that their failure to appear would result in the exclusion of evidence, Magistrate Judge Leung prohibited them from "offering any evidence by way of testimony or affidavit for any purpose" pursuant to Fed. R. Civ. P. 37, and awarded the defendants the costs associated with arranging the latter depositions. ***Great Gulf Corp. v. Graham***, 2022 WL 2712880 (D. Minn. 7/13/2022).

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Immigration Law

JUDICIAL LAW

■ **Ineligible for asylum and withholding of removal on account of "particularly serious crime" conviction.** On 8/1/2022, the 8th Circuit Court of Appeals held the Board of Immigration Appeals and the immigration judge did not commit error when they concluded that the petitioner's Illinois conviction—dismembering a human body after the victim was already deceased—was a "particularly serious crime" rendering him ineligible for asylum and withholding of removal. "We conclude that the IJ and the BIA applied the correct legal framework in determining that Gutierrez-Vargas's conviction constituted a particularly serious crime." The court also held the petitioner failed to show it was more likely than not that he would be subject to torture by members of the Zetas gang upon his return to Mexico, thus making him ineligible for Convention Against Torture (CAT) relief. ***Gutierrez-Vargas v. Garland***, No. 21-3520, *slip op.* (8th Circuit, 8/1/2022). *https://ecf.ca8.uscourts.gov/opndir/22/08/213520P.pdf*

■ **Migrant protection protocols (MPP) ("Remain in Mexico"): An update.** As last noted in the August 2022 edition of *Bench & Bar of Minnesota*, the U.S. Supreme Court ruled 5-4 in *Biden, et al. v. Texas, et al.*, that the Biden administration's recission of Remain in Mexico was a valid action. Consequently, the Biden administration filed an unopposed motion to vacate the U.S. District Court's (Northern District of Texas) 8/13/2021 permanent injunction to reimplement the Migrant Protection Protocols (MPP). On 8/8/2022, U.S. District Court Judge Matthew J. Kacsmaryk granted the motion and accordingly vacated the permanent injunction. ***State of Texas, et al. v. Biden, et al.***, No. 2:21-CV-067-Z (N.D. Tex. 8/8/2022). *https://litigationtracker.justiceactioncenter.org/cases/texas-v-biden-tx-rmx-district-court/order-vacating-injunction-pdf*

■ **Public health and immigration: Update on Title 42 expulsions at the border.** As last noted in the May/June 2022 edition of *Bench & Bar of Minnesota*, the Biden administration was sued by several states in the Western District of Louisiana seeking to halt its plan to terminate the covid-related restrictions on immigration enacted by the Centers for Disease Control pursuant to its authority under Title 42, Section 265 of the U.S. Code. On 5/20/2022, U.S. District Court Judge Robert Summerhays issued a nationwide preliminary injunction enjoining enforcement of Biden administration's 4/1/2022 order anywhere within the United States. ***State of Louisiana, et al. v. Centers for Disease Control, et al.***, No. 6:22-cv-00885-RRS-CBW (W.D. La. 5/20/2022). *https://www.courthousenews.com/wp-content/uploads/2022/05/order-granting-injunction-against-ending-use-of-title-42.pdf*

On 5/23/2020, the Biden administration appealed Judge Summerhays's decision.

ADMINISTRATIVE ACTION

■ **USCIS issues its final rule on public charge ground of inadmissibility.** On 9/9/2022, U.S. Citizenship and Immigration Services (USCIS) issued its final rule providing guidance on assessing noncitizens' admissibility to the United States based on their likelihood of becoming a public charge. The rule goes into effect on 12/23/2022. **87 Fed. Reg. 55472-639** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-09-09/pdf/2022-18867.pdf*

■ **Extension of TPS for Venezuela.** On 9/8/2022, the Department of Homeland Security (DHS) announced that Secretary Alejandro Mayorkas had extended the designation of Venezuela for temporary protected status (TPS) for 18 months from 9/10/2022 through 3/10/2024. The 60-day re-registration period for existing TPS beneficiaries will run from 9/8/2022 through 11/7/2022. **87 Fed. Reg. 55024-32** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-09-08/pdf/2022-19527.pdf*

■ **More details about Liberian DED and the application process for employment authorization and travel authorization.** On 6/27/2022, President Biden announced in his "Memorandum on Extending and Expanding Eligibility for Deferred Enforced Departure for Liberians" the extension of Deferred Enforced Departure (DED) through 6/30/2024 for those Liberians with DED (as of 6/30/2022) as well as expansion of DED for Liberians who have been continuously present in the United States since 5/20/2017. On 9/6/2022, USCIS published a notice with further information about DED and the application process for DED-based employment authorization and travel authorization. **87 Fed. Reg. 54515-20** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-09-06/pdf/2022-19207.pdf*

■ **DHS issues its final rule on Deferred Action for Childhood Arrivals (DACA).** On 8/30/2022, the Department of Homeland Security (DHS) published a final rule implementing its 9/28/2021 proposed rule (with some amendments) seeking to establish regulations to "preserve and fortify" the Deferred Action for Childhood Arrivals (DACA) program. The rule will go into effect on 10/31/2022. **87 Fed. Reg.**

53152-300 (2022). *https://www.govinfo.gov/content/pkg/FR-2022-08-30/pdf/2022-18401.pdf*

Extension and redesignation of Syria for TPS. On 8/1/2022, the Department of Homeland Security (DHS) announced that Secretary Alejandro Mayorkas had extended the designation of Syria for temporary protected status (TPS) for 18 months from 10/1/2022 through 3/31/2024. The 60-day re-registration period for existing TPS beneficiaries will run from 8/1/2022 through 9/30/2022. DHS also announced that the registration period for new applicants under TPS redesignation will run from 8/1/2022 through 3/31/2024. **87 Fed. Reg. 46982-91** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-08-01/pdf/2022-16508.pdf*

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Intellectual Property
JUDICIAL LAW

Patent: Local counsel not subject to sanctions under §1927. Judge Wright recently granted in part Niazi Licensing Corporation's motion to vacate the court's prior order awarding attorneys' fees and costs under 35 U.S.C. §285 and 28 U.S.C. §1927. Niazi sued St. Jude Medical S.C., Inc. in November 2017 for patent infringement. The court later granted summary judgment of noninfringement. The court then rejected a claim for sanctions under Federal Rule of Civil Procedure 11 but awarded sanctions under §285 of the Patent Act and §1927 based on the court's inherent authority. On the record before it, the court found Niazi's attorneys were jointly and severally liable to satisfy the sanctions award because Niazi's local counsel's names appeared in the signature bloc of all of Niazi's submissions to the court, including the submissions that led the court to conclude that Niazi's local counsel had either participated in the preparation and presentation of the sanctionable conduct or reflected an intentional or reckless disregard of local counsel's duties to the court under Local Rule 83.5(d)(2)(A). The court then ordered St. Jude to file supplemental briefing as to the reasonable amount of attorneys' fees and costs that should be awarded.

Niazi moved to vacate the sanctions award, arguing in part that its local counsel should not be held liable in light of the narrow scope of their responsibilities as local counsel in this case. Based on the supplemented record, the court now finds the record undisputedly demonstrates that Niazi's local counsel did not actively participate in the vexatious conduct that the court has found to be sanctionable under Section 1927. The court further found the reputational consequences of the court's prior orders provided adequate sanction and deterrence as to Niazi's local counsel. Accordingly, Niazi's local counsel is not liable for the sanction imposed by this order pursuant to 28 U.S.C. §1927. ***Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.***, No. 17-cv-5096 (WMW/BRT), 2022 U.S. Dist. LEXIS 153734, (D. Minn. 8/26/2022).

Trademark: Noninfringement of unregistered trade dress. Following a six-day bench trial, Judge Nelson recently found defendant U.S. Merchants Financial Group, Inc. did not infringe plaintiff National Presto Industries, Inc.'s unregistered trade dress. Presto sold a parabolic electric heater under the brand name "HeatDish" to Costco Wholesale Corporation. At Costco's request, U.S. Merchants developed a parabolic electric heater under the brand name "The Heat Machine" and sold it at certain Costco locations in 2018-2019. Presto sued U.S. Merchants for various federal and state law claims, including infringement of an unregistered trade dress under the Lanham Act. To succeed on a claim for unregistered trade dress infringement under the Lanham Act, a plaintiff must demonstrate, by a preponderance of the evidence, that the claimed trade dress is distinctive or has secondary meaning and is nonfunctional, and that its imitation would likely cause confusion for consumers as to the source of the product. Based on the evidence presented, which did not include consumer surveys or customer testimony, the court found Presto had not proved its heater had established secondary meaning. Based on the evidence presented, the court found the HeatDish design was primarily functional. The court rejected the argument that the overall appearance was not functional because third-party heaters look different. The court's analysis looked at whether the shape and design, although serving useful purposes, are primarily adopted to distinguish it from competitors. The court found no evidence was presented to show the shape and the design were developed to distinguish it from competitors. Finally, the court found Presto had not presented evidence to establish a likelihood of confusion. Accordingly, the court concluded that Presto's trade dress infringement claim failed as a matter of law. ***Nat'l Presto Indus. v. U.S. Merchs. Fin. Grp., Inc.***, No. 18-cv-03321 (SRN/BRT), 2022 U.S. Dist. LEXIS 147797 (D. Minn. 8/18/2022).

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Tax Law
JUDICIAL LAW

Property tax: Matter of first impression. In a matter of first impression, the Supreme Court held that the tax-code provision of section 278.05, subdivision 3, governs and permits the county to use nonpublic data in "assessor's records" at trial, including its expert appraisal report. This dispute arose in the context of a property owner's challenge to the county's valuation of the Oracle building. The property owner moved pretrial to exclude the county's use of nonpublic data in its expert opinion assessing the value of comparable properties owned by third parties and the market value of the Oracle building. Applying *de novo* review to a "question [that] is an issue of statutory interpretation," the Court explained that the "answer turns on how statutes under two separate statutory schemes interact: (1) the Data Practices Act, Minnesota Statutes sections 13.01–.90 (2020); and (2) the statutes in the tax code governing property tax litigation, particularly Minnesota Statutes section 278.05 (2020)."

Finding that the tax code provision at issue was ambiguous, the Court used relevant statutory factors to discern the Legislature's intent. The Court reasoned that of "four persuasive indicia of legislative intent most support the County's interpretation that section 278.05, subd. 3 permits the County to use nonpublic data in assessor's records at trial." In a concurring opinion joined by Justice Anderson, Justice Thissen identified the central issue as "figuring out the proper balance between... the conflict of interest created by a county's dual roles as (1) the custodians of sensitive information of property owners necessitated by its duty to fairly assess taxes and (2)

a party to litigation over the assessments and other decisions it makes in individual cases." He warned that "[o]ur decision today does not settle the issue; if anything, it adds to the confusion." And he admonished the Legislature to "step up" to settle this conflict that "has been percolating for over 3 decades." ***G&I IX OIC LLC v. Cnty. of Hennepin***, ___N.W.2d ___, 2022 WL 3640918 (Minn. 8/24/2022).

Property tax: Failure to provide substantial evidence results in affirmance of assessment. Married taxpayers contested the assessed value of their Norman County property, alleging that the estimated market value exceeded the actual market value. While assessments are presumptively valid, a public hearing provides taxpayers with an opportunity to offer evidence and arguments to dispute the assessed value of the property. Minn. Stat. §271.06, subd. 6(a) (2020). The burden of proof falls to the taxpayer "to show that [the assessment] does not reflect the true market value of the property" to invalidate the assessment. *S. Minn. Beet Sugar Coop (SMBSC) v. Cnty. Of Renville* (737 N.W.2d 545, 557-58 (Minn. 2007)). While the court may consider either the sales or cost approach to valuation, a taxpayer must supply "substantial evidence" that an assessment is incorrect to overcome the presumptive validity of a real property assessment. *Harmon v. Comm'r of Revenue*, 894 N.W.2d 155, 159 (Minn. 2017) (citing *Conga Corp. v. Comm'r of Revenue*, 868 N.W.2d 41, 53 (Minn. 2015)).

In this dispute, Mr. Wagner offered no evidence, other than his own opinion testimony, that his property assessment "doesn't make any sense to me" and admitted he had no knowledge of what his property was worth. The county assessor provided testimony regarding the fair market value and agreed with Mr. Wagner's description of the property. The assessor further testified that her initial estimated market value, which was solely based on the exterior of the Wagner property, compared to the recent sale of a comparable property, was an incorrect valuation. An interior inspection was conducted on the Wagner property and the market value was reduced from $209,100 to $169,000. The Wagners did not cross-examine the county assessor nor provide rebuttal testimony. The county moved for involuntary dismissal on the basis that the Wagners had not established a *prima facie* case. The court denied the county's motion but sustained the assessment on the grounds that the Wagners did not submit sufficient evidence to overcome the presumptive validity of the estimated market value of the subject property. ***Timothy Emil Wagner and Polly Wagner, Petitioners, v. County of Norman, Respt.***, 54-CV-20-99, 2022 WL 4015332 (Minn. T.C. 9/2/2022).

Property tax: Valuation "as speculative as the assessment on which it is based." A taxpayer contested the assessed value of eight diverse-size, adjacent parcels of vacant land in Forest Lake, Minnesota. Two assessment dates were at issue; the taxpayer's appraisal valued the subject property at $515,000, while the county's appraisal valued the subject property at $2.6 million.

The subject property was a combination of wetlands and developable uplands, oddly shaped, with varying portions zoned either commercial or residential. The value was assessed by both parties using the sales comparison approach, but the appraisals had no comparable sales in common. The parties disagreed about adjusting comparables for costs associated with installing water utilities and sewer, an access road, and for irregularly shaped developable upland. Appraiser conclusion differences mostly stemmed from differing assumptions regarding the amount a developer would be willing to pay for the property and the amount a developer would need to invest to prepare the property for sale. The appraisers agreed that, as of both assessment dates, the subject property was likely to be developed as a mixed commercial and residential development, but the appraisals disagreed as to the timing of that development. Further, neither appraiser prepared a subdivision development analysis.

The court found that the subject property's highest and best use as of both assessment dates as for immediate development as a mixed commercial and residential development. The court then addressed the appraisers' disagreement about how much of the subject property was developable upland as well as the appraisers' "markedly different" adjustments to three factors in their sales comparables: utility availability, road access, and shape. The court adopted the taxpayer's upland estimate and thoroughly discussed the treatment of utility, road access, and shape issues before turning to a sales comparison approach. The court determined an indicated value of $749, 641, which the court then distributed across the properties.

Although the court used the sales approach and resolved the dispute, the court cautioned that its use of the sales approach "does not indicate a belief either that the sales comparison approach is particularly strong in this case, or that the court's valuation based on that approach is particularly reliable." The court "would have preferred to rely—in part or in whole—on a subdivision development analysis" and "consider[s] [its] final valuation to be as speculative as the evidence on which it was based." ***Smith v. Cnty of Washington***, 82-CV-17-1819, 2022 WL 3694898 (Minn. T.C. 8/25/2022).

Offer-in-compromise: No jurisdiction to direct IRS to process and consider offer. Plaintiffs Richard and Bonnie Dillon are nearing retirement and owe over $150,000 in income tax debt but have only about $180,000 in their combined retirement accounts. The Dillons do not challenge the liability of the tax debt. Given their economic situation, however, they submitted an offer-in-compromise. The couple acknowledged that collection in full could be achieved, but asserted that it would cause them economic hardship. The IRS rejected the Dillons' offer-in-compromise, writing, "[w]e have determined that your offer was submitted solely to hinder or delay our collection actions which are expected to collect significantly more than the amount you have offered."

The Dillons then brought suit in federal district court, "seeking 'issuance of a writ or order' directing the Internal Revenue Service to process and consider an offer-in-compromise...." The Dillons initially named three defendants, the commissioner of revenue and two individual IRS employees. The Dillons later assented to the dismissal of the individual defendants.

The IRS moved to dismiss the complaint for lack of subject-matter jurisdiction, asserting that the United States has not waived its sovereign immunity from suit in a way that would allow this case to proceed. The Dillons identified three statutes they assert confer federal subject-matter jurisdiction over the case: (1) the general federal-question statute, (2) the mandamus

statute, and (3) the Administrative Procedure Act (APA). The court considered and rejected each claimed assertion of subject-matter jurisdiction. The court dismissed the case, without prejudice, for lack of subject-matter jurisdiction because, the court held, the United States has not waived its sovereign immunity with respect to the Dillons' claims in this case. ***Dillon v. United States***, No. 22CV00126EC-TJFD, 2022 WL 3229854 (D. Minn. 8/10/2022).

■ **$75,000 deduction for home mortgage interest disallowed for failure to substantiate.** Robert Pressman purchased a home in Southampton in 2012; that home was his primary residence until 2017. Subject to a few qualifications, taxpayers are permitted to deduct the interest they pay on their home mortgage debt. One of those qualifications is that the taxpayer must "substantiate" the payment. When Mr. Pressman attempted to deduct the home mortgage interest on his Southampton home, the commissioner challenged the deduction, asserting that Pressman had not adequately substantiated the interest payments.

The court agreed with the commissioner. Explaining that Pressman "provided limited documentation to show that he paid the claimed $75,000 of home mortgage interest," the court held that Pressman was not entitled to the deduction. The evidence Pressman supplied, which included emails from Putnam Bridge (the mortgage holder) and a handwritten Form 1098, Mortgage Interest Statement, was insufficient. "While the emails from Putnam Bridge state that interest was 'accrued' and 'charged,' the emails do not reference actual payments." The court also observed that "neither party could confirm that the handwritten Form 1098, Mortgage Interest Statement, was actually filed by the creditor, Putnam Bridge." Because the court could not determine when payments were made, from what accounts payments were made, and what amounts were paid, the court did not have a reasonable basis to estimate the amount of expenses. The court upheld the accuracy-related penalties. ***Pressman v. Comm'r***, No. 16084-19S, 2022 WL 3714615 (T.C. 8/29/2022).

■ **Settlement agreement taxable: Recitation in settlement agreement that compensation is for "personal injuries" insufficient to demonstrate payment was for "physical injuries" so as to exclude from income.** Thomas Dern worked for over 20 years as a commissioned salesperson. In 2015, he suffered a heart attack unrelated to work. Although he returned to the job, he was ultimately terminated. Mr. Dern asserted the termination was because of his health condition and that the termination was illegal. He sued his former employer asserting 10 causes of action, including disability discrimination, intentional infliction of emotional distress, and breach of contract. The parties entered a settlement agreement in which the former employer agreed to pay $550,000 "to compensate [Mr. Dern] for alleged personal injuries, costs, penalties, and all other damages and claims." The agreement provided that it was "for and on account of [Mr. Dern's] claims alleging compensatory damages, emotional injuries, penalties, and punitive damages." Mr. Dern received from his attorney about $325,000 of the settlement proceeds (attorney's fees and costs were retained by the attorney). Despite Mr. Dern's physical injury and the language in the settlement agreement, the court rejected Mr. Dern's *pro se* argument that the settlement was "on account of physical injury" and thus not subject to income tax. ***Dern v. Comm'r***, T.C.M. (RIA) 2022-090 (T.C. 2022).

■ **Tax court issues additional findings of fact and decision following remand in long running Medtronic transfer pricing dispute.** The tax court issued a decision for the taxpayer in part and for the Service in part in this billion-dollar dispute. The 8th Circuit remanded after concluding that the tax court's factual findings were insufficient to evaluate the tax court's determination that a particular agreement was an appropriate comparable uncontrolled transaction (CUT) because the agreement involved similar intangible property and had similar circumstances regarding licensing. The tax court identified the "issues for [its] consideration... [as] (1) whether the CUT method is the best method for determining the arm's-length rate, (2) what the proper royalty rates are for the devices and the leads, and (3) what the proper royalty rate is for devices sold pursuant to the Swiss supply agreement. In an extensive opinion, the tax court first held that the CUT method was not the best method for determining arm's-length royalty rates for licenses. It further held that allocations of income and deductions among Medtronic and its subsidiaries and affiliates, as made in commissioner of internal revenue's comparable profits method (CPM) analysis, were arbitrary, capricious, and unreasonable and, thus, CPM analysis was not best method for determining arm's-length royalty rates for licenses. Finally, the court determined the proper royalty rate for the specific devices: With certain adjustments, Medtronic's proposed unspecified method was the best method to determine arm's-length royalty rate of 48.8 percent to apply in connection with determining appropriate allocations among the corporate taxpayer and its subsidiaries and affiliates. ***Medtronic, Inc. & Consol. Subsidiaries v. Comm'r***, T.C.M. (RIA) 2022-084 (T.C. 2022).


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Mitchell Hamline Alumni Association names three newest winners

BY TOM WEBER

A tribal general counsel working to raise the profile of Native people and their sovereignty, a Florida judge who teaches about baseball and the law, and a defense attorney working for justice reform are being honored with this year's alumni awards from the Mitchell Hamline Alumni Association.

Jessie Stomski '08 is the Distinguished Alumni Award recipient for her work in Indian Country. **Judge Lou Schiff '80** is recipient of the Outstanding Alumni Award for his years as an adjunct faculty member, teaching a popular summer course on baseball and the law. **Nadine Graves '17** is being honored with the Recent Alumni Award for her work to reform the criminal justice system in Minnesota and beyond.

Jessie Stomski

An enrolled citizen of the Muscogee (Creek) Nation, Stomski is general counsel for the Prairie Island Indian Community. She was at the forefront of an effort this spring to raise awareness of the dearth of Native student-athletes in the NCAA.

She is also a lobbyist for the tribe and helped win legislative approval in 2020 for a first-of-its kind "net zero" energy project for the tribe and has worked on Indian gaming matters, as well. Stomski also was a star high school basketball player in Minnesota, a college athlete in Wisconsin, and also played professionally.

Judge Lou Schiff

An adjunct professor since 2008, Broward County Judge Schiff travels from Florida every summer to teach "Law and the Business of Baseball" in collaboration with the minor league St. Paul Saints and, previously, the Minnesota Twins.

Schiff co-authored "Baseball and the Law: Cases and Materials," the first baseball law casebook written specifically for law school use, which won a Society for American Baseball Research award in 2017.

Nadine Graves

Graves joined the Legal Rights Center this year, after several years as both a defense attorney and public defender in Hennepin County.

She has represented parents in child protection matters; residents facing evictions; and hundreds of people charged with criminal cases. She first worked for the public defender's office while attending Mitchell Hamline.

The daughter of Liberian immigrants, Graves was born and raised in Minnesota and is a voice for racial equity and justice reform. She has testified in support of state policies including Ban the Box and expungement reform. She sits on Attorney General Keith Ellison's panel that reviews cases for people believed to be innocent, and she is a past board chair of We Are All Criminals, a non-profit that challenges perceptions of what it means to be "criminal."

PEOPLE + PRACTICE

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

Vanessa Johnson has joined Fredrikson & Byron with the firm's energy, environment law, energy regulation & permitting, and energy litigation groups.


Steve D. Pattee and **Eric C. Arch** have joined Tewksbury & Kerfeld, PA. Pattee brings more than 25 years of experience in a variety of areas, including insurance defense and coverage, construction, trucking, product liability, agribusiness, and federal crop insurance litigation. Arch practices in the areas of personal injury, insurance defense, consumer protection, and general litigation.

Jeffrey A. Wencl joined Beaumier Trogdon Orman Hurd and Viegas, PLLP in Duluth as an associate attorney. Wencl advises in the areas of estate planning, elder law, real estate, and bankruptcy.

Kevin Dunlevy established Dunlevy Law PA. Formerly a shareholder at Beisel & Dunlevy, PA, Dunlevy concentrates on real estate litigation, real estate transactions , and creditor remedies and is an MSBA-Certified Real Property Specialist.


Patterson Thuente IP announced that **Michael Gale-Butto** and **Richard Sutton** have joined the firm. Gale-Butto joins the IP litigation team and Sutton, a registered patent attorney, joins the patent prosecution team.

Maria Christu has joined Latitude as director of legal recruiting and placement in the company's Minneapolis office. Before joining Latitude, she served for 18 years as chief legal officer and senior vice president of advocacy at Children's Minnesota.


Moss & Barnett announced that attorneys **Gabrielle J. Martone** and **Aaron D. Quinby** have joined the firm. Martone is a member of the business law and real estate teams and Quinby is a member of the real estate finance, real estate, and business law teams.


Meagher + Geer announced that **Anthony Joyce** and **Thomas Joyce** have joined the firm. Anthony joins the employment practice group and Thomas joins the anti-fraud counseling and litigation practice group. Both are graduates of the University of Oklahoma College of Law.


Gov. Walz appointed **Jean Burdorf** and **John Lucas** as district court judges in Minnesota's 4th Judicial District. These seats will be chambered in Minneapolis in Hennepin County. Burdorf is the managing attorney of the special litigation division at the Hennepin County Attorney's Office. She will be replacing Hon. Kathryn L. Quaintance. Lucas is a solo practitioner and assistant public defender in the Fourth Judicial District Public Defender's Office. He will be replacing Hon. Philip C. Carruthers.

Heidi Torvik joined Lommen Abdo. Torvik is experienced in litigation surrounding medical malpractice, motor vehicle accidents, products liability, wrongful death, and dram shop.

Kristen Larson has joined the business and transactions department and consumer financial services group of Ballard Spahr as of counsel.

In memoriam

WILLIAM M. BEADIE of St. Paul died at age 82 on August 21, 2022. He graduated from the University of Minnesota Law School in 1965 and in 1966 joined Moore, Costello, and Hart, where he continued to practice law for 42 years.

EDWARD J. DRISCOLL JR., age 85 of Mendota Heights, passed on August 21, 2022. Driscoll practiced law at the Larkin Hoffman Law firm for 40 years and was the law firm president from 1986 to 1991.

CARLA CHRISTINE KJELLBERG age 65, of Minneapolis died August 28, 2022. She was a family law attorney.

JENNIFER QUICK died on September 14, 2022. She served as an attorney in the Steele County Court defending the rights of children in custody cases.

GARY THOMAS HILDEBRAND died on September 18, 2022 at age 74. Hildebrand was an attorney by training but spent most of his career as an entrepreneur.

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