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NOVEMBER 2019
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ON THE COVER

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WHEN RULES GET IN THE WAY OF REASON
One judge's view of legislative interpretation
By Justice Paul Thissen

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Our Vote, Our Voice, Our Choice

A year from now, we will have the opportunity, and the obligation, to cast our vote in the 2020 elections. They will no doubt be hard fought, perhaps even seriously wrought. During this coming year, we will also mark the 100th year since women won the right to vote. Seems like a good time to punch the "pause button" and reflect on this right and responsibility.

Voting is a non-partisan issue. President Reagan called it "the crown jewel of American liberties." President Ford praised the vote as "the very foundation of our American system." LBJ described it as "the most powerful instrument ever devised by man [no doubt, with women] for breaking down injustice;" and Dr. King called it "Civil Right No. 1." Our Supreme Court has reminded us that our right to vote is not only "fundamental" but "precious," and "the essence of a democratic society," the undermining of which would render "illusory" even the most basic of the rest of our rights. It is also a fragile right, indeed.

In the beginning, the Founders were a bit squeamish about the vote. They didn't contemplate (or trust) the direct election of the president and other officials. Instead, they created the Electoral College—creating the possibility that the Electoral College might trump the popular vote (as happened in 1876 and 2016, not to mention whatever it is that happened in 2000). Native Americans couldn't vote; nor could enslaved people; nor could women, whether enslaved or free. Voting was the right of white, likely propertied, men.

TOM NELSON is a partner at Stinson LLP (formerly Leonard, Street and Deinard). He is a past president of the Hennepin County Bar Association.

After the Civil War, as part of the "Second Founding," our nation ended slavery (the 13th Amendment), confirmed citizenship and its accompanying rights for those born in the United States or "naturalized" (the 14th Amendment), and granted to citizens the right to vote (the 15th Amendment). They were majestic steps, but they were also incomplete. Still no right to vote for women, or for others then deemed "the other."

Unfortunately, being "given" those rights did not secure the ability to exercise them. The concerted effort to deconstruct Reconstruction came to life. Lynchings (including the June 15, 1920 lynching of three young men in our own Duluth) were not only vicious murders but terroristic messages. Basically: "Don't you dare exercise your rights." Poll taxes and literacy tests abounded, with seemingly limitless ingenuity: "How many bubbles in that bar of soap?" and "How many drops in that bucket of water?"

Still, our nation persisted. During the 1890s, the secret ballot took hold. By 1913, the 17th Amendment required the direct election of U.S. Senators. By 1920, women won the right to vote, via the 19th Amendment. In 1924, the Indian Citizenship Act was passed, including the right to vote for Native Americans. In 1943, the Magnuson Act permitted Chinese immigrants to become naturalized citizens, and thus to vote. And then the '60s and '70s came along—with the 23rd Amendment giving D.C. citizens the right to vote in presidential elections; the 24th Amendment eliminating poll taxes; the Voting Rights Act prohibiting literacy tests (and, it seemed, securing the right to vote for all, for all time, as long as it was allowed to renew); and the 26th Amendment, granting the right to vote to those who were 18 years old (being old enough to go to war called for the right to vote, including the right to vote for or against those who would send them to war in the first place).

All of which reflects a strong and hopeful trend, worthy of our nation's founding and core character. Chief Justice Roberts has said that "things have changed dramatically," and that "our Nation has made great strides" since the 1965 Voting Rights Act, in particular. But Justice Ginsburg's cautionary note is also important; we must be alert to the risk of "throwing away your umbrella in a rainstorm because you are not getting wet." Our fragile right to vote is still vulnerable to subtle, sophisticated, "second generation" barriers: redistricting, gerrymandering, polling place relocations or scheduling manipulations, intricate or unrealistic Voter ID or other registration or "residency" requirements, the occasional purging of voter rolls, hackable voting machines, or even printing too-few ballots. It is also vulnerable to anonymous, highly-funded, and clever injections of chaos, whether by foreign nations, tricksters, or carefully veiled operatives, whose motives range from mischievous to malignant. Vigilance is vital.

One more thought; and yes, it's connected. This month we mark Veteran's Day, first called Armistice Day (the 11th hour of the 11th day of the 11th month, 101 years ago now).

Sometimes we catch the eye of a uniformed service member, or a vet proudly sporting a patriotic cap, including many lawyers amongst us, and say: "Thank you for your service." Do you wonder what they wonder about, as they nod graciously?

They served to protect and preserve our rights. The least we can do is exercise those rights. If we don't exercise the right to vote, the heartbeat of our democracy will wither. If we don't guard against its diminishment, the lamp of our liberty, and the rule of law itself, will dim and then fade. So, of course: Vote. But do more. Keep your eyes and ears open, and your antennae up, to detect efforts to suppress the vote. Shine a light on those efforts. Do something to protect and strengthen our sacred right to vote. On that we should be united. ▲

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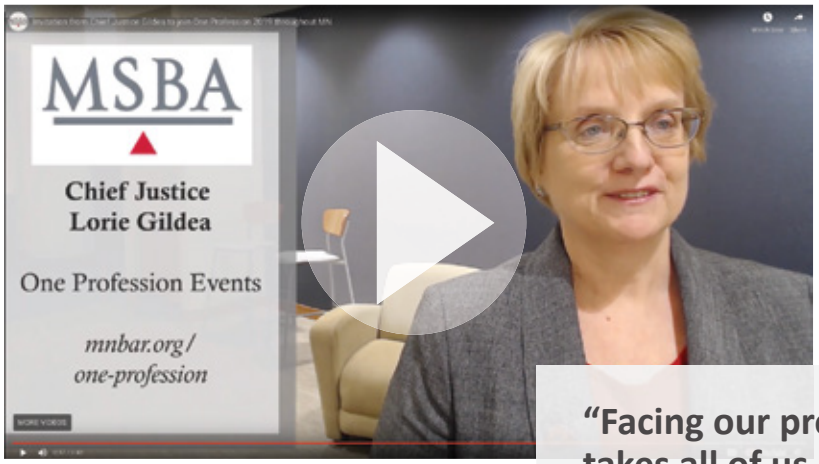

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Welcome new lawyers!

On October 25 MSBA officials and staff were on hand to welcome 401 new Minnesota lawyers to the profession during admission ceremonies at the State Capitol sponsored by the Minnesota Supreme Court and the MSBA. MSBA President Tom Nelson spoke at the event, and we have more photos online—visit Bench & Bar Online at *www.mnbar.org/bench-bar* to have a look.

Clarification

Following the publication of Janel Dressen's article on the Lund v. Lund shareholder litigation ("Don't Be the Next Lunds & Byerlys," May/June 2019), Steve Wells and Jaime Stilson (the Dorsey & Whitney attorneys who represented the Lund defendants) contacted Bench & Bar to request a clarification regarding certain claims made by Dressen in the article, found in the following passage: "One of the most fascinating, yet tragic, facts about the Lunds case is that the parties did not engage in a single settlement discussion after Kim commenced litigation. In business litigation, that is virtually unheard of. However, because Kim Lund was requesting liquidity and defendants were solely focused on keeping Kim Lund captive as a shareholder, the parties were at a standstill." Based on follow-up discussions about the article, Bench & Bar wishes to clarify the following points. First, information provided to Bench & Bar by Wells and Stilson indicates that the defendants did convey a previously rejected settlement offer following the commencement of the litigation, and offered to continue negotiating with respect to the settlement amount. Second, with regard to Dressen's claim that the defendants sought to keep "Kim Lund captive as a shareholder," Wells and Stilson point out that the Hennepin County District Court wrote in its buyout Order that defendant "Tres [Lund] has done nothing to 'lock Kim in as a Lunds shareholder'," though the Court of Appeals noted in its opinion that defendants' position throughout the litigation "has been that Kim [Lund] cannot liquidate her interests because her siblings do not consent." Third, the MSBA Probate and Trust Law Section filed an amicus brief in support of the Lund defendants with the Court of Appeals, relating to one issue in the appeal involving payment of attorneys' fees and costs for two defendants who served as trustees. This was a section-only position that was not adopted by the MSBA Assembly.

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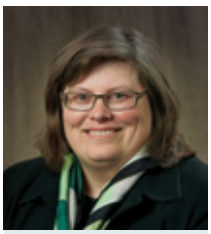
Withdrawing as counsel (ethically)

How to ethically withdraw as counsel is the third most frequently asked question on our advisory opinion/ethics hotline. Annually, hundreds of Minnesota attorneys seek advice on whether and how they may terminate a particular lawyer-client relationship. This Office has written several columns on the subject,[1] but the topic's importance makes it worth revisiting periodically given the care required when the lawyer-client relationship ends prior to its planned conclusion.

Circumstances allowing withdrawal

"A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion."[2] What "completion" means will depend on the agreement of the parties and the type of matter involved. If court rules allow it, a lawyer may limit the scope of representation to specific, agreed-upon services—provided the limitation is reasonable and the client has provided informed consent.[3] Lawyers also must ethically communicate the scope of the representation before or within a reasonable time of commencing representation, preferably in writing.[4] Compliance with the ethics rules ensures that both lawyer and client are on the same page regarding the services to be provided, and what completion of the representation will involve.



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The ethics rules contemplate numerous situations where continued representation is impermissible and withdrawal is mandatory, as well as several circumstances where withdrawal is permissible prior to completing the representation. Let's start with when you *must* withdraw. There are three scenarios: (1) the representation will result in a violation of the Rules of Professional Conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged.[5] Each is generally self-explanatory. Indeed, while it should go without saying that you must withdraw when you have been discharged, more lawyers than you would think have been disciplined for failing to do so.

Beyond mandatory withdrawal, Rule 1.16(b) establishes a robust list of reasons why a lawyer may permissibly withdraw. A lawyer may withdraw without a specific reason if it can be accomplished without material adverse effect on the interests of the client.[6] Withdrawal is permissible if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.[7] (Note, however, that other rules may make withdrawal in this circumstance mandatory, because you cannot assist a client in conduct you know to be criminal or fraudulent.[8]) Similarly, you may withdraw if the client has used your services to perpetrate a crime or fraud, or if the client insists upon taking action that you consider repugnant or with which you have a fundamental disagreement.[9] You may withdraw if the client fails substantially to fulfill an obligation to you regarding your services and has been given reasonable warning that you will withdraw unless the obligation is fulfilled. You may withdraw if the representation will result in an unreasonable financial burden on you, or your representation has been rendered unreasonably difficult by the client.[10] Finally, an attorney may withdraw if "other good cause for withdrawal exists."[11] Given the breadth of these provisions, the question is generally not whether a permissible basis for withdrawal exists, but rather whether timing and the applicable procedural rules will support withdrawal in a particular case, irrespective of the ethical basis for withdrawal.

Where to start

If you are representing a client in a litigated matter, the first consideration is the procedural rules governing withdrawal of the tribunal in the matter. I cannot stress this enough. Even in my short time as director, I have spoken on the ethics line to scores of attorneys who are not familiar with the procedural requirements of the court before which the relevant matter is pending. As Rule 1.16(c), MRPC provides, "A lawyer must comply with the applicable law requiring notice to or permission of a tribunal when terminating a representation." This is true even if withdrawal is ethically mandatory. And don't forget that until you effectively withdraw, you are counsel and owe your client compliance with all other ethical rules pending authorized withdrawal. While a listing of the procedural rules governing withdrawal are beyond the scope of this article, it is typically true that each tribunal has a general rule of practice or local rule governing the procedure and circumstances under which withdrawal may be accomplished.[12] Please do not forget the procedural rules relating to withdrawal as you focus on the ethical rules.

What to say

If you are counsel of record in a matter requiring a motion and order to effectuate withdrawal, what you may say to support that motion is also guided by the ethics rules. Rule 1.6, MRPC, protects confidential information relating to the representation. As I say whenever I have the chance, our duty of confidentiality is broader than simply protecting attorney-client privileged communications; it covers "all information relating to the representation of a client" unless an exception for disclosure exists. Such a broad confidentiality obligation can make it difficult to provide sufficient information to a court to establish good cause, and there is no exception in Rule 1.6(b) that allows disclosure of information specifically to effectuate withdrawal.

Some exceptions can apply. For example, the client may give informed consent to any disclosures.[13] Information can also be disclosed if it is not protected by the attorney-client privilege, the cli-

ent has not requested the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client.[14] This, however, might still be a small universe of information.

Beyond the foregoing, our advice is generally that the lawyer must start with general—and, of course, true—statements supporting withdrawal, such as that there has been a breakdown in the attorney-client relationship, or (as reflected in the comments) professional considerations require termination of the relationship.[15] Another potential disclosure exception is that "the lawyer reasonably believes the disclosure is necessary to comply with other law or court order."[16] If you are ordered to do so, after communications with your client under Rule 1.4, you can disclose such information as reasonably necessary to comply with such an order. I know this is generally an unsatisfying answer, but the truth is that competing interests present a real dilemma if your client will not authorize disclosure of information. This is a line to walk carefully.

What else to do

In all circumstances, and whether or not the matter is in litigation, there are additional considerations set forth in Rule 1.16 that must be satisfied upon termination of representation. The main requirement is that upon termination, "a lawyer shall take steps to the extent reasonably practicable to protect the client's interest."[17] The steps to take may vary according to the facts of the representation, but a non-exhaustive list includes: (1) giving reasonable notice to the client; (2) allowing time for employment of other counsel; (3) returning the client's file; and (4) refunding any advance payment of fees or expenses that have not been earned or incurred.[18] Please keep in mind your ethical obligation to take steps to protect the client's interest as well when you are disclosing confidential information under an exception. Requesting to do so in camera, under seal, or *ex parte*—depending on the nature of the information that may be disclosed—is often important to protect the client's interest, and is a "reasonably practicable" step available to you.

Conclusion

Withdrawal as counsel is generally ethically available but requires thoughtful consideration of timing and procedural requirements. I know that this can be frustrating for lawyers, but the rules are designed to protect even the most undeserving of clients. Because of the care that must be taken, I'm glad so many lawyers take advantage of the ethics line to obtain advice when they are considering termination of an attorney-client relationship. Please give us a call at 651-296-3952 if you need assistance in complying with your ethical duties when ending a lawyer-client relationship. ▲

Notes

[1] *See, e.g.,* Martin A. Cole, "Withdrawing: Must I? May I?," Bench & Bar (November 2014); Kenneth L. Jorgensen, "Ethical and Procedural Withdrawal Requirements, Minnesota Lawyer (11/4/2002); Edward J. Cleary, "Withdrawing as Counsel, " Bench & Bar (November 1999), all available at *www.lprb.mncourts.gov/articles*.

[2] Rule 1.16, Minnesota Rules of Professional Conduct (MRPC), Comment [1].

[3] Rule 1.2(c), MRPC.

[4] Rule 1.5(b), MRPC.

[5] Rule 1.16(a)(1)-(3), MRPC.

[6] Rule 1.16(b)(1), MRPC.

[7] Rule 1.16(b)(2), MRPC.

[8] Rule 1.2(d), MRPC; Rule 1.16(a)(1), MRPC.

[9] Rule 1.16(b)(3), MRPC; Rule 1.16(b)(4), MRPC.

[10] Rule 1.16(b)(5), MRPC; Rule 1.16(b)(6), MRPC.

[11] Rule 1.16(b)(7), MRPC.

[12] *See, e.g.,* Minn. Gen. R. Prac. 105 (2019) ("After a lawyer has appeared for a party in any action, withdrawal will be effective only if written notice of withdrawal is served on all parties who have appeared, or their lawyers if represented by counsel, and is filed with the court administrator if any other document in the action has been filed. The notice of withdrawal shall include the address, email address, if known, and phone number where the party can be served or notified of matters relating to the action. Withdrawal of counsel does not create any right to continuance of any scheduled trial or hearing."); Minn. Gen. R. Prac. 703 (2019) ("Once a lawyer has filed a certificate of representation [in a criminal case], that lawyer cannot withdraw from the case until all proceedings have been completed, except upon written order of the court pursuant to written motion, or upon written substitution of counsel approved by the court *ex parte.*"); D. Minn. LR 83.7 (2019) (allowing withdrawal with notice of substitution and only within proscribed timelines or upon motion for good cause shown).

[13] Rule 1.6(b)(1), MRPC.

[14] Rule 1.6(b)(2), MRPC.

[15] Rule 1.16, MRPC, Comment [3].

[16] Rule 1.6(b)(9), MRPC.

[17] Rule 1.16(d), MRPC.

[18] Id.

Proportionality and digital evidence

In 2015, amendments made to Federal Rule of Civil Procedure 26 affected issues of establishing proportionality during discovery. These changes were made largely to counteract the increasing incidence of e-discovery fishing expeditions and their burden on discovery procedures. The rule states, "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[1] Proportionality is a major consideration during the course of discovery, as the court guards against overly expensive and/or burdensome productions in relation to what is at stake in the case. In this article, I will refer specifically to e-discovery and digital forensic productions.

In keeping with the spirit of protecting against expansive fishing expeditions, any opposing party must provide evidence to demonstrate why an e-discovery or digital forensic investigation would be disproportionate due to its cost. If an estimate for work is provided to the court, an explanation of cost should be provided—particularly if the cost is steep. Unfortunately, I've encountered an increasing number of experts who deliberately inflate would-be costs to support a party's claims of undue burden. Many litigants are treating Rule 26 as an excuse to object to any and every discovery request. It has become a useful tool to manipulate the course of discovery; furthermore, when "tech talk" is involved, it can often be difficult to argue with an e-discovery vendor and get the facts.

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In a recent case on which I was consulted, opposing counsel objected to restoring a backup tape that was relevant to the major claims being argued. Their objection centered on the purported expense of the restoration; their e-discovery vendor supported their proportionality argument with the claim that restoration of this single tape would cost $35 million! While I don't know whether this vendor ended up providing evidence for this estimate, I think it is safe to say that a project of this type would not come with such a hefty price tag.

To keep working relationships with clients, e-discovery vendors will often agree to provide inflated estimates and confusing explanations to the court. Improper collection and preservation techniques can also contribute to the cost, making the duty to preserve electronic evidence all the more critical. The Sedona Conference Commentary on Proportionality in Electronic Discovery states, "In assessing whether a particular discovery request or requirement is unduly burdensome or expensive, a court should consider the extent to which the claimed burden and expense grow out of the responding party's own action or inaction."[2] Basically, the ease of conducting an e-discovery investigation often depends on the data storage practices of the client, who is therefore responsible for ensuring that their proportionality argument isn't based on their own mishandling of relevant evidence.

To help avoid the confusion and BS that can surround arguments about proportionality and e-discovery, the judicial authority to appoint special masters can be the most important factor in obtaining accurate, unbiased information. In my experience, this action can be the catalyst for parties coming to terms with discovery protocols, as it tends to disable the powerful and frequently mystifying "tech talk" of hired guns. ▲

Notes

[1] *https://www.law.cornell.edu/rules/frcp/rule_26*

[2] *https://thesedonaconference.org/sites/default/files/publications/155-168%20WG%20Proportionality.pdf*

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* Based on median hourly rate; Blue Hill Research study "Building a Case for Law Practice Management"

iRecorded a private conversation: Call recording and the law

In the days of landlines, before iPhone was a household name, proving what was said during a private phone conversation generally came down to "he said, she said" and who was ultimately more believable. Nowadays, apps such as TapeACall Pro, Call Recorder-Int Call, Call Recorder for iPhone, Call Recorder Lite, and Call Recorder Unlimited enable almost anyone with a smartphone to record private telephone conversations with the mere click of a button. While this may sound like an attractive option—especially when a client's case hinges on the contents of a private conversation, and the client just so happens to have a recording of such conversation—it is vital to brush up on the applicable wiretapping law(s) before using any telephone call recording for a case (especially since violations of wiretapping laws can result in hefty fines and prison time).

RACHEL D. ZAIGER is an associate at Dady & Gardner, P.A., where she represents franchisees, dealers, and distributors throughout the United States in their relationships with franchisors, manufacturers, and suppliers.

At its most basic level, "wiretapping laws" are laws that govern telephone call recording. The U.S. government has passed a federal wiretapping law, and most states have passed similar laws as well. The federal law, "Title III of the Omnibus Crime Control and Safe Streets Act," provides the following as it relates to the recording of *private* telephone conversations among *private* individuals:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.[1]

The federal wiretapping law is known as a "one-party consent" law. If a client is a party to the conversation, the client—and the client alone—can lawfully be the party to consent to the recording, without notifying the other party to the conversation.

Minnesota's wiretapping law tracks the federal statute and similarly requires one-party consent:

> It is not unlawful under this chapter for a person not acting under color of law to intercept a wire, electronic, or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state.[2]

Nonetheless, the requisite amount of consent is not uniform among the states. Indeed, some states, like Pennsylvania and California, require the consent of *all* parties to the conversation prior to recording. States with this requirement are known as "two-party consent" states or "all-party consent" states. Thus, when a private individual client in a one-party consent state (like Minnesota) records a telephone conversation with another private individual in a two-party consent state (like Pennsylvania or California), the situation warrants preemption, choice of law, ethical, and evidentiary considerations.

The law concerning how and when the federal wiretapping law comes into play is pretty well settled. The federal wiretapping law will only control if the state's wiretapping law is less strict than the federal law, or if the state does not have a wiretapping law at all.[3] The choice of law inquiry is not nearly as well-settled. While some courts apply the wiretapping law of the state where the recording took place, other courts

apply the wiretapping law of the state where the recorded individual was located.[4] Minnesota courts have not yet directly opined on this particular issue.

Although this gray area may lend itself to colorful and novel arguments, the risk of subjecting the client to potential criminal liability should be weighed against the desire to win the client's current case by introducing a recorded telephone conversation. A conversation can almost always be introduced through an evidentiary vehicle other than an exact recording—one that poses no risk of criminal liability.

Amidst the uncertainty, a couple of things are clear. First, telephone call recording has become more widespread and generally accepted in society over the past few years, with some individuals even expecting all their conversations to be recorded. Second, violations of wiretapping laws have hefty penalties, so it is important that a thorough analysis of preemption, choice of law, ethical, and sometimes evidentiary issues be considered before using a recorded telephone conversation for a client's case. Remember, even though a recording may win the client's case, it may also subject the client to criminal liability. Finally, the majority of state wiretapping laws only require one-party consent (see table), so more likely than not, a private individual client can lawfully surreptitiously record a telephone conversation so long as that individual is a party to the conversation. When in doubt, though, the best practice is to obtain consent of all parties to a telephone conversation prior to recording. That way, the client will not be in any danger of criminal liability. ▲

Notes

[1] 18 U.S.C. §2511, subd. 2(d).

[2] Minn. Stat. §626A.02, subd. 2(d).

[3] *See, e.g., Roberts v. Americable Int'l Inc.*, 883 F. Supp. 499 (E.D. Cal. 1995).

[4] *Compare Broughal v. First Wachovia Corp.*, 14 Pa. D. & C. 4th 525 (Pa. Com. Pl. 1992), *with Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006).

State wiretapping laws: Consent requirements

STATE	ONE-PARTY CONSENT	TWO-PARTY CONSENT	STATUTE
ALABAMA	X		Ala. Code §13A-11-30
ALASKA	X		Alaska Stat. §42.20.310
ARIZONA	X		Ariz. Rev. Stat. §13-3005
ARKANSAS	X		Ark. Code §5-60-120
CALIFORNIA		X	Cal. Penal Code §632
COLORADO	X		Colo. Rev. Stat. §18-9-303
CONNECTICUT	X	X	Conn. Gen. Stat. §53a-187; Conn. Gen. Stat. §52-570d *[Note: Criminal law requires one-party consent, civil law requires two-party consent]*
DELAWARE	X		Del. Code tit. 11, §2402
DISTRICT OF COLUMBIA	X		D.C. Code §23-542
FLORIDA		X	Fla. Stat. §934.03
GEORGIA	X		Ga. Code §16-11-66
HAWAII	X		Haw. Rev. Stat. §803-42
IDAHO	X		Idaho Code §18-6702
ILLINOIS		X	720 Ill Comp. Stat. 5/14-2
INDIANA	X		Ind. Code §35-31.5-2-176
IOWA	X		Iowa Code §808B.1
KANSAS	X		Kan. Stat. Ann. §21-6101
KENTUCKY	X		Ky. Rev. Stat. Ann. §526.010
LOUISIANA	X		La. Rev. Stat. Ann. §15:1303
MAINE	X		Me. Stat. tit. 15, §709
MARYLAND		X	Md. Code Ann., Cts. & Jud. Proc. §10-402
MASSACHUSETTS		X	Mass. Gen. Laws ch. 272, §99
MICHIGAN		X	Mich. Comp. Laws § 750.539c *[Note: The Michigan Court of Appeals has interpreted the statute to only require one-party consent if you are a party to the conversation. See Sullivan v. Gray, 324 N.W.2d 58 (Mich. Ct. App. 1982)]*
MINNESOTA	X		Minn. Stat. §626A.02
MISSISSIPPI	X		Miss. Code Ann. §41-29-531
MISSOURI	X		Mo. Rev. Stat. §542.402
MONTANA		X	Mont. Code Ann. §45-8-213
NEBRASKA	X		Neb. Rev. Stat. §86-290
NEVADA	X		Nev. Rev. Stat. §200.620 *[Note: The Nevada Supreme Court held that all-parties must consent to telephone call recording. See Lane v. Allstate Ins. Co., 969 P.2d 938 (Nev. 1998)]*
NEW HAMPSHIRE		X	N.H. Rev. Stat. Ann. §570-A:2
NEW JERSEY	X		N.J. Stat. Ann. §2A:156A-4
NEW MEXICO	X		N.M. Stat. Ann. §30-12-1
NEW YORK	X		N.Y. Penal Laws §§250.00
NORTH CAROLINA	X		N.C. Gen. Stat. §15A-287
NORTH DAKOTA	X		N.D. Cent. Code §12.1-15-02
OHIO	X		Ohio Rev. Code Ann. §2933.52
OKLAHOMA	X		Okla. Stat. tit. 13, §176.4
OREGON	X		Or. Rev. Stat. Ann. §165.540
PENNSYLVANIA		X	18 Pa. Cons. Stat. §5704
RHODE ISLAND	X		R.I. Gen. Laws §11-35-21
SOUTH CAROLINA	X		S.C. Code Ann. §17-30-30
SOUTH DAKOTA	X		S.D. Codified Laws §23A-35A-20
TENNESSEE	X		Tenn. Code Ann. §39-13-601
TEXAS	X		Tex. Penal Code Ann. §16.02
UTAH	X		Utah Code Ann. §77-23a-4
VERMONT			No statute enacted
VIRGINIA	X		Va. Code Ann. §19.2-62
WASHINGTON		X	Wash. Rev. Code §9.73.030
WEST VIRGINIA	X		W. Va. Code §62-1D-3
WISCONSIN	X		Wis. Stat. Ann. §968.31
WYOMING	X		Wyo. Stat. Ann. §7-3-702

'I wanted to help people like my mother'

Why did you go to law school?

I've always admired my mother for her strength and resilience. She taught me that education is the one thing that can never be taken away from you. I was about 10 years old and I remember sitting in the car with my mom after a difficult parenting time exchange and asking her what lawyers do and why she needed one. Growing up I had witnessed so much pain and suffering, and in that moment, I couldn't comprehend why my mom was not getting the legal help she needed. I decided then and there that I wanted to help people like my mother. Going into law school, I thought that meant practicing in the area of family law or child advocacy, but I quickly realized it meant becoming an immigration attorney because that was the moment I realized that the bigger problem was my mother's misunderstanding of her rights as an immigrant.

NYSHA CORNELIUS places a special focus on helping clients facing deportation and removal—immigration trials, deportation appeals, and other complex immigration matters. Her work in immigration law also touches heavily on the areas of family and criminal law. She proudly defends the rights of individuals in all three practice areas. Nysha's experience has enabled her to provide powerful legal guidance in and out of the courtroom. In addition to her employment at Paschal Nwokocha & Chukwu Law Office, she volunteers and works pro bono with the Volunteer Lawyers Network (VLN) of Minnesota. She was recognized as VLN's 2019 Volunteer of the Year.

NYSHA@PASCHAL-LAW.COM

You have an immigration-focused practice. How has it changed over the course of the immigration crackdown of the past few years?

It has kept me on my toes. Almost every day, there is a new court ruling, legal memo, or practice advisory that is issued. In the past I didn't worry as much about my client having multiple forms of relief. Now I am always looking for plan B and plan C in case immigration policy changes overnight, which it often does. The drastic changes in immigration policy in the last few years has forced many attorneys, including myself, to be on defense at all times. It constantly feels like we are shooting at a moving target.

I have spent a lot more time in recent years educating our clients and the community about immigrants' rights and how policy changes may affect them. I have to explain that nothing is guaranteed, and the process takes years. For those who don't practice immigration law, it comes as a shock that we have merits hearings set for the end of 2021 on judges' dockets who have yet to appear at the bench.

Additionally, as immigration attorneys, we are exposed to so much trauma. I can't put into words how emotionally challenging it is to explain to someone, after hearing their traumatic experience, that there is no easy legal fix.

Tell us a little about your volunteer work through VLN and others.

Volunteering with the VLN has been the most rewarding experience for me. I began working with the organization as soon as I became a licensed attorney in 2013. I started by giving phone advice for two hours every week and then expanded to doing in-person consultations at Park Avenue Church every month. To this day, I continue my volunteer work with the VLN and take on full representation pro bono cases as often as my schedule allows.

Last March I had an incredibly eye-opening experience volunteering for a week at the southern border in Tijuana, Mexico, through an organization called Al Otro Lado. I would be happy to share my experience in depth with anyone who wants to know more.

This work is very important to me because I can relate to many of the adversities that underrepresented individuals face and my volunteer work allows me to provide legal services to those who may not have otherwise received legal assistance.

How is bar association membership useful to you in your career?

The most valuable aspect of my membership is the ability to have a leadership role in the Immigration Section. I currently hold the position of vice chair, and through my position I have the opportunity to get to know other attorneys, not only in my practice area, but in other practice areas as well.

What do you like to do when you're not working?

I love new experiences, whether it is checking out a new brewery, restaurant, or traveling somewhere I haven't been before. For example, I am going to Tokyo, Japan in November with my husband and in January my office is taking a trip to Oaxaca, Mexico. Most of my weekends aren't as extravagant and are usually spent at dog-friendly breweries/events with our dog, Lady Bird, or at home with our cat, Lexi. ▲

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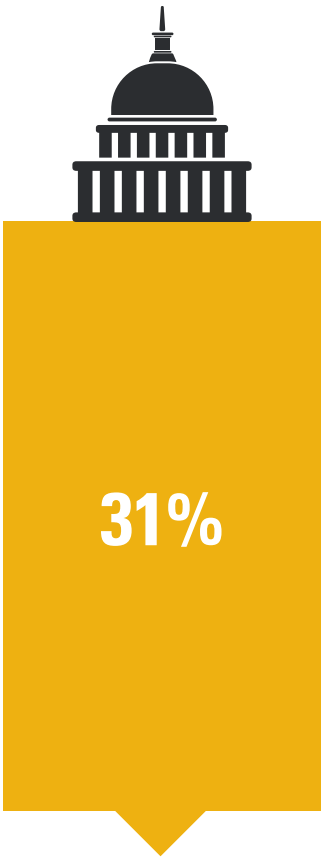
WHERE DOES LEGAL AID FUNDING COME FROM?

BY **SHERRI KNUTH, MSBA access to justice director.** SKNUTH@MNBARS.ORG
DREW SCHAFFER, Mid-Minnesota Legal Aid executive director. DSCHAFFER@MYLEGALAID.ORG



LEGISLATURE

85% of the state appropriation is distributed to six civil legal aid programs that collectively provide legal representation throughout the entire state based on the geographical distribution of people living in poverty in Minnesota's 87 counties and tribal lands. The remaining 15% consists of discretionary grants focused on direct client service. In the 2019 legislative session, statewide funding of civil legal aid increased by $1 million per year for Fiscal Years 2020 and 2021, a 7.29% increase over FY 2018-19. Even with the increase, inflation-adjusted funding for civil legal services remains lower than it was in FY 2008-09.

FEDERAL

The Legal Services Corporation (LSC) provides grants to civil legal aid organizations across the United States, including $4.7 million to five Minnesota civil legal aid providers. Although the president wants to eliminate LSC funding completely, bipartisan congressional support has led to modest increases in funding since 2017. Civil legal aid organizations also receive support through federal programs focused on assistance to veterans, older Americans, people with disabilities, and victims of crimes, including domestic violence. In Minnesota, civil legal aid funding through these federal programs is more than twice that received through LSC.

FOUNDATIONS & CORPORATIONS

Civil legal aid programs receive funding for special projects and general operations from foundations and corporations that value the impact civil legal aid has in reducing poverty, stabilizing families, and ensuring access to justice for vulnerable Minnesotans. But as United Way—traditionally a major funding source—adapts to new trends in philanthropic giving, its funding of civil legal aid has declined dramatically. Civil legal aid programs have not been able to generate new revenue from other sources to make up the United Way support they have lost over the last decade.

OTHER STATE OR LOCAL GOVERNMENT

Some Minnesota state agencies provide funding for legal aid projects related to their mission and programs. Tribal governments, county and city governments also provide some financial resources, although these resources vary significantly among civil legal aid organizations across the state.

* AN ADDITIONAL 4% OF LEAGAL AID FUNDING COMES FROM SOURCES DESIGNATED ONLY "OTHER"

"The legal community can play a strong role in leveling the playing field for Minnesotans needing legal help. I encourage all members of the legal community to join me in supporting civil legal aid statewide."

– DYAN EBERT, MSBA PRESIDENT-ELECT

8%

MN JUDICIAL BRANCH

Funding derives from IOLTA revenue—which is allocated to civil legal aid grants—and a portion of the lawyer registration fee. IOLTA revenue dropped sharply beginning in 2008, and by 2015 reserves were depleted. Interest rates increased in 2018, resulting in the first increase in IOLTA revenue in a decade. The portion of the lawyer registration fee dedicated to civil legal services provides an important stable funding source for grants.

7%

INDIVIDUALS & FIRMS

As lawyers, we know that equal justice under the law is a right, not a privilege. Almost a quarter of Minnesota's population lives in poverty[1] and is unable to afford legal help to understand and safeguard their basic legal rights.

Legal aid makes a real and lasting impact on the lives of those they serve, stabilizing families and preventing legal problems from escalating. Consider 12-year-old Katrina. A custody agreement between her parents provided that Katrina would have regular visits with her father. One week before a scheduled visit, Katrina told her mother that her father had abused her on past visits. Katrina's mother called a legal aid attorney who had previously helped her. The attorney filed for an order for protection, and the judge prohibited Katrina's father from contacting her for two years, giving her mother and legal aid staff time to get a new custody order. "The lawyers were such a blessing," Katrina's mother said. "Without them, none of this would ever have gone through."

Legal aid funding is also a good investment. The results of a recently completed Minnesota evaluation shows that "for people experiencing poverty, dealing with legal issues effectively can mean the difference between a downward spiral into deeper poverty and a pathway to a better life."[2] In fact, for every $1 invested in Legal Aid in our state, $3.94 in economic benefits are returned to individuals and the community.

But legal aid cannot serve all the people who need their help. In fact, resource-strapped Minnesota legal aid programs are forced to turn away 60 percent of income-eligible clients. Even though legal aid programs cobble together dollars from multiple sources by applying for grants, testifying at the Legislature, coordinating with county boards, collaborating with the Judicial Branch to streamline infrastructure, and reaching out to the legal community, the shortfall of investment in civil legal aid prevents us from achieving the foundational American promise of equal justice for all. You and I can help change that.

"As lawyers, we understand the importance of fairness in the justice system," says Dyan Ebert, MSBA president-elect and past board member of the Minnesota State Bar Foundation. "The legal community can play a strong role in leveling the playing field for Minnesotans needing legal help. I encourage all members of the legal community to join me in supporting civil legal aid statewide."

NOTES

[1] Based on 200% of the federal poverty guidelines—the highest income guideline for any of Minnesota's civil legal aid programs. Some programs serve people with income up to 125% of poverty guidelines.

[2] *http://mncourts.gov/mncourtsgov/media/scao_library/documents/Community-Development-and-Legal-Assistance-Final-Evaluation-Report.pdf*

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SHERRY BRUCKNER

LEGAL SERVICES OF NORTHWEST MINNESOTA DONOR

A graduate of Hamline University School of Law, Sherry Ann Bruckner dedicated the first 20 years of her career to public interest law. In her work with HOME Line, Appalachian Research and Defense Fund of Kentucky (AppalReD), and Legal Services of Northwest Minnesota (LSNM), Bruckner advocated for thousands of clients in consumer, education, employment, family, housing, public benefits, and senior legal matters. She now serves as a mediator and conflict resolution skills trainer through Healing Truth LLC, based in Alexandria, Minnesota. Bruckner also holds an adjunct faculty position at Mitchell Hamline School of Law.

Appreciating the challenge and importance of civil legal aid work motivates her to be a Partner in Justice (financial supporter) of LSNM. In her words, "From advising a senior facing wrongful garnishment to filing federal court action to protect important housing rights—and the thousands of critical family and other cases—legal aid makes a very real difference every single day. With only one legal aid attorney for every 6,000 people eligible in northwest Minnesota, the advocates and support staff give generously of their time, talent, passion and compassion to bring justice to rural Minnesota. Even with double the staff size, there will still be a justice gap. However, if we all do our part by giving what we can, we will bridge the gap and bring hope and justice to more people."

SARAH DAVIS

LOAN REPAYMENT ASSISTANCE PROGRAM OF MINNESOTA DONOR

Sarah Davis is a new donor to the Loan Repayment Assistance Program of Minnesota (LRAP). LRAP Minnesota helps reduce the education debt burden experienced by dedicated public interest lawyers who represent low-income clients seeking legal services to secure essential needs like food, shelter, and safety, and fundamental rights like equal access to justice.

Davis said she donates to LRAP for a simple reason: "I can't think of a more critical program to support effective advocacy for people whose circumstances would not otherwise allow them to have an attorney."

LRAP helped Davis make her student loan payments until her loans were forgiven last year through Public Service Loan Forgiveness. Without the burden of student loan debt, Sarah can commit to a career helping at-risk youth at the Legal Rights Center. Her philanthropic support for LRAP is helping to sustain the work of other attorneys in careers they love.

TIM GOODMAN

MINNESOTA JUSTICE FOUNDATION DONOR

Tim Goodman and his wife, Anne, have provided financial support to the Minnesota Justice Foundation for 25 years. Tim joined the MJF Board of Directors as a 1L at the University of Minnesota Law School. "When I started law school," he recalls, "I learned about MJF's work and decided to become involved. I saw firsthand how important fundraising is to MJF's work. Connecting with individuals and convincing them to donate to MJF means a law student can receive a small stipend to work at a legal aid clinic; it funds the salary for an MJF staff attorney who arranges pro bono placements and reaches out to students; and it allows law students and others to train high school students on street law.

"Connecting with individuals also means sharing MJF's story, its mission, and its work. Hearing the law student experiences, learning the difference they make, and knowing that this work can lead to a lifetime commitment to pro bono service has led me to donate to MJF year after year."

Goodman has backed up his enthusiastic support for the mission of MJF by serving the board in a variety of leadership positions, including treasurer, vice-president, and president. He has also put his legal expertise to work for MJF by drafting several benefits plans for the organization.

SEVEN MINNESOTA ATTORNEYS WHO DONATE TO LEGAL AID CAUSES

LAURA COOPER

MID-MINNESOTA LEGAL AID DONOR

In 1975, the women's caucus at the University of Minnesota Law School asked for a course in welfare law. Professor Laura Cooper was asked to teach the course—and to start a welfare law clinic. Lacking experience, she asked Mid-Minnesota Legal Aid (then the Legal Aid Society of Minneapolis) to allow her to serve as counsel and coach her through some cases. That was the beginning of a long relationship that has been invaluable to legal aid.

Cooper served on Legal Aid's board of directors for 23 years, including a term as president. She is a founding member of the Fund for Legal Aid and was Legal Aid's honoree at the 27th Annual Law Day Testimonial Dinner in 2008. She and her husband, Ben, are deliberate about their philanthropy, choosing organizations where they know the leadership, understand the strategy, and are familiar with the financial situation. In addition to traditional support as a Centennial Circle donor, Cooper has been sponsoring University of Minnesota Law students to work with Legal Aid as summer clerks since 2005.

"Legal Aid has always had inspiring, dedicated, talented lawyers who can efficiently make a difference," says Cooper. "The organization strategically plans to do the most good on multiple fronts. As lawyers, we are in a wonderful position to recognize the good that lawyering can do, and how critical it is to improving lives of low-income people. Legal Aid is there all of the time, doing the work other lawyers care about but often can't do themselves."

KATHY KIMMEL & BOB ATKINSON

TUBMAN DONORS

Domestic abuse is a tragic reality for many families. In 1998, three organizations created the Safety Project, a program now housed within Tubman, in which volunteer lawyers provide legal representation to domestic abuse victims who are seeking orders for protection for themselves and their family members. One of the founding organizations was the former law firm of Rider Bennett Egan & Arundel, where Kathy Kimmel was working as a litigation attorney. Since the creation of the Safety Project, she has volunteered there as a pro bono attorney, providing legal representation to clients facing profound need and vulnerability. Recognizing that the success of the Safety Project requires the work of many people as well as financial resources, Kimmel has also made financial gifts to help ensure that victims of domestic violence have advocates who can help them in their time of need.

Kimmel has been friends with Bob Atkinson since their first days at law school in 1993. Recently she was joined by Bob and his wife, Barb, at the 2019 Tubman gala. At the event, the Atkinsons made a generous contribution to Tubman. Reflecting on their gift, they noted, "We feel good about supporting Tubman because we saw first-hand that the refuge Tubman offers to families experiencing trauma translates to hope, perseverance, success, and heart-felt joy."

KATE DEVRIES SMITH

VOLUNTEER LAWYERS NETWORK DONOR

Kate DeVries Smith has been a part of Volunteer Lawyers Network for 20 years. Though she works in patents as a founding partner of Pauly, DeVries Smith & Deffner, L.L.C., her pro bono passion is housing law—helping tenants to clear eviction records and hold landlords accountable for repairs.

DeVries Smith is one of VLN's biggest financial supporters. In addition to her generous personal gifts, her firm is also a loyal VLN donor. She also frequently recruits friends, family, and colleagues to join her in giving, and brings fundraising opportunities to VLN via her professional memberships, including the Minnesota Intellectual Property Law Association.

"As a board member and a volunteer," she says, "I get to see the impact of VLN's work on clients and volunteer attorneys, and it is impressive! By harnessing the power of volunteers, VLN provides a huge value to the community using my contribution. Also, my profession is law. I don't feel good about the fact that the legal system is expensive and difficult to access to enforce basic rights and meet basic needs. I want to take significant steps to improve access to justice."

ALL PARKS ALLIANCE FOR CHANGE FIGHTS THE GOOD FIGHT

By Athena Hollins and Amanda Idinge

MEET ONE OF THE 2019 MINNESOTA STATE BAR FOUNDATION GRANT RECIPIENTS

There are 900 manufactured housing parks — "trailer parks" — in Minnesota, in almost all 87 counties. Around 180,000-200,000 Minnesotans live in manufactured housing. Leases in parks work very differently than tenancy in apartment buildings. Park residency is not at-will. If a resident's lease ends, they can decline to sign a new lease and continue to rent the lot their manufactured home sits on until the park owner has one (of eight) predetermined "good causes" to evict.

"There are people who are being led to believe the eviction process is just the park owner telling you they want you out," says Dave Anderson, the executive director of All Parks Alliance for Change. What many residents don't know is that only the courts can evict them. This is where All Parks Alliance for Change (APAC) — a Minnesota State Bar Foundation grant recipient since 2005 — comes in. APAC hosts workshops and meetings, assists attorneys in their cases involving manufactured home residents, and lobbies local and state governments.

APAC was founded in 1980 under the name Anoka People's Alliance for Change. It was conceived as a means of assisting low- to moderate-income residents in Anoka County with a broad set of concerns such as access to healthcare, wage discrepancies, and more. After a few years, it became clear that there was little attention paid to people residing in manufactured home parks. When housing policy changes were proposed at the local or state level, these changes did not apply to people who rented or owned mobile or manufactured homes. In fact, mobile home parks were often specifically excluded in these policies.

APAC worked to establish foundational legal protections, collaborating with legislators to establish rules requiring park owners to provide leases to residents and offering protections against retaliation. "Park residents should have the basic rights that other renters have," says Anderson.

The organization adopted its current name, All Parks Alliance for Change, and went metro-wide in 1989, moving its office from Fridley to St. Paul. In 1994, they changed the bylaws and mission statement to reflect their broader representation of residents throughout the state.

In the late '80s, parks began closing, and organizations started putting pressure on communities catering to low-income residents. Because of this, APAC added another layer to their organization, responding to the redevelopment of parks and pushing for a specific closure process. Before they tackled this issue, a park owner could close a park simply by giving everyone in the park a 60-day eviction notice.

To volunteer with APAC, or for further information, please contact Dave Anderson, executive director, at dave@allparksallianceforchange.org.

APAC lobbied for a policy that provides relocation benefits, and as of 2019, parks must provide 12 months minimum notice if they are closing; make contributions to the cost of relocation; indicate where in a 50-mile radius a manufactured home could move and what the rental costs are; and offer a right of first refusal, which includes an option for residents to purchase the park.

One attempt to exercise the right of first refusal that received a lot of media attention involved the community of Lowry Grove in St. Anthony Village. As it turned out, the state law was riddled with unforeseen issues, including many vague provisions that made the law hard to use as well as loopholes that allowed park owners to avoid complying with the law. Even though residents came up with the required $6 million asking price within the stipulated 45 days, a judge found that when the park owner sold to a developer instead, the residents had no recourse. All Parks Alliance for Change backed a top-to-bottom cleanup of that law, which now allows the purchase right to work as intended.

APAC has also moved beyond its defensive posture, advocating for proactive, concrete measures to ensure that residents are being protected in the same way as owners or renters of other kinds of residential property. Today APAC has multiple ongoing projects, many of which involve legal rights and quality of life issues. They are currently putting together their agenda for the 2020 legislative session, including proposals to use alternative dispute resolution to allow residents to better address operational problems, and to recognize residents as property owners entitled to receive notifications about health and safety code violations that now only go to the landowner.

Recently there has been an increase in the consolidation of ownership of manufactured home parks in national chains, one of which is Havenpark Capital, a new company that has received negative press over leases they've attempted to foist on residents. "These big chains are either ignorant of or ignoring the state law," said Anderson.

APAC relies on volunteer attorneys for information and representation of its clients. When a client calls APAC's hotline, they are assisted in the self-advocacy process through conciliation court, referred to an attorney, or referred to HOME Line, Housing Justice Center, or Legal Aid. ▲

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Understanding pet custody law

Trends in animal law jurisprudence

By Barbara J. Gislason

It is well-known that about 67 percent of U.S. households have pets, and expenditures on them exceed $72 billion per year.[1] Following Hurricane Katrina, according to one poll, 93 percent of pet owners claimed they would risk their lives for their pets.[2] Consider these developments against the backdrop of the 1897 landmark decision of *Sentell v. New Orleans Carrollton Railroad Co.*[3] According to *Sentell*, dogs, in particular, were "quasi-property" unless subdued or dead. Now that more than a century has passed and rabid dogs are rare, there are many indications that dogs are beginning to enter the family unit. This can be better understood by seeing how animal-related cases in unrelated subject matters, both within a state and across the country, affect each other. This is both a sophisticated and a complex analysis.

A predicate to the emerging view that animals are not merely property is the passage of animal cruelty laws. All states, as well as Washington D.C., Puerto Rico, and the Virgin Islands, have passed at least one type of animal cruelty felony law.[4] The earliest states to pass such laws were Massachusetts in 1804, Oklahoma in 1887, Rhode Island in 1896, and Michigan in 1931. The last state to enact a law of this type was South Dakota in 2014.[5] In a similar vein, a growing list of states have passed laws that enable a judge to include pets in orders for protection. According to the Animal Legal and Historical Center, 32 states had passed these laws as of 2017.[6]

At the turn of the last century, estate planning lawyers—aware that people could not bequeath their "property to property," and that this limitation was concerning for their clients—brought this problem to the attention of what is now called the Uniform Law Commission (ULC). The ULC created two types of uniform pet trust laws that served as the backbone for pet trust laws passed in all 50 states. These laws are indicative of the fact that companion animals, at the very least, are distinguishable from other types of property.

On another front, the seeds were planted for setting criteria that should be applied in pet custody disputes, including what negative behaviors the judiciary and legislators would tolerate.[7] Against all odds, dicta from an unpublished decision in Minnesota, *Pratt v. Pratt*,[8] gained national attention. In that decision, the appellate court, while declining to render its decision based upon the best interests of two St. Bernards, nevertheless speculated on what the court would do if mistreatment of a companion animal was involved. The court also pointed out that the trial court had broad discretion in rendering an award if there was an "acceptable basis in fact."[9]

Courts have wanted to take the best interests of animals into account as far back as 1944, when the seminal decision in *Akers v. Sellers*[10] was issued. In that often-cited case, the court complained that on appeal, it lacked an adequate record to decide whether the lower court had rendered a "just and wise decision." The court further stated, "Whether the interests and desires of the dog, in such a situation, should be the polar star pointing the way to a just and wise decision, or whether the matter should be determined on the brutal and unfeeling basis of legal title, is a problem concerning which we express no opinion." More so, the court went on to opine that it would be a tragedy to award the Boston Bull Terrier to one party when the affection and loyalty of the dog lay with another.

In a post-decree cat custody dispute, *Raymond v. Lachman*,[11] the New York court in 1999 issued a decision using best interest criteria for a cat named Lovey. There, the court recognized that not only could an owner love their cat, but that the cat could love them back. Ultimately, the court awarded Lovey to the party who had the house where Lovey had long lived, and where the cat prospered.

A case from New Jersey, *Houseman v. Dare*,[12] exemplifies how the courts, dealing with legal issues of first impression, have looked to a variety of well-reasoned animal law decisions across states as well as subject areas. Following their breakup, an unmarried couple effectively had shared custody of their Pug, Dexter, until one of them decided to keep the dog. The appellate court found that the underlying oral shared caregiving agreement into which the parties had entered following separation was enforceable. The higher court explored the contours of laws affecting companion animals and opened the door for the trial judge to render a joint physical custody decision, which the court effectively did.

Another influential case where the court undertook a sweeping analysis of national jurisprudence was New York's

Travis v. Murray.[13] There, in a dispute about a Miniature Dachshund named Joey, the court reasoned that the best standard to use for rendering a decision could be included within an over-arching "best interests for all" standard.

As these decisions reflect, a lawyer handling these cases is best served by understanding the broader jurisprudence of animal law first, followed by learning how cases specifically affecting companion animals are differentiated. It is also wise to monitor what is happening in the state of Oregon, where forward-thinking jurists are looking at the subject of property in new ways in animal cruelty cases.[14]

In 2016 and 2017, respectively, Alaska[15] and Illinois passed statutes explicitly allowing the courts to utilize a type of best interest standard, or well-being standard, for a companion animal as a factor in the courts' decision-making.[16] Since then, a law in a similar vein was passed in California in 2019.[17] The California statute also enables courts to implement shared custody agreements. It will be interesting to find out how these laws affect outcomes not only in pet custody awards in these three states, but also in disputes outside of family court jurisdiction and across state lines.

Pet custody disputes, outside of family court, can arise when two people cohabitate, between family relatives, and in instances where animals are lost, found, fostered, or relinquished, to name a few. These cases typically arise as replevin actions or the more modern cease-and-desist actions.

Pet custody disputes constitute an area where pioneering efforts matter. It is important to develop pet-friendly presumptions and best interest and wellness-based decision-making criteria. Enlightened judges may help further craft groundbreaking principles. We are just learning, too, how to resolve these types of disputes in Alternative Dispute Resolution processes.

The national trend regarding companion animals is to treat them as family members despite their "property" status, although, upon a closer look, judges seem to interpret evidence of donor intent or evidence of abandonment in such a way as to promote a common sense outcome, as envisioned in *Travis v. Murray*,[18] even if the utilization of this more kindly analysis is never expressed. Accordingly, courts are looking beyond the purchase price and financial support of the animal and inviting evidence about the care of an animal, bonds of affection, and mistreatment of the animal, if not the animal's best interests or well-being. ▲

Notes

[1] *National Pet Owners Survey*, American Pet Products Association; the report is not publicly available, but key results are summarized at "Pet ownership, spending going strong," American Veterinary Medical Association News (5/8/2019) *https://www.avma.org/News/JAVMANews/Pages/190601d.aspx*

[2] *2004 U.S. Companion Animal Owner Survey*, Faunalytics, *https://faunalytics.org/american-animal-hospital-association-2004-pet-owner-survey/* (last visited 4/17/2019).

[3] 166 U.S. 698, 703 (1897). The Minnesota Supreme Court, in *Saw v. City of Lino Lakes*, 823 N.W.2d 627 (Minn. 2012), relied upon this old analysis crafted when dogs were often rabid.

[4] A good example of how the animal cruelty statute is applied in Minnesota is *State v. Bell*, 2014 WL 5314457, No. A14-0137, 10/20/2014.

[5] *South Dakota Passes Law to Make Animal Cruelty a Felony*, DVM 360 Magazine, *http://veterinarynews.dvm360.com/south-dakota-passes-law-make-animal-cruelty-felony* (last visited 4/15/2019).

[6] Rebecca F. Wisch, *Domestic Violence and Pets: List of States that Include Pets in Protection Orders*, Animal Legal & Historical Center, *https://www.animallaw.info/article/domestic-violence-and-pets-list-states-include-pets-protection-orders* (last visited 4/15/2019).

[7] It should be noted that the indicia of ownership, as illustrated in Minn. Stat. §347.22, is broader in cases involving tort liability.

[8] N.W.2d, 1988 WL 120251 (Minn. App.).

[9] In *Boehm v. Glick*, WL 1320609, A18-0941 Minn. Ct. App. 3/25/2019, the court awarded a cat to a party based upon a personal property, rather than a best interests, standard.

[10] 114 Ind. App. 660, 54 N.E.2d 779 (Ind. App. 1944).

[11] 695 N.Y.S.2d 308 (N.Y. A.D. 1st Dept. 1999).

[12] 966 A.2d 24 (N.J. Super. Ct. App. Div. 2009).

[13] 2013 N.Y. Slip. Op. 23405 (N.Y. Sup. Ct. 2013).

[14] *State v. Nix*, 355 Or. 777, 334 P.3d 437 (2014), *vacated*, 356 Ore. 768, 345 P.3d 416 (2015); *State v. Fessenden*, 355 Or. 759 (Or. 2014); and *State v. Hess*, 359 P.3d 288 (Or. Ct. App. 2015).

[15] Alaska is not only a trendsetter by passage of the first statute regarding an animal's best interests, but also has some of the country's most important pet-related case law. In the 2002 Alaska post-decree dispute of *Juelfs v. Gough*, 41 P.3d 593 (Alaska 2002), the court awarded a Chocolate Labrador Retriever named Coho to the party who would keep him safe, even though the parties had been awarded shared custody of the dog pursuant to the Judgment and Decree.

[16] HB 147 was passed as Chapter 60 of the 2016 Alaska session laws. The Act is 17 pages long and was codified into several different statute sections. The session law citation is CHAPTER 60 SLA 16. *See also* Nicole Pallotta, *Alaska Legislature Becomes First to Require Consideration of Animals' Interests in Custody Cases*, Animal Legal Defense Fund, *https://aldf.org/article/alaska-legislature-becomes-first-to-require-consideration-of-animals-interests-in-custody-cases/* (last visited 4/15/2019); Elaine S. Povich, *This New Law Aims to Prevent Couples from Fighting Over Cats and Dogs*, Huff Post, *https://www.huffpost.com/entry/divorce-pet-custody-dog-california_b_5c3e14f4e4b06248f31edc8b* (last visited 4/15/2019).

[17] Nicole Pallotta, *California's New 'Pet Custody' Law Differentiates Companion Animals from Other Types of Property*, Animal Legal Defense Fund, *https://aldf.org/article/californias-new-pet-custody-law-differentiates-companion-animals-from-other-types-of-property/* (last visited 4/15/2019).

[18] 2013 N.Y. Slip. Op. 23405 (N.Y. Sup. Ct. 2013).

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When Rules Get in the Way of Reason

One judge's view of legislative interpretation

By Justice Paul Thissen

The job of a judge when interpreting statutes is straightforward: "ascertain and effectuate the intention of the legislature."[1] As a former legislator, however, I am chastened to admit that the Legislature does not always make that job easy and, for a variety of reasons, too often makes that task quite difficult.[2] So what is a judge to do?

This question, of course, has been hotly contested for decades. And rightly so, because the question raises fundamental constitutional and separation of powers issues. Indeed, settling on a broadly acceptable and justifiable answer to the question is critical to the legitimacy of the judiciary as an institution. In this brief article, I have no illusions of adding substance to the rich literature written by scholars more deeply steeped in the constitutional, structural, and linguistic aspects of statutory interpretation. What I can offer is a practical perspective on the task of statutory interpretation informed by my fairly unique perspective as a sitting Minnesota Supreme Court Justice, a former 16-year member of the Minnesota House of Representatives, and a former civil and criminal litigator who practiced primarily in Minnesota.

A basic challenge of statutory interpretation is making sure everyone stays in his or her lane. The job of a legislator is to sort through contested problems of public policy and pass laws to resolve, remedy, or otherwise address those problems. This is most often accomplished by imposing obligations or limitations on how the people and institutions in the state can act and organize their lives and activities. The job of a judge is to step in when a dispute arises over what those obligations or limitations mean and what impact they have on a particular party. In performing that task through statutory interpretation, however, it is essential that the judge not step out from behind the bench and into the legislative chamber to impose obligations or limitations different from those established by the Legislature.[3] Stated another way, the legal contests over statutory interpretation are about how we best ensure judges stay in their proper lane.

Briefly described, the current prevailing method of statutory interpretation includes two important and interrelated concepts. First, over the past several decades, courts (and law schools that integrated this fashion of statutory interpretation in the legal curriculum) moved decisively toward a narrow focus on statutory text as the dominant (and, for some, nearly exclusive) methodology for keeping judges in their lane.[4] The ability to apply rules of grammar became a more highly prized legal skill than fluency in broader policy and practical considerations of the law. Justice Antonin Scalia is perhaps the best-known advocate for this position.[5]

Second, the move to a strong textual orientation in statutory interpretation emerged in the context of an increasingly rigid hierarchy of temporal rules that limits when other useful tools of statutory interpretation besides the cold text—long-established canons of construction, legislative history, clear statutory purpose, common sense—can be used. In particular, courts have erected a nearly impermeable divide between a limited and privileged class of interpretative tools that can be used to determine the meaning of "unambiguous" language and a broader set of rules that can be used if statutory language is found "ambiguous." This hierarchy of rules cements the primacy of text as the near-exclusive basis for understanding what the Legislature meant when it enacted a law.

The central question I wrestle with in this article is this: Is the current prevailing method of statutory interpretation used in Minnesota (and United States courts generally) the best method for making sure judges stay in their lane? I will make the case that this rigid temporal hierarchy, far from enhancing a judge's ability to do her primary job of ascertaining and effectuating the intent of the Legislature, actually impairs it by arbitrarily limiting a judge's access to tools of statutory interpretation that may prove enlightening, even decisive, as to actual legislative intent. Moreover, the preliminary interpretive inquiry into whether statutory language is "plain" or "ambiguous" operates in a way that leaves ample space for judges to impose their preferred outcomes, but in a surreptitious, nontransparent way. Thus I worry that the strict adherence to a hierarchy of rules does not simply keep judges from entering the legislative lane; it narrows the judicial lane itself precipitously.

I also worry about a larger issue: that strict textualism and an increasing rigidity in how tools of statutory interpretation may be applied have adversely affected how lawyers think about their job. Rules of statutory construction have become a catechism. Lawyers feel too comfortable blindly citing a rule or canon of construction without considering whether and why the rule or canon provides insight into the meaning of the particular statute being interpreted. While such an approach may make life easier for lawyers, that is bad for the practice of law. Much as I love the beauty and rationality of Euclidian geometry with its axioms and theorems, the law is not geometry and the rules and canons of construction cannot be applied that way.

So what do I offer in the alternative? In my view—and this is the central idea of this article—the job of judges is ultimately to exercise judgment.[6] My intuition is that the best check on the exercise of that judgment is to demand that judges thoroughly explain their reasons for reading a statute a certain way, rather than requiring that judges follow a rigid hierarchy of rules. Crafting an explanation that seems to the parties and the public like a sensible and fair understanding of legislative intent (an explanation that may, of course, rely heavily on established interpretation rules) is a process that serves as a strong check on judicial overreach and enhances public trust in the courts. And in assessing legislative intent, judges should be able use all of the tools available to them—certainly the text of the statute, but

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[1] Minn. Stat. §645.16 (2018).

[2] In my experience, there are many reasons that legislation may not be clear. Often, the lack of clarity or precision in statutory language is unintentional. Legislators are not seers and cannot anticipate every unique set of facts that may arise in the future. Ambiguity in statutory language may also emerge as established statutes are later amended. The agglomeration of new provisions on old statutes understandably produces laws that are more sedimentary than igneous. *See, e.g.*, Minn. Stat. §609.582, interpreted in *State v. Rogers*, 925 N.W.2d 1 (Minn. 2019). Other factors in imprecise drafting include: the legislative process itself, which increasingly moves at a pace that does not allow staff or legislators the time to reflect and review; the increasing use of massive omnibus bills instead of discrete pieces of legislation focused on a single subject; and procedures allowing committee or floor amendments with no prior notice. A lack of transparency in the legislative process, which shuts out the public (including lobbyists, who—like them or not—have important expertise) is another factor. There are also intentional reasons for ambiguity in legislation. It is sometimes easier to assemble the votes to pass legislation when some legislators think a bill means one thing and other legislators believe a bill means something else. What judges do with these varying reasons for ambiguity is better left for future discussion.

[3] The judge's role is certainly different when addressing the constitutionality of a statute or dealing with (vanishing) questions of common law. Those issues are left for another day.

[4] The strongest claim to legitimacy made by textualists—that it takes judicial discretion and values out of the equation—has been challenged by legal scholars and linguists alike on the ground that rules of textual interpretation and grammar can be as readily manipulated to reach the judge's preferred outcome as any other tool of statutory interpretation. *See, e.g.,* Richard H. Fallon, Jr., *Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment within Both*, 99 Cornell L. Rev. 685 (Issue 4 May 2014). For a fascinating examination of how linguists view statutory interpretation, *see* Brian G. Slocum, ed. *The Nature of Legal Interpretation: What Judges Can Learn about Legal Interpretation from Linguistics and Philosophy* (University of Chicago Press 2017) (Slocum 2017). Nonetheless, the primacy of "the text" in statutory interpretation has become the water we swim in as lawyers.

also meaningful and relevant canons of construction, legislative history, common sense, and practical experience—as long as the judge considers and can explain why a particular tool illuminates the legislative intent behind a particular statute.

Indeed, it is essential to the legitimacy of courts that a judge be allowed to exercise her judgment, while still being required to explain her reasons, instead of being able to simply point to a generic rule that emerged from the mists of time. How many of us have faced a situation like the day in law school I tried to go to the gym to play basketball—something I did four or five times a week—without my student ID? Even though the guy behind the desk saw me nearly every day for months, he refused to let me in. "Those are the rules," he shrugged. No consideration of the context or purpose of the rule (to prevent people unaffiliated with the college from getting on the courts). Few phrases are more frustrating, but that is what judges do when they decide a question critically important to the parties to a case with a similarly shrugged "Those are the rules." Judges should not rely on a hidebound repertoire of generic rules that may or may not spark any insight into the particular case. Instead we should use the best available information, whether drawn from the text or otherwise, and explain how that information provides the best insight into legislative intent in a particular case. Ultimately, this process will improve the public's trust that the courts are truly places of fair adjudication of rights.[7]

Of course, none of this is to say that looking first to the text is wrong. The text is often an excellent signal of legislative intent. But when statutory interpretation cases get in front of a court—and particularly an appellate court—it is likely that each party has at least an arguably coherent reason to read a statute in the way that supports its position. It is striking how often our court is faced with a statutory interpretation dispute where both parties insist that the statute is unambiguous in a way that supports their directly contradictory interpretations. That should be a clue to all of us about how plain the statute really is.[8]

So what gets in the way of this broader "all tools in the toolbox" approach to statutory interpretation? One major roadblock is the great ambiguity wall that judges and practitioners cite so often we can do so in our sleep: "When interpreting a statute, we give effect to the plain meaning of statutory text when it is clear and unambiguous. A statute is ambiguous only if it is susceptible to more than one reasonable interpretation, in which case we may resort to the canons of statutory construction to determine its meaning."[9] The rule creates a two-step process for statutory interpretation. First, the court must decide whether the statute is ambiguous. Only if the court decides in the affirmative can it employ most of the tools of interpretation.

My purpose here is not to jettison the two-step process entirely. Rather, it is to call on judges to apply it more reluctantly and more humbly. My impression is that courts find statutes to be "plain" and "unambiguous" too readily.

First, our current test for ambiguity—is there more than one reasonable interpretation of the statute?—is opaque, lacking clear and explainable boundaries. The current test creates a vast space for judges to exercise largely unrestrained judgment in deciding whether a particular interpretation is reasonable and rejecting interpretations they deem unreasonable.[10] Critically, the rule provides such expansive judicial discretion even as it limits the sources of information a judge may consider for information about legislative intent. This prohibits judges from considering important signals of legislative intent, like the purpose of a statute or its legislative history, which in some cases may prove decisively illuminating. The result is a divide between pre-ambiguity and post-ambiguity reasoning, wherein judges have few tools (but broad

[5] *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 405 (1991 (Scalia, J., dissenting). It has not always been this way. At the time of statehood, for instance, the Minnesota Supreme Court took a much broader approach to statutory interpretation. In the 1863 case of *Barker v. Kelderhouse*, the Court stated that "the attention of the legislature should always be followed wherever it can be discovered, although the construction seems contrary to the letter of the statute." 8 Minn. 207, 211 (1863) (citing *Grimes v. Byrne*, 2 Minn. 89 (1858)); *see also Rogers*, 925 N.W.2d at 8, n.3 (Thissen, J., dissenting); Robert A. Katzmann, *Judging Statutes* 52 –53 (2014). That principle was followed and used by Minnesota courts for decades. *See, e.g., Judd v. Landin,* 1 N.W.2d 861 (1942) ("when [legislative intent] is ascertained the statute must be so construed as to give effect to such intention, even if it seem contrary to such rules and the strict letter of the statute"); *Wegener v. Commissioner of Revenue,* 505 N.W.2d 612, 613 (Minn. 1993).

[6] This conception of the judicial role is captured well in David E. Pozen, *Justice Stevens and the Obligations of Judgment*, 44 Loy. L.A. L. Rev. 851 (2011).

[7] *See generally* Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 Yale L.J. F. 525 (2014).

[8] A slight detour for a practitioner tip (with the caveat that it is coming from a single judge). I have been surprised how many times lawyers appearing before the Minnesota Supreme Court who rely on a plain language argument refuse to even contemplate the potential that the statute may be ambiguous. It is not a sign of weakness to assert that the plain language favors your client, *but if the Court finds it ambiguous,* your client still wins. Making an ambiguity argument in the alternative does not undermine your plain language position. Further, even if you firmly believe that the statutory language is plain, providing a judge with other information about the context, purpose, and legislative history of a statute that supports your client's position does not hurt; it helps.

[9] *Gen. Mills, Inc. v. Comm'r of Revenue*, 931 N.W.2d 791 (Minn. 2019).

[10] There are of course some tools that can be used "pre-ambiguity" to determine meaning. For instance, judges rely on syntactic canons like the last-antecedent canon, the series-qualifier canon, and the nearest-reasonable-referent canon when determining whether a statute is ambiguous. *See, e.g., State v. Pakhnyuk*, 926 N.W.2d 914 (2019); *see generally*, Antonin Scalia & Bryan A.

discretion) in deciding whether an interpretation is "reasonable" for purposes of assessing ambiguity, but have access to a broad range of tools to use for guidance in the post-ambiguity realm. That makes little sense to me.

A recent case, *State v. Rogers,* highlighted the implications of the pre-ambiguity/post-ambiguity wall for statutory interpretation.[11] *Rogers* required the Minnesota Supreme Court to interpret Minnesota's burglary statute, Minn. Stat. §609.582, subd. 1(b), which provides that burglary is a first-degree offense if "the burglar possesses, when entering or at any time while in the building… any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon." The Court analyzed whether the victim must be physically present during the burglary for a conviction under subdivision 1(b).

The majority, employing the Court's traditional test for ambiguity, determined from textual clues that the victim's physical presence was required under the statute. In particular, the Court concluded that the Legislature's use of the phrase "the victim" rather than "a victim" meant that "the victim" must be present at the time of the burglary. The majority also concluded that the Legislature's use of the word "used" required the victim's presence (i.e., how could a burglar use an article in a way to lead the victim to reasonably believe it to be a dangerous weapon if the victim was not there?).[12] The majority's textual analysis was well done and reasonable. The dissent, focusing on the list of items that a burglar must "possess," concluded from the text that there was another reasonable interpretation of the statute that did not require the victim's presence, but the majority found that an unreasonable interpretation.[13]

The critical point, however, is missing from the dueling interpretations of the statutory text. More important is that the text was not the best evidence of legislative intent available to the Court. The legislative history of the statute, including the legislative debate around the amendment that inserted the phrase "any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon" into the law, made the legislative intent clear. The amendment was adopted at a time when there was significant public concern over the use of fake weapons and the operative phrase was pulled nearly verbatim from a prior statute that used the language to refer to a fake weapon.[14] In my view, this history shed much more light on the Legislature's intent than any parsing of the statutory language ever could: The Legislature intended to make it a first-degree crime to possess a gun, a bomb, or a fake weapon. And because the victim's presence was never required in the case of gun or bomb possession, it should also not be required for possession of a fake weapon. But because our statutory interpretation hierarchy makes resort to legislative history off-limits in assessing whether a particular reading of a statute is "reasonable" for purposes of determining ambiguity, the majority was precluded from even considering it.

The lack of clear boundaries in our current ambiguity test is exacerbated by unanswered questions about which rules can be applied pre-ambiguity and which are only relevant after a statute is found to be ambiguous.[15] Take, for example, the canon that statutes in derogation of the common law are strictly construed. Minnesota Supreme Court precedent is unclear about whether the canon applies before or after an ambiguity determination is made. In some cases, the Court has applied the canon when analyzing whether a statute is ambiguous.[16] In other cases, the Court has applied the rule to help analyze a statute already determined to be ambiguous.[17] And although there may be reasons to justify each position, the real question is whether forcing judges to engage in such an esoteric debate gets them any closer to ferreting out the Legislature's actual intent—or indeed gets in the way.[18]

In Minnesota, the current standard for determining ambiguity is also in conflict with (of all things!) state statutes. Minnesota Statutes §645.16 provides that "[t]he object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature" and then sets forth a pathway for doing so:

> When the words of a law *in their application to an existing situation* are clear and *free from all ambiguity*, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.
>
> When the words of a law are not *explicit*, the intention of the legislature may be ascertained by considering, among other matters, [several factors like the purpose of the law and legislative history].[19]

Garner, *Reading Law: The Interpretation of Legal Texts* 140–167 (2012) (Scalia and Garner). Judges also consult dictionaries to understand the meaning of words. *See State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018). But these canons are not sacrosanct or foolproof, as our Court has properly noted. *Pakhnyuk*, 926 N.W.2d at 922 (stating that syntactic canons do not "trump[] the text of the statute, and… can be defeated by other indicia of meaning"); *Scovel*, 916 N.W.2d at 554 (stating that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress of the dictionary") (quoting Learned Hand in *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945)). Further, even resort to competing dictionary definitions is subject to manipulation. How many lawyers have scanned dictionaries to find the one definition that supports their client to the exclusion of other definitions? I know I did when I was practicing. Finally, it is worth noting that nearly 70 percent of Minnesota legislators who responded to a recent survey said they never or only rarely relied on dictionaries and other reference materials when considering the meaning of a bill before a vote. For more information on the survey, *see* footnote 24.

[11] 925 N.W.2d 1 (Minn. 2019).

[12] *Id.* at 4–5.

[13] *Id.* at 7–8 (Thissen, J., dissenting).

[14] *Id.* at 9–10 (Thissen, J., dissenting).

[15] *See, e.g.*, *State v. Thonesavahn*, 904 N.W.2d 432, 439 n.4 (Minn. 2017) (discussing whether the concurrence was applying the imputed-common-law-meaning canon or the common-law-abrogation canon and arguing that the former applies only after a statute has been found ambiguous).

[16] *See, e.g.*, *Do v. American Family Mut. Ins. Co.*, 779 N.W.2d 853, 858, 859; *see also id.* at 860 (Anderson, P., J., concurring); *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382, 383 (Minn. 2008); *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 457 (Minn. 2006). *See also Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 726 n.4 (Minn. 2014) (Lillehaug, J., dissenting).

[17] *See, e.g.*, *In re Stadsvold*, 754 N.W.2d 323, 328–29 (Minn. 2008); *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 327–28 (Minn. 2004). *See Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601, 608 (Minn. 2016) (referring to the canon that statutes in derogation of the common law are to be strictly construed as an example of a post-ambiguity canon).

[18] There are other reasons to question the general validity of "presumption canons" (like the canon that statutes in derogation of common law should be construed strictly) as a tool for

This provision sets a much higher standard for determining that a statute is unambiguous than our current "is there more than one reasonable interpretation" test. According to §645.16, the words of a statute must be "free from all ambiguity" and "explicit" before it can be considered plain. And critically, the words must have such precision as applied to the existing set of facts before the Court. As I read that legislative mandate, courts should find a statute plain only if the language of the statute is so precise as applied to the particular circumstances of the case that it precludes any possibility of an alternative interpretation. Stated more simply: If there is a doubt, a judge should err on the side of ambiguity.

This restrained standard limits the discretion of judges when (under the current regime) they have access to fewer interpretive tools. Of course, using this standard allows judges to use a much wider variety of potentially useful interpretive tools in more cases. In turn, courts will reach more accurate results in ascertaining and effectuating the intent of the Legislature.[20]

My position also finds support in Minn. Stat. §645.08 (2018), which directs judges to construe words of a statute according to the "rules of grammar" and the "common and approved usage" of the words.[21] Contrary to how the statute is generally understood, however, §645.08 conditions a judge's resort to rules of grammar and common and approved usage with a significant caveat. Words are *not* to be given their common and approved usage and rules of grammar do *not* apply if those rules "would involve a construction inconsistent with the manifest intent of the legislature" or would result in an interpretation of the statute that is "repugnant to the context of the statute."[22] This conditional structure suggests that the Minnesota Legislature intended from the time of statehood that courts could consider more than just the plain and ordinary meaning of a word in interpreting statutes. Indeed, for several decades after statehood, Minnesota courts interpreted statutes against this general background statutory rule of construction much more broadly than we currently do.[23]

Adopting an approach to statutory construction that makes more interpretive tools available more often also finds support in a recent survey of Minnesota legislators conducted by high school student Ethan Less.[24] The survey was designed to learn about the tools and methods that sitting Minnesota legislators use to understand the meaning of statutes before they cast a vote.

Unsurprisingly, the Minnesota legislators reported that they relied most heavily on the text of the statute when ascertaining the meaning of bills before them in committee or on the floor. More surprising, however, was that legislators reported they relied nearly equally as much on the reports of non-partisan research and the discussion of the legislation by the chief author of the bill (and by legislative colleagues considered to be subject matter experts) as they did on the statutory text.

Legislators also reported that context matters when working to understand the legislation before them. In addition to the text, legislators responded that they found the purpose of the bill, the problem to be remedied, and the intent of the proponents of the legislation to be essential to ascertaining the meaning of a proposed law. And, notably, more than half of the legislators reported that they read the text of less than half the bills before voting on them.

According to the survey responses, the chief author of a bill is more likely not only to read the bill, but also to read the entire existing section of law when a bill only amends a portion of that section. (Legislative bills that amend only a subdivision of a larger section of existing law often only show the subdivision being amended and not the entire section.) This fact, paired with the survey results, suggests that courts should be much more open to using the chief author's statements about a bill when ascertaining legislative intent than is the current practice. Indeed, three-quarters of the legislators surveyed said judges should rely on statements in committee or on the House and Senate floor when interpreting a statute. This compares to 100 percent who said judges should look at the words of the statute and 87 percent who said judges should consider the purpose of the statute when construing laws.

Because a judge's job is to ascertain and effectuate legislative intent, a key message from the survey is that judges should not place too heavy a reliance on statutory text alone. Rather, judges (and lawyers trying to persuade judges) should be open to using all the tools in the interpretive toolbox to truly understand the context of a statute, at least to the extent that a particular tool makes sense in a particular case and the judge can explain why it makes sense.

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ascertaining actual legislative intent. Indeed, as Scalia and Garner note, this particular rule is "a relic of the courts' historical hostility to the emergence of statutory law" rather than a rule based on an understanding of legislative norms. Scalia & Garner, *supra* note 10, at 218. The question of how much of the common law the Legislature intended to change would be better answered by other signals of legislative intent—the text and context of the statute, the legislative history. If anything, such canons may be best justified by their role in providing broader institutional benefits to the legal system. *See, e.g.*, *Depositors Ins. Co. v. Dollansky*, 919 N.W.2d 684, 696 (Minn. 2018) (Thissen, J., dissenting) (noting the benefit of alignment in common law and statutory subrogation rules). A bit more on applying canons below.

[19] Minn. Stat. §645.16 (emphasis added).

[20] Supreme Court Justice Brett Kavanaugh has similarly identified the lack of clear boundaries for the threshold ambiguity inquiry as a problem. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118 (2016). Justice Kavanaugh approaches the problem from an angle that is much more text-based than the approach articulated in this article. He proposes to do away with the threshold ambiguity inquiry altogether and suggests a two-step inquiry instead: (1) courts should "determine the best reading of the text of the statute," and (2) "once judges have arrived at the best reading of the text, they can apply—openly and honestly—any substantive canons (such as plain statement rules or the absurdity doctrine) that may justify departure from the text." *Id.* at 2135. *See also* Meredith A. Holland, *The Ambiguous Ambiguity Inquiry: Seeking to Clarify Judicial Determinations of Clarity Versus Ambiguity in Statutory Interpretation*, 93 Notre Dame L. Rev. 1371 (2018) (arguing that the Roberts Court has been more willing to consider non-textual factors in assessing whether a statute is ambiguous and applying the Kavanaugh test to Title IX cases). From my perspective, allowing courts to determine the "best" reading of a text with a limited suite of interpretive tools leaves open as much space for judicial freewheeling as the current rule.

[21] The notion that there is a single "common and approved usage" of words is itself a contestable concept. Experience tells us that, in real life, there is significant (English) linguistic diversity in our communities. We observe—and speak with and write with ourselves!—improper English grammar and usage every day. Who thinks about the last-antecedent rule of grammar in

The judicial duty to exercise judgment and articulate the reasons for interpretive choices extends to the specific decision to use (or not) a particular canon of construction. As Judge Posner (among others) has pointed out, "for every canon one might bring to bear on a point there is an equal and opposite canon."[26] As with the ambiguity analysis, restraint should be the watchword when applying canons of construction. Unless there are good independent reasons that a canon is useful to an interpretive project, a judge should not rely on it.

This need for rigorous judicial analysis and fleshed-out judicial reasoning rather than rote reliance on canons is borne out in other results from the legislator survey. For instance, judges and other lawyers often use the surplusage canon to determine the meaning of a statute. The canon provides that every word in a law is to be given effect and no word should be given an interpretation that causes it to duplicate another provision or to have no consequence.[27] This sometimes means courts create multiple meanings to fit the rule. That's backwards, particularly since around 90 percent of the legislators surveyed reported that statutes often are drafted with redundant terms. Three-quarters of the legislators said that in their experience, words with similar or overlapping meaning are added to a statute to make certain the meaning is clear even though the words mean pretty much the same thing. And very few legislators said they relied on the surplusage canon when trying to understand the meaning of a statute before a vote. If these results are taken seriously, it suggests that judges should have a very good reason—from context, legislative history, or otherwise—before using the surplusage canon as a decisive basis for reading a statute one way instead of another.[28]

Another example is the presumption of consistent usage canon: A word or phrase is presumed to bear the same meaning throughout a text.[29] Although there is something intuitive about the canon, less than half the Minnesota legislators surveyed agreed that, in their experience, a word used in a statute has the same meaning throughout the statute. Further, only a quarter of the legislators reported that the meaning a word has been given in an unrelated statute is extremely or very valuable in understanding the meaning of the same word in the bill before them. Once again, these results caution judges and lawyers against relying on the consistent usage canon without thinking hard about whether and why the canon actually illuminates legislative intent when used to interpret a statute.[30] Resort to context, legislative history, and common sense will be useful in making that assessment.

When lawyers and judges think about legislative history, we most often have in mind statements made by legislators about their intent in enacting a bill. And such statements may illuminate the meaning of a statute; they should not be ignored.

But another category of legislative history—perhaps best described as a kind of statutory archeology—is often overlooked.[31] Understanding the development of a statute over time can shine a bright light on what to contemporary eyes is nothing but confusion. Don't ignore it.

real life? I know I do not and did not when I was a legislator. And remember that legislators are enacting laws at greater speed, under greater time pressure, and with less time for review than ever before. Consequently, the notion that a "common and approved" usage exists as an objective fact is an idea that should be met with some skepticism. Karen Petroski's article, *The Strange Fate of Holmes's Normal Speaker of English*, in Slocum 2017, is an interesting path into this discussion. Moreover, in recent years, courts and lawyers have placed a handful of in-vogue grammarians on a pedestal as the final word on "proper" English grammar and usage. In so doing, courts and lawyers seal themselves off from the broader public with two consequences: (1) limiting the diversity of information that courts have access to in determining legislative intent, and (2) reducing trust and understanding of what courts do. Once again, the better approach is not just to cite the rule and the grammar or usage authority chosen by the court, but to think hard and explain why relying on a "common and approved usage" rule and, more specifically, why relying on one particular grammar or usage authority rather than another to set the standard makes sense in the particular case.

[22] Minn. Stat. §645.08(1).

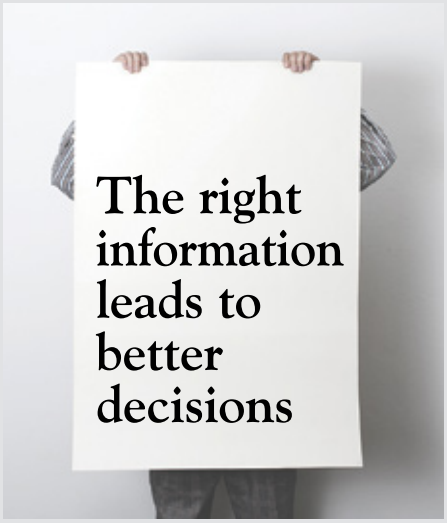
[23] *See Barker*, 8 Minn. at 211 (1863) (stating that "the attention of the legislature should always be followed wherever it can be discovered, although the construction seems contrary to the letter of the statute.") (citing *Grimes v. Byrne*, 2 Minn. 89 (1858)). Language essentially identical to current Minn. Stat. §645.08 which sets forth several canons of construction was part of the Minnesota territorial statutes incorporated into Minnesota law at statehood. Minn. Gen. Stat. ch 3 §§1–2 (1858). A public meaning-originalist interpretation of Minn. Stat. §645.08 supports a broader reading of the statute than is currently in favor.

[24] The survey was conducted from April to June 2019 as a senior project by Mr. Less. I served as an advisor to Mr. Less on the project. Mr. Less provided the survey to every member of the Minnesota House and Minnesota Senate. The response rate was 15%. Mr. Less also conducted follow-up narrative interviews with several legislators. The survey results are available from the author. The survey was inspired by the excellent and illuminating work of Abbe Gluck and Lisa Schultz Bressman. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part 1*, 65 Stan. L. Rev. 901 (2013).

For example, in *State v. Scovel*, the Minnesota Supreme Court interpreted Minnesota Sentencing Guidelines 2.B.7.a (2015), which provides that "the classification of a prior offense as a... felony is determined by current Minnesota offense definitions... and sentencing policies."[32] The central question was whether the classification of a prior offense for the purpose of calculating a defendant's criminal history score is determined by Minnesota offense definitions at the time the current offense was committed or at the time the defendant was sentenced for the current offense. The word "current" was not defined in the Sentencing Guidelines and the multiple meanings of "current" offered in dictionaries were not helpful. What became decisive in determining the Sentencing Guidelines Commission's intent was an analysis of the "history and evolution of Guidelines 2.B.7.a. It demonstrate[d] that the provision had its roots in Guidelines 2.B.5.b."[33] Because Guidelines 2.B.5.b made clear that "current" referred to the time when the current offense was committed (and not the time of sentencing for the current offense), the Court read Guidelines 2.B.7.a to similarly mean that offense classifications in effect at the time the current offense was committed applied when calculating a defendant's criminal history score.

More recently, the Minnesota Supreme Court interpreted Minnesota's research and development tax credit statute.[34] The statutory formula for the credit incorporated the federal law concept of "base amount as defined in Section 41(c) of the [federal] Internal Revenue Code..."[35] Unfortunately, in 2011 (the relevant tax year) I.R.C. §41(c) contained a variety of subdivisions, some of which informed the concept of "base amount" and some of which were not relevant to "base amount." A central issue in the case was whether one of those subdivisions—I.R.C. §41(c)(2), which set a "minimum base amount" for the federal calculation—was incorporated by the Minnesota statute.

Viewed from the perspective of readers of the statute in 2011, the legislative intent in incorporating I.R.C. §41(c) was a messy thicket: Did the Legislature intend to incorporate every provision of I.R.C. §41(c) or just some of them—and if only some of them, which ones? But when one stepped back in time to 1982 (when the Minnesota R&D credit was first enacted in Minnesota) or 1991 (when the Minnesota R&D credit statute was last amended), the thicket cleared. At both points in time, I.R.C. §41(c) as incorporated into Minnesota law was a much simpler statute which included only subdivisions that informed the meaning of "base amount."[36] In particular, the "minimum base amount" limitation existed in the 1982 version of I.R.C. §41(c), removing any doubt that the Legislature intended to incorporate the "minimum base amount" limitation into Minnesota law.[37]



In the end, we need to come back to common sense and practical experience when thinking about the job of statutory interpretation. When we make important decisions in our daily lives, we want more relevant information rather than less—and for good reason. Having the right information to thoughtfully consider typically leads to better decisions. Arbitrarily restricting the information that a decision-maker can use limits access to what may be the right information. Why should it be any different when it comes to ascertaining legislative intent?

And one last thing. As a legal community, we must do a better job of understanding how legislatures and legislators go about the practical work of enacting statutes. If judges, and the lawyers who appear before them, appreciate legislators' methods for understanding what bills mean, we can better effectuate the intent of the Legislature. That is, after all, the job of a judge. ▲

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[25] Attributed to Confucius.

[26] Richard A. Posner, *The Federal Courts: Crisis and Reform* 276 (1985) (citing Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 521–535 (1960)). Judge Posner's entire essay, *Interpreting Statutes and the Constitution*, which is found in the book, is well worth a read.

[27] Scalia & Garner, *supra* note 9, at 174–180.

[28] *See* Linda D. Jellum, *Mastering Statutory Interpretation* 104 (2008) ("Statutes are not always carefully drafted. Legal drafters often include redundant language on purpose to cover any unforeseen gaps or simply for no good reason at all. And legislators are not likely to waste time or energy arguing to remove redundancy when there are more important issues to address. Thus, the presumptions [underlying the surplusage canon] do not match political reality.") Notably, other common interpretive canons like the negative-implication canon (*expressio unius est exclusion alterius*) find broader understanding and acceptance among legislators as they work to understand the meaning of bills before them. Over three-quarters of Minnesota legislators agreed that the concept of negative implication was useful in understanding statutes. Further, legislators were asked the following hypothetical: "If a bill refers to 'automobiles, trucks, tractors, motorcycles, and other motor-powered vehicles' would you assume the bill covers airplanes?" Nine out of ten legislators assumed the bill did not cover airplanes because all the vehicles listed are land-based vehicles. Similarly, Minnesota legislators broadly support the interpretive principle that doubts about the meaning of a criminal statute should be resolved in favor of the defendant.

[29] Scalia & Garner, *supra* note 10, at 170–174.

[30] Scalia and Garner agree that the consistent meaning canon "assumes a perfection of drafting that, as an empirical matter, is not often achieved" and note that the canon has some "distinguished detractors," including Justice Joseph Story. Scalia & Garner, *supra* note 10, at 170.

[31] *See* Minn. Stat. §645.16(2) (courts may consider the "circumstances under which [a statute] was enacted").

[32] 916 N.W.2d at 551 (Minn. 2018).

[33] *Id.* at 556.

[34] *Gen. Mills*, 931 N.W.2d at 793.

[35] *Id.* at 796 (citing Minn. Stat. §290.068, subd. 2(c)).[36] *Id.* at 797–98.

[37] *Id.*

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

Criminal procedure: Petty misdemeanor convictions cannot be used to enhance subsequent offense. Appellant's two prior petty misdemeanor convictions from 2014 and 2015 for no proof of insurance were used to enhance a 2017 charge of operating a vehicle without insurance to a gross misdemeanor. Appellant received citations for the 2014 and 2015 offenses and paid the fine amounts, which were within the petty misdemeanor limits. As a result, per Minn. R. Crim. P. 23.02, the misdemeanor offenses became petty misdemeanor convictions.

Section 609.131, subd. 3, disallows enhancement of a subsequent offense to a gross misdemeanor by using "a conviction for a violation that was originally charged as a misdemeanor and was treated as a petty misdemeanor." Despite the plain language of section 609.131, subd. 3, the state argues the enhancement here is permitted under either section 609.13, subd. 3 (convictions of felony or gross misdemeanors; when deemed misdemeanor or gross misdemeanor), or section 169.797, subd. 4(a) (penalties for failure to provide vehicle insurance). The court of appeals rejects the state's argument, noting that section 609.13, subd. 3, involves an unrelated sentencing issue, and that section 609.131, subd. 3's expansive language, "[n]otwithstanding any other law," denotes that section 609.131, subd. 3's prohibition of the use of petty misdemeanors to enhance a subsequent offense to a gross misdemeanor "eclipses any other purportedly contrary provision."

Under section 609.131, subd. 3, appellant cannot be convicted of a gross misdemeanor. However, the court finds appellant can be convicted of a misdemeanor based on the stipulated facts found by the district court. Reversed and remanded to reduce appellant's conviction to a misdemeanor. ***State v. Selseth***, No. A18-1426, 2019 WL 4147596 (Minn. Ct. App. 9/3/2019).

Implied consent: Prehearing revocation allowed only if driver was given refusal-is-a-crime warning before blood or urine test. Appellant's driver's license was revoked after a blood test, conducted pursuant to a search warrant, showed that appellant drove with an alcohol concentration over 0.08. Appellant was served with the search warrant but was never told test refusal is a crime. Minn. Stat. §171.177, subd. 1, requires that, "[a]t the time a blood or urine test is directed pursuant to a search warrant…, the person must be informed that refusal to submit to a blood or urine test is a crime." Section 171.177, subd. 1, was created to replace the implied consent statutes for blood and urine tests after the Minnesota and United States Supreme Courts held that testing of blood or urine without a warrant is unconstitutional, and the procedures in section 171.177 largely mirror those in the implied consent statutes. Thus, the court of appeals applies case law interpreting the related implied consent statutes to section 171.177.

The court looks to *Tyler v. Comm'r of Pub. Safety*, 368 N.W.2d 275 (Minn. 1985), which held that complying with the warning requirement was necessary before a license could be revoked under the implied consent law. The court holds that an officer must have warned a driver as required under section 171.177, subd. 1, before the driver's license may be revoked prior to a hearing under subd. 5. However, the court also suggests a number of other ways the commissioner could revoke appellant's license. Reversed and remanded to rescind appellant's prehearing revocation. ***Jensen v. Comm'r of Pub. Safety***, 932 N.W.2d 844 (Minn. Ct. App. 9/3/2019).

Public trial: Right to public trial applies throughout *voir dire*. A jury found appellant guilty of aiding and abetting second-degree criminal sexual conduct, aiding and abetting kidnapping, and aiding and abetting second-degree assault. During jury selection, the district court

closed the courtroom while individual jurors were questioned, at the state's request. The courtroom remained closed throughout the remainder of *voir dire*, and 28 of 46 prospective jurors were individually questioned on a variety of topics.

The Minnesota and United States Constitutions confer upon all criminal defendants the right to a public trial. This right applies during all phases of trial, including *voir dire* of prospective jurors. Closure of a courtroom during criminal proceedings may be justified if: (1) the party seeking closure advances an overriding interest that is likely to be prejudiced, (2) the closure is no broader than necessary to protect that interest, (3) the district court considers reasonable alternatives to closing the proceeding, and (4) the district court makes findings adequate to support the closure.

Here, the district court did not make findings concerning the reasons for closing the courtroom, the necessary breadth of the closure, or the existence or absence of reasonable alternatives. Thus, the court of appeals is unable to determine whether the closure was justified. The court finds the proper remedy is a remand for an evidentiary hearing and findings concerning whether the closure was justified. ***State v. Petersen***, No. A18-1431, 2019 WL 4147598 (Minn. Ct. App. 9/3/2019).

■ **Jury instructions: No error to deny counsel's request for no adverse inference jury instruction when defendant is absent and has not consented to or requested instruction.** On the second day of appellant's trial on charges of first- and second-degree criminal sexual conduct, he failed to appear. After excusing the jury and recessing to discuss jury instructions, the district court noted that appellant's counsel preferred to include a no-adverse-inference jury instruction. It was not known whether appellant wanted the instruction, and the court ultimately did not give the instruction. The jury found appellant guilty.

First, the court of appeals holds that appellant did not waive his challenge to the jury instructions through his voluntary absence at trial. Second, the court holds the district court did not err by denying appellant's counsel's request for the no-adverse-inference instruction. The instruction must be given when requested by a defendant who did not testify at trial, but it should ordinarily not be given unless requested or personally consented to by the defendant. Here, there was no record of appellant's counsel conferring with him about the instruction or appellant's agreement to such an instruction, and appellant was voluntarily absent when the instruction was requested. The court finds no error in the district court's refusal to give a no-adverse-inference instruction. ***State v. Flah***, No. A18-1758, 2019 WL 4251985 (Minn. Ct. App. 9/9/2019).

■ ***Habeas corpus: Habeas* relief is proper procedural remedy for challenge to continued incarceration during conditional release period.** Appellant was convicted of third-degree criminal sexual conduct in 2008 and sentenced to three years' imprisonment, stayed for 15 years, and a five-year conditional release term. The sentence was executed in 2013. He was placed on supervised release in January 2014, but supervised release was revoked in August 2014. Appellant's supervised release term expired in February 2015 and he became eligible for conditional release. On his release date, appellant was instead transferred to Blue Earth County jail because he did not have approved housing in Blue Earth County. He unsuccessfully searched for housing and his release was revoked for 90 days, and appellant was returned to prison. This pattern continued, with appellant unable to find approved housing and his incarceration extended.

Appellant petitioned for a writ of *habeas corpus*, arguing the Department of Corrections (DOC) unlawfully extended his incarceration after his conditional release term began. The court of appeals reversed, finding the DOC was required to provide assistance to appellant in finding approved housing, and remanded to permit the DOC to develop the record as to what other housing options were available, warning that, if no suitable options were available, the department was required to consider restructuring the conditions of release.

Two days before the case was scheduled for a hearing before the district court, appellant was released to a residential sex offender treatment program in Hennepin County, Alpha House, and the DOC argued appellant's release made appellant's *habeas* petition moot. The hearing proceeded and the district court ultimately granted appellant's petition, ordering the department to treat either Hennepin or Ramsey County as appellant's presumptive release jurisdiction and, if either county declined to accept supervision, to provide supervision in that county or modify appellant's release conditions. The court of appeals reversed, finding appellant's *habeas* petition moot upon his release to Alpha House.

The Supreme Court reverses the court of appeals, finding appellant's release to Alpha House did not render his petition moot, that a writ of *habeas corpus* provides the proper procedural relief under the circumstances of this case, and that the DOC failed to adhere to the law. Appellant's petition is not moot because he could be returned to prison after his release from Alpha House, based on the likelihood that Hennepin County would not supervise appellant and that appellant would not be able to find approved housing.

Habeas relief is also the proper procedural remedy here. Minn. Stat. §589.01 allows any person imprisoned or otherwise restrained of liberty to petition for a writ, and appellant's liberty was restrained by the department's failure to abide by its own internal policies regarding supervised release and judicial precedent.

Finally, the DOC failed to follow the law, specifically *State ex rel. Marlowe v. Fabian*, 755 N.W.2d 792 (Minn. Ct. App. 2008). The court of appeals in *Marlowe* stated that the department "has an obligation to fashion conditions of release that are workable and not impossible to satisfy." *Id.* at 793. The Supreme Court accepts the district court's conclusion in this case that, contrary to *Marlowe*'s holding, the DOC "never modifies offenders' conditions of release." The court upholds the district court's order for the department to "fully comply" with *Marlowe*. ***State ex rel. Ford v. Schnell***, No. A17-1895, 2019 WL 4282040 (Minn. 9/11/2019).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Municipal liability; claim rejected.** A jury determination that a mayor was not liable for racial discrimination against a municipal employee barred any related claims against the city. The 8th Circuit Court of Appeals held that the absence of liability against the municipal official precluded those other claims. ***Ridgell v. City of Pine Bluff,*** 935 F.3d 633 (8th Cir. 8/29/2019) (unpublished).

■ **Employee discipline; split NLRB decision.** The 8th Circuit upheld an administrative determination that an employer violated the National Labor Relations Act (NLRA) by prohibiting an employee from discussing her discipline with coworkers and then discharging her for doing so. But it overturned an administrative determination that the employer wrongfully gave the employee a "last chance" warning while she was appealing a prior unlawful discipline charge. ***Southern Bakeries, LLC v. NLRB,*** 2019 WL 4280367 (8th Cir. 9/11/2019) (unpublished).

■ **Race discrimination; none similarly situated.** An African-American man who claimed he was fired due to race discrimination lost his claim because he was unable to show that the employer treated other similarly-situated Caucasian workers differently. Absent such evidence, the 8th Circuit Court of Appeals upheld a lower court ruling that the termination was not pretextual. ***Beasley v. Warren Unilube, Inc.,*** 933 F.3d 932 (8th Cir. 8/9/2019) (unpublished).

■ **Social Security disability; receptionist not disabled.** An office receptionist was deemed ineligible for social security disability (SSDI) benefits. Affirming an administrative law decision, the 8th Circuit held that the claimant was able to engage in substantial gainful activities despite her maladies. ***Sloan v. Saul,*** 933 F.3d 946 (8th Cir. 8/12/2019).

■ **Athletic coaches; state law claims dismissed.** Claims of violation of the Minnesota Human Rights Act and whistleblower act by former coaches of women's athletic teams at the Duluth campus of the University of Minnesota were dismissed by the Minnesota Court of Appeals, affirming a lower court ruling. It held that the doctrine of equitable tolling of the statute of limitations was inapplicable for claims previously brought and dismissed in federal court, while the exclusivity provision of the Human Rights Act, as *res judicata*, and collateral estoppel all barred the claims, as well. ***Miller v. Board of Regents,*** 2019 WL 4164898 (Minn. Ct. App. 9/3/2019) (unpublished).

■ **Unemployment compensation; safety issue.** A facilities technician at a semiconductor facility was denied unemployment benefits because he failed to timely respond to alarms at the work site. The appellate court held that the employee committed disqualifying misconduct. ***Goudiaby v. Skywaters Tech Foundry, Inc.,*** 2019 WL 3540666 (Minn. Ct. App. 8/5/2019) (unpublished).

■ **Unemployment compensation; PIP not basis to quit.** An employee who quit after receiving a performance improvement plan (PIP) was not entitled to unemployment compensation. The appellate court ruled that the employer did not force him to resign. ***Stenger v. Minnesota Wire & Cable Co.,*** 2019 WL 3543692 (Minn. Ct. App. 8/5/2019) (unpublished).

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ENVIRONMENTAL LAW

JUDICIAL LAW

Federal district court rejects challenges to PolyMet federal land exchange. The United States District Court for the District of Minnesota issued an opinion dismissing four actions against PolyMet Mining, Inc. concerning a land exchange between PolyMet and the U.S. Forest Service (USFS). The land exchange, which the USFS approved with a Final Record of Decision in January 2017, involved PolyMet's proposed transfer to USFS of 6,690 acres of private land in exchange for the USFS's transfer to PolyMet of property rights in 6,650 acres of federal land in the Superior National Forest. PolyMet plans to develop an open-pit copper-nickel mine on the federal land. The four actions were brought by numerous environmental groups asserting claims under federal statutes including the Administrative Procedures Act, the Federal Land Policy and Management Act, the National Environmental Policy Act, the Weeks Act, and the Endangered Species Act. Asserting that the plaintiffs lacked standing under Article III of the U.S. Constitution and that their claims were not ripe, Poly Met Mining moved to dismiss all four actions.

In granting PolyMet's motion to dismiss, the court focused its analysis on whether the plaintiffs had standing under the standard articulated in *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013): "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

For example, the court held that even though some of the plaintiffs' members had visited the federal lands involved in the land exchange, they did not have individual standing because they had not articulated concrete plans to revisit the lands in the future (at least, not until the litigation was commenced), and had not explained how they would overcome the practical and legal hurdles involved in visiting the land once it was fully under PolyMet's control and private property. The court also rejected standing based upon alleged diminution in value of certain of plaintiffs' members, explaining that the alleged property value losses are not germane to the purpose of plaintiffs' organizations. Similarly, the court held that the plaintiffs' use of resources for litigation, investigation in anticipation of litigation, or advocacy related to the proposed land exchange is not sufficient to give rise to an Article III injury.

The court also noted that to the extent plaintiffs asserted standing based on PolyMet's intended future use of the federal property for the proposed non-ferrous mine, this did not present an injury that was sufficiently concrete, particularized, and imminent. In addition, unless and until PolyMet Mining secures the permits needed to build its mine (which had not yet happened at the time plaintiffs brought their actions), the court held, nothing in the record indicated PolyMet intended any changes to the federal land after the land exchange that would affect those not on the property. ***WaterLegacy v. USDA Forest Serv.***, 2019 U.S. Dist. LEXIS 169350 (9/30/2019).

Enbridge Line 3 updates. *Minnesota Supreme Court rejects Line 3 challenges.* On 9/17/2019, the Minnesota Supreme Court declined to take up challenges raised by tribal and environmental groups regarding the environmental review of Enbridge Energy's proposal for replacing Line 3 in northern Minnesota. The challenges made by tribal and environmental groups argued that the state Public Utilities Commission's (PUC) approval of the environmental review provided for the Line 3 project was inadequate in that it did not appropriately address the potential impact of a spill in the Lake Superior watershed. Those challenges were first heard by the Minnesota Court of Appeals, which in June 2019 reversed a portion of the PUC's approval of the Line 3 environmental review—requiring the PUC to further address the possibility of a spill in the Lake Superior watershed.

The tribal and environmental groups then appealed those portions of the Line 3 environmental review which were not reversed to be heard by the Supreme Court. With the Supreme Court's refusal to take up the challenges, Minnesota regulators, namely the PUC, will now be able to begin the process of fixing the deficiency in the Line 3 environmental review identified by the court of appeals. Enbridge cannot begin construction of the Line 3 project until it obtains several environmental permits from state and federal agencies. Those permits cannot be obtained until after the PUC gives final approval of the updated environmental review. Even then, approval of the updated environmental review will likely trigger new lawsuits from tribal and environmental groups.

MPCA denies Enbridge's 401 Certification. On 9/27/2019, the Minnesota Pollution Control Agency (PCA) issued a denial of the application for Clean Water Act (CWA) Section 401 Water Quality Certification by Enbridge Energy for its Line 3 project in northern Minnesota. The PCA based its denial on the Minnesota Court of Appeals ruling that the environmental impact statement (EIS) provided for the Line 3 project was inadequate in that it did not adequately address the potential for a spill in the Lake Superior watershed.

The PCA stated that the appellate court's ruling suggests that "additional information directly pertinent to water quality in Minnesota (and therefore, the 401 request) will likely be required to be prepared for the EIS." The PCA went further and clarified that in addition to the information needed to address a potential spill in the Lake Superior watershed, Enbridge would also need to provide (1) a revised pre- and post-construction monitoring plan for aquatic resources, and (2) a revised proposal for compensatory wetland mitigation.

The PCA also found that although Enbridge provided a summary plan for post-construction monitoring, PCA would need additional, more specific information from Enbridge regarding the monitoring plan for aquatic resources. Likewise, the PCA found that although Enbridge had proposed a compensatory mitigation plan for proposed impacts to wetlands resulting from the Line 3 project, the proposal itself did not provide adequate justification for certain compensatory mitigation ratios proposed by Enbridge.

Accordingly, the PCA denied Enbridge's 401 Certification without prejudice, requiring additional information supporting the request for 401 Certification in order to provide the PCA with reasonable assurance of the Line 3 Project's ability to comply with Minnesota water quality standards.

ADMINISTRATIVE ACTION

EPA withdraws California's Clean Air Act fuel emissions waiver. On 9/19/2019, the U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) and the U.S. Environmental Protection Agency (EPA) issued the final One National Program Rule to enable federal uniform emission standards on fuel economy and greenhouse gases for automobile and light duty trucks. In

doing so, EPA proposed to withdraw a preemption waiver that gives California unique authority to enact stricter emission standards than federal regulations. Specifically, EPA is withdrawing the Clean Air Act preemption waiver it granted to California in January 2013 as it relates to California's greenhouse gas (GHG) and zero emission vehicle (ZEV) programs.

The waiver revocation finalizes standards initially proposed in August 2018's proposed "Safer, Affordable, Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks." The SAFE rule proposed to give EPA authority to reconsider and withdraw previous waivers already granted in order to standardize fuel economy standards. EPA grounded the revocation in congressional intent to implement uniform national standards and in furtherance of President Trump's plan to scale back Obama-era vehicle emission standards.

Prior to this rule, California was able to request a waiver to set its own vehicle emission standards if it could demonstrate that the proposed standards were at least as stringent as federal standards. Under Clean Air Act (CAA) Section 209(b), EPA must grant a waiver request unless it finds that (1) California's determination that the standards are as stringent as federal standards is arbitrary and capricious, (2) California does not need additional standards to meet compelling and extraordinary conditions, or (3) California's standards and enforcement procedures are not consistent with federal emission standards. Once a waiver was granted, other states could choose to opt into either the federal emission standards or California's emission standards. As of September 2019, 13 other states, as well as Washington DC, followed the California standards.

EPA claims authority to revoke the waiver because, contrary to the requirements of Clean Air Act Section 209(b)(1)(B), California does not need the GHG and ZEV standards to address "compelling and extraordinary conditions." It also claims that the waiver violates the Energy Policy & Conservation Act's (EPCA) bar on states establishing their own fuel economy standards because California's rules are "related to" fuel economy. California and 23 other states as well as the cities of Los Angeles and New York have filed a lawsuit against the EPA for this rule. At issue are whether EPA has legal authority to withdraw a waiver and under what circumstances it may exercise that authority.

The One National Program Rule takes effect on November 18.

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FEDERAL PRACTICE

JUDICIAL LAW

■ **CAFA; amount in controversy; timeliness of removal; reversal of remand.** Plaintiffs filed a putative class action in the Missouri courts seeking compensatory and statutory damages, punitive damages, and an award of attorney's fees in unspecified amounts. The defendant eventually removed the action under CAFA. Plaintiffs moved to remand, arguing that the removal was untimely. However the district court, *sua sponte*, remanded the action, finding that defendants had not established that the amount in controversy exceeded $5 million. The defendant petitioned for leave to appeal.

On appeal, the 8th Circuit granted the petition, and then found that the district court had erred in its amount-in-controversy analysis by focusing on the likelihood of the plaintiffs' recovery rather than the possibility of that recovery. The 8th Circuit also found that the removal was timely where the defendant removed within 30 days of the completion of its investigation of the potential amount in controversy. ***Pirozzi v. Massage Envy Franchising, LLC***, ___ F.3d ___ (8th Cir. 2019).

■ **Notice of removal; validity; attorney not admitted in jurisdiction.** Finding that "removal is a federal procedure governed by federal statute," the 8th Circuit rejected a challenge to a removal from the Arkansas state courts where the attorney who filed the removal was licensed in federal court but was not licensed in the Arkansas courts. ***Brooks v. Liberty Life Assurance Co.***, 937 F.3d 1144 (8th Cir. 2019).

■ **Fed. R. Civ. P. 15(c)(1); relation back of amendments.** Magistrate Judge Wright granted the plaintiff's motion to amend to correct misnomers, finding that Judge Wright had already determined that the claims related back for purposes of Fed. R. Civ. P. 15(c)(1), and that there was no evidence that the plaintiff "made a conscious choice" to sue the wrong parties. ***Cahoon v. L.B. White Co.***, 2019 WL 4786097 (D. Minn. 10/1/2019).

■ **Motion for partial summary judgment denied; advisory opinion.** Judge Magnuson denied the defendant's motion for partial summary judgment, finding that the issue was not yet "ripe for decision," and that the court was "being asked to render an advisory opinion on a hypothetical determination of crucial facts." ***Borup v. The CJS Solutions Group***, 2019 WL 4820732 (D. Minn. 10/1/2019).

■ **Removal; Fed. R. Civ. P. 65; temporary injunction dissolved.** Judge Schiltz dissolved a temporary injunction entered prior to removal, finding that the injunction had been entered without notice to the defendant, did not state the reasons why it was issued, and did not require the posting of a bond, all of which ran afoul of Fed. R. Civ. P. 65. ***Marco Technologies, Inc. v. Midkiff***, 2019 WL 4298086 (D. Minn. 9/11/2019).

■ **Discovery of settlement discussions; waiver of work-product privilege.** Overruling objections to an order by Magistrate Judge Rau, Judge Ericksen declined to apply a heightened standard of relevance to discovery of settlement negotiations, and also found that any work-product privilege was waived when the disputed information was voluntarily disclosed to the government during the litigation. ***United States ex rel. Higgins v. Boston Scientific Corp.***, 2019 WL 4052327 (D. Minn. 8/28/2019).

■ **Motion to deny motion for *pro hac vice* admission denied.** Magistrate Judge Leung denied a motion by *pro se* plaintiffs to deny *pro hac vice* admission to a Pennsylvania attorney, finding that the plaintiffs' potential inability to record their telephone conversations with him because Pennsylvania is a "two-party" state did not provide a basis to deny *pro hac vice* admission. ***Bailey v. Met. Council***, 2019 WL 4387325 (D. Minn. 9/13/2019).

■ **Request for sanctions pursuant to Fed. R. Civ. P. 26(g), inherent powers and 28 U.S.C. §1927 denied.** Despite criticizing plaintiff's counsel's "gross oversight" in failing to conduct a thorough pre-suit investigation and his finding that counsel's conduct "verge[d] on abuse of the judicial process," Judge Frank denied one defendant's request for sanctions under Fed. R. Civ. P. 26(g), inherent powers, and/or 28 U.S.C. §1927. ***Beaulieu v. Stockwell***, 2019 WL 3947007 (D. Minn. 8/21/2019).

■ **Fed. R. Civ. P. 37(a)(5)(B); motions to compel; attorney's fees awarded.** Magistrate Judge Menendez awarded the defendants $1,803 in attorney's fees for expenses incurred in responding to a motion to compel that was not "substantially justified." ***Smith v. Bradley Pizza, Inc.***, 2019 WL 4387357 (D. Minn. 9/13/2019).

Magistrate Judge Menendez awarded the defendant $4,000 in attorney's fees incurred in responding to the plaintiff's motion to compel, finding that the motion was not "substantially justified." ***Darmer v. State Farm Fire & Cas. Co.***, 2019 WL 4387324 (D. Minn. 9/13/2019).

■ **Motion for Rule 11 sanctions denied.** Judge Tostrud denied the defendant's early motion for Rule 11 sanctions in a patent case, finding that a "reasonable and competent attorney" could "believe the legal and factual bases" for the plaintiff's claims. ***Red Rhino Leak Detection, Inc. v. Anderson Mfg. Co.***, 2019 WL 4410324 (D. Minn. 9/16/2019).

■ **Motion to extend time to respond to motion to amend granted.** While chastising defendants for failing to file their opposition to plaintiffs' motion to amend in accordance with the deadline established in the Local Rules, Magistrate Judge Leung granted the defendants' motion to extend time to respond to that motion. ***Bailey v. Met. Council***, 2019 WL 4687040 (D. Minn. 9/26/2019).

■ **Attorney's fees granted.** Chief Judge Tunheim awarded the prevailing plaintiff in an employment discrimination case more than $2.3 million in attorney's fees, rejecting the defendants' challenge to the rates of out-of-market attorneys and paralegals, which ranged from $550-$750 per hour, and $200 to $250 for paralegals. ***Miller v. Bd. of Regents of the University of Minnesota***, ___ F. Supp. 3d ___ (D. Minn. 2019).

ADMINISTRATIVE ACTION

■ **Transcripts; privacy procedures; interim order.** Effective 10/14/2019, court reporters are required to file all transcripts under temporary seal to allow parties the opportunity to identify personal identifiers or confidential information that need to be redacted. If personal identifiers require redaction, a party must follow the procedures set forth in L.R. 5.5. If a party believes that confidential information needs redaction, a

motion must be filed within seven days after the filing of the transcript. And if a party believes that no redactions are necessary, it must file a notice to that effect no later than seven days after the transcript is filed. ***In Re: Revised Transcript Procedures to Provide Increased Privacy Protections*** (Order dated 10/11/2019).

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IMMIGRATION LAW

JUDICIAL LAW

■ **Applications for asylum by those who travel through a third county without first seeking relief there.** Subsequent to the 7/24/2019 order issued by the U.S. District Court in the Northern District of California enjoining the government from implementing its rule (i.e., a mandatory bar to asylum eligibility for individuals entering or attempting to enter the United States through the southern border while traveling through a third country without first seeking relief in that country), the same district court and 9th Circuit Court of Appeals issued further rulings on the injunction. The matter then went before the U.S. Supreme Court, which issued an order on 9/11/2019 staying the district court's injunction during the pendency of the court litigation on the mandatory bar to asylum eligibility. ***Barr, el al. v. East Bay Sanctuary Covenant, et al.,*** 588 U.S. ____ (2019). *https://www.supremecourt.gov/opinions/18pdf/19a230_k53l.pdf*

■ **Inadmissibility and public charge grounds.** On 8/14/2019, the Department of Homeland Security (DHS) published its final rule amending regulations addressing inadmissibility, on public charge grounds, of foreign nationals seeking admission or adjustment of status. The rule was scheduled to go into effect on 10/15/2019. **84 *Fed. Reg.*, 41,292-508** (8/14/2019). *https://www.govinfo.gov/content/pkg/FR-2019-08-14/pdf/2019-17142.pdf*

On 8/20/2019, the State of New York, the City of New York, the State of Connecticut, and the State of Vermont (state plaintiffs) filed a complaint seeking declaratory and injunctive relief in the U.S. District Court for the Southern District of New York. ***State of New York, et al. v. DHS, et al.***, No. 1:19-cv-07777 (S.D.N.Y 8/20/2019). *https://ag.ny.gov/sites/default/files/8.20.2019_complaint_as_filed.pdf*

On 8/27/2019, Make the Road New York, African Services Committee, Asian American Federation, Catholic Charities Community Services, and Catholic Legal Immigration Network, Inc.) (organizational plaintiffs) filed a complaint in the U.S. District Court for the Southern District of New York. ***Make the Road New York, et al. v. Ken Cuccinelli, et al.***, No. 1:19-cv-07993 (S.D.N.Y. 8/27/2019). *https://ccrjustice.org/sites/default/files/attach/2019/08/Public%20Charge%20Complaint.pdf*

On 9/9/2019, the state plaintiffs filed a motion for preliminary injunction to enjoin the government from enforcing the final rule. *https://ag.ny.gov/sites/default/files/35_plaintiffs_mol_iso_pi.pdf*

On 9/9/2019, the organizational plaintiffs also filed a motion for preliminary injunction to enjoin the government from enforcing the final rule. *https://www.courtlistener.com/recap/gov.uscourts.nysd.521773/gov.uscourts.nysd.521773.38.0.pdf*

On 10/11/2019, the U.S. District Court in the Southern District of New York issued a nationwide order enjoining and restraining the government from "enforcing, applying or treating as effective, or allowing persons under their control to enforce, apply, or treat as effective, the Rule" until such time as the order is terminated and the rule goes into effect. ***State of New York, et al. v. DHS, et al.***, No. 1:19-cv-07777-GBD (S.D.N.Y 10/11/2019). *http://www.nysd.uscourts.gov/cases/show.php?db=special&id=720* ***Make the Road New York, et al. v. Ken Cuccinelli, et al.***, No. 1:19-cv-07993-GBD (S.D.N.Y. 10/11/2019). *http://www.nysd.uscourts.gov/cases/show.php?db=special&id=722*

In its accompanying order and memorandum, the court pointedly noted, while discussing the arbitrary and capricious nature of the rule, that "Defendants do not articulate why they are changing the public charge definition, why this new definition is needed now, or why the definition set forth in the Rule—which has absolutely no support in the history of U.S. immigration law—is reasonable. The Rule is simply a new agency policy of exclusion in search of a justification. It is repugnant to the American Dream of the opportunity for prosperity and success through hard work and upward mobility." ***State of New York, et al. v. DHS, et al.***, No. 1:19-cv-07777-GBD (S.D.N.Y 10/11/2019). *https://ag.ny.gov/sites/default/files/doc_110_opinion.pdf*

Related litigation in other regions of the United States includes the following:

On 8/14/2019, the states of Washington, Virginia, Colorado, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, and Rhode Island filed a complaint for declaratory and injunctive relief against the Department of Homeland Security and U.S. Citizenship and Immigration Services in the U.S. District Court for the Eastern District of Washington at Richland. ***State of Washington, et al. v. DHS, et al.***, No. 4-19-cv-05210 (E.D. Wash. 8/14/2019). *https://agportals3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/001_Complaint_1.pdf*

On 10/11/2019, the U.S. District Court found in favor of the plaintiff states, enjoining the government from implementing the rule until further order of the court. ***State of Washington, et al. v. DHS, et al.***, No. 4:19-cv-05210-RMP (E.D. Wash. 10/11/2019). *https://www.waed.uscourts.gov/sites/default/files/19513691270.pdf*

On 8/13/2019, the City and County of San Francisco and the County of Santa Clara filed suit in the U.S. District Court for the Northern District of California seeking declaratory and injunctive relief, challenging the final rule. ***City***

and County of San Francisco, et al. v. USCIS, et al., No. 3:19-cv-4717 (N.D. Cal. 8/13/2019). *https://www.sfcityattorney.org/wp-content/uploads/2019/08/Filed-Complaint.pdf*

On 8/16/2019, the states of California, Maine, Oregon, Commonwealth of Pennsylvania, and the District of Columbia filed a complaint for declaratory and injunctive relief against the Department of Homeland Security and U.S. Citizenship and Immigration Services in the U.S. District Court for the Northern District of California. ***State of California, et al. v. DHS, et al.***, No. 3-19-cv-04975 (N.D. Cal. 8/16/2019). *https://oag.ca.gov/system/files/attachments/press-docs/Public%20Charge%20Complaint.pdf*

On 10/11/2019, the U.S. District Court issued an order for the plaintiffs in both cases (City and County of San Francisco, the County of Santa Clara, and the States of California, Maine, Oregon, Commonwealth of Pennsylvania, and the District of Columbia), enjoining the government from applying the rule, in any manner, "to any person residing (now or at any time following the issuance of this order)" in those locales. The injunction remains in effect until the matter is resolved on the merits. ***City and County of San Francisco, et al. v. USCIS; State of California, et al. v. DHS; La Clinica de la Raza, et al. v. Donald Trump, et al.***, No. 4:19-cv-04717-PJH (N.D. Cal. 10/11/2019). *https://www.uscis.gov/sites/default/files/USCIS/files/NDCA_Injunction.pdf*

These court decisions do not, however, enjoin the changes brought by the public charge rule as implemented by DHS' sister agency, Department of State, in consular processing of visas abroad. They remain in place as outlined in its 10/11/2019 Interim Final Rule, scheduled to go into effect on 10/15/2019. The rule makes changes to the existing definitions of public charge, public benefit, foreign national's household, and receipt of public benefit. At the same time, the consular officer assessing an applicant for admissibility is accorded greater discretion as (s)he reviews such factors as Age, Health, Family Status, Financial Status, Education and Skills, as well as such negative factors as Lack of Recent Employment or Prospect of Future Employment; Current or Certain Past Receipt of Public Benefits; Lack of Financial Means to Pay for Medical Costs; and Prior Public Charge Inadmissibility or Deportability Finding. **84 Fed. Reg., 54,996-015** (10/11/2019). *https://www.govinfo.gov/content/pkg/FR-2019-10-11/pdf/2019-22399.pdf*

Since publication of the Interim Final Rule in the Federal Register on 10/11/2019, the Department of State has announced that it will not implement the changes until such time as it obtains approval for use of a new form (Affidavit of Support) reflecting them. *https://travel.state.gov/content/travel/en/traveladvisories/ea/Information-on-Public-Charge.html*

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INTELLECTUAL PROPERTY

JUDICIAL LAW

Copyright: Statutory damages limited to number of infringed registrations. Judge Tostrud recently entered default judgment against Your Inspiration and awarded $300,000 in statutory copyright damages. Adventure Creative Group (ACG) entered into a marketing services contract with Your Inspiration in 2012. Your Inspiration stopped paying ACG its fee, but continued to use the advertising materials generated by ACG. ACG sued Your Inspiration for copyright infringement. After Your Inspiration failed to answer the complaint, default was entered. ACG sought an award of $16,350,000, which it calculated by multiplying the number of works it said Your Inspiration infringed (109) by the maximum statutory damage award available for willful infringement ($150,000). The court, however, found Adventure Creative Group's calculation improper. ACG holds two registered copyrights that Your Inspiration infringed—a catalog and a video. Statutory damages may be awarded under 17 U.S.C. §504(c) entitling a copyright owner to recover up to $30,000 in statutory damages per infringed registration or a maximum of $150,000 per registration if the infringement was willful. ACG arrived at its 109 infringements by counting individual photographs and text removed from each registered work. The court, however, found that all of the parts of a compilation or derivative work constitute one work. Therefore, ACG was entitled to statutory damages on only the two registered works, not the 109 separate elements. The court awarded Adventure Creative Group the maximum $150,000 statutory award for willful infringement of each of ACG's registered works. ***Adventure Creative Grp., Inc. v. CVSL, Inc.***, No. 16-cv-2532, 2019 U.S. Dist. LEXIS 155545 (D. Minn. 9/12/2019).

Patent: Construing design patent claims. Judge Tostrud also recently entered a claim construction order in a design patent infringement case that avoided a "no-scope" construction. Graphic Packaging International sued Inline Packaging for infringing its utility and design patents for microwave susceptor sleeves—sleeves used for heating and carrying food products, including "Hot Pockets." After all claims of the utility patent were canceled in an *inter partes* review, the case proceeded with Graphic Packaging's remaining three design patents. Each design patent contained a single claim claiming "the ornamental design for a carton blank, as shown and described." Graphic Packaging sought constructions that construed the scope of the claims as the visual appearance of the susceptor sleeves as shown in the claim drawings. Inline Packaging argued that the design of the sleeves was primarily functional and sought constructions giving the patents no scope. The court found the law discourages no-scope constructions. Because the sleeves were amenable to alternative designs, the sleeves' patented designs were not primarily functional. The court adopted Graphic Packaging's constructions. ***Graphic Packaging Int'l, LLC v. Inline Packaging, LLC***, No. 15-cv-03476, 2019 U.S. Dist. LEXIS 17066 (D. Minn. 10/1/2019).

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PROBATE & TRUST LAW

JUDICIAL LAW

Motions to confirm claim disallowance during appeal. Prior to decedent's death, plaintiff filed a lawsuit against decedent in federal court. Following decedent's death, plaintiff asserted a contingent claim against decedent's estate, based on the pending lawsuit, by filing a statement of unsecured claim. The personal representative of the estate disallowed the claim. The district court granted a motion to dismiss plaintiff's claims against the estate in federal court. While the appeal was pending in the 8th Circuit, the personal representative of the estate moved to confirm disallowance of the contingent claim. The district court denied the motion.

In a matter of first impression, the Minnesota Court of Appeals held that in cases involving contingent claims and possible delay to probate administration, district courts must balance the "prompt, orderly, and efficient administration of a decedent's estate" against the "interest in protecting the claims of creditors against [an estate]." The court of appeals concluded that the district court had conducted the proper balancing and confirmed. ***In re the Supervised Estate of Brian Short***, No. A18-1682 (Minn. Ct. App. 8/26/2019).

■ **Statute of limitations; "some damage" rule.** Decedent Robert Hansen and his brother Bryan Hansen contracted to sell a piece of property to Community Facilities Partnership of Vadnais Heights (CFP) to be used for a community sports complex. Pursuant to the purchase agreement, CFP agreed to pay $2.5 million in cash and a $2 million tax-exempt subordinate nonrecourse 30-year note. Payments on the note were to be made using anticipated revenue from the sports complex.

Following decedent's death, U.S. Bank served as co-special administrator of the estate in order to supervise and oversee closing on the property. Following some changes to the purchase agreement, the sale closed on 4/27/2010. From 2010 through 2012, the sports complex suffered revenue shortfalls and the estate stopped receiving payments on the note in August 2012. In January 2017, the beneficiaries of the estate filed a breach of fiduciary duty claim against U.S. Bank alleging, among other things, that it failed to obtain any of the required financial forecasts or revenue assurances and failed to require CFP to master lease the property to the City of Vadnais Heights.

U.S. Bank filed a motion to dismiss, arguing that the statute of limitations had run. The district court granted the motion, reasoning that the beneficiaries' claims accrued in 2010, more than six years before the lawsuit was filed, because the beneficiaries suffered some damages at the time the sale closed. The district court did not identify any damages suffered by the beneficiaries upon closing. The court of appeals affirmed, reasoning that the beneficiaries had suffered damages because the lost opportunity to demand the required forecast, to negotiate the terms of the purchase agreement, or to cancel the purchase agreement, constituted the loss of a legal right.

The Supreme Court accepted review and held that the complaint did not allege facts that establish some damage in the form of a loss of a legal right. The Court started by laying out the general rule that some damage may be created by establishing either financial liability or the loss of a legal right. The Court held that no loss of legal right had been established because the operative legal right at issue was the ownership of property. The point of the transaction was precisely to exchange ownership of the property for money. In other words, "the parties may dispute whether U.S. Bank's alleged breaches caused the Beneficiaries to part with their legal right to ownership of the property for too little money, but that type of harm falls in the financial liability category, rather than the loss of a legal right category." The Court reversed and remanded. ***Hansen v. U.S. Bank, N.A.***, No. A17-1608 (Minn. Ct. App. 9/25/2019).

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TAX LAW

JUDICIAL LAW

■ **States not permitted to single out railroads for extra taxation.** Chapter 70 of the Wisconsin Code governs the taxation of manufacturing and commercial companies aside from railroad and utilities companies. Chapter 76 governs the taxation of railroad and certain other entities. Wisconsin law requires taxpayers to pay taxes on real and personal property unless that property is exempt. Exemptions includes a broad exemption for "all intangible personal property"; the exemption for intangible personal property includes an exemption for custom computer software. (Wis. Stat. §70.112(1)). Manufacturers and commercial taxpayers generally qualify for the intangible personal property exemption, but railroad and utility companies do not.

The Wisconsin Department of Revenue disallowed the Union Pacific Railroad Company from claiming a property tax exemption for the value of the railroad's custom computer software. Union Pacific refused to pay the $2,631,104.77 tax bill and instead filed suit, arguing that the Wisconsin tax singles out railroads as part of an isolated and targeted group in violation of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976. 49 U.S.C. §11501 (b)(4).

The federal district court and the 7th

Circuit agreed with Union Pacific and held that Wisconsin's intangible personal property tax impermissibly singles out railroads as part of a targeted and isolated group in violation of the federal statute that bars states from discriminating against railroads. The court noted that "[it] is now well established that a showing that the railroads have been targeted is enough to prove discrimination." Since the Wisconsin Department of Revenue failed to provide a nondiscriminatory justification for imposing a targeted tax on the intangible property of railroad and utilities companies, and the department did not contest the district court's conclusion that the railroad and utilities companies defined in the Code are a targeted and isolated group, the district court's grant of summary judgment to Union Pacific was upheld. ***Union Pac. R.R. Co. v. Wisconsin Dep't of Revenue***, No. 19-1741, 2019 WL 4926516 (7th Cir. 10/7/2019).

■ **"Tax home" cannot be foreign country if taxpayer maintains abode in United States.** A taxpayer who worked in Afghanistan for a year was not eligible for foreign earned income exclusion because he maintained a home in Colorado. Although the taxpayer hired a tax preparer for assistance in filing his return, the tax court imposed an accuracy-related penalty. The court found that "[t]he evidence establishes negligence in that petitioner has failed to make a reasonable attempt to comply with the provisions of the Code." The court admonished the taxpayer that "[m]erely hiring a professional to prepare an income tax return—without giving him necessary information or relying on his advice—does not absolve a taxpayer from liability for a penalty." ***Cambria v. Comm'r***, No. 13323-18S, 2019 WL 4784859 (T.C.S. 9/30/2019).

■ **Attorney does not have "basis in labor"; Section 6673 not unconstitutional.** The taxpayer in this case, a practicing attorney, contended that he should be entitled to take into account his "basis in labor" and that the value or cost of his labor is its fair market value. As support for this position, the taxpayer pointed to Sections 83, 1001, and 1012 and various regulations under those sections. The court rejected the taxpayer's argument, noting that "[i]t is well established that the income tax applies to income for personal services and that taxpayers have no basis in their labor for purposes of deciding their income tax liability for income from personal services." The court characterized the taxpayer's argument as relying on "selective and misguided readings of multiple statutes." The court further rejected the taxpayer's argument that Section 6673 is unconstitutional. Section 6673 authorizes the tax court to impose a penalty of up to $25,000 when it appears to the tax court that proceedings before the court have been instituted or maintained by the taxpayer primarily for delay; that the taxpayer's position in such proceeding is frivolous or groundless; or that the taxpayer unreasonably failed to pursue available administrative remedies. The taxpayer in this case argued that since Section 6673 does not equally apply to the Service, it is unconstitutional. In particular, the taxpayer argued that Section 6673 "discourages his First Amendment right to make legitimate arguments because it does not apply equally to taxpayers and the Commissioner." The tax court reminded the taxpayer that he does not have a "constitutional right to litigate frivolous claims without being sanctioned" and reserved the amount of sanctions for a separate opinion. ***Worsham v. Comm'r***, T.C.M. (RIA) 2019-132 (T.C. 2019).

■ **Sales & use tax: Capital equipment sales tax exemption applies to entire production of equipment.** The commissioner granted taxpayer Inthermo's request for a capital equipment sales tax exemption for its burn-off oven, which Inthermo uses exclusively to clean accumulated powder coating from hooks, racks, and fixtures that its customers use to produce personal property sold at retail. *See* Minn. Stat. §297A.68, subd. 5 (2018). Inthermo then sought an exemption and a refund of sales tax paid for the natural gas and electricity it used to operate the oven. *Id.*, subd. 2(a)(3) (2018). Inthermo argued that the gas and electricity were exempt from sales tax because Inthermo's cleaning of its customers' production equipment is a necessary component of the customers' "industrial production." *Id.*, subd. 2(a)(c) (2018). The commissioner denied Inthermo's refund claim based on Minn. Stat. §297A.68, subd. 2(c), stating in part: "Industrial production does not include painting, cleaning, repairing or similar processing of property except as part of the original manufacturing process." Inthermo appealed the commissioner's decision and the parties filed cross-motions for summary judgement.

Minnesota imposes a tax on gross receipts from retail sales, but there are a number of business-related exemptions created to exempt intermediate transactions and impose a tax on sales of finished products by the ultimate user. *See* Minn. Stat. §297A.62, subd. 1 (2018). See also, *Weigel v. Comm'r of Revenue*, 566 N.W.2d 79, 80 (Minn. 1997). One business exemption is for capital equipment. Minn. Stat. §297A.68, subd. 5(a) defines exempt capital equipment as machinery and equipment: (1) "purchased or leased, and used in this state by the purchaser or lessee primarily for manufacturing, fabricating, mining, or refining tangible personal property to be sold ultimately at retail"; and (2) "essential to the integrated production process of manufacturing, fabricating, mining, or refining." The Legislature has defined equipment to mean, in relevant part, "independent devices or tools separate from machinery but essential to an integrated production process". *Id.* subd. 5(d)(1).

The court states that the post-production-processing exclusion in Minn. Stat. §297A.62, subd. 2, which deals with property rather than with machinery and equipment, is not applicable in this matter. Inthermo cleans production equipment that its customers use to produce tangible personal property to be sold at retail. After one or two uses, customers cannot reuse this equipment in the pro-

duction process without first cleaning it. The commissioner offered no argument for denying Inthermo the industrial production exemption that is not ultimately based on Minn. Stat. §297A.62, subd. 2(c). Therefore the court grants Inthermo's motion for summary judgment and denies the commissioner's motion. ***Inthermo v Comm'r***, 2019 WL 4418322 (Minn. TC 9/10/2019).

■ **Utility trailer dealers must have valid motor vehicle dealer license to be exempt from MVET.** MVET is the motor vehicle excise tax. In this case, the tax court was called upon to determine under what circumstances a dealer may purchase motor vehicles (including trailers) without paying the MVET. Minn. Stat. §297B.035, subd. 1 (2018) provides: "[e]xcept as provided in this section, motor vehicles purchased solely for resale in the ordinary course of business by any [licensed] motor vehicle dealer... shall be exempt from the provisions of this chapter." "To purchase motor vehicles without paying MVET, a person: (1) must be licensed dealer; (2) must purchase solely for resale; and (3) must purchase in the ordinary course of business."

Mark Mimbach owned and operated MJ Mimbach Trailers. Until 2010, Mimbach held a valid motor vehicle dealer license, which required him to possess a valid surety bond. Minn. Stat. §168.27, subd.12a(a), 24 (2018). On 7/23/2010, CNA Surety notified the Minnesota Department of Public Safety's Driver and Vehicle Services Dealer Unit (DVS) that it intended to cancel Mimbach's surety bond effective 10/3/2010. DVS then sent correspondence to Mimbach stating they were notified that his surety bond would be cancelled on 10/3/2010, and a reinstatement notification must be received on or before that date, or his dealer license would expire. Mimbach allowed the surety bond to lapse, and subsequently, his dealer license expired. On 8/3/2011, Mimbach submitted evidence to DVS of a new surety bond. DVS responded that since his coverage ended and his license cancelled, he had to (1) submit evidence of a backdated surety bond on or before 10/3/2010, or (2) apply for a new license and subsequently owe MVET on any vehicles purchased during the lapse. On 12/6/2012, Mimbach filed a permit request form and was denied due to outstanding tax liability. In 2014, Benton County filed complaints alleging that Mimbach 1) failed to remit collected tax, and 2) falsely represented himself and his business as a licensed seller of motor vehicles. Mimbach pled guilty and was convicted of tax evasion.

Following his conviction, the Department of Revenue audited his MVET liability and assessed Mimbach $71,912.66 for the tax periods 6/1/2010 through 5/31/2012: $37,441.81 of unpaid MVET, $8,261.45 of interest, and $26,209.40 of penalty. Mimbach appealed the assessment. The commissioner sought summary judgment, which Mimbach opposed on the grounds that he sold only "utility trailers" and therefore was exempt from the dealer license requirement.

Minn. Stat. §168.002, subd. 35 (2018) defines trailer as "any vehicle designed for carrying property... on its own structure and for being drawn by a motor vehicle." A utility trailer is "a motorless vehicle... equipped with one or two wheels... and used for carrying property on its own structure while being drawn by a motor vehicle." Minn. Stat. §168.27, subd. 20(c) (2018). "Although trailers and utility trailers are both defined in terms of 'being drawn by a motor vehicle,' they are themselves taxable motor vehicles." Chapter 297B (2018) imposes the MVET on the "purchase price of any motor vehicle... required to be registered under the laws of this state." Minn. Stat. §297B.02, subd. 1. "Because trailers are motor vehicles required to be registered under state law, the MVET applies to the sale and purchase of trailers." *See* Minn. Stat. § 168.09, subd. 1 (2018).

In addition to evidence of Mimbach's dealer license being cancelled on 10/3/2010, the commissioner also submitted invoices documenting Mimbach's trailer purchases during the audit. The invoices indicated that Mimbach purchased some trailers that did not qualify as utility trailers and, therefore, Mimbach did not qualify for the exemption. Mimbach did not submit evidence that he (1) has a valid dealer license, or (2) that he sold only utility trailers. Therefore the court granted the commissioner's motion for summary judgment for all vehicles Mimbach purchased between 10/3/2010 and 5/31/2012, and denied the commissioner's motion for all vehicles Mimbach purchased between 6/1/2010 and 10/2/2010. ***Mimbach v Comm'r***, 2019 WL 4451248 (Minn. TC 9/12/2019).

■ **Six-factor test to grant attorney's fees in property tax dispute.** Minnesota Rules of Civil Procedure require courts to award fees in certain circumstances. In particular, "if a court grants a motion to compel discovery responses, the court shall require the party... whose conduct necessitated the motion... to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds... that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust." Minn. R. Civ. Pro. 37.01. Taxpayer IRC Riverdale Commons (RC) and Anoka County litigated a property tax valuation. As part of that dispute, the county filed a motion to compel RC to produce a complete response to discovery, and requested an award of expenses, including attorney fees incurred in connection with its motion. The court granted the county's motion and gave the county 30 days to submit a declaration of expenses. The county filed its declaration, requesting a total of $14,080. RC opposed in part the county's request for expenses, raising two arguments: first, that the county failed to establish that $400 per hour is a reasonable rate for time spent preparing a motion to compel; and second, that the number of hours spent on the motion were excessive.

The tax court reviewed the relevant Minnesota Supreme Court jurisprudence, including *Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Tr.*, 912 N.W.2d 652 (Minn. 2018), in which the Court

noted the longstanding six-factor test for determining the "reasonable value of legal services. ..." These six factors are used to evaluate the reasonableness of statutory attorney's fees. In *Faricy*, the Court adopted an eight-factor test for calculating the value of an attorney's services when a client terminates the contingent-fee agreement before the matter concludes. The Court considered the last two factors necessary specifically for evaluating attorney's services after client termination.

Here, the tax court located no express authority approving any particular method for determining attorney fees, and therefore used the first six factors in *Faricy* for determining reasonable attorney's fees, and then separately evaluated the county's other claimed expenses. The court ultimately considered (1) time and labor, (2) nature and difficulty, (3) amount involved and results obtained, (4) fees charged for similar services, (5) experience and reputation, (6) fee arrangement between counsel and client, and (7) attorney fee amount. The court granted the county's request for attorney's fees in the amount of $9,460. ***IRC Riverdale Commons, LLC v. Anoka***, 2019 WL 4607064 (Minn. TC 9/17/19).

Tough bounce: Incarcerated former NBA player fails to file returns; loses out on itemized deductions; summary judgment to Service. Former professional basketball player Claude Tate George was convicted in 2013 in federal court of wire fraud resulting from running a real estate Ponzi scheme. He remains incarcerated. While incarcerated in 2013, petitioner received a National Basketball Association (NBA) pension distribution of $208,111. The bank that distributed the pension withheld $41,622 of income tax from the distribution. Mr. George did not file a tax return for tax year 2013 and the Service prepared a substituted return in which the Service determined a deficiency in petitioner's 2013 federal income tax of $70,318 together with approximately $8,700 in additions to tax. In preparing the substituted return, the Service made certain assumptions, including a filing status of "single." The revenue agent also assumed a Section 72(t) tax of $20,811, which the agent assumed Mr. George owed because he considered the pension distribution to be an early distribution from a qualified retirement plan. In a timely filed petition, Mr. George argued that due to his incarceration, he was unable to file a return. He further argued that had he filed a return, he might have demonstrated that he had itemized deductions in excess of the standard deduction. The court reasoned that although Section 63 allows an individual to itemize his deductions rather than take a standard deduction, no itemized deductions shall be allowed unless the individual makes an election. Section 63(e)(2) provides that such election shall be made on the individual's return. Since Mr. George failed to file a return, he made no election to itemize his deductions and may not claim itemized deductions. Since there were no disputes of material fact, the commissioner was entitled to summary judgment. ***George v. Comm'r***, T.C.M. (RIA) 2019-128 (T.C. 2019).

Tax court gives a pass to first-time frivolous argument. The petitioner in this case filed federal income tax returns reporting taxable income of about $500,000 over three tax years. Although the petitioner calculated the tax due on these amounts, he did not pay any portion of the balance due. For each year the IRS assessed the tax shown as due, additions to tax under sections 6651 and 6654, and interest. Petitioner's aggregate unpaid tax liabilities eventually exceeded $200,000. Throughout the collection proceedings, the petitioner argued that he did not owe any tax, because in separate litigation against the government, the petitioner was owed more money than he owed in taxes. As the petitioner put it, "It's my position that the United States owes more than owed, therefore, [I] will not pay any debt to the United States until the debt owed is settle[d] through the courts or settlement." At the time of the tax court's opinion, the petition had not been successful in the separate litigation, and in fact the district court and court of appeals deemed petitioner's litigation frivolous and imposed sanctions.

The tax court acknowledged the petitioner's argument, and the court also acknowledged that the courts has "no authority to second-guess the decisions of the courts that have ruled against" petitioner. Further, the court reasoned that "[e]ven if we had such jurisdiction, no legal authority exists for offsetting, against an assessed Federal tax liability, a claim against the Government in a totally unrelated matter." The court deemed petitioner's arguments frivolous and noted that the petitioner wasted considerable resources of respondent and the court. Although petitioner's conduct was deserving of a penalty, the court determined that because this was petitioner's first appearance in the tax court, and because the court had not previously advised petitioner of the risk he faced, no sanctions would be imposed. The court did, however, "warn [petitioner] that we will be less generous in the future." ***Tartt v. Comm'r***, T.C.M. (RIA) 2019-112 (T.C. 2019).

ADMINISTRATIVE ACTION

IRS issues guidance on cryptocurrency transactions. In a Revenue Ruling, the Service addressed the following issues: (1) Does a taxpayer have gross income under §61 of the Internal Revenue Code as a result of a hard fork of a cryptocurrency the taxpayer owns if the taxpayer does not receive units of a new cryptocurrency? (2) Does a taxpayer have gross income under §61 as a result of an airdrop of a new cryptocurrency following a hard fork if the taxpayer receives units of new cryptocurrency? The Ruling provides that a taxpayer does not have gross income in Issue 1, and that "[a] taxpayer has gross income, ordinary in character, under §61 as a result of an airdrop of a new cryptocurrency following a hard fork if the taxpayer receives units of new cryptocurrency." **Rev. Rul. 2019-24.**

MORGAN HOLCOMB & SHEENA DENNY
Mitchell Hamline School of Law
morgan.holcomb@mitchellhamline.edu


CLEARY

Gov. Walz reappointed Hon. Edward Cleary as chief judge of the Minnesota Court of Appeals. Chief Judge Cleary will continue to serve as the chief judge until his retirement on April 30, 2020. At that time, a new chief judge will be selected to serve the remainder of the term, which will expire on October 31, 2022.


PETERSON

Gov. Walz appointed Andrew Peterson as district court judge in Minnesota's 6th Judicial District. Peterson will be filling the vacancy of Hon. Gary Pagliaccetti and will be chambered at Virginia in St. Louis County. Peterson is currently an attorney and shareholder of Cope & Peterson Ltd., where he represents clients in all aspects of civil litigation, criminal law, real estate, business law, and municipal law.


ROSENFELDT

Gov. Walz appointed Jade Rosenfeldt as district court judge in Minnesota's 7th Judicial District. This appointment fills a vacancy that occurred upon the creation of a new district court judgeship effective July 1, 2019 and will be chambered in Moorhead in Clay County. Rosenfeldt is currently a shareholder at Vogel Law Firm, where she manages criminal and family law cases.


BRYAN


SEGAL

Gov. Walz appointed Hon. Jeffrey Bryan and Susan Segal as judges on the Minnesota Court of Appeals. Judge Bryan will be replacing Hon. Judge Heidi Schellhas and will serve in an at-large capacity. Ms. Segal will be replacing Hon. Jill Flaskamp Halbrooks, filling the seat designated for the 5th Congressional District. Bryan currently serves as a trial court judge in the 2nd Judicial District and as co-chair of the Ramsey County Juvenile Detention Alternatives Initiative. Segal is currently the Minneapolis city attorney.


LEE

Jason Lee joined Melchert Hubert Sjodin PLLP as an associate attorney in the Hutchinson office. Lee represents estate planning, estate administration, real estate, and business clients.

Jesse C. Beier, Jacob P. Harris, Zachary S. Pratthas, and Chantal M. Wilson have joined Fredrikson & Byron. Beier joins the trusts & estates and trusts & estates litigation groups; Harris joins the litigation, white collar & regulatory defense, and appellate groups; and Pratt joins the patents, intellectual property, and artificial intelligence groups; Wilson joins the mergers & acquisitions group.

Lindsey R. Danielson and David T. Hackworthy have joined Gregerson, Rosow, Johnson & Nilan, LTD as associates.


SEABORG


HOUGH

Colin S. Seaborg and Molly B. Hough have become associates of Bassford Remele. Seaborg focuses his practice in the areas of product liability, employment law, commercial litigation, and appellate law. Hough focuses her practice in the areas of commercial litigation, and employment law and consumer law defense.


WOLF

Luke Wolf has joined Spencer Fane LLP as a litigation associate in the firm's Minneapolis office.

Eric H. Chadwick and Bradley J. Thorson joined the Minneapolis Office of DeWitt LLP in the intellectual property practice group.


ANDREASEN

Creig Andreasen has joined Lommen Abdo as a shareholder in its Minneapolis office. He concentrates his practice on real estate law and banking.


HASKO

Joshua A. Hasko was elected president of Messerli Kramer. Hasko practices in the areas of commercial litigation and creditor's remedies and has been an active member of the firm's board of directors.


MOMOH

Adine S. Momoh joined the Federal Bar Association's National Board of Directors and will serve a year-long term as chair of the Younger Lawyers Division. Momoh is a partner at Stinson LLP and a past president of the Hennepin County Bar Association.

Matthew Buckley has joined Ballard Spahr as an associate in the real estate department.

Classified Ads

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ATTORNEY WANTED

ASSISTANT ATTORNEY General. Attorney General Keith Ellison is accepting resumes from attorneys who are interested in a career of public service and representing the government in significant lawsuits to help Minnesotans afford their lives and live with dignity and respect. Assistant attorneys general appear on behalf of the State of Minnesota in administrative, state, and federal district and appellate courts in a wide variety of case types. Our work protects public safety, everyday consumers and workers, the environment, and the State and its various agencies and boards. Attorneys can expect excellent litigation experience in handling their own cases and helping to build and create a better, safer and more equitable Minnesota. Requirements. Applicants should be committed to public service on behalf of all Minnesotans, have demonstrable litigation or law school experience, strong research, writing, and communication skills, good work ethic, character and judgment, and a strong professional drive. Service with the office may qualify applicants to have part of their student loans forgiven under the federal student loan forgiveness program that applies to state government employees. (For more information, visit www.studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service.) Applications. Please submit a cover letter and resume that includes relevant experience and academic credentials to: Office of the Minnesota Attorney General, Attention: June Walsh, 445 Minnesota Street, Suite 1100, St. Paul, MN 55101, ag.jobs@ag.state.mn.us. Note: The Attorney General's Office greatly encourages, celebrates and values diversity. It is an equal opportunity employer which does not discriminate on the basis of race, creed, color, national origin, religion, sex, marital status, sexual orientation, gender identity, age, disability, or military status. If you need reasonable accommodation for a disability, please call June Walsh at: (651) 757-1199 or (800) 627-3529 (Minnesota Relay).

ATTORNEY/SENIOR Attorney. The Federal Reserve Bank of Minneapolis (Bank) is seeking to fill a full-time Attorney or Senior Attorney position within its Law Department. The position involves advising and working with Bank management as well as regular interaction with attorneys from other Federal Reserve Banks and the Board of Governors of the Federal Reserve System. The attorney will practice in a team environment in a variety of areas including general in-house matters such as drafting contracts and advising Bank management on a variety of legal issues. Areas of practice within the department include the typical in-house areas such as procurement/contracts, intellectual property and other general corporate matters, but also include functions more specific to the Federal Reserve such as banking regulation, discount window lending, payments, law enforcement, and support for our research, Treasury, and payment system risk functions, among other responsibilities. Qualifications: Juris Doctorate degree required and must be admitted to practice law in the state of Minnesota. Some prior legal experience or judicial clerkship preferred. Excellent legal research and writing skills. Excellent analytical abilities along with sound legal and business judgment. Excellent communication skills. A requirement of this position is that the employee must be a "Protected Individual." A "Protected Individual" includes but is not limited to: (1) a citizen or national of the U.S.; or (2) an alien who is lawfully admitted to the U.S. for permanent residence and who applies for citizenship within six months of being eligible to apply for citizenship and, if offered a position with the Federal Reserve Bank of Minneapolis, will sign a Declaration of Intent to Become a United States Citizen. Excellent benefits include annual PTO allowance, 10 paid holidays, immediate eligibility in a matched 401(k) plan with 100% employer matching contribution on employee contributions up to 6% of salary, defined benefit retirement plan, medical, dental, short-term disability benefits, free on-site fitness center, and more. Interested candidates must apply online at: www.minneapolisfed.org

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BERNICK LIFSON, PA, a business law firm, seeks an attorney with a minimum of five to seven years' experience in commercial litigation. The successful candidate will have experience in drafting pleadings and discovery, taking and defending depositions, as well as drafting and arguing motions. The right person for our firm is smart, practical and results-oriented with the capacity to service existing clients, as well as a desire to develop and grow their own practice. We offer a competitive compensation and benefits package in an atmosphere of respect and support. Please send cover letter, resume and short writing sample to Laurie Blum at: lblum@bernicklifson.com. No phone calls please.

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CORPORATE ASSOCIATE – International. Larkin Hoffman, one of the largest full-service business law firms in the Twin Cities, is seeking a highly motivated associate with four plus years' international and general corporate experience to join our growing, creative and fast paced group. Candidates should have experience in general business matters, and corporate law and governance and experience in international corporate law, data privacy law and compliance with US export control, anti- bribery and foreign trade laws. We are looking for an attorney with outstanding academic credentials, drafting skills, communications skills, a dedication to client service and a commitment to excellence in the practice of law. We are motivated to attract and retain talented and diverse professionals into our growing firm and are committed to the training and professional development of our employees. Working at Larkin Hoffman has the benefit of being located in a prime office location outside the downtown core at Normandale Lake Office Park for easy access and complimentary parking. If you are interested in joining our team, please send your resume and cover letter to: hr@larkinhoffman.com.

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CRIMINAL TRIAL Attorney – The Office of The Minnesota Attorney General. The Office of the Minnesota Attorney General is seeking an attorney with at least 10 years of criminal trial experience either as a prosecutor or criminal defense attorney. This is an exciting opportunity for a qualified professional to join a highly committed team that handles important public safety and legal matters for the State of Minnesota. Duties of the position will include the prosecution of serious violent and white-collar crimes throughout the State of Minnesota, training law enforcement officers and attorneys, and serving as a resource for other divisions of the office. Requirements: Applicants should have good academic credentials, well-developed written and oral communication skills, superior research and analytical abilities, good judgment and character, and a strong professional work ethic. Applicants must be able to serve the public with a high level of distinction. Public service with this office may qualify applicants to have part of their student loans forgiven under a federal student loan forgiveness program for state government employees. (Visit www.studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service for more information.) Applications: Attorneys may express interest by submitting a cover letter and resume that includes relevant criminal trial experience and academic credentials to: Office of the Minnesota Attorney General, Attn: June Walsh, 445 Minnesota Street, Suite 1100, St. Paul, MN 55101, ag.jobs@ag.state.mn.us. Note: The Attorney General's Office greatly encourages, celebrates and values diversity. It is an equal opportunity employer which does not discriminate on the basis of race, creed, color, national origin, religion, sex, marital status, sexual orientation, gender identity, age, disability, or military status. If you need reasonable accommodation for a disability, please call June Walsh at (651) 757-1199 or (800) 627-3529 (Minnesota Relay).

ARONSON

Robert D. Aronson was awarded the 2019 Fredric Moskol Leadership Award at the 3RNet Annual Conference in Wichita, Kansas in September 2019. 3RNet is a nonprofit organization that works to improve healthcare access and coverage to rural communities. Aronson is a shareholder at Fredrikson & Byron.

MASON

Amy Mason has joined Miller & Stevens Law in Forest Lake. She will be focusing her practice in the areas of civil litigation, probate, guardianship and conservatorship, trust and estate disputes, and family law.

WEBBER

Robert Webber was appointed vice president-communications of the Asian Pacific American Bar Association of Minnesota. Webber is a partner at Dorsey & Whitney LLP.

Janet C. Evans and Benjamin M. Podobinski joined Christensen & Laue, PLLC. Evans has 30 years experience and will be serving in an of counsel role litigating all types of business disputes. Podobinski is a 2019 graduate of the University of St. Thomas School of Law. He will focus his practice on litigation and transactional matters.

NELSON

Christopher Nelson joined Eckberg Lammers. In his new role, Nelson will serve as a lead civil municipal attorney.

Bench & Bar accepts press releases and announcements regarding current members of the MSBA for publication, without charge. **www.mnbenchbar.com/people-practice**

In Memoriam

Michael J. Mahoney, age 50, of West St. Paul, died on August 22, 2019. He was a graduate of William Mitchell College of law. He took pride and earned great respect in his professional career advocating for access to, and delivery of, high quality healthcare in rural areas.

Melvin "Mel" Burstein, age 85, of Golden Valley, passed away on August 13, 2019. He received his JD from the University of Minnesota Law School. Mel had a distinguished career as an attorney, including 32 years at the Federal Reserve Bank, from which he retired as executive vice president and general counsel.

Wheeler Smith died on July 22, 2019, after having lived a full 100 years. He earned his law degree from Harvard after serving in the Navy (South Pacific) during World War II. He launched his law practice by examining titles at Shearer, Byard, Trogner and Peters. In 1950 he began work for John B. Hawley's Northern Pump Company specializing in oil and gas, and as counsel for Northern Ordnance dealing with government contracts. In the early 1980s he started his own practice with a goal to provide quality legal services for a nominal fee.

Duane James Rivard, age 91, of Roseville, died September 11, 2019. He obtained his law degree from William Mitchell School of Law and held many insurance designations. He spent 37 years at State Farm.

Lt. Col. Russell J. Jensen died on September 20, 2019. He was a respected St. Paul lawyer, and a pilot for the Minnesota Air National Guard for 31 Years.

John D. Healy Jr. of St. Paul died on October 14, 2019 at age 84. He attended University of Michigan Law School. He was a partner with Oppenheimer Law Firm for 35 years.

CORPORATE ASSOCIATE – securities. Larkin Hoffman, one of the largest full-service business law firms in the Twin Cities, is seeking a highly motivated associate with four plus years' securities and general corporate experience to join our growing, creative and fast paced group. Candidates should have a background in business transactions, with experience in counseling businesses with respect to federal and state securities laws and exemptions from registration, private placement offerings, Regulation D offerings, solicitation safe harbors and Regulation A+ crowdfunding. We are looking for an attorney with outstanding academic credentials, drafting skills, communications skills, a dedication to client service and a commitment to excellence in the practice of law. We are motivated to attract and retain talented and diverse professionals into our growing firm and are committed to the training and professional development of our employees. Working at Larkin Hoffman has the benefit of being located in a prime office location outside the downtown core at Normandale Lake Office Park for easy access and complimentary parking. If you are interested in joining our team, please send your resume and cover letter to: hr@larkinhoffman.com.

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GENERAL COUNSEL. North American Banking Company, a community bank with five offices throughout the Twin Cities has an opening for its in-house General Counsel position. The General Counsel reports directly to upper bank management and advises the officers and employees on a wide range of legal issues including: Preparing and reviewing original loan documents (primarily commercial) including secured and unsecured transactions, real estate mortgage loans, participation loans; Reviewing bank contracts with outside parties; Managing problem loan files; Assist loan officers in performing due diligence on prospective borrowers and evaluating proposed security arrangements; Advise management with respect to legal issues related to the development and implementation of business strategy, internal and external governance, corporate structure and organizational issues, employment matters and other related legal matters; Coordinate and supervise outside counsel; Develop and provide training for staff on matters such as employment law and loan documentation. Ideal candidate should have relevant experience in a commercial law practice or financial industry experience. Position is a salaried position (no time cards) and subject to a generous benefit package. Interested candidates should submit an introductory letter detailing experience, resume, and salary requirements to: bmartinson@nabankco.com.

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GORDON REES Scully Mansukhani, a national law firm, has an excellent opportunity for an experienced contract attorney. A minimum of five years' civil litigation and insurance defense work is preferred. Excellent academic credentials with proven skills in writing, analysis and research are required. Candidates must be licensed in Minnesota and be able to handle a case from inception through pre-trial work with little or no supervision. Please note this is not a full time, associate level position. We are seeking independent contract attorneys only. Please submit cover letter, writing sample and resume by email to: ntanner@grsm.com. Please reference "Minnesota Contract Attorney" in the subject line. No recruiter or telephone calls please. Gordon Rees Scully Mansukhani is an equal opportunity employer.

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HALL LAW, PA, a premier plaintiffs personal injury law practice with offices in St. Cloud and Edina, is looking for an associate attorney with 1-10 years' relevant experience to join its practice. If you are a lawyer looking to join a winning team and make a positive difference in people's lives, please submit a cover letter, resume, writing sample (15 pages or less), and a law school transcript to: lori@hallinjurylaw.com. Thank you in advance for your interest in our firm.

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LEGAL SERVICES of North Dakota. Attorney needed to serve North Dakota's first Medical Legal Partnership – Legal Advocates for Health. Location: Fargo Closing Date: until filled. The Medical Legal Partnership ("MLP") is collaboration between LSND, Legal Services of Northwest Minnesota, and local healthcare providers, including the Veteran Administration Medical Center. The MLP Collaboration is entitled Legal Advocates for Health ("LAH"). The LAH attorney will focus on growing the LAH. In addition to this outreach focus the LAH attorney will provide legal advice and representation to patients with civil legal issues that impact the social determinants of health. Aside from this direct client service the LAH attorney will provide education to healthcare staff and community education to organizations serving the patient population. Requirements: JD with a license to practice law; Strong verbal and written communication skills; Commitment to providing high quality civil legal services to low income and senior individuals; Ability to interface and connect with the New American community, including individuals and leadership; Comfortable with the use of interpreters to interview and advise clients; Ability to interface with key stakeholders for the LAH; Ability to communicate with and educate healthcare providers about the LAH; Aptitude for public speaking; Interest in assisting with or spearheading opportunities for additional grants. Salary: DOE. Excellent Benefit Package. If interested, please submit your cover letter, resume, writing sample, law school transcript and three professional references by mail to: LSND – LAH, PO Box 1327, Fargo, ND 58107-1327. Or email: apage@legalassist.org. LSND is an Equal Opportunity Employer. LSND does not discriminate based on age, race, color, religion, gender, gender identity, disability, national origin or sexual preference.

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PERSONAL INJURY Attorney Wanted — Maschka, Riedy, Ries & Frentz, a nine-attorney law firm in Mankato, MN with litigation emphasis seeking to hire an attorney with two to five plus years of experience in personal injury litigation. Candidates must have strong written and oral communication skills. Excellent opportunity for growth. Submit cover letter, resume, law school transcript and legal writing sample to Annetta Skogen at: askogen@mrr-law.com.

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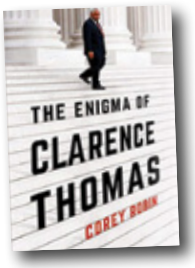
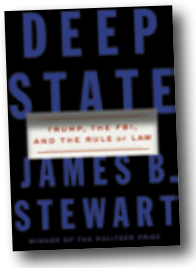


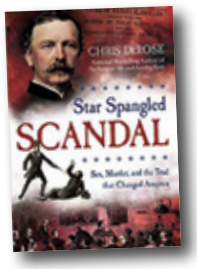
Corey Robin
The Enigma of Clarence Thomas
(Metropolitan Books, $30)

Most people can tell you two things about Clarence Thomas: Anita Hill accused him of sexual harassment, and he almost never speaks from the bench. Here are some things they don't know: Thomas is a black nationalist. In college he memorized the speeches of Malcolm X. He believes white people are incurably racist. In the first examination of its kind, author Corey Robin delves deeply into both Thomas's biography and his jurisprudence, masterfully reading his Supreme Court opinions against the backdrop of his autobiographical and political writings and speeches. The hidden source of Thomas's conservative views, Robin shows, is a profound skepticism that racism can be overcome. Thomas is convinced that any government action on behalf of African-Americans will be tainted by racism; the most African-Americans can hope for is that white people will get out of their way.



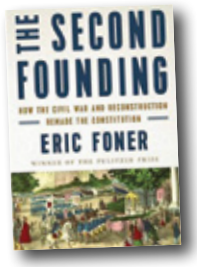
James B. Stewart
Deep State: Trump, the FBI, and the Rule of Law
(Penguin Press, $30)

From bestselling author James Stewart, the definitive story of the war between President Trump and America's principal law enforcement agencies, answering the questions that the Mueller report couldn't—or wouldn't. When Trump fired James Comey, he triggered the appointment of Robert Mueller as an independent special counsel and caused the FBI to open a formal investigation into the president himself. Drawing on scores of interviews with key FBI, Justice Department, and White House officials, and voluminous transcripts, notes, and internal reports, Stewart tells the dramatic saga of the FBI and its simultaneous investigations of both Hillary Clinton and Donald Trump—the first time in American history the FBI has been thrust into the middle of both parties' campaigns for the presidency.



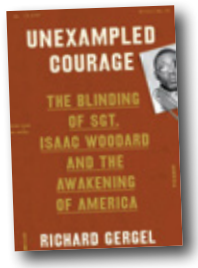
Chris DeRose
Star Spangled Scandal: Sex, Murder, and the Trial That Changed America
(Regnery History, $29.99)

It is two years before the Civil War, and Congressman Daniel Sickles and his lovely wife Teresa are popular fixtures in Washington, D.C. society. Their house sits on Lafayette Square across from White House grounds, and the president himself is godfather to the Sickles' six-year-old daughter. Because Congressman Sickles is frequently out of town, he trusts his friend, U.S. Attorney Philip Barton Key—son of Francis Scott Key—to escort the beautiful Mrs. Sickles to parties in his absence. Then one day an anonymous note sets into motion a tragic course of events that culminates in a shocking murder in broad daylight in Lafayette Square. This is the riveting true story of the murder and trial that sparked a national debate on madness, male honor, female virtue, fidelity, and the rule of law.



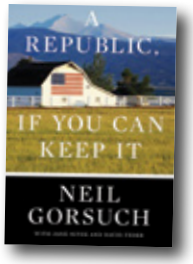
Eric Foner
The Second Founding: How the Civil War and Reconstruction Remade the Constitution
(WW Norton & Co., $26.95)

The Declaration of Independence announced equality as an American ideal, but it took the Civil War and the subsequent adoption of three constitutional amendments to establish that ideal as American law. The Reconstruction amendments abolished slavery, guaranteed all persons due process and equal protection of the law, and equipped black men with the right to vote. They established the principle of birthright citizenship and guaranteed the privileges and immunities of all citizens. The federal government, not the states, was charged with enforcement, reversing the priority of the original Constitution and the Bill of Rights. In grafting the principle of equality onto the Constitution, these revolutionary changes marked the second founding of the United States.



Richard Gergel
Unexampled Courage: The Blinding of Sgt. Isaac Woodard and the Awakening of America
(Picador, $18)

On February 12, 1946, Sergeant Isaac Woodard, a returning, decorated African American veteran, was removed from a Greyhound bus in Batesburg, South Carolina, after he challenged the bus driver's disrespectful treatment of him. Woodard, in uniform, was arrested by the local police chief, Lynwood Shull, and beaten and blinded while in custody. President Harry Truman, outraged by the incident, established the first presidential commission on civil rights and his Justice Department filed criminal charges against Shull. In July 1948, following his commission's recommendation, Truman ordered an end to segregation in the U.S. armed forces. An all-white South Carolina jury acquitted Shull, but the presiding judge, J. Waties Waring, was conscience-stricken by the failure of the court system to do justice. Waring began issuing major civil rights decisions from his Charleston courtroom, including his 1951 dissent in *Briggs v. Elliott*, declaring public school segregation *per se* unconstitutional.



Justice Neil Gorsuch
A Republic, If You Can Keep It
(Crown Forum, $30)

As Benjamin Franklin left the Constitutional Convention, he was reportedly asked what kind of government the founders would propose. He replied, "A republic, *if you can keep it*." In this book, Justice Neil Gorsuch shares personal reflections, speeches, and essays that focus on the remarkable gift the framers left us in the Constitution. Justice Gorsuch draws on his 30-year career as a lawyer, teacher, judge, and justice to explore essential aspects our Constitution. He discusses the role of the judge in our constitutional order, and why he believes that originalism and textualism are the surest guides to interpreting our nation's founding documents and protecting our freedoms.

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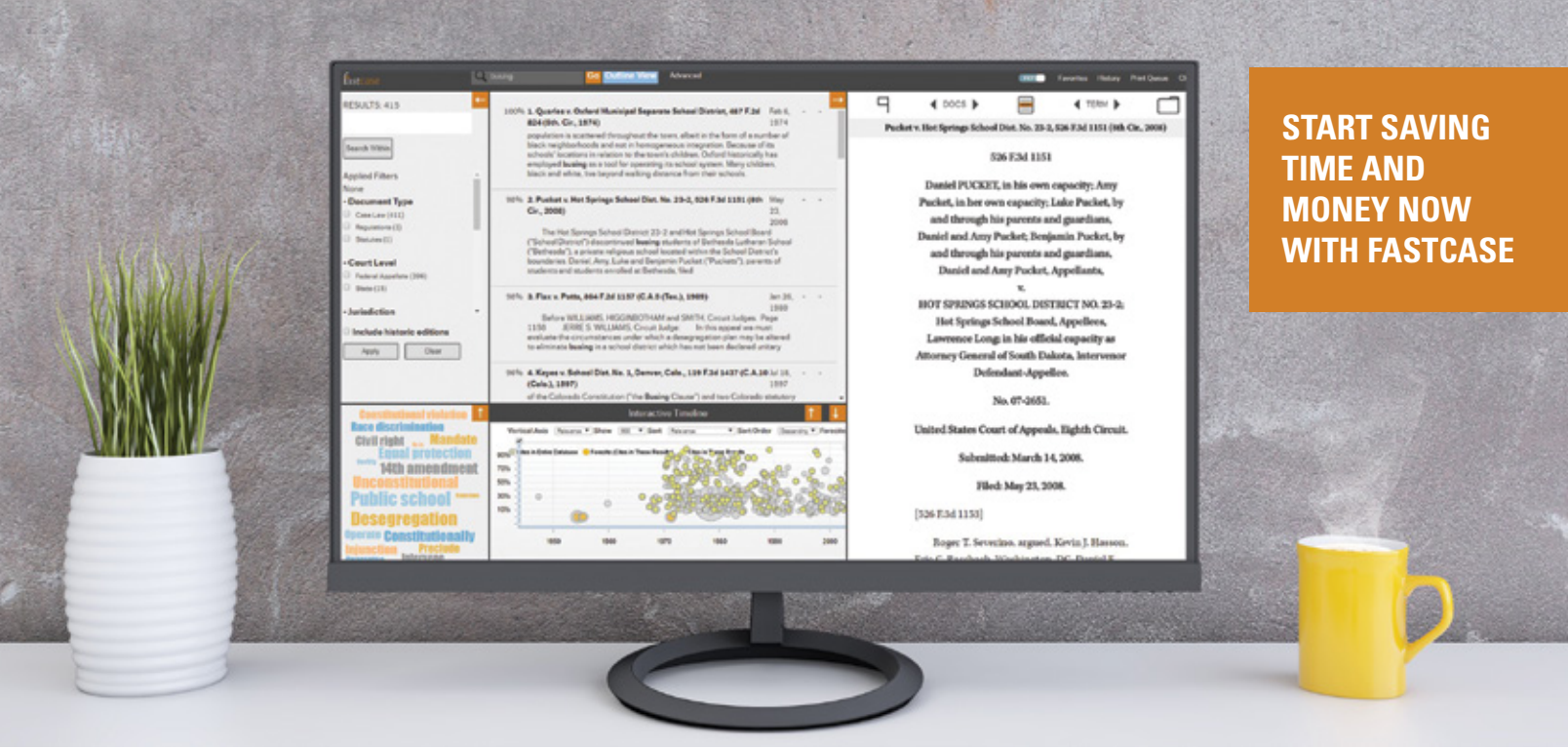

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