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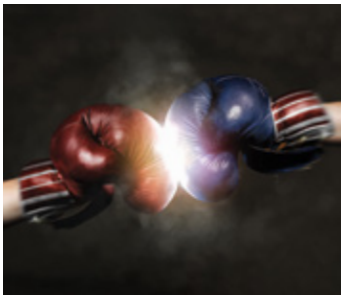

Defending the rule of law

I have been fortunate to practice my entire career with a firm that recognizes the importance of lawyers taking on leadership roles and giving back to the communities in which we live and work. The firm encourages—and I dare say even expects—lawyers to lend their time and talent to organizations that are dedicated to enhancing the community, addressing social and economic injustices, and improving the legal profession and the legal system. I am proud to say that throughout the last 27 years, I have had the honor of working with colleagues who have served as state, district, and local bar presidents; industry association board members and presidents; and nonprofit board members and presidents.

I know that my firm is not unique in this regard. Lawyers are often regarded as leaders in their communities and are tapped to take on significant leadership positions with various organizations.

A civic duty

The events of the last year, however, have taught me that the most important leadership role that a lawyer has in our society does not bring with it a formal title or appointment. The most important professional obligation we have is to defend the rule of law.

DYAN EBERT is a partner at the central Minnesota firm of Quinlivan & Hughes, P.A., where she served as CEO from 2003-2010 and 2014-2019. She also served on the board of directors of Minnesota CLE from 2012-2019.

To be sure, the obligation to defend the rule of law is embedded in our Rules of Professional Conduct, which provide that "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." (*Minn. R. Prof. Conduct, Preamble* ¶6.)

The rule of law is the bedrock of our democracy. It permeates our society; it is part of our social compact and it ensures a fair and just society. John Adams wrote that a republic is "a government of laws, and not of men." The fundamental proposition behind this statement is that no one is above the law and everyone must be treated the same under law.

The American Bar Association explains the rule of law as

> [A] set of principles, or ideals, for ensuring an orderly and just society. Many countries throughout the world strive to uphold the rule of law where no one is above the law, everyone is treated equally under the law, everyone is held accountable to the same laws, there are clear and fair processes for enforcing laws, there is an independent judiciary, and human rights are guaranteed for all.[1]

One of my favorite ways to think of the rule of law is found in the U.S. Constitution, and is known as "the great promise:" Every man, woman, and child should be judged by the same legal rules and have access to the same public benefits, no matter the color of our skin, national origins, or gender.

The Fair Response Committee

Of course, an independent judiciary is key to preserving the rule of law. To be truly independent, the judiciary must be free of undue influence and must remain committed to the protection of individual rights and liberties. Given the significant role the courts and judges play in the administration of justice, it is not surprising that they are often subject to criticism. But when criticism of judges' rulings crosses the line into personal attacks or intimidation, or proves to be inaccurate and unjust, the public's respect for our system of justice is undermined and it is our obligation to speak out. To that end, I recently announced the re-invigoration of the MSBA's Fair Response Committee. I am also excited to share that former MSBA Presidents Susan Holden and Paul Godfrey have agreed to serve as co-chairs of this important committee.

The Fair Response Committee's purpose is to encourage the legal profession to promote public confidence in the administration of justice by fostering public understanding and appreciation of the judicial system. As lawyers, we must do more than pay mere lip service to the rule of law; we must recognize that this obligation necessarily involves a duty to defend and preserve the independence of the judiciary. The Fair Response Committee is one small way that the MSBA can assist our members in fulfilling this important obligation.

As former U.S. Supreme Court Justice Sandra Day O'Connor wrote, "Commitment to the rule of law provides a basic assurance that people can know what to expect whether what they do is popular or unpopular at the time." We need to hold true to this commitment as we hear reports of the trial of the officer accused of murdering George Floyd. We need to be strong in our support of the people working in that courtroom—the judge, the lawyers, the clerks, and the court reporter and bailiffs. We also need to encourage people in our various communities who raise questions about the trial process to be respectful and appreciate the work of the people in that courtroom. We need to uphold the rule of law that is playing out on this very visible, highly charged, stage.

Please also commit to educating the people in your circles about the rule of law. Talk about your experiences as a lawyer, and share stories of how justice prevailed. Think about the reasons you went to law school, as this may reinvigorate your passion for your profession. Together let's rebuild trust and confidence in this ideal we hold so dear, and without which our society would crumble. ▲

[1] *https://www.americanbar.org/groups/public_education/resources/rule-of-law/* (last accessed 2/7/21).

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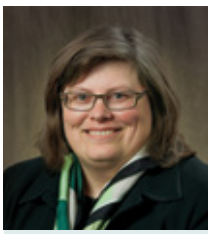
WE'D LIKE TO HEAR FROM YOU: To query potential articles for Bench & Bar, or to pass along your comments on matters related to the profession, the MSBA, or this magazine, write to editor Steve Perry at sperry@mnbars.org or at the postal address above.

Private discipline in 2020

In 2020 the Director's Office closed 82 complaints with admonitions—a form of private discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are isolated and nonserious. This number was down substantially from 2019, when 107 admonitions were issued. Overall, approximately 8 percent of file closings in 2020 were due to the issuance of an admonition. Another 20 complaints were closed with private probation, a stipulated form of private discipline approved by the Lawyers Board chair. Private probation is generally appropriate where a lawyer has a few nonserious violations in situations that suggest supervision may be of benefit. More files resulted in private probation dispositions in 2020 than in 2019, when 14 files closed with private probation. Notably, the pandemic was generally not a material factor in admonitions from 2020.

The rule violations that lead to private discipline run the gamut, and a table of admonition violations by rule can be found in the annual report issued each July. Generally, the most violated rules are Rule 1.3 (Diligence) and Rule 1.4 (Communication), with communication violations being more frequent in 2020 than diligence. Other frequently violated rules, particularly in the private discipline context, involve declining or terminating representation (Rule 1.16), making fee arrangements (Rule 1.5), and safekeeping client property (Rule 1.15), although 2020 also saw a higher number than usual of no-contact rule violations (Rule 4.2) and confidentiality violations (Rule 1.6). Let's look at a few specific rules and situations that tripped up lawyers in 2020.



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

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Safekeeping client property

As I wrote in my December 2020 column, safekeeping client property is an important obligation, and it is particularly important that fees paid in advance of being earned and filing fees be held in trust. (Rule 1.15(a), MRPC; Rule 1.15(c)(5), MRPC.) Clients will frequently pay advance fee retainers and expense deposits by credit card. If you have not already done so, make sure you are using a credit card service provider that allows you to deposit advance fees and filing fees directly into your trust account, while separately withdrawing any service fees or disputed fees from your operating account. LawPay comes to mind, but there are numerous other solutions, many of which integrate with other client management software solutions you might use already.

If you do not use such a service, you can deposit credit card advances in your operating account and then transfer then over to trust—*see* Rule 1.15(h), Appendix 1(I)(10)—but you then need to have good internal processes to make sure that happens "immediately" as referenced in the appendix. If you don't have a good process, you can inadvertently leave money that belongs in trust in your operating account. This is what happened to one attorney who received an admonition in 2020. While on vacation, the attorney accepted a new engagement, and the client paid an advance retainer by credit card. Because she was on vacation, however, the attorney did not transfer that advance fee into her trust account though it remained unearned, and through a continued oversight, the advance fee remained in her business account for a fair amount of time. Because the funds were not in trust, the lawyer failed to safekeep client funds and received an admonition for Rule 1.15(a), MRPC.

No-contact rule

In 2020, four attorneys received admonitions for violating Rule 4.2, MRPC. Rule 4.2 is seemingly straightforward:

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

As one would expect, the circumstances surrounding the Rule 4.2 admonitions in 2020 were distinct. One involved a father-in-law repeatedly contacting a represented soon-to-be ex-daughter-in-law regarding a dissolution, as he assisted his son, on and off, with the divorce. When one is personally involved, it is easier than you might think to fail to remember rules that you would ordinarily never disregard. Other Rule 4.2 cases involved lawyers attempting to narrowly define the matter in issue in order to contact the opposing party, when they know full well that counsel is involved. This is an area that really bothers both opposing counsel and opposing parties, so it frequently draws complaints. Sometimes Rule 4.2 violations occur when civil proceedings arise out of facts that also give rise to criminal actions. Four in one year is a lot of admonitions for Rule 4.2, MRPC. Please take note.

Prejudicial conduct

Rule 8.4(d), MRPC, makes it professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. This is a broad rule with various applications. One action that the Office has consistently found to fall within this provision is a prosecutor's failure to comply with victim-notification statutes. Minnesota law places special obligations on prosecutors, particularly in domestic abuse cases.

Only about 20 percent of complaints to the OLPR result in any discipline, and private discipline is far more prevalent than public discipline.

For example, Minn. Stat. §611A.0315, subd. 1(a), provides that prosecutors shall make every reasonable effort to notify victims in domestic assault cases of a decision not to file charges or to dismiss pending charges. In 2020, a prosecutor received an admonition under this rule, affirmed by a panel of the Board, for failing to notify the victim—a minor child and her custodial parent—of dismissal of misdemeanor assault charges against the non-custodial parent. In prior years, there has been a push from various stakeholders to amend Rule 3.8, MRPC, to include reference to prosecutors' victim-notification obligations due to a concern about uneven compliance. The response has historically been that Rule 8.4(d), MRPC, covers such conduct and that a more specific rule is not needed. For new prosecutors or those who are unaware, please note.

Conclusion

Only about 20 percent of complaints to the OLPR result in any discipline, and private discipline is far more prevalent than public discipline. As I noted in my column on this same subject last year, most attorneys care deeply about compliance with the ethics rules but it is important to remember that ethical conduct involves more than refraining from lying or stealing. You cannot go wrong by taking a few minutes each year to re-read the Minnesota Rules of Professional Conduct. They can be found on our website, and are in the Minnesota Rules of Court. You will find the time well spent. And, remember, we are available to answer your ethics questions: 651-296-3952. ▲

Ransomware and federal sanctions

Ransomware, as most of us know by now, is a type of malware that takes data or devices hostage, with cyber attackers demanding the payment of a ransom in exchange for restored access. Preparation is the critical factor when it comes to handling a ransomware attack. Strong backup policies are essential for mitigating data loss; adhering to best security practices, such as the use of encryption, also better enables organizations to respond to cyber threats. While attackers may still have the ability to threaten the publication of data, it is always advisable to not pay ransoms. Paying a ransom puts an organization at greater risk of repeat attacks. But paying a ransom is also ultimately risky for another reason—it may be a violation of U.S. sanctions laws.

Given the increased reliance on remote work capabilities in 2020, ransomware attacks abounded. This added threat led the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) to issue an advisory in October detailing the additional compliance risks associated with paying ransoms. On a national level, "ransomware payments made to sanctioned persons or to comprehensively sanctioned jurisdictions could be used to fund activities adverse to the national security and foreign policy objectives of the United States."[1] Even if the identity of the attacker is unknown, a victim may still commit a violation if they pay a ransom to a sanctioned individual or entity. Furthermore, individuals who assist or facilitate payments on behalf of a victim—including attorneys, insurance companies, and security vendors—may also be at risk of sanctions violations.

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

Individuals who assist or facilitate payments on behalf of a victim—including attorneys, insurance companies, and security vendors—may also be at risk of sanctions violations.

When confronted with a ransomware attack, organizations become panicked and want the incident to be resolved at any cost. Many of them rush to pay the cyber terrorist. The risk of losing access to data can be preventively managed with a strong data backup policy, along with the implementation of strong information security controls. In some instances, organizations may still feel the need to pay cyber attackers in the hope that doing so will prevent publication of their data. But paying the ransom does not guarantee that the attacker will actually do what they say; it remains a possibility that the data will be posted or sold regardless of whether the victim pays. Paying ransoms fuels cyberterrorism internationally and puts the victim, and others, at greater risk.

OFAC guidelines

While the penalties for violating sanctions laws are steep and contribute to the legal, reputational, financial, and operational risks that accompany ransomware attacks, OFAC provides guidelines for appropriate response procedures and ways to potentially mitigate the repercussions of inadvertently committing a violation. If a violation is identified, "the existence, nature, and adequacy of a sanctions compliance program is a factor that OFAC may consider when determining an appropriate enforcement response."[2] A Framework for OFAC Compliance Commitments has been published to assist organizations in creating this type of program.[3] Having this in place reduces the risk of a violation to begin with, and potentially improves the outcome in the event of a violation. The five key categories identified by OFAC as primary components of a risk-based program are similar to the necessary factors contributing to a strong security culture. Proper response procedures at the time of an attack also reflect favorably on an organization, including contacting OFAC and appropriate law enforcement agencies.

In assessing the potential risks associated with ransomware, it is important to consider the possibility of violating sanctions laws. Cyberattacks often come with a web of risks; preparation and adherence to best practices help to offset the uncertainty. Developing a strong compliance culture and establishing a strong incident response plan are important to proactively address risk. ▲

Notes

[1] *https://home.treasury.gov/system/files/126/ofac_ransomware_advisory_10012020_1.pdf*

[2] *https://home.treasury.gov/system/files/126/ofac_ransomware_advisory_10012020_1.pdf*

[3] *https://home.treasury.gov/system/files/126/framework_ofac_cc.pdf*

'I like to get involved'

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Why did you go to law school?

While growing up in the Middle East in Bahrain and then in Toronto, Canada, my parents instilled in me a drive for higher education. My mother, a brilliant woman, ranked first in her Master of Science program and was the first female to receive a PhD in chemistry in her community in India. My father, an electronics engineer, was a distinguished CEO of two software companies in Bahrain. They set remarkable examples for me. For a career, doctor and lawyer were at the top of my list, but after a few science classes and occasional visits to the sterile environment of hospitals and clinics, I dispelled the idea of becoming a doctor. I found science and medicine quite intriguing, but couldn't imagine spending every day in the work setting. On the other hand, I loved my high school law classes and had fun leading a class-wide mock trial, and decided being a lawyer would better suit my abilities. Following a rigorous undergraduate international business program and a short detour in the financial sector, I set my sights on law school.

What led you to focus your practice on professional malpractice and personal injury issues?

My keen interest in personal injury law emerged when I interned at a Minneapolis products liability defense firm during law school. The issues were fascinating and each case was unique. That internship, coupled with my enjoyment of torts classes, catapulted me into the personal injury world. Before I graduated in 2010, the market had crashed and there were widespread hiring freezes.

Back then, I didn't distinguish between plaintiffs' versus defense work or even appreciate the differences; I only knew I wanted to practice personal injury law. I applied to a job posting by a plaintiffs' personal injury firm in Eau Claire, Wisconsin. The next thing I knew, I was accompanying my soon-to-be boss to court during my interview process and getting a tour of the town from his delightful wife. (Talk about a personal touch!) Some years later, my practice expanded to include medical malpractice claims on behalf of plaintiffs, and later, on behalf of defendants. I now defend physicians, hospitals, and long-term healthcare facilities and love the work, as it is a marvelous marriage of my interest in science and medicine and the practice of law. In my professional malpractice work, I also defend lawyers, which I find similarly rewarding.

You chair the MSBA's Professional Regulation Committee. Tell us a little about that body's work.

The committee is a think tank of professionals with knowledge and experience in professional regulation—some with decades of it. We study and recommend changes to the Rules of Professional Conduct, Rules on Lawyers Professional Responsibility, Rules for Bar Admission, Client Security Board, and policies and administration of the Office of Lawyers Professional Responsibility, Lawyers Board, and Board of Law Examiners. For example, one of our charges is to keep apprised of rule changes to the Model Rules of Professional Conduct, examine whether to recommend the same or similar changes in Minnesota, and make recommendations.

What do you get professionally or personally out of being involved in the MSBA and other bar groups?

As far back as I can recall, I've been someone who signs up for different clubs and organizations and volunteers. I like to get involved and help others. The legal community provides ample opportunity for this, given all the committees and bar associations it takes to regulate, facilitate, and improve the profession for lawyers and those we serve. My involvement with the MSBA, No-Fault Standing Committee, and State Bar of Wisconsin, among others over the years, have enabled me to contribute and, hopefully, make a difference. Also, a fantastic "side-effect" is getting to work with extraordinary individuals who are similarly invested and share values like furthering diversity, inclusion, and belonging.

What do you do to feel rejuvenated when you aren't working?

In my work, I naturally tend to go-go-go, but I cherish downtime. For getaways, my husband, Jason, and I love traveling overseas, but during the pandemic, relaxing has included lake life at his parents' cabin and visiting my parents in Chicago, where we're always greeted with a feast of my mother's delicious, savory Indian cooking. Overall, anything involving family and friends is a guaranteed serotonin boost—I'm fortunate to have them, as well as my career. ▲

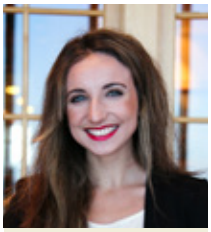
Covid-19 and *force majeure*

What every attorney ought to know

Covid-19 has been dubbed a whole host of things: a global pandemic, a national health emergency, the novel coronavirus, unprecedented, Rona, the list goes on. Another phrase that has frequently been thrown into the mix? *Force majeure*.

At its core, the effect of a *force majeure* clause is to excuse performance of one party to a contract in the event an unforeseen circumstance occurs.[1] Minnesota law is clear that the clause itself is determinative of the performance to be excused, and courts applying Minnesota law are reluctant to read a *force majeure* clause broadly.[2] Clauses that explicitly cover pandemics/epidemics and acts of governmental authorities are likely triggered by covid-19 and any resulting government mandate. While some *force majeure* clauses may allow one party to terminate the contract after a specified amount of time wherein performance has been suspended due to the unceasing *force majeure* event, the majority of such clauses only provide for the temporary suspension of performance until the *force majeure* event is no longer a constant.

Moreover, such clauses often expressly carve out payment obligations under the contract. Stated differently, while a contractual party may have the ability to temporarily suspend performance due to a *force majeure* event, any payment obligations under the contract still remain intact. This can (and indeed, has) become problematic in situations where, for example, an individual is locked into a 10-year lease to operate a restaurant, the applicable governor's mandate has rendered operating the restaurant at full capacity unfeasible, and the individual is still obliged to make full rental payments despite the substantial decline in gross revenues. Even more problematic are situations in which the applicable contract does not even contain a *force majeure* provision, or the provision does not extend to covid-19. In situations such as these, a party may need to turn to the defenses of impossibility/impracticability and frustration of purpose to temporarily suspend the performance of its contractual obligations or abandon its contractual obligations altogether.



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.

Impossibility/impracticability

Under Minnesota law, the defenses of impossibility and impracticability have been used interchangeably to excuse a party's performance of a contractual duty where: (1) due to the existence of a fact or circumstance; (2) of which the promisor at the time of making the contract neither knows nor has reason to know; (3) performance become impossible, or becomes "impracticable in the sense that performance would cast upon the promisor excessive or unreasonable burden, hardship, loss, expense or injury."[3]

While there are many nuances to the defense of impossibility/impracticability, this defense has been notably recognized as suitable for circumstances in which a "prevention of law" occurs—that is, where an unforeseen act of governmental authority renders a party's performance of a contractual duty impossible or impracticable.[4] In light of Gov. Tim Walz's numerous executive orders concerning covid-19 (imposing restrictions on essential and non-essential businesses), parties may find themselves using the defense of impossibility/impracticability more frequently.

Frustration of purpose

The defense of frustration of purpose, on the other hand, focuses on a party's *principal purpose* in entering a contract, rather than a party's ability to perform a contract. The defense of frustration of purpose excuses, in whole or in part, a party's performance of a contractual duty where: (1) the contracting party's principal purpose for entering into the contract has been frustrated; (2) due to no fault of the party; (3) by the occurrence of an event, the "non-occurrence of which was a basic assumption on which the contract was made."[5]

Parties seeking to use this defense should pay particular attention to whether the frustration temporarily suspends the party's contractual duty to perform or discharges the party's performance altogether. Indeed, where a frustration is only temporary, a party's contractual obligation is, similarly, temporarily suspended. A party's contractual obligation is discharged only where performance of a contract would be considerably more burdensome after the frustration concludes than it would have been had no frustration occurred;[6] the same applies equally to the application of impossibility/impracticability.

Key takeaway

Whether a party was (or is) justified in excusing performance under a contract, or abandoning a contract altogether, due to covid-19 may be the key issue flooding the courts in 2021. In order to protect clients now and in the future, it is best practice to ensure that any contract includes a well-drafted *force majeure* provision, so that the unprecedented will not also prove the party's undoing. ▲

Notes

[1] *See Melford Olsen Honey, Inc. v. Adee*, 452 F.3d 956 (8th Cir. 2006) (applying Minnesota law).

[2] *See, e.g., id.*

[3] *Powers v. Siats*, 70 N.W.2d 344, 348 (Minn. 1955).

[4] *See, e.g., Automatic Alarm Corp. v. Ellis*, 99 N.W.2d 54 (Minn. 1959); *Vill. of Minnesota v. Fairbanks, Morse & Co.*, 31 N.W.2d 920 (Minn. 1948); *Meier v. First Commercial Bank*, No. A12-146, 2012 WL 3101290, at *3 (Minn. Ct. App. 7/30/2012).

[5] *City of Savage v. Formanek*, 459 N.W.2d 173, 176 (Minn. Ct. App. 1990).

[6] *enXco Dec. Corp. v. N. States Power Co.*, 758 F.3d 940, 945 (8th Cir. 2014) (citing the Restatement (Second) of Contracts §269 and applying Minnesota law).

Construction law

Covid-19 forces contractors to examine AIA agreements

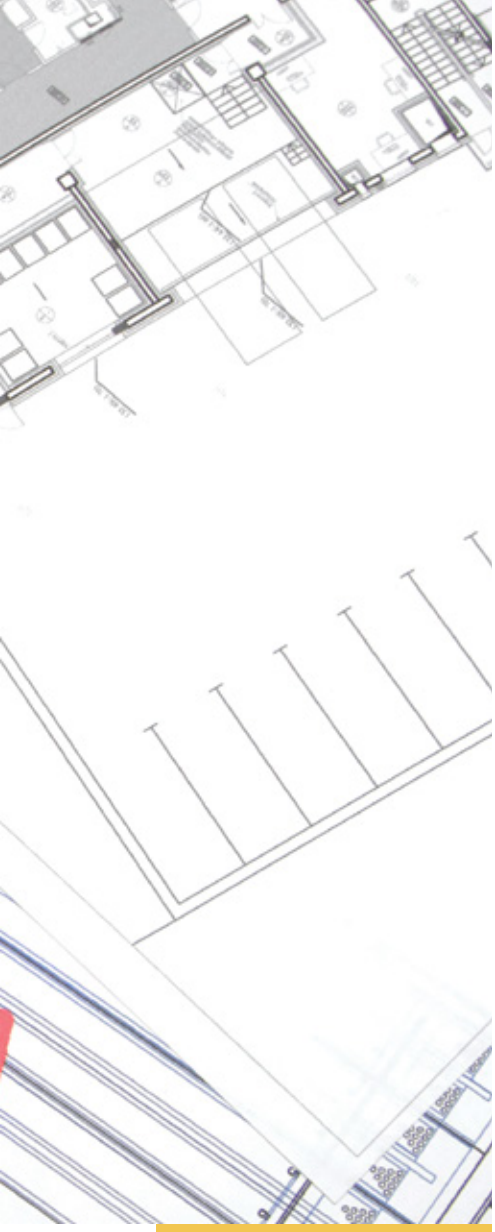
By Taylor Stemler

Implied in contract law is the assumption that the world will remain the way the contracting parties imagined at the time of formation. This principle originated from an early English case, where a venue owner was excused from renting out a music hall unexpectedly destroyed by fire.[1] The covid-19 pandemic has sparked many "fires" of its own—not only for parties left unable to fulfill contractual obligations, but also for lawyers attempting to determine their client's exposure under these agreements. The cumulative effects of the pandemic are especially problematic in the construction industry, as supply chain and workforce issues slow operations to a halt.[2]

Fortunately, contract attorneys have learned from situations like the burned down music hall and have developed contractual devices to assign unforeseen risks to parties. These *force majeure* clauses are now common and variants have even made their way into the American Institute of Architects industry standard contract form.[3] Whether covid-19 is covered under these clauses depends largely on their terminology and the yet-to-be-understood effects of the pandemic.[4]

The AIA termination and suspension clauses

Under the AIA General Conditions form, contractor delays due to unusual delays in deliveries, unavoidable casualties, or other causes beyond the contractor's control may provide a basis for contractor time extensions.[5] Due to the deaths, supply chain issues, and stay-at-home orders caused by the covid-19 pandemic, it seems likely that related contractor delays would be excused under the AIA form. The AIA form also allows a contractor to terminate the contract if the work is stopped for 30 consecutive days due to "an act of



Editor's note: This essay was the first-place winner in the MSBA Construction Law Section's 2020 writing competition.

government, such as a declaration of national emergency, that requires all work to be stopped."[6] Should this occur, the contractor may terminate the contract and recover compensation for work executed, termination costs, and a reasonable overhead and profit on work yet to be performed.[7] Although so far Minnesota's shelter-in-place orders have generally exempted the construction industry,[8] if this should cease to be the case, the clause might also allow contractors to terminate their contracts and recover compensation.

Conversely, project owners may terminate or suspend the contract for convenience. Thus, there is no requirement that the pandemic have any adverse effect on the project. However, should an owner decide to terminate or suspend, they are responsible for compensating the contractor.[9] Additionally, the amount of time the owner is permitted to suspend the contract may be limited by the contractor's ability to terminate, which arises after the owner's suspensions for convenience exceed a predetermined number of days.[10] Again, in this case, the contractor is permitted to collect payment from the owner for work done as well as profits and expenses on the work yet to be completed.[11]

Likely outcomes and available recovery

So far, where long-term stay-at-home orders have exempted the construction industry, widespread terminations of construction contracts are unlikely. This is due to the relatively limited ability of contractors to terminate their contracts (absent a government mandated shutdown), and the lack of motivation for project owners to do so.[12]

The more probable scenario will be for contractors to suspend performance of the contract due to material and personnel shortages. Under the AIA form, it is the contractor's responsibility to provide adequate materials and personnel to ensure timely completion of the project. If contractors are unable to fulfill this responsibility, they will be forced to suspend performance or face potential uncompensated termination by project owners.[13] Although the contractor is technically excused for these pandemic-induced delays, under the AIA form, the owner need not compensate the contractor for additional expenses incurred by these delays.[14] These expenses may be substantial and include terminating existing subcontracts as well as performing preventative maintenance on previously completed work.[15] Despite the covid-19 emergency, it is unlikely that courts will permit recovery of damages incurred by contractors where the contract provides only for time extensions—and not additional compensation.[16]

Contractors may still be able to recover for pandemic-related delays under business interruption clauses embedded within their insurance policies. Unfortunately, however, these policies often require physical loss or damage to initiate coverage. Alternatively, contractors may collect government aid provided under the federal CARES Act or Disaster Loan Program. ▲

Notes

[1] *Taylor v. Caldwell*, 122 Eng. Rep. 309 (1863).

[2] James P. Chivilo et al., "A Look at COVID-19 Impacts on the Construction Industry," Holland & Knight, *https://www.hklaw.com/en/insights/publications/2020/05/a-look-at-covid19-impacts-on-the-construction-industry* (last visited 11/21/2020).

[3] Am. Inst. Architects, A201-2017 General Conditions of the Contract for Construction §8.3 [hereinafter A201].

AIA contracts are the most widely used standard form contracts in commercial construction. *Contract Documents*, AIA N.Y., *https://www.aiany.org/resources/contract-documents/* (last visited 11/21/2020).

The A201-2017 contract sets for the obligations between the owner and contractor. Although the termination and suspension clauses are not labeled as *force majeure* clauses, they have a similar effect of assigning risk to parties due to unforeseen contingencies.

[4] *Dealing With The Construction Impacts Of COVID-19*, *supra* note 3.

[5] A201 §8.3.1.

[6] A201 §14.1.1.2.

[7] A201 §14.1.1.3.

[8] *See e.g.*, Minn. Exec. Dept., Executive Order No. 20-20 § 6.x.

[9] A201 §14.3-4.

[10] A201 §14.1.2.

[11] A201 §14.1.3.

[12] *See e.g.*, A201 §14.4.3. (mandating owners to pay costs to contractors for owner-initiated terminations).

[13] A201 §14.2.1.1.

[14] A201 §8.3.1. Although section 8.3 does not preclude damages for delay, available damages do not include those caused by COVID-19. Tony Flesor, "COVID-19 and the AIA A201 – 2017: Anatomy of a Delay Analysis," L. Week Colo., *https://lawweekcolorado.com/2020/04/covid-19-and-the-aia-a201-2017-anatomy-of-a-delay-analysis/* (last visited 11/21/2020).

[15] Chivilo, *supra* note 2.

[16] *See e.g.*, *S&B/BIBB Hines PB3 Joint Venture v. Progress Energy Fla., Inc.*, 365 F. App'x 202 (11th Cir. 2010) (dismissing suit for damages due to increased construction costs due to hurricanes where the contract unambiguously precludes additional damages).

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Crashes are caused by many preventable and careless behaviors, including distracted driving, speeding, chemical and alcohol use, and simply failing to pay attention, among other violations of the rules of the road. Crashes are not, however, caused by seat belts.

It only *sounds* like common sense

Why repealing the seat belt evidence rules serves no public purpose

By Genevieve M. Zimmerman, Patrick Stoneking, & Joel D. Carlson

Eliminating Minnesota's long-standing seat belt evidence rule, as recently promoted in one Bench & Bar article,[1] would result in the largest windfall to negligent drivers and their insurance companies that lawmakers could ever give them. Over the last 25 years, there have been multiple efforts by the insurance and trucking industries to repeal this law. Each time, policymakers have weighed the benefits of repeal (there are none) and the harm to injured motorists (it's extensive) and they have rightly rejected this unfair money grab by the insurance industry.

First, despite a record number of Minnesotans buckling up, our state continues to suffer tremendous devastation from the actions of careless drivers. Specifically, according to the Department of Public Safety's (DPS) annual Crash Facts Report in 2019:[2]

- 80,636 traffic crashes were reported to DPS; these crashes involved 148,774 vehicles and 174,422 people;
- these crashes caused 364 deaths and injured 27,260;
- 4,000 crashes were alcohol-related, resulting in 114 deaths and 2,176 injuries; and
- none of the crashes were reported to have been caused by anyone's failure to wear a seat belt.

In view of these facts, the Legislature has rightly decided that the public is better served by a civil justice system that puts responsibility for crashes on those who caused the crashes in the first place. Crashes are caused by many preventable and careless behaviors, including distracted driving, speeding, chemical and alcohol use, and simply failing to pay attention, among other violations of the rules of the road. Crashes are not, however, caused by seat belts.

Of course, it goes without saying that people should wear seat belts—which, in 94 percent of cases, Minnesotans do. The National Highway Transportation Safety Administration (NHTSA) has studied seat belt use and determined the best way to increase compliance is to make failure to use a seat belt a primary offense, something Minnesota has already done. Legislative efforts to allow the use of seat belt evidence in civil cases often claim to have a similar effect, but in fact they have nothing to do with safety and everything to do with shifting liability *away* from those who cause crashes and *onto* those who are innocently injured by the carelessness of others. By definition, because the seat belt evidence has nothing to do with assigning blame for the *crash*, the introduction of seat belt evidence only serves to allow a careless driver to tell the victim of their negligence that their injuries are their own fault. This is a dangerous rule that leads to awful and unjust outcomes—all of which are directly beneficial to the insurance industry.

The suggestion that juries should hear seat belt evidence may seem to make sense, which is part of the reason other states have given in to the insurance industry's demands to put such evidence before a jury whenever possible. After all, jurors would likely think it is very relevant that an injured person was not wearing his or her seat belt when a crash occurred. But the rules of evidence always face a difficult balancing act: Is this evidence really as important as it would seem to be? Does this evidence need further explanation for the jury to understand it? And even with such an explanation, will the jury *ever* interpret this evidence the way the law thinks it should? This analysis is familiar to any attorney and is the reason that courts keep all sorts of interesting information from the jury.

In fact, the rules of evidence almost always prevent the jury from getting to hear the juicy details that it might want to know in deciding a case. For example, you cannot tell the jury that the defense attorney is really an employee of the insurance company and that the defendant will not pay one penny of his own money to compensate the plaintiff. Some states allow that evidence, but Minnesota does not.

Seat belt evidence is both very powerful and very likely to be misunderstood, so it is exactly the type of information judges are careful with.

The jury might also like to hear that the plaintiff's extensive injuries would make her completely dependent on the taxpayers for care because her health insurance would not cover the extensive support that she requires to live. That type of information might make a jury less likely to let a culpable defendant's insurance company off the hook, but Minnesota courts would not allow such a discussion to occur at trial either. So when we talk about introducing seat belt evidence as evidence a person is to blame for his or her own injuries, it has nothing to do with giving the jury all the facts because what the jury actually sees and hears is the subject of a huge number of carefully crafted rules.

Seat belt evidence is both very powerful and also very likely to be misunderstood, so it is exactly the type of evidence judges are careful with—even in states where they allow it as evidence. Allowing highly prejudicial and easily misunderstood evidence is dangerous as it results in unjust outcomes. To illustrate, in one newsworthy case, a Walmart driver who had not slept for over 24 hours fell asleep at the wheel before ramming his 80,000-pound 18-wheeler into the back end of a limo bus carrying comedian Tracy Morgan and four others. Evidence showed that the driver was traveling over 20 miles per hour above the speed limit at the time of the crash. Morgan and three others sustained serious and life-threating injuries, and passenger Jimmy Mack was killed.

Walmart's response? Morgan and the others were at fault for their own injuries because they were not wearing seat belts. This is truly an absurd argument and no sound policy is served by allowing it. Despite the ridiculous defense of the claim, Morgan settled with Walmart, but others have not been so lucky.

The state of Florida allows seat belt evidence without limitation. In 2015, Ryland Nye was rear-ended by a drunk off-duty police officer, who fled the scene after the crash.[3] Nye was ejected from his car and killed. The officer could not attend the Nye estate's civil trial because he

was in jail for the accident. The insurance company's lawyer was able to convince the jury at trial that Nye was completely responsible for his own injuries. His estate recovered nothing, despite the jailed officer having significant insurance coverage. Is that fair or just?

These are exactly the type of windfalls that Minnesota truckers and insurers are looking for. They are hoping to avoid paying on behalf of their drunk, distracted, or negligent drivers and leave somebody else—anybody else—holding the bag.

As noted above, the seat belt evidence rule would not even come up in the vast majority of cases because so many Minnesotans follow the law. But whenever it came up, it would become such a tremendous can of worms that the Legislature has wisely opted to leave that can sealed. For one thing, the seat belt defense would become an expensive proposition for everybody involved, because it hinges on complicated issues of biomechanics and medicine. Whenever such a defense is raised, a defendant and insurance company would need to hire scientific experts to support their affirmative defense that the lack of seat belt use was to blame for all or part of the injury. Perversely, this battle of experts would be more significant in smaller cases because the insurance company could always defend the case by arguing (regardless of merit) that its driver may have caused the crash but that the injured person would have been perfectly fine if he or she had been wearing a seat belt. Insurance companies know that in practice, the mere prospect of hiring biomechanical engineers to testify is likely to keep many plaintiffs with serious but relatively minor injuries out of the courtroom altogether. Insurers know that this would lead to windfall profits for their companies, as they could comfortably deny such claims on a wholesale basis regardless of merit.

The Legislature has examined evidence about repealing the seat belt evidence rule many times over the past 25 years. Whenever they start peeling the onion to look at the real evidence, it is clear who really benefits from this change: insurance companies. Given the potentially devastating losses to their constituents, the response of our elected representatives has repeatedly been a correct and resounding NO. We hope that continues in 2021 and well into the future. ▲

Notes

[1] "Click it or Zip It: It's Time to Rethink the Seat Belt Gag Rule," Michael T. Burke and Brandon D. Meshbesher, *Bench & Bar of Minnesota*, January 2021.

[2] *Crash Facts, Minnesota Department of Public Safety 2019 edition.*

[3] *Jones v. Alayon*, 162 So. 3d 360 (Fla. Dist. Ct. App. 2015).

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TODD

A game-changer from the 8th Circuit

By Sam Calvert

In early February the 8th Circuit Court of Appeals issued an opinion that should horrify anyone who has prepared a transfer-on-death deed (TODD) for a client.

Briefly, the facts in *Strope-Robinson v. State Farm Fire & Cas. Co.*[1] are these. David Strope owned a house. He was dying. He signed and recorded a transfer-on-death deed to his house on August 11, 2017. The transfer-on-death deed provided that upon his death that the house would go to his niece, Dawn Strope-Robinson. He died three days later. A few days after David Strope died, his ex-wife allegedly burned down the house.

Dawn Strope-Robinson was appointed as special administrator of David Strope's estate and made a claim against State Farm for the value of the house. State Farm turned her down and refused to pay for the house. (They did pay the estate for the personal property loss.) She then sued State Farm naming herself as special administrator of David Strope's estate and herself, individually, as plaintiffs; the case was removed to federal court.

State Farm's legal argument was that ownership of the house passed to Dawn Strope-Robinson at the instant that David Strope died, and therefore the estate did not have an insurable interest in the house. And because Dawn Strope-Robinson, the niece, was not a named insured under the policy, she also did not have an insurable interest in the house.

Citing *Closuit v. Mitby*,[2] the court wrote that "in the absence of assignment or express stipulation of the parties...[,] policies of insurance do not attach to or run with the property insured... [and] [i]n case of a conveyance or assignment of the property, they do not go with it as an incident thereto...."

Strope-Robinson argued that "[t]he Transfer on Death is not an immediate transfer under applicable law such as a Quit Claim Deed and/or Warranty Deed or other forms of immediate transfer. The Transfer on Death is only effective upon death, it can be revoked at will like a Will, it can be nullified if the owner alienates the property transferred under the TODD just like a Will, and it can convey property to a different beneficiary at will…. In fact, all property vests in the legatee(s), heir(s), beneficiar(ies) and devisee(s), etc., immediately upon death—no different than the way a TODD works."

The argument was obviously unavailing. This is a scary case to contemplate. Who knows how many transfer on death deeds have been issued over the years with no thought at all about adding the grantee beneficiary to the insurance policy?

The U.S. district court thought it had an answer, because in his summary judgment decision, Judge Donovan Frank said: "However, when questioned by the Court, State Farm's counsel quite reasonably countered that the advice he would give to a client considering executing a TODD would be to contact his or her insurance provider and try to add their intended grantee as an additional insured to their current policy or to advise the future grantee to obtain their own personal coverage independently. With such options available to individuals planning to use such an instrument, it does not follow that Minnesota's TODD statute is inherently flawed or that the result in this case runs afoul of the legislative intent behind it."

Unfortunately, the course of action suggested by State Farm counsel may not work, at least with respect to some insurance carriers. My independent agent tells me that neither Western National nor any of the many other companies they represent would add such a grantee-beneficiary to an in-force policy. The grantee-beneficiary would have to get their own policy as soon as the grantor-owner dies. Next I phoned a State Farm agency and was told that State Farm would add the grantee-beneficiary as "as additional insured" but not as a "named insured." But the real concern is that following this decision, many people who have executed and recorded a transfer-on-death deed now face a risk of which they are not even aware. ▲

[1] 8th Circuit Court of Appeals Case No. 20-1147 (2/5/2021).

[2] 56 N.W.2d 428, 431 (Minn. 1953).

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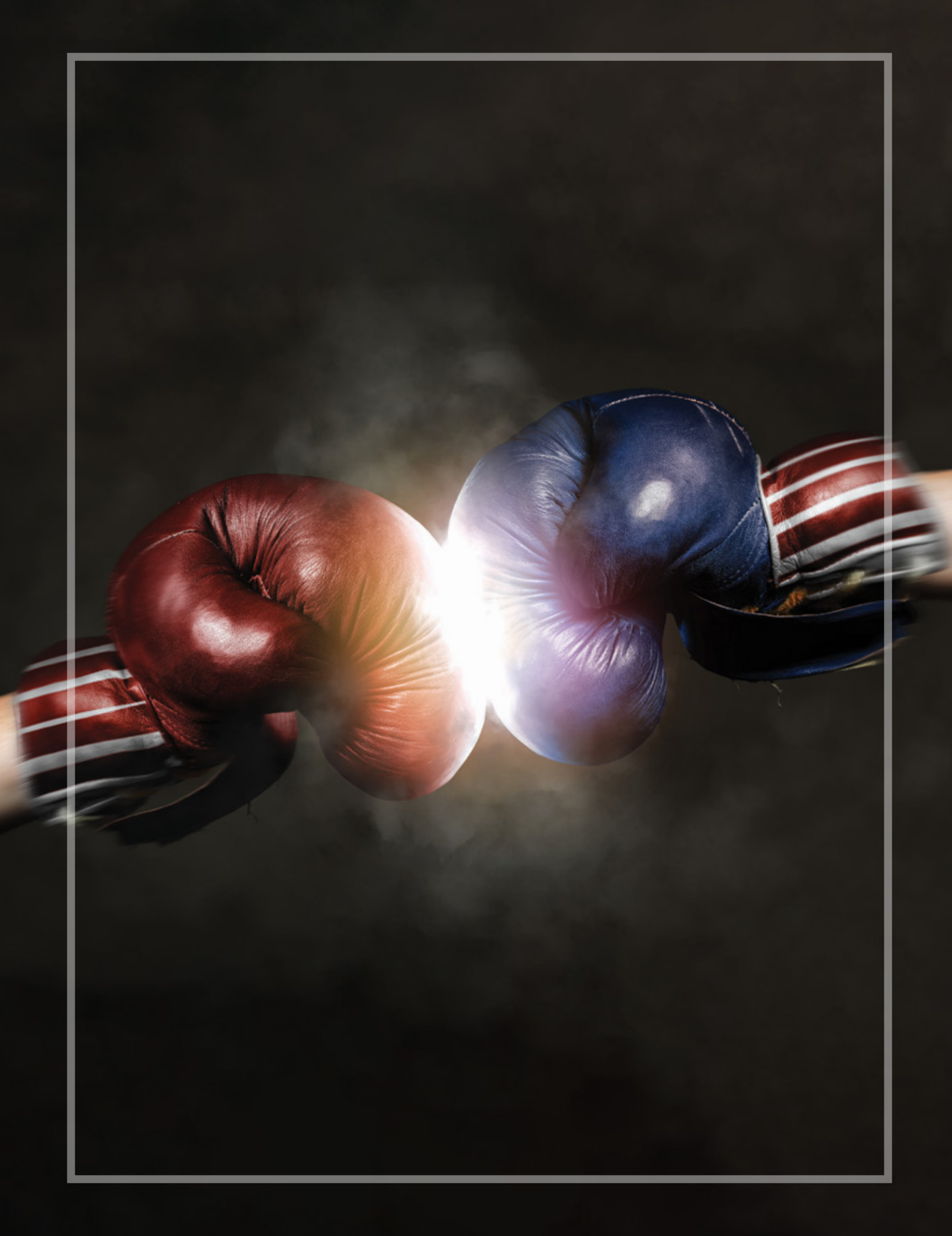

DEMOCRACY GOES TO COURT

Litigating voting rights and election administration in Minnesota in 2020

By George W. Soule & Anna Veit-Carter

The 2020 elections were hard-fought, high-stakes affairs that drew intense scrutiny. The covid-19 pandemic greatly influenced campaign methods, voting, and election administration, and the government's response to the pandemic created major political issues. It is no surprise that in this electoral tinder box, parties resorted to courts to press their concerns over voting and election issues. While the candidates' positions and personalities dominated campaign news, reports of election litigation made plenty of headlines as well. Parties litigated voting and election procedures heavily in the presidential swing states, but most states experienced significant election litigation.

Minnesota was no exception. Minnesota political parties, voter organizations, voters, and election officials fought in court over many aspects of voting and elections. The lawsuits continued after the election, contesting the results of several Minnesota races. This article will review the key Minnesota legal battles over voting and elections in 2020.

BALLOT ACCESS AND ORDER

Presidential primary ballot access

The first ballot case arose from Minnesota's 2020 presidential primary election—the state's first since 1992. The results of the primary (rather than the state's caucus and convention system) would bind the Republican and DFL's election of delegates to their national conventions. Minn. Stat. §207A.13, which was signed into law in 2016, provides that "[e]ach party must determine which candidates are to be placed on the presidential nomination primary ballot for that party." The Republican Party of Minnesota submitted only one name for the March 3 Republican ballot: Donald Trump. (Minnesota's DFL Party designated 15 candidates for its primary ballot.) The Republicans also elected to place a write-in option on their ballot, as authorized by the statute. Roque De La Fuente, who claimed he was a Republican candidate for president, petitioned the Minnesota Supreme Court to get his name on the ballot, arguing that excluding him per the statute violated the Minnesota Constitution's special-privileges clause, the U.S. Constitution's presidential eligibility clause, and the First Amendment's right to freedom of association. In ***De La Fuente v. Simon***, 940 N.W.2d 477 (Minn. 2020), the Supreme Court found that the statute's burden on De La Fuente's associational rights were "de minimis" and the political parties' associational interests were "legitimate," and concluded that the Secretary of State's acceptance of the Republican Party candidate list (of one) did not violate constitutional provisions.

Ballot order of candidates

The second ballot case focused on the order of the major party candidates on general election ballots. Minn. Stat. §204D.13, subd. 2, requires that such candidates be listed on the ballot in reverse order of the parties' average number of votes received in the last general election. Democratic Committees and voters sued to strike down the statute, contending that the law disadvantages their candidates—who would appear last on 2020 general election ballots—and "places an undue burden on the right to vote as well as the right to political association in violation of the First and Fourteenth Amendments to the United States Constitution." ***Pavek v. Simon***, No. 19-cv-3000 (SRN/DTS), 2020 U.S. Dist. LEXIS 103989 (D. Minn. 6/15/2020). On plaintiffs' motion for preliminary injunction, U.S. District Judge Susan Richard Nelson found that a "primacy effect" that advantaged the first candidate listed on a ballot burdened the plaintiffs' constitutional rights and that interests asserted by the state in support of the statute—"(1) encouraging political diversity; (2) countering the 'incumbent' effect; and (3) discouraging sustained single-party rule"—were not legitimate. The court granted a preliminary injunction "barring enforcement of the statute, and [requiring] the implementation of a nondiscriminatory ballot ordering system under which the State does not discriminate on the basis of party affiliation," a procedure in which parties' positions on a ballot are assigned by lot.

The Secretary of State did not appeal the preliminary injunction but intervenor Republican Committees appealed and requested a stay of the injunction pending appeal. In ***Pavek v. Simon***, 967 F.3d 905 (8th Cir. 2020), the 8th Circuit granted the motion to stay. The court noted that the statute "does not in any way restrict voting or ballot access," but did promote political diversity and counter the "incumbent effect" and predominant party rule. The court found no constitutional violation; rather, the statute "articulates one of the few ways Minnesota can organize its ballots without either favoring predominant parties or abandoning the task of ballot-organizing to random choice."

VOTING RIGHTS FOR PERSONS CONVICTED OF FELONIES

In October 2019, a group of plaintiffs sued Minnesota's Secretary of State to challenge Minnesota's restrictions on voting rights for persons convicted of felonies. ***Schroeder v. Minn. Secy. of State***, No. 62-CV-19-7440, 2020 Minn. Dist. LEXIS 269 (Ramsey Cnty. 8/11/2020). Pursuant to Article VII, §1 of the Minnesota Constitution, persons who have been convicted of felonies are not "entitled or permitted to vote at any election in this state… unless restored to civil rights." Minn. Stat. §609.165 restores civil rights and the right to vote to persons convicted of felonies when their conviction is discharged "(1) by order of the court following stay of sentence or stay of execution of sentence; or (2) upon expiration of the sentence."

The plaintiffs in *Schroeder* had been convicted of felonies, served their term of incarceration, and were on probation, parole, or supervised release; therefore their sentences had not expired. They argued that Section 609.165 violated the equal protection and due process clauses of the Minnesota Constitution because their voting rights should be restored "when they return to live in their communities… rather than at the end of their felony sentence."

While noting that "[i]n Minnesota voting is a fundamental right," Ramsey County Judge Laura Nelson found that this "right is explicitly limited by the text of the Minnesota Constitution" and therefore "a person who has been convicted of a felony does not have a fundamental right to vote in Minnesota until restored to civil rights." The court thus applied a rational basis review to plaintiffs' constitutional claims, and concluded that the Minnesota Legislature "demonstrated a clearly legitimate policy goal" for Section 609.165: "to promote the rehabilitation of the defendant and his return to his community as an effective participating citizen by automatically restoring civil rights to persons convicted of felonies after their sentence has ended." Judge Nelson found that Section 609.165 was a rational means to achieve this goal, and therefore did not violate equal protection or due process. The court granted the defendant's summary judgment motion and dismissed plaintiffs' claims.

In its conclusion, the court stated it was "aware of, and troubled by, the fact that the criminal justice system disproportionately impacts Black Americans and other communities of color in Minnesota, and the subsequent effect this impact has on those communities' ability to vote. Ultimately, however, this is an issue to be addressed by the legislature." Plaintiffs appealed the court's order.

CHALLENGES TO ABSENTEE (OR MAIL) BALLOT REQUIREMENTS

In a year in which the pandemic placed in-person voters at risk, many voter advocates went to courts nationwide to expand voting opportunities, especially for absentee (including mail) ballots. Minnesota organizations challenged enforcement in the 2020 elections of several statutory provisions: those requiring that a registered voter or notary public verify that the absentee voter marked the ballot in the witness's presence (witness requirement); mandating that election officials receive absentee ballots by Election Day to be counted (ballot receipt deadline); prohibiting an individual from assisting more than three voters in either marking or returning their ballots; and providing that absentee ballots be mailed only to voters who had requested them.

The court stated it was "aware of, and troubled by, the fact that the criminal justice system disproportionately impacts Black Americans and other communities of color in Minnesota, and the subsequent effect this impact has on those communities' ability to vote. Ultimately, however, this is an issue to be addressed by the legislature."

Witness requirement

On May 13, the Minnesota Alliance for Retired Americans Educational Fund and others sued Secretary of State Steve Simon in Ramsey County District Court. Plaintiffs alleged that many voters may be deterred by the pandemic from voting in person or safely finding a voter to witness their absentee ballot, and thereby be disenfranchised. The complaint asked the court to enjoin enforcement of the witness requirement (Minn. Stat. §203B.07, subd. 3) on the ground that it would burden the right to vote in violation of the Minnesota and United States Constitutions. On June 16, the parties joined in a consent decree, which was promptly approved by the court, in which the secretary agreed not to enforce the witness requirement in the August 11 primary election. ***LaRose v. Simon***, No. 62-CV-20-3149 (Ramsey Cnty.). The parties entered a second consent decree on July 17, providing the same relief in the general election.

The Republican Party of Minnesota moved to intervene to oppose the consent decree. The party argued that Minnesota had "implemented a host of safeguards to protect voters who vote in-person or by absentee ballot during the COVID-19 pandemic" and plaintiffs had not demonstrated that suspending the witness requirement for all voters was needed. The party also argued that Minnesota's "legitimate interests in deterring fraud, in maintaining public confidence in the integrity of its elections, and in ensuring the orderly administration of its elections" supported the statutory witness requirement, and thus its enforcement did not violate constitutional rights.

The parties in a similar case assigned to Judge Grewing also entered a consent decree enjoining enforcement of the witness requirement. ***Nat'l Assoc. for the Advancement of Colored People Minnesota-Dakotas Area State Conference v. Minnesota Sec'y of State***, 62-C-20-3625, order dated 8/3/2020 (Ramsey Cnty.).

While the Ramsey County cases were pending, parties also litigated the witness requirement in federal court. ***League of Women Voters of Minnesota Education Fund v. Simon***, Case 0:20-cv-01205 (ECT-TNL) (D. Minn.). The League alleged that enforcement of the witness requirement during the pandemic would unduly burden the right to vote in violation of the First and Fourteenth Amendments to the U. S. Constitution. As in *LaRose*, the secretary joined in a consent decree not to enforce the witness requirement in the August primary election. State and national Republican organizations and the Trump campaign intervened and opposed the consent decree. In a fairness hearing on June 23, Judge Eric Tostrud considered whether the "proposed decree is fair, reasonable, and faithful to the objectives of the governing law." He ruled from the bench, declining to enforce the consent decree because it "goes well beyond remedying the harm Plaintiffs allege

to suffer in support of their as-applied challenge…." "The harms established by Plaintiffs here are risk of exposure to COVID-19 owing to health conditions and personal circumstances that give one a reasonable fear that complying with the witness requirement will risk one's health and safety. That's not everyone…. Plaintiffs have not with their as-applied challenge shown a justification for the Secretary's blanket refusal to enforce the witness requirement."

On July 31, Judge Sara Grewing heard the Republican Party's motion to intervene and the request to grant, and opposition to, the consent decree in *LaRose*. On August 3, Judge Grewing—in a 25-page order—granted the motion to intervene, found the consent decree "fair and appropriate," and entered the decree. In her order, Judge Grewing acknowledged Judge Tostrud's order and stated she was "deeply concerned about two courts in Minnesota reaching opposite conclusions, especially on something so essential to a functioning government as the right to vote." Judge Grewing concluded that "this Court is not bound by the same overbreadth reasoning that drew the federal court to the opposite conclusion" because the state case "relies both on claims raised under the Minnesota Constitution and the U.S. Constitution" and the court was bound by *Erlandson v. Kiffmeyer*, 659 N.W.2d 724 (Minn. 2003), in which the Minnesota Supreme Court broadly construed the right to absentee ballots. Judge Grewing also entered the consent decree in the *NAACP* case.

The Republican Party appealed the *LaRose* and *NAACP* injunctions, but on August 18 agreed to dismiss its appeal and "waive the right to challenge in any other judicial forum the August 3, 2020 Orders and the August 3, 2020 Stipulations and Partial Consent Decrees …." Thus, Judge Grewing's order remained standing and Minnesota's election officials did not enforce the witness requirement in the 2020 elections.

Ballot receipt deadline

Minnesota statutes require that absentee ballots may be counted only if received by Election Day—by 3:00 p.m. if delivered in person, or by 8:00 p.m. if delivered by mail or a package delivery service. Minn. Stat. §203B.08, subd. 3, and §204B.45, subd. 2. The ballot receipt deadline was heavily litigated in Minnesota, as were similar provisions nationwide. Plaintiffs in *LaRose*, *supra*, challenged enforcement of the Election Day deadline for receipt of mailed absentee ballots. Plaintiffs alleged that many more voters may use mail ballots because of the pandemic and mail delivery may be delayed, resulting in disenfranchisement of voters whose ballots were not received by Election Day. In the parties' initial consent decree, the secretary agreed to accept and count mail ballots received within two days of the primary election. In their subsequent general election consent decree, the secretary agreed that election officials would count absentee ballots if they were postmarked on or before Election Day and received by 8 p.m. on November 10, seven days after Election Day. As explained above, Judge Grewing granted the consent decree regarding the general election over Republican Party objections. The Republican Party appealed but dismissed its appeal.

Republicans mounted two later challenges to the one-week extension of the ballot receipt deadline for mail ballots. On September 22, two Republican electors brought suit against the Secretary of State in federal court, seeking an injunction forbidding the counting of ballots "received in violation of Minnesota law." The complaint alleged that the "Consent Decree is nothing but a contract between the Secretary of State and certain voters prohibiting the Secretary of State from enforcing Minnesota law." Plaintiffs claimed that the consent decree's one-week extension for receipt of mail ballots violated the U. S. Constitution's electors clause, Article II, §1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.") and that only the Legislature, not the Secretary of State or state court, could extend the period for receipt and counting of mail ballots. Plaintiff also claimed that the extension for mail ballots changed the date of the election in violation of U.S. Constitution, Article II, §1, cl. 4, and 3 U.S.C. §1 ("The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."). On October 16, Judge Nancy Brasel denied plaintiffs' motion for preliminary injunction, finding that plaintiffs lacked standing. ***Carson v. Simon***, No. 20-CV-2030 (NEB/TNL), 2020 U.S. Dist. LEXIS 191445 (D. Minn. 10/16/2020).

Plaintiffs appealed to the 8th Circuit Court of Appeals. In a 2-1 decision issued on October 29, the 8th Circuit panel reversed the district court's order. ***Carson v. Simon***, 978 F.3d 1051 (8th Cir. 2020). The 8th Circuit majority found that "the Electors have standing as candidates" and concluded that "the Secretary's actions in altering the deadline for mail-in ballots likely violates the Electors Clause …." "[O]nly the Minnesota Legislature, and not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota. Simply put, the Secretary has no power to override the Minnesota Legislature." The court also noted that "[t]here is no pandemic exception to the Constitution." The court ordered the secretary to segregate the ballots received after the statutory deadlines to allow such votes for presidential electors "to be removed from vote totals in the event a final order is entered… determining such votes to be invalid or unlawfully counted."

While awaiting the results of the *Carson* appeal, the Trump campaign filed a petition in the Minnesota Supreme Court under Minn. Stat. §204B.44, seeking an order requiring the Secretary of State to segregate mail ballots received after the statutory deadlines. ***Donald J. Trump for President, Inc. v. Simon***, A20-1362 (Minn. 11/3/2020). On November 2, after the *Carson* opinion was issued, the Trump campaign withdrew its petition.

After the 8th Circuit opinion was filed, the Secretary of State mounted a campaign to inform Minnesota voters to return their ballots so that they would be received on or before Election Day. According to the Secretary of State, 1.9 million Minnesota voters cast absentee ballots. Only 2,500 ballots arrived after the Election Day deadline. Those late-arriving votes were included in the count for presidential electors (the *Carson* opinion only applied to the presidential race) but were also segregated. There were no further court orders on the subject, so the votes received after Election Day remain in the final counts. The *Carson* case was dismissed by stipulation on December 9.

Assistance to absentee voters

Minn. Stat. §204C.15, subd. 1, provides that "[a] voter who claims a need for assistance because of inability to read English or physical inability to mark a ballot" may "obtain the assistance of any individual the voter chooses." The statute provides that "a candidate for election" may not provide such assistance, and that an individual who provides assistance cannot "mark the ballots of more than three voters at one election." Under Minn. Stat. §203B.08, subd. 1, an individual voting by absentee ballot "may designate an agent" to deliver or mail the sealed absentee ballot envelope to election officials, but an individual cannot deliver or mail completed ballots of "more than three voters in any election."

St. Paul City Council member Dai Thao and others challenged Minn. Stat. §204C.15's restrictions on assisting voters in marking their ballots, contending that federal law preempted the restrictions. (Ramsey County had criminally charged Thao under Minn. Stat. §204C.15 for unlawfully marking a voter's ballot in the 2017 mayoral election. *State v. Thao*, No. 62-CR-18-927 (Ramsey Cnty.). District Judge Nicole Starr found that Section 208 of the Voting Rights Act, 52 U.S.C. §10508, preempted Section 204C.15's prohibition against a candidate assisting a voter and found Council member Thao not guilty.) In the civil case, plaintiffs and the Secretary of State entered a consent decree, agreeing that the candidate assistance and three-voter limit were preempted by the Voting Rights Act, and Judge Thomas Gilligan entered the consent decree on April 21, 2020. ***Thao v. Minn. Sec'y of State***, No. 62-CV-20-1044 (Ramsey Cnty.).

On January 17, 2020, Democratic Committees filed a separate lawsuit challenging Minnesota's restrictions on the number of voters an individual may assist in marking and delivering their absentee ballots. The Democratic Committees moved to enjoin enforcement of these statutes, arguing that they "directly contradict federal law, unduly burden the fundamental right to vote, and infringe on the core political speech and associational rights of organizations and citizens that work to increase voter turnout." Judge Thomas Gilligan granted the Democratic Committees' request for a temporary injunction against enforcement of the three-voter assistance and delivery restrictions, ***DSCC & DCCC v. Simon***, No. 62-Cv-20-585, 2020 Minn. Dist. LEXIS 2020 (Ramsey Cnty. 7/28/2020), and the Minnesota Supreme Court granted accelerated review. The Supreme Court affirmed the injunction against enforcement of the voter-assistance limit and reversed the injunction against the ballot-collection limit. ***In re DSCC***, 950 N.W.2d 280 (Minn. 2020).

According to the Secretary of State, 1.9 million Minnesota voters cast absentee ballots. Only 2,500 ballots arrived after the Election Day deadline. Those late-arriving votes were included in the count for presidential electors ... but were also segregated.

The Supreme Court agreed with the district court that Section 208 of the Voting Rights Act conflicted with and preempted the three-voter assistance limit. Under Section 208 a voter "who requires assistance to vote" due to a disability or "inability to read or write may be given assistance *by a person of the voter's choice*" with a few exceptions. 52 U.S.C. §10508 (emphasis added). The Court concluded "that Minnesota's three-voter limit on marking assistance can be read to stand as an obstacle to the objectives and purpose of section 208 because it could disqualify a person from voting if the assistant of choice is, by reason of other completed assistance, no longer eligible to serve as the voter's 'choice.'"

The Supreme Court found no such conflict between Minnesota's limit on the number of voters whose ballots an individual may return and federal law. Minnesota's limit was not "an obstacle to accomplishing" the purposes of Section 208 because Minn. Stat. §203B.08 was not limited to "voters with disabilities or language impairments" like Section 208, and the Minnesota statute provided multiple options for returning an absentee ballot. The Supreme Court also rejected the Democratic Committees' arguments that the delivery restriction unduly burdened their First Amendment free speech and associational rights. The Court found that the burden placed on the committees by the "three-voter limit on collecting and delivering marked ballots is not severe." The Court also acknowledged the "State's important regulatory interests" such as preventing "one person or a group of people from tampering with or mis-delivering a large number of ballots."

Mail ballots for all

In addition to seeking suspension of the witness requirement for absentee ballots, plaintiffs in the *NAACP* lawsuit, *supra*, sought an order to require Minnesota's election officials to mail absentee ballots to all registered voters regardless of whether they had requested them. On August 3, Judge Grewing approved the consent decree enjoining the witness requirement but denied plaintiffs' motion for a preliminary injunction to require that absentee ballots be mailed to all voters. The court concluded that "it is difficult to imagine the application process [for an absentee ballot] being any easier than as currently provided for in state law" and "the very modest restriction imposed by the absentee ballot application does not rise to the level of an undue restriction on a constitutional right." The court acknowledged that some voters may "*want* to go to the polls to vote in person" and found that requiring that ballots be mailed to such voters may create chaos and unnecessary expense. Later, the Secretary of State reached a settlement with plaintiffs in which the secretary agreed to mail an application for absentee ballot in the general election to all registered voters who had not already requested one.

COUNTING ABSENTEE BALLOTS

In July 2020, the Minnesota Voters Alliance, Republican Party of Minnesota, and others filed petitions for writs of mandamus against the City of Duluth, City of Minneapolis, Olmsted County, and Ramsey County, contending that Minn. Stat. §203B.121 required them to appoint only partisan-balanced election judges and not city or county employees (who were not partisan election judges) to absentee ballot boards. Such boards are responsible for taking possession of absentee ballot return envelopes and accepting or rejecting the envelopes according to statutory standards. The respondents stated that they had appointed, or would appoint, partisan election judges to the boards, but contended that the statute authorized them also to appoint city or county employees (who had not disclosed partisan affiliation) to the boards.

The Minnesota Supreme Court consolidated the actions and assigned them to Judge Thomas Gilligan in Ramsey County. Minn. Stat. §203B.121 provides: "The [absentee ballot] board must consist of a sufficient number of election judges trained in the handling of absentee ballots and appointed as provided in sections 204B.19 to 204B.22. The board may include deputy county auditors or deputy city clerks who have received training in the processing and counting of absentee ballots." Judge Gilligan denied petitioners' requests for writs of mandamus, concluding that cities and counties may appoint their trained employees to absentee ballot boards and that both partisan election judges and the city or county employees may review absentee ballots. ***In re Minn. Voters Alliance***, Nos. 62-CV-20-4124, 27-CV-20-9085, 69DU-CV-20-1252, 55-CV-20-4446, 2020 Minn. Dist. LEXIS 282 (Ramsey Cnty. 9/24/2020). The plaintiffs have appealed the order.

ELECTION DAY FOR SECOND CONGRESSIONAL DISTRICT

Adam Weeks, Legal Marijuana Now Party's (LMNP) congressional candidate in Minnesota's Second District, died on September 21, 2020—43 days before the election. Because LMNP is a "major political party" under Minnesota law, his death triggered the Minnesota Nominee Vacancy Statute, Minn. Stat. §204B.13. Under the statute, if a candidate of a major political party dies less than 79 days before the general election, the election is postponed until the following February. After Mr. Weeks's death, the Secretary of State issued a statement that the Second District Congressional race would still appear on the November 3 ballot, but the votes in that race would not be counted.

Second District Representative Angie Craig sued the secretary, seeking an injunction against enforcement of the Minnesota vacancy statute that would establish a special election for the seat on February 9. Republican candidate Tyler Kistner moved to intervene in the case and opposed the injunction. Representative Craig claimed, and U.S. District Judge Wilhelmina Wright concluded, that the vacancy statute was preempted by federal law, which requires elections for members of the United States Representatives to be held on the Tuesday after the first Monday in November in every even-number year (2 U.S.C. §7). ***Craig v. Simon***, No. 20-cv-2066 (WMW/TNL), 2020 U.S. Dist. LEXIS 187996 (D. Minn. 10/9/2020). Judge Wright rejected the secretary and Kistner's argument that the election was to "fill a vacancy," for which a different federal statute (2 U.S.C. §8(a)) permitted an election at a time set by state law. Judge Wright also found that potential harms to voters who might have to vote twice during a pandemic, to Second District residents who would be unrepresented in Congress for more than one month, and to Rep. Craig, who had "expended resources and structured her campaign" in reliance on the November 3 election date, favored an injunction.

Kistner appealed the injunction to the 8th Circuit Court of Appeals and requested a stay. The 8th Circuit concluded that federal law permitted a state to cancel an election only based on "exigent circumstances" not present in this case. The court relied principally on the fact that, even though the LMNP met Minnesota's standard for a major political party, the party was not a major player in Minnesota elections. "Even if the death of a Republican or Democratic-Farmer-Labor candidate could qualify as an exigent circumstance that would allow the State to cancel an election and trigger a vacancy in office, we think it unlikely that the rationale would extend to the death of a third-party candidate from a party with the modest electoral strength exhibited to date by the Legal Marijuana Now Party in Minnesota." The 8th Circuit denied the request for a stay, ***Craig v. Simon***, 978 F.3d 1043 (8th Cir. 2020), and affirmed the district court's order, ***Craig v. Simon***, 980 F.3d 614 (8th Cir. 2020).

ACTIVITIES AT POLLS

Mask mandate

On July 22, 2020, Gov. Tim Walz issued Executive Order 20-81, requiring Minnesotans to "wear a face covering in indoor businesses and indoor public settings" to prevent the spread of covid-19. Minnesota Voters Alliance and other activists sued the governor and other government officials to prohibit enforcement of the executive order. ***Minn. Voters Alliance v. Walz***, Case No. 20-CV-1688 (PJS/ECW), 2020 U.S. Dist. LEXIS 183108 (D. Minn. 10/2/2020). "Plaintiffs… framed [their] action as primarily relating to the impact of Executive Order 20-81 on their right to vote." Plaintiffs' principal argument was that the mask requirement directly conflicted with Minn. Stat. §609.735, which prohibits an individual from concealing her identity "in a public place by means of a robe, mask, or other disguise." Plaintiffs argued that the conflict prevented them from entering "an indoor public place—such as a polling place, or a meeting hall, or even a grocery store—without committing a crime." U.S. District Judge Patrick Schiltz denied plaintiffs' motion to enjoin enforcement of the mask mandate, concluding that, based on the statute's legislative history and language, Section 609.735 "is violated only when someone wears a face covering for the purpose of concealing his or her identity." Therefore, wearing a mask pursuant to the executive order would not violate the statute.

Plaintiffs also argued that the mask mandate violated the U.S. Constitution's elections clause ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof…" Art. I, §4, cl. 1) because it was not adopted by the Legislature and violated the First Amendment because the mandate "does not permit them to enter indoor public spaces without face coverings as a way to protest the requirement that they wear face coverings when they enter indoor public spaces." Judge Schiltz found that the mask mandate did not regulate the "manner of holding elections" and that the mandate "did not implicate the First Amendment at all or, at most, has an incidental and trivial impact on First Amendment freedoms." In January, Judge Schiltz dismissed plaintiffs' claims. ***Minn. Voters Alliance v. Walz***, 2021 U.S. Dist. LEXIS 4770 (D. Minn. 1/11/2021).

Voter intimidation

On October 6, 2020, Atlas Aegis, a private security company, posted a job listing "for former special forces personnel to 'protect election polls, local businesses and residences from looting and destruction' in Minnesota." ***Council on Am.-Islamic Relations-Minn. v. Atlas Aegis***, *LLC*, No. 20-CV-2195 (NEB/BRT), 2020 U.S. Dist. LEXIS 201288 (D. Minn. 10/29/2020). The Council on American-Islamic Relations of Minnesota and the League of Women Voters of Minnesota sued Atlas and its chairman, Anthony Caudle, in federal court seeking an injunction to prevent Atlas from placing armed agents at polling places. Plaintiffs argued that Atlas's plan to hire and deploy armed ex-soldiers to polling sites constituted illegal voter intimidation under Section 11(b) of the Voting Rights Act of 1965, 52 U.S.C. §10307.

Before plaintiffs' motion was heard, the Minnesota Attorney General entered into an "Assurance of Discontinuance" with Atlas, in which Atlas agreed not to provide any protective services or intimidate voters during the upcoming general election. U.S. District Judge Nancy Brasel found that the assurance did not render plaintiffs' request moot because the agreement applied only to Atlas (not its chairman) and "lack[ed] complete overlap with the requested relief." The court then granted a preliminary injunction to protect plaintiffs' interests under the Voting Rights Act, enjoining defendants from "deploying armed agents within 2,500 feet of Minnesota polling places," threatening to deploy armed agents, or "otherwise intimidating, threatening, or coercing voters in connection with voting activities in Minnesota."

POST-ELECTION CHALLENGES

Supreme Court petition

On November 24, three weeks after the election, and hours before the State Canvassing Board was to meet to certify Minnesota's election results, certain Republican candidates, legislators, and voters filed a Petition to Correct Errors and Omissions Under Minnesota Statute §204B.44 in the Minnesota Supreme Court. ***Kistner v. Simon***, No. A20-1486 (Minn. 2020). The 56-page petition focused on (1) the consent decree that waived the witness requirement and (2) on alleged irregularities in counties' postelection reviews (PER) required by Minn. Stat. §206.89 (i.e., a manual count of ballots in a small number of precincts to verify the Election Day vote totals). The petition also referenced newsworthy claims made in post-election challenges in other states: "In the past two weeks,

the entire world has been following the news about the alleged tampering with Dominion voting machines. Minnesota has many areas that use these machines. There are many examples of similar vote count anomalies in Minnesota as well as issues with systems being down or experiencing unexplained 'glitches' during the night allowing for alteration of vote counts." The petition requested that the Supreme Court enjoin the State Canvassing Board from certifying the November 3 election, issue an injunction to "ensure that every county has completed a PER in full compliance with MN Stat. §206.89," and order the county canvassing boards "to complete a full canvass [recount] of all the elections." Petitioners requested that the "statewide recount… be conducted using Minnesota election law," presumably disallowing mail ballots received without witness verification. Alternatively, petitioners sought "a new statewide election."

The Supreme Court dismissed the petition on December 4. The Court concluded that petitioners' complaints about suspension of the witness requirement were barred by laches. The Court noted that "suspension of the witness requirement was publicly announced in Minnesota well before voting began on September 18, 2020." "[P]etitioners had a duty to act well before November 3, 2020, to assert claims that challenged that procedure; asserting these claims 2 months after voting started, 3 weeks after voting ended, and less than 24 hours before the State Canvassing Board met to certify the election results is unreasonable. We must also consider the impact of petitioners' requested relief on election officials, candidates, and voters who participated in the 2020 general election knowing that the witness requirement was suspended." The Court also dismissed complaints about counties' post-election reviews because petitioners did not serve the petition "on the election official[s] charged with a wrongful act"—county auditors or other local officials.

District court contests

Republican candidates and voters filed election contests in Ramsey, Dakota, Clay, and St. Louis Counties under Minnesota Statute §209.12 against successful DFL candidates for United States Senate, for Second, Third, Fourth, and Fifth District Congress, and for 14 Minnesota legislative seats. A Chapter 209 contest "may be brought over an irregularity in the conduct of an election or canvass of votes, over the question of who received the largest number of votes legally cast, over the number of votes legally cast in favor of or against a question, or on the grounds of deliberate, serious, and material violations of the Minnesota Election Law." Minn. Stat. §209.02. "When a contest relates to the office of senator or a member of the house of representatives of the United States, the only question to be decided by the court is which party to the contest received the highest number of votes legally cast at the election…." Minn. Stat. §209.12.

The contestants' arguments were similar to those made in the Supreme Court petition in *Kistner*, *supra*; they focused on the waiver of the witness requirement for absentee ballots and alleged irregularities in counties' post-election reviews. The contests also included allegations about the delivery of a "new 520-pound Dominion voting machine" to Dakota County after the election, an alleged "ballot harvesting scandal" in the Fifth Congressional District, and delivery of "a stack of ballots… in a large white purse by some employee of the City of Hastings."

In orders issued in Clay County (Judge Timothy Churchwell), in Dakota County (Judge Timothy McManus), in Ramsey County (Judge Leonardo Castro), in St. Louis County (Judge Eric Hylden), and by a three-judge panel for the U.S. Senate contest (as required by Minn. Stat. §209.045 for statewide races), the courts dismissed each of the contests. *See* ***Hahn v. Simon***, No. 14-CV-20-433 (Clay Cnty. 12/14/2020); ***Kistner v. Simon***, No. 19AV-CV-20-2183 (Dakota Cnty. 12/15/2020); ***Jensen et al. v. Simon et al.***, No. 62-CV-20-5599 (Ramsey Cnty. 12/18/2020); ***Bergstrom v. Nilsen, et al.***, No. 69DU-CV-20-2162 (St. Louis Cnty. 1/5/2021); ***Quist et al. v. Steve Simon & Tina Smith***, No. 62-CV-20-5998 (Ramsey Cnty. 12/29/2020). In contests in which contestants complained about the consent decree's suspension of the witness requirement for absentee ballots, the courts relied on the Minnesota Supreme Court's finding that laches barred that claim. The courts also found that the contests were procedurally deficient, including that the contests were not timely filed and were not adequately served on the contestees.

The courts also found that the contestants had not adequately pleaded how any alleged irregularities in voting or counting votes, or in conducting post-election reviews, changed "who received the largest number of votes legally cast." For example, Judge Castro in Ramsey County concluded that the contests over congressional elections were facially inadequate because they alleged errors of a "relatively small number of ballots, but do not allege that the identified errors would be enough to reverse Contestee Craig's almost 10,000-vote victory, Contestee Phillips's more than 50,000-vote victory, Contestee McCollum's more than 133,000-vote victory, and Contestee Omar's more than 153,000-vote victory." Judge Castro further noted that the contestants conceded that their claims were "'not necessarily about particularly who won,'" but were more about the post-election process, which was fatal to their Chapter 209 claims. In the contest over the U.S. Senate race the panel found that, while the contestants noted a number of irregularities, they "failed to allege that Senator Smith did not receive the highest number of votes legally cast because of these claimed irregularities."

CONCLUSION

In 2020, the covid-19 pandemic affected many aspects of campaigns and elections, and Minnesota political parties, voter organizations, voters, and election officials litigated many voting and election issues in the Minnesota courts. In several of the cases, the courts upheld application of Minnesota statutes. The courts declined to apply other provisions—notably, the three-voter limit on assisting voters in marking ballots and postponement of an election for U.S representative when a vacancy in nomination occurs close to Election Day.

Some cases highlighted issues for consideration by the Legislature. Other cases will be seen as a relic of this difficult year. While a pandemic may not plague future elections, the increasing partisan divide may assure that Minnesota courts will be an important and constant fixture in managing future elections in Minnesota. ▲

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WHAT WOULD A DISCIPLINE OFFICE DO?

Examining the high-profile complaints against election attorneys from a lawyer regulatory perspective

By William J. Wernz

It's no surprise that a presidential election as bitterly fought as last November's should also yield a lot of litigation—and a striking volume of complaints from lawyers regarding the conduct of other lawyers. Although many lawyers were involved in the electoral challenges, the spotlight here is on complaints regarding four prominent lawyers.

- Thousands of law students and lawyers signed a petition to disbar U.S. Sen. Josh Hawley for his objections to certified presidential election results.[1] Hawley was the first member of the Senate to announce he would object on January 6 to certification of electoral college results.

- The Lawyers Defending American Democracy (LDAD), a large group of prominent lawyers, filed a lengthy complaint against Rudolph Giuliani, centering on his allegedly false claims of widespread voter fraud. In addition to serving as President Trump's lead litigation attorney, Giuliani also spoke frequently in the media and to state legislatures.

- Courts in several jurisdictions are deliberating whether to sanction or discipline lawyers who sued to invalidate presidential election results. One of these lawyers is Sidney Powell, who represented several groups in electoral challenges and was, for a time, a member of the Trump-Giuliani litigation team.

- L. Lin Wood is under investigation by the Georgia bar discipline agency for numerous extraordinary and incendiary statements regarding John Roberts, Mike Pence, Antonin Scalia, and others, at rallies, on social media, and in interviews.[2] The agency is also investigating Wood's conduct both as a lawyer and as a party in several litigation challenges to election results.

How would a discipline agency handle these complaints? Having reviewed complaints against lawyers and judges for 40 years, I offer one lawyer's expectations.

Fairness, consistency, and adherence to constitutional constraints are the most important hallmarks of a properly run discipline agency. They are crucial where the setting is politics verging on warfare. Because it is not fair to reach conclusions on discipline issues without hearing the accused lawyers' side of the story, the focus here is on how discipline agencies would approach the allegations in the complaints.

Precedents

The precedents for professional discipline of lawyers acting in political settings show both the propriety of some disciplines and the danger of being caught up in popular passions. Thirty years ago, the Minnesota Supreme Court disciplined U.S. Senator David Durenberger and two of his lawyers for backdating and falsely notarizing documents supporting U.S. Senate reimbursements for rental payments that Durenberger had not yet made.[3]

Conversely, two cases from a century ago show how discipline systems can be misused. In 1917, the Minnesota State Bar Association commenced disbarment proceedings against Albert Pfaender, a state senator. Pfaender's alleged offense was speaking out against United States entry into World War I. Gov. Joseph Burnquist removed Pfaender from his position as New Ulm City Attorney, finding "malfeasance in office." Under great pressure, Pfaender apologized and recanted.

On the same basis, Burnquist removed from office Dodge County Probate Judge James Martin.

The Minnesota Supreme Court found Judge Martin's public statements to be "clearly at variance with good citizenship, and contrary to the obligations every citizen owes to the government of his country." Nonetheless, the Court wisely based its holding on a broader perspective: "But we are clear that scolding the President of the United States, particularly at long range, condemning in a strong voice the war policy of the federal authorities, expressing sympathy with Germany, justifying the sinking of the Lusitania, by remarks made by a public officer of the jurisdiction and limited authority possessed by the judge of probate under the Constitution and laws of this state, do not constitute malfeasance in the discharge of official duties, and therefore furnish no legal ground for removal."[4] Today a discipline agency would likewise separate the issue of whether lawyers' conduct was consistent with good citizenship from the issue of whether lawyers violated disciplinary rules. If rule violations were found, issues such as whether the conduct was inimical to democracy or the rule of law could be considered in determining the severity of discipline.

Constitutional protections

Today we would regard Pfaender's and Martin's statements as protected by the First Amendment. The highest standard of review protects speech whose content is the basis for penalty. The First Amendment allows robust free speech when advocates call for public demonstrations against perceived governmental misconduct. The leading case requires that to sustain a charge of "inciting a riot," there must be proof of (1) intent to incite; (2) imminence of a riot; and (3) likelihood the statement will incite a riot.[5]

The protection of due process of law applies to lawyer discipline proceedings.[6] Due process requires fair notice of the alleged basis for discipline. Fair notice includes specific allegations of violation of one or more Rules of Professional Conduct. A tribunal may not impose discipline for violation of a rule whose violation was not alleged in the operative pleading.[7] Alleged violations of an attorney's oath or of the general norms stated in the rules' preamble are not a basis for discipline, although they may be considered along with other general norms in determining the degree of discipline.

A century after Pfaender and Martin, a discipline agency would also be mindful of discipline and bar admission cases in which proponents sought to exact penalties for political purposes. For example, authorities in the American South tried to block civil rights progress by disciplining attorneys and commencing defamation actions.[8] In evaluating complaints against election lawyers, an agency would consider whether discipline charges would unduly stretch constitutional theories and interpretations of discipline rules, and would prove to be short-sighted.

Criminal, civil, and discipline procedural relationships

For several reasons, a discipline agency normally awaits the outcome of a civil or criminal case against a lawyer before considering disciplinary action: Resources are conserved; the agency may lack the resources to investigate alleged crimes; inconsistent outcomes are avoided; and it may be unfair to the lawyer to demand candor and cooperation that are not required in criminal investigations. The Minnesota Office of Lawyers Professional Responsibility advises would-be complainants, "Examples of complaints that are often dismissed without investigation include:... most matters pending in court, unless the misconduct is clear and serious."[9] However, a discipline agency may not await outcomes in other forums where misconduct is flagrant.

Disciplinary allegations must be proved by "clear and convincing evidence." The normal civil standard of proof is the lower one of "preponderance of the evidence." Therefore, civil findings, including those supporting sanctions, are not preclusive in discipline proceedings, but they may be considered.[10] Because the "beyond a reasonable doubt" standard of criminal proceedings is higher than its disciplinary counterpart, a criminal conviction is preclusive in a discipline proceeding.

Did Hawley commit a criminal act?

Rule 8.4(b) forbids a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." The petition alleges that Hawley "flagrantly" violated ethics rules, including that he "potentially" committed "a criminal act." Combining "flagrant" and "potential" reveals a rush to accuse that impairs the petition's credibility.

A later, more formal complaint against Hawley alleges "potential" crimes, including inciting a riot. But the complaint's specification of the elements of the potential crime raises more questions than it answers. How would Hawley's December 30 announcement of intent to object to certification of the election on January 6 satisfy the First Amendment imminence standard? How could Hawley's auto-scheduled fundraising message—cited in the complaint, but disseminated after rioters had already invaded the Capitol—cause the invasion? Would any of the insurrectionists testify that Hawley incited them? Is a raised fist not a ubiquitous gesture with a variety of meanings, riotous and otherwise? How and why should Missouri disciplinary counsel investigate alleged criminal incitement of a riot in Washington D. C., rather than await the outcome of any criminal investigation by U.S. and D.C. authorities? Although the LDAD complaint against Giuliani cites his invitation on January 6 for the crowd to engage in "trial by combat," the complainants—perhaps recognizing the barriers to investigation and proof—do *not* allege a Rule 8.4(b) violation.

Hawley, Giuliani, Powell: Knowingly false statements?

Rule 8.4(c) proscribes "dishonesty, fraud, deceit, or misrepresentation." Rule 8.4(c) applies to conduct in or outside the practice of law. Minnesota case law is mixed on whether the "misrepresentation" proscribed by the rule requires intent.[11]

The Hawley complaint alleges that Hawley repeatedly and publicly claimed that Pennsylvania failed to follow its own election laws. Citing two cases, the complaint alleges, "Sen. Hawley directly contradicted the rulings of federal and state courts across the country, particularly in Pennsylvania." In one case, the Pennsylvania Supreme Court dismissed, *as untimely*, a suit that claimed universal mail-in voting was not permitted under Pennsylvania law. The case did not reach the merits of the claim of plaintiff and of Hawley. In the other cited case, plaintiffs claimed that Pennsylvania officials improperly "let voters fix technical defects in their mail-in ballots." In dismissing this claim, the court said, "This case is not about whether those claims are true."[12] A discipline agency might ask the complainants: "The cases you cite are dismissals on procedural grounds. Do you still maintain, 'Sen. Hawley directly contradicted the rulings of federal and state courts... in Pennsylvania?' Please cite the relevant section of any court opinion that rejects Hawley's claims regarding Pennsylvania mail-in voting *on the merits*."

Complaints by Michigan Gov. Gretchen Whitmer and others against Sidney Powell allege that Powell knowingly offered false evidence from pseudo-experts. Revelations of the identities and lack of qualifications of the purported experts may well lead discipline authorities to inquire of Powell what she knew, when she knew it, and why she presented as experts persons who lacked expertise and who made extravagant statements that were readily disproved.

The LDAD complaint alleges both that Giuliani repeatedly alleged a pattern of criminal voter fraud in several states and made allegations as to specific instances of fraud. A discipline agency might well notify Giuliani that it was investigating his claims of fraud, both broadly and narrowly made. The agency might well request Giuliani to state whether he made these allegations, whether he continues to claim the allegations are true, and what basis he has for his allegations. The agency might cherry-pick any other allegations that appear susceptible to determinations of truth or falsity without unduly complicated investigation. When a complaint alleges many violations, a discipline agency will often focus on the marquee attractions—the allegations that appear most serious and most readily proved or disproved.

The Giuliani complaint and many commentaries on election litigation have said that fraud and other theories have been "debunked" by many courts. The devil may or may not be in the details. Fraud was not alleged in many of the cases. Many cases were dismissed on procedural grounds. A discipline authority would carefully match the cases in which fraud allegations were made and rejected on the merits with the fraud allegations made by the respondent attorneys.

Dominion Voting Systems (DVS) and Smartmatic have commenced defamation suits against Giuliani, Powell, and others. Smartmatic alleges that Guiliani stated on national television that Smartmatic was founded by Venezuelans close to Hugo Chavez "in order to fix elections." DVS alleges that Giuliani persistently stated publicly that the DVS machines were manipulated so that many votes for Trump were counted for Biden. DVS also alleges that investigations by William Barr, DOJ, DHS, and Georgia election officials all found no evidence supporting Giuliani's statements but Giuliani nonetheless persisted. These are the kinds of important and specific allegations on which a discipline agency might well concentrate. A discipline agency might write to DVS, "Please keep this agency advised of developments in your litigation, and in particular...." The agency might also ask Giuliani to provide all evidence supporting his accusations

Heightened constitutional scrutiny applies to content-based prohibitions of speech, including prohibitions on false speech. The prohibition must serve a compelling state interest and there must not be a less restrictive alternative. In invalidating the Stolen Valor Act, the United States Supreme Court found that counter-speech, rather than the prohibition on falsely claiming to be a Medal of Honor winner, would serve the Act's purpose. On the other hand, a Minnesota statute penalizing intentionally false campaign speech was upheld because it served the interest of an informed electorate. In upholding the statute, the Minnesota Court of Appeals stressed that it penalized only *intentional* false statements. With these standards in mind, the discipline agency would ask: Is counter-speech, rather than discipline, a sufficiently effective deterrent to post-election false statements that allegedly undermine voter confidence in campaign results and the election system? Can the statements be proved to be *knowingly* false?[13]

Heightened constitutional scrutiny applies to content-based prohibitions of speech, including prohibitions on false speech. The prohibition must serve a compelling state interest and there must not be a less restrictive alternative.

Rule 1.0(g) defines "knowledge" as "actual knowledge," but adds that knowledge may be inferred from circumstances. A lawyer may not claim a lack of knowledge while turning a blind eye to the obvious. In determining whether a lawyer knew a statement was false, an agency would ascertain whether, when, and how the truth of the matter was clear. If a fact was clearly established, and the lawyer continued to assert the contrary, the agency would ask for an explanation.

In evaluating Rule 8.4(c) complaints, an agency would consider possible ramifications of imposing discipline for false claims of voter fraud. What if a lawyer wrote a letter to the editor that echoed Giuliani's claims, even after debunking by Barr *et al.*? What if a lawyer-legislator signed a group petition with similar claims? Would they be subject to discipline? To what degree do the Pfaender and Martin cases teach discipline authorities to tread lightly in political matters? On the other hand, if on demand the respondent attorneys cannot produce any credible evidence supporting their claims of fraud, will a discipline proceeding aid in demonstrating important truths to the public, thereby helping to restore faith in the electoral process?

Frivolous pleadings?

Rule 3.1, R. Prof. Conduct and Rule 11, R. Civ. Proc. both proscribe frivolous pleadings. Of one election challenge, a federal judge wrote, "Plaintiffs' theory... lies somewhere between a willful misreading of the Constitution and fantasy. It is not a stretch to find a serious lack of good faith here.... Yet even that may be letting Plaintiffs off the hook too lightly.... Courts are not instruments through which parties engage in such gamesmanship or symbolic political gestures."[14] Numerous courts harshly criticized pleadings they dismissed, as lacking a basis in fact or law. Several orders to show cause and sanctions motions are pending. L. Lin Wood attested that one of his pleadings was made "under plenty [sic] of perjury," but he later fixed the typo.

A Rule 3.1 charge is seldom brought without a prior civil finding. And the Supreme Court has cautioned, "We are concerned that overzealous application of Rule 3.1 may hinder the development of law by discouraging attorneys from bringing issues of first impression or good faith arguments for the extension, modification or reversal of existing law...."[15] On the other hand, the Court has found Rule 3.1 violations that are not preceded by Rule 11 violations, in part because Rule 3.1 does not include Rule 11 procedural defenses, such as dismissing a suit within a safe harbor period.[16]

In evaluating complaints of frivolous litigation, a discipline agency would likely ask: Are judicial proceedings pending or complete for imposing sanctions or making findings that pleadings lack a basis in fact or law? If not, are there nonetheless some allegations that appear obviously frivolous on their face? If not, is there an undue burden in investigating claims of fact or law?

L. Lin Wood: Attacks on judges and legal officials, fitness

Rule 8.2(a), R. Prof. Conduct provides, "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge...." Three of the statements by Wood under investigation in Georgia are: (1) "Corruption & deceit have reached the most powerful office in our country – the Chief Justice of U.S. Supreme Court. Roberts is reason that SCOTUS has not acted on election cases. Justice John Roberts is corrupt & should resign immediately." (2) "I have linked Roberts to illegal adoption, Jeffrey Epstein, pedophilia & prior knowledge of Scalia's death." (3) "Pence is on videos captured by FBI. Discussions about murdering judges. [CJ] Roberts was involved." Before initiating a discipline inquiry, Georgia authorities requested that Wood undergo a mental health exam, which he declined.

Minnesota attorneys have been suspended for making false, baseless allegations about the integrity of judges. The Court adopted an objective standard for such allegation, because a false accusation concerning judicial integrity "adversely reflects on the accuser's capacity for sound judgment."[17] Wood's accusations have a lesser counterpart in Minnesota. A lawyer who made numerous scurrilous statements, including anti-Catholic slurs ("Jesuitess"), about judges and court personnel, was sanctioned and later suspended from practice.[18]

Pro hac vice *revocations*

After an attorney has been admitted to practice *pro hac vice,* the attorney's right to appear may not be revoked without a hearing and a showing of good cause. However, the standards for *pro hac* revocation often are not as strict or specific as those for discipline in the lawyer's home state and revocation procedures move much more quickly than discipline matters. For example, in Delaware the revocation standard is whether continued admission is "inappropriate or inadvisable." A Delaware judge revoked Wood's admission because Wood did not show an "appropriate level of integrity and competence" in election challenges in Georgia (which the judge found to be "textbook frivolous litigation") and Wisconsin (which the judge found to show Wood as "mendacious or incompetent").[19] Shortly after the Delaware revocation, lawyers opposing Wood in a New York case moved to have his *pro hac* admission revoked in New York.[20] Lawyers with a national litigation practice, such as Wood and Powell, might well face a series of *pro hac* revocation motions and opposition to future *pro hac* admissions.

Interim suspension

In the extraordinary circumstance that a lawyer's continued authority to practice law during discipline investigation and proceedings poses a substantial threat of serious harm to the public, the discipline agency may petition the state Supreme Court for an immediate suspension. The LDAD complaint seeks Giuliani's suspension during investigation and proceedings. The complaint argues, "The Committee already has 'uncontroverted evidence of professional misconduct' because Mr. Giuliani has committed his violations in the public eye." A disciplinary agency would

question whether the public nature of Giuliani's statements renders their truth or falsity, or Giuliani's state of mind, "uncontroverted." A leading commentator endorsed the interim suspension request, but also said that the discipline process "could take months, or even years," due to its complexity. The agency would question how key allegations could be at once "uncontroverted," "complex," and challenging to investigate and adjudicate.[21]

In contrast, the statements attributed to L. Lin Wood by the Georgia bar, regarding John Roberts and others, are so manifestly false and wild that, if Wood admits (or cannot credibly deny) having made the statements, his immediate suspension might well be sought. Remorse and reform seem unlikely, as Wood has called for followers to investigate the Georgia bar.

Rising to the occasion?

What if, after all the limits, cautions, and considerations described above, an agency concludes that a lawyer did persistently and knowingly make false public statements, or take litigation positions not supportable by fact or law, or was convicted of a crime?

Well, then the agency should vigorously seek severe discipline. Lawyers take an oath to support the truth and the rule of law and those who instead gravely damage these ideals should lose their licenses. A common theme in discipline opinions is whether an attorney's conduct impaired the public's faith in the administration of justice or in the legal profession. One of the first OLPR directors told me that the chief justice told him to err on the side of zeal, because the Court could temper excess zeal, but could not act where OLPR did not act first. Distinguishing a time to rise to the occasion from a time to pay heed to limits of a professional responsibility system calls for zeal, balanced by wisdom and prudence.

An agency also would consider possible challenges in managing a discipline proceeding. Might the respondent turn the proceeding into political theater, in which every purported expert and witness to voter fraud was called as a defense witness? Or exercise discovery rights by deposing various political figures? Or recruit followers who might disrupt proceedings?

Conclusion

Discipline investigations and proceedings often last years, especially when stayed to await the results of criminal or civil proceedings. Many disciplinary agencies decline to confirm pendency of an investigation unless and until public charges are made.[22] However, complainants and respondents have a constitutional right to make public their knowledge of the discipline agency's actions.

Will any of the attorneys identified above be disciplined? I cannot say, but a few general expectations may be hazarded. Discipline agencies will be reluctant, without prior court findings, to investigate allegations of complicated facts in distant places. It would be extraordinary, without a prior criminal conviction, for a discipline agency to allege that an attorney committed a crime. Any attorneys who are found in criminal or civil proceedings to have engaged in wrongful conduct will likely face follow-on disciplinary charges. In some cases, a discipline agency might borrow from the First Amendment concept of whether "counter-speech," rather than discipline, is the best remedy to allegedly false speech. If an attorney has engaged in flagrantly false accusations or meritless litigation, the attorney well be subject to discipline charges even without prior court sanctions.

Finally, we can make one prediction confidently: The disciplinary aftermath of the 2020 elections will produce surprises, controversy, and publicity. How could it be otherwise? ▲

Notes

[1] Petition to Disbar Senators Hawley and Cruz. The Petition is considered here only as it applies to Hawley, not Cruz. LDAD's website has a copy of the LDAD complaint. *https://lawyersdefendingdemocracy.org/statements/.*

[2] Wood confirmed the complaint on his Telegram account and has uploaded the inquiry on Dropbox.

[3] *In re Durenberger*, 464 N.W.2d 498 (Minn. 1991); *In re Johnson*, 462 N.W.2d 598 (Minn. 1990); *In re Mahoney*, 474 N.W.2d 598 (Minn. 1991).

[4] Minn. State Bar Ass'n, For The Record: 150 Years of Law & Lawyers In Minnesota 257 (1999); *State ex rel. Martin v. Burnquist*, 141 Minn. 308, 322, 170 N.W. 201, 203 (1918).

[5] *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

[6] *In re Ruffalo,* 390 U.S. 544, 551 (1968); *In re Rerat*, 224 Minn. 124; 28 N.W.2d 168 (1947).

[7] *In re Charges of Unprofessional Conduct in Panel File No. 42735*, 2019 WL 1051406 (Minn. 2019); Minnesota Legal Ethics Blog, Dec. 2016 *http://my.mnbar.org/blogs/williamwernz/2016/12/14/in-re-olson-and-state-v-whitcup-a-prosecutors-travails-and-vindication?CommunityKey=06b06e45-74ca-4cf9-ae84-fede75b8e1b5&Tab=.*

[8] James E. Moliterno, "Politically Motivated Bar Discipline," 83 Wash. U. L.Q. 725 (2005).

[9] *http://lprb.mncourts.gov/complaints/LawyerComplaintDocs/Complaint%20Brochure%20-%20English.pdf*

[10] Rule 19(a), R. Law. Prof. Resp. *In re Murrin,* 821 N.W.2d 195, 205 (Minn. 2012).

[11] William J. Wernz, *Minnesota Legal Ethics* (10th Ed. 2020) at 1408 et seq.

[12] *Kelly v. Commonwealth,* 240 A.3d 1255 (Pa. 2020); *Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 Fed. App'x 377, 382 (3d Cir. 2020).

[13] *United States v. Alvarez*, 567 U.S. 709 (2012); *Linert v. MacDonald,* 901 N.W.2d 664 (Minn. Ct. App. 2017).

[14] *Wisconsin Voters Alliance et al. v. Pence et al.,* Civ. File No. 20-3791 (JEB), U.S. Dis. Ct. D.C., 1/4/2021.

[15] *In re Panel Case No. 15976*, 653 N.W.2d 452, 457 (Minn. 2002).

[16] "[A] decision by a district court to not issue sanctions is of limited import in a disciplinary action because '[c]onsiderations for imposing ethical sanctions differ from considerations of Rule 11 sanctions.' *In re Panel Case No. 17289*, 669 N.W.2d 898, 905 (Minn. 2003)." *In re Ulanowski*, 800 N.W.2d 785 (Minn. 2011).

[17] *In re Graham*, 453 N.W.2d 313, 322 (Minn. 1990); *In re MacDonald,* 906 N.W.2d 238 (Minn. 2018).

[18] *In re Nett*, 839 N.W.2d 716 (Minn. 2013). To make the slurs even odder, the court personnel apparently were not in fact Catholic.

[19] *Page v. Oath, Inc.,* 2021 De. Super. LEXIS 27.

[20] Josh Gerstein, *Move Underway to Oust Wood from Libel Suit,* Politico, 1/25/2021.

[21] Rule 16(a), R. Law. Prof. Resp. Daniel Slotnik, "Prominent Lawyers Want Giuliani's Law License Suspended Over Trump Work," *N.Y. Times,* Jan. 22, 2021 at A18.

[22] Minnesota's system is more open than most, and when the subject of a discipline complaint has already been the subject of publicity, OLPR will normally confirm that it is investigating the matter.

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CRIMINAL LAW

JUDICIAL LAW

■ **Interference with privacy: Interference with privacy of a minor does not require knowledge of victim's age.** Appellant was convicted of interference with the privacy of a minor after using his cell phone camera to view a 15-year-old male in a bathroom stall. Minn. Stat. §609.746, subd. 1(d), makes it a crime to install or use "any device for observing, photographing, recording, amplifying, or broadcasting sounds or events… where a reasonable person would have an expectation of privacy and has exposed or is likely to expose their intimate parts… or the clothing covering the immediate area of the intimate parts," if done "with intent to intrude upon or interfere with the privacy of the occupant." The offense is a felony if done "against a minor under the age of 18, *knowing or having reason to know that the minor is present*." Minn. Stat. §609.746, subd. 1(e)(2) (emphasis added). Appellant argues the italicized phrase requires proof of knowledge of the victim's age.

The court of appeals focuses on the statutory definitions of "know" and "criminal intent." "'Know' requires only that the actor believes that the specified fact exists," Minn. Stat. §609.02, subd. 9(2), and "[c]riminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question." *Id.* at subd. 9(6). Because section 609.746, subd. 1(e)(2), does not explicitly require proof of knowledge of age, the only reasonable interpretation of that section is that "it establishes age as a material element but requires knowledge only of the victim's presence, not knowledge of the victim's age." ***State v. Galvan-Contreras***, A20-0366, 2021 WL 161982 (Minn. Ct. App. 1/19/2021).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Race discrimination, retaliation; no animus, reprisal shown.** An employee who claimed he was denied a promotion due to race discrimination and retaliation and then wrongfully laid off as part of a reduction in force was denied relief by the 8th Circuit Court of Appeals. Affirming summary judgment, a panel of the 8th Circuit that included Judge James Loken of Minnesota held that a supervisor's statement that the claimant was "big and intimidating" did not constitute direct evidence of racial animus and there was no showing of a *prima facie* case that the promotion was the result of race discrimination or retaliation. ***Gipson v. Dassault Falcon Jet Corp., Inc.***, 983 F.3d 377 (8th Cir. 12/22/2020).

■ **Denial of tenure; sex discrimination rejected.** A claim by an associate professor that she was denied tenure by the university where she worked on grounds of sex discrimination failed. The 8th Circuit, affirming summary judgment, held that the claimant did not establish a reasonable inference of discriminatory animus, or that her sex contributed to the decision to deny her tenure. ***Maras v. Curators of the University of Missouri***, 983 F.3d 1023 (8th Cir. 12/29/2020).

■ **Insurance coverage; school district denied coverage.** A claim by a school district for coverage under its legal liability policy for a lawsuit brought by a teacher was rejected. The 8th Circuit held that the single claim provision in the policy unambiguously applied to the claim and, therefore, the insurer was not required to cover it, nor were the doctrines of waiver and estoppel applicable to compel coverage. ***Pine Bluff School District v. ACE American Insurance Company***, 984 F.3d 583 (8th Cir. 12/28/2020).

■ **Attorney general investigation; compliance demand too broad.** A demand by the attorney general to compel compliance with a civil investigation arising out of complaints of waste by an employer were overbroad. The Minnesota Court of Appeals held that the Ramsey County District Court abused its discretion in failing to narrow the scope of the discovery demands to the particular entities that the attorney general had reasonable grounds to suspect may have engaged in the improper behavior. ***Madison Equities, Inc., v. Office off Attorney General***, 2021 WL 79337 (Minn. Ct. App. 1/11/2021) (unpublished).

■ **Unemployment compensation; policy violation bars claim.** An employee who violated an unwritten policy of not giving out the names of contactors to do flooring work was denied benefits. Affirming a decision of an unemployment law judge (ULJ) from the Department of Employment and Economic Development (DEED), the appellate court held that the employee committed "disqualifying misconduct" when he recommended other contractors for certain customer needs, contrary to the company's policy. ***Braegelmann v. Hansen Flooring Gallery, Inc.***, 2021 WL 79528 (Minn. Ct. App. 1/11/2021) (unpublished).

■ **Unemployment compensation; quitting employee denied benefits.** An employee who turned in his tools and told his boss "I'm done here" was denied unemployment compensation benefits. The appellate court, affirming a ULJ decision, held that the employee's conduct and statements indicated that he had quit his job without good cause attributable to the employer and, therefore, was not entitled to unemployment benefits. ***Haluzka v. Prime Pork***, 2020 WL 7688607 (8th Cir. 12/28/2020) (unpublished).

LOOKING AHEAD

■ **Pending workers comp decisions.** The Minnesota Supreme Court began the year by hearing a pair of workers compensation cases. In ***Luis Aquilar Prado v. W. Zintl Construction, Inc.,*** No. A20-0833, the Workers Compensation Court of Appeals (WCCA) upheld a determination by an arbitrator that the claimant's injury arose out of the course of employment, but erred in not taking into account a surgeon's report of the need for surgery on grounds that the surgeon was not on an approved list of physicians for the union and also overturned the arbitrator's denial of an intervention claim by a medical provider. The Supreme Court is considering three issues: (1) whether the WCCA erred in determining that the employee sustained a compensable injury; (2) the propriety of the WCCA's determinations regarding the arbitrator's exclusion of the surgeon's report; and (3) whether the denial of the intervention claim of the medical provider was proper. In ***Schalock v. Battle Lake Good Samaritan Center,*** No. A20-0917, denial by the carrier of a claim asserted by a nursing assistant at a health care facility was overturned by the workers compensation tribunal on grounds that the injury was "a substantial contributing factor" to ongoing symptoms and disabilities, which the employer is challenging before the Supreme Court on the basis that the decision was not supported by substantial evidence and sufficient reasoning.

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **Minnesota Supreme Court holds MPCA's Class 1 water standards apply to groundwater.** The Minnesota Supreme Court issued a decision reversing a decision of the Minnesota Court of Appeals concerning a National Pollutant Discharge Elimination System (NPDES)/State Discharge System (SDS) permit that the Minnesota Pollution Control Agency (MPCA) reissued to U. S. Steel Corporation on 11/30/2018 for U. S. Steel's Minntac taconite tailings basin facility in Mountain Iron, Minnesota.

At issue were two holdings by the court of appeals on water-law questions of first impression. The first involved the regulation of seepage discharges from the tailings basin to groundwater that is hydrologically connected to, and transports pollutants to, certain surrounding surface waters. Specifically at issue was whether these groundwater-to-surface-water discharges (GSWDs) constitute discharges to "waters of the United States" under the Clean Water Act (CWA) and are thus subject to NPDES permitting requirements such as the requirement to meet surface water quality standards—or, as MPCA and U. S. Steel contended, GSWDs are properly regulated under state law only—that is, MPCA's SDS permitting program. The court of appeals sided with MPCA and U. S. Steel, holding that the relevant language in the CWA was ambiguous regarding GSWDs and that MPCA's interpretation of that language as *not* bringing GSWDs within the scope of the CWA—"regardless of any hydrological connection to surface waters"—was reasonable. Subsequent to the court of appeals decision, however, on 4/23/2020, the U.S. Supreme Court issued an opinion in *County of Maui v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462 (2020), holding that the GSWDs can be within the scope of the CWA where the GSWD is the "functional equivalent" of a direct discharge. This decision, the Minnesota Supreme Court held, required reversal of the court of appeals and remand to MPCA to determine whether seepage from the Minntac tailings basin to groundwater met the new "functional equivalent" test.

The second issue was whether groundwater is subject to MPCA's Class 1 water quality standards in Minn. R. 7050.0221, which incorporate by reference EPA's primary and secondary drinking water standards. Based on its position that groundwater is subject to the Class 1 standards, MPCA included numerous conditions in the permit requiring Minntac to comply with the Class 1 standards for sulfate and total suspended solids (TSS) in groundwater, both of which are based on the corresponding nonmandatory EPA secondary drinking water standards. The court of appeals held that chapters 7050 and 7060 unambiguously do not classify groundwater as Class 1 waters and that therefore MPCA erroneously imposed permit conditions requiring compliance with the Class 1 sulfate and TSS standards in groundwater.

The Supreme Court disagreed. Applying the analytic framework for reviewing an agency's interpretation of its own rules set forth in *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance*, 731 N.W.2d 502 (Minn. 2007), the Court first determined that the relevant rules and statues were ambiguous as to whether groundwater was subject to the Class 1 standards; they could support an interpretation either way. On one hand, neither chapter 7050 nor 7060 expressly states that groundwater is classified Class 1, as the rules do for Class 1 surface waters, and the scope of the "potable" use for which groundwater is protected in chapter 7060 is distinct from and broader than the scope of the Class 1 standards. On the other hand, the Court held, there are various "textual clues" that could support a reading that groundwater is classified Class 1, including references to groundwater in part

7050.0221 (the rule describing the Class 1 category) and language indicating that the standards in chapter 7050 can apply to both surface and groundwater.

Because the Court thus found the regulatory language ambiguous, it then looked, pursuant to *In re Annandale*, to whether MPCA's interpretation that groundwater is classified Class 1 is a reasonable one. The Court held that it is, determining that deference was particularly appropriate here because water pollution and classification is a technical issue. In addition, the Court noted that MPCA has made statements in various contexts since at least 1993 (the rules were adopted in 1973) that groundwater is subject to the Class 1 standards, indicating a longstanding interpretation. Finally, the Court emphasized that language in chapter 7060 indicating that parts of chapter 7050 apply to groundwater had been part of the groundwater rules since they were first adopted. Accordingly, the Court held that MPCA's interpretation that the Class 1 standards apply to groundwater is a reasonable one and that the MPCA properly exercised its authority in applying the Class 1 standards to Minntac's 2018 NPDES/SDS Permit. In reversing on this issue, the Supreme Court also instructed the court of appeals to address several appeal issues it had not addressed, including whether the MPCA properly denied U. S. Steel's requests for a permit-related contested case hearing and a variance from certain groundwater standards, both of which the court of appeals concluded it need not address after it had held the Class 1 standards were inapplicable. ***Matter of NPDES/SDS*, A18-2094, A18-2095**, A18-2159, A18-2163, ___ N.W.2d ___ (Minn. 2/10/2021).

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FAMILY LAW

JUDICIAL LAW

Modifications of custody require proof of changed circumstances even where parties agree to apply the best-interest standard. As part of a 2015 stipulation, the parents agreed mother would have sole custody of their child, provided that father could seek modification of legal custody in 2020 based on a best interest standard. Father did so, and mother opposed the motion. The district court ultimately denied father's request for joint legal custody because father failed to allege a sufficient change in circumstances to justify the change. Father appealed, arguing the parties' agreement to employ the best interest standard obviated the need to prove changed circumstances.

The Minnesota Court of Appeals affirmed. Citing three nonprecedential opinions, the court observed that parents' stipulation to employ a best interest standard does not void the statutes' other requirements for modification, including changed circumstances, which are designed to preserve stability in a child's environment. Because father failed to plead any such change in circumstances, the district court appropriately denied his motion without an evidentiary hearing. Father has since petitioned for review to the Minnesota Supreme Court. ***Woolsey v. Woolsey***, No. A20-0749 (Minn. Ct. App. 12/28/2020).

Third party given limited right to intervene in a divorce proceeding to enforce their interest in property. Miller and Spera divorced in 2004 and agreed to divide all of their retirement accounts equally. In 2018, Miller died, having never completed the required retirement division. At the time of his death, Miller's four daughters, including his youngest from a later relationship, were listed as beneficiaries of his retirement accounts. To obtain her share of Miller's accounts, Spera brought a motion in the divorce action to divide Miller's retirement. The mother of Miller's youngest daughter (Molloy) sought to intervene on her daughter's behalf and objected to Miller's request, arguing that both laches and the statute of limitations precluded enforcement of the divorce decree. The district court denied Molloy's motion to intervene, and the court of appeals reversed, holding Molloy (on the child's behalf) had a right to ensure an accurate valuation.

The Minnesota Supreme Court affirmed the court of appeals holding with modifications. On the issue of intervention, the Court held Molloy's motion met all four elements of Minn. R. Civ. P. 24.01 for intervention as a matter of right. Namely, the motion was timely, Molloy claimed an interest in property subject to the action, her interest could be impaired or impeded by the action, and her interests weren't adequately represented by the existing parties. Thus, the Court concluded Molly was entitled to intervene. But the Court also made clear that Molloy's rights only extended to the proper valuation of the child's interest in the accounts. She did not have a right to challenge the enforceability of the underlying divorce decree or seek to alter its property division. The Court emphasized that children cannot seek an interest in their parent's property in a divorce, and that parties "have the right to their own divorce action." Thus, while recognizing a limited right to intervention in a post-decree enforcement action, the Court declined to throw the courtroom doors wide open by allowing any third party with an interest in marital property to intervene in an attempt to influence how that property is divided. ***Miller v. Miller***, No. A19-0372, ___ N.W.2d ___ (Minn. 1/20/2021).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **Summary judgment; new theory of liability not properly before the court.** Awarding one defendant summary judgment on a claim arising out of that defendant's alleged negligent inspection of a car tire, Judge Doty agreed with the defendant that the plaintiff's attempt to recharacterize her claim in opposition to the summary judgment motion could be disregarded where that theory had not been alleged in the complaint. ***Sage ex rel. Sage v. Bridgestone Ams. Tires Ops., LLC***, 2021 WL 195797 (D. Minn. 1/20/2021).

■ **Fed. R. Civ. P. 12(b)(6); pleading the factual basis and legal theory for a claim.** Rejecting plaintiffs' "startling" argument that the pleading of the "factual basis" for their claims was sufficient to withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), Judge Schiltz found that a plaintiff must also identify the legal right that was allegedly violated, that a complaint can be dismissed when it is based on an "unavailing" legal theory. ***Viewpoint Neutrality Now! v. Regents of the Univ. of Minnesota***, 2021 WL 354130 (D. Minn. 2/2/2021).

■ **Class certification; questions relating to standing.** Noting a split among courts "across the United States, including courts within the District of Minnesota" regarding "whether and in what circumstances Article III standing issues may be postponed until after class certification" where class certification is "logically antecedent" to standing, Judge Wright deferred resolution of the question of whether the plaintiff had standing until the class-certification stage. ***Gisairo v. Lenovo (United States) Inc.***, 2021 WL 352437 (D. Minn. 2/2/2021).

■ **Fed. R. Civ. P. 12(b)(6) AND 9(b); putative class action dismissed for lack of specificity.** Where the plaintiff brought a putative class action including claims for breach of warranty and fraud, but failed to allege, among other things: where he purchased the product; when he bought the product; how he had been misled; where he was misled; when he was misled; where he was damaged; and when he knew or had reason to know he was damaged, Judge Schiltz found that the plaintiff had not alleged a "single plausible claim" and dismissed the action without prejudice. ***Ehlis v. DAP Prods., Inc.***, 2021 WL 83269 (D. Minn. 1/11/2021).

■ **Remand following transfer; procedures.** Where an action was filed in the Texas courts, removed to the Southern District of Texas on the basis of diversity jurisdiction, and then transferred to the District of Minnesota, where Judge Brasel rejected some defendants' partial motion to dismiss for fraudulent joinder and determined that diversity was lacking, Judge Brasel rejected those defendants' request that the action be "remanded" to the Minnesota courts, and found that the only appropriate court for remand was the Texas court where the case had been commenced. ***Monty v. Patterson Dental Supply, Inc.***, 2021 WL 323868 (D. Minn. 2/1/2021).

■ **28 U.S.C. §1447(c); untimely removal; remand; award of attorney's fees.** Where the defendant removed an action more than 17 months after the action was commenced, Chief Judge Tunheim rejected the defendant's argument that the removal was timely because the parties had been involved in related litigation in the Texas courts, found that the removal "lacked an objectively reasonable basis," remanded the action, and awarded the plaintiff attorney's fees in an amount to be determined. ***Uptime Systems, LLC v. Kennard Law, P.C.***, 2021 WL 424470 (D. Minn. 2/8/2021).

■ **Behavior by multiple attorneys criticized; motion for sanctions denied.** Describing the case as a "mess," and criticizing plaintiff's counsel for a "kitchen sink approach in drafting their complaint," Judge Schiltz criticized counsel for both sides for their conduct during discovery, including "bickering like children during depositions," "one lawyer questioning the sanity of another," and one lawyer asking if the other lawyer wanted to "step out of the room" and "have a fight." Judge Schiltz admonished counsel for their behavior but denied the defendant's motion for Rule 11 sanctions, finding that both sides had made frivolous arguments. ***ARP Wave, LLC v. Salpeter***, 2021 WL 168501 (D. Minn. 1/19/2021).

■ **Motion for sanctions denied.** Chief Judge Tunheim denied defendants' motion for sanctions under Fed. R. Civ. P. 11, 28 U.S.C. §1927 and the court's inherent powers, finding that sanctions were not warranted even though one of the plaintiff's claims "lack[ed] a reasonable basis in law and fact," and another claim was "meritless and lack[ed] a colorable basis," finding that all of the plaintiff's claims were within the bounds of Fed. R. Civ. P. 11(b). ***Protege Biomedical, LLC v. Duff & Phelps Secs., LLC***, 2021 WL 168467 (D. Minn. 1/19/2021).

■ **Fed. R. Civ. P. 26(e) AND 37(c)(1); motion for sanctions denied.** Where the plaintiff sought sanctions for one defendant's alleged untimely ninth supplemental interrogatory answer, Magistrate Judge Schultz found no evidence that the defendant had violated its duty to supplement under Fed. R. Civ. P. 26(e), denied sanctions pursuant to Fed. R. Civ. P. 37(c)(1), and ordered that the deposition of one witnesses be reopened on a limited number of topics. Noting that this was "at least" the seventh request for sanctions by the plaintiff, Magistrate Judge Schultz also cautioned both parties that any further motions for sanctions were likely to result in an award of attorney's fees to the prevailing party. ***Fair Isaac Corp. v. Fed. Ins. Co.***, ___ F.R.D. ___ (D. Minn. 2021).

■ **Fed. R. Civ. P. 54(d)(1); costs; prevailing party; dismissal of federal claims.** Where the plaintiff's federal claims were dismissed on the merits, his supplemental claims were remanded, and the defendants filed a bill of costs, Judge Schiltz rejected the plaintiff's argument that the defendants were not prevailing parties, finding that the dismissal of the federal claims was sufficient to make them prevailing parties, and that the fact that defendants removed the case from state court did not alter that analysis. ***Jacobs v. County of Hennepin***, 2021 WL 509284 (D. Minn. 2/11/2021).

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IMMIGRATION LAW

JUDICIAL LAW

■ **Denial of deferral of removal under CAT.** The 8th Circuit Court of Appeals affirmed the Board of Immigration Appeals' (BIA) decision denying the petitioner's request for deferral of removal under the Convention Against Torture (CAT) to Somalia, finding substantial evidence supported the immigration judge's and BIA's conclusions that he was unlikely to be tortured by Al-Shabaab due to his minority-clan membership. Furthermore, "the record does not show that the Somali government has willfully turned a blind eye to Al-Shabaab's activities. In fact, it shows the opposite. The Somali government is actively fighting to control Al-Shabaab,

has considerably reduced Al-Shabaab's military capacity, and has demonstrated a willingness to fight terrorism." ***Hassan v. Rosen***, 19-2918, *slip op.* (8th Cir. 1/15/2021). *https://ecf.ca8.uscourts.gov/opndir/21/01/192918P.pdf*

■ **DHS allowed to substitute one charge (CIMTs) for another (immigration fraud) in removal proceedings.** The 8th Circuit Court of Appeals held that the Department of Homeland Security (DHS) may choose to rely on a charge involving the commission of crimes involving moral turpitude (CIMTs) rather than an alternative one encompassing immigration fraud. According to the court, "[t]he rules of procedure that govern removal proceedings in the immigration court allow the government to adjust the charges against an alien [sic] during the case. 'At any time during deportation or removal proceedings, additional or substituted charges of deportability... may be lodged' by the Department. 8 C.F.R. §1003.30; *see also id.* §1240.10(e)." ***Herrera Gonzalez v. Rosen***, 19-2290, *slip op.* (8th Cir. 1/4/2021). *https://ecf.ca8.uscourts.gov/opndir/21/01/192290P.pdf*

■ **Motion to reopen removal proceedings on account of changed country conditions in Somalia is denied.** The 8th Circuit Court of Appeals upheld the Board of Immigration Appeals' (BIA) denial of the petitioner's motion to reopen his *in absentia* order of removal based on changed country conditions in Somalia. Finding the BIA did consider Al-Shabaab's increase in power and ISIS-Somalia's emergence and growing violence, the court concluded, however, that "no reasonable adjudicator" would surmise there was any material change in conditions from 2011 to 2018. ***Mohamed v. Barr***, 19-3356, *slip op.* (8th Cir. 12/23/2020). *https://ecf.ca8.uscourts.gov/opndir/20/12/193356P.pdf*

ADMINISTRATIVE LAW

■ **Filing period for LRIF-based permanent residence applications extended to 12/20/2021.** On 1/12/2021, the Department of Homeland Security announced that the filing period for certain Liberian nationals and family members to apply for adjustment of status under the Liberian Refugee Immigration Fairness (LRIF) provision had been extended an additional year to 12/20/2021. *https://content.govdelivery.com/accounts/USDHS/bulletins/2b5dc64?reqfrom=share*

■ **Deferred enforced departure for Liberians extended to 6/30/2022.** On 1/20/2021, President Biden issued a memorandum reinstating and extending deferred enforced departure (DED) for Liberian nationals, or persons without nationality who last habitually resided in Liberia, to 6/30/2022, provided they were present in the United States and under a grant of DED as of 1/10/2021. **86 Fed. Register, 7055-57** (1/25/2021). *https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01770.pdf*

■ **Extension and re-designation of TPS for Syria.** On 1/29/2021, Department of Homeland Security Acting Secretary Pekoske announced an 18-month extension and re-designation of Syria's temporary protected status (TPS). Current beneficiaries under Syria's TPS designation were deemed eligible to re-register for an extension of their status while those Syrians who entered the United States after 8/1/2016, and were otherwise eligible, would also be allowed to register for the first time. *https://www.dhs.gov/news/2021/01/29/acting-dhs-secretary-pekoske-extends-temporary-protected-status-syria*

■ **Deferred enforced departure for certain Venezuelans.** On 1/19/2021, President Trump issued a memorandum directing the Departments of Homeland Security and State to defer, with certain exceptions, for 18 months the removal of any Venezuelan national, or noncitizen without nationality who last habitually resided in Venezuela, who is present in the United States as of 1/20/2021. **86 Fed. Register, 6845-46** (1/25/2021). *https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01718.pdf*

■ **Reaffirmation: The United States is a nation of immigrants.** On 2/2/2021, President Biden issued Executive Order 14012 (Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans), reaffirming our nation's character as one of opportunity and welcome. Noting that our nation is "enriched socially and economically by the presence of immigrants," the order declared that the federal government should develop welcoming strategies promoting integration, inclusion, and citizenship, while embracing, at the same time, full participation of the newest Americans in our democracy. The order directed, among other things, that both the Departments of State and Homeland Security review existing regulations, orders, guidance documents, policies, and other similar agency actions that may conflict with those policy objectives. **86 Fed. Register, 8277-80** (2/5/2021). *https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02563.pdf*

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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Copyright: Disputed ownership rights when works created by independent contractors.** Judge Tunheim recently granted in part Peakspeed, Inc.'s motion for preliminary injunction. In 2019, Timothy Emerson formed EmersonAI to develop geospatial applications for Field Programmable Gate Arrays (FPGA), in particular the application TrueView. By the end of 2019, Emerson's business advisor Dave Eaton wanted to create a new company to further develop TrueView. Peakspeed was formed. By mid-2020, Emerson felt he was being pushed out of Peakspeed. Emerson then allegedly

modified the copyright notices of 230 files and locked Peakspeed from the AWS account and the servers, owned by Emerson. Peakspeed filed its complaint alleging it was the sole owner and exclusive user of the copyright to TrueView's source code and that Emerson violated the Computer Fraud and Abuse Act and converted Peakspeed property.

To succeed on a copyright claim, a movant must demonstrate a right to own the copyright where ownership vests initially in the author or authors of the work. If there are joint authors, then they are co-owners of the copyright. The court found neither party was the sole author of TrueView. The parties agreed Emerson wrote 95% of the FGPA code, which constituted 10% of the total code. But TrueView required both the FGPA code and the host processing code, which was created by Oscar Kramer. Both parties argue that the other's contributions were works for hire. Oscar and Emerson, however, were independent contractors, not employees, and neither had transferred their ownership interests by written conveyance. Accordingly, Peakspeed was likely to succeed on the merits of its claim that it has an undivided ownership interest in TrueView's source code as a joint author. The court enjoined Emerson from interfering with or calling into question Peakspeed's joint right to own and use TrueView's source code. ***Peakspeed, Inc. v. Emerson***, No. 20-1630 (JRT/BRT), 2020 U.S. Dist. LEXIS 248635 (D. Minn. 12/29/2020).

■ **Trade secrets: Identification of trade secrets requires specificity.** Judge Schiltz recently granted in part defendants' motion for summary judgment. ARPwave leased to defendant Garrett Salpeter electrostimulation devices and licensed Salpeter to operate an ARPwave clinic in Austin, Texas. After a few years, Salpeter stopped doing business as ARPwave and set up his own business using an electrostimulation device he designed. ARPwave sued for patent infringement—previously dismissed for improper venue—breach of contract, misappropriation of trade secrets, unfair competition, conversion, and unjust enrichment. To prove misappropriation of a trade secret, plaintiff must show the defendant acquired the trade secret by improper means or disclosed the trade secret when under a duty to maintain its secrecy or limit its use. ARPwave accused defendants of misappropriating the following categories of trade secrets: (1) ARPwave's devices; (2) its protocols; (3) its user manuals; (4) its contracts and similar business-related documentation; (5) unspecified confidential information that defendants obtained from in person and online seminars, webinars, and/or training sessions; and (6) its marketing terminology. ARPwave alleged that each component of every device was a trade secret. The court found that that could not possibly be true. The court found that ARPwave's protocols were abstract and lacked the specificity necessary to be a trade secret. ARPwave's briefing did not discuss the other categories of trade secrets. Because ARPwave failed to identify a protectable trade secret, ARPwave could not succeed on its misappropriation claim. The court granted defendants' motion for summary judgment and dismissed the misappropriation of trade secrets claim with prejudice. ***ARPWave, LLC v. Salpeter***, No. 18-cv-2046 (PJS/ECW), 2021 U.S. Dist. LEXIS 9552 (D. Minn. 1/19/2021).

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REAL PROPERTY

JUDICIAL LAW

■ **Permitted exception: Purchase agreement.** Red Star Group, LLC executed a purchase agreement on a parcel owned by 1933 Lyndale, LLC. 1933 Lyndale obtained and provided a title commitment to Red Star. The purchase agreement gave Red Star seven days to tender written objections. The title commitment excluded a $2.3 million mortgage. Red Star did not submit an objection. The day of the closing, Red Star informed 1933 Lyndale that it would not accept title subject to the mortgage. 1933 Lyndale provided a partial release and assurances that the mortgage would be satisfied and released at closing. Red Star refused to close, and commenced an action against 1933 Lyndale, asserting that it had breached of the purchase agreement by failing to provide marketable title. 1933 Lyndale moved for summary judgment, arguing that the mortgage was a permitted exception. The district court agreed, and granted summary judgment in favor of 1933 Lyndale. The court of appeals affirmed, holding that the mortgage was a permitted exception due to Red Star's failure to timely object, and further that 1933 Lyndale's obligation was to deliver marketable title at closing, which Red Star had failed to attend. ***Red Star Group, LLC, d/b/a Cheers v. 1933 Lyndale, LLC***, 2021 WL 417010 (Minn. Ct. App. 2/8/2021) (unpublished).

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TAX LAW

JUDICIAL LAW

■ **Property tax: Mandatory disclosure rule strikes again!** Petitioners timely filed property tax petitions contesting the 1/2/2019 assessment (for taxes payable in 2020) concerning three separate subject properties. The parties agree the properties are leased to third parties, thereby making them income-producing.

The county sought a motion to dismiss, alleging that petitioners failed to timely provide complete income and expense information for the subject properties. An affidavit by the county's commercial appraiser stated that the county sent a courtesy letter to petitioner's counsel noting their obligation to provide the necessary information by 8/1/2020. On 8/21/2020, the county received 2018 and 2019 profit and loss statements and tenant information. Petitioners oppose the county's motion, arguing 1) that a portion of the information was not available on 8/1/2020, and 2) the covid-19 pandemic necessitates "'extended and flexible deadlines,' especially since there is little, if any, prejudice to the County."

Under Minnesota's mandatory disclosure rule, when the valuation of income-producing property is contested, the petitioner must provide the information listed in Minn. Stat. §278.05, subd. 6(a) to the county assessor by August 1 of the taxes payable year. Failure to disclose the required information by 8/1/2020 will result in a dismissal, even if the county is not prejudiced. *See Kmart Corp. v. Cty. of Becker*, 639 N.W.2d 856, 861 (Minn. 2002); *see also BFW Co. v. Cty. of Ramsey*, 566 N.W.2d 702, 703, 705 (Minn. 1997).

There are two exceptions for failing to supply the required information: "1) the failure to provide it was due to the unavailability of the information at the time that the information was due, or 2) the petitioner was not aware of or informed of the requirement to provide the information." Minn. Stat. §278.05, subd. 6(b). Petitioners argued that 2020 budget information was not available at the time the information was due, therefore, the case should not be dismissed.

The court noted that during the hearing, petitioners acknowledged that five

of the six enumerated pieces of information were available as of 8/1/2020. The Supreme Court has previously addressed this situation, concluding "the statute clearly requires the petitioner to provide *any* of the required information within its possession on the date of the deadline. The unavailability of one type of evidence does not render unavailable other types of information within the possession of the petitioner." *BFW Co.*, 566 N.W.2d at 705 (emphasis in original). Additionally, the court recognized the pressure placed on businesses during the pandemic but explained that the court has no authority to extend deadlines found in Minn. Stat. §278.05, subd. 6. Finally, the court concluded that the Supreme Court has rejected the argument that failure to disclose information should be forgiven because the county was not prejudiced. The statute gives no explicit exception for prejudice. Because the petitioners failed to provide timely information pursuant to the mandatory-disclosure rule, the petitioners' tax appeals are dismissed. ***Tinos LLC v. Olmsted Co.***, 2020 WL 7485179 (Minn. Tax Court 12/10/20).

■ **Parties disagree over statute interpretation; petitioner's definition helps commissioner.** This case concerns the market value of Minnegasco's natural gas distribution pipeline. The tax court previously filed findings of fact, conclusions of law, and order finding that the commissioner's estimated unit value of the subject property overstated its actual unit value as of the assessment date. *See CenterPoint Energy Res. Corp. v. Comm'r of Revenue*, No. 9125-R, 2020 WL 4045620, at *1-2.

Minnesota Rule 8100 (2019) governs the valuation of formula-assessed pipeline property. The rule states in relevant part: "After the Minnesota portion of the unit value... is determined, any property which is non-formula-assessed or which is exempt from *ad valorem* tax, is deducted from the Minnesota portion of the unit value." Minn. R. 8100.0500, subp. 1. This deduction produces apportionable market value. That value is then distributed among the various Minnesota taxing districts where the pipeline property is located. In the previous case, the court only determined the Minnesota unit value and instructed the commissioner to calculate the value of the property that is non-formula-assessed or exempt from *ad valorem* tax to arrive at Minnegasco's taxable value. The commissioner was to then serve the calculation no later than 8/21/2020. The court gave Minnegasco a chance to object to the calculation and gave the commissioner a chance to respond to the objection.

On 8/21/2020, the commissioner filed a detailed calculation. Minnegasco subsequently filed an objection. Minnegasco argued that the commissioner's calculation deviated from one key requirement of Rule 8100, and that deviation "results in an apportionable value $24,882,459 higher than that authorized by Rule 8100." The commissioner responded that Minnegasco's proposed calculation was inconsistent with Minnegasco's own interpretation of Rule 8100 and understated apportionable market value.

The commissioner assesses pipeline property as a whole, using the unit-rule method. *See Comm'r of Revenue v. Enbridge Energy, LP* (*Enbridge I*), 923 N.W.2d 17, 20 (Minn. 2019). Rule 8100 details a four-step valuation and allocation process. The parties' dispute focuses on the third step of the process: the subtraction for exempt and non-formula-assessed property (excludable property). *See* Rule 8100.0500. Minn. R. 8100.0500, subp. 3 states, "The Minnesota portion of the unit value is reduced by the value included in the unit value of the company for land, rights-of-way, nonoperating property, and exempt property. This amount is calculated by determining the ratio of the unit value computed in part 8100.0300, subpart 5, to the cost *less depreciation* allowed in part 8100.0300, subpart 3. This ratio is multiplied by the cost *less depreciation* of the property to be deducted." (Emphasis added.) The parties disagree over the applicable meaning of "depreciation."

In a detailed analysis of Rule 8100 and the plain meaning of the provisions surrounding "depreciation," the court agreed with Minnegasco's interpretation, but concludes that the commissioner's alternative calculation proposed in her response to Minnegasco's objections reflect the meaning of the rule accurately defined by Minnegasco. ***CenterPoint Energy Resources Corp. v. Comm'r of Revenue***, 2020 WL 7485163 (Minn. Tax Court 12/15/2020).

■ **Property tax: Lakefront property appreciates in value.** Petitioner David A. Kent filed a petition in the tax court's Small Claims Division 4/29/2019 for taxes payable in 2019, with respect to real property located at 12435 State Highway 29 South, Hudson Township, in Douglas County. The petition alleged the estimated market value of the subject property as of 1/2/2018 exceeded its actual market value. The property is approximately 5.22 acres of land on Maple Lake, with two structures—one of them petitioners' residence, and the other a pole shed.

During trial, Mr. Kent testified that the subject property was part of a larger, 6.7 acre parcel he purchased in August 2015, for the amount of $500,000, which he promptly subdivided following purchase—selling the smaller of the two subdivided parcels to a third party for $150,000 in 2015. (The smaller parcel is not at issue here.) Mr. Kent offered no expert testimony, no written appraisal, nor did he offer any testimony of other fact witnesses concerning the property valuation. Mr. Kent argued that the property is unique and incomparable to other properties. Mr. Kent contended that the only valid basis to determine the property's market value is through an actual sale of the subject property. Mr. Kent further opined that the characteristics of the home on the property, its modest appearance compared to surrounding homes, and his knowledge of real estate leads him to believe the property is

worth much less than its valuation.

The county moved for dismissal pursuant to Minnesota Rule of Civil Procedure 41.02(b), stating that Mr. Kent failed to meet his burden to demonstrate the estimated market value of the subject property was excessive. A party shall have the opportunity to offer evidence and arguments concerning the assessed value of property, but the burden is on the party appealing the assessment to show it is excessive. *S. Minn. Beet Sugar Coop v. Cty. of Renville*, 737 N.W.2d 545, 557-58 (Minn. 2007). "The taxpayer has the burden of proof at trial 'to show that [the assessment] does not reflect the true market value of the property.'" *Id.* at 558.

When determining market value, the court may consider three traditional approaches to valuation: cost, income, and sales comparison *See Equitable Life Assur. Soc'y of the US. v. Cty. of Ramsey*, 530 N.W.2d 544, 552 (Minn. 1995). The sales approach values property "based on the price paid in actual market transactions of comparable properties" *Lowe's Home Ctrs., LLC (Plymouth) v. Cty. of Hennepin*, 938 N.W.2d 48, 54 (Minn. 2020). The cost approach "determines the current cost of constructing the existing improvements on the property, subtracts depreciation to determine the current value of the improvements, and then adds the value of the land to determine the market value." *Id.* "The court is not required to give weight to all valuation approaches and may place greater emphasis on a particular approach." *Equitable Life*, 530 N.W.2d at 554.

Generally, the tax court is governed by the Minnesota Rules of Civil Procedure and the Minnesota Rules of Evidence. Minn. Stat. §271.06, subd. 7 (2020). Minn. R. Civ. P. 41.02(b) provides that, "after the plaintiff has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and law, the plaintiff has shown no right to relief."

In its analysis, the court noted that although Mr. Kent is not required to offer a written appraisal to rebut the county's property assessment, he must present substantial evidence to rebut the *prima facie* validity of the assessment. Instead, Mr. Kent contended that the property is unique and must be treated as such for valuation purposes. Therefore, the court found that Mr. Kent did not present credible evidence showing that the estimated market value was incorrect and granted the county's motion for dismissal. ***Kent v. Douglas Co.***, 2020 WL 7682261 (Minn. Tax Court 12/21/2020).

County may substitute appraisers when the previous one ends employment. On 4/28/2018, JMIR Marquette Hotel LLC (JMIR) filed a property tax petition in the tax court as to property taxes due in 2018, for the subject property located at 710 and 730 Marquette Avenue in Minneapolis, Minnesota. On 4/1/2019, the court filed a scheduling order, which was subsequently amended on 4/2/2020. Pretrial submissions from the parties included witness and exhibit lists, both of which disclosed Alyssa Browne as a trial witness. The scheduling order specifies that each written appraisal or expert report will serve as the authoring expert's direct testimony at trial.

On 11/10/2020, the county moved to amend the scheduling order again, seeking modification to substitute Brian Kieser, chief appraiser with the City of Minneapolis Assessor's Office, for Ms. Browne as the county's expert witness. The county stated that Ms. Browne has since left her employment with the city for the private sector, and she contends that her expert testimony would conflict with her new role. The county stated that Mr. Kieser intended to adopt Ms. Browne's appraisal. The county contended that cause existed to amend the scheduling order pursuant to Minn. R. Civ. P. 16.02. JMIR objected to the amendment and disputed that Ms. Browne is unavailable, stating that the court has the power to subpoena Ms. Browne.

A scheduling order "shall not be modified except by leave of court upon a showing of good cause." Minn. R. Civ. P. 16.02. Factors in determining whether a pretrial order should be modified or amended include: "1) The degree of prejudice to the party seeking modification; 2) the degree of prejudice to the party opposing modification; 3) the impact of modification at that stage of litigation; and 4) the degree of willfulness, bad faith, or inexcusable neglect on the part of the party seeking modification."

JMIR objected to amending the scheduling order on the grounds the departure of Ms. Browne from city employment does not constitute good cause for amendment. The county asserted it has shown good cause because without the amendment, it would have no appraisal and, therefore, no expert testimony. The county did not request extension of any deadlines that would delay the trial date; thus the court granted the county's motion. ***JMIR Marquette Hotel LLC v. Hennepin Co.***, 2020 WL 7688062 (Minn. Tax Court 12/22/20).

Government not required to separately assess tax liabilities of taxpayer against owners in order to collect those liabilities from owners. The government brought action against taxpayer, a C corporation, as well as owners of Henco's stock who had allegedly received fraudulent transfers from the corporation. The government sought to reduce Henco's unpaid tax liabilities to judgment, and asserted fraudulent transfer claims against the owners. District court dismissed action for failure to state a claim. The 11th Circuit reversed. The circuit court held that government was not required to separately assess tax liabilities of a taxpayer against the owners in order to collect those liabilities from the owners. In reaching this conclusion, the court parsed Sections 6502, 6502, and 6901. The court reasoned that its interpretation of those sections was bounded by the Supreme Court's interpretation as announced in *Leighton v. United States*, 289 U.S. 506 (1933). The 11th Circuit opinion is notable for its exhaustive discussion of *Leighton* and subsequent related cases. The reviewing court also rejected a statute of limitations argu-

ment the court deemed "without merit." ***United States v. Henco Holding Corp.***, No. 19-12758, ___ F.3d ___ 2021 WL 164324 (11th Cir. 1/19/2021).

■ **"Bumper crop" of hobby losses not permitted.** In a colorful opinion, the tax court affirmed the commissioner's conclusion that the taxpayer's farming activity was not one engaged in for profit. As such, the majority of the taxpayer's $1.5 million in claimed losses was not permitted. The taxpayer was a successful banker who began to operate "Sheepdog Farms" while continuing his banking career. Had the farm been an "activity engaged in for profit" as defined by the Code and Regulations, the farm's losses, which far outpaced gains, would have been deductible. The "hobby loss" regulation sets out a number of factors to determine whether an activity is engaged in for profit. In this case, Judge Holmes works through what he characterizes as the "goofy" factors but seems to prefer "Judge Posner's 'holistic' approach." The latter, Judge Holmes notes, "would get us [to the same result] much more quickly." The court noted the taxpayer's full-time banking career, including 70+ hour work weeks, and summarized that the taxpayer "found this property and bought it. This let him work outdoors—something that he did as a child and enjoyed. But the property was a cattle farm with no cattle during all but part of one year at issue. It had consistent and substantial losses which totaled over $1.5 million from 2004-14. Even if he later cut and sold the timber, he had no chance of turning a profit; but Sheepdog Farms' expense, if allowed, would substantially offset his income from other sources. That deduction is just what section 183 prevents." ***Whatley v. Comm'r***, T.C.M. (RIA) 2021-011 (T.C. 2021).

■ **Capital gain; self-employment tax; NOL; substantial understatement penalty.** Accomplished neurosurgeon and entrepreneur Dr. Aaron Filler (who also holds a JD from Concord Law School, Kaplan University) challenged a $611,367 federal income tax deficiency and $122,273 penalty. The tax court addressed four issues, including whether Dr. Filler properly reported $100,000 of income received as capital gain; whether he was liable for self-employment tax; his entitlement to deduct a net operating loss (NOL) carryover; and finally, whether he is liable for a penalty under section 6662(a). The court found for the commissioner on all issues. The capital gain issue arose after Dr. Filler received payment from a corporation in which he held 75% interest in connection with a patent rights transfer. The patent was related to Dr. Filler's development of technology related to medical imaging. Because Dr. Filler was "related" to the corporation (as defined in Sec. 1235), he was not entitled to capital treatment under Sec. 1235. In addition, Secs. 1222 and 1231 were unavailable because Dr. Filler had not held the property for the requisite holding period and there was no sale or exchange. The court determined Dr. Filler was a "mere middleman" and he did not acquire sufficient ownership interest to make his ensuing transfer a sale or exchange for capital gain purposes. The court spent scant time on the self-employment tax issue because Dr. Filler did not brief the issue and the court deemed that he had conceded it. The NOL matter, in contrast, generated a lengthy discussion despite the court's ultimate finding that Dr. Filler's arguments were "illogical" and his position had "no merit." Finally, the court upheld the Sec. 6662 negligence or substantial understatement penalties. Dr. Filler's education and sophistication, including his law degree, led the court to find he had not satisfied his burden to prove reasonable cause and good faith for any portion of the underpayment. ***Filler v. Comm'r***, T.C.M. (RIA) 2021-006 (T.C. 2021).

■ **Additional tax due on early distribution from qualified retirement plan is not a "penalty."** Certain tax penalties cannot be imposed unless the IRS personnel obtains their immediate supervisor's written approval before the penalties are assessed. Section 6751(b)(1) imposes this written approval requirement, which generally applies to "deficiency procedure penalties" (Secs. 6651-6665). It is not clear whether the supervisory approval requirement applies to other categories of penalties. In this dispute, a taxpayer who had taken early distribution from her pension plan argued that she should not be liable for the 10% addition of tax because the Service did not follow the written supervisory approval process before assessing the additional tax. (The taxpayer's early distribution was not qualified and therefore Section 72(t)'s 10% tax on early distributions was applied.) The court rejected the taxpayer's argument that approval was required. Section 6751(b)(1) does not apply to the section 72(t) exaction on early distributions from qualified retirement plans. ***Grajales v. Comm'r***, No. 21119-17, 2021 WL 242409 (T.C. 1/25/2021).

■ **"Significant questions" about settlement officer's actions in CDP case result in remand.** In a collection due proceeding (CDP), the taxpaying couple requested an installment agreement, offering to pay $1,000 each month toward their tax debt. The couple provided required documents, including a specified form and a pay stub from taxpayer husband. Following some additional back-and-forth, including supplemental requested information and documentation from the taxpayers, the settlement officer rejected the taxpayer's proposal and determined the taxpayers had just over $4,000 a month to pay toward their tax debt. The taxpayers sought review. Review of such a determination is under the familiar abuse of discretion standard: The court will uphold the determination unless it is "arbitrary, capricious, or without sound basis in fact or law." Despite this generous standard of review, the court's "[m]ultiple unanswered questions cast doubt on the settlement officer's analysis." One of the multiple issues the court flagged was that the settlement officer rejected the taxpayers' installment agreement outright rather than giving them the opportunity either to accept the amount

she believed they were able to pay or to make a counteroffer. Such an outright rejection has been enough to constitute an abuse of discretion in similar cases. These and other questions left the court was "unwilling to weigh the propriety of the settlement officer's determination" because the record was insufficient. The court remanded the case for a supplemental hearing. ***Boettcher v. Comm'r***, T.C.M. (RIA) 2021-004 (T.C. 2021).

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TORTS & INSURANCE

JUDICIAL LAW

Pre-verdict interest; notice of claim. Plaintiff was involved in a motor vehicle accident with Anderson. The accident resulted in serious injuries to plaintiff and the death of Anderson. In January 2017, plaintiff's counsel sent a letter to Anderson's insurer, stating that the law firm had been retained to represent respondent in connection with the accident, and sought to "confirm the existence and amount of coverage." The letter also sought the claim number and any information that the insurance claims office had in its possession regarding the accident. In August 2018, plaintiff filed suit against defendant, the personal representative of Anderson's estate. After the jury returned a verdict finding plaintiff 25% at fault and Anderson 75% at fault, the district court granted plaintiff's motion for *additur* in the amount of $15,000 for past pain and suffering and granted pre-verdict interest from the date of the January 2017 letter.

The Minnesota Court of Appeals affirmed. With respect to what constitutes a "notice of claim," an issue of first impression, the court held: "a written notice of claim need not identify a specific amount of damages to trigger preverdict interest under Minn. Stat. §549.09, subd. 1(b)." "Instead, to constitute a 'notice of claim' under the statute, the written notice must be sufficient to allow the noticed party to determine 'its potential liability from a generally recognized objective standard of measurement.'" While the January 2017 letter did not demand a specific amount of money, it was sufficient to constitute a notice of claim because it "sufficiently notified the insurer that respondent was making a claim for damages as a result of the accident and that the insurer, based upon the information in the letter and in its claim file, was sufficiently notified of its potential liability to respondent." The court went on to affirm the district court's decision to award pre-verdict interest on *additur* damages, holding that they did not fall within the exception for "other similar items added by the court" found in Minn. Stat. §549.09, subd. 1(b)(5). ***Blehr v. Anderson***, A20-0691 (Minn. Ct. App. 1/11/2021). *https://mn.gov/law-library-stat/archive/ctap-pub/2021/OPa200691-011121.pdf*

JEFF MULDER
Bassford Remele
jmulder@bassford.com


LOVEN

Matt Loven joined the partnership of Maslon LLP. Loven represents clients in real estate transactions, property development, and commercial leasing.


MCCAHERY

Anneliese McCahery has joined Eckberg Lammers as an attorney with the municipal law group. She earned her JD from Mitchell Hamline School of Law in 2020.


REDPATH

John C. Redpath has joined Winthrop & Weinstine, PA as a shareholder in the corporate & transactions and mergers & acquisitions practices.


HARTNEY

Tyler Hartney, an associate in Meagher + Geer's mass tort/toxic tort practice, has been admitted to the Illinois State Bar. In addition to Illinois, Hartney is also licensed to practice in Minnesota, Montana, and North Dakota.

Ward & Oehler, Ltd. is now Wagner Oehler, Ltd. as of January 1, 2021. The firm has served clients throughout Minnesota for over 45 years.


GUMBEL

Jennifer Gumbel has joined Wagner Oehler, Ltd. as an associate attorney. She has several years of experience in the areas of estate planning, probate, and real estate law.


NAGORSKI

Julie N. Nagorski, partner/co-chair of DeWitt's litigation practice group, was appointed to the Minnesota State Bar Association's Real Property Certification Board. The board has eight members, each of whom serve a three-year term.


LINDQUIST


PROCHASKA


BJERVA

Chestnut Cambronne named Erica J. Lindquist and Ryan Prochaska partners and announced that Eric B. Bjerva has joined the firm.


MCELLISTREM

Tessa McEllistrem has been named partner at Jardine, Logan & O'Brien, PLLP. McEllistrem has been an associate at the firm since 2014 and practices in the areas of civil litigation defense, government liability, and employment law.

Gov. Walz appointed Johnathan Judd as district court judge in Minnesota's 7th Judicial District. Judd will replace Hon. Barbara R. Hanson and will be chambered at Fergus Falls in Otter Tail County. Judd is currently the mayor of the City of Moorhead, director of equity and inclusion at Minnesota State Community and Technical College, and an adjunct instructor at Minnesota State University-Moorhead.


ANDOW


COURI

Gov. Walz appointed Anna Andow and Theresa Couri as district court judges in Minnesota's 4th Judicial District. These seats are chambered in Minneapolis in Hennepin County. Andow's appointment will fill a vacancy that occurred upon the retirement of Judge Kevin S. Burke. Andow is a child support magistrate at the Family Law Justice Center in Minneapolis. Couri's appointment will fill a vacancy that occurred upon the retirement of Judge Mary R. Vasaly. Couri is a managing county attorney at the Hennepin County Attorney's Office.

In Memoriam

Amy Joyce, age 51, of Minneapolis, lost her battle with cancer on February 9, 2021. She was a partner at Skolnick & Joyce, PA. She cared deeply for her clients, their cases, the practice of law, and the pursuit of justice.

Sherrill Rae Oman of Minnetonka passed away at age 73. She was a passionate and pioneering female attorney and among the earliest women to be appointed to the board of a major Minnesota law firm.

Earl Edwin Maus passed away on February 10, 2021 at age 67. A lifelong public servant, his career included working as Cass County Attorney in Walker for over 20 years and then a 9th Judicial District judge in Brainerd for 11 years.

James J. Cronin, age 82, of Minnetonka, passed away on February 10, 2021. He attended Georgetown University Law School in Washington, D.C. and supported his family by working as a member of the Capitol Police. He later moved to Minnesota to work at Felhaber, Larson, Fenlon & Vogt, where he practiced labor law for the rest of his career.


GROGAN


VEDDER


ALLEN


ENGEBRETSON


MILLER


SCHMID

Moss & Barnett announced that Brian T. Grogan and James J. Vedder were elected to three-year terms as members of the firm's board of directors. Kathy Y. Allen, Kelly C. Engebretson, Brittney M. Miller, John M. Schmid, and Alex R. Schoephoerster have become shareholders in the firm.

Fredrikson & Byron announced the addition of 12 associates to the firm's Minneapolis office: Tyler J. Bush, Dalton K. Crum, Devin T. Driscoll, Melissa R. Hodge, William M. Howieson, Aaron J. Hurd, Emily M. McAdam, Sage H. O'Neil, N. Chethana Perera, Edward M. Peilen, Aaron Z. Stenz, and Thomas Wheeler. Tanner J. Pearson joined the firm's Bismarck office.

Stinson LLP announced that Minneapolis partner David Crosby will serve as the firm's next deputy managing partner, alongside Managing Partner-elect Allison Murdock. Their term will begin July 2021.

Wilkerson & Hegna, PLLP updated the firm name to Wilkerson, Hegna, Kavanaugh & Johnston, PLLP. Gary Wilkerson and Kyle Hegna founded the firm over 30 years ago. The new firm name highlights the next generation of partners. Morgan Kavanaugh and Chris Johnston have been partners and owners of the firm since 2015.

The Minnesota Corporate Pro Bono Council announced the board of director reappointments of David E. March as chair, Debra L. Hovland as treasurer, and Janet Lambert as secretary. The council works to increase the level of pro bono work performed by members of corporate law departments and includes pro bono leaders from 30 Minnesota-based companies.


WILLIAMS

Stuart Williams, a lawyer at Henson Efron, was re-elected president of the Minnesota Board of Pharmacy for 2021 and was re-appointed to a three-year term on Minnesota's Drug Formulary Committee, where he will continue to serve as the committee's chairperson.

We gladly accept press releases and announcements regarding current members of the MSBA for publication, without charge.
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ATTORNEY WANTED

ANISHINABE LEGAL Services Staff Attorney – FTE (salaried). Anishinabe Legal Services is seeking a highly motivated attorney to provide civil legal assistance and court representation to program clients before area Tribal Courts, State Courts, and Administrative Forums. This attorney will be housed out of our main office on the Leech Lake Reservation in Cass Lake, Minnesota. Primary duties will include handling a wide variety of civil matters before State and Tribal Courts. Compensation: D.O.E. Generous benefit package includes individual and family health and dental insurance, paid time off, and life insurance. To Apply: Please email a cover letter and resume to Executive Director Cody Nelson, at: cnelson@alslegal.org. Applications will be accepted until the position is filled.

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ASSISTANT GENERAL Counsel – Minneapolis, MN. We are seeking a full-time Assistant General Counsel to join our AgCountry CFG team in the Minneapolis, MN office but are willing to consider other AgCountry office locations for the right candidate. In this position, you will assist the legal department in providing legal counsel and advice to AgCountry CFG personnel; provide focused and specialized legal support to commercial finance, agribusiness, and capital markets lending functions; and provide ongoing legal training and support to AgCountry personnel on loan documentation issues and related legal issues. If you are a team player, have an undergraduate degree and a law degree from an ABA accredited law school; three or more years of private practice or corporate legal experience; and significant background and experience in agricultural and commercial lending transactions, apply today. Closing Date: March 17, 2021 6PM CT. For full details and to submit your resume, please visit our website at: www.agcountry.com/careers "We Bring More To Your Table" EEO/AA/M/F/Veteran/Disability

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ASSOCIATE ATTORNEY. Thomton, Sperry, Jensen & Keithahn, Ltd., seeks an associate attorney with 0-3 years to join its thriving civil practice in Litchfield, MN. Attorney will have significant exposure to clients in real estate, estate planning, probate, and other civil matters. Collegial atmosphere, mentorship, and reasonable billing expectations. Successful candidate will have excellent interpersonal skills, an interest in residing in central MN, and a desire to become a partner. Flexible work arrangement may be considered. Please send resume and cover letter to Denise Baune: denise@tsjklaw.com.

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CIVIL LITIGATION Attorney Needed. For residential rental property matters, using the court process against abusive municipal policies and local government conduct in violation of ordinances and state law. The attorney must be knowledgeable, aggressive, tough, dependable, and principled. 612-825-6283

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CONTRACT LITIGATION Attorney – Blackstock Walters LLC is seeking motivated and qualified litigation attorneys for litigation drafting projects. We maintain an active roster of contract attorneys who we notify of available projects consistent with their skill sets. Successful contractors in this position may be considered for full time employment during the next year. Blackstock Walters is a litigation support company based in Minneapolis, MN, that provides project-based support for civil litigation attorneys, nationwide and internationally, in all phases of litigation. This position will focus on legal research and motion drafting. Our ideal candidate has at least five years of experience with litigation work, including research and motion practice; exceptional writing skills; a high attention to detail; and a problem-solving approach. This candidate will be expected to work with unique and complicated fact patterns and provide sophisticated legal analysis based on original research. First-hand experience with challenging research and analysis is a must. Please submit a cover letter describing your qualifications and interest in this work, a resume, and a writing sample to: Blackstock Walters, LLC, Attention: Lynn Walters, lwalters@blackstockwalters.com

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CORPORATE / BUSINESS Law Associate or Lateral Attorney Mid-sized well-established Coon Rapids law firm seeks corporate / business attorney with experience in acquisitions / sales. Three plus years' experience in corporate / business law required. Competitive salary and benefit package, in addition to a positive work life balance and a great place to work. Lateral movement possible as well. Please send CV including description of transaction experience to: humanresources@bgs.com. No phone calls. EOE/AA Employer.

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EVANS HAIGH & HINTON LLP is currently accepting applications for an attorney with three plus years' experience in litigation. Evans Haigh & Hinton is a growing civil litigation firm with an emphasis in commercial litigation, health care litigation and personal injury litigation. We are looking for an attorney who is interested in litigating complex and significant cases. Applicants with trial experience, civil or criminal, are preferred. We offer an attractive salary and benefit package commensurate with experience. Please send a cover letter and resume to Mark Arndt at: Mark J. Arndt, Evans, Haigh & Hinton, LLP, 101 North Main, Suite 213, P.O. Box 2790, Sioux Falls, SD 57101. 605-275-9599, 605-906-8904 (DD), Email: marndt@ehhlawyers.com Website: ehhlawyers.com

FRANKLIN D. AZAR & Associates, PC is the largest personal injury plaintiffs firm in Colorado and has represented thousands of people entitled to recover damages from injuries in all types of accidents, from dangerous and defective products, and from employers not paying adequate wages. The firm maintains a powerful team of, in many cases renown, lawyers. Every attorney in our firm benefits from a collegial environment with open access to some of the most experienced and reputable attorneys in Colorado. Requirements: Demonstrate strong dedication to personal injury law and a passion for helping people; Possess strong organizational and writing skills; Be energetic, hard-working, and a team-player Have experience with complex litigation; Two years of experience preferred but all candidates will be considered. Franklin D Azar & Associates offers a comprehensive benefits package and competitive compensation based on results. Send resumes to: malcolmo@fdazar.com

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GUNDERSEN HEALTH System — Legal Counsel Gundersen Health System is looking for a Legal Counsel in La Crosse, WI. Ideal candidates will have knowledge of employment law and labor relations. This is an in-house position for an experienced attorney with five to seven years of experience handling general health care, risk mitigation, business, employment and labor relations, regulatory and contractual matters. Reporting directly to the Associate General Counsel, the Legal Counsel will work collaboratively and respectfully across departments to anticipate, identify, and manage Gundersen's legal issues. Education: REQUIRED; Juris Doctor (JD) degree; Work Experience: REQUIRED five to seven years of experience handling general health care, risk mitigation, business, and contractual matters; License and Certifications: REQUIRED; Licensed to Practice Law in the State of Wisconsin (LPL) or eligible for in-house exception. To view the complete job description and apply, please visit: https://www.gundersenhealth.org/careers/. Equal Opportunity Employer

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LARKIN HOFFMAN, one of the largest full-service business law firms in Bloomington Minnesota, is seeking a highly motivated attorney with 10+ years of experience to join our corporate and business law team. Candidates should have a background and demonstrated experience in complex corporate and partnership tax-related and business transactions, tax planning, compliance, and tax driven structural considerations. They should also have knowledge in Federal, state, local and foreign tax related issues, financial transactions tax matters related to structuring mergers, acquisitions and reorganizations, and the taxation of real estate transactions. 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. Candidates with a book of business is required. Larkin Hoffman offers a collegial and energetic work environment with attorneys who are recognized leaders in their areas of practice. We are motivated to attract and retain talented and diverse attorneys into our growing firm and are committed to the training and professional development of our attorneys. 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 with complimentary parking. If you are interested in joining our team, please send your resume and cover letter to: HRMail@LarkinHoffman.com.

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REGULATORY ATTORNEY Winthrop & Weinstine, an entrepreneurial, full-service law firm, located in downtown Minneapolis has an excellent opportunity for an associate attorney in its fast-paced Regulatory and Government Relations practice. The client base is robust and diverse, spanning virtually every industry, and ranging from individual entrepreneurs to Fortune 100 companies. Qualified candidates will

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RESPECTED WORKERS' compensation law firm, Mottaz & Sisk Injury Law, is looking to add an associate attorney to their team with one to four years of practical workers' compensation experience. The firm offers a competitive salary and benefits along with the opportunity to work with accomplished attorneys and staff in the practice area. Please submit a cover letter, resume and two references to: csisk@mottazlaw.com.

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STAFF ATTORNEY. Central Minnesota Legal Services seeks full-time attorney for its St. Cloud office. Family Law; some work in other poverty law. Licensed in Minnesota preferred. Post-law school poverty law experience, family law or clinical experience preferred. Spanish or Somali language a plus. Salary $51,000-$61,218 D.O.E. Excellent benefits. Resume with references and writing sample to CMLS, 110 6th Avenue S, St. Cloud, MN #205, 56301. Email to: dmorris@centralmnlegal.org deadline: 03/05/21 or until filled. EOE.

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THE MINNESOTA DISABILITY Law Center, a division of Mid-Minnesota Legal Aid, is seeking a staff attorney with five to nine years of disability rights or discrimination-related litigation experience. The position is full-time and will be based in our Minneapolis office. More information and on-line application process at: www.mylegalaid.org/employment.

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COUSINEAU WALDHAUSER & Kieselbach is an insurance defense firm located in Mendota Heights, MN. We are seeking an Associate Attorney for a position in our Workers' Compensation group. Associate Job Duties Include: Prepares legal drafts by assembling and organizing information for legal forms and documents, including complaints, declarations, discovery requests, responses, and other pleadings. Researches law by studying laws, statutes, regulations, court opinions, including precedents and reasoning, and trends using standard print texts and computers, and then prepares legal memoranda. Assembles case materials by collecting, organizing, and summarizing information, documents, medical records, reports, and evidence. Assists with litigation action plans, conflict checks, initial case summaries, and background investigations. Prepares for trial by preparing trial briefs, exhibits, subpoenas, evidence, and motions. Maintains calendar by entering and updating requirements, court dates, and meetings. Updates job knowledge by participating in continuing educational opportunities; reading legal publications; maintaining personal networks. Experience preferred but not required; ability to thrive in high-volume practice and great organizational skills a must. Will consider recent graduates, especially those with experience clerking at a workers' compensation firm. Forward cover letter, resume and transcript to Jeff Downes at Jeff.Downes@cwk-law.com. Early applications encouraged.

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MISO (MIDCONTINENT Independent System Operator). Location: Carmel, IN or Eagan, MN or Little Rock, AR As a Senior Corporate Counsel, you will help MISO adapt its markets, products, and services to an evolving energy landscape by providing legal and strategic advice. In this role, you will: Provide compliance and regulatory support for matters subject to the jurisdiction of the Federal Energy Regulatory Commission and other regulatory authorities; Collaborate with internal business partners on risk identification and mitigation; and identify solutions and paths forward related to challenges facing the electric energy industry and MISO's members. What we are looking for: Juris Doctor degree; License to practice law in any US state or the District of Columbia; A minimum of five years of legal experience in the electric or natural gas industries. At least five years of federal energy regulatory practice; strong preference

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HEACOX, HARTMAN, Koshmrl, Cosgriff, Johnson, Lane & Feenstra, PA, is a St. Paul law firm that specializes in the area of workers' compensation. We are currently seeking a highly motivated associate attorney to join our team. Candidates should be licensed to practice law in the state of Minnesota and possess strong research and writing skills, as well as, the ability to work well under pressure in a fast-paced environment. Our firm is an equal opportunity employer that offers a competitive benefits and compensation package. Interested candidates should submit their resume to cfeenstra@heacoxlaw.com

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GUNDERSEN HEALTH System is seeking a Paralegal in La Crosse, WI. Ideal candidates would have familiarity with electronic health care records systems. The Paralegal reports to the Associate General Counsel and is responsible for working under the supervision of attorneys in the legal department. They provide legal advice and assistance to Gundersen Health System and its key affiliates. In addition, the Paralegal provides assistance in compliance, contractual, corporate, employment, labor, medical malpractice, risk management, and other legal issues related to patient care, including consent, termination of care, medical malpractice, and risk management. Education and Learning: (Required)Associate degree in Paralegal or Bachelor of Science with major in paralegal studies. Work Experience: (Required)three to four years minimum of related work experience. To view the complete job description and apply, please visit: www.gundersenhealth.org/careers/. Equal Opportunity Employer

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