OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVI NUMBER V
MAY/JUNE 2019
www.mnbar.org

Bench&Bar OF MINNESOTA

The Guns Aren't Illegal. But Sometimes the Owners Are.

Understanding Minnesota's private-transfer exception suggests the best path to reducing gun violence

Your smartphone and the 5th Amendment

Lessor beware: Tenant trademark infringement

Lessons learned from the Lunds *shareholder litigation*

2019 MSBA CONVENTION

June 27 & 28, 2019 • Mystic Lake Center • www.msbaconvention.org

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What do lawyers, judges, academics, activists, technologists and business leaders have in common? They will all be at the 2019 MSBA Convention engaging in a rich, rewarding educational experience.

This year's convention combines thoughtful presentations on the legal profession and "critical conversations" about timely issues with important legal updates and provocative "ED TALKS".

Attendees will enjoy their choice of two sunrise sessions each day, plus lunch and the President's Reception, along with other fun activities. The MSBA Convention provides numerous opportunities to network with your colleagues in new ways.

Packed with stimulating presentations, numerous networking opportunities and special events, the MSBA Convention is an amazing opportunity to experience the Minnesota State Bar Association at its best!

FEATURED SPEAKERS

CHRISTIAN PICCIOLINI

Christian Picciolini is an American author and activist who is the co-founder of a nonprofit peace advocacy organization called Life After Hate. He wrote two books: White American Youth and Romantic Violence: Memoirs of an American Skinhead, which detail his time as a leader of the American white power movement and his journey out.

BOB CARLSON

Bob Carlson, a shareholder with the Butte, Montana, law firm of Corette Black Carlson & Mickelson, P.C., is president of the American Bar Association, the world's largest voluntary professional organization with more than 400,000 members.

STEVE CROSSLAND

Steve Crossland is the Chair of Washington State's Limited License Legal Technician Board. He also has a solo practice in Cashmere, Washington.

CHIEF JUSTICE LORIE SKJERVEN GILDEA

Chief Justice Gildea has served as the Chief Justice of the Minnesota Supreme Court since 2010. Prior to that she served as an associate justice from 2006 to 2010 and as a district judge in the Fourth Judicial District from 2005 to 2006.

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THURSDAY, JUNE 27

7:30 – 8:30 a.m.
CHECK-IN & CONTINENTAL BREAKFAST

7:45 – 8:30 a.m.
SUNRISE SESSIONS

- Cheers and Jeers: Expert Reviews of Legal Tech Products and Trends in 2019
  Joe Kaczrowski; Minnesota State Bar Association; Minneapolis
  Todd Scott; Minnesota Lawyers Mutual; Minneapolis
- How to Avoid 7 Common Legal Writing Mistakes
  Karin Ciano; Karin Ciano Law PLLC; Saint Paul

8:30 – 8:45 a.m.
ANNOUNCEMENTS

8:45 – 9:00 a.m.
PRESIDENTIAL WELCOME & AWARDS
Paul Godfrey; MSBA President

9:00 – 10:00 a.m.
Breaking Hate: A Journey Into and Out of America's Most Violent Hate Movement
Christian Picciolini; Free Radicals Project; Chicago, Illinois

10:00 – 10:45 a.m.
ED TALKS

- All Square: Civil Rights and Neon Lights
  Emily Hunt Turner; All Square Café; Minneapolis
- The Importance of Bonding
  Mindy Mitnick; Uptown Mental Health Center; Minneapolis

10:45 – 11:00 a.m.
EXHIBITORS & NETWORKING BREAK

11:00 a.m. – 12:00 p.m.
BREAKOUT SESSION A

101) Critical Conversation: Lawyer Well-Being in Minnesota and Nationally
Bob Carlson; Corette Black Carlson & Mickelson, P.C.; Butte, Montana
Ivan Fong; 3M; Saint Paul
Justice David L. Lillehaug; Minnesota Supreme Court; Saint Paul
MODERATOR: *Joan Bibelhausen*
Lawyers Concerned for Lawyers; Saint Paul

102) 2019 U.S. Supreme Court Update
Aaron D. Van Oort; Faegre Baker Daniels LLP; Minneapolis
Nicholas J. Nelson; Faegre Baker Daniels LLP; Minneapolis

103) How to Protect Children from Online Recruitment by Hate Groups
Christian Picciolini; Free Radicals Project; Chicago, Illinois

12:00 – 1:30 p.m.
CONVENTION LUNCHEON

Only $125 for MSBA Members

MSBA Minnesota State Bar Association

12:15 – 12:30 p.m.

Remarks by American Bar Association President Bob Carlson

12:30 – 12:45 p.m.

Passing of the Gavel Ceremony

Paul Godfrey, MSBA President
Tom Nelson, Incoming MSBA President

12:45 – 1:15 p.m.

State of the Judiciary Address

Chief Justice Lorie Skjerven Gildea
Minnesota Supreme Court; Saint Paul

1:30 – 2:30 p.m.

BREAKOUT SESSION B

201) Critical Conversation: Lawyer Safety in the Law Office and the Courtroom

Daniel Adkins; North Star Criminal Defense; Saint Paul
John Lillie III; Kelsey Law Office; Forest Lake
Randy McAlister; Cottage Grove Police Department; Cottage Grove
MODERATOR: *Samuel J. Edmunds*
Sieben Edmunds Miller PLLC; Mendota Heights

202) 2019 Minnesota Appellate Case Law Update

Justice G. Barry Anderson
Minnesota Supreme Court; Saint Paul
Justice Margaret H. Chutich
Minnesota Supreme Court; Saint Paul
Chief Judge Edward J. Cleary
Minnesota Court of Appeals; Saint Paul
Judge Kevin G. Ross
Minnesota Court of Appeals; Saint Paul
MODERATOR: *Justice David L. Lillehaug*
Minnesota Supreme Court; Saint Paul

203) The Top 10 Mistakes Lawyers Make When Working with Scientific Evidence

Christine Funk; Attorney at Law; Saint Paul

2:30 – 2:45 p.m.

EXHIBITORS & NETWORKING BREAK

2:45 – 3:45 p.m.

BREAKOUT SESSION C

301) Critical Conversation: The Future of Legal Representation in MN – LLLTs and More

Steve Crossland; Washington State Limited License Legal Technician Board Chair; Cashmere, Washington
Sam Glover; Lawyerist.com; Minneapolis
Judge John R. Rodenberg; Minnesota Court of Appeals; Saint Paul
MODERATOR: *Eric T. Cooperstein*
Law Office of Eric T. Cooperstein; Minneapolis

302) Ethics Issues for Retiring Lawyers

1.0 ethics credit applied for

Paul M. Floyd; Wallen-Friedman & Floyd, P.A.; Minneapolis
Jack Setterlund; Duluth; Minnesota
Binh T. Tuong; Office of Lawyers Professional Responsibility; Saint Paul
MODERATOR: *Roy S. Ginsburg*
Attorney at Law; Minneapolis

* MSBA Assembly Meeting

3:45 – 4:00 p.m.

EXHIBITORS & NETWORKING BREAK

4:00 – 5:00 p.m.

ED TALKS

- Making the Case for Sleep
  Dr. John Parker; Sleep Performance Institute; Minneapolis
- Transformational Metaphors
  Madge S. Thorsen; Law Offices of Madge S. Thorsen; Minneapolis
- Restoring Waldmann, Saint Paul's Oldest German Lager House
  Thomas S. Schroeder; Faegre Baker Daniels LLP; Minneapolis

* MSBA Assembly Meeting, continued

5:00 – 6:00 p.m.

PRESIDENT'S RECEPTION

Enjoy music, drinks and conversation with your colleagues!

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6:00 – 7:00 p.m.

BAGS TOURNAMENT – Big Prizes, Big Fun!

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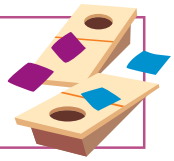

FRIDAY, JUNE 28

7:30 – 8:30 a.m.

CONTINENTAL BREAKFAST

7:45 – 8:30 a.m.

SUNRISE SESSIONS

- How to Avoid Getting Caught in the Dark Web
  Mark Lanterman; Computer Forensic Services; Minnetonka
- Marketing a Small-Town Legal Practice
  Vincent Stevens; Miller & Stevens Law; Forest Lake

8:30 – 9:30 a.m.

ED TALKS

- On Becoming a Judge: Things to Consider Before You Apply, When You Apply, and If You Get an Interview
  Lola A. Velazquez-Aguilu; Medtronic, Inc.; Fridley
- How to Have a More Dementia-Friendly Law Practice
  Jean M. Gustafson; Attorney at Law; Brainerd
- Courageous Connections: Every Heart Matters
  Kelly D. Holstine; 2018 Minnesota Teacher of the Year; Shakopee Public Schools; Shakopee

9:30 – 9:40 a.m.

EXHIBITORS & NETWORKING BREAK

9:40 – 10:40 a.m.

BREAKOUT SESSION D

401) Someone Like Me Can Do This – Stories of Latino Lawyers and Judges in Minnesota

1.0 elimination of bias credit applied for

Aleida O. Conners; Cargill, Inc.; Wayzata
Roger A. Maldonado; Faegre Baker Daniels LLP; Minneapolis
Marcos Ramirez; Nexum Legal; Saint Paul
MODERATOR: *Judge Peter M. Reyes*
Minnesota Court of Appeals; Saint Paul

402) How to Keep the Cabin in the Family

J. Steve Nys; Fryberger, Buchanan, Smith & Frederick, P.A.; Duluth

10:40 – 10:50 a.m.

EXHIBITORS & NETWORKING BREAK

10:50 – 11:50 a.m.

BREAKOUT SESSION E

501) Important Lessons from Recent Attorney Discipline Cases

1.0 ethics credit applied for

Susan M. Humiston; Office of Lawyers Professional Responsibility; Saint Paul

502) Books about Bias and Diversity: *Becoming* and *The Loudest Duck: Moving Beyond Diversity While Embracing Differences to Achieve Success at Work*

1.0 elimination of bias credit applied for

Sarah Lynn Oquist; Sapientia Law Group; Minneapolis
Athena Hollins; Minnesota State Bar Association; Minneapolis

11:50 a.m. – 12:00 p.m.

EXHIBITORS & NETWORKING BREAK

12:00 – 1:00 p.m.

BREAKOUT SESSION F

601) The Intersection of Ethics, Inclusion, and Professionalism: The New Model Rule 8.4(g)

1.0 ethics credit applied for

Kristine Kubes; Kubes Law Office PLLC; Minneapolis
Mary Schwind; Kubes Law Office PLLC; Minneapolis

602) The Complete Lawyer: Quick Answers to Questions Across 4 Practice Areas

INTELLECTUAL PROPERTY LAW
James L. Young; Westman, Champlin & Koehler; Minneapolis

EMPLOYMENT LAW
Leonard B. Segal; SeilerSchindel, PLLC; Minneapolis

FAMILY LAW
R. Leigh Frost; R. Leigh Frost Law, Ltd.; Minneapolis

WORKERS' COMPENSATION LAW
Kathryn Hipp Carlson; Hipp Carlson Law PLLC; Long Lake

1:00 p.m.

ADJOURN

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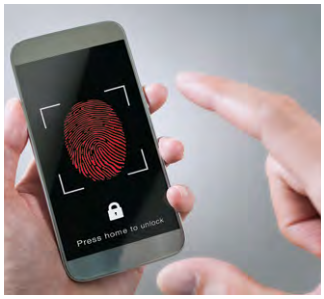
FEATURES



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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@mnbar.org or at the postal address above.

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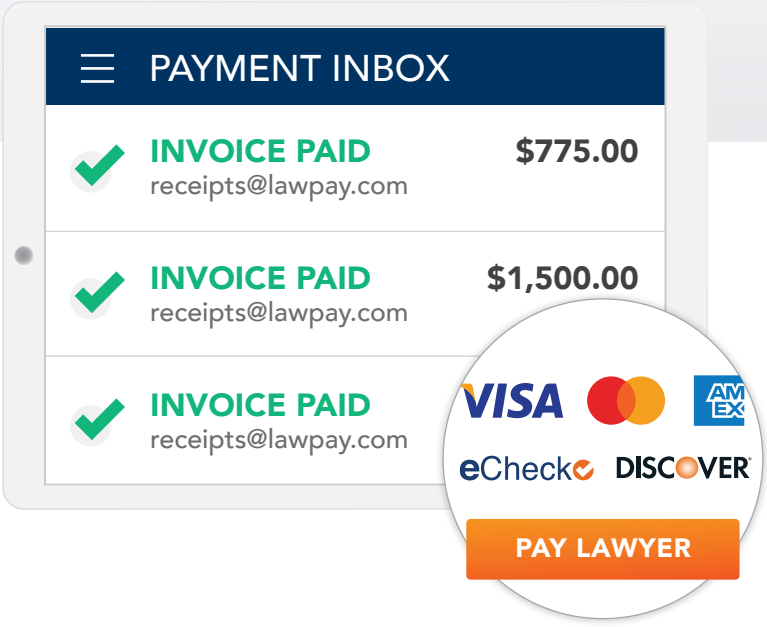

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MSBA
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It was a very good year

During the years leading up to my time as president of the MSBA, several people asked me to describe my plan for the year. Since I wasn't sure, and, because I knew from talking to past presidents that any plan can be derailed by events, I told them I needed to wait and see. As my term approached, events dictated my plan. Tim Groshens announced his retirement and we had made a decision to have One Profession conferences in every judicial district in greater Minnesota. Hence the plan: Hire a new executive director and implement the One Profession program. I am excited to report we were able to accomplish both goals.

Achieving greater efficiencies

As our executive director, Tim Groshens did an excellent job of taking us from the era of paper billing to online dues payments. He also helped lead the discussions about merging the staffs of the HCBA, the RCBA, and the MSBA. In early 2018 all three boards agreed on a plan to merge staffs. Tim's retirement provided an excellent opportunity to find a new executive director to lead the merged staff. I am happy to report that all three bar associations collaborated to make this process work smoothly. We formed a Joint Coordinating Committee to decide the scope of the search, choose a search firm, and determine the hiring timeline. The committee was made up of three members from each association. We met multiple times in summer and fall of 2018. All three boards approved Cheryl Dalby as the new leader of the combined staff in November 2018. Cheryl started her new role as chief executive officer on January 2, 2019. She is already making strides to make sure our members are served as efficiently as possible.

PAUL GODFREY is the Managing Attorney for the Twin Cities Branch Legal Office for Farmers Insurance. He is a trial attorney. He has tried more than 40 cases to jury verdict, with issues ranging from claims for whiplash to claims for wrongful death.

For example, the communications staffs from all three organizations are now one team. They are all able to specialize in what they do best, whether it be writing, photography, graphic design, or social media. Rather than having three groups communicating with three separate but overlapping groups, we have one team getting the messages out to the right audiences.

Bringing together legal professionals

The other goal for the year was to serve our members as a convener. We have a statewide reach, so we are well positioned to address issues that face the entire bar. Through the One Profession program we were able hold day-long meetings in six of the eight judicial districts in greater Minnesota during my year as president. The other two meetings are scheduled to take place early in Tom Nelson's term.

The program is aptly named. Lawyers and judges are all part of one profession. These meetings have been an opportunity for lawyers and judges in each judicial district to come together and discuss issues facing the district. Every meeting has included presentations by the Supreme Court and the Court of Appeals. They also include a state of the district presentation by the chief judge or a panel discussion of issues facing the court. At every meeting there was time for questions and answers. This is how the bench and bar collaborate: We get together, discuss issues, and look for solutions. The attendance at these meetings has been fantastic. I am proud that we were able to bring these meetings to our members.

The MSBA is doing good things for our profession. Much of what we do depends on strong support from our staff. I want to publicly thank the staffs from all three organizations. They continued to produce quality work during times of uncertainty and have worked together on the staff merger.

I also want to thank everyone for the opportunity to serve as president of the MSBA. It has been a wonderful opportunity to work with talented staff and attorneys to make our justice system better. ▲

Welcome, new lawyers!

Congratulations to the 75 new lawyers granted admission to the Minnesota bar during a series of swearing-in ceremonies held in the Supreme Court Chambers at the Minnesota State Capitol Building on May 10. Chief Justice Lorie Gildea presided over the four morning sessions and was joined on the bench by Justice G. Barry Anderson, Justice David Lillehaug, Justice Natalie Hudson, Justice Anne McKeig, and Justice Paul Thissen.

The ceremony featured an address by Justice Hudson, who recounted her own experience as a newly admitted lawyer helping a *pro se* petitioner, and the gravity she felt with that new responsibility. John Koneck, board member of the Minnesota Board of Law Examiners (MBLE), and Emily Eschweiler, director of MBLE, introduced the new lawyers to the Court, Chief Justice Gildea administered the oath, and MSBA President Paul Godfrey welcomed them to the Minnesota legal community.

Chief Justice Gildea—who initiated a return of the admissions ceremony to the Supreme Court Chambers in a trial run last spring—welcomed the new admittees to "one of the most beautiful rooms, in one of the most beautiful buildings, in the country." (For many years, the swearing-in ceremonies had been held at St. Paul's RiverCentre.) Chief Justice Gildea also reinstated the signing of the Minnesota attorneys roll book as a part of the new lawyers' admission experience. This practice dates back to 1858, the year that Minnesota gained statehood.

Court rules on MSBA petition to amend MRPC

On May 3, the Minnesota Supreme Court issued an order in response to an MSBA petition proposing amendments to rules 1.6 and 5.5 of the Minnesota Rules of Professional Conduct. The Court rejected a proposed amendment to Rule 1.6 that would have permitted lawyers to disclose limited confidential client information to respond to a client's public criticism of the lawyer if the client had first disclosed confidential information. The Court stated the proposed change could have unforeseen effects on the lawyer-client relationship.

The Court accepted a proposed amendment to Rule 5.5(d) to permit a non-Minnesota lawyer to continuously practice in Minnesota the law of a jurisdiction in which the lawyer is admitted, provided that lawyer notifies clients that the lawyer is not admitted to practice Minnesota law. The Court reasoned that this is a logical extension of the current Rule 5.5 exemption permitting a non-Minnesota lawyer to practice in other limited areas of non-Minnesota law.

The Court amended Rule 5.5(c)(3) to permit a non-Minnesota lawyer to provide legal services in Minnesota that are reasonably related to the lawyer's recognized expertise in an area of law developed through regular practice in a jurisdiction in which the lawyer is lawfully admitted.

Finally, the Court agreed with a proposed amendment to Rule 5.5(c)(3) permitting a non-Minnesota lawyer to provide representation in Minnesota to a family member. The Court recognized that this change responds to the Court's invitation to the MSBA in *In Re Panel File* No. 49402, 884 N.W.2d 661 (Minn. 2016) to suggest amendments to the rule if the bar felt that the court's ruling in that case unnecessarily affected the ability of lawyers to meet client needs. But the Court rejected language that would have extended the exemption to close personal friends and existing clients.

2019 Becker Award winners announced

The Access to Justice Committee has conferred its annual Bernard P. Becker honors for outstanding legal work for low-income clients. The awards were presented at the MSBA Assembly to five honorees; the committee recommended two recipients for the Legacy of Excellence because the strength of the nominations in this category made it impossible to select just one winner.

- Advocate: Georgia Sherman, Southern Minnesota Regional Legal Services
- Emerging Leader: Jocylyn Poehler, Southern Minnesota Regional Legal Services
- Legacy of Excellence: Steve Wolfe, Southern Minnesota Regional Legal Services
- Legacy of Excellence: Michele Garnett McKenzie, Advocates for Human Rights
- Law Student: Kim Boche, University of St. Thomas

Affordable employer-provided health insurance, anyone?

Law firms of all sizes face significant challenges in providing affordable health insurance for their employees. And we have heard from MSBA members that there is a growing interest in exploring possible solutions by pooling together the purchasing power of MSBA employers and their employees to obtain affordable health insurance coverage. Developing an association health plan (AHP) will allow smaller employers to obtain coverage on terms similar to those currently available only to large employers.

The MSBA has engaged with Mercer, a national employee benefit consulting firm with a division that focuses exclusively on offering association benefit programs. The first step in this venture is to collect information about you and your employees that will be used exclusively for obtaining a competitive health care and benefits program from select insurance carriers and evaluating the feasibility of an AHP offering. Providing this information does not obligate you or your organization to participate in any eventual AHP sponsored by the MSBA. A comprehensive response from you and your peers will help the MSBA obtain the most competitive offering possible while accurately gauging the possibility of offering an AHP.

To help in this process, please visit *https://census.mercer.com/msba/* as soon as you can. Our data collection effort will end June 30, 2019. The URL has complete instructions on providing the information, and the process should take you no more than 10 minutes. You will be required to enter the Association ID of MSBA1234 and your Membership ID. If you do not have a Membership ID, or it is not readily available, you can enter the Association ID in the field instead. If you have questions regarding the submission of data using the Mercer Data collection tool, please contact Mercer's Help Desk at *MercerMarketplace365+CustomerSupport2@mercer.com.*

A delegation of five MSBA officers and former officers attended ABA Day 2019 in Washington D.C. to advocate for funding of Legal Services Corporation and the Public Service Loan Forgiveness program. Shown here with Representative Tom Emmer, who is a strong advocate for Legal Services Corporation, are President-Elect Tom Nelson, President Paul Godfrey, and Judge Cara Lee Neville.

Business transactions with clients

Lawyers frequently have an opportunity to do business with clients beyond the straightforward monetary payment for legal services rendered. Sometimes clients wish to offer their lawyer an ownership interest in a start-up business as payment for some or all of the legal services provided, or lawyers wish to acquire an interest in property owned by the client to secure payment for future legal fees. Sometimes a client would like to partner with their lawyer to pursue a new business opportunity, or sometimes a client simply cannot pay a bill and wishes to trade property the client owns or barter professional services for payment. Each of these situations is permissible, but all present a potential concurrent conflict of interest with a client. How to ethically navigate these conflicts is specifically regulated by professional responsibility rules.

SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

The rules

Rule 1.8, Minnesota Rules of Professional Conduct, is helpfully entitled "Conflicts of Interest: Current Clients: Specific Rules." There are 11 main subparts to Rule 1.8 that cover a gamut of situations from business transactions with clients to financial assistance to clients to sex with clients (expressly prohibited unless that relationship predated the lawyer-client relationship). Let's start with the main rule on business transactions: Rule 1.8(a):

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a document signed by the client separate from the transaction documents, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.[1]

As written, the rule is expansive in its application, and applies to everything except standard commercial transactions with clients of the kind and on the same terms as the client markets to the public, and ordinary fee arrangements between a client and lawyer, including applying whenever a "lawyer accepts an interest in the client's business or other nonmonetary property as payment for all or a part of a fee."[2]

The requirements of the rule are strictly enforced from a disciplinary perspective but more importantly, lawyers should view them as important risk management tools. Because of the trust and confidence that clients place in counsel, business transactions with clients can be easy targets for claims of overreaching and breach of fiduciary duty. Taking pains to comply with the requirements of the rule provides an effective counter to such claims.

What does compliance look like?

First, remember Rule 1.8(a) is conjunctive—all three prongs must be satisfied. Second, note that each prong contains additional requirements. Specifically, Rule 1.8(a)(1) requires that the terms of the transaction be (i) "fair and reasonable," *and* (ii) requires that the terms be disclosed in writing *and* (iii) disclosed in a manner that can be reasonably understood by the client. Accordingly, depending on the sophistication level of your client, the written agreement effectuating the transaction may need to be separately summarized in an understandable manner. You should also spend time establishing for yourself how the terms are "fair and reasonable" to the client. What factors are available to show the current value of the transaction? If the transaction is in lieu of payment of fees, how is the value "reasonable" in light of Rule 1.5(a), which requires that lawyers charge fees that are reasonable under the circumstances? As with much in the law, what these elements look like will depend on the particular facts and circumstances presented.

The second prong, Rule 1.8(a)(2), contains two requirements: The client is advised in writing of the desirability of seeking counsel *and* the client is given a reasonable opportunity to obtain such advice. Again, what is reasonable will depend on the particular facts and circumstances. Requiring the client to execute the documents on the same day they are given to the client, or shortly thereafter, is likely unreasonable. Providing the client with several weeks to seek separate counsel and to consult with same is likely reasonable.

The third prong, Rule 1.8(a)(3), incorporates one of the most important aspects of conflict law—informed consent. Rule 1.0(f) defines "informed consent" as an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternative to the proposed course of conduct."[3]

In addition, the informed consent must be in a document separate from the transaction, must be signed by the client, must discuss the essential terms of the transaction, and must disclose the lawyer's role in the transaction *vis-à-vis* the client.

Remember, it is generally insufficient just to use the words "informed consent." Rather, as the definition states, you must give your client information about the material risks and alternatives available in order for the consent to the transaction to actually be informed. Think about this from your client's perspective—if someone asks them, "What were the risks of the transaction," what do you think they will say? What about, "What were the alternatives available to you?" Having a written document that sets forth this information, signed by the client, demonstrates compliance with the rule and is a good risk management strategy.

Other things to keep in mind

In addition to the black-letter law required to do business with clients, Rule 1.8 contains a lot of other rules on specific client conflicts, such as specific restrictions that usually cannot be papered over, including that a "lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent."[4] This rule generally prohibits lawyers from usurping client opportunities. Lawyers cannot draft an instrument that gives the lawyer or a member of the lawyer's family a substantial gift unless the lawyer is related to the donee.[5]

This rule would, for example, prohibit a lawyer from drafting sale documents for a below-market transaction with a client meant as a gift to the lawyer for exceptional services. While a lawyer can accept a gift from a client, neither the lawyer, nor the lawyer's law firm, can draft the transaction documents.[6] Lawyers cannot provide financial assistance to clients in connection with pending or contemplated litigation except in limited, specified circumstances.[7] This prohibition applies to loan advances against settlement proceeds. Further, lawyers cannot acquire a proprietary interest in the cause of action or subject matter of the litigation, except by statutory lien or reasonable contingency fee agreement.[8] Accordingly, for example, while you can have a contingency fee agreement on damages arising from a patent infringement case, you cannot acquire an ownership interest in the patent that is the subject of the infringement case.

Conclusion

Clients often look to us as trusted business advisors in addition to legal advisors, and it may make perfect sense to do business with clients. Before engaging in business with a client (beyond standard commercial transactions with your client of the kind your client markets to the general public),[9] however, please review the rules so that you are familiar with the conflicts of interest that such transactions create, the specific steps needed to address those conflicts, and times when there is a *per se* prohibition on the type of transaction you are contemplating. As always, you can call our ethics hotline for advice on how to ethically do business with your client, 651-296-2963 or 1-800-657-3601. ▲

Notes

[1] Rule 1.8(a), MRPC.
[2] Rule 1.8, MRPC, Comment [1].
[3] Rule 1.0(f), MRPC.
[4] Rule 1.8(b), MRPC.
[5] Rule 1.8(c), MRPC.
[6] Rule 1.8(k), MRPC, "While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them."
[7] Rule 1.8(e), MRPC.
[8] Rule 1.8(i), MRPC.
[9] *See* Rule 1.8, MRPC, Comment [1], excluding from Rule 1.8(a) "standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services."

"Papers and effects" in a digital age, pt II

Modern information technologies are testing the United States Constitution's protection against government intrusion. In our article "'Papers and effects' in a digital age," published here in January 2019, we looked at the impact of smartphones and the challenges they pose for search warrants and government investigators. We concluded that as our technological landscape rapidly expands and evolves, so too do courts need to adjust to maintain the degree of privacy afforded by the 4th Amendment.

Our digital age has forced courts to reevaluate the balance between privacy concerns and the government's legitimate interests when digital devices are seized during investigations. Just as the founders sought to bar Britain's writs of assistance and the Crown's ability to indiscriminately search private homes or offices, we again face the need to establish acceptable boundaries for warrant-authorized searches. Modern digital telephones and electronic devices regularly contain vast amounts of their owners' personal information. This new reality means that government investigators must have carefully defined limits when they seek to review these items or locate electronically stored evidence. Courts are responding to these concerns.

Case in point: *Riley v. California*

In 2014, the United States Supreme Court considered the case *Riley v. California* (573 U.S. __ (2014)). Mr. Riley had been arrested for a traffic violation. His cellphone was seized incident to the arrest. Police officers, without a warrant, examined information stored on the phone; they discovered photos and videos that suggested gang involvement. This stored information led to Riley's being charged in connection with a shooting that occurred weeks earlier. He challenged the digital search, raising the question of what investigators are allowed to search on digital evidence. The lower courts found that the digital search incident to Riley's arrest allowed the evidence.

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The Supreme Court reversed. It recognized that, historically, officers were permitted to examine objects seized incident to a lawful arrest. But in 2014, the Supreme Court held that a modern digital phone was not just another object; its ability to store vast amounts of data called for a deeper consideration of the effect of its seizure. In today's technological landscape, the average person stores a huge amount of data about their daily lives. This reality is unprecedented; even in the rare event that an officer found a personal diary on a person incident to an arrest, that diary would contain a limited amount of information. The Court set aside issues of officer safety or evidence destruction, neither of which was materially implicated in the seizure of a cellphone. Instead the Court found that, in considering digital devices, "a search of digital information on a cellphone… implicates substantially greater individual privacy interests than a brief physical search[.]"

> The law is properly recognizing that our digital world requires a new level of warrant specificity.

The Court further held that the threat of evidence destruction, either by remote wiping or encryption, was not substantial enough to merit a warrantless search. Many investigators argue that warrants hold up investigations, making it difficult if not impossible to properly examine digital evidence. However, investigators can take immediate action to secure digital devices for future analysis, including turning off the devices and using Faraday bags, which help to protect against the threat of remote tampering.

A unique information source

Even the most basic smartphone has significant storage capacity and often holds information spanning the course of several years. Cloud computing and the existence of data stored on remote servers that can be easily accessed via smartphones further complicates the search process, since the accessible data technically extends beyond the physical confines of the phone itself.

In spite of these issues, the Court emphasized that "the Court's holding is not that the information on a cellphone is immune from search; it is that a warrant is generally required before a search[.]" The nature of our digital world justifies the need for warrant specificity.

The law is properly recognizing that our digital world requires a new level of warrant specificity. For the majority of Americans, these devices contain private details about almost every, if not every, aspect of our lives. The fact that technology now enables an individual to carry such information in his hand does not make the information any less worthy of the protection for which the founders fought. Our answer to the question of what police must do before searching a cellphone seized incident to an arrest is accordingly simple—specify what you are searching for and get a warrant.

The Supreme Court's emphasis on the need for a warrant should not unduly impede the competent investigator. Any issues posed by needing to wait to obtain a warrant can be readily mitigated. Indeed, the same kinds of electronic access can be used to obtain warrants electronically. Many states and federal procedures provide for electronic warrant application and authorization. This is an area where the law is fast developing, as the courts apply timeless principles to evolving situations. As illustrated by the *Riley* case, digital devices have vastly expanded the scope of information which may be available in seized objects. The law is beginning to consider these new factors. ▲

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Eminent Domain

Damages to contiguous tracts in Minnesota

Eminent domain is an "awesome" power: the ability of the state, or its delegates, to take an individual's property without that individual's consent.[1] Under the United States and Minnesota Constitutions, that "awesome" power comes with a corresponding responsibility: to pay "just compensation" to the owner of the property.[2] In cases where not all of an owner's property is acquired, just compensation includes compensation not just for the property taken, but also lost value to the owner's remaining land—an element of damages known as severance damages.[3] To this end, Minnesota follows the "before" and "after" rule, comparing the value of the property before the taking with the value after the taking in order to determine the property compensation.[4]

Often, a property owner or investor will hold contiguous properties in different single-purpose entities. There are potential tax advantages and development advantages to holding property in smaller or separate economic units. The owner can decide to develop the properties together or to sell off one of the economic units. The owner may also decide to develop the property in phases, based on market conditions and forces. An important condemnation issue is whether or not these economic units may be considered as a single property or must be considered as multiple properties. Assume Acme, LLC owns both Green Acres and Blue Acres. A condemning authority takes only a portion of Green Acres, but the project will interfere with the use, access, or some other development potential of Blue Acres as well. Is Acme entitled to damages caused to Blue Acres as well as Green Acres? The answer, as in so many legal issues, is that it depends. Primarily, it depends on whether in the marketplace, Blue Acres and Green Acres are considered part of the same larger parcel.

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The "larger parcel" rule considers three factors: unity of ownership, unity of use, and physical unity, also known as contiguity.[5] The use considered is one of highest and best use.[6] For properties that are not contiguous, Minnesota law provides a specific rule in Minn. Stat. §117.086, subd. 1. A recent unpublished Minnesota Court of Appeals case helps spell out the rule in Minnesota for contiguous properties.

In December 2017, the court of appeals ruled, in *County of Anoka v. Ramsey-Arbor Properties, LLC*,[7] on an issue related to the so-called "larger parcel" test. Anoka County acquired a portion of land known in the court proceedings as Parcel 20. The landowner owned Parcel 20 along with a contiguous tract adjoining the eastern boundary of Parcel 20, known in the proceedings as Tract A.

The landowner purchased Parcel 20 and Tract A together and had planned a single, phased development involving the property. At the time of the taking, Tract A was improved with a commercial structure leased to a bank and Parcel 20 was mostly unimproved, though the two shared parking, sanitary sewer, storm sewer, lighting, fire protection, zoning, and guidance.

At the district court level, the county moved for partial summary judgment to exclude a claim for any damages to Tract A, arguing that because the parcels were separate tax parcels and because Tract A was improved while Parcel 20 was not, that the larger parcel test was not met in the case and that damages to Tract A could not be found. The district court granted the county's motion.

The landowner appealed to the court of appeals, which overturned the district court opinion. The court of appeals held that the required question was whether the "physically distinct tracts [were] adaptable to, and actually and permanently used as, a single unitary tract" and that that question was a question for the jury unless the evidence was conclusive.[8]

Minnesota follows the "before" and "after" rule, comparing the value of the property before the taking with the value after the taking in order to determine the property compensation.

In this case, the court overturned the district court because the evidence was not conclusive and genuine issues of material fact existed as to whether property was a single unitary tract. Disputes identified by the court of appeals included facts related to the shared driveway, lighting, utilities, and storm water systems; differing appraisers' opinions; and the intent of the owner with respect to the development, irrigation, landscaping, and zoning, among other issues.

In condemnation cases where the issue involves contiguous land, if there are disputed facts then the question of what land must be considered and compensated for will be a decision for the jury. It is vital in such cases that condemnation counsel closely follows the disputed facts and issues that may demonstrate a sufficient connection to claim damages. ▲

Notes

[1] *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 875 (Minn. 2010).
[2] U.S. Const. Amend. V; Minn. Const. art. I, § 13.
[3] *Victor Co. v. State*, 290 Minn. 40, 44, 186 N.W.2d 168, 171–72 (1971).
[4] *State v. Strom*, 493 N.W.2d 554, 558–59 (Minn. 1992).
[5] J.D. Eaton, *Real Estate Valuation in Litigation*, 76 (2nd ed., Appraisal Institute 1995).
[6] *See Id.*; *Minneapolis – St. Paul Sanitary Dist. v. Fitzpatrick*, 201 Minn. 442, 277 N.W.2d 394, 399 (1937).
[7] *County of Anoka v. Ramsey-Arbor Properties, LLC*, No. A17-1060, 2017 WL 6567697 (Minn. Ct. App. 12/26/2017) (unpublished).
[8] *Id.* at 2 (*citing Victor Co. v. State*, 290 Minn. 40, 41, 186 N.W.2d 168, 170–72 (1971)).

'Never forget where you came from'

***JESSIE NICHOLSON** has served as the chief executive officer of Southern Minnesota Regional Legal Services (SMRLS) since 2007 after having been employed as a staff attorney in various practice areas and in an administrative capacity under SMRLS's pioneer director, Bruce Beneke. She has devoted her entire legal career, since 1985, in service to the disadvantaged in addressing their critical civil legal needs.*

Why did you decide to go to law school?

Law school was not something that was on my radar as a child growing up, nor was it something I gave serious consideration to until much later. I had been teaching Spanish at the University of Northern Iowa in Cedar Falls for a couple of years when my husband announced that he was being asked to relocate to Sioux City, Iowa, by the company he was working at. Because that was not something he wanted to consider, he instead elected to see if there were openings in the same industry in Minnesota. He landed on his feet in the Twin Cities. But that left me without a job. So, after careful consideration and deciding not to pursue a doctorate that would have enabled me to be marketable at the university teaching level, I decided to switch careers. And the law seemed like an interesting option.

What brought you to legal aid work?

One of the pastors at our church happened to also be the only African American judge on the district court bench in Black Hawk County, Iowa. He gave a sermon one Sunday to a group of us who were graduating from high school. And I will never forget his admonition to us: "For those of you out there who are fortunate enough to be heading to college, I want you to never forget where you came from. Whatever you do with your lives, always remember to give something back." Though I didn't do that in my first career as a Spanish teacher, Judge Parker's words somehow reentered my mind and heart once I entered law school. I knew that I wanted to use my law degree to work on behalf of those who, in my mind, had historically limited access to our system of justice. I thought about pursuing a career as a public defender but ultimately decided on the civil side.

What's the most rewarding facet of your work? The most frustrating?

Having a staff of lawyers, paralegals, and other professionals who truly embrace the mission of legal aid brings me great joy. It is a privilege to work on their behalf to help SMRLS maintain its role as a respected provider of legal aid services to the disadvantaged. And I cannot really identify any single frustration other than the obvious frustrations faced by any non-profit: having adequate resources to meet the needs of the eligible client community.

What advice do you have for law students or newer lawyers thinking of working for legal aid?

I think the best advice I can offer law students and new lawyers is to seek out opportunities to volunteer or intern with a legal aid provider. It is critically important that they develop a good understanding of the work as well as an understanding of the challenges faced by the client community.

What are the resources/opportunities that you've valued most as a member of the MSBA?

The networking opportunities. This allows me to be an effective ambassador for SMRLS. Another benefit I derive from being a member of the association is the exposure to a broad array of CLE opportunities at a discount. As a public sector attorney, this is very important. Additionally, I have served on various committees and this has allowed me to help shape the direction of the association for the betterment of all its members. ▲

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MORE THAN A RULE OF THUMB

Your smartphone and the 5th Amendment

By Adam T. Johnson

According to the Pew Research Center, 77 percent of Americans own a smartphone.[1] These devices employ encryption technology when not in use, and require a user's passcode or other biometric feature to unlock them. Encryption, though a blessing for domestic harmony, poses significant barriers to law enforcement investigations.[2] These barriers can be overcome, but it is not only technological barriers that prevent access to these devices. The courts, outpaced by technology—and that's fine, it's not a knock—are grappling with applications of the 4th and 5th Amendments to a wide variety of searches and compulsory processes in the ever-evolving technological landscape.

Last year in *State v. Diamond*, the Minnesota Supreme Court held as a matter of first impression that it is not a violation of the 5th Amendment for a district court to order a criminal defendant to provide a fingerprint or thumbprint so that his smartphone may be unlocked.[3] On the one hand, *Diamond* was not a watershed case. Some might say *Diamond* presents as a somewhat conventional restatement of established Minnesota law allowing for the compulsory production of some kind of non-testimonial evidence, such as appearing in a line-up, having one's body measured, or requiring a defendant to produce a hand-writing exemplar.[4] In this regard, *Diamond* is not all that significant; it is not a cloudburst in 5th Amendment law.

On the other hand—and there are only two hands in this apothegm—a line-up, a measurement of the body, and a hand-writing exemplar are all incapable of decrypting a device like a smartphone. Additionally, a line-up, a body measurement, and a hand-writing exemplar do not constitute acts of production that may betray the contents of a person's mind, and much, much more. So *Diamond* does bring us into new and important (and unsettled) territory. *Diamond* also begs a series of important questions: If the 5th Amendment is not offended by the compulsory process of a thumbprint or fingerprint, is it also constitutional to require a defendant to provide his smartphone passcode, either orally or in writing? If not why, why not? If so, how come? Was *Diamond* correctly decided? What lies ahead? It is the answers to these questions that I attempt to take up presently.

The 5th Amendment

The clause from the 5th Amendment germane to this article is the one prescribing that no person shall be "compelled in any criminal case to be a witness against himself."[5] The Minnesota Constitution contains an identical clause in its Bill of Rights.[6] In short, this clause bars the government from (1) compelling a defendant (2) to make a testimonial communication to the state (3) that is incriminating.[7] The constitutional foundation underlying the privilege is the respect a government must accord to the dignity and integrity of its citizens.[8] The privilege also helps to ensure the appropriate state-individual balance by

requiring the government to "shoulder the entire load" in building and bringing a criminal case.[9] As stated by the Supreme Court in *Estelle v. Smith*, "[t]he essence of this basic constitutional principle is the requirement that the [s]tate which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips."[10] And so we can all remain silent, kind of.[11]

Over the course of our nation's history—but mostly during the 20th century—the 5th Amendment has been continually revisited by jurists and scholars in innumerable contexts. It is a frequent guest in the case law, and it is only natural that it would be. People, both defendant and officer, are wont to gab. In cases where the government seeks to compel some kind of process (say, the production of documents by way of a subpoena), the physical act itself may implicate the protections of the 5th Amendment. This is so because a physical act is deemed testimonial when the act is a communication that "itself, explicitly or implicitly, relate[s] a factual assertion or disclose[s] information."[12] In other instances, an act may *not* be testimonial where the act provides "real or physical evidence" that is "used solely to measure physical properties," or where the act is used to "exhibit physical characteristics."[13]

In these examples, a distinction exists between the testimonial act of producing documents as evidence and the nontestimonial act of producing the body as evidence. This is the distinction that led our own state Supreme Court to hold in *Diamond*, rightly or wrongly, that there was nothing "testimonial" in requiring the defendant to supply his fingerprint. As stated by the court in *Diamond*, there was not "any communicative testimony inherent in providing the fingerprint," and the act did not "reveal the contents of [the defendant's] mind."[14] This is only partially true, which is a variant on saying this may not be true at all. You see, Diamond provided his fingerprint directly onto a seized phone during a court proceeding after being held in civil contempt and warned about the consequences of criminal contempt.

In providing his fingerprint onto the seized device, Diamond committed an "act" that was testimonial in nature: His unlocking of the phone with his finger established that the phone, in fact, belonged to him. In other words, the act conceded that the phone was at one time in his possession and control, and authenticated either ownership or access to the phone and all of its contents.[15] As stated by a federal district court in Illinois, "[w]ith the touch of a finger, a suspect is testifying that he or she has accessed the phone before, at a minimum, to set up the fingerprint password capability, and that he or she currently has some level of control over or relatively significant connection to the phone and its contents."[16]

It is unclear from the Minnesota Supreme Court's opinion in *Diamond* what evidence existed to connect Diamond to the seized cellphone prior to his unlocking it. The opinion states only that the "police lawfully seized a cellphone from [Diamond], a burglary suspect, and attempted to execute a valid warrant to search the cellphone."[17] On the topic of evidence connecting Diamond to the phone, the court of appeals opinion states that Diamond "was booked at the Scott County jail, where staff collected and stored his property, including his shoes and cellphone."[18] It may have been the case that Diamond's possession and control of the phone were undisputed—or, stated differently, that police already knew that the phone belonged to Diamond, making any testimonial aspect in his unlocking it a "foregone conclusion." In any event, the Minnesota Supreme Court did not discuss this doctrine.[19] Instead the Court stated that there was not "any communicative testimony inherent in providing the fingerprint." This is a potential crack in *Diamond's* foundation, which will be discussed more fully below.

The "foregone conclusion" doctrine

The Supreme Court has marked out two ways in which an "act of production" is considered *not* testimonial. The first, as briefly identified above, exists where the act of production does not betray the contents or processes of a person's mind (their knowledge, thoughts, or beliefs). This is the theory that drove the decision in *Diamond*. The second class of cases fall into what has been coined the "foregone conclusion" grouping. Under this doctrine, an act of production is not testimonial, even if the act conveys a fact regarding knowledge, thoughts, or beliefs—say, the existence or location of subpoenaed materials, or ownership over a passcode-protected device—if the government can show with "reasonable particularity" that, at the time it sought to compel the act of production, it already knew of the materials, thereby making any testimonial aspect a "foregone conclusion."[20]

There are two seminal Supreme Court cases that gave rise to, and solidified, the foregone conclusion doctrine: *Fisher v. United States* and *United States v. Hubbell*.[21] Both of these cases are excellently summarized by the Honorable Gerald Bard Tjoflat, U.S. Circuit Judge for the 11th Circuit Court of Appeals, in *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011* (*In re Grand Jury Subpoena Duces Tecum* herein).

In *Fisher*, the Court considered two Internal Revenue Service investigations, one in the 5th Circuit and one in the 3rd Circuit, where the IRS sought to obtain voluntarily prepared documents that certain taxpayers had given to their attorneys.[22] In each investigation, the IRS issued a summons requiring the taxpayer's attorney to hand over the documents, "which included an accountant's work papers, copies of the taxpayer's returns, and copies of other reports and correspondence."[23] In response, attorneys refused to comply, invoking both the attorney-client privilege and their clients' 5th Amendment privilege against self-incrimination. The IRS then brought an enforcement action in district court.

Turning to the question that matters for our purposes here, the Supreme Court treated the taxpayers as retaining possession of the documents.[24] The Court held that the taxpayers' act of production could qualify as testimonial if conceding the existence, possession and control, and authenticity of the documents tended to incriminate them.[25] However, in the cases before it, the Court concluded that the act of providing the subpoenaed documents would not involve testimonial self-incrimination because the IRS was in "no way relying on the truth telling of the taxpayer."[26] This reasoning took root as the foregone conclusions doctrine, which the Court went on to explain as follows:

> It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment.... Surely the Government is in no way relying on the 'truth telling' of the taxpayer to prove the existence of or his access to the documents. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons 'no constitutional rights are touched. The question is not of testimony but of surrender.'[27]

Twenty-four years after *Fisher* and seven years before the first iPhone, the Court decided *Hubbell*.[28] In *Hubbell*, a grand jury investigating the activities of the Whitewater Development Corporation issued

a subpoena *duces tecum* requiring Hubbell to provide certain documents. In response, Hubbell invoked his 5th Amendment privilege, so the government did him the kindness of obtaining a district court order granting him immunity.[29] Hubbell then complied with the subpoena and turned over 13,120 pages of documents.[30] Not long after that, Hubbell was indicted for several federal crimes.

Hubbell moved to dismiss the indictment, arguing that the government could not convict him without the documents that had been provided after the grant of immunity. The district court held a hearing, determined that the government could not show that it had knowledge of the contents of the documents from a source other than the documents themselves, and dismissed the indictment.[31] On review, the Supreme Court concluded that Hubbell's act of production was sufficiently testimonial to trigger 5th Amendment protection because knowledge of the implicit testimonial facts associated with his act of production was not a foregone conclusion.[32] In this way, the Court in *Hubbell* distinguished *Fisher*. As stated by the Court:

> Whatever the scope of this 'foregone conclusion' rationale, the facts of this case plainly fall outside of it. While in *Fisher* the Government already knew that the documents were in the attorneys' possession and could independently confirm their existence and authenticity through the accountants who created them, here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent. The Government cannot cure this deficiency through the overbroad argument that a businessman such as respondent will always possess general business and tax records that fall within the broad categories described in this subpoena.[33]

Beyond paper documents

So far, I have examined two act-of-production cases in which the government sought physical documentary records either in the possession of a person or thought to be in the possession of a person. In *Fisher*, the documents were known to exist, and the taxpayer's testimonial act of providing the documents added nothing to the government's case. In *Hubbell*, conversely, the existence of the documents was not a foregone conclusion, and the defendant was able to stand on his 5th Amendment right to not incriminate himself through the testimonial act of producing documents the government was not privy to.

Judge Tjoflat discussed both of these decisions in *In re Grand Jury Subpoena Duces Tecum*. There, as revealed in part by its name, a grand jury investigating child pornography issued a subpoena *duces tecum* to an individual (the target of the investigation, referred to as "John Doe") requiring him to produce the decrypted contents of his laptop computers and external hard drives.[34] After Doe asserted his 5th Amendment privilege, the government sought, and the district court granted, Doe "act-of-production immunity."[35] This immunity was said to "convey immunity for the act of production of the unencrypted drives, but [did] not convey immunity regarding the United States' [derivative] use" of the decrypted contents of the drives.[36] Doe was later incarcerated for contempt when he appeared before the grand jury and refused to decrypt the drives.

In *In re Grand Jury Subpoena Duces Tecum*, Doe was tracked by police to a hotel room in California as part of a child pornography investigation. A search warrant issued allowing law enforcement to seize all digital media, as well as any encryption devices or codes necessary to access such media. Officers seized two laptops and five external hard drives. The FBI analyzed the digital media, but was unable to access portions of the hard drives. Later, a grand jury issued a subpoena *duces tecum* requiring Doe to produce the "unencrypted contents" of the digital media, and "any and all containers or folders thereon."[37] Interestingly, and of importance, the fact that the hard drives belonged to Doe was not in dispute.[38] Instead of arguing that his act of production would establish *ownership*, Doe argued that by decrypting the hard drives, he would be testifying that he, as opposed to someone else, placed the contents onto the hard drives, encrypted the contents, and could retrieve them. Thus, the question before the court was "whether Doe's act of decryption and production would have been testimonial."[39]

In answering this question, the court looked to both *Fisher* and *Hubbell*, and ultimately concluded that "(1) Doe's decryption and production of the contents of the drives would be testimonial, not merely a physical act; and (2) the explicit and implicit factual communications associated with the decryption and production are not foregone conclusions."[40] The first conclusion is of little debate, as everyone can agree that the physical act of producing a passcode is a testimonial act of production. What matters for the nonce is the court's second conclusion—that the government fell short in its knowledge base, thereby placing *In re Grand Jury Subpoena Duces Tecum* outside the "foregone conclusion" class of cases.

Persuasive to the court was the fact that the government could not articulate, at least to the court's satisfaction, that it knew whether any files were located on the hard drives, and what's more, whether Doe was capable of accessing the encrypted portions of the drives (a curious finding, as it was undisputed that the hard drives belonged to Doe).[41] The problem for the court, therefore, was principally that the government did not know what, if anything, was held on the encrypted drives. This hang-up by the court was likely a result of reading too much into certain language from *Hubbell*, where the government was asking a person to retrieve and produce to the government documents the government was unaware of entirely.

But the provision of a passcode and the physical retrieval of documents are two very different things. In Professor Orin Kerr's estimation, the 11th Circuit's error was in "applying language from cases compelling disclosure of broad classes of documents to the very different case of an order to enter a password to unlock a computer."[42] Professor Kerr went on to state that the error is subtle, but critical, writing, "[i]t's subtle because both cases involve steps that lead to the government accessing a lot of documents. If you look at the cases from 30,000 feet, they look kind of similar. But the error is critical because the testimonial aspects of production in the two cases are vastly different."[43] Professor Kerr goes on to illustrate this distinction in the foregone conclusion cases as follows:

> In particular, the idea that the government must have some idea about what files exist and where they are located makes sense when the government has an order requiring the suspect to hand over a described set of files—but it makes no sense when the government is requiring the suspect to enter a password to access those files itself. When the government is relying on the target to go through his stuff and say which files are responsive to a request, the government is obtaining the suspect's testimony about what files exist and which files are responsive. The suspect has a Fifth Amendment privilege unless that testimony about existence and location of the sought-after files is a foregone conclusion.

When the court order only compels the suspect to enter a password, on the other hand, the government is not obtaining the suspect's testimony about what documents exist, where they are, and whether they comply with the court order. The only implicit testimony is, "I know the password." What files exist, where, and what they say is distinct from that. The government has to find that out on its own. The government has to search the computer and look for the records described in the warrant. It isn't relying on the defendant's testimony about what is on the computer because entering in the password does not imply any testimony about that.

In his 2016 article, from which I have quoted above, Professor Kerr voiced his hope that "courts faced with this issue don't just assume that the 11th Circuit's analysis was correct." At the time, there was a case with a similar question pending in the 3rd Circuit. In that case, *U.S. v. Apple MacPro Computer,* the 3rd Circuit affirmed the district court's order compelling decryption—a disparate result from the 11th Circuit.[44] And yet, *Apple MacPro Computer* was not a retrenchment from the 11th Circuit's framework. Instead, the 3rd Circuit simply found that the government provided "evidence to show both that files exist on the encrypted portions of the devices and that Doe [could] access them."[45] Thus, while the 3rd Circuit did in fact look to the testimonial act of production inherent in the decryption itself, the court was persuaded by the fact that the government had a significant knowledge base of what was contained on the hard drives in question. This fact drove the outcome.

The present state of things

The analysis from the 11th and 3rd Circuits was *not* followed earlier this year, when the Supreme Judicial Court of Massachusetts decided *Commonwealth v. Jones*, in line with the analysis advocated for in Professor Kerr's article.[46] In *Jones*, the government was interested in viewing Jones's lawfully seized cellphone for evidence in his prosecution for human trafficking and prostitution-related offenses. In resolving the 5th Amendment question, the Supreme Judicial Court of Massachusetts held that "[i]n the context of compelled decryption, the only fact conveyed by compelling a defendant to enter the password to an encrypted electronic device is that the defendant knows the password, and can therefore access the device."[47] The court in *Jones*, consistent with Professor Kerr's analysis, deemed irrelevant whether the government knew what the *contents* of the phone were because the only testimonial act was whether the defendant knew the passcode. Thus, under *Jones*, the government in Massachusetts needs only to establish "that a defendant knows the password to decrypt an electronic device before his or her knowledge of the password can be deemed a foregone conclusion under the Fifth Amendment…."[48] Under Massachusetts law, to succeed in compelling a defendant to decrypt a device, the government must show that the defendant knows the password beyond a reasonable doubt. In deciding on this evidentiary standard, the court in *Jones* concluded that using any lower standard of proof would create a "greater risk of incorrectly imputing knowledge to those defendants who truly do not know the password."

A survey of courts reveals a divide on whether, and to what extent, the 5th Amendment is implicated in an assortment of situations involving the compelled production of passcodes and

biometric unlocking features for the purpose of decryption. For example, a federal district court in Illinois ruled that the 5th Amendment bars the compelled production of an individual's fingerprint for the purpose of unlocking a device (this was the opposite of the conclusion reached by our own state Supreme Court in *Diamond*).[49] In the Illinois case, the court stated that it did "not believe that a simple analogy that equates the limited protection afforded a fingerprint used for identification purposes to forced fingerprinting to unlock an Apple electronic device that potentially contains some of the most intimate details of an individual's life (and potentially provides direct access to contraband) is supported by Fifth Amendment jurisprudence."[50] In another case, a federal district court in the District of Columbia ruled that the 5th Amendment is no bar to the government securing a warrant to search and seize devices in a home and at the same time compelling a specific person therein to supply their fingerprints, face, and irises to unlock devices seized.[51]

This article has focused primarily on the dual testimonial act/foregone conclusion framework because it appears to be best suited for application across the various means of decryption. Additionally, this framework has proven both its wisdom and its functionality over time, as technology evolves. This framework imposes a two-part test of asking (1) whether the given act is testimonial or non-testimonial; and (2) if the act is testimonial, whether the testimony inherent in the act is a foregone conclusion.

Our own state Supreme Court did follow this framework in the *Diamond* case, but concluded that the provision of a fingerprint is a non-testimonial, physical act *per se*. It may well have been that, had our Court concluded that the production of Diamond's fingerprint constituted a testimonial act, the same result would have been reached. After all, the fact that Diamond's smartphone belonged to him may have been a foregone conclusion, thus voiding any claim that Diamond's 5th Amendment right was violated.

Diamond was incorrectly decided, in my estimation, because the Court failed to appreciate the testimonial qualities inherent in the act of production, namely, the production of one's fingerprint. The testimony in the act is, "my fingerprint decrypts or 'unlocks' this device," and "I previously set up this encryption." Again, this testimony may have been a foregone conclusion in *Diamond*, but the Court should have recognized the inherent testimonial qualities associated with the act of production. Looking ahead, under *Diamond*, the 5th Amendment is no bar to the police entering a home with a search warrant to seize all devices, and then requiring all occupants, whether two or 20 in number, to place their thumbs and fingers on the devices seized to establish ownership (earlier this year, a federal district court in California held that the 5th Amendment bars this precise activity by police).[52] At the time *Diamond* was decided, the Minnesota Supreme Court observed that neither the Supreme Court of the United States nor any state Supreme Court had addressed the issue presented.[53] In the one year and some months since *Diamond*, several courts have cast doubt on Minnesota's rule, including the Supreme Judicial Court of Massachusetts, the Indiana Court of Appeals, and the federal district courts mentioned above.[54] The United States Supreme Court has yet to resolve the debate.

The decision in *Jones* imposes the dual testimonial act/foregone conclusion framework, and supplies a high evidentiary standard of proof before the government may compel some form of

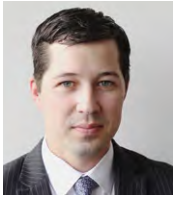
decryption process. But the problem with *Jones* is that it involved compelled decryption by requiring the defendant to actually enter his passcode, rather than supply his finger or thumbprint. The former seems to require a person to disclose the contents of their mind, whereas the latter does not. This is not an insignificant distinction. In *Hubbell*, the Supreme Court analogized the assembly of subpoenaed documents to "telling an inquisitor the combination to a wall safe," rather than "being forced to surrender the key to a strongbox."[55] In conveying the combination to a wall safe, rather than surrendering a key to a strongbox, a person must use the "contents of [their] own mind."[56] Once the contents of a person's mind are involved, it should be axiomatic that the 5th Amendment prevents those processes, in the absence of immunity, from being compelled into oral or typewritten existence.[57] Even if ownership of the device is a foregone conclusion, compelling a person to reveal the contents of their mind and supply their passcode from the mind's inner sanctum runs afoul of the Supreme Court's pronouncement in *Estelle v. Smith*—that the state cannot resort to the expedient of forcing evidence from a person's lips.

In the end, I conclude that the 5th Amendment should provide an unqualified bar, in the absence of a grant of immunity, to the government compelling a person to provide a decryption password or passcode, irrespective of whether the testimonial act of production is a foregone conclusion. If one is protected from telling an inquisitor the combination to a wall safe, one should also be protected from telling an inquisitor the combination to a smartphone. In both instances, the contents of the person's mind are revealed, and that should be the end of the debate.

In other cases—those involving biometric features like fingerprints, thumbprints, iris scanning, and facial recognition—the dual testimonial act/foregone conclusion framework, coupled with the evidentiary standard from the *Jones* case, strikes the right balance. To begin, it creates a straightforward 5th Amendment rule. Additionally, it tends in the direction of requiring the government to "shoulder the entire load" in building and bringing a criminal case. It also avoids the tendency, witnessed in some judicial decisions of late, to bend the 5th Amendment ever closer to the 4th, with arguments grounded in well-meaning, but in the end constitutionally elusive, privacy concerns. The 5th Amendment either fits, or it does not fit. And while it should be flexible in order to meet the exigencies of technological development, it should not be bent and forged anew. It remains to be seen what the Minnesota Supreme Court will do—assuming the question is not first answered by the United States Supreme Court—when presented with the same facts as *Diamond* but where the government seeks a passcode rather than a fingerprint. ▲

Notes

[1] *Mobile Fact Sheet*, Pew Research Ctr.: Internet & Tech. (2/5/2018).
[2] Orin Kerr & Bruce Schneier, *Encryption Workarounds*, 106 Georgetown Law Journal 989 (2018).
[3] *State v. Diamond*, 905 N.W.2d 870 (Minn. 2018).
[4] Minn. R. Crim. P. 9.03, subd. 2(1).
[5] U.S. Const. amend. V.
[6] Minn. Const. art. I, §7.
[7] *Fisher v. United States*, 425 U.S. 391, 408 (1976).
[8] *Schmerber v. California*, 384 U.S. 757, 762 (1966).
[9] *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).
[10] *Estelle v. Smith*, 451 U.S. 454, 462 (1981).
[11] *See e.g. State v. Borg*, 806 N.W.2d 535 (Minn.2011) (holding, as a matter of first impression, that the 5th Amendment privilege against compelled self-incrimination did not prevent the state from presenting evidence during its case in chief of a defendant's failure to respond to a letter sent by a police sergeant).
[12] *Doe v. United States*, 487 U.S. 201, 209-10 (1988) (*Doe II*).
[13] *United States v. Dionisio*, 410 U.S. 1, 7 (1973); *United States v. Wade*, 388 U.S. 218, 222 (1967).
[14] *Diamond*, 905 N.W.2d at 875-76.
[15] *In the Matter of the Search of a Residence in Oakland, California*, 354 F.Supp.3d 1010 (N.D. Cal. 1/10/2019).
[16] *In re Application for a Search Warrant*, 236 F.Supp.3d 1066, 1073 (N.D. Ill. 2/16/2017).
[17] *Diamond*, 905 N.W.2d at 871.
[18] *State v. Diamond*, 890 N.W.2d 143, 145-46 (Minn.App.2017).
[19] In a footnote, the court in *Diamond* cited to a foregone conclusion case, but did so parenthetically and without application to the case before it. *Diamond*, 905 N.W.2d at 878, n. 1.
[20] *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1346 (11th Cir. 2012).
[21] *Fisher*, *supra*; *United States v. Hubbell*, 530 U.S. 27 (2000).
[22] *Fisher*, 425 U.S. at 393–94
[23] *In re Grand Jury Subpoena Duces Tecum*, 670 F.3d at 1342 (citing *Fisher*, 425 U.S. at 394).
[24] *Fisher*, 425 U.S. at 405.
[25] *Id.* at 410.
[26] *Id.* at 411.
[27] *Id.* (quoting *In re Harris*, 221 U.S. 274, 279 (1911)).
[28] United States v. Hubbell, 530 U.S. 27 (2000).
[29] *United States v. Hubbell*, 530 U.S. at 31.
[30] *Id.*
[31] *Id.* at 31-32.
[32] *Id.* at 44-45.
[33] *Id.*
[34] *In re Grand Jury Subpoena Duces Tecum*, 670 F.3d at 1337.
[35] *Id.* at 1338.
[36] *Id.*
[37] *Id.* at 1339.
[38] *Id.*
[39] *Id.* at 1342.
[40] *Id.* at 1346.
[41] *Id.*
[42] Orin Kerr, "The Fifth Amendment Limits on Forced Decryption and Applying the 'Foregone Conclusion' Doctrine," Wash. Post, 6/7/2016 (*https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/07/the-fifth-amendment-limits-on-forced-decryption-and-applying-the-foregone-conclusion-doctrine/*) (last visited 4/8/2019).
[43] Id.
[44] *U.S. v. Apple MacPro Computer*, 851 F.3d 238 (3rd Cir. 2017).
[45] *Id.* at 248.
[46] *Commonwealth v. Jones*, 117 N.E.3d 702 (Mass.2019).
[47] *Jones*, 117 N.E.3d at 705.
[48] *Id.*
[49] *In re Application for a Search Warrant*, 236 F.Supp.3d 1066 (D. N.D. Ill.) (2/16/2017).
[50] *Id.* at 1073-1074.
[51] *Matter of Search of [Redacted] Washington, District of Columbia*, 317 F.Supp.3d 523 (D. D.C. 6/26/2018).
[52] *In the Matter of the Search of a Residence in Oakland, California*, 354 F.Supp.3d 1010 (N.D. Cal. 1/10/2019).
[53] *Diamond*, 905 N.W.2d at 871.
[54] *Seo v. State*, 109 N.E.3d 418 (Ind. Ct. App. 2019).
[55] *Hubbell*, 530 U.S. at 43.
[56] *Id.*
[57] *Schmerber v. California*, 384 U.S. 757 (1966).



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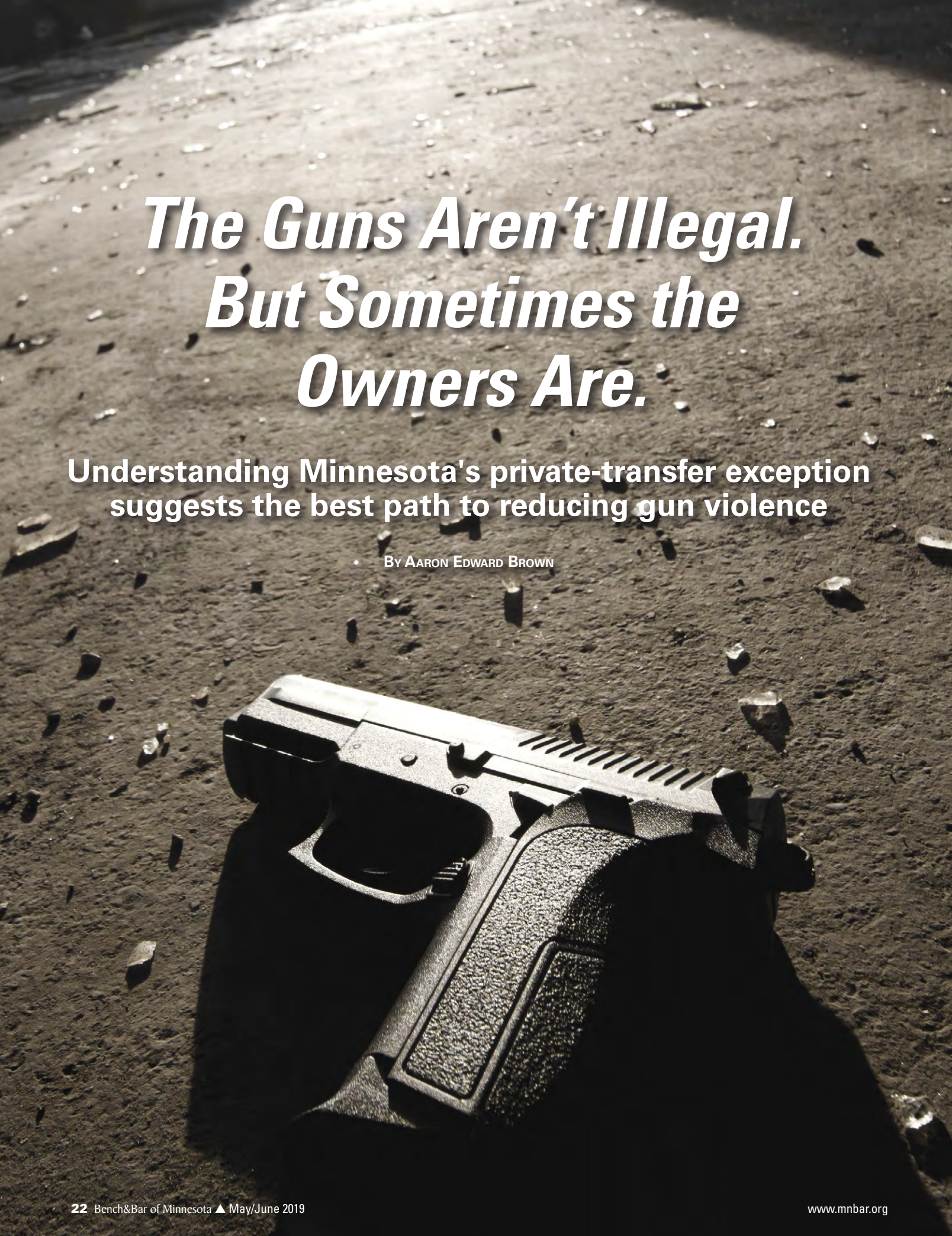

The Guns Aren't Illegal. But Sometimes the Owners Are.

Understanding Minnesota's private-transfer exception suggests the best path to reducing gun violence

By Aaron Edward Brown

Last October, Kanye West was asked during a meeting with President Trump and former NFL legend Jim Brown how to fix the gun violence problem in Chicago. Kanye responded by saying, "The problem is illegal guns. Illegal guns is the problem, not legal guns. We have the right to bear arms." Bradley Buckles, the former director of the Bureau of Alcohol, Tobacco, and Firearms (ATF), made a subtly different point almost two decades earlier, when he noted that "[v]irtually every gun [used in a crime] in the United States *starts off* as a legal firearm." (Emphasis added.) Essentially all the research over the past three decades supports Buckles's statement that firearms become illegal because an individual who eventually obtains the firearm is an ineligible possessor of the firearm and not because the firearm itself was *per se* illegal.

But what about Kanye and his "illegal gun"? Is it one that is illegal because the possessor is ineligible under federal, state, or local law? Or is it one that would be illegal for anyone to possess regardless of their status under the law? This distinction is the first step in understanding which policy options have an opportunity to successfully reduce gun violence in Minnesota and the United States.

In the United States we have what some might call a patchwork of firearm laws. Although the federal government has passed firearm laws that apply to the country as a whole, most states also have their own laws regulating firearms. Under federal law, there are several statutes that attach specifically to firearms, as opposed to the possessor of the firearm. For example, firearms manufactured without serial numbers[1] or firearms with altered or obliterated serial numbers are "illegal" firearms regardless of their possessor's status.[2] It is also illegal to possess or manufacture certain types of weapons, such as fully automatic firearms (commonly referred to as "machine guns"),[3] sawed-off shotguns, and sawed-off rifles, as well as certain accessories such as firearm suppressors, unless you fall under certain limited exceptions.[4] Another example of federal firearm law that applies to the firearm—regardless of the status of the possessor—is the ban on manufacturing, importing, selling, or possessing any firearm not detectable by airport security devices.[5]

But most of the federal firearm crimes committed and charged do not involve machine guns, sawed-off shotguns, or firearms with defaced serial numbers. Instead, at least a bare majority—if not substantially more—of these crimes are committed by guns that are "legal" firearms possessed by an "ineligible person." There are many categories of ineligible persons for purposes of our federal firearm laws, and even more categories if individual states' ineligibility categories are parsed out.[6] Broadly, though, it is illegal for all individuals to sell or transfer[7] a firearm to anyone who

1) has been convicted of (or is currently indicted for) a felony;
2) is a fugitive from justice;
3) is an unlawful user or addict of a controlled substance;[8]
4) has been committed to a mental institution or adjudicated mentally defective;
5) is an alien;
6) has been dishonorably discharged from the Armed Forces;
7) has renounced their United States citizenship;
8) is subject to a qualified order for protection; or
9) has been convicted of a misdemeanor crime of domestic violence.

Minnesota, for example, includes many of the federal firearm prohibitions in its state law dealing with ineligible firearm possessors,[9] but Minnesota has also expanded the prohibitory statuses in many areas, including an expanded category of misdemeanor crimes and certain drug crimes.[10]

Access to firearms by ineligible possessors

As the foregoing suggests, there are many categories of ineligible people for purposes of Minnesota and federal firearm laws. In fact, the number of ineligible persons for purposes of our federal firearm laws is well into the tens of millions.[11] So the question now becomes, how do these ineligible people get access to firearms? The answer is by exploiting loopholes in our laws.

Intervening events: Some people buy a firearm while they are eligible and then, during the time they own that firearm, do something that makes them ineligible. Many states have no process in place for requiring firearm relinquishment, which means that the now-ineligible person will keep their firearm indefinitely until they have an interaction with police or voluntarily relinquish the firearm(s). This happens frequently in the state of Minnesota. One common intervening event involves the issuance of an order for protection.[12] One investigative report found that in 2016 alone, there were 2,937 orders for protection cases in Minnesota that required firearm relinquishment as a matter of law. Yet of those nearly 3,000 cases, there were transfer affidavits in only 119 instances. Although some of these now-prohibited individuals ended up relinquishing or disposing of their now "illegal" firearms without filing the requisite affidavit, many of them simply end up holding on to their firearms until a different intervening event occurs (one that typically involves an arrest after a violent crime).[13]

Private transfers: The private-transfer exception (also commonly referred to as the gun-show loophole or the private-sale loophole) allows for a non-licensed individual to transfer (give, sell, lend) firearms to a different individual in the same state without going through the normal requirements that would apply to a federally licensed firearm dealer (formally known as a Federal Firearms Licensee, or FFL)—requiring the transferee to fill out an ATF form 4473 and submit to a background check.[14] A "non-licensed" seller under federal law is someone who does not "engage in the business of selling firearms."[15]

These sellers will not face criminal repercussions under federal law as long as the seller *does not know*, or *does not have a reasonable basis to know*, that the buyer is prohibited under federal, state, or local law from possessing firearms.[16] Private transfers represent a big problem in affording ineligible individuals access to firearms. Many states have experimented with ways to curb unauthorized transactions via the private-transfer exception, such as enacting statewide universal background checks or, in the case of Minnesota, by establishing criminal penalties for firearm sales when the purchaser later uses the firearm in a violent crime.[17]

Straw purchases: A straw buyer is a person who purchases a firearm on behalf of another person. Straw purchases at a federally licensed firearm dealer (FFL) violate federal law because firearm purchases, in general, require the "buyer" to answer—among other things—whether they are "the actual transferee/buyer of the firearm(s) listed on [the] form."[18] If the "buyer" answers no on this question, then the FFL is precluded from selling to that buyer. Of course, this question—like all of the other questions on the ATF form 4473—is not asked during private transactions because federal law does not require form 4473 or a background check for a private transfer, and many states don't have a background check or ATF-form 4473-like requirement for private transactions. Straw purchases represent a big problem, with one ATF study from the turn of the century concluding that the most common channel for illegal trafficking of firearms was through straw purchases.[19]

Stolen firearms: Firearms are frequently stolen from both private individuals and gun stores, and these weapons make up an estimated 10-15 percent of all guns used in crimes.[20] In fact, from the beginning of 2012 to the end of 2015, it was estimated that approximately 1.2 million firearms (worth nearly half a billion dollars) were stolen.[21] Stolen guns pose a significant risk to society, as they usually end up on the underground market—where they spend years being transferred between people until the web of transfers ends with someone who commits a violent crime with the stolen firearm.[22] One potential problem that muddies the stolen-firearm statistics is that many individuals who have firearms stolen do not report the theft; when they are later contacted by police, after the firearm has been traced, they are unable to identify when or where the firearm was stolen. The frequency with which this happens has caused many experts to infer that after-the-fact claims of theft are a common way for straw buyers to try to avoid criminal liability.[23]

Also worth mentioning are black-market sales and illegally imported or manufactured firearms. The prevailing thought is that both of these occurrences are customary ways for criminals to obtain firearms—but they aren't. Illegally imported or manufactured firearms are not that common; a vast majority of firearms begin their life being sold legally from an FFL, incuding almost all of the firearms that will eventually end up in a criminal's hand.[24] So too with black-market sales, which is defined as a sale that the seller *knows* is illegal under federal law.[25]

Although the vast majority of firearms originally enter the stream of commerce with an FFL selling it to an individual after a background check and paperwork, these firearms are simply too easy to divert out of the legal stream through straw purchases, private transfers, or theft. Although any firearm being transferred to a prohibited person is deeply concerning, perhaps the most worrisome method employed is the private-transfer exception because of the volume of firearms and lack of regulation at the federal level. A 2012 study published in the peer-reviewed journal *Injury Prevention* found that 96 percent of inmates who were convicted of firearm-related offenses obtained their firearms through an unlicensed private seller.[26] This should come as little surprise: Private firearms purchases are fairly common amongst all gun owners, with one 2017 study concluding that 22 percent of current U.S. gun owners who acquired a firearm within the past two years did so without a background check, and a recent survey of 1,613 gun owners found that 42 percent had acquired their most recent firearm without a background check.[27] Suffice it to say a large number of people—people with good intentions and people with bad intentions—use the private-transfer exception to acquire firearms.

Almost three years ago, Eitan Benjamin Feldman was indicted by the United States Attorney for the District of Minnesota.[28] His crime, one that had been charged only twice in the preceding decade by all of the United States Attorney's Offices combined, was illegally selling firearms without a license. Feldman committed this crime by purchasing firearms through online-licensed auction sites. He would then have those firearms sent to a local FFL—in compliance with federal law—where he would fill out the required paperwork and take possession of the firearms. Within days he would then turn around and sell those firearms on Armslist.com without a background check or evidence of a permit from the transferee. Feldman engaged in over 40 separate transactions during the three years preceding his indictment, and at least three of the firearms he sold were used in violent crimes—some just days after being transferred. If Feldman had just sold a few guns over the same time period, he would likely not have been charged under federal law.

In Minnesota, unlike many other states that allow the private-transfer exception, certain private transfers can be a little

more difficult when the purchaser wishes to find a handgun or semiautomatic military-style assault weapon. This is because the transferor will risk some backend criminal liability[29] if a handgun or assault weapon is transferred privately without verification that the transferee was legally able to purchase the handgun or assault weapon.[30] As a consequence, finding people in Minnesota willing to sell a handgun or assault weapon without verifying the transferee's permit to purchase or permit to carry can be somewhat burdensome.[31]

Policy options

With federal inaction leaving the private-transfer exception firmly in place,[32] it is up to states to decide for themselves how to modify the private-transfer exception to ensure the exception is not being abused by ineligible persons. The following are several ideas on how the state of Minnesota could proceed in shoring up the private-transfer exception.

Armslist and gun show background checks: Minnesota has the option of taking key provisions from the almost successful federal legislation known as the Manchin-Toomey Public Safety & 2nd Amendment Rights Protection Act—which, in relevant part, mandated that sales at gun shows and through online platforms like Armslist would require a background check.[33] But the bill continues to exempt friends, family members, neighbors, etc. from a background check. This approach represents a compromise that tried to recognize the importance of stopping the abuse of the private-transfer exception while allowing people to retain the right to transfer firearms to their friends and acquaintances—which is infinitely more reasonable than transferring a firearm to some random person you just met on the internet.

Universal background check: Minnesota also has the option to pass a universal background check, like those already enacted in New Jersey, Connecticut, and a few other states.[34] This type of legislation would require a background check for all transfers involving firearms, regardless of the type of firearm or the terms of the transfer.

Universal permit to purchase: Minnesota might also consider requiring permits to purchase instead of background checks. A permit-to-purchase regime would operate in essentially the same fashion, because in order to receive a permit to purchase, the licensing authority would perform a background check on the individual.[35] In Minnesota, we already have this requirement to a certain degree.[36] To buy either a handgun or assault weapon from an FFL, the individual must have either a permit to purchase or a permit to carry (which acts as a *de facto* permit to purchase as long as it is active). But no permit is required for a private sale, even if the firearm is a handgun or assault weapon.[37]

Mandatory FFL facilitation: Finally, perhaps the most stringent option Minnesota could consider is a mandatory FFL facilitation bill. Such a law would require all transfers (including private transfers) to proceed through an FFL, which would then require the transaction to comply with all of the federal laws for FFL transfers, including a background check, completion of ATF form 4473, and having the FFL keep certain records regarding the transaction.[38]

In assessing these options, Minnesota could decide to include and exclude certain weapon classes (e.g., rifles or shotguns) and certain relationships (parent-child, grandparent-grandchild, sibling, etc.) from any permit or background option. So while legal guns may not be the problem, the ease with which anyone, including those with the worst of intentions, can obtain a "legal firearm" certainly is. It is long past time that we require, at the very least, that a seller who does not know their potential buyer perform, or ask a governmental entity to perform, a cursory due diligence check to ensure the transferee is not prohibited before transferring them a lethal weapon. Transferors may not feel responsible to protect society, but forgoing any sort of verification of status is a stunning example of gross negligence, which will likely continue to contribute to increasing fatalities (and injuries) due to gun violence—a statistical category that now accounts for more deaths in Minnesota than either traffic crashes or opioid overdoses.[39] ▲

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Notes

[1] There remains an exception for registering and placing a serial number on a firearm that you manufactured under federal law.

[2] *See* 18 U.S.C. §922(k); 26 U.S.C. §5861(i).

[3] 26 U.S.C. §5861(d).

[4] To be owned by an individual, that individual must apply for approval from the ATF, pass several fairly involved background checks, register the weapon in the National Firearms Registration and Transfer Act, and pay for the corresponding tax stamp.

[5] 18 U.S.C. §922(p).

[6] For example, Minnesota generally prohibits many of the same categories as the federal law but also includes additional categories like being on the "gang list."

[7] It is also a crime for a buyer to purchase a firearm when they are ineligible to possess or receive the firearm under a similar version of these categories. 18 U.S.C. §922(g)(1)-(9).

[8] And unfortunately for Minnesotans—and residents of 29 other states—that means anyone who uses medical marijuana.

[9] Minn. Stat. §624.713, subd. 1(10)(i)-(viii).

[10] *See* Minn. Stat. §624.713, subd. 1 (11) (those convicted of gross-misdemeanor level crimes that were crimes committed for the benefit of a gang, assaults motivated by bias, false imprisonment, neglect or endangerment of a child, burglary in the fourth degree, setting a spring gun, riot, and stalking—but they are eligible again if it has been more than three years since the conviction and they have not been convicted of any of these crimes again. See Minn. Stat. §624.713, subd. 1 (someone convicted of a misdemeanor or gross misdemeanor drug crime under Minn. Stat. §152.01-.37, unless three years has elapsed without an additional conviction under Minn. Stat. §152.01-.37).

[11] In 2010, it was estimated that at least 19 million Americans had a felony record. Sarah K. S. Shannon, et al., "The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010," 54:5 Demography 1795 (9/11/2017), *https://link.springer.com/article/10.1007%2Fs13524-017-0611-1*. The felony numbers (added together with all of the people who have been convicted of a misdemeanor crime of domestic violence, are subject to a current order for protection, use medical cannabis, or are an alien) would yield a substantially higher total than simply focusing on the at least 19 million felons in the United States.

[12] As discussed above, federal and Minnesota law both make it illegal for someone subject to a qualifying order for protection to possess a firearm while the order is active. Under Minnesota law, unlike federal law, those under an order for protection are required to turn over their firearms within days of the order issuing.

[13] Sometimes the new intervening event will have deathly consequences. *See, e.g.*, *Man Gets 35 Years For Girlfriend's Shooting Death Outside Aurora Legion*, WCCO 4 CBS Minnesota (1/30/2017) *https://minnesota.cbslocal.com/2017/01/30/aurora-legion-shooting-sentencing/*.

[14] 18 U.S.C. §922(s).

[15] 18 U.S.C. §923(a).

[16] *See* 18 U.S.C. §922(d) ("It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person [is prohibited].")

[17] In Minnesota, when someone other than a federally licensed firearm dealer transfers a pistol or semiautomatic military-style assault weapon to another without complying with the transfer requirements of Minn. Stat. §624.7132, they are guilty of a gross misdemeanor if the transferee possess or uses the weapon within one year after the transfer in furtherance of a felony crime of violence, as long as the transferee was prohibited from possessing the weapon under Minn. Stat. §624.713 at the time of the transfer, or it was reasonably foreseeable at the time of the transfer that the transferee was likely to use or possess the weapon in furtherance of a felony crime of violence. Minn. Stat. §609.66.

[18] For an example of Form 4473 see *https://www.google.com/search?q=form+4473&sourceid=ie7&rls=com.microsoft:en-US:IE-Address&ie=&oe=*.

[19] Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives, *A Progress Report: Gun Dealer Licensing and Illegal Gun Trafficking* (1997).

[20] Dan Noyes, "How Criminals Get Guns," Center for Investigative Reporting, PBS.com, *https://www.pbs.org/wgbh/pages/frontline/shows/guns/procon/guns.html*.

[21] Chelsea Parsons & Eugenio Weigend Vargas, *Stolen Guns in America*, Center for American Progress (7/25/2017), *https://www.americanprogress.org/issues/guns-crime/reports/2017/07/25/436533/stolen-guns-america/*.

[22] *See, e.g.*, Keith Allen, Jessica Suerth, and Eric Levenson, "New York Police Officer Fatally Shot in 'Unprovoked Attack'," CNN 7/5/2017 *https://www.cnn.com/2017/07/05/us/nypd-officer-shooting/index.html*. (Detailing how a police officer was executed with a revolver that was stolen four years prior in West Virginia.)

[23] Max Siegelbaum, *Only 11 States Require Gun Owners to Report Stolen Weapons to Police*, The Trace (11/20/2017), *https://www.thetrace.org/2017/11/stolen-guns-reporting-requirements/*

[24] Phillip Cook, How dangerous people get their guns in America, CBSNews.com (10/3/2017), *https://www.cbsnews.com/news/gun-sales-how-dangerous-people-get-weapons/*

[25] For example, an FFL selling a firearm "under the table" without any sort of paperwork or background check.

[26] Katherine Vittes et al., "Legal status and source of offenders' firearms in states with the least stringent criteria for gun ownership," 19 Injury Prev. 26-31 (2013).

[27] Matthew Miller, et al., Firearm Acquisition Without Background Checks, 166 Annals of Internal Medicine 233, 233 (2/21/2017), *http://annals.org/aim/fullarticle/2595892/firearm-acquisition-without-background-checks-results-national-survey*; "What works to reduce gun deaths," The Economist (3/22/2018), *https://www.economist.com/news/united-states/21739193-washington-dithers-and-argues-some-states-show-way-what-works-reduce-gun-deaths*.

[28] Stephen Montemayor, "Federal charges brought against St. Paul man accused of illegally selling guns online" (2/18/2016) *http://www.startribune.com/federal-charges-brought-against-st-paul-man-accused-of-illegally-selling-guns-online/369301451/*.

[29] See infra note 17. It is possible that Feldman could have been charged under this statute, if the following conditions were met: 1) The transferee was prohibited at the time of transfer; 2) the transferee committed a qualifying violent crime within a year of the transfer; and 3) the weapon transferred was a handgun or assault weapon.

[30] This verification process will commonly consist of either a permit to purchase or a permit to carry because either one of these verify that the transferee is able to purchase a handgun or assault weapon at the time of the transfer. Minnesota law also requires that the transferor verify the identity of the transferee. Minn. Stat §624.7132.

[31] The author of this article reached out to around eight people on Armslist.com before he found someone willing to sell him a handgun without evidence of a permit to purchase, carry, or a background check and within 24 hours after initial contact was made. The transfer was for a Springfield XD 45 pistol and 150 rounds of ammunition for the very reasonable price of $345.

[32] The last meaningful attempt was made in the shadows of the Sandy Hook Massacre, and the bill was six votes short of getting the required 60 votes to beat a filibuster. Aaron Blake, "Manchin-Toomey gun amendment fails," Washington Post (4/17/2013) *https://www.washingtonpost.com/news/post-politics/wp/2013/04/17/manchin-toomey-gun-amendment-fails/*.

[33] Molly Moorhead, "A summary of the Manchin-Toomey gun proposal," PolitiFact (4/30/2013) *https://www.politifact.com/truth-o-meter/article/2013/apr/30/summary-manchin-toomey-gun-proposal/*.

[34] See, e.g., 37.R.I. Gen. Laws §§11-47-35 – 11-47-35.2; 28.Conn. Gen. Stat. §§29-33(c), 29-36l(f), 29-37a(e)-(j). 2013 Ct. ALS 3; 35.Or. Rev. Stat. §166.435; Or. Rev. Stat. §166.436 (At gun shows, Oregon law allows a transferor who is not a licensed dealer to contact the Department of State Police directly to conduct the background check).

[35] See, e.g., 41.Haw. Rev. Stat. Ann. §§134-2, 134-13; 47.N.J. Stat. Ann. §2C:58-3; 46.Neb. Rev. Stat. Ann. §§69-2404, 69-2407, 69-2409 (applying to handguns only).

[36] Minn. Stat. §624.7131.

[37] Minn. Stat. §624.7131, subd. 12 (noting that a permit is not required for private sales, but that an individual can still be criminally prosecuted if a handgun or assault weapon was transferred to a prohibited person without evidence of a permit who then goes on to commit a violent felony within one year of the transfer).

[38] See, e.g., 26.Cal. Penal Code §§27545, 27850-28070;

[39] Pat Kessler, "Reality Check: Gun Deaths in Minnesota," CBS Minnesota (2/28/2018) *https://minnesota.cbslocal.com/2018/02/28/reality-check-gun-deaths/*.

COUNTERFEIT BAGS SOLD IN MARKET.

LESSOR BEWARE

Courts are increasingly willing to hold commercial landlords liable for their tenants' trademark infringement

By Bryan Huntington

Recent federal court decisions reflect a trend in favor of expanded liability for commercial landlords premised upon the unlawful conduct of their tenants. The theory of liability applied against landlords, known as "contributory" liability, derives from the federal trademark laws, 15 U.S.C. §1051, *et seq.* (the Lanham Act). Plaintiffs in these cases are the manufacturers and holders of trademarks. Federal judges are upholding jury verdicts awarding millions in damages against landlords predicated on their tenants' trademark infringement. Where Lanham Act liability is established, damage awards can be devastating. Lanham Act plaintiffs have the option to elect treble damages or minimum statutory damages (ranging from $1,000 up to $2,000,000 per counterfeit sale) and attorneys' fees. Furthermore, officers of the landlord can be held *individually* liable for violations. This article analyzes the theory of contributory liability in the landlord-tenant context and concludes by offering five lessons for commercial landlords.

Origins and elements of contributory trademark infringement

Contributory trademark infringement is a judicially created cause of action that originates from the common law of torts. The theory was established by the United States Supreme Court in *Inwood Lab., Inc. v. Ives Labs, Inc.*, wherein the Court concluded that:

BUNCH OF FAKE BRAND SHOES AT MARKET.

> Even if a manufacturer does not directly control others in the chain of distribution, it can be held responsible for their infringing activities under certain circumstances. Thus, if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorially responsible for any harm done as a result of the deceit.[1]

Federal circuit courts have ruled that contributory trademark infringement extends to service contracts.[2] Neither the Supreme Court nor the 8th Circuit has had occasion to consider landlord contributory liability, so the Minnesota practitioner must look to foreign authority to understand the mechanics of such a claim where a landlord is the defendant. Case law generally considers four factors, including whether the landlord:

1. had sufficient control over the instrumentality used to infringe;
2. possessed the requisite knowledge of trademark infringement activity;
3. continued to supply its service despite said knowledge; and
4. took sufficient remedial steps to stop the infringing activity.[3]

The first factor (sufficient control over the instrumentality) and third factor (continued supply of services) are easily established in landlord-tenant cases because of the landlord's ongoing provision of physical space, utilities, parking, advertising, or customers to its tenant(s). Ac cordingly, court decisions in this context focus upon the second (knowledge of infringement) and fourth (remedial steps) factors. These are analyzed in further detail below.

Knowledge of trademark infringement

Courts have found a duty for landlords to "avoid providing spaces to counterfeiters who the owner *knows or has reason to know are selling* counterfeit goods."[4] A landlord's knowledge that a particular counterfeit good is being sold at a particular location may satisfy the knowledge requirement.[5] Establishing that a landlord is merely negligent with respect to ongoing trademark infringement is insufficient as a matter of law.[6] Absent a landlord's actual or constructive knowledge of infringement, a landlord has no affirmative duty to take precautions against the sale of counterfeit goods.

Demonstrating a landlord's willful blindness to a tenant's trademark's infringement satisfies the knowledge requirement. To be "willfully blind, a person must suspect wrongdoing and deliberately fail to investigate."[7] Landlords cannot close their eyes to trademark infringement. The willful blindness standard is subjective: Of consequence is what the landlord knew and what the landlord did with the information.

The extent and nature of the infringement bears upon the landlord's knowledge: "'If the infringement is serious and widespread, it is more likely that' the defendant 'knows about and condones' the infringing activity."[8] A landlord's receipt of complaints regarding alleged infringement may be used as evidence to establish the knowledge requirement. Furthermore, law enforcement activity on the leased premises (e.g., stings, arrests, execution of search warrants) is relevant to the landlord's knowledge.[9]

Remedial steps to stop infringement

Where the knowledge factor is satisfied, a landlord must prove it took genuine and concrete actions to eradicate infringement. Landlords may be required to exercise contractual remedies such as default and eviction of tenants violating the law. Two recent federal cases—*Omega SA v. 375 Canal, LLC* and *Luxottica Grp., S.P.A. v. Airport Mini Mall*—show that courts are strongly inclined to let juries decide the reasonableness of the landlord's efforts.

In *Omega SA v. 375 Canal, LLC*, the landlord moved for summary judgment arguing that it took reasonable remedial steps as a matter of law, including: (1) language in its leases prohibiting tenants from selling counterfeit merchandise and prohibiting subleasing; and (2) after landlord learned of an instance of counterfeit sales, landlord served a notice of default, followed by a notice of termination, and then initiated legal action against its tenant. Despite all this, the court denied summary judgment and the jury held the landlord liable for $1.1 million.

Similarly, in *Luxottica Grp., S.P.A. v. Airport Mini Mall*, the landlord argued in a post-trial motion that the following circumstances absolutely barred contributory liability:

1. Landlord's inclusion of provisions in its leases prohibiting the sale of counterfeit goods;
2. landlord's receipt of assurances from tenants that merchandise was legitimate;
3. landlord's agents' warnings to tenants that landlord would evict if there was evidence of counterfeit sales;
4. landlord's distribution of fliers informing tenants that the distribution of counterfeit goods was prohibited;
5. landlord's direction to tenants that certain products should not be sold unless tenants could prove that they were authorized dealers of those products;
6. landlord's request for assistance from the plaintiff trademark holder's investigator to identify tenants engaged in the sale of counterfeit goods; and
7. landlord's attempt to secure information from law enforcement regarding the sale of counterfeit goods.

Despite these precautions and remedial measures, the jury returned a verdict of $1.9 million against the landlord and individuals associated with the landlord. The landlord's motion for judgment notwithstanding, the verdict was rejected because the court ruled the jury could reasonably conclude the landlord had "deliberately failed to take serious, corrective action in light of what was known from the various notice letters and law enforcement

raids."[10] The court also affirmed the jury's conclusion that individuals associated with the landlord were individually liable for contributory trademark infringement. The court observed that the standard for individual liability in this context is whether the person "actively participated as a moving force in the decision to engage in the infringing acts, or otherwise caused the infringement as a whole to occur."[11]

Lessons for commercial landlords

Court decisions sustaining substantial jury verdicts against commercial landlords for contributory infringement hold five significant lessons for landlords:

1. Unlike in other contexts, the lease agreement will not absolutely shield the landlord from liability. Even if the lease expressly prohibits the sale of counterfeit goods, such a clause has been held not sufficient for the landlord to secure an early exit from this type of suit.
2. If a landlord has contractual power to default or terminate a tenant based upon the tenant's sale of counterfeit goods, failure to exercise that power will be used against the landlord. A landlord's renewal of a tenant with a history of trademark infringement will be used as evidence of the landlord's willful blindness to trademark infringement.
3. Courts expect landlords to take remedial steps to counter infringement that are proportional to the infringement. If infringement is widespread and continuing over a lengthy period of time, the landlord may have exposure no matter the remedial steps taken. Landlords must not permit these situations to fester.
4. A landowner granting leases to multiple tenants operating in a common space need not know which particular tenant is engaged in infringement for the landlord to be liable for contributory infringement. Instead, it may be sufficient if the landlord knew that a particular counterfeit product was being sold at a particular location.
5. The potential for individual liability for persons associated with the landlord is greatly increased compared to other contexts. The Lanham Act plaintiff need not prove the elements associated with piercing the corporate veil in order to recover against related individuals and officers.

Commercial landlords can expect to see the number of contributory infringement claims grow as news of the victories achieved against landlords is disseminated around the bar. Landlords with reason to believe infringing activity is occurring should take swift and deliberate action to stomp it out. ▲

Notes

[1] 456 U.S. 844, 854 (1982).
[2] *See Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 103-104 (2d Cir. 2010); *Hard Rock Café Licensing Corp. v. Concession Svcs., Inc.*, 955 F.2d 1143, 1149 (7th Cir. 1992) (holding that Lanham Act applied to owner of flea market).
[3] *Omega SA v. 375 Canal, LLC*, No. 12-civ-6979, 2016 WL 7439359, at *2 (S.D.N.Y. 12/22/2016).
[4] *Louis Vuitton Malletier v. Eisenhauer Road Flea Market, Inc.*, No. SA-11-CA-124-H, 2011 WL 13237799, at *4 (W.D. Tex. 12/19/2011) (emphasis in original).
[5] *Omega SA*, 2016 WL 7439359, at *2.
[6] *Hard Rock Café Licensing Corp.*, 955 F.2d at 1149.
[7] *Id.* (citation omitted).
[8] *Luxottica Grp., S.P.A. v. Airport Mini Mall, LLC*, 287 F.Supp.3d 1338, 1342 (N.D. Ga. 2017) (appeal pending) (citation omitted).
[9] *See id.* at 1342 (observing that "[a] landlord's knowledge of infringing conduct by its tenants may come from raids by law enforcement agencies[.]"); *Coach, Inc. v. Gata Corp.*, No. 10-cv-141, 2011 WL 2358671, at *8 (D.N.H. 6/9/2011) (determining that raids on the premises, arrests of licensees and confiscation of counterfeit goods was sufficient to establish willful blindness).
[10] *Luxottica Grp., S.P.A.*, 287 F.Supp.3d at 1345.
[11] *Luxottica Grp., S.P.A.*, 287 F.Supp.3d at 1348.

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Don't Be The Next LUNDS & BYERLYS

Lessons learned from the *Lunds* shareholder litigation

By Janel Dressen

On March 27, 2019, the Minnesota Supreme Court denied review in the *Lunds* litigation that spanned more than four years and resulted in the largest reported fair value buyout award to a minority shareholder in Minnesota under Minn. Stat. §302A.751 (Section 751).[1] The history leading to the litigation, the litigation itself, and the courts' decisions in the case offer many important lessons for all private company business owners, business lawyers, and business litigators.[2]

In December 2014, Kim Lund, as a 25 percent beneficial owner, commenced a Section 751 case based upon the frustration of her reasonable expectations of liquidity and financial independence from the Lunds and Byerlys grocery store businesses. She commenced a lawsuit against the companies and her brother, Tres Lund—who was in control of the businesses—after 20 years of clearly articulating her expectation of an exit plan (specifically, that her beneficial ownership interests in the companies be separated from the family business so she could engage in charitable and philanthropic pursuits). The Lund family worked on developing an exit plan without any indication that Kim could not get out as an owner or that the family wealth equally gifted to her by her grandparents and father would have to remain invested in the Lund's enterprise indefinitely. Kim's expectations, as well as her siblings' and the companies' support of those expectations, were confirmed in numerous documents, many of which included the words of her siblings and company management. Ultimately, after 18 months of discovery, the district court granted Kim Lund's buyout motion, ordering that she was entitled to a fair value buyout because her brother, Tres Lund, and the companies frustrated her reasonable expectations to financial independence and liquidity.[3]

Lesson 1: Business owners need to understand the reasonable expectations doctrine.

In order to fully appreciate the lessons to be learned from the *Lunds* litigation as a business owner or an attorney advising Minnesota private businesses and business owners, the legal genesis of this family business dispute is important. The heart of the *Lunds* case turned on the "reasonable expectations" doctrine as defining the "unfairly prejudicial" conduct that led the district court to order a fair value buyout award to Kim Lund under Section 751, subd. 1(b)(3).

Minnesota does not stand alone in the adoption of the reasonable expectations doctrine. More and more jurisdictions are adopting a reasonable expectations standard in business separation and dissension cases. In fact, about one-half of U.S. jurisdictions apply a "reasonable expectations" approach to oppression, unfair prejudice, and/or breach of fiduciary duty claims.[4]

While the Minnesota Legislature has not defined what constitutes "unfairly prejudicial" conduct, judicial authorities and the Reporter's Notes to Section 751 dictate that the phrase "unfairly prejudicial" as used in Section 751 is to be interpreted liberally.[5] The *Lunds* courts emphasized this tenet of Section 751 law in their decisions.[6]

The heart of the Lunds case turned on the "reasonable expectations" doctrine as defining the "unfairly prejudicial" conduct that led the district court to order a fair value buyout award to Kim Lund.

The Minnesota Supreme Court first applied the reasonable expectations doctrine—previously adopted by the Minnesota Court of Appeals in several decisions—in 2011.[7] The Court affirmed that acting in an unfairly prejudicial manner "*includes* conduct that violates the reasonable expectations of the minority shareholder."[8] While the "reasonable expectations" doctrine was not new law applied in the *Lunds* case, the doctrine was applied to a set of facts not previously presented in any published or unpublished Minnesota decision.[9]

One mistake many lawyers make in Section 751 cases is to assume that the section applies only to a "freeze-out" of a minority shareholder. That assumption is not correct. Neither Section 751 nor Minnesota jurisprudence have held that any particular expectations are *per se* unreasonable. Businesses, therefore, need to understand the development of shareholder expectations and manage those expectations. Indeed, the district court held that Tres Lund and the companies "have an ongoing obligation toward the other Lund siblings/shareholders to meet their reasonable expectations."[10]

Defendants argued that Kim's expectations of liquidity and financial independence were not reasonable because the companies did not "freeze" her out of the companies, and her "personal desires" were counter to the reasonable expectations Minnesota law recognizes. But the district court rejected defendants' arguments and aptly noted that varying fact patterns were "anticipated when section 751 was amended so as to include broader remedial flexibility than the previous versions" and the only prerequisite to application of Section 751 is the existence of a closely held corporation.[11] Minnesota law does not establish the reasonable expectations; the conduct, words, and actions of the parties do.

So how do reasonable expectations develop? Importantly, reasonable expectations are not the "mere subjective hopes of a shareholder, but must be determined *objectively*, based on review of written and oral agreements among shareholders, as well as the conduct of the parties. The

reasonable expectations of a particular shareholder will vary depending on the circumstances and the nature of the corporation... Those expectations are not limited to traditional shareholder rights such as notice, information, voting, and dividends."[12]

In this regard, the district court and the court of appeals rejected defendants' arguments that Kim could not have a reasonable expectation to liquidity because: (1) the dominant characteristic of a closely held business is the lack of a public market for its shares; and (2) a buy-out remedy to Kim would discourage close corporations from accommodating or even discussing a shareholder's request for liquidity because any consideration could later be found to establish the shareholder's reasonable expectations. Both of these arguments reflect a misunderstanding of Section 751 and in particular the reasonable expectations doctrine.

As to the first argument, there is nothing in the Minnesota Business Corporations Act or in the law providing that a private company cannot purchase shares from a shareholder.[13] The second argument ignores that Section 751 gives the district court the authority and discretion to evaluate and balance the equities before it, and determine, based upon all of the facts and circumstances, whether an expectation to liquidity was reasonable. *Lunds* did not turn on a simple discussion among the shareholders about purchasing Kim's shares; rather, the district court's determination was based on the decades-long conduct of the parties and the defendants' decades-long assurances to Kim that an exit plan would be provided. The conduct of the parties is key and should be considered in the determination of reasonable expectations.

Lesson 2: Written agreements are not dispositive of expectations in all circumstances.

Section 751 subd. 3a provides that in determining whether to order equitable relief to a shareholder, including a fair value buy-out, "any written agreements, including employment agreements and buy-sell agreements, between or among shareholders or between or among one or more shareholders and the corporation are presumed to reflect the parties' reasonable expectations concerning matters dealt with in the agreements."

The Lunds shareholders entered into Transfer Restriction Agreements (TRAs) providing that all shareholders had to consent to the transfer of shares by a shareholder. Defendants argued that the TRAs made Kim's liquidity expectation unreasonable as a matter of law because all shareholders did not agree that her shares should be purchased by the companies. The district court and the court of appeals rejected defendants' argument. The reasonable expectations of a minority shareholder "frequently include understandings which are not articulated in the corporate documents."[14] The district court considered the TRAs, as well as the companies' bylaws and the shareholder trust agreements, and held that "the words, conduct, and history of the parties shed more light on Kim's reasonable expectations than do the trust and corporate governance documents. Tres, in particular, as well as [the chief administrative officer, secretary and treasurer of the Lund Entities], have continuously contributed to Kim's belief that an exit strategy was in the works, wherein she would gain liquidity and financial independence from the Lund Entities."[15]

In analyzing the TRAs and other corporate documents, the court of appeals highlighted the fact that the documents did not prohibit transfers and, in the case of the TRAs, actually authorized a sale of interests by a shareholder. Thus, the district court had to assess the communications and conduct of the parties to determine if Kim's liquidity expectations were reasonable.[16]

In order to dictate "reasonable expectations," any agreements between the shareholders need to expressly eliminate the expectation at issue in order to govern the analysis. And it is not enough to have an agreement in place if the shareholders do not follow it and their conduct demonstrates a course of conduct and dealing inconsistent with the agreements entered into. In such circumstances, the statutory presumption of the written agreements may be overcome.

Lesson 3: Minority shareholders have rights and may need protection by the courts if the company and its shareholders have not implemented planning to address the rights of the minority.

Throughout the litigation, the Lunds companies and Tres Lund continuously emphasized Kim's role as a minority shareholder as though that meant she had limited expectations and virtually no rights. Businesses and controlling owners should not make the same mistake. "Minority shareholders are in a vulnerable position."[17] The district court stressed that the defendants' emphasis on Kim's "limited role as a minority shareholder" was wrong: "Defendants are wrong to rely on Kim's vulnerabilities in making their argument that, essentially all is well at Lunds. Emphasizing the limitations of Kim's voting rights, Defendants highlight the necessity of an equitable remedy in this situation. Minority shareholders in a closely-held company are the exact persons section 751 was created to protect..."[18]

The district court further observed from the evidence that: (1) "the relationship among the Lund siblings had steadily and sadly deteriorated;" (2) "Family discussions, which once appeared candid and collegial, have devolved into an entrenched legal battle;" and (3) "for at least 15 years, Tres and Kim have been unable to effectively address their divergent expectations as beneficial owners,

shareholders, and co-trustees, and the relationships and dealings among the siblings have become increasingly acrimonious as the years have passed."[19]

The district court also addressed the need for family business planning. "In a family setting such as this, it is also prudent corporate planning, as has been recognized over the years by [professionals], to ensure the wellbeing of the Lund Entities in the face of aging grandchildren/shareholders and to properly prepare for any life changes that could trigger additional liquidity needs. A court-ordered buyout—which will provide necessary closure to the parties and will galvanize the development of a clear plan to address the long-term needs of the company and its remaining beneficial owners/shareholders—is an appropriate equitable remedy under the circumstances."[20]

Rather than implementing planning that incorporated Kim's reasonable expectations as defendants assured Kim they would do, the defendants instead focused on the "divide" between Kim and her siblings, repeatedly arguing to the district court that on every issue, "Kim stands alone." The district court found this to be another basis upon which equitable relief was appropriate:

> "[S]eeking to bolster their claim that Kim's expectations are unreasonable, Defendants overstate the divide between Kim and her siblings, implying an unequivocal "us" versus "her" situation. *** The reasonableness of Kim's expectations does not hinge on whether her siblings have the exact same objectives for themselves as shareholders and beneficial owners of the Lund Entities. The conduct and words of the parties define what of Kim's expectations are "reasonable" in this case, and the evidence indicates that all individuals involved were well versed in and, to varying degrees at various times, supportive of Kim's desire for independence and liquidity. The fact that Kim is the only sibling pursuing complete independence from the family business does not make her expectations unreasonable."[21]

If there is dysfunction and disharmony among shareholders in a closely held business, it is prudent to consider, plan for, and address those matters proactively, rather than ignore such matters by employing internal reasoning that a minority shareholder has limited rights. That kind of thinking is a mistake under Minnesota law. It would be equally prudent for closely held companies to understand, plan for, and address the varying differences in shareholder expectations rather than treating a shareholder who holds differing views as "standing alone."

Lesson 4: Transparency, not appeasement, should be the objective.

The Lund defendants made a number of poor decisions before Kim commenced litigation. Had they avoided such decisions and actions, the parties may have been able to resolve their differences by a negotiated resolution, rather than a forced resolution dictated by Hennepin County District Court Chief Judge Ivy Bernhardson. For example, before the litigation was commenced, defendants implemented a partial redemption plan providing that the Lund siblings could elect to sell a limited portion of their shares in the entities for a total of up to $8,000,000 for all four owners. Such a partial, limited redemption offering, together with the manner in which it was implemented, had many flaws—resulting in Kim's concluding that she had no other viable option but to commence litigation.

The district court addressed the shortcomings of the offering: "[t]he partial redemption offer was inconsistent with what Kim had reasonably desired since at least the early 1990s—full divestiture of her trust assets from the Lund Entities, at a fairly valued price."[22] The court of appeals also weighed in on the partial, limited redemption offering and held that it did not create a disputed fact requiring a trial: "[o]ffering a single, partial redemption over a 20-year period when all parties understood that Kim would achieve complete liquidity established frustration of her reasonable expectations as a matter of law."[23]

Second, to make matters worse, when implementing the single, partial redemption offering, the companies refused to allow Kim to attend a board meeting during a discussion about the offering and refused to give her communications containing the valuation of professionals employed by the companies to value the company stock for the redemption offering. This lack of transparency by the companies served to heighten the lack of trust by Kim in the companies' treatment of her as a shareholder, and to undermine any confidence that the redemption would be fair to her.

Had the Lund Entities and Tres Lund acted with transparency, rather than insincere appeasement, the parties may have been able to resolve the matter without litigation and without suffering the negative consequences of damage to the family relationships and to the reputation of the business in the public eye.

Lesson 5: Family business disputes get resolved by making a compromise business deal and setting aside egos and emotions.

One of the most fascinating, yet tragic, facts about the *Lunds* case is that the parties did not engage in a single settlement discussion after Kim commenced litigation. In business litigation, that is virtually unheard of. However, because Kim Lund was requesting liquidity and defendants were solely focused on keeping Kim Lund captive as a shareholder, the parties were at a standstill. Very rarely is it beneficial to the company and its other shareholders to insist that a shareholder wanting separation remain a shareholder, particularly when the company and/or its shareholders are in a financial position to fund, on terms and conditions, a separation. In that respect, it is not much different from spouses seeking a divorce.

Avoiding litigation when a shareholder dispute arises, or resolving a shareholder dispute after litigation has commenced, undoubtedly requires compromise by everyone, and most importantly, a recognition that the parties are making a business deal. With family businesses in particular, that means the parties must set aside their emotions and their desire for control to reach a deal that results in a permanent separation.

The benefits of a negotiated resolution in these cases are significant, as are the risks of a failure to compromise. A compromise resolution avoids the parties fighting over and wasting their own assets as well as the collateral damage to family relationships and the distraction and reputational harm to the business and business owners. To state the obvious, one side of the equation cannot make a business deal. It takes all hands on deck to compromise—and in these cases, compromise can mean the difference between saving and permanently losing important relationships and between protecting and causing undue harm to a successful business. The stakes are high. Employing counsel and advisors who understand this area of the law, and the risks involved, is therefore imperative. ▲

Notes

[1] *Lund v. Lund*, 924 N.W.2d 274, 2019 WL 178461 (Minn. Ct. App. 1/14/2019), *review denied* (3/27/2019).

[2] There are many legal and business lessons that can be learned from the *Lunds* litigation, not all of which can be covered in the space limitations of this article. For example, this article does not address any of the lessons learned on valuation and trustee matters, which were the subject of a trial, or the award of attorneys' fees, which is currently on remand before the district court.

[3] *Lund v. Lund*, 10/4/16 Buy-Out Order (Dist. Ct.) at 23.

[4] *See* 2 Close Corp and LLCs: Law and Practice §9:18 (Rev. 3d. ed.) (Nov. 2018 Update), *O'Neal and Thompson's Close Corporations and LLCs, Statutory and judicial alternatives for closely held entities wracked by dissension*.

[5] *U.S. Bank N.A. v. Cold Spring Granite Co.*, 802 N.W.2d 363, 378 (Minn. 2011); Minn. Stat. §302A.751, Reporter's Notes (1982-1984) ("This change altered the grounds for involuntary dissolution or buy-out on motion to include circumstances when the directors *or* those in control of the corporation (a deliberately vague term not necessarily referring only to majority shareholders) act in an 'unfairly prejudicial' manner towards any shareholder in that person's capacity as a shareholder, director, officer, or employee. This is a more liberal rule than 'persistently unfair,' which required repeated adverse results before a shareholder could sue. Now only one instance is required.")

[6] *Lund*, 924 N.W.2d at 280; *Lund v. Lund*, 10/4/16 Buy-Out Order (Dist. Ct.) at 5.

[7] *Id.; Berreman v. W. Publ'g Co.*, 615 N.W.2d 362, 374 (Minn. Ct. App. 2000); *Gunderson v. Alliance of Computer Prof'ls, Inc.*, 628 N.W.2d 173, 184 (Minn. Ct. App. 2001); *see also* Minn. Stat. §302A.751, subd. 3a, which states that the Court "*shall* take into consideration the duty which all shareholders in a closely held corporation owe one another to act in an honest, fair, and reasonable manner in the operation of the corporation and the reasonable expectations of all shareholders as they exist at the inception and develop during the course of the shareholders' relationship with the corporation and with each other."

[8] *Cold Spring Granite Co.*, 802 N.W.2d at 378-79.

[9] It is important to note that violation of a shareholder's "reasonable expectations" is not the sole source of determining "unfairly prejudicial conduct." The *Cold Spring Granite* court left open the possibility that "conduct other than conduct violating the reasonable expectations of the shareholder may also be unfairly prejudicial." *Cold Spring Granite*, 802 N.W.2d at 379, n.10.

[10] *Lund v. Lund*, 10/4/16 Buy-Out Order (Dist. Ct.) at 22.

[11] *Id.* at 6-7.

[12] *Id.* at 11.

[13] *Lund*, 924 N.W.2d at 281.

[14] *Lund v. Lund*, 10/4/16 Buy-Out Order (Dist. Ct.) at 11.

[15] *Lund v. Lund*, 10/4/16 Buy-Out Order (Dist. Ct.) at 12.

[16] *Lund*, 924 N.W.2d at 280-81.

[17] *Id.* at 282.

[18] *Lund v. Lund*, 10/4/16 Buy-Out Order (Dist. Ct.) at 24.

[19] *Lund v. Lund*, 10/4/16 Buy-Out Order (Dist. Ct.) at 25.

[20] *Id.* at 24, 26.

[21] *Id.* at 20.

[22] *Lund v. Lund*, 10/4/16 Buy-Out Order (Dist. Ct.) at 23.

[23] *Lund*, 924 N.W.2d at 281.

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Landmarks in the Law

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COMMERCIAL & CONSUMER LAW

JUDICIAL LAW

Do not sit on your rights. Assume you have just received ordered goods, inspected them, and found the goods are seriously deficient. Extremely upset, you vow never to deal with the seller again and throw the goods out. That is exactly what not to do—you now can owe the purchase price! Why?

The applicable law, Article 2 of the Uniform Commercial Code, affords a remedy here even if the seller provided no express warranty; you can reject the goods for breach of the implied warranty of merchantability, or fitness for a particular purpose if applicable, and if neither are disclaimed. See UCC §§2-601 – 2-607 (unless there is a limitation of remedy—UCC §§2-718 and 2-719), and UCC §§2-314, 2-135, and 2-316. In *SunOpta Grains and Foods Inc. v. JNK Tech Inc.*, 97 U.C.C. Rep. Serv. 2d 279, 2018 WL 6045261 (D. Minn. 2018), the buyer sought to avoid payment for a shipment of soybeans allegedly for having germination rates of less than 85% as required by contract, which assertedly substantially impaired their value. The buyer had received the soybeans in August, but the buyer did not raise the alleged too-low germination rate until November. At that point the soybeans had been in the buyer's possession for three months. That would be too late for rejection and instead constituted acceptance of the shipment, and therefore an obligation to pay for the shipment. See UCC §§2-606(b), 2-607(1).

Even so, a buyer may have another chance to avoid payment if the buyer has a right to revoke acceptance, and the buyer in the case asserted that right. See UCC §2-608. However, revocation of acceptance must occur before any substantial change in the condition of the goods not caused by their own defects. The court held the soybeans' germination rates, which tested above 80% when in the seller's control, if they declined as alleged, had experienced a substantial change in their condition during the delay before the attempted revocation, and that precluded revocation. See UCC §2-608(2).

Such a ruling, however, does not preclude a recovery of damages, only the remedy of revocation. See UCC §§2-714 and 2-607(3)(a). Unfortunately the buyer also lost here, since the soybeans had tested at a germination rate above 80% when in the seller's control, and if the rate was lower after the buyer had been in control for three months and the goods had been in unknown storage and transport, any decrease could not be attributable to the seller.

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CRIMINAL LAW

JUDICIAL LAW

Robbery: Jury need not agree which alternative means was used to commit first-degree aggravated robbery. Appellant was convicted of first-degree aggravated robbery after a jury trial. The evidence at trial showed appellant hit the victim in the head with a baseball bat before taking a pocket knife from the victim. The district court instructed the jury they could find appellant guilty of first-degree aggravated robbery either because he was armed with a dangerous weapon or because he inflicted bodily harm upon the victim while committing a robbery. Appellant argues the jury should have unanimously decided whether he was armed with a dangerous weapon or inflicted bodily harm upon the victim.

Jury verdicts in criminal cases must be unanimous. However, "the jury need not always unanimously decide which of several possible means [a] defendant used to commit [an] offense in order to conclude

that an element has been proved beyond a reasonable doubt." *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002). Minn. Stat. §609.245, subd. 1, provides that "whoever, while committing a robbery, is armed with a dangerous weapon…, or inflicts bodily harm upon another, is guilty of aggravated robbery in the first degree…" The issue here is whether this statute, specifically the phrase "is armed with a dangerous weapon…, or inflicts bodily harm upon another," defines separate elements of the offense and, therefore, separate crimes of first-degree aggravated robbery, or defines alternative means of committing first-degree aggravated robbery.

The court of appeals finds the plain language of the statute manifests a legislative intent to establish one crime that can be committed in alternative ways. The aggravated robbery statute clearly states what the offense is, and, before that, in one sentence, lists the acts or alternative circumstances that result in the commission of the crime. Thus, the court holds that the jury was not required to specifically or unanimously agree which of the alternative means of committing first-degree aggravated robbery was employed by appellant, and the district court's instructions were proper.

Next, the court considers whether the Legislature's articulation of alternative means of committing first-degree aggravated robbery violates due process. The court finds that the alternative means are not distinct, dissimilar, or inherently separate. The court also notes that the breadth of possible conduct embodied in the first-degree aggravated robbery statute is narrow and includes behaviors that have similar degrees of seriousness. The court ultimately concludes that the alternatives in the first-degree aggravated robbery statute are consistent with fundamental fairness. Appellant's conviction is affirmed. ***State v. Lagred***, 923 N.W.2d 345 (Minn. Ct. App. 2/11/2019).

■ **Robbery: "Carrying away" is act of moving personal property from location of "taking."** A wine shop employee observed appellant and another woman put bottles of liquor in their handbags. The employee and appellant struggled and one bottle fell out of her handbag, breaking on the floor. The struggle continued outside the store. The employee was able to remove the remaining bottles of wine from appellant's handbag, after which appellant ran away. Appellant was found guilty of simple robbery and she challenges the sufficiency of the evidence to sustain her conviction.

Minn. Stat. §609.24 states: "Whoever… takes personal property from the person or in the presence of another and uses or threatens the imminent use of force against any person to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property is guilty of robbery…" Appellant argues she did not overcome the employee's resistance or compel his acquiescence in the carrying away, because the employee took the wine and appellant left emptyhanded.

The court of appeals notes that simple robbery requires only that use of force or threats precede or accompany either the taking *or* the carrying away, which means the "taking" and the "carrying away" are separate acts. "Carrying away" is not defined in Minn. Stat. §609.24, but the court deciphers its plain and ordinary meaning from dictionary definitions, concluding that "carrying away" is the act of moving personal property from the location of the taking. The record in this case shows appellant's threats and attempt to bite the store employee during the struggle overcame his resistance, allowing appellant to carry some of the wine outside of the store, which was the location of the taking. Thus, the evidence was sufficient to sustain appellant's conviction. ***State v. Townsend***, 925 N.W.2d 280 (Minn. Ct. App. 3/11/2019).

■ **Criminal procedure: No absolute right to withdraw valid guilty plea after "put formally before the court."** At his plea hearing, appellant pleaded guilty to violating an OFP. The district court deferred accepting his plea until sentencing. At the sentencing hearing, appellant sought to withdraw his guilty plea because, as his attorney informed the court, "[his attorney] threatened him to do so." However, because appellant denied on the record at his plea hearing that anyone made any threats to him, his friends, or his family to coerce him into accepting the plea agreement, the district court denied appellant's motion. Later in the sentencing hearing, appellant explained he did not feel threatened by his attorney and agreed with the district court's characterization that "he felt coerced by the situation because [he was] facing some bad consequences." The district court then formally accepted appellant's guilty plea and sentenced appellant.

Under the Minnesota Rules of Criminal Procedure, a district court may allow a defendant to withdraw a plea prior to sentencing if it would be fair and just to do so. Additionally, a defendant must be allowed to withdraw a plea at any time to correct a manifest injustice. Appellant argues neither plea withdrawal standard should apply, as his withdrawal request was made before the court accepted his plea. He argues that, when he made his request, he had an absolute right to withdraw his plea.

In *State v. Tuttle*, 504 N.W.2d 252 (Minn. Ct. App. 1993), the court of appeals stated that Rule 15.04, subd. 3(1) "gives the district court authority to reserve acceptance of a plea pending a PSI; it does not give a defendant an absolute right to withdraw a plea pending acceptance by the court." *Id.* at 257. The question still remains, however, whether an absolute right to withdraw a guilty plea prior to its acceptance exists outside the rules of criminal procedure.

The court of appeals holds that such a right does not exist. The court rejects appellant's argument that this absolute right can be inferred from a defendant's trial rights, including the presumption of innocence, and the idea that those rights are not waived until a valid guilty plea is accepted. The Supreme Court has previously held that "[o]nce a guilty plea is entered, there is no absolute right to withdraw it." *Shorter v. State*, 511 N.W.2d 743, 746 (Minn. 1994). The court of appeals holds that a guilty plea is entered once it has been "put formally before the court." At that point, a defendant has no absolute right to withdraw it. In this case, appellant's guilty plea was put formally before the district court at appellant's plea hearing. Thus, he had no absolute right to withdraw it at his sentencing hearing prior to the district court's acceptance of his plea.

The court of appeals also finds that district court did not err in denying appellant's request to withdraw his plea under the fair and just standard. Appellant argued he should have been permitted to withdraw his plea under this standard because the OFP was not in effect when he was accused of violating it. An *ex parte* OFP was issued on 12/8/2016, and appellant was served on 12/9/2016. Appellant requested a hearing on 12/12/2016, and one was scheduled for 12/16/2016. The hearing was rescheduled by the court due to the victim's pregnancy and health to 1/5/2017. Appellant was accused of violating the OFP on 12/21/2016. The court rejects appellant's argument that the OFP expired the moment the district court continued the hearing and rescheduled it outside of the 10-day statutory time frame. The court concludes that the statutory language makes

clear that an *ex parte* OFP expires once the time frame runs without a hearing. Here, appellant violated the OFP within 10 days of his request for a hearing. At that time, the OFP was undoubtedly still in effect. ***State v. Nicholas***, 924 N.W.2d 286 (Minn. Ct. App. 2/11/2019).

■ **Criminal procedure: Guilty plea entered in consideration of unlawful sentence is coerced.** Appellant was charged with a second-degree controlled substance offense and the state notified him of its intent to seek an aggravated sentence based on appellant's status as a career offender and a dangerous offender. Appellant subsequently entered a guilty plea under a plea agreement that provided for a 100-month sentence. If the district court found appellant to be a career or dangerous offender, it could have sentenced appellant to the 25-year statutory maximum. However, appellant qualified as neither a dangerous nor career offender. The state's threat to have appellant sentenced as such induced appellant's guilty plea. The court of appeals concludes that the state's threat of an aggravated sentence that was unauthorized by law coerced appellant's plea. Because a coerced plea is involuntary, appellant's plea was invalid. ***Johnson v. State***, 925 N.W.2d 287 (Minn. Ct. App. 3/11/2019).

■ **Sentencing: Out-of-state probationary sentence reserving right to revoke probation and impose prison sentence is equivalent to stay of imposition.** Appellant argues the district court erred in denying his motion to correct his sentence for aiding and abetting second-degree unintentional murder based on an incorrect criminal history score. The district court assigned one-half of a point for appellant's prior Illinois conviction for possessing 1.7 grams of cocaine. The court of appeals holds that the district court did not abuse its discretion. Under the sentencing guidelines, a prior out-of-state felony conviction can be used in calculating a criminal history score, and an out-of-state conviction is considered a felony if the offense would be defined as a felony in Minnesota and the defendant received a felony-level sentence, including the equivalent of a stay of imposition.

Here, the Illinois offense would be a felony under Minnesota law and the court of appeals agrees with the district court's conclusion that the sentence appellant received in Illinois, 24 months of probation, is functionally equivalent to a stay of imposition. The Illinois sentencing order states that "failure to follow the conditions of this sentence or probation

could result in a new sentence up to the maximum penalty for the offense which is before this Court," which is consistent with the court of appeals' description of the characteristics of a stay of imposition in *State v. C.P.H.*, 707 N.W.2d 699, 702 (Minn. Ct. App. 2006): "By staying the imposition of the sentence, the district court reserves the right, in the event the defendant does not meet certain conditions, to vacate the stay and impose a sentence." The district court is affirmed. ***State v. Watson***, No. A18-1187, 2019 WL 1233383 (Minn. Ct. App. 3/18/2019).

■ **Forfeiture: Due process requires prompt hearing on innocent owner defense.** The driver of a 1999 Lexus was arrested for first-degree DWI and the vehicle, owned solely by the driver's mother, was seized. Both the driver and her mother challenged the forfeiture of the vehicle, arguing the DWI vehicle forfeiture statute was unconstitutional for violating their due process rights. The driver's mother also asserted the innocent-owner defense. The district court agreed that the statute violated both the driver and the owner's due process rights. The court of appeals found Minn. Stat. §169A.63, subd. 9(d), constitutional on its face but unconstitutional as applied to both the vehicle driver and owner. The Supreme Court ultimately agrees with the court of appeals that the statute is constitutional on its face, but finds it constitutional as applied to the driver and unconstitutional only as applied to the owner.

In its analysis, the Supreme Court first affirms that the framework outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976), applies to determine whether the delay in this case, driven by the DWI forfeiture statute's mandate that no judicial hearing on the demand for judicial determination occur until after the related criminal proceedings are concluded ("the central question in [the] case"), violated due process.

The Supreme Court concludes that section 169A.53, subdivision 9(d), is facially constitutional, "[b]ecause we can conceive of a circumstance where the legitimacy of the forfeiture (and the demand for judicial determination) can be resolved in a constitutionally prompt manner following the swift resolution of the underlying criminal proceedings…" The Court then considers the driver's and owner's as-applied challenges to the DWI forfeiture statute, addressing each of the three factors laid out in *Mathews*. As to the driver, the Court finds the statute constitutional as applied. That is, the Court determines the driver's right to due process was not violated by the 18-month delay before her demand for judicial determination was heard, because the driver does not own the vehicle and has a limited private interest in keeping the vehicle. The state, on the other hand, has a significant fiscal, functional, and administrative interest in protecting the public and not conducting pre-seizure hearings, and the pre-seizure process for determining whether forfeiture is authorized is reliable.

However, the Court's balancing of the *Mathews* factors as to the owner lead the court to hold that due process requires a prompt hearing for the vehicle owner. Even though she cannot drive the vehicle because her license was cancelled, she still has a significant financial interest in the vehicle. She also was not driving the vehicle and had an innocent owner claim, which received no pre-seizure consideration. The scope of a hearing would be limited to considering her innocent owner defense, and this would not pose a substantial burden on courts and prosecutors. Thus, the 18-month delay between the seizure of her property and the hearing on her demand for judicial determination violated her right to procedural due process. To remedy this violation, the Court orders that the defendant vehicle be returned to its owner. ***Olson v. One 1999 Lexus***, 924 N.W.2d 594 (Minn. 3/13/2019).

■ **Physician-patient privilege: Blood sample drawn during medical emergency not "information" covered by physician-patient privilege.** Law enforcement found appellant bleeding from his head, lying in the street following an ATV accident, and smelled alcohol on his breath before he was taken to the hospital. A deputy learned the hospital took a sample of appellant's blood prior to giving a blood transfusion. The deputy obtained a search warrant to seize the blood sample for testing, which later revealed appellant's blood alcohol concentration was 0.155. Prior to his trial for fourth-degree DWI, the district court granted appellant's motion to suppress the blood sample as "information" subject to the physician-patient privilege. The court of appeals reversed, and the Supreme Court affirms, finding that a blood sample is not "information" within the

scope of the physician-patient privilege.

The Supreme Court first clarifies that its statements regarding "information" as used in the physician-patient privilege statute in *State v. Staat*, 192 N.W.2d 192 (Minn. 1971), and *State v. Heaney*, 689 N.W.2d 168 (Minn. 2004), which appellant argues supports his position that a blood sample is "information," were merely dicta. Thus, the court examines the question of whether a blood sample is "information" as an issue of first impression. Based on the plain and common meaning of the word "information," and keeping in mind the court's observation that "[t]here probably is no privilege… so abused as the physician[-]patient privilege" and the need to ensure it does not "become [a] vehicle[ ] for the suppression of evidence which is not privileged," the Court concludes that a blood sample is not "information." Quoting the dictionary definition of "information" published the same year the New York statute upon which Minnesota's physician-patient privilege statute is based, the Court explains that "[a] blood sample [itself] is not 'intelligence; notice, news, or advice communicated by word or writing.'" The statute covers information itself, not objects that contain or carry information. ***State v. Atwood***, No. A17-1463, 2019 WL 1142420 (Minn. 3/13/2019).

■ **Burglary: Victim must have been present for first-degree burglary based on defendant's possession of article victim believed was dangerous weapon.** While J.T. was away, appellant burglarized J.T.'s home. A neighbor observed the burglary and notified police. When police arrived, they approached appellant in an alley behind the house and saw appellant drop what they believed was a gun. After arresting appellant, police discovered the item was a BB gun. After a court trial, appellant was convicted of first-degree and second-degree burglary. Appellant appealed his first-degree burglary conviction under Minn. Stat. §609.582, subd. 1(b), which elevates burglary to a first-degree offense if "the burglar possesses, when entering or at any time while in the building,… any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon." Appellant argues the statute requires the victim be physically present and reasonably believe the item is a dangerous weapon. The court of appeals affirmed his conviction, concluding the statute's plain language requires only "that the article's appearance supports an objective belief that it is a dangerous weapon."

The Supreme Court agrees with appellant's argument that the plain language of Minn. Stat. § 609.582, subd. 1(b), requires the victim to be present, noting that the statute "requires the item be 'fashioned in a manner to lead *the* victim,' not *a* victim, to reasonably believe the item is a dangerous weapon." By requiring a specific person, "*the* victim," to have the reasonable belief, the statute requires that person to be present. Because the victim in this case was not physically present during the burglary, the evidence is insufficient to support appellant's conviction for first-degree burglary. ***State v. Rogers***, 925 N.W.2d 1 (Minn. 3/20/2019).

■ **Implied consent: Deputy has no duty to notify driver that field sobriety and preliminary breath tests are optional.** Appellant was arrested for DWI after failing field sobriety tests and a PBT revealed his blood alcohol concentration was 0.096. A subsequent breath test reported a blood alcohol concentration of 0.09, and appellant's driver's license was revoked. Appellant argues the deputy had an obligation to inform him he could refuse all field sobriety tests and that the deputy's failure to do so violated his right to procedural due process. The district court and court of appeals disagree. No statutory provision or case requires law enforcement to inform a driver that they may refuse field sobriety testing or a preliminary breath test. Such tests are also not considered searches or custodial interrogations, so there are no constitutional obligations to support appellant's argument. Appellant's license revocation is affirmed. ***Otto v. Comm'r Pub. Safety***, 924 N.W.2d 658 (Minn. Ct. App. 3/25/2019).

■ **Entrapment defense: Defendant need only show inducement by state, not that state's conduct actually induced him.** An acquaintance introduced H.F. to appellant, and they ran into each other at a party a year later. Appellant saw H.F. with Walker, who H.F. described as her drug source. A couple of months later, H.F. contacted appellant through social media, asking him to help her obtain drugs from Walker, because her boyfriend would beat her out of jealousy if she contacted Walker herself. Appellant refused and H.F. offered him $500 to help. Appellant again refused. H.F. contacted appellant multiple times in the

following weeks, but he did not answer her calls. Eventually, he answered one of the calls. H.F. asked if Walker would be at a party appellant planned to attend and asked Appellant to hand his phone to Walker so H.F. could buy drugs from Walker. Appellant agreed to let Walker use his phone at the party. At the party, Walker used appellant's phone to arrange a drug exchange with H.F. Walker told appellant to go to the meeting location to look for H.F. Appellant ended up walking a bag of methamphetamine from Walker's car to H.F. in her car and walking cash from H.F. to Walker in his car. He did not use any of the drugs or take any of the money. H.F. had been working the entire time as an informant making controlled drug purchases. After being charged with first-degree sale of a controlled substance, appellant raised an entrapment defense. However, the district court rejected the defense, finding appellant failed to show that the government induced him to participate in the transaction. After a stipulated facts trial, the district court found appellant guilty.

To initiate the entrapment defense procedures, the defendant notifies the prosecutor of the facts supporting the defense and whether he chooses the jury or court to decide the issue of entrapment. If he elects to have the court decide the issue, a hearing is held and the court addresses (1) whether the defendant has first shown by a preponderance of the evidence that the government induced him to commit the crime, and (2) whether the state can then prove beyond a reasonable doubt that the defendant was predisposed to commit the crime.

The court of appeals concludes that the district court "conflated the two elemental steps of the entrapment analysis into one, loading Garcia with an expanded burden of proof." The defendant has the burden of showing inducement, not that the inducement was his motivating force. The first step focuses on the state's actions, while the second step focuses on the defendant's predisposal to commit the offense. The court clarifies that the defendant's burden is to prove not that the government's conduct actually induced him but to make a showing from the evidence that the state's conduct demonstrated inducement.

The record shows appellant did meet his burden of production. However, the district court never reached the second step in the entrapment defense analysis, and the state must be afforded the opportunity to prove beyond a reasonable doubt that appellant was predisposed to commit the crime. Reversed and remanded. ***State v. Juan Neil Garcia***, No. A18-0343, 2019 WL 1757995 (Minn. Ct. App. 4/22/2019).

■ **Conditional release: Phase II of Challenge Incarceration Program is "release from prison."** Appellant received a 51-month sentence and five-year conditional release term for first-degree test refusal in June 2007. In July 2008, he moved into phase II of the Challenge Incarceration Program, which allowed him to reside at home. He entered phase III in January 2009, but was returned to phase II in April 2009 for failing to remain sober. A few months later, he was returned to custody for again failing to remain sober. He was released in December 2010 and remained on supervised release until he was taken into custody again in March 2014 for failing to satisfy treatment requirements. He was released again in May 2014.

Appellant argues that entering phase II triggered the start of his conditional release term, which would have then expired in July 2013. Therefore, when the state revoked his conditional release in March 2014, his conditional release term had already expired, and his subsequent incarceration was unlawful. The court of appeals found that both appellant's conditional and supervised release terms began at the same time, in December 2010.

The Supreme Court reverses the court of appeals, concluding that appellant's conditional release term began when he entered phase II of the Challenge Incarceration Program. The Court notes that "[f]unctionally, conditional release is identical to supervised release." However, while supervised release occurs with most felony sentences, an additional conditional release period is imposed for a certain classes of offenders. For first-degree DWIs, Minn. Stat. §169A.276, subd. 1(d), provides that after the offender "has been released from prison the commissioner [of corrections] shall place the person on conditional release for five years." The plain meaning of "release" was recently defined by the court as "to set free from confinement or bondage." *State ex rel. Duncan v. Roy*, 887 N.W.2d 271, 277 (Minn. 2016). For both supervised and conditional release, the "release" begins when the offender is "set free from confinement."

Under the Challenge Incarceration Program, confinement is required for phase I, but not phase II. In phase II, participants are subject to intense supervision and surveillance and house arrest conditions, but they live in the community and are not confined in a Minnesota Correctional Facility. Thus, the conditional release imposed under Minn. Stat. §169A.276, subd. 1(d), begins when a Challenge Incarceration Program participant enters phase II and begins living in the community. ***Heilman v. Courtney***, No. A17-0863, 2019 WL 1781483 (Minn. 4/24/2019).

■ **Confrontation clause: Direct or circumstantial evidence may be used to prove defendant caused unavailability of witness.** Appellant was convicted of violating a domestic abuse no contact order (DANCO). During trial, jail-recorded phone calls between appellant and the victim, the contact that violated the DANCO, were played for the jury. However, the victim did not appear pursuant to the state's subpoena. The state had jail-recorded phone calls by appellant during which he was looking for someone to seek out the victim and make sure she did not appear in court. The district court allowed the detective to testify that, during an interview with the victim, the victim confirmed she was the female voice in the recorded calls played for the jury. Appellant testified that he was the male voice in the recordings, but that the female voice was not the victim. The jury found appellant guilty of four counts of violating the DANCO.

The court of appeals holds the district court did not err in applying the forfeiture by wrongdoing exception to permit the victim's out-of-court statements to be admitted as substantive evidence, because appellant procured the victim's unavailability. Appellant does not challenge that the victim was unavailable, that he engaged in wrongful conduct, or that he intended to procure the victim's unavailability for trial, but argues he or his family members did not *cause* the victim to be unavailable, because the state did not present evidence as to why exactly the victim did not appear.

In concluding that appellant's wrongful conduct actually caused the victim's failure to appear, the district court relied on circumstantial evidence: The victim met with the detective on the first day of trial, she called appellant's attorney to say she would testify the next day, and then she failed to appear after appellant sent his family to tell her not to come. In Minnesota, direct and circumstantial evidence carry the same weight. Thus, the court holds that a district court "may draw reasonable inferences from circumstantial evidence in determining whether a defendant's wrongdoing procured the unavailability of a witness." Here, the record supports the inferences drawn by

the district court from the circumstantial evidence. The district court did not violate appellant's constitutional rights in admitting the victim's statements to the detective. ***State v. Shaka***, No. A18-0778, 2019 WL 1890550 (Minn. Ct. App. 4/29/2019).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **At-will employment; loss of security clearance.** An employee who refused to participate in a debriefing in connection with his government security clearance was properly terminated from his job. The 8th Circuit Court of Appeals, affirming a lower court ruling, held that the claimant could not pursue an action for wrongful termination because he was an at-will employee, which is not overcome by his refusal to violate the law or any "public policy" in connection with the loss of a security classification necessary for his work. ***Dubuque v. Boeing Company,*** 917 F.3d 666 (8th Cir. 2/2/2019).

■ **Discrimination and retaliation; failure to exhaust bars claim.** A lawsuit for constructive discharge based upon discrimination and retaliation failed because the claimant did not exhaust some of his claims before pursuing the litigation. The 8th Circuit, affirming a lower court ruling, held that the failure to include in a preceding charge before the Equal Employment Opportunity Commission (EEOC) the adverse acts that the claimant now asserts forced him to resign barred his claim, as well as his at-will employment status, depriving him of any due process claim. ***Voss v. Housing Authority of City of Magnolia, Arkansas*** 917 F.3d 618 (8th Cir. 2/25/2019).

■ **ERISA; insufficient evidence of continuing disability.** An employee's challenge to a determination by his insurance carrier, terminating long-term disability benefits as part of his ERISA benefits, was dismissed on grounds of insufficient evidence. The 8th Circuit, upholding a decision of the trial court, held that even though the employee presented "some evidence" of disability from medical providers, the insurer did not abuse its discretion because it had evidence that the claimant was "deliberately" exaggerating his symptoms, which barred his claim for disability. ***Johnston v. Prudential Insurance Company,*** 916 F.3d 718 (8th Cir. 2/25/2019).

■ **Repudiation of union agreement; enforcement order granted.** The National Labor Relations Board (NLRB) obtained an order adopting an administrative law judge's decision that the company violated the National Labor Relations Act by repudiating its relationship with a contract and the local union. The 8th Circuit upheld a determination by the NLRB that the employer's conduct was unlawful and directed it to cease and desist, rejecting the employer's claim that the underlying charge was not filed within the required six months of the termination of the business relationship. ***NLRB v. Westrum,*** 2019 WL 856597 (8th Cir. 2/22/2019) (unpublished).

■ **Workers' compensation; exclusivity no bar to disability claim.** The exclusivity provision of the Minnesota Workers' Compensation Act, Minn. Stat. §176.031, does not bar claims for disability discrimination for failure to provide a reasonable accommodation to a disabled employee under the Minnesota Human Rights Act, Minn. Stat. §363A.01 *et seq.* Reversing a ruling of the court of appeals, the state Supreme Court held that the exclusivity provision does not prevent claimant, a firefighter with the city of Minneapolis, from proceeding with a discrimination claim for failure to accommodate his disability by allowing him to wear tennis shoes at work. ***Daniel v. City of Minneapolis,*** 932 N.W.2d 637 (S.Ct. 2/27/2019).

■ **Workers' compensation offset; self-funded plan inapplicable.** An employee's claim for temporary total disability (TTD) benefits under the Workers' Compensation Act cannot be offset by the benefits paid to the employee for the same time period of disability under the employer's self-funded, self-administered, short term disability (STD) plan. Affirming a ruling of the Workers' Compensation Court of Appeals, the state Supreme Court held that an employer may not offset the TTD benefits by amounts previously paid by it for STD benefits. ***Bruton v. Smithfield Foods, Inc.*** 923 N.W.2d 661 (S.Ct. 2/27/2019).

ADMINISTRATIVE LAW

■ **BMS dismissal upheld.** The dismissal by the Bureau of Mediation Services (BMS) of a petition seeking to de-certify a union purporting to represent certain personal care assistants was upheld by the Minnesota Court of Appeals in ***Certain Employees of State of Minnesota v. SEIU Health Care MN,*** 2019 WL 661660 (Minn. Ct. App. 2/19/2019) (unpublished). The court rejected the contention that legislation authorizing the collective bargaining agreement violated the Article 4, Section 17, "title and single subject provision" of the Minnesota Constitution. The court held that the legislation, which provided funding to the Department of Human Services to implement this collective bargaining agreement, which had been approved by Minnesota Management & Budget (MMB) and authorized by it, was "broadly related" to state government and the DHS budget and operation and, therefore, did not violate the constitutional requirement.

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ENVIRONMENTAL LAW

JUDICIAL LAW

Court of appeals rejects claims that DNR violated MERA and public trust doctrine in permitting groundwater pumping near White Bear Lake. The Minnesota Court of Appeals issued an opinion overturning the Ramsey County District Court and rejecting claims that the Minnesota Department of Natural Resources (DNR) had violated both the Minnesota Environmental Rights Act (MERA) and the public trust doctrine in its handling of groundwater appropriations affecting water levels of White Bear Lake in the northeast area of the greater Twin Cities.

Plaintiffs initiated the lawsuit in 2013 as lake levels in the relatively shallow and groundwater-fed White Bear Lake reached historic lows. Plaintiffs claimed DNR permitted an unsustainable and increasingly large volume of groundwater to be pumped in the northeast metro area, which relies almost exclusively on groundwater for municipal water supply. DNR's conduct, plaintiffs argued, directly led to the drawdown of White Bear Lake and violated both MERA and the public trust doctrine.

The appellate court's MERA holding focused on the interplay between sections 116B.03 and 116B.10 of MERA. Section 116B.03, subd. 1 establishes a cause of action that any person residing in the state can bring against "any person" for the protection of natural resources; to a successful plaintiff, the court can grant direct equitable relief necessary to protect the natural resources. Minn. Stat. §116B.07. Section 116B.10, on the other hand, establishes a cause of action against a state agency that has issued an environmental quality permit where the plaintiff claims the permit is inadequate to protect natural resources. However, under section 116B.10, subd. 3, the only available relief for a successful plaintiff (apart from emergency temporary injunctive relief) is for the court to remit the matter to the agency to for further administrative proceedings.

In this case, plaintiffs asserted their MERA claim against DNR over the inadequacy of its water appropriation permits not under the agency-permit provisions of section 116B.10 but under the more general provisions of section 116B.03. The district court held that this was permissible and proceeded to grant direct relief, right down to dictating the times of year that residents in the northeast metro area could operate lawn sprinklers. On appeal, the court of appeals held that this interpretation of MERA effectively rendered section 116B.10 of no effect, contravening principles of statutory interpretation, and would authorize courts to "issue remedies outside of the ordinary administrative process established by the legislature." Because plaintiffs had stated a claim under section 116B.10, however, the court reversed and remanded to the district court to "remit the parties to the DNR to institute appropriate administrative proceedings."

With regard to the public trust doctrine—which provides that the state, in its sovereign capacity, holds absolute title to all navigable waters and the soil under them for common use—the court of appeals followed its prior decision in *Aronow v. State*, 2012 Minn. Dist. LEXIS 171 (Minn. Ct. App. 2012), holding that the doctrine had only been applied in Minnesota to navigable water and that only the Minnesota Supreme Court could create a new common law cause of action by extending the doctrine to resources other than navigable water, e.g. groundwater. ***White Bear Lake Restoration Association v. Minn. Dept. Nat. Res.***, No. A18-0750, (Minn. Ct. App., 4/22/2019).

Minnesota Supreme Court finds drainage system reestablishment proceedings are subject to *certiorari* review. The Supreme Court of Minnesota issued an opinion that an order by a drainage authority reestablishing drainage-system records under Minnesota Statutes, Section 103E.101, subd. 4a is a quasi-judicial decision subject to *certiorari* review.

The Chippewa/Swift Joint Board of Commissioners had received a request from landowners for repairs to be made to Chippewa and Swift Ditch No. 9. While considering the request, the board determined that the original records establishing the drainage system had been lost, destroyed, or were otherwise incomplete and that it was necessary to reestablish the records before proceeding with any repairs. As part of reestablishing the record, the board submitted a report to the Minnesota Department of Natural Resources (DNR) for their review. In a written response and at a public hearing, the DNR expressed concerns that the board's reestablishment proposal would have the effect of lowering the water levels of nearby wetlands and recommended specific changes. Subsequently, the board issued its order reestablishing the drainage system's records, without incorporating the changes recommended by the DNR. The DNR then petitioned the Minnesota Court of Appeals for a writ of *certiorari*. The board moved to dismiss the appeal for lack of jurisdiction. The court of appeals found that the board's order was not a quasi-judicial decision and thus was not subject to review by *certiorari* and dismissed the appeal for lack of jurisdiction.

On review, the Supreme Court reiterated and applied the three indicia for determining whether a decision is quasi-judicial, all of which must be present for certiorari review: (1) investigation into a disputed claim and weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim. Both the DNR and the board agreed that the first two indicia were satisfied; accordingly, the court focused on the third factor—whether the board's order was a binding decision. The Court first found that the plain language of section 103E.101, subdivision 4a indicates that the record-reestablishment order at issue was a binding order regarding the disputed claim at hand, i.e., whether

the drainage-system records were reestablished correctly. Next, the Court concluded that because many of the essential procedures for the *establishment* of a drainage system, which the court noted is "undisputedly a quasi-judicial proceeding," are also found in the procedures for *reestablishment* of a drainage system's records, record-reestablishment proceedings should similarly be deemed quasi-judicial. Finally, the Court found that the reestablishment of drainage-system records had a significant binding effect on the rights of the adjacent landowners and other interested parties. Accordingly, the Court held that an order by a drainage authority reestablishing drainage-system records is a quasi-judicial decision subject to quasi-judicial review. The Court reversed and remanded to the court of appeals with instructions to reinstate the appeal. ***Minn. Dep't of Nat Res. v. Chippewa/Swift Joint Bd. of Comm'rs***, 2019 Minn. LEXIS 189 (Minn., 4/3/2019).

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FAMILY LAW

JUDICIAL LAW

■ **District Court must calculate spousal maintenance using net incomes, even if the parties don't provide them.** After 35 years of marriage, husband and wife divorced following a two-day bench trial on the issue of spousal maintenance. At the time of trial, the trial court imputed $2,860 in gross income to wife (then unemployed) and found her expenses to be $5,825 per month. By comparison, the trial court found husband earned gross income of $7,478.44 per month, with expenses of only $4,655. Comparing just *gross* income and expenses, Husband thus enjoyed a $2,800 monthly income surplus while wife suffered a deficit of $2,900 per month. Accordingly, the trial court awarded wife spousal maintenance of $2,700 per month.

In post-trial motions, husband sought amendments to the court's findings, observing that his income net of taxes was only $3,875 per month—resulting in a maintenance award which consumed 70% of his take-home pay. The court denied husband's motion, observing that while findings regarding net income would normally be appropriate, neither party introduced such evidence (at least as to wife) and the court could not be expected to "divine new evidence" from the record. Husband appealed, arguing the trial court committed error by calculating spousal maintenance based on his gross income.

While acknowledging the inadequacy of the record presented to the lower court, the court of appeals still reversed and remanded. Stressing the importance of husband's ability to pay, the appellate court observed that husband's tax liability "could significantly affect the amount of income available to pay a spousal maintenance award," and thus must be factored either into the calculation of husband's income or as part of his expenses. Here, the lower court did neither. Accordingly, the court of appeals remanded the case, instructing the lower court to reopen the record to receive evidence as to both parties' net incomes. ***Wood v. Wood***, No. A18-0722, 2019 WL 1591767 (Minn. Ct. App. 4/15/2019).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **Classwide arbitration; ambiguous agreement.** A divided Supreme Court held 5-4 held that an ambiguous arbitration agreement does not establish the contractual "consent" necessary to provide for class arbitration.

Four separate dissenting opinions either questioned the Court's subject matter jurisdiction and/or criticized the majority's decision on the merits. ***Lamps Plus, Inc. v. Varela***, ___ S. Ct. ___ (2019).

■ ***Cy pres* settlement; standing; *Spokeo*.** Where plaintiffs brought class action claims against Google alleging violations of the Stored Communications Act, a settlement agreement was reached which provided for payments to counsel and *cy pres* recipients but no payments to absent class members, a number of class members objected to the proposed settlement, the district court approved the settlement and the 9th Circuit affirmed, the Supreme Court, in a *per curiam* opinion, avoided the issue of the validity of the

cy pres settlement, vacating and remanding the case for consideration of whether plaintiffs have standing following *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

Justice Thomas dissented, finding that the plaintiffs had standing, and determining that *cy pres* payments are not a form of relief to absent class members, and did not otherwise comply with Fed. R. Civ. P. 23. ***Frank v. Gaos***, ___ S. Ct. ___ (2019).

■ **Successive motions to intervene; timeliness of appeal.** The 8th Circuit found an appeal by prospective intervenors to be untimely where the intervenors filed successive motions to intervene on virtually identical grounds, and the intervenors filed a motion to appeal only after the denial of the second of their motions. The 8th Circuit found that "[t]he denial of a second motion to intervene covering the same grounds as the first motion... does not reset the clock for purposes of an appeal [because] holding otherwise would defeat the statutory timeliness requirement." ***Smith v. SEECO, Inc.***, ___ F.3d ___ (8th Cir. 2019).

■ **Americans with Disabilities Act claims; mootness.** Affirming Judge Doty's grant of a motion to dismiss ADA claims, the 8th Circuit agreed with Judge Doty that he lacked subject matter jurisdiction over the claims once the defendant remedied the alleged ADA violations. ***Davis v. Morris-Walker, Ltd.***, ___ F.3d ___ (8th Cir. 2019).

■ **Denial of motion to disqualify attorney treated as harmless error.** While finding that a district court should have granted the defendant's motion to disqualify a large Twin Cities law firm from representing the plaintiff, the 8th Circuit found that the failure to disqualify constituted "harmless error" absent any evidence that the law firm had improperly used the defendant's confidential information and the defendant failed to establish any other harm arising from the conflict. ***Cedar Rapids Bank & Trust Co. v. Mako One Corp.***, 919 F.3d 529 (8th Cir. 2019).

■ **Preliminary injunction; relevant standard; state action.** Reversing Judge Magnuson's denial of the plaintiffs' motion for a preliminary injunction allowing them to compete in high school competitive dance, the 8th Circuit held that the "heightened standard" applicable to preliminary injunction motions aimed at "state statutes" and "other forms of government actions" did not apply to bylaws adopted by the Minnesota State High School League, because those bylaws were not based on "presumptively reasoned democratic processes." ***D.M. ex rel. Xiong v. Minnesota State High School League***, 917 F.3d 994 (8th Cir. 2019).

■ **Punitive damages; due process.** Where a jury awarded the plaintiff in an employment discrimination case $1 in compensatory damages and $250,000 in punitive damages, the 8th Circuit rejected a due process challenge to the punitive damage award, "declin[ing] to place undue weight on the mathematical ratio between compensatory and punitive damages." ***Bryant v. Jeffrey Sand Co.***, 919 F.3d 520 (8th Cir. 2019).

■ **Appeal from denial of motion to remand moot following entry of summary judgment.** In an unpublished opinion, the 8th Circuit declined to rule on the plaintiff's post-summary judgment appeal from the denial of his motion to remand premised on the defendant's alleged untimely removal of the action, finding that once the case had proceeded to summary judgment, it would not address a non-jurisdictional procedural defect. ***Shelby v. Oak River Ins. Co.***, ___ F. App'x ___ (8th Cir. 2019).

■ **28 U.S.C. §1782; orders on motions for discovery for use in a foreign proceeding.** Magistrate Judge Rau granted two recent requests under 28 U.S.C. §1782.

In the first case, a Czech court requested assistance in obtaining information from a bank headquartered in Minnesota, and its "narrowly tailored" request was granted. ***In Re: Request for Judicial Assistance from the Municipal Court in Brno, Czech Republic***, 2019 WL 1513897 (D. Minn. 4/8/2019).

One day later, a motion was granted allowing "narrowly tailored" discovery from the same bank in aid of litigation pending in Brazil and Singapore, as well as a Brazilian arbitration. ***In Re: Application of CA Investment (Brazil) S.A. for an Order to Take Discovery for Use in Foreign Proceedings Pursuant to 28 U.S.C. §1782***, 2019 WL 1531268 (D. Minn. 4/9/2019).

■ **Numerous motions to remand granted.** Where the defendant had received a pre-litigation demand asserting that the plaintiff had suffered more than $3,000,000 in damages, the plaintiff's state court complaint demanded more than $50,000 in damages, and the defendant removed the action only after the plaintiff served its initial disclosures, which also asserted that it incurred more than $3,000,000 in damages, Judge Doty granted the plaintiff's motion to remand, finding that the pre-litigation demand constituted "other paper" sufficient to put the defendant on notice of the amount in controversy. Judge Doty did deny the plaintiff's motion for an award of costs and expenses under 28 U.S.C. §1447(c), finding that the defendant's position was not "objectively unreasonable." ***Repco, Inc. v. Flexan, LLC***, 2019 WL 1170667 (D. Minn. 3/13/2019).

Judge Tostrud granted the plaintiff's motion to remand an action that had been removed on the basis of federal question jurisdiction, finding that the plaintiff's reference to federal regulations underlying her Minnesota whistleblower claims was "not substantial" enough to support federal question jurisdiction. ***Martinson v. Mahube-Otwa Community Action Partnership, Inc.***, 2019 WL 1118523 (D. Minn. 3/11/2019).

Judge Brasel granted two motions to remand, finding in both cases that the complaints did not allege claims arising under federal law, and that no exception to the well-pleaded complaint rule applied. ***General Mills, Inc. v. Retrobrands USA, LLC***, 2019 WL 1578689 (D. Minn. 4/12/2019). ***City of Cambridge v. On Love Housing, LLC***, 2019 WL 1499724 (D. Minn. 4/5/2019).

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INDIAN LAW

JUDICIAL LAW

■ **No jurisdiction under the Indian Tucker Act.** The Indian Tucker Act allows Indian tribes to bring certain statutory claims for monetary damages against the United States. The plaintiff sued the United States for title to land based on the United States' common-law trust responsibility. The Court of Claims dismissed for lack of jurisdiction. The Federal Circuit Court of Appeals affirmed, holding that the Indian Tucker Act does not provide jurisdiction for claims brought by individuals or for claims brought based on the United States' common-law trust responsibility. ***Cloud v. United States***, ___ Fed. App'x ___, 2019 WL 1579599 (Fed. Cir. 4/12/2019).

■ **Tribal-court exhaustion and immunity apply to §1983 claims.** A *pro se* non-Indian plaintiff sued a tribe and tribal law-enforcement officers for allegedly violating his federal constitutional rights. The district court dismissed the claims against the tribe and official-capacity claims on immunity grounds, and the 8th Circuit Court of Appeals affirmed, confirming that 42 U.S.C. §1983 does not abrogate tribal immunity. The district court separately dismissed the individual-capacity claims against the officers without prejudice for failure to state a claim. The 8th Circuit affirmed, but on other grounds. It applied the tribal-court exhaustion doctrine and held that the tribal court should determine first whether the plaintiff can maintain implied federal claims against the officers. It also applied *Pullman* abstention—previously limited to cases involving state law and state courts—noting that the tribal court may grant adequate relief under the Indian Civil Rights Act and tribal law and moot the federal claims. ***Stanko v. Oglala Sioux Tribe***, 916 F.3d 694 (8th Cir. 2019).

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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Copyright: Court holds copyright and DMCA claims may remain.** Judge Tunheim recently denied a defendant's motion to dismiss claims for copyright infringement and violation of the Digital Millennium Copyright Act (DMCA). FurnitureDealer.net (FDN) creates and manages websites and associated content for furniture retailers. Coaster entered into an agreement with FDN to create and maintain a website for selling Coaster's furniture and to create search-engine-optimized (SEO) text to maximize the website's search prominence. The SEO text was part of FDN's database, registered as a copyrighted collection, and FDN also retained exclusive rights to the text under the agreement. FDN sued Amazon and Coaster for copyright and DMCA violations after finding the SEO text on several Amazon webpages featuring Coaster furniture. Coaster moved to dismiss the claims under Rule 12(b)(6).

The court held the SEO text was copyrightable and denied Coaster's motion. The court agreed with the view that registration of a collective work covers its component works where the registrant has rights to the component works, and found that this view aligned with "the spirit of the Copyright Act." The court also held that FDN had plausibly stated its DMCA claim, which was based on Coaster intentionally removing or altering copyright management information from FDN's protected works. FDN alleged that it placed a notice on each of its webpages informing the viewer of its rights in the content and prohibiting reproduction without permission. Although Coaster argued that the notice should not apply to the SEO text on the website, the court rejected Coaster's arguments and followed case law holding that such designations extend to individual contributions from a collective work and to copies of an original work. ***FurnitureDealer.Net, Inc. v. Amazon.com, Inc.***, No. CV 18-232 (JRT/HB), 2019 WL 1207011 (D. Minn. 3/14/2019).

■ **Trademark: Goodwill belongs to licensor, not licensee.** Judge Wright recently denied a motion for temporary restraining order and preliminary injunction in a franchisee-franchisor dispute. Izabella HMC-MF, LLC, owns and operates the Radisson Menominee Falls Hotel in Menominee Falls, Wisconsin. In January 2019, Radisson Hotels International, Inc., informed Izabella that it allegedly breached the parties' licensing agreement due to unauthorized renovations of the hotel. Radisson informed Izabella that failure to cure the breach would result in termination of the agreement and loss of the Radisson mark for its hotel. Izabella sued to prevent termination of the license and moved for a temporary restraining order and preliminary injunction. In considering whether a temporary restraining order or preliminary injunction is warranted, courts consider four factors: (1) the probability that the movant will succeed on the merits, (2) the threat of irreparable harm to the movant, (3) the balance between this harm and the injury that the injunction will inflict on other parties, and (4) the public interest. The court focused exclusively on the irreparable harm factor. Izabella argued termination of the licensing agreement would result in a reduced number of bookings and substantial loss of revenue. These injuries, however, are compensable by monetary damages and do not represent irreparable harm. Izabella next argued termination of the

licensing agreement would cause harm to Izabella's reputation and goodwill if it lost its Radisson branding. While the loss of intangible assets such as reputation and goodwill can constitute irreparable injury, the goodwill arising from a licensed brand belongs to the licensor, not the licensee. As the licensing agreement states that Radisson owns the Radisson marks and goodwill associated with them, Izabella cannot demonstrate that its loss of the Radisson branding will irreparably harm any goodwill that belongs to Izabella. ***Izabella Hmc-Mf v. Radisson Hotels Int'l***, Case No. 19-cv-1147 (WMW/ECW), 2019 U.S. Dist. LEXIS 79073 (D. Minn. 5/10/2019).

■ **Patent: Term in preamble is a claim limitation.** Judge Brasel recently issued a claim construction order and found that a term in the patent claim's preamble was also a claim limitation. Danfoss accused DeltaTech of infringing a patented joystick device used to control heavy machinery. The disputed term "main electronic controller" appeared in the patent claim preamble, which generally introduces the claimed invention, and in the patent claim body, which defines the claimed invention. The parties disputed whether the term in the preamble further defined the invention. Judge Brasel noted federal circuit precedent holds that a phrase found in both a patent claim's preamble and body can limit the claim. The court found that the claim depended on the preamble phrase "a remotely located main electronic controller" because the phrase was required to understand the term "a main electronic controller" as used in the claim body. The court rejected Danfoss's arguments that the claim was not limited by the phrase "main electronic controller" because the patent drawings did not show the controller. The patent statute only requires drawings "where necessary for the understanding of the subject matter sought to be patented." The court determined that a drawing of an electronic controller would not have been required for prosecution of the patent application. ***Danfoss Power Sols. Inc. v. DeltaTech Controls***, No. 16-CV-3111 (NEB/DTS), 2019 U.S. Dist. LEXIS 59915 (D. Minn. 4/8/2019).

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PROBATE & TRUST LAW

JUDICIAL LAW

■ **Trustee and beneficiary attorneys' fees.** Following the settlement of disputes between the trustee and a beneficiary, the district court held that attorneys' fees incurred by both the trustee and beneficiary were payable from the trust. The district court awarded the beneficiary attorneys' fees based primarily on the fact that the trustee was awarded attorneys' fees for the same dispute.

The Minnesota Court of Appeals reversed and remanded on the basis that the district court failed to conduct the proper analysis with respect to whether trustee and beneficiary attorneys' fees are payable from a trust. The court held that Minn. Stat. §501C.0709, as supplemented by the common law, controls awards of trustee attorneys' fees and that "trustees are *entitled* to fees when 'the fees are reasonable and incurred in good faith.'" (Emphasis in original.) On the other hand, the court held that Minn. Stat. §501C.1004, as supplemented by the common law, controls awards of beneficiary attorneys' fees. Specifically, the court held that "beneficiary fees are subject to a justice-and-equity analysis" and that district courts are required to conduct the analysis outline in *In re Atwood*, 35 N.W.2d 736, 740 (Minn. 1949). Because the district court did not apply the proper standard, the court of appeals reversed and remanded. ***In re Schauer***, No. A18-0969, 2019 WL 1510698 (Minn. Ct. App. 4/8/2019).

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REAL PROPERTY

JUDICIAL LAW

■ **Partition; settlement; royalties.** In a family partition action, the parties settled the matter in a stipulated judgment. Leland conveyed his interest in a gravel pit to Randy, and reserved an interest in royalties. Believing he was underpaid, years later Leland obtained post-judgment discovery and a contempt order against Randy. The Minnesota Supreme Court reversed the district court and the court of appeals, holding that the creation of an unaccrued royalty interest at the time of the stipulation and conveyance is a real property interest, and does not create a judgment debt. Leland was therefore not entitled to post-judgment discovery. The Supreme Court further held that the district court abused its discretion in issuing the contempt order because the court of appeals reversed a necessary finding of fact as unsupported by the record, and that contempt would be inappropriate in any event since a writ of execution was available. It is not obvious, however, why the Supreme Court would suggest such a course of action after previously holding that no judgment debt existed in the case. ***Sehlstrom v. Sehlstrom***, ___ N.W.2d ___ (Minn. 2019).

■ **Annexation.** Nonparties to an orderly annexation agreement may annex real property within the designated area by ordinance. Midway Township and the City of Duluth entered into an orderly annexation agreement governing annexation of property by Duluth. The city of Proctor lies between Midway and Duluth. Owners of property within the

designated area desired to have Proctor annex their property, which Proctor did by ordinance. Annexations by ordinance are governed by Minn. Stat. §414.033, orderly annexations by Minn. Stat. §414.0325. The Supreme Court held that Minn. Stat. §414.0325 does not preempt annexations by ordinance by non-parties to the orderly annexation. ***In re Annexation of Certain Real Property to City of Proctor from Midway Township***, ___ N.W.2d ___ (Minn. 2019).

■ **Foreclosure.** In a quiet title action, sheriff certificates of sale, assignments of the certificate, and underlying mortgages may be reformed by a district court to conform to the mortgaging parties' intent and to protect subsequent purchasers. The borrowers owned two parcels of land. Their home was situated on only one parcel. In a refinancing, the borrowers stated that the property was their primary residence and their purpose for refinancing was home improvement. Only one legal description was included in the mortgage and the subsequent sheriff's certificate—the parcel not including the home. Neither the district court nor the court of appeals were convinced that a failure to include the legal description of the house parcel in the foreclosure process caused the foreclosure to fail on a theory of strict compliance. The court of appeals held that because both parcels shared the same street address and because the underlying mortgage also lacked a legal description of the house parcel, the foreclosure substantially complied. ***Moore v. Mortgage Elec. Registration Sys. Inc.***, No. A18-1370, 2019 WL 1434232 (Minn. Ct. App. 4/1/2019).

■ **MCIOA.** The Minnesota Court of Appeals recently affirmed a grant of summary judgment in a case concerning a dispute between a non-residential condominium unit owner and the association that touched on several MCIOA statutes. First, the court of appeals held that even when an association fails to approve a budget and levy assessments, resulting in the declarant becoming responsible for all common expenses under Minn. Stat. §515B.3-1151, the statute does not preclude the declarant from seeking reimbursement from unit owners, nor does payment by a unit owner to a declarant create a debt owing from the association to the unit owner. Second, even if a declarant-controlled board holds over in violation of Minn. Stat. §515B.3-103, if the unit owners do not call a meeting to vote in a new board under Minn. Stat. §515B.3-103(d)(3), the board and its actions remain valid. ***KGK, LLC v. 731 Bielenberg Ass'n***, No. A18-1265, 2019 WL 1510846 (Minn. Ct. App. 4/8/2019).

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TAX LAW

JUDICIAL LAW

■ **State tax pre-empted by 1855 treaty between the United States and Yakama Nation.** In a 5-4 decision, the Supreme Court upheld the treaty rights of the Yakama nation in a dispute with the state of Washington. The Court held that the state could not impose its fuel import tax on fuel importers who are members of the Yakama nation because an 1855 treaty between the United States and the Yakama Nation forbids such a tax. Justice Breyer announced the judgment and was joined in his opinion by Justices Sotomayor and Kagan. Justice Gorsuch concurred in the judgment and was joined in his opinion by Justice Ginsburg. The Chief Justice's dissent was joined by Justices Thomas, Alito, and Kavanaugh. Justice Kavanaugh also filed a separate dissent, which was joined by Justice Thomas. ***Washington State Dep't of Licensing v. Cougar Den, Inc.***, 139 S. Ct. 1000 (2019).

■ **Attorney's failure to file Minnesota tax returns results in indefinite suspension.** An attorney who failed to file Minnesota individual income-tax returns for several years, failed to pay Minnesota tax obligations for two of those tax years, and failed to cooperate with the Director's investigation was suspended indefinitely with no right to petition for reinstatement for 120 days. ***In re Disciplinary Action Against Converse***, No. A18-2077, 2019 WL 2024863 (Minn. 5/6/2019).

■ **Minnesota still has taxing authority.** A Minnesota resident filed 2014, 2015, and 2016 Minnesota tax returns reporting taxable income from wages and distributions. In 2017, after reading "various acts of Congress and court cases" the taxpayer "realized" that he is "not a taxpayer" and that the state (and federal government) lacked authority to tax him. He filed amended tax returns for all three years claiming no income. The Minnesota Department of Revenue disagreed with the individual's reading of the relevant authority. Further, after reviewing the taxpayer's returns for the years at issue, the department assessed additional taxes for the years at issue. Mr. Feliciano appealed this determination, stating he "was not given a reason as to where the Department of Revenue was granted authority to tax [his] wages even after presenting evidence of who is liable for taxes of compensation." Mr. Feliciano claimed that only the occupations listed within Public Salary Tax Act of 1939 can be taxed. The Minnesota Department of Revenue sought a dismissal of Mr. Feliciano's action for failure to state a claim. The tax court converted the motion to dismiss to a motion for summary judgement because the tax court considered additional documents Mr. Feliciano submitted to oppose the department's motion. Mr. Feliciano's arguments were without merit and the tax court granted the summary judgment motion. ***Pereira v. Comm'r***, Nos. 9232-R & 9251-R (4/9/2019).

Property tax cases; prevailing party's costs and disbursements within discretion of court. In a property tax appeal, prevailing party costs and disbursements are governed by specific statutory language, which provides that "Judgment shall be for the amount of the taxes for the year as the court shall determine the same, less the amount paid thereon, if any.... If the tax so determined is decreased from the amount originally levied, the court may, *in its discretion*, award disbursements to the petitioner, which shall be taxed and allowed and be deducted from the amount of the taxes as determined." Minn. Stat. §271.06, subd. 1 (2018) (emphasis added). In the instant case, the court awarded $2,164.50 of the $6, 652 requested by the prevailing property taxpayer. Following established norms, the court did not award fees requested for the expert's appraisal or for the time the expert spent preparing for court. Fees were awarded, however, for the two hours the expert spent testifying. ***Podany v. Hennepin Co.***, No. 27-CV-16-05625, 2019 WL 1560856 (Minn. Tax 4/5/2019).

Property tax: Dismissal for failure to comply with disclosure requirements. Avis Budget Car Rental (Avis) leases space from the Metropolitan Airports Commission (MAC). Although the Minneapolis-St. Paul airport itself is exempt from taxation, when the MAC makes its property available for use in conjunction with a business associated for profit, that for-profit entity incurs property tax obligations. Avis petitioned the tax court challenging the county's assessment of the value of Avis's interests. Minnesota statute requires that challengers to property tax assessments provide certain information to the county assessor by August 1 of the taxes-payable year. The required information includes financial statements and other similar information. Minn. Stat. §278.05, subd. 6(a) (2018). Minnesota statute also provides that failure to provide the information "*shall result* in the dismissal of the petition." Minn. Stat. §278.05, subd 6(b) (2018) (emphasis added).

Minnesota case law establishes that the duty to disclose the required information is strictly enforced, even if there is no prejudice to the county by the omission. In this dispute, Avis provided extensive financial information to the county. In addition, the county received information from the MAC about the value of Avis's property. However, the county claimed, and the tax court agreed, that a piece of required information was not timely disclosed. Although the county may have received sufficient information from other sources, and despite Avis's strenuous argument that the county was not prejudiced by the purported failure to provide the information, the tax court determined that since the statutory disclosure provision in Minn. Stat. §278.05 is mandatory, failure to comply required the tax court to dismiss Avis's petition. On this same rationale, the court reasoned that "The County cannot waive compliance with the statute, either explicitly or implicitly" and rejected Avis's argument that the county waived compliance with the statute. Avis's equity-based argument fared no better: The court rejected an equitable estoppel argument, finding insufficient evidence of wrongful conduct. Finally, the court rejected a laches argument, noting that the Minnesota Tax Court sits as a court of law, not equity, and that "Avis points to nothing that would allow us to perpetuate, on equitable grounds, a petition that the law requires be dismissed." ***Avis Budget Car Rental LLC v. Hennepin Co.***, No. 27-CV-17-04683, 2019 WL 1768464 (Minn. Tax 4/12/2019). *See also* ***Enterprise Leasing Co. of Minnesota v. Hennepin Co.***, No. 27-CV-17-04682, 2019 WL 1768442 (Minn. Tax 4/12/2019) (dismissing nearly identical challenge on same grounds).

WWII airplane, business or hobby? Students in introductory income tax classes learn that business expenses are (generally) deductible, while hobby expenses (generally) are not. The dividing line between whether an activity is one entered into for profit (as required for expenses attributable to the activity to be fully deductible from income tax) is a subjective one. The taxpayer must show that she undertook the challenged activity with an actual and honest objective of making a profit. The expectation of a profit does not have to be reasonable, but it must be genuine. In this dispute, the tax court was called upon to determine whether accomplished airline pilot Edward Kurdziel had the requisite profit motive when he purchased and then painstakingly (and expensively) restored a vintage, two-seater World War II airplane. The tax court, applying the 9-factor test for determining intent as set out in the regs, held that Mr. Kurdziel did not have an actual and honest objective of making a profit. He was not permitted to use his personal hobby expenses to offset the income he earned as a commercial airline pilot.

The extensive and entertaining opinion authored by Judge Holmes begins by recognizing Mr. Kurdziel's skill and experience as both a pilot and mechanical engineer. Mr. Kurdziel had a distinguished career flying for the military and continues to work as a commercial airline captain. He purchased the plane at issue—a vintage Fairey Firefly—for $200,000. When he purchased the plane, it was not airworthy. He spent years, and over $1 million, to get the plane ready to fly (the opinion does not report total restoration costs, but Kurdziel claimed a basis of $1.6 million in the restored plane). He achieved an airworthiness certificate and became licensed to fly the plane. He remains "the only man in America licensed to fly a Fairey Firefly."

Mr. Kurdziel claimed significant losses on his Firefly-related activities. In fact, his Schedule C losses offset more than half of his income from other sources. Kurdziel's plan to take passengers up in the airplane turned out to be a nonstarter, so Kurdziel took the restored plane to air shows. The plane

was a hit with plane enthusiasts, but Kurdziel did not make much money. Instead, he generated six-figure losses, which the commissioner denied—a denial the tax court upheld. Kurdziel's motive in purchasing and restoring the plane, according to the Tax Court, was not to make a profit. Noting, however, that there is "no outright victor" in this dispute, the tax court disallowed the negligence penalty the commissioner imposed. The commissioner established that Kurdziel failed to make a reasonable attempt to comply with the provisions of the internal revenue laws by misrepresenting his not-for-profit activities as an "airplane leasing" business. This reporting position allowed Kurdziel to achieve large, income-offsetting deductions that were "too good to be true." The commissioner, however, failed to produce evidence that the penalties at issue here were "personally approved (in writing) by the immediate supervisor of the individual making such determination." Sec. 6751(b)(1). Thus, the commissioner did not meet his burden of production, and the accuracy-related penalties were not upheld. ***Kurdziel v. Comm'r***, T.C. Memo 2019-20 (3/21/2019).

■ **Matter of first impression: Social Security income included in modified adjusted gross income for purposes of premium tax credit.** As part of the Patient Protection and Affordable Care Act (ACA), Congress provided that certain taxpayers were eligible to receive a subsidy to reduce the cost of that taxpayer's health insurance premiums. The subsidy is administered through the tax code, and is referred to as a premium tax credit (PTC). During the tax years at issue, the PTC was available to taxpayers whose household income was at least 100% but not more than 400% of the federal poverty line. Household income, in turn, was defined as the sum of the taxpayer's modified adjusted gross income (MAGI) plus the MAGI of certain family members (the question of family members was not relevant to this taxpayer's situation).

The question of first impression faced by the tax court in this appeal was the treatment of Social Security benefits when received in a lump sum. The tax court held that MAGI includes all Social Security benefits a taxpayer receives in a particular tax year, including nontaxable portion of lump sum payment attributable to prior year for which he made Code Sec. 86(e) election. Relying on what the tax court read as unambiguous language, bolstered by its reading of legislative history, the court held that for the purposes of determining taxpayer eligibility for a §36B credit, MAGI includes all Social Security benefits received in year at issue, including the nontaxable portion of any lump sum payment attributable to prior year even if the taxpayer made a IRC §86(e) election. ***Johnson v. Comm'r***, No. 1394-16, 2019 WL 1125865 (T.C. 3/11/2019).

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TORTS & INSURANCE

JUDICIAL LAW

■ **Insurance; ability of insurer to intervene in underlying action.** Plaintiff, a four-year-old, sustained injuries from a dog bite while in the care of defendant's in-home childcare center. The childcare center was insured under a childcare insurance policy issued by a non-party insurer, which provided a defense and tendered its policy limits. Defendant was insured under a homeowner's policy issued by appellant insurer, which contained an exclusion for bodily injury arising out of business pursuits. Appellant denied coverage for the claim and refused to provide a defense for defendant. Between July 2013 and October 2014, plaintiff and defendant each notified appellant of their intent to enter into a Miller-Shugart settlement agreement. In July 2016, plaintiff informed appellant that they had finalized a Miller-Shugart agreement that called for a determination of damages through binding arbitration. Appellant appeared at the arbitration hearing but did not participate. The arbitrator valued damages at $510,000.

In November 2016, plaintiff and her family filed a motion in district court to approve and enter judgment on the settlement agreement. Appellant filed a motion to intervene and asked the district court to continue the settlement-approval hearing until after the intervention motion was resolved. The district court went forward with the settlement-approval hearing and declined to hear appellant's argument on the merits. In its order approving the settlement and ordering entry of judgment against defendant, the district court found that the settlement was reasonable and prudent and "dismissed" appellant's motion to intervene.

The Minnesota Court of Appeals affirmed. The court held that appellant failed to satisfy the third requirement for intervention as a matter of right: "circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect" an interest in the subject matter of the litigation. The court reasoned that because appellant "has the opportunity to challenge the characterization of the settlement and its reasonableness in an action to recover under the settlement in a separate action, the third factor for intervention as a matter of right in this matter is not satisfied." ***Daberkow v. Remer***, No. A18-0472 (Minn. Ct. App. 2/19/2019). *http://www.mncourts.gov/mncourtsgov/media/Appellate/Court%20of%20Appeals/Holiday%20Opinions/OPa180472-021919.pdf*

JEFF MULDER
Bassford Remele
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Greenberg Traurig, LLP has expanded its new Minneapolis office with the addition of intellectual property & technology shareholders Stephen R. Baird, Tiffany A. Blofield, and Craig S. Krummen.

Allen J. Peterson has joined the Red Wing law office of Vogel & Gorman, PLC, handling matters of municipal prosecution, child protection, civil litigation, and criminal defense.


BURTON


PAYZANT

Matthew R. Burton and Scott S. Payzant have joined Morrison Sund PLLC. Burton will continue to practice in the field of bankruptcy law, and Payzant will focus his practice on employment law and general business law.


EISLER


LEWIS

Katie Eisler and Pharaoh Lewis have joined Nilan Johnson Lewis as associates. Eisler joins the corporate and transactional services practice. Lewis joins the product liability/mass tort and business litigation practices.


HOROSHAK


CYPULL


PEDEN

Kain & Scott announced the addition of three associate attorneys. Dr. Jesse Horoshak joined the firm in October 2017. He is a graduate of Mitchell Hamline School of Law and practices out of the Maple Grove office. Dr. Clara Cypull joined the firm in June 2018. She is a graduate of University of St. Thomas School of Law and practices out of the Maple Grove office. Finally, Dr. Jake Peden joined the firm in December 2018. He is a graduate of University of St. Thomas School of Law and practices out of the Brainerd office.

Benjamin Bauer joined Nichols Kaster in the ERISA litigation practice group, where he is handling class actions involving the imprudent management of employee 401(k) funds by employers.


ANDREASEN


KIRK


STECKLER

Creig Andreasen, Benjamin J. Kirk, and Jon Steckler have joined the Coleman Law Firm. Andreasen is an MSBA Certified Real Property Specialist and focuses his practice in banking, real estate, and corporate law. Kirk's practice is focused on construction and real estate, with particular focus on construction defect litigation. Steckler's practice focuses on commercial law and litigation plus insurance coverage and defense, real estate, franchise, and business litigation.


RUMICHO

Kaleb E. Rumicho was appointed to the board of trustees of Wallin Education Partners, a college-completion program. Rumicho is an associate at Fredrikson & Byron practicing in the bank & finance, mergers & acquisitions, and corporate governance groups.

Mark W. Ostlund has joined Huemoeller, Gontarek, & Cheskis, PLC, in Prior Lake, as a partner practicing in the areas of real estate, municipal, and estate law.

Bob Koneck has joined Maslon LLP in the litigation group. He focuses his practice on business litigation.


KONECK


BROCK

Thomas Brock was elected a shareholder at Erickson, Zierke, Kuderer & Madsen, PA. Brock represents clients on matters ranging from personal injury and professional liability to insurance coverage and business disputes.

Paul Grinde and Kris Dicke announced the opening of their new law firm, Grinde & Dicke Law Firm PA, in Rochester, MN. Jennifer Shabel has joined the firm as an associate attorney.

Anna M. Koch has joined Trepanier MacGillis Battina PA as an associate attorney practicing in the areas of business, employment, and real estate litigation.


KOCH

Gov. Walz appointed Rebekka Stumme as a district court judge in Minnesota's 6th Judicial District. Stumme will be replacing the Hon. Mark A. Munger and will be chambered at Carlton in Carlton County. Stumme is an assistant county attorney in the St. Louis County Attorney's Office.


STUMME

Gov. Walz appointed Matthew Mallie as a district court judge in Minnesota's 9th Judicial District. He will be replacing Hon. Earl E. Maus and will be chambered at Brainerd in Crow Wing County. Mallie is a solo practitioner at Mallie Law Offices, PA, where he maintains a general practice.

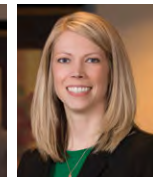
Stuart Deuring was honored as Cancer Legal Care's 2019 Volunteer Attorney of the Year at the organization's Legal Care Affair Celebration and Fundraiser on May 8.


DEURING

Andrea Derby Workman has been elected a shareholder at Henschel Moberg, PA, a boutique law firm with a singular focus on family law.

Travis Adams and Amber Donley joined Melchert Hubert Sjodin PLLP as associate attorneys at the firm's Waconia office. Donley will focus her practice mainly in family law. Adams joins the personal injury and litigation team.


ADAMS


DONLEY



BRANDT KAISER WIELAND

Moss & Barnett announced the expansion of the firm with the arrival of lawyers Craig A. Brandt, Peter J. Kaiser, and Jeffrey A. Wieland.

Benjamin C. Neitzel has joined Fredrikson & Byron as an associate in the firm's mergers & acquisitions and corporate governance groups.

KEEGAN

Kelly Keegan has been elected the 2019 president of the Minnesota Association of Criminal Defense Lawyers.

Andrew Christoffel has joined Christoffel & Elliott, PA in the firm's real estate, banking, business, and finance practice. He previously was working as an associate at a firm in New York.

IN MEMORIAM

GLENN A. FROBERG, age 92 of Chanhassen, passed away on April 8, 2019. He worked for Motorola for 20 years in engineering before entering William Mitchell College of Law. Glenn earned his JD in 1972 and subsequently established a private legal practice in Minnetonka, MN. Before retiring from the law at age 80, Glenn served as attorney for the city of Shorewood, MN, and referee for the Hennepin County Conciliation Court. Glenn was also mayor of Tonka Bay for two terms.

JAN MARIE ZENDER passed away on October 4, 2018. She graduated from the University of Minnesota School of Law in 1985 and practiced law in St. James, MN.

MARTIN N. KELLOGG, age 88 of St. Paul, passed away on March 21, 2019. Kellogg attended evening classes to obtain a degree from the William Mitchell College of Law. In 1983, he joined UFE Incorporated, an international manufacturer of precision molded plastics, where he eventually became president, CEO, and co-owner.

WILLIAM B. BARTE, age 85, of St. Paul, passed away January 8, 2019. Barte was a long-time 3M employee and a graduate of William Mitchell College of Law.

WILLIS "BILL" FORMAN passed away at age 93 on March 19, 2019. He spent 40 years at Paper, Calmenson & Co. as president, treasurer, and CEO, retiring in 1999.

GARY A. DAVIS, age 77 of White Bear Lake, passed away on March 22, 2019. Gary retired in 2012 after a challenging and satisfying legal career of 41 years serving the Ramsey County's Attorney's Office Civil Division.

JOHN R. 'BUD' CARROLL, 93, prominent long-time real estate attorney, passed away on February 23, 2019. In 1974, his firm merged Maloney, Carroll & Olson with Best & Flanagan, where Bud continued to practice law and mentor young lawyers until his retirement in 2001 at the age of 76.

BERT J. MCKASY, age 77 of Mendota Heights, passed away on February 8, 2019. He was a retired partner at Lindquist & Vennum LLP (now Ballard Spahr). McKasy was active in government and served three terms in the Minnesota House of Representatives.

JOHN GIBLIN, age 68 of Plymouth, passed away on January 30, 2019. Giblin graduated from William Mitchell College of Law and was a long-time Minneapolis attorney.

Classified Ads

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ATTORNEY WANTED

LIES, BULLIS & Hatting, PLLP, a general practice firm based in Wahpeton, ND, has an immediate opening for an associate attorney. Compensation will be commensurate with experience and qualifications. Excellent academic credentials and writing skills required. Ideal candidate will have one to two years of experience, have gained admission to ND and/or MN bar, be willing to litigate complex matters, handle a wide variety of matters at once, and have the ability/willingness to cultivate relationships with existing and new clients. Confidential inquiries, including a resume and cover letter, should be directed to: Brittany Hatting, Lies, Bullis & Hatting, PLLP, at bhatting@liesandbullis.com.

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ASK LLP, a nationally recognized law firm involved in major commercial bankruptcy cases throughout the U.S., is looking for an associate attorney with at least three years' experience. We value excellent academic credentials, writing and negotiation skills and ability to manage a large case load. We expect impeccable references and a strong work ethic. Prior bankruptcy law experience a plus. This is a unique opportunity to gain national bankruptcy and litigation experience. Our attorneys are given front line experience and the opportunity to interact with the top bankruptcy professionals both in court and at major bankruptcy conferences. We provide excellent benefits, opportunity for travel, and continuing education. Please send resume and cover letter along with salary expectations to: wpansegrau@askllp.com.

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ASSOCIATE ATTORNEY – Civil Rights and Impact Litigation. Nichols Kaster PLLP, one of the nation's largest class action firms, is growing its Civil Rights and Impact Litigation practice. The firm's Civil Rights and Impact Litigation Group takes on large-scale injustices that threaten protected groups and the country's most vulnerable populations. The group focuses on class action cases involving discrimination, fraud, and other unfair business practices in employment, government and private contracts, insurance, healthcare, housing, schools, prisons, and the environment. The Civil Rights and Impact Litigation practice group seeks applicants for an associate attorney position in its Minneapolis, MN office. We are looking for creative, motivated, and socially-conscious attorneys who want to use the law to fight injustice and make change. Associates take an active role in managing their own cases, writing, responding to, and arguing motions, taking and defending depositions, and participating in trials. We staff our cases efficiently, giving new lawyers the opportunity to gain valuable experience early on in their careers. Our associates are on the front lines of active litigation and find the practice both challenging and rewarding. At Nichols Kaster, we believe that diversity in all forms improves every workplace and makes every organization better. Nichols Kaster is committed to creating an equitable and inclusive work environment for our employees and to bringing a diversity, equity, and inclusion lens to our work. Roles and responsibilities: Litigate class action cases in federal and state courts; Conduct legal research and write legal memoranda; Draft pleadings and briefs, argue motions in court; Maintain client relationships; Take and defend depositions; Travel as required for nationwide litigation and conferences; Work with industrial-organization psychology, economics, and other experts; Develop new cases and conduct pre-suit investigations; Develop relationships with other attorneys in the plaintiffs' bar; Engage in public speaking, including at conferences, CLEs, and on panels; Work closely with and supervise paralegals, assistants, interns, and clerks. Experience and qualifications: JD degree - Candidates with zero to three years of litigation experience are encouraged to apply and responsibilities and compensation will be adjusted accordingly; Desire to work on class action and multi-plaintiff cases; Self-motivated, entrepreneurial, collaborative, and diligent, with a commitment to plaintiffs' side litigation; Admission to the MN bar, or eligibility for admission within six months; Superior analytical skills and excellent research and writing skills; Excellent oral communication and advocacy skills; Ability to juggle multiple responsibilities, work independently, and meet strict deadlines under pressure. Apply online at: https://www.nka.com/careers.html

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BEST & FLANAGAN is seeking a transactional attorney to join its business law team. Candidates should have experience in entity formation, structure and governance, contract negotiation, tax and regulatory compliance, M&A, succession planning or tax-exempt entities. While you must be licensed in Minnesota, no minimum number of years of practice is required. Judgment, intelligence, curiosity, creativity, accountability and fit are more important than years of experience. We believe that smart people working as a team can advance the goals of our clients and our firm. If you are interested in joining our team, please visit our website at: www.bestlaw.com/Current-Opportunities.

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BOSSHARD | PARKE LTD, a leading law firm based in La Crosse, Wisconsin, is seeking associates. Candidates should have strong academic credentials, excellent written and oral communication skills, self-motivation, and the ability to build client relationships. We offer competitive compensation and benefits in a collegial and family-friendly environment. Our associates take substantial responsibility and ownership over individual client matters, while working collaboratively on complex issues. Interested candidates should submit a cover letter and resume via email to: twiltgen@bosshardparkelaw.com.

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CIVIL LITIGATION Associate Attorney. Northwest-suburban law firm has an immediate opening for an associate attorney in its growing, defense-oriented civil

litigation department. Our nine-attorney firm offers challenging work representing a high-level clientele in a collegial, but professional, small-firm atmosphere. The ideal candidate would have two to five years of civil litigation experience, but exceptional applicants with less experience may apply. Workers' compensation experience a plus. Other practice areas in our litigation department include employment law, corporate, business, construction litigation, real estate, personal injury defense, and insurance litigation. We offer a competitive, comprehensive benefit package, with substantial opportunity for professional growth as our litigation practice expands. Candidates must be admitted to the Minnesota Bar. Email letter of application and resume to: dawn@glalawfirm.com.

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CLOQUET LAW firm seeking attorney willing to permanently relocate to the Cloquet area. Strong writing and oral communication skills are required, demonstrable client skills and work ethic are important. Prior legal experience preferred but not required. For consideration please forward cover letter and resume to: sandy@rudylawfirm.com.

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COME GROW with us! Stearns Bank NA is seeking a junior level, in-house corporate attorney. The ideal candidate has a background in corporate law, secured transactions, commercial transactions and litigation, collections, creditors' rights and bankruptcy. Banking law experience and representation of lenders and financial institutions a plus. Responsibilities: Support General Counsel in managing a comprehensive range of legal matters. Provide direction, guidance and assistance on legal matters to General Counsel and management. Research legal issues and statutes/regulations, and brief General Counsel and management on research and recommendations. Provide recommendations and legal support in potential litigation and loan documentation, secured transactions, and lender rights, remedies and recourse. Engage and manage outside counsel. Qualifications: Juris Doctor (JD) from an accredited law school or Paralegal Degree. Licensed to practice in Minnesota (if attorney). For more information visit our website: www.stearnsbank.com. The Company Founded in 1912, Stearns Financial Services Inc. (SFSI) is a $2 billion well-capitalized, independent financial holding company based in St. Cloud, Minnesota. Specializing in nationwide small business lending and equipment financing, Stearns has maintained outstanding customer service, fast decisions, and customized finance solutions to their customers for decades. Stearns Bank has earned itself a stellar reputation amongst customers and competitors alike. This reputation goes beyond just word-of-mouth, as Stearns has been recognized by the Independent Community Banker's Association (ICBA) as the #1 top-performing bank in the nation over a based on the three-year average Return on Assets for banks $1 billion or more. They have also been recognized by American Banker as the #1 top-performing bank in the nation over a three-year period for Return on Equity for banks from $2 billion to $10 billion. As a 2017 & 2018 recipient of the Minnesota Business Magazine 100 Best Places to Work in Minnesota award, Stearns takes pride in their team and holds their employees in extremely high regard. We offer a competitive salary and benefit package including our Employee Stock Ownership Program-one of the best long-term incentive programs in the nation.

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COMMERCIAL LITIGATION & Employment Law Associate Attorney (Minneapolis) – Trepanier MacGillis Battina PA seeks a highly-motivated commercial litigation and employment law associate with three to six years of experience to perform top-quality work in small-firm atmosphere. Work includes litigating commercial and employment law disputes (complaints, answers, discovery, drafting pleadings and motions, depositions, mediation, research, trial preparation, and general litigation support); counseling employer clients on compliance with federal, state, and local employment laws and discipline/termination issues; drafting offer letters, employment agreements, employee handbooks, restrictive covenants, and severance agreements; and advising executive clients on employment contracts. Candidate must have prior experience handling commercial and employment litigation matters and advising employers on HR compliance issues. Candidate should have strong academic credentials, excellent writing skills, and attention to detail. Competitive wage based on experience; 401(k), PTO, paid holidays, health/dental insurance, and life insurance available. If you have a positive attitude and great work ethic, please apply to join our team! We offer a casual and friendly work environment. Please send resume by email only to Joni L. Spratt, Office Manager, at: jspratt@trepanierlaw.com. More information on the firm can be found at www.trepanierlaw.com.

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CORPORATE ASSOCIATE – Fafinski Mark & Johnson. We are seeking an associate with at least three years of relevant experience to add to our growing Corporate practice. The candidate should have strong drafting and communication skills, a professional demeanor, experience in managing complex and time-sensitive projects, and the ability to work both as part of a team (including cross-office) and independently. Candidates with experience in general corporate advising; formation of business entities; tax; and/or contract drafting are preferred. A background in real estate would also be beneficial. We offer excellent benefits, a salary commensurate with experience, performance-based bonuses, and an opportunity for professional growth. Please email resume and cover letter with salary requirements to employment@fmjlaw.com or mail to FMJ-HR, 775 Prairie Center Drive, Ste. 400, Eden Prairie, MN 55344.

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HALL LAW, PA, a premier plaintiffs personal injury law practice is seeking an associate attorney with one to ten years' experience to join its practice full-time in its St. Cloud, MN office. If you are a lawyer looking to make a positive difference in people's lives by offering innovative, tenacious and compassionate representation to your clients, please submit a cover letter, resume, writing sample (15 pages or less), references and your law school transcript to: lori@hallinjurylaw.com. Thank you in advance for your interest in our firm.

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JACKSON LEWIS is looking for an Employment/Litigation Attorney to join our Minneapolis team. Ideal candidate will have one to five years employment law experience, excellent academic credentials, Minnesota Bar Admission, excellent written and oral communication skills, strong organization, time management and project management skills. Responsibilities to include defense of agency charges of discrimination, lawsuits involving a range of employment related claims; daily advice and counsel to clients regarding various employment and labor law issues; represent employers in court, before administrative agencies, at mediation, and in arbitration and in employment matters, including class/collective actions and discrimination, harassment, retaliation, employment tort, and non-compete cases. Email resumes to: MinneapolisRecruiting@jacksonlewis.com.

JOIN THE #1 Furniture Company – Join The #1 Furniture Brand. The Senior Regulatory Counsel is responsible for providing legal research and advice, both proactively and reactively, in all assigned subject areas. This position will focus mainly on regulatory compliance, including Consumer Product Safety Commission, OSHA, international and similar matters, as well as on general contract negotiation and review. Qualifications: Juris Doctorate from an accredited ABA law school, required. Seven plus years of legal experience including two to three years with significant client contact. Candidate with at least four plus years of regulatory compliance experience at a large law firm or corporation, including CPSC, OSHA or international compliance matters, will also be considered. License to practice law and in good standing under the Bar of any state that enable admission to practice as in-house counsel in Wisconsin or Florida, required. Send resume to Khara Erickson at: kherickson@ashleyfurniture.com.

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MALKERSON GUNN Martin LLP seeks experienced, partner-level attorneys specializing in a transactional or litigation real estate practice. We enjoy low overhead, almost no law firm "bureaucracy," downtown Minneapolis offices, sophisticated practitioners and a collegial atmosphere. Please contact Stu Alger (sta@mgmllp.com).

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MOLINARO DAVIS Law PLLC in Burnsville is seeking an associate attorney with an interest in estate planning, guardianship/conservatorship, probate and/or tax, including litigation in all areas. Some experience with real estate law or business law is preferred. Please send a resume, cover letter, transcripts, and writing sample to: teresa@molinarodavis.com. All applications kept confidential.

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MELCHERT HUBERT Sjodin, PLLP, an established law firm located in the SW Metro, is seeking an associate attorney for the commercial practice area. Position will involve transactional work and litigation. Candidates should have a minimum of three years practice experience in several of the following areas: commercial finance, secured transactions, creditor's rights and remedies, business transactions and agri-business, and governmental matters. Please submit resume, transcript and writing sample to: mwillmsen@mhslaw.com.

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MELCHERT HUBERT Sjodin, PLLP, an established law firm located in the SW Metro, seeks an associate attorney for our municipal practice group. This attorney will provide legal guidance to municipalities on issues such as ordinances, land use, easements, eminent domain, and public finance. Candidates with a minimum of three years of experience in municipal law preferred. Please submit resume, transcript and writing sample to: mwillmsen@mhslaw.com

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OHNSTAD TWICHELL, one of North Dakota's fastest growing full-service law firms, is seeking motivated and qualified candidates to apply for a position with the firm's litigation and real estate practice groups. As an associate attorney at Ohnstad Twichell, you will have the opportunity to learn under the region's top attorneys while completing meaningful, challenging and cutting-edge legal work. We hire associates carefully, with the expectation that those selected will eventually become partners and spend their careers at Ohnstad Twichell. Associate attorneys enjoy the privilege of significant flexibility in their work and are expected to be self-motivated, hard-working go-getters capable of juggling a diverse set of projects without constant oversight. In addition to forming professional relationships with clients, Ohnstad Twichell strongly encourages and supports active participation in volunteer and networking activities within our communities. We offer excellent benefits and a great culture that fosters both personal and professional growth. Find out more about us at: www.ohnstadlaw.com. One to three years' experience preferred; 3Ls will be considered. Please send resume and cover letter to Joy Knutson at: jknutson@ohnstadlaw.com.

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PERSONAL INJURY/Workers' Compensation Attorney: McCashin Law Firm in Alexandria seeking an associate attorney to represent injured people in fast growing firm. Salary dependent on experience. Contact Rhonda at: rralaw@centurylink.net.

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RAJKOWSKI HANSMEIER Ltd is a regional litigation firm that specializes in the defense of civil lawsuits, including but not limited to personal injury claims and construction defect cases. We handle lawsuits throughout Minnesota, including a significant volume of work in the Twin Cities. We are seeking an associate attorney with two to four years litigation experience. The position will involve all aspects of litigation, including written discovery, motion practice, deposition coverage, and trial and appellate work. The ideal candidate must be self-motivated, have excellent communication and writing skills, and be comfortable working in a demanding and challenging work environment. Please submit resume, transcript, and writing sample: Human Resources, Rajkowski Hansmeier Ltd., 11 Seventh Avenue North, St. Cloud, MN 56302, (320) 251-1055, humanresources@rajhan.com. EOE

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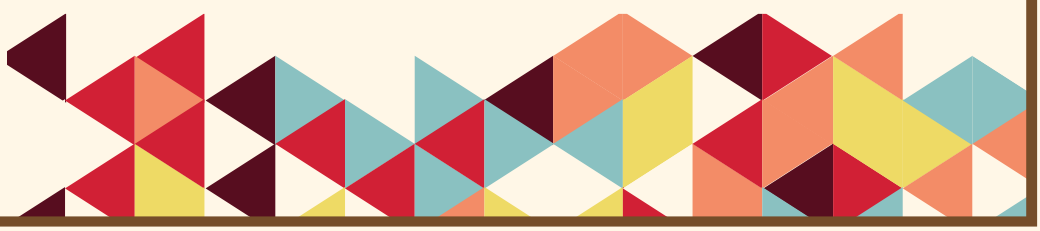





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