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VOLUME LXXVIII NUMBER XI
DECEMBER 2021
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Look for our newly combined January/February 2022 issue, coming in early February!*

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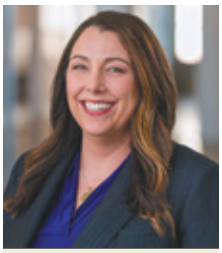
** Editor's note: Beginning in 2022, Bench & Bar will be published 10x/annually, including combined issues in January/February and May/June.*

A great day to be a new lawyer

MSBA President Jennifer Thompson welcomed 345 new lawyers to the Minnesota bar in admission ceremonies held at the Minnesota State Capitol on October 29.

At the end of October, I had the honor of offering a few remarks to the newest members of our profession when I spoke at the new lawyer admission ceremonies. The ceremonies were held (in person, mostly) in the House of Representatives chamber at the Minnesota State Capitol. The setting was magnificent yet intimate. There were ear-to-ear smiles, and also tears—which seemed born equally from a feeling of uncontainable joy and the weight of having "made it" being lifted from many shoulders. There were trembling voices in moving for the admission to the bar of loved ones, and the confident pose of those swearing an oath they had worked hard to earn the privilege to take. There were babies and grandparents; siblings and friends; parents clutching their children's hands—and sometimes their entire bodies—tightly. There were pictures and videos and handshakes and hugs. I ended the day feeling like my cup had been filled, and it wasn't even my day!



JENNIFER THOMPSON is a founding partner of the Edina construction law firm Thompson Tarasek Lee-O'Halloran PLLC. She has also served on the Minnesota Lawyers Mutual Insurance Company board of directors since 2019.

As Abraham Lincoln watched over each ceremony from his grand painting at the front of the House chamber, Chief Justice Gildea reminded everyone of his words: "As a peacemaker the lawyer has a superior opportunity of being a good [person]." Each new lawyer also swore an oath to do good, promising to conduct themselves with "all good fidelity." The entire day was a reminder about that which is at the heart of our profession—goodness and doing good. At its core, this is what the MSBA is about, too.

The mission of the MSBA is to promote the highest standards of excellence and inclusion within the legal profession, provide valued resources to MSBA members, and strive to improve the law and the equal administration of justice for all. In short, the MSBA's mission is to work for the good of the profession, the good of its members, and the good of the justice system.

As lawyers, we have a unique opportunity to work for that good. We earn a little more respect and hold a special place in the community by virtue of the profession we chose. We must honor that respect by practicing law in a manner that serves the public good. We cannot be so gripped by the power and opportunity that our profession affords us that we lose sight of the great privilege and responsibility that comes with it. Our state needs the legal profession to be part of its heart and its conscience and to work for the greater good.

The MSBA, with its members' support and engagement, will continue to work for good on matters of critical importance, including access to justice, the equal administration of the law, and diversity, equity, and inclusion. When MSBA members are engaged and active on these issues, the bar association can shape the profession and our larger community for the better. My hope for the new lawyers admitted to the profession in October, and for all lawyers in Minnesota, is that they will remain as dedicated to the principle of doing good as they were on the day they swore their oath to it, and that they will join with the other members of the MSBA to engage in this work together. ▲

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MSBA

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The Minnesota State Bar Foundation is ready to take your donations and increase its funding of critical legal services across the state at **www.mnbar.org/donateMSBF.** You'll get the satisfaction of being able to "check the box" when you renew, telling the supreme court that you have contributed to a more just state.

Minnesota's newest attorneys sworn in at the Capitol

The Minnesota Supreme Court and the MSBA welcomed 345 new lawyers to the bar in seven admission ceremonies held at the state Capitol on October 29. One ceremony was conducted virtually for those who could not attend in person. The new lawyers join the ranks of more than 25,000 active licensed attorneys in Minnesota.

Chief Justice Lorie Skjerven Gildea led the proceedings in the House of Representatives chambers, joined by the associate justices. Justice Gordon Moore addressed the new lawyers, talking about the profession's responsibilities, the importance of protecting their health and well-being, and their duty to advocate for the underrepresented. John Koneck, president of the Minnesota Board of Law Examiners (MBLE), gave the introduction; MBLE's Natasha Melchionne read the roll of new attorney candidates; Chief Justice Gildea administered the oath; and MSBA President Jennifer Thompson welcomed them to the Minnesota legal community.

Before and after the ceremony, the new lawyers were invited to sign their names in the Roll of Attorneys book, advancing a practice that dates to 1858—the year of Minnesota's statehood—and reinstated in 2018 after a 35-year break. Attorneys admitted between 1983 and 2018 who would like to sign the roll book may do so by appointment at the Minnesota State Law Library. ▲

Pro bono spotlight
The Reentry Justice Program

The MSBA is proud to partner with legal services organizations across Minnesota to encourage pro bono and to let you know about opportunities to volunteer your time. This month we are highlighting the Minnesota Collaborative Justice Project's Reentry Justice Program, which focuses on the civil legal needs of formerly incarcerated individuals.

The civil legal needs initiative is dedicated to improving the experiences and outcomes of formerly incarcerated Minnesotans by working to reduce barriers and create productive pathways for these individuals. Driver's license reinstatement is just one critical component for the formerly incarcerated, and volunteer attorneys play a critical role in helping to resolve this issue. Many reentering clients need to obtain a valid driver's license, and some may need to resolve unpaid fines and fees to obtain the license. Helping these people is important work: Reliable transportation is integral to seeking and maintaining employment, and sustained employment is a key indicator for success in reentry. The approximate time commitment for a volunteer attorney is five to 10 hours per week, and a recorded training is available. Mentorship options are also available for each case. If you would like to volunteer or learn more, please email *reentry@probonoinst.org*.

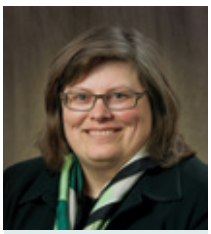
This opportunity is posted on the MSBA's recently introduced pro bono spotlight page. You can watch a short video and read more about volunteering with the Minnesota Collaborative Justice Project at *www.mnbar.org/pro-bono-spotlight*. ▲

Potential ethics rule changes

The ethics rules generally change infrequently. Currently pending before the Minnesota Supreme Court are petitions to amend the advertising ethics rules (Rule 7, Minnesota Rules of Professional Conduct) as well as a proposal to amend the confidentiality rules applicable to information held by the Director's Office (Rule 20, Rules on Lawyers Professional Responsibility). If you are interested in either of these topics, take note of the comment period established by the Court: Any person or organization wishing to provide written comments in support of or in opposition to the amendments must file comments with the Clerk of the Appellate Court by December 20, 2021. I thought an overview of the proposed changes to Rule 7, MRPC, and Rule 20, RLPR, would be helpful in case you wish to comment.

Rule 7, MRPC

Rule 7, MRPC, governs lawyer advertising and communications. In August 2018, the American Bar Association amended Rule 7 of the Model Rules, significantly reworking the rule's subparts to eliminate what the ABA believed were unnecessary provisions. Some of the noted reasons for amending Rule 7 include the advent and increased use of social media, and to address trends in First Amendment and antitrust law that disfavor regulation of truthful communication about the availability of professional services. The Director's Office and the Lawyers Professional Responsibility Board (LPRB) jointly petitioned the Court to adopt the ABA model rule changes. The Minnesota State Bar Association also petitioned the Court to adopt the proposed ABA changes, with one notable exception. In general, the main changes are as follows:



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

SUSAN.HUMISTON@COURTS.STATE.MN.US

Rule 7.1: Communications Concerning a Lawyer's Services

The principal change to 7.1 is to the comments. The cardinal rule remains the same: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." The proposed rule moves the requirements of Rule 7.5, MRPC, to the comments of Rule 7.1.

Rule 7.2: Advertising

The amended changes would permit nominal "thank you" gifts under certain conditions as an exception to the general prohibition against paying for recommendations. The amendment would also permit the use of a "qualified referral service," which the current rule does not provide. Notably, the proposed amendment would broaden the use of "specialist" language currently addressed in Rule 7.4(c) (which would be deleted under the amended rule) and permit lawyers who, by means of experience, specialized training, or education, have attained special competence in a field of law, to state that they are specialists or specialize in that field of law.

This is the primary area of disagreement between the OLPR/LPRB petition and the MSBA petition, and may be of particular interest to members of the bar. The MSBA's petition wishes to maintain rule language such that only individuals who are "certified" by an accredited program may use the term "specialists." This departs from the ABA proposed amendments, which allows attorneys to refer to themselves as "specialists" based on years of experience, education, and focus on a specialized practice, even if such attorneys were not certified, and limits the use of "certification" as a specialist to accredited programs. This also differs from the current Rule 7.4(c), MRPC, which allows the use of the term "certified as a specialist" as determined by any program as long as the certifying organization and its accreditation by the Minnesota Board of Legal Certification (or lack thereof) are noted.

Rule 7.3: Solicitation of Clients

The most notable change in Rule 7.3 is the elimination of the requirement that all solicitations clearly and conspicuously include the words "Advertising Material." The rule still prohibits targeted mailings that are misleading; involve coercion, duress, or harassment; or that involve a target of the solicitation who has made known to the lawyer a desire not to be solicited. Added to Rule 7.3 under the amendment is a provision specifying that the rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

Rule 7.4: Communication of Fields of Practice and Certification

As noted above, this subdivision is eliminated with a portion of its requirements incorporated into revised Rule 7.2.

Rule 7.5: Firm Names and Letterheads

The amendments eliminate this subdivision concerning firm names and letterheads by incorporating its guidance as part of the comments to Rule 7.1.

Rule 20, Rules of Lawyers Professional Responsibility

Many attorneys are not familiar with Rule 20, RLPR, and most attorneys will never have to know this rule. Rule 20, RLPR, governs the public and private nature of the documents and information maintained by the OLPR. Records maintained by the OLPR are specifically exempt from the Minnesota Data Practices Act (see Minn. Stat. §13.90) and from the Minnesota Rules of Public Access to Judicial Records (see Minn. Stat. Access to Rec., Rule 1, Subdiv. 2). Rule 20, RLPR, is therefore the only guidance on the confidential or public

nature of the records maintained by the Director. The purpose of amending Rule 20, RLPR, is to provide clarity as to the public or private nature of information maintained by the Director. Here are the changes of note.

Changes in the organization of the rule

A major change in the rule is in its organization. The proposed amendment would divide the rule into categories of information: (a) before probable cause or commencement of referee or court proceedings (nonpublic information); (b) after probable cause or commencement of referee or court proceedings (public information); (c) information maintained as part of the Director's more administrative rather than investigative or prosecutorial function; and (d) expungement.

Changes related to nonpublic information

The amended changes to Rule 20 would make clear the circumstances under which the Director is allowed to reveal otherwise nonpublic information. The amended changes would clarify that the OLPR may:

- share information with other lawyer admission or disciplinary authority that have matters under investigation relating to the affected attorney;
- share information otherwise deemed confidential with the DEC and any fact witness or expert witness as necessary to investigate a complaint;
- share information with the Supreme Court-approved lawyer assistance program (in this case, Lawyers Concerned for Lawyers (LCL)) in situations where, in the Director's discretion, such *one-way* notification is necessary or appropriate to address concerns related to a lawyer's mental, emotional, or physical well-being; and
- share information otherwise deemed confidential under this section with law enforcement or court personnel in situations where public safety and the safety of the Director and staff, Board, or district court is at risk.

Changes to public information

The amended changes to Rule 20 would make clear the circumstances under which the Director is allowed to keep certain information confidential that would otherwise be public. The amended changes would clarify that the OLPR may keep confidential:

- sensitive personal information contained in the file such as Social Security numbers, birthdates, driver's license numbers, bank account numbers, and medical information;
- information received from other disciplinary or government agencies classified by such agency as confidential, nonpublic information;
- the identity of non-complaining clients unless such party waives confidentiality, is subpoenaed as a witness to testify under oath, provides a sworn affidavit, or files documents in compliance with a subpoena *duces tecum*; and
- the Director's work product or the mental processes or communications of the Committee or Board members made in furtherance of their duties. This provision was previously contained under section 20(a) of Rule 20, and with the reorganization of Rule 20, is more appropriately under Rule 20(b).

Conclusion

If you have an opinion about these proposed amendments to the rules, please provide your comments to the Minnesota Supreme Court by the deadline of December 20, 2021. The Court's order and the pending petitions can be found at the LPRB website under the "Rules" heading and "Proposed/Pending Rules/Opinions" section. If you have suggestions for additional rule changes, please let me know. ▲

On the defensive: Responding to security suggestions

Almost 10 years ago, the health insurance marketplace for Minnesotans, MNsure, was launched. Like many undertakings of its size, some security issues marked the website's release. In particular, it was discovered that simple attacks could easily compromise personal information submitted by users. The problem and its solution were both fairly straightforward. But in trying to communicate with the officials in charge, I quickly found that bringing the problem to the attention of those in a position to fix it proved more challenging than expected. Instead of welcoming the information and suggestions for improvement, MNsure personnel received the news with denial and frustration.

A recent headline out of Missouri made me remember this incident. Missouri Gov. Mike Parson is planning to prosecute the *St. Louis Post Dispatch* for reporting a security vulnerability in a state education website that exposed Social Security numbers.[1] Instead of taking the warning to heart and being grateful for the opportunity to proactively prevent future breaches, the governor is retaliating with the threat of legal action. He views the research that documented and publicized the vulnerability as a hack, stating that, "Not only are we going to hold this individual [reporter] accountable, but we will also be holding accountable all those who aided this individual and the media corporation that employs them." The governor believes that the vulnerability was reported with the purpose of embarrassing the state and selling papers, not to remediate a glaring security issue that could continue to expose the personal information of educators.

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

The episode has led many critics to point out the long-term effects of silencing security researchers, not to mention the repercussions of trying to control and intimidate the press. It has also been noted that the paper acted ethically and in accordance with guidelines in reporting on the vulnerability. According to an account published in Wired, "The *Post-Dispatch* seems to have done exactly what ethical security researchers generally do in these situations: give the organization with the vulnerability time to close the hole before making it public."[2] It would seem that the paper did not act inappropriately or with malicious intent in its reporting. Rather, like many individuals trying to bring about improvements in cybersecurity, the reporters were shot for being the messengers. An expensive witch hunt to penalize those who spoke up will further complicate the issue by utilizing resources that could be spent to improve security infrastructure and culture; the governor has provided an estimate of $50 million for dealing with the "hack." It is unclear what the cost of fixing the security vulnerability alone was, nor is it apparent how the $50 million estimate was calculated. It should be emphasized that the vulnerability itself has already been fixed.

> Instead of blaming individuals for trying to improve security, organizations should openly encourage information-sharing and communication.

Though what happened in Missouri represents an extreme example, this kind of reaction is not entirely uncommon. Many security professionals and IT departments are faced with this kind of behavior when cybersecurity vulnerabilities are discovered. Deflection, anger, denial, minimization of the threat, and an instant resort to the blame game often follow an earnest attempt to inform upper management of a security concern. Attempting to divert attention away from the problem at hand by blaming the individuals who brought attention to it is unproductive at best.

Within organizations, this might be a good example of how not to address and remediate security issues. While there might be written policies in place on reporting cybersecurity concerns to upper management, employees or the IT department may feel apprehension when it comes to actually providing information. Knowing beforehand that concerns will be disregarded or that negative consequences will result are common deterrents. Instead of blaming individuals for trying to improve security, organizations should openly encourage information-sharing and communication. All reports should be investigated properly before any action (including denial that there is any issue) is implemented.

Security professionals are not responsible for the vulnerabilities they unearth, nor should they be discouraged or punished for bringing these problems to the public's awareness provided they follow proper ethical guidelines. Security research is an important part of proactively countering cyber threats and the risks that accompany them. Within organizations, it is important to take security reporting seriously and to encourage improvement. Whether that's the IT department informing upper management of a vulnerability or an employee with a concern about email safety, security issues should be addressed with a mindset of remediation and advancement. ▲

[1] *https://www.npr.org/2021/10/14/1046124278/missouri-newspaper-security-flaws-hacking-investigation-gov-mike-parson*

[2] *https://www.wired.com/story/missouri-threatens-sue-reporter-state-website-security-flaw/*

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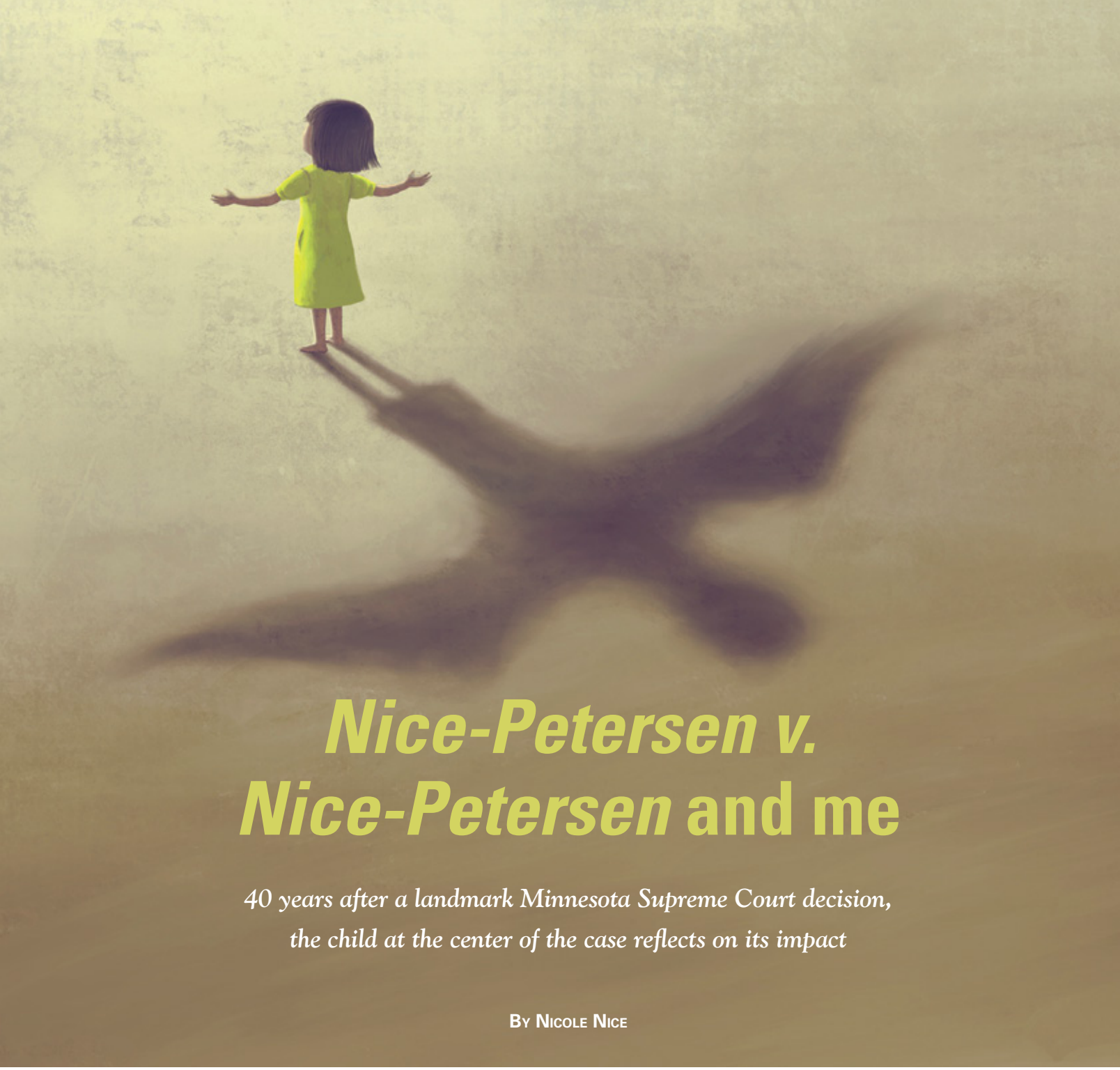


Nice-Petersen v. *Nice-Petersen* and me

40 years after a landmark Minnesota Supreme Court decision, the child at the center of the case reflects on its impact

By Nicole Nice

I was 16, one year out of the custody arrangement that marked much of my childhood, when I asked a friend to drive me to the Hennepin County Courthouse after school one day. I wanted to understand what had transpired between my parents for almost 15 years. I wanted to read our family's history. I asked the records clerk for my parent's case file; she dropped a pile of papers almost eight inches tall on the reading table. I sat before it feeling overwhelmed and daunted. The clerk informed me that the office closed in 30 minutes. I decided to leave and come back another day when I had more time. I never went back.

I did not know until almost 10 years later, as I was about to start law school, that there was a case decision in those files handed down by the Minnesota Supreme Court. A friend had stumbled upon it on Westlaw. I did not learn until several years after that, from a high school friend who had begun practicing family law in the state, that the case was in fact a significant precedent in Minnesota family law, frequently cited today. With each revelation, though, I still did not give the news much thought. I did not want to. As a child who had been at the heart of over a dozen hearings before Hennepin Family Court by the age of 15, I had learned that self-preservation depended on a determined art of compartmentalization. The trauma of these court battles, and the persistent tension of my childhood, was in the past. I needed to look forward.

Nice-Petersen v. Nice-Petersen (310 N.W.2d 471) was decided in 1981, when I was four. It is a brief, procedural decision in which the Minnesota Supreme Court held that a district court

can decide, on the basis of affidavits and without an evidentiary hearing, whether there is sufficient justification for modification of a custody order. Today a "*Nice-Petersen* hearing" is used to consider whether the petitioner has established a *prima facie* case by alleging facts that, if true, would provide sufficient grounds for a modification.

It is such a simple decision, and one so ingrained in Minnesota family law today, that it is perhaps natural to discuss it or to prepare for a *Nice-Petersen* hearing, without fully understanding what this dry, procedural decision meant to me and my mother. My father had been physically abusive to my mother during their marriage, violence that at times threatened my welfare as well. The custody arrangement that had been in place since their divorce gave my mother primary custody and allowed my father visitation only under the supervision of the Department of Court Services. He then moved to modify the custody arrangement to give him joint custody. It was a startling motion given his history, but also a terrifying one for my mother, who was facing the possibility that she would have to negotiate each parental decision with her abuser until I reached adulthood.

Reviewing the record and affidavits in our case, the district court decided that there was not a sufficient basis to modify the custody arrangement. Following the Supreme Court's affirmation, my mother did not have to give up primary custody, and I did not have to spend half of my childhood with a threatening parent struggling with mental illness. My mother didn't have to spend thousands of dollars on an evidentiary hearing at a time when she was a single mother with limited income. Over the next several years, my mother would prevail at numerous other hearings that repeatedly left my visitation schedule unchanged despite my father's continued motions. These were challenging years; family court hearings peppered my childhood. But the system worked to protect me. At the age of 15, after a violent episode that left me scared to spend more time with my father, I was released from mandated visitation and finally embarked on a life that felt free—mine.

This case and my childhood are inseparable, and as such, it has always felt incredibly personal. Even upon learning that the case reached the Minnesota Supreme Court, even after becoming an attorney, my memory of this case was always that it was my (and my mother's) own painful and private experience. Then last year, a childhood friend who I had not heard from in almost 20 years found me on Facebook and reached out. She knew her note was "random," she said, but she felt compelled to thank me and my mom for the case law that she was now using to protect her daughter, and to let us know how much she admired our courage in fighting for decisions that were now helping her.

I re-read her note several times. I could hardly believe it. I slowly opened the mental compartment in which my childhood and this case live and began to put the pieces together. Of course this case was helping others: It was a major family law precedent. Why did that not occur to me until now, at the age of 44? Why did I never realize how many other parents and children were spared pain and financial hardship, because of what we went through? As it turns out, this simple, procedural decision that meant everything to my mom and me meant everything to my friend, too, and presumably to many other parents in the same situation over the past 40 years. Perhaps the pain behind the pages of that decision was worth something after all.

Recently I reached out for the first time to Mary Lauhead, the dogged attorney who represented my mother in these disputes for almost 15 years. Though I never really knew her as a child, we spoke easily as if we shared years of life history because, of course, we had. Mary shared with me her reflections from those years as well as her still-vivid memory of the contentious hearings, and of how the family bar watched our case closely because it seemed to never end. She told me of the number of people who worked hard to protect me, including psychologist Mindy Mitnick (a frequent witness on my behalf) and Family Court Referee Milton G. Dunham (who "freed" me in 1992). She told me how the Supreme Court's decision in our case has resulted in more stable custody, and less life disruption, for Minnesota kids in the decades since. It was a much better history than I would have found in those courthouse records when I was 16.

As any family law practitioner knows, behind each custody battle, in the best of cases, lies an immense amount of love for a child. But closer to the surface of the most challenging cases is a great deal of pain and anger. In the many years that have passed since *Nice-Petersen v. Nice-Petersen* was decided, I haven't wanted to dwell on those court battles, but as I've come to understand, only good things have happened since. Though I will never feel gratitude for the childhood trauma I experienced, I see now that there is gratitude to feel for those who fought hard to keep me safe, and gratitude to receive from those the case has helped. After all, it took a "random" note from a childhood friend, and *her* experience of this case 40 years on, for me to see things differently. What an incredible, healing journey it has been. ▲

NICOLE NICE (pictured above) is an attorney living in Denver. She would like the Minnesota family law bar to know that the correct way to pronounce her name, and the case that bears it, is indeed the plain English pronunciation ("have a nice day"). She forgives all the wrong pronunciations (and misspellings of Petersen) that have occurred over the past 40 years.
NMNICE@GMAIL.COM

Is there a better way to admit lawyers?

The future of the bar exam needs a hard look

By Leanne Fuith

The bar exam has long served as a gatekeeper to the profession, with the goal of protecting the public by ensuring that newly licensed attorneys meet minimum standards of competence. Yet critics have suggested that the bar exam has also served to "gatekeep" who can become a lawyer and that it works to exclude individuals along race, class, and gender lines. In a profession that desperately needs to become more diverse and inclusive to ensure access to justice on a broad scale, this is of particular concern. Now, in the wake of the covid-19 pandemic, jurisdictions across the nation are looking critically at the bar exam and evaluating new pathways to attorney licensing.

A history of racialized gatekeeping

For more than 25 years, academics and practitioners have sounded the alarm about the bar exam's possible racialized gatekeeping function. The use of bar exams to exclude people from the practice of law coincided with periods of heightened immigration and with the success of Black people in joining the legal profession.[1]

In 1921, the American Bar Association pushed to abolish diploma privilege, add other licensing requirements, and require applicants to the bar to identify their race, stating that "it has never been contemplated that members of the colored race should join this association."[2] Not coincidentally, these additional barriers were implemented as an increasing number of immigrants, Blacks, and Jewish people sought to join the legal profession.[3]

Today, the bar exam continues to disproportionately limit, or even exclude, the entry of the historically underrepresented and economically disadvantaged into the legal profession.

Racial and gender disparities well documented

The racial disparities in the legal profession and in bar passage rates that still exist today are well-documented. As of January 1, 2021, there were 1,327,910 active lawyers in the U.S., an increase of approximately 8.4 percent in the past decade.[4] Currently, 85 percent of lawyers identify as non-Hispanic white people. In comparison, roughly 60 percent of U.S. residents identify as non-Hispanic white people.

Despite ongoing efforts to increase diversity in the legal profession, just 4.7 percent of all lawyers are Black—the same percentage as a decade ago—while 13.4 percent of the U.S. population is Black. Only 4.8 percent of all lawyers are Hispanic, slightly up from 4 percent a decade earlier, although 18.5 percent of the U.S. population is Hispanic. And 2.5 percent of all lawyers are of Asian descent, again slightly increased from 1.7 percent a decade ago, while almost 6 percent of the U.S. population is Asian. Roughly one-half of 1 percent of all lawyers (0.4 percent) are Native American, down from 1 percent a decade ago, while the U.S. population is 1.3 percent Native.

Not surprisingly, the same patterns are reflected in the judiciary. During the past four years, from 2017 through 2020, the U.S. Senate confirmed 229 federal judges. Of those, 192 (84 percent) were white, 13 (6 percent) were Asian American, nine (4 percent) were Black, nine (4 percent) were Hispanic, and none were Native American, according to the Federal Judicial Center, the research and educational arm of the U.S. court system. Over the same four years, 174 of the people confirmed to federal judgeships (76 percent) were men and 55 were women.

Racial and gender disparities connected to the bar exam

In June 2021, the ABA revealed bar exam passage rates, as reported by 197 law schools in 2020 and 2021, broken down by race, ethnicity, and gender.[5] The first-of-its-kind report revealed that white test takers were more likely to pass the bar exam in 2020 than test takers of other races and ethnicities. Among white men and women taking the bar exam for the first time, 88 percent passed.

By comparison, only 66 percent of Black first-time test takers passed, along with 76 percent of Hispanics, 78 percent of Hawaiians, 78 percent of Native Americans, and 80 percent of Asians. The "ultimate" pass rate, which measures success with the bar exam over a two-year period, was higher for all categories than the rate for first-time takers.

Bar exam design is problematic and does not adequately assess competency

The effectiveness of the bar exam in measuring competence to practice law has long been the source of concern. In daily practice, attorneys need the knowledge, skills, and ability to understand their clients' issues, consult relevant law, and assist clients and other parties in solving problems.

Most would agree that we need some type of assessment of new lawyers to protect the public and ensure the integrity of the legal profession. In fact, the American public still overwhelmingly supports the requirement that law school graduates pass a bar examination before being allowed to practice law.[6] But the bar exam does not fully reflect the realities of practice.

Scholars have attributed the racial gaps to the design of the bar exam, a high-stakes test that requires memorization of legal rules across a wide array of areas of law.[7] Law practice today, in contrast, does not rely on rule memorization. In fact, most legal practitioners practice in niche areas of law and do not need to be familiar with the broad swath of laws tested on the bar exam to be considered competent in their work.

The bar exam's focus on memorization also requires two months of full-time preparation that place a substantial burden of time and financial costs on candidates. After three to four costly years of legal education, the bar exam demands that candidates graduate law school only to take time out of the work force to continue their studies and purchase expensive preparation courses to learn strategies for taking the bar exam. Passing the bar exam is not just a requirement for fulfilling a candidate's dream to become a lawyer. For many, it is also a requirement for their financial survival. Candidates of color are less likely to have the financial resources to support this preparation and may also bear more responsibilities supporting families with few resources.[8]

The pandemic has focused new attention on the bar exam

The bar exam has come under intense scrutiny since the covid-19 pandemic was declared in the United States in March 2020. Beginning with the July 2020 administration of the bar exam, many examinees around the country were forced to prepare for the bar exam during a lockdown and required to continually shift their plans as public health guidelines changed and jurisdictions made changes to their plans to administer the bar exam.

Adding to the confusion, every jurisdiction has administered the bar exam differently during the pandemic. Some states, including Minnesota, administered the exam in person while taking as many precautions as possible to protect the health of examinees, while other states administered the bar exam online (with limited success) and still others rescheduled or canceled their bar exams multiple times.

The disruption of the covid-19 pandemic, and the extraordinary anxiety and stress and professional and financial consequences experienced by examinees during this time, has highlighted the urgent need for a broader and deeper study and reform of attorney licensing requirements.

NCBE implementing recommendations for next-generation bar exam

In 2018, the National Conference of Bar Examiners (NCBE), which provides licensure exam materials for the Uniform Bar Exam (UBE), appointed a Testing Task Force to undertake a study to identify the legal knowledge and skills entry-level attorneys are expected to have or learn within the first three years of practice, and to determine whether, how, and when those identified competencies should be assessed on a bar exam.[9]

The NCBE's work was conducted in three phases beginning in 2018 and concluding at the end of 2020. It consisted of both qualitative and quantitative research that included listening sessions with attorney licensing stakeholders and a nationwide practice analysis survey of lawyers describing the work performed by newly licensed lawyers and the knowledge and skills needed to perform that work. NCBE also established two expert committees to review the data gathered and provide input on the content that should be tested on the bar exam.

In January 2021, after nearly three years of study, the Board of Trustees of the National Conference of Bar Examiners approved the NCBE Testing Task Force's recommendations for building a better bar exam. The NCBE's recommendations are based on the principle that the purpose of the bar exam is to protect the public by ensuring that newly licensed lawyers possess the minimum knowledge and skills to perform activities typically required of entry-level lawyers, which include knowledge and skills that are of foundational importance to numerous practice areas.

The NCBE Testing Task Force's recommendations suggest that the next generation of the bar exam should:

- "test fewer subjects and… test less broadly and deeply within the subjects covered";
- place greater emphasis on assessment of lawyering skills to better reflect real-world practice and the types of activities new lawyers perform;
- remain affordable;
- ensure fairness and accessibility for all candidates; and
- ensure score portability across jurisdictions.[10]

The NCBE Testing Task Force's recommendations are consistent with the purpose of the exam to protect the public and the notion that newly licensed lawyers secure a general license to practice law, suggesting that the knowledge and skills assessed on the bar exam should reflect foundational knowledge and skills common to numerous practice areas.

The NCBE is now working to implement the recommendations for the next generation bar exam—a process that is expected to take four to five years. The changes include drafting new exam questions that test both knowledge and skills in an integrated way, ensuring examination accessibility for all candidates (including those with disabilities), analyzing and reviewing the exam format to ensure fairness for candidates of diverse backgrounds, and studying options for administering the exam in-person and online.

While a good first step, the NCBE's evaluation and recommendations are focused entirely on developing the next iteration of the bar exam and do not go far enough. But they have created a unique moment for Minnesota and other jurisdictions to conduct their own evaluations of attorney licensing more broadly.

Efforts in other jurisdictions and at home in Minnesota

Other jurisdictions are leading the way in evaluating new paths to attorney licensing. Several, including California, New York, Washington, Oregon, and Georgia, have launched task forces to tackle the complex and nuanced issue. Some of these task forces were created prior to the pandemic, but their findings are especially relevant in the present moment.

Each of these task forces is charged, in some way, with evaluating the knowledge, skills, and abilities needed to practice law ethically and competently, examining the efficacy of the current bar exam, and exploring innovative methods of adapting the professional licensure process to ensure an equitable and responsible path to attorney admission that continues to fulfill the core objective of protecting the public.

Of particular note is Oregon.[11] After examining methods such as apprenticeship programs, experiential learning programs, and admission by diploma privilege based on law school graduation, the Oregon State Bar Alternatives to the Exam Task Force recommended two alternatives to the traditional bar exam in June 2021.[12] The first is an experiential learning pathway in which law students focus on hands-on coursework during their last two years of law school and submit a capstone portfolio to the state Board of Bar Examiners upon graduation. The second is a supervised practice pathway in which law students would work between 1,000 and 1,500 hours under the supervision of a licensed attorney before submitting a portfolio of work to the Board of Bar Examiners to show minimum competency. The Oregon Board of Bar Examiners unanimously voted to advance the task force's recommendations to the Oregon Supreme Court for further consideration and adoption. The Oregon Supreme Court will now consider whether to adopt the recommendations and will make a decision within the next several months.

Efforts to evaluate the bar exam are underway at home in Minnesota as well. In June 2021, the Minnesota Board of Law Examiners (BLE) announced plans to commence a comprehensive two-year study of the bar examination for the purposes of providing the Minnesota Supreme Court with a report and recommendation no later than June 1, 2023.[13]

The scope of the BLE's Competency Study will be broad; the primary focus is the bar examination, including the history of the examination in Minnesota and the impact of being a UBE jurisdiction. The BLE also intends to review: alternative options for determining competency for licensure; supervised practice/limited practice models; legal education and the impact of any potential change on legal education requirements; and the impact of the licensure process on diversity and equity. Individuals interested in receiving updates on the Competency Study should email *ble@mbcle.state.mn.us* for more information.

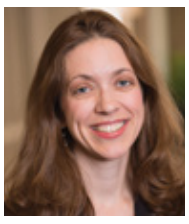
In October 2021, the Minnesota State Bar Association (MSBA), whose mission it is to "[promote] the highest standards of excellence and inclusion within the legal profession, [provide] valued resources to its members, and [strive] to improve the law and the equal administration of justice for all," petitioned the Minnesota Supreme Court to form a diverse, robust, and inclusive task force to study and consider recommendations for change in attorney licensing generally in Minnesota, including but not limited to the bar exam.[14]

Citing the importance of this issue to the Minnesota legal profession and the recent actions that have been undertaken by jurisdictions across the country to study the bar exam and attorney licensing, the MSBA asked the Minnesota Supreme Court to appoint a task force to conduct a broader inquiry—one that explores possible changes to the bar exam, whether the bar exam is necessary, and whether there are alternative attorney-licensing approaches that may more accurately evaluate attorney competence and protect the public.[15]

The MSBA also requested that the Minnesota Supreme Court appoint members to the task force that represent greater diversity in age, race and ethnicity, gender, number of years of practice, geographic location, and practice areas than the current composition of the BLE. The MSBA proposed that the task force include representatives from the BLE; the Lawyers Professional Responsibility Board; Lawyers Concerned for Lawyers; the Minnesota Judicial Branch; the three Minnesota law schools; new lawyers; law students; members of the MSBA, HCBA, and RCBA; Minnesota's affinity bar associations; legal employers representing all sectors, including private practice, business, government, the judicial branch, and nonprofit; and national experts on exam development or grading and on online testing software, security, and privacy evaluation.

Following the filing of the MSBA's petition, the BLE filed a letter with the Minnesota Supreme Court confirming the steps it has undertaken in its Competency Study of the bar exam, the scope of its continued work, and its support for a comprehensive and inclusive study of this issue.[16] The MSBA's petition remains with the Minnesota Supreme Court for review and consideration as of the date of this publication.

As our focus on creating a diverse, equitable, and inclusive legal profession increases, it is essential that we re-evaluate licensing measures that govern attorney admission into the legal profession. The bar exam is too often a measure of privilege and opportunity, rather than competency to practice law. Now is the time to consider better ways to license attorneys. The need is urgent. ▲



LEANNE FUITH is an associate professor at Mitchell Hamline School of Law, where she teaches courses in business formation and management and lawyer and law student professional identity formation. She previously practiced business law, employment law, and commercial and employment litigation and is admitted to practice in the state of Minnesota.

LEANNE.FUITH@MITCHELLHAMLINE.EDU

Notes

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DIVERSITY IN DEFENSE

The path to management-side employment law as a diverse attorney

By Nicole Dailo, Christopher H. Jison, and Richard Liu

The dearth of diversity in the legal profession is well known, but the problem is especially acute on the management (defense) side of labor and employment law. There are myriad reasons behind the diversity issue, the vast majority of which we are likely unqualified to address or attempt to solve. This article will discuss the value in becoming a management-side labor and employment (L&E) attorney, the career path to management-side L&E practice, and some words of wisdom we wish had been shared with us along the way.

It is our hope that law students and attorneys curious about the practice area gain a better understanding of a management-side L&E attorney's career path and the positive impact you can have, particularly as a diverse attorney.

The benefits of L&E practice

For a diverse law student or attorney trying to positively impact his or her community, there is often a misconception that L&E attorneys must represent employees to effectively fight systemic racism, promote diversity, and empower marginalized communities. This overlooks the prophylactic efforts that management-side attorneys undertake every day to prevent the harm from occurring in the first place. Each of us has been asked how we are able to reconcile our own backgrounds with the work we do, and the answer is simple: We gravitated to the area where we could do the most good.

As a management-side attorney, you can effect real change. In working for a law firm and serving as outside counsel to employers, you defend your clients against meritless claims and advise them on remedial damages to be paid for meritorious claims. You counsel your clients on how to comply with the complex web of state and federal employment laws, and more importantly, you have the chance to counsel clients on how to avoid violations. In an in-house role, you advise on and sometimes draft policies that can affect thousands of employees—finding creative ways to make your company's employment practices fairer, more inclusive, and more compassionate. You push your company to genuinely commit to diversity, equity, and inclusion, and you collaborate with business leaders to transform that commitment into action. Put another way, being on the management side gives you the opportunity to have a seat at the table, directly advocate for the interests of the underrepresented, and create real systemic change.

Additionally, in our humble opinion, it is one of the most fascinating areas of law because it deals so intimately with immutable traits and core values that implicate sex, color, gender identity, national origin, religion, age, or disability. Employment law turns on an individual's story and whether a workplace succeeds or falls short in its diversity, equity, and inclusion efforts. Nearly every problem presented reads as if it were written by a law school professor, because people never run out of creative ways to interact with each other.

Ultimately, whether you are on the employee or employer side of the equation, you can have a real and positive impact. When you represent employees, the recourse is often remedial action, with a collateral effect being broader change. Representing employers, on the other hand, generally allows you to develop sound policies and employment practices at the outset to avoid the harm altogether; it allows for true systemic change.

How we got to where we are today

Much like other practice areas, the path to management-side employment law is fairly traditional, because it is typically mid-size and large law firms that advise and defend employers. The path often entails law review or a law journal, a judicial externship, the on-campus interview process (OCI), and a judicial clerkship. The typical trajectory also entails joining a law firm as an associate before ascending to partnership or moving to an in-house counsel role.

Each of the three of us took a more circuitous route to our current roles. Nicole externed with a federal judge, took a fellowship after law school, clerked for a federal judge, moved to Minnesota to join a mid-size firm with a prominent L&E practice, and then moved to an in-house employment counsel role with a lifestyle and fitness company. Chris externed with a state district court judge, clerked with a state district court judge immediately after law school, joined a boutique L&E firm, and subsequently moved to an employment legal consultant role for a large bank. Richard externed with a federal judge, moved to Minnesota to join a large firm, spent some time at two other large firms, and finally founded his own firm, where he is currently managing counsel. While there may be more common routes to a management-side L&E practice, they are not the only way to get there.

In discussing our respective career trajectories among ourselves, we spotted a couple of common denominators: mentoring and networking. In reality, no one practices alone—not even solo practitioners. Every lawyer relies on much broader support systems composed of friends, colleagues, or even opposing counsel. The key to leveraging these relationships is ensuring they are based on a genuine desire to learn about another person and help him or her.

In talking to law students, we often describe networking as meeting friends on the playground. It is not some quid pro quo agreement, but rather an organic relationship. Building these organic relationships makes it feel far less transactional to ask for help in looking for a new position or connecting with a key person at a new potential employer. Nicole's and Chris's networks, for example, directly resulted in judicial clerkship offers because the judges were familiar with them through common contacts. In Richard's case, his new firm would not have been nearly as successful without his network providing word-of-mouth marketing and acting as a sounding board for his ideas. The people in our networks also provided new opportunities to further expand our skill set and expertise, because partners will usually give work to people they know and trust. Our colleagues also provided critical feedback that allowed us to grow.

Networking, however, was not without its challenges. Its noble aspirations aside, the legal profession is still traditional in the sense that the practice of law remains very tribal. Minnesota has a very close-knit legal community, but that also makes it difficult for transplants like us to break into the inner circle. For each of us, that meant being more deliberate in how we expanded our networks, and purposefully seeking out people who shared common interests or who were willing to include us in their daily activities and their lives outside of work. (The "inclusion" aspect of diversity, equity, and inclusion is probably the most challenging issue when it comes to networking in Minnesota.) The goal was not to collect as many business cards as possible; it was to meet people and have one-on-one conversations over a beverage or meal with the goal of creating a professional relationship that very much resembled friendship.

The legal community in Minnesota is relatively small, and the employment law community is even smaller. That provides an ideal opportunity to make meaningful connections, help those colleagues, and occasionally ask for help yourself. Whether you take the traditional OCI-to-law-firm route or a more scenic route like each of us, your network will get you where you need to be.

What we wish someone had shared with us

There are countless nuggets of wisdom that have been shared with us throughout our careers, and we thought it appropriate to include a few here because they can provide a competitive advantage and help you stand out in the law firm recruiting world.

First, as you have likely already inferred, networking is indispensable. What we wish someone had told us early on is that many attorneys truly want to talk to and mentor more junior attorneys or law students. There is no shortage of attorneys who want to network and genuinely get to know you. The challenge lies simply in finding them.

Second, the rallying cry of work-life balance has become a cliché, but it bears repeating that you do not need to make "lawyer" your entire identity. The legal profession is a noble one, and as an attorney, you absolutely have the power to truly benefit society. It is important, however, to avoid destroying yourself in the process. It is often the other aspects of your life—family, friends, hobbies—that bring fulfillment and balance. Being an attorney can just be a job, and that is okay.

Finally, to bring this article full circle, it is important to do what you love. The attorneys reading this article know that they certainly did not get into the practice of law for the money or the work-life balance. Being passionate about your practice area ensures that you find fulfillment even when the work challenges you. In our opinion, management-side employment law provides ample opportunity to find your passion because it deals primarily with people, their relationships, and their livelihoods. There is no shortage of complex problems to be solved, dramatic fact patterns, and chances to create systemic change.

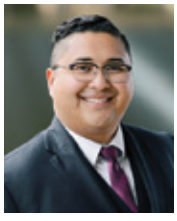
In summary, know that the management side of L&E law needs diverse attorneys just as much as the employee side, if not more. The work is fascinating and fulfilling and offers diverse attorneys the opportunity to advocate for and create better circumstances for the communities that raised them. Though each of us took different paths to get to this juncture in our careers, we hope our experiences convince you that you can do the same, regardless of where you are in your own legal career. With mentors and colleagues to champion you, a healthy balance between work and other aspects of your life, and a commitment to doing what you love, you can't go wrong—and if you're fortunate, you can make systemic change and do some good in the process. ▲

***NICOLE DAILO** is corporate employment counsel at Life Time, Inc., where she manages employment litigation and advises business leaders on labor and employment issues. Nicole previously worked in private practice and clerked for a federal bankruptcy judge. She earned her JD from the USC Gould School of Law in 2014.*

NDAILO@LT.LIFE

***RICHARD LIU** serves clients as a management-side defense lawyer in employment and commercial litigation. His practice focuses on claims involving breach of contract, wrongful termination, workplace harassment and retaliation, employment discrimination, wage and hour claims, and trade secret misappropriation. Richard is the managing counsel for Innovative Legal Services (www.consultils.com).*

RICHARD.LIU@CONSULTILS.COM



***CHRISTOPHER H. JISON** is a legal EEO consultant with Wells Fargo, where he defends the company against federal and state charges of discrimination. Prior to that, he was a management-side labor and employment associate with the Minneapolis office of Wessels Sherman and a judicial law clerk to the Hon. Tracy Perzel.*

CHRISTOPHER.JISON@WELLSFARGO.COM

Mitchell Hamline School of Law welcomes record number of Native students


Professor Angelique EagleWoman


GeWaden Dunkley

BY TOM WEBER

Weston Jones chose to attend Mitchell Hamline because it occupies his people's traditional lands. A member of the Oglala Lakota Nation who grew up on the Pine Ridge Indian Reservation in South Dakota, he says "there's something about the land that helps me and helps with my studies."

"The law, especially federal law, is inseparable from Native identity and what it is to be Native," said Jones, who notes he has one goal in attending law school: Being able to work to get land back for his people.

"As a Native person you have a duty to take control of the future. I believe law and law school can help me build a better future."

Jones is one of eleven Native American first-year students at Mitchell Hamline this year, a record for the school.

The increase is part of a concerted effort to attract more tribal-enrolled and tribal-descendant students, according to Angelique EagleWoman (*Wambdi A. Was'teWinyan*), director of Mitchell Hamline's Native American Law and Sovereignty Institute and a citizen of the Sisseton-Wahpeton Dakota Oyate.

"I'm proud of our work to bolster offerings in Native American law," she said. "We have a prominent program here.

"Our Native students study more than Native American law. That's why it's also important to make Mitchell Hamline a place where Indigenous students feel welcome."

To that end, EagleWoman has worked with Native students who attend a pre-law institute through the American Indian Law Center the summer before they start law school. Jones attended that institute; getting to know EagleWoman is another reason he says he felt welcome and wanted to attend Mitchell Hamline.

There's also a new physical space on campus for Native students, in a room next to EagleWoman's office. There, Native students can attend classes online in each other's company; one corner is set aside for ceremony.

"Seeing all these Native 1Ls is a sign that we are still here and thriving in spite of what was done to us," said GeWaden Dunkley (Bois Forte Band of Chippewa), a 3L who is president of Mitchell Hamline's Native American Law Student Association. "As with other marginalized groups, most history since contact with Europeans omits Natives' voices either by neglecting or actively suppressing them.

"This is compounded by the unique nation-to-nation relationship between Native communities and the United States that allowed the latter to create despicable laws that controlled every aspect of Native life."

For Dunkley, he sees Native students seeking law degrees as a way "to be the voice of the voiceless and make change for those who were powerless.

"We are the dreams of the babies who died in the boarding schools and the last wish of those starved by broken promises."

"There is a great need for law graduates who know Native American law and an even greater need for Indigenous people to learn the law themselves so they can serve their peoples," EagleWoman added. "I look forward to expanding the work of the NALS Institute and strengthening tribal sovereignty in legal education."

Follow the Native American Law and Sovereignty Institute on Twitter and Instagram @nals_institute. Contact Professor EagleWoman at Angelique.EagleWoman@mitchellhamline.edu

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What is kosher? From Moses to Minnesota

A brief history of Jewish dietary law and the state's courts

By Judah A. Druck

Kosher food is serious business. The Torah contains a litany of laws and restrictions concerning the circumstances under which certain foods may be eaten, and thousands of years of rabbinic commentaries have further detailed and elaborated upon these dietary regulations. These discussions range from answering mundane questions of whether bugs are kosher (no), to more particular questions regarding the volume of non-kosher substances a kosher food item can have and still maintain its kosher status (1/60th), to the more bizarre question of how to properly slaughter a giraffe (it's complicated). These commentaries, and commentaries on those commentaries, continue to this day, with more recent discussions covering topics such as the kosher status of lab-grown meat.

But kosher food is also serious business in the literal sense. The global kosher food industry currently exceeds $20 billion in annual sales, and is projected to grow to over $25 billion by 2026. These sales are driven not only by Jews, who make up a mere 0.18 percent of global population, but by Muslims maintaining Halal diets, Seventh-Day Adventists, and individuals who perceive kosher food as being healthier or higher quality than non-kosher alternatives. Indeed, over 40 percent of all packaged food in the United States is certified kosher.

Given the serious matters at issue—both theological and financial—it is unsurprising that consumers have sought judicial and legislative regulation of the kosher marketplace. Yet these requests implicate fundamental questions regarding the separation of synagogue and state, notwithstanding the secular concerns at issue. Minnesota's own forays into the world of *kashrut* (kosher law) have resulted in fascinating judicial and legislative discussions regarding the role government should, and constitutionally *can*, play in upholding Biblical law. This article details these discussions, and how courts and legislators have struggled with the question explored since Moses: What is and is not kosher?

What is kosher? A primer

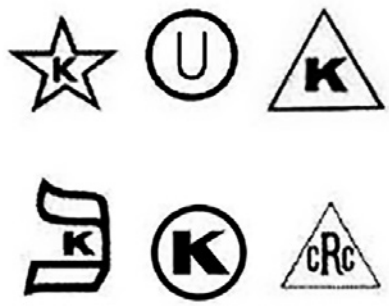
The complex rules of *kashrut* can be summarized as follows. First, according to the Torah, land animals must have split hooves and chew their cud (thus: cows in, pigs out), and must be killed in a specific way in order to be kosher. This form of kosher slaughter, known as *shechita*, involves severing the trachea and esophagus of the animal with a special blade in order to cause instantaneous death with no pain to the animal. Second, fish must have fins and scales (thus: no shellfish). Third, the Torah applies the principle of "everything which is not forbidden is allowed" to fowl, enumerating certain types of bird that are not kosher but permitting all others. Finally, based on the passage prohibiting the boiling of a kid in its mother's milk, foods are categorized into "meat" and "dairy" products, which must be eaten separately (and even served on separate sets of dishes). Foods that fall into neither category (e.g., fruits, vegetables, eggs, nuts) are placed into a third neutral category called "pareve."

These basic rules are subject to numerous qualifiers, exceptions, and customs. Chicken is categorized as "meat" despite ostensibly falling into a separate category from land animals. Many Jews wait after eating meat before eating dairy (ranging from one to six hours) but *not* between eating dairy and then meat. Sturgeon, which has fins and scales, is subject to contrary opinions from different Jewish sects because of the *type* of scales it has. And so on.

As with foods labeled "organic" or "vegan," consumers have no ability to determine whether a certain food product is actually "kosher." Thus, companies rely on third parties to certify that their food is kosher and has been prepared in a way that maintains its status as such (for example, by assuring that a meat product never comes into contact with dairy). These organizations and their rabbinic inspectors place symbols on food packaging to indicate that the food has been examined and is in fact kosher. There are hundreds of different certifying entities and corresponding kosher symbols, the largest being the Orthodox Union (which uses an "OU" symbol). Minnesota itself is home to two kosher certifications: Minnesota Kosher and MSP Kosher.

Of course, not all of these certifying agencies are treated equally, and whether a certification is sufficiently reliable is a constant source of debate ("two Jews, three opinions" goes the old joke). Consumers may reject a certification if they believe the standard applied was not sufficiently stringent. An Orthodox Jew may reject a certification given by a Conservative rabbi. More insular Jewish denominations may only accept—or "hold by"—the certifications given by their local authorities.

Thus, the question "Is it kosher?" does not always lend itself to a straightforward response. Kosher *to whom*? And, more importantly, how can a government regulate an industry with no objective measure for determining what has and has not been accurately labeled?



A sampling of kosher food certifications. The "Triangle K" symbol sparked litigation in both federal and state court over the meaning of "kosher."

Wallace v. ConAgra: The federal judiciary explores *kashrut*

Appropriately enough, the kosher status of Hebrew National hot dogs—a popular, well-recognized, and quintessentially American food product that "answers to a higher authority"—provided the first opportunity for Minnesota courts to confront this intra-faith debate over *kashrut* certification. The hot dogs are certified by Triangle K, a kosher agency whose reliability has long been a point of contention in the Jewish community, with some accepting the *kashrut* standards employed by its rabbis and others (particularly those within the Orthodox community) rejecting the certification outright.

This debate came to a head in *Wallace v. ConAgra Foods*,[1] in which 11 consumers filed suit in Minnesota state court against ConAgra, the manufacturer of Hebrew National products. The plaintiffs argued that ConAgra falsely labeled its meat products as being "100% Kosher" despite failing to comply with a litany of "objective" *kashrut* requirements, including the proper inspection and slaughter of cattle. Plaintiffs alleged pecuniary damages as a result of the "premium price" paid for the inaccurately labeled kosher meat, and asserted causes of action for negligence, violation of state consumer protection laws, and breach of contract. Notably, plaintiffs did not name Triangle K itself as a defendant.

OVER 40 PERCENT OF ALL PACKAGED FOOD IN THE UNITED STATES IS CERTIFIED KOSHER.

After removing the litigation to federal court, ConAgra moved to dismiss for lack of subject matter jurisdiction under the establishment clause and the free exercise clause of the First Amendment. Specifically, ConAgra argued that while plaintiffs' suit was brought against a secular organization on ostensibly secular grounds in order to uphold "objective" standards, plaintiffs' suit ultimately required a civil court to assess whether something was "kosher," and in doing so resolve "differing rabbinical interpretations of *kashrut*"—here, by "evaluat[ing] the religious correctness of kosher determinations made by the rabbis of Triangle K."

Judge Donovan Frank of the Federal District Court of Minnesota agreed. While expressing clear sympathy for plaintiffs and the "highly disconcerting" allegations within the complaint, Judge Frank explained that the determination of whether Hebrew National products were kosher was "intrinsically religious in nature," and that any such inquiry would "necessarily intrude upon rabbinical religious autonomy." In particular, the court highlighted that ConAgra itself did not make kosher determinations, but instead relied on Triangle K for its certification of Hebrew National products. Yet plaintiffs had not alleged that CongAgra misrepresented that its products were in fact certified by Triangle K. Thus, despite plaintiffs' "tactical decision to leave Triangle K... out of the lawsuit," their claims that the "kosher" designation was improper ultimately represented a challenge to "Triangle K and its Orthodox rabbis who make such determinations." Plaintiffs' beef, as it were, was with Triangle K, not ConAgra. Because the question of whether the hot dogs were properly labeled "100% kosher" would necessarily require the Court to "delv[e] into questions of religious doctrine," the court concluded that the complaint offered a "religious question that is not the proper subject of inquiry by this Court."

Wallace Part II: The state court chews on the issue

Wallace took a surprise twist on appeal when the 8th Circuit vacated Judge Frank's decision with instructions to remand the case back to state court.[2] In doing so, the court of appeals expressly avoided the substance of Judge Frank's decision and instead concluded that plaintiffs had failed to allege a particularized and actual injury in fact sufficient to grant Article III standing. The panel highlighted that the complaint merely alleged that *some* hot dogs had been improperly certified, without ever stating that plaintiffs' particular packages were tainted by non-kosher beef. It was therefore "quite plausible ConAgra sold the consumers *exactly what was promised*: a higher quality, kosher meat product." (Emphasis in original.)

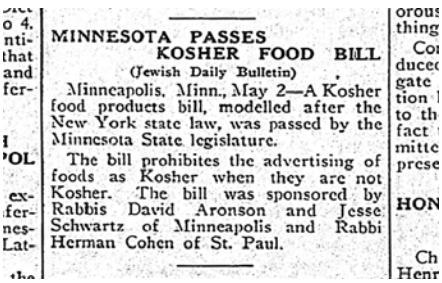
The case was thereafter returned to state court, where Judge Jerome Abrams was given an opportunity to stew over ConAgra's renewed motion to dismiss and the First Amendment concerns implicated by plaintiffs' allegations. Like Judge Frank, Judge Abrams looked beyond the named defendant and focused on the real meat of the complaint: Triangle K's certification. While plaintiffs "[f]or some unexplained reason... opted not to include Triangle K" as a defendant, the "100% kosher" representation at issue in the complaint was predicated on Triangle K's independent certification—not any independent conduct by ConAgra. Plaintiffs' claims "therefore challenge the certification and underlying determination made by Triangle K that the beef and resulting products were kosher," which would in turn require the court "to review the propriety of the rabbinical determination made by... Triangle K." As before, Judge Abrams refused to act as "an arbiter of the application of *kashrut* by a Rabbi over a kosher determination; an impermissible entanglement and infringement upon religious practices," and dismissed plaintiffs' complaint.[3]

The *Wallace* decisions are premised on the same principle: A civil court cannot resolve disputes that ultimately come down to matters of religious philosophy. Indeed, both Judge Frank and Judge Abrams implicitly faulted plaintiffs for attempting to circumvent this barrier by suing a secular entity (ConAgra) rather than pursuing the entity actually responsible for the *kashrut* determination—Triangle K. And in both cases, despite appreciating the seriousness of plaintiffs' allegations, the courts reasoned that the remedy was to simply refrain from eating foods failing to satisfy the individual consumer's religious beliefs, in this case by "opting not to purchase or ingest Defendant's Hebrew National products, or other products certified by Triangle K." But to ask a civil court to dictate matters of religious practice was, simply put, not kosher.

Kosher labeling laws and *Commack I*

While the *Wallace* plaintiffs' proposed remedy was ultimately rejected, the underlying concern at issue—food being fraudulently labeled kosher—was not unfounded. As the American Jewish population began to grow during the turn of the 20th Century, so did the rise of kosher food consumption and, with it, the sordid and scandalous elements often associated with the meatpacking industry of that era. In the absence of any central religious supervision, Jewish shop owners and butchers began hiring their own "house rabbis" (some with questionable ordination) in order to apply their own "kosher" certifications. The ability to charge a premium for food without any regulatory oversight was an open invitation to fraud, and some estimate that half of the "kosher" meat sold to the Jewish public during this time was not kosher.[4]

Faced with this growing corruption and without any communal mechanisms to enforce standards of *kashrut*, the Jewish community turned to the government. In 1915, the New York State Legislature enacted the country's first "kosher food bill," which criminalized the fraudulent labeling of non-kosher food as kosher. While there is no indication that Minnesota faced a similar epidemic of kosher fraud, on April 26, 1929, the Minnesota Legislature passed Minn. Stat. 31.651. The law, sponsored by three Twin Cities rabbis (whose synagogues are still active to this day) and explicitly modeled after the New York kosher food bill, stated in relevant part that it was a misdemeanor to sell, "with intent to defraud," any raw or prepared meat and "falsely represents the same to be kosher... or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements." The conflation of "kosher" and a specific Jewish denomination's *kashrut* determination would prove to be the statute's most controversial provision.



MINNESOTA PASSES
KOSHER FOOD BILL
(Jewish Daily Bulletin)

Minneapolis, Minn., May 2—A Kosher food products bill, modelled after the New York state law, was passed by the Minnesota State legislature.

The bill prohibites the advertising of foods as Kosher when they are not Kosher. The bill was sponsored by Rabbis David Aronson and Jesse Schwartz of Minneapolis and Rabbi Herman Cohen of St. Paul.

Press release following the passage of Minn. Stat. 31.651. The three sponsors are Rabbi Aronson of Beth El Synagogue in Minneapolis (now Saint Louis Park), Rabbi Schwartz of Adath Jeshurun Synagogue in Minneapolis (now Minnetonka), and Rabbi Cohen of Temple of Aaron in St. Paul. (Courtesy of the Jewish Telegraphic Agency)

Early challenges to these food bills were largely unsuccessful, however. In *Hygrade Provision Co., Inc. v. Sherman*,[5] the United States Supreme Court took up an appeal from a kosher food dealer,

who argued that the statutory references to "kosher" and "orthodox Hebrew religious requirements" was unconstitutionally "indefinite" given the alleged "impossibility, or at least the great difficulty, of determining with certainty what is kosher according to the rabbinical law and the customs, traditions, and precedents of the orthodox Hebrew requirements." But a unanimous Court (minus Justice Louis Brandeis, who interestingly took no part in the case) held that there was no due process concern because New York's statute required not only a false representation but also an intent to defraud. Thus, the statute merely required that a seller "assert an honest purpose to distinguish to the best of their judgment between what is and what is not kosher." Delving into the specifics of Orthodox rabbinic law was therefore unnecessary as long as the seller "exercise[d] their judgment in good faith" in attempting to comply with the statute, thereby ameliorating the vagueness concerns raised by appellants. The highest authority had spoken.

But a second wave of constitutional challenges to the kosher food bills, this time under the establishment clause, saw far more success. The 2nd Circuit's decision in *Commack Self-Service Kosher Meats, Inc. v. Weiss*[6] is illustrative. There, a kosher meat seller cited for various violations of New York's kosher food bills challenged the law on the grounds that the law equated "kosher" with "orthodox Hebrew religious requirements," as well as the same vagueness concerns raised in *Sherman*. This time, the court agreed with plaintiff. The panel explained that the laws "excessively entangle government and religion" because they "effectively discriminat[e] in favor of the Orthodox Hebrew view of dietary requirements," which constituted not only an "official position on religious doctrine" but also a delegation of "civil authority to individuals apparently chosen according to religious criteria." This was in spite of the numerous "differences of opinion within Judaism regarding the dietary requirements of *kashrut*."

Indeed, by discriminating in favor of this Orthodox view, the law prohibited members of other branches of Judaism from using kosher labels "in accordance with the dictates of their religious beliefs where their dietary requirements differ from those of Orthodox Judaism." Additionally, without naming *Sherman*, the court explained that it was "unpersuaded" by the "intent to defraud" portion of the laws because, ultimately, "State authorities could not make a determination that the [plaintiffs'] meat did not conform to kosher requirements without first having arrived at an official position on what the kosher requirements are." This unorthodox viewpoint, the court concluded, constituted a position the state could not take.

Kosher labeling laws revisited and *Commack II*

States soon began amending their kosher food bills to avoid the constitutional issues highlighted by the 2nd Circuit, and Minnesota was no different. In 2004, Minn. Stat. 31.651 was amended to remove reference to "orthodox Hebrew religious requirements" and instead required that a product being sold as "kosher" display a label or other indicia from a "rabbinic authority" indicating that the product was prepared or processed in accordance with said rabbinic authority. In presenting the amendment, state Rep. Frank Hornstein (DFL-Minneapolis) made explicit reference to the constitutional challenges levied against similar statutes in other states (including New York), and expressed the need to assure that Minnesota's statute was "constitutionally appropriate." (Rep. Hornstein further assured the chamber that there was no pork in the bill.)[7]

But was this new version of the kosher food bill actually "appropriate"? The 2nd Circuit revisited the issue in *Commack Self-Service Kosher Meats, Inc. v. Hooker*[8] (*Commack II*), where Commack again raised a First Amendment challenge to New York's similarly modified kosher food bill. But the absence of any Orthodox-specific language—the primary concern in *Commack I*—proved decisive. Agreeing with the district court that the law's changes had turned the legislation into "purely a labeling and disclosure law," the panel explained that the statute had a secular purpose of protecting against fraud by informing a consumer that the seller believes a product is kosher, at which point the consumer can examine "the kosher certifying criteria of the seller." More importantly, the court highlighted that the new law did not adopt an Orthodox standard of *kashrut* (or even provide a definition of "kosher"), did not regulate which foods are acceptably kosher, and did not take a position on what it means for a product to be kosher; it simply required that "if a product is to be held out to the public as 'kosher,' the product must bear a label describing it as such." This newer act—which neither advanced nor impeded religion, had a secular purpose, and did not excessively entangle the state and religion—had the panel's blessing.

Thus, while it has never faced a direct challenge, Minn. Stat. 31.651 would likely be deemed constitutionally sound, given its move from Orthodox-specific *kashrut* determinations to those made by any "rabbinic authorities." This transition additionally satisfies the spirit of the *Wallace* decisions, which resolved that determinations of whether a product is reliably "kosher" should be made by the consumer, rather than civil authorities. An observant Jew believing that a certain rabbinic authority's *kashrut* determination is sufficiently unreliable can choose instead to purchase a product with another authority's label. This legal landscape, in which the state does not favor one interpretation of *kashrut* over another, presents a truly kosher Minnesota.

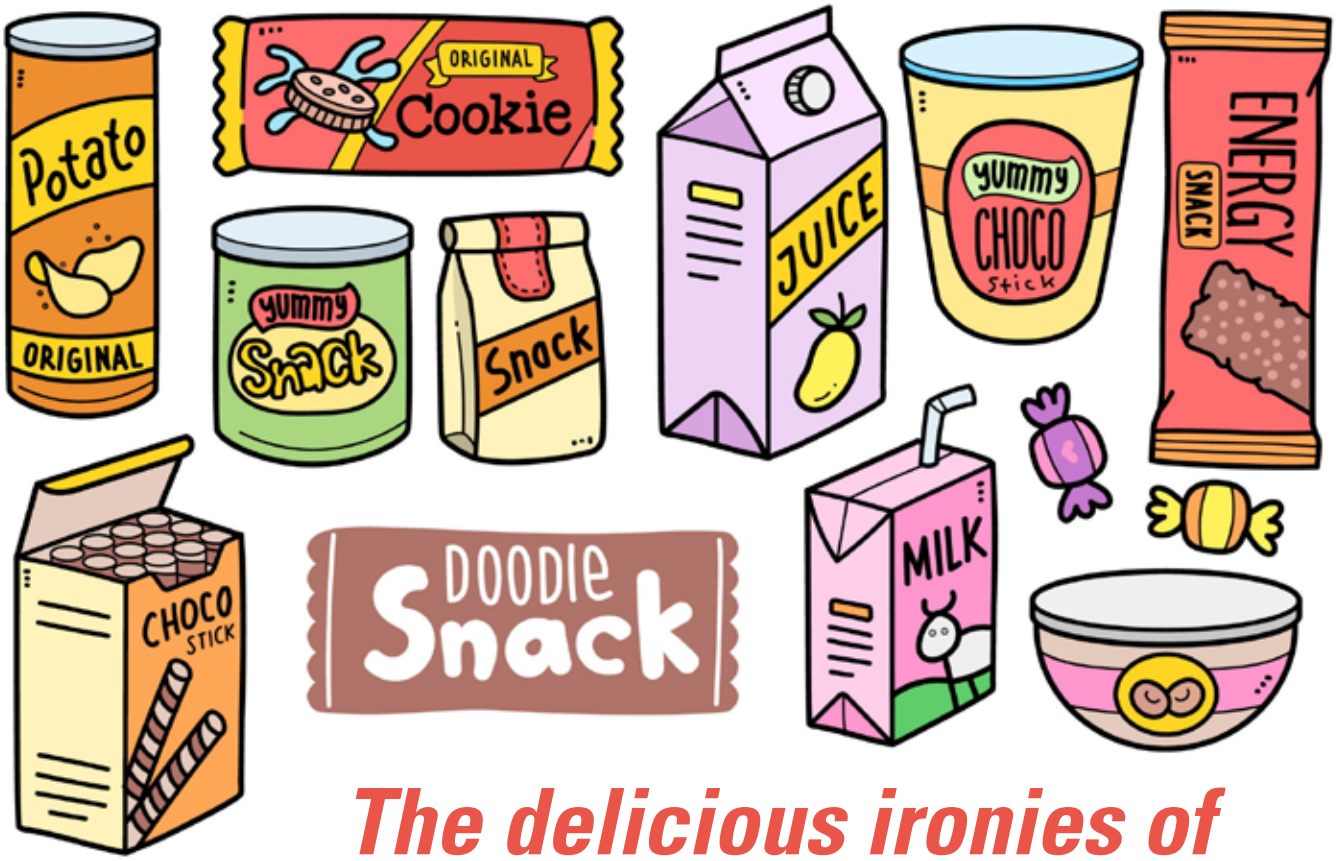
Conclusion

The next time you go into a supermarket and pick up a food item, examine the packaging for any unfamiliar markings. What may seem like an innocuous symbol—a "U" within an "O," a "K" within a star, the letters "CRC"—actually carries great significance for thousands of consumers holding to an ancient custom. It also provides a vivid example of the state's limits on regulating inherently religious practices. While the debate over what is and is not "kosher" may be never-ending, the state's rightful role as a passive observer has been conclusively settled. ▲

Notes

[1] 920 F.Supp.2d 995 (D. Minn. 2013).
[2] 747 F.3d 1025 (8th Cir. 2014).
[3] Order Dismissing Plaintiffs' First Amended Class Action Complaint, No. 19HA-CV-12-3237 (10/6/2014).
[4] *E.g.*, Sachar, A History of the Jews in America, pg. 389.
[5] 266 U.S. 497 (1925).
[6] 294 F.3d 415 (2d Cir. 2002).
[7] House Floor Session, 5/10/2004 (archive available at *https://www.house.leg.state.mn.us/hjvid/83/2163*). Special thank you to Rep. Hornstein for taking the time to speak with me as part of my research into this article.
[8] 680 F.3d 194 (2d Cir. 2012).

***JUDAH DRUCK** is a litigation attorney Maslon LLP in Minneapolis. He represents corporate and individual policyholders in insurance coverage and complex business disputes, including recent cases involving coverage for covid-19 losses. He also maintains a robust commercial litigation practice spanning multiple industries and forums.*
JUDAH.DRUCK@MASLON.COM

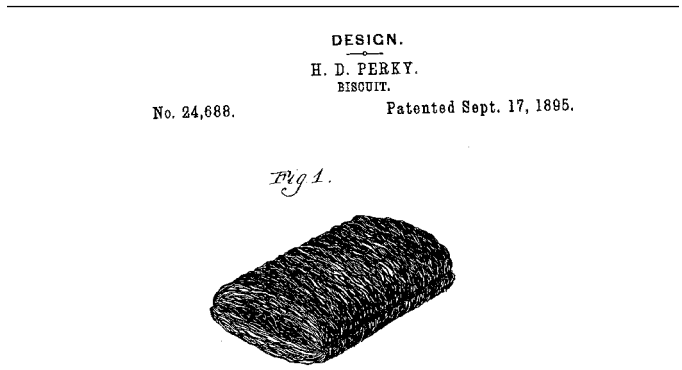


The delicious ironies of food product configuration protection

By Austen Zuege

Intellectual property (IP) protection for product configurations of comestibles, confections, foodstuffs, and the like have been a matter of dispute in courts for well over a century. A variety of distinct IP rights may be invoked in this context, among them design patents and trade dress (either as a registered or unregistered trademark). Courts have grappled with the limits of such IP rights, seeking to prevent end-runs around the expiration of patent and copyright rights that the Constitution restricts to only limited times.[1] Such limits on IP rights embody long-standing Anglo-American legal principles in place since the Statute of Monopolies curbed the English Crown's practice of granting "odious" monopolies over common commodities to raise funds or bestow favor.[2] Cases up to the present highlight continued aggressive assertions of trade dress rights by foodstuff manufacturers—coupled with pushback by courts to deny trade dress rights in purely functional product configurations.

A number of important historical decisions observed the tendency for assertions of trade dress in (food) product configurations/shapes/forms/designs—these terms being used somewhat interchangeably—to inappropriately extend monopoly protections after a patent expired. Judge Learned Hand authored *Shredded Wheat Co. v. Humphrey Cornell Co.*, which dealt with alleged trade dress infringement of the shape of shredded wheat biscuits after the expiration of a design patent to the same biscuit shape.[3] He wrote that "the plaintiff's formal dedication of the design [upon expiration of U.S. Des. Pat. No. 24,688] is conclusive reason against any injunction based upon the exclusive right to that form, however necessary the plaintiff may find it for its protection."[4]


DESIGN.

H. D. PERKY.

BISCUIT.

No. 24,688. Patented Sept. 17, 1895.

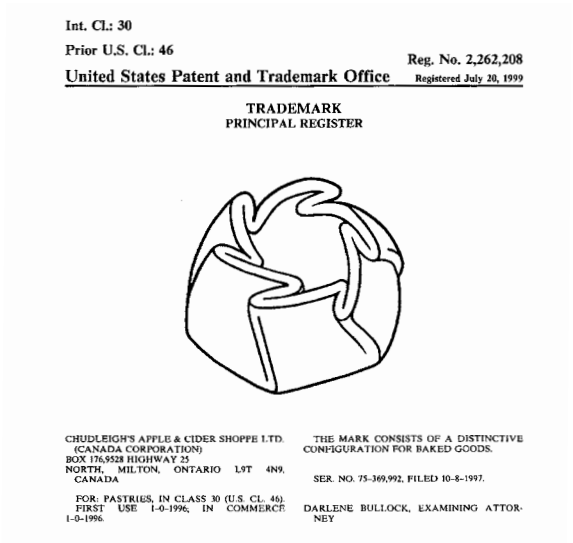
Fig 1.

Later, the Supreme Court weighed in on a dispute between Kellogg and Nabisco, finding the pillow shape of a shredded wheat biscuit to be functional because "the cost of the biscuit would be increased and its high quality lessened if some other form were substituted for the pillow-shape."[5] The Court stated,

> "The plaintiff has not the exclusive right to sell shredded wheat in the form of a pillow-shaped biscuit — the form in which the article became known to the public. That is the form in which shredded wheat was made under the basic [utility] patent. The patented machines used were designed to produce only the pillow-shaped biscuits. And a design patent [U.S. Des. Pat. No. 24,688] was taken out to cover the pillow-shaped form. Hence, upon expiration of the patents the form... was dedicated to the public."[6]

Kellogg has remained the touchstone for cases on the limits of trade dress protection, and not just for foodstuffs. Subsequent decisions have elaborated on the non-functionality doctrine without changing the basic framework.[7]

In a more modern case, *Sweet Street Desserts*, a "Blossom Design" for a round, single-serving, fruit-filled pastry with six folds or petals of upturned dough was held to be functional and, accordingly, unprotectable as trade dress because the product's size, shape, and six folds or petals of upturned dough were all essential to the product's ability to function as a single-serving, fruit-filled dessert pastry.[8] Only incidental, arbitrary, or ornamental product features that identify the product's source are protectable as trade dress. Chudleigh's trade dress Reg. No. 2,262,208 was cancelled.[9]



Int. Cl.: 30
Prior U.S. Cl.: 46
United States Patent and Trademark Office
Reg. No. 2,262,208
Registered July 20, 1999

TRADEMARK
PRINCIPAL REGISTER

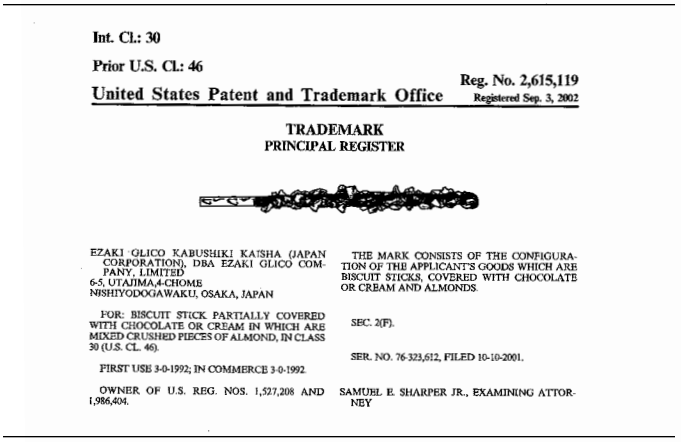
CHUDLEIGH'S APPLE & CIDER SHOPPE LTD. (CANADA CORPORATION)
BOX 176,9528 HIGHWAY 25
NORTH, MILTON, ONTARIO L9T 4N9, CANADA

FOR: PASTRIES, IN CLASS 30 (U.S. CL. 46).
FIRST USE 1-0-1996; IN COMMERCE 1-0-1996.

THE MARK CONSISTS OF A DISTINCTIVE CONFIGURATION FOR BAKED GOODS.

SER. NO. 75-369,992, FILED 10-8-1997.

DARLENE BULLOCK, EXAMINING ATTORNEY



Int. Cl.: 30
Prior U.S. Cl.: 46
United States Patent and Trademark Office
Reg. No. 2,615,119
Registered Sep. 3, 2002

TRADEMARK
PRINCIPAL REGISTER

EZAKI GLICO KABUSHIKI KAISHA (JAPAN CORPORATION), DBA EZAKI GLICO COMPANY, LIMITED
6-5, UTAJIMA,4-CHOME
NISHIYODOGAWAKU, OSAKA, JAPAN

FOR: BISCUIT STICK PARTIALLY COVERED WITH CHOCOLATE OR CREAM IN WHICH ARE MIXED CRUSHED PIECES OF ALMOND, IN CLASS 30 (U.S. CL. 46).

FIRST USE 3-0-1992; IN COMMERCE 3-0-1992.

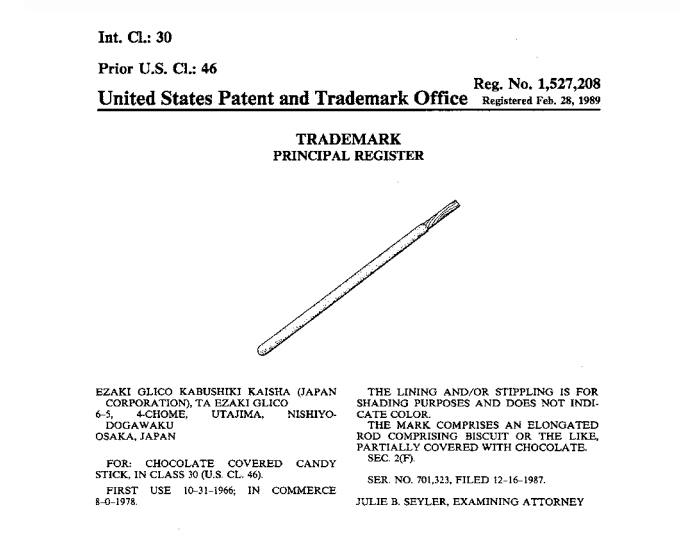
OWNER OF U.S. REG. NOS. 1,527,208 AND 1,986,404.

THE MARK CONSISTS OF THE CONFIGURATION OF THE APPLICANT'S GOODS WHICH ARE BISCUIT STICKS, COVERED WITH CHOCOLATE OR CREAM AND ALMONDS.

SEC. 2(F).

SER. NO. 76-323,612, FILED 10-10-2001.

SAMUEL E. SHARPER JR., EXAMINING ATTORNEY



Int. Cl.: 30
Prior U.S. Cl.: 46
United States Patent and Trademark Office
Reg. No. 1,527,208
Registered Feb. 28, 1989

TRADEMARK
PRINCIPAL REGISTER

EZAKI GLICO KABUSHIKI KAISHA (JAPAN CORPORATION), TA EZAKI GLICO
6-5, 4-CHOME, UTAJIMA, NISHIYODOGAWAKU
OSAKA, JAPAN

FOR: CHOCOLATE COVERED CANDY STICK, IN CLASS 30 (U.S. CL. 46).

FIRST USE 10-31-1966; IN COMMERCE 8-0-1978.

THE LINING AND/OR STIPPLING IS FOR SHADING PURPOSES AND DOES NOT INDICATE COLOR.

THE MARK COMPRISES AN ELONGATED ROD COMPRISING BISCUIT OR THE LIKE, PARTIALLY COVERED WITH CHOCOLATE.

SEC. 2(F).

SER. NO. 701,323, FILED 12-16-1987.

JULIE B. SEYLER, EXAMINING ATTORNEY

In *Ezaki Glico v. Lotte*, the non-functionality requirement was assessed in connection with Ezaki Glico's POCKY® treats—thin, rod- or stick-shaped cookies partially coated in chocolate (with optional nuts)—and Lotte's competing PEPERO® treats.[10]

The core dispute was how to define "functional" for product configuration trade dress. Ezaki Glico argued a narrow reading, equating "functional" with "essential." The court disagreed, reading Supreme Court precedent to say that product configuration features need only be useful to be functional. That is, a product shape feature is "useful" and thus "functional" if the product works better in that shape, including shape features that make a product cheaper or easier to make or use. The 3rd Circuit held that a product feature being "essential to the use or purpose of the article or if it affects the cost or quality of the article"[11] is merely one way to establish functionality.[12] A product feature is also unprotectably functional if exclusivity would put competitors at a significant, non-reputation-related disadvantage.[13] The rejection of a narrow reading of the functionality doctrine echoes cases in other circuits characterizing the Supreme Court's *TrafFix* case as setting forth two ways to establish functionality.[14] There are several ways to establish functionality that are not limited to merely "essential" product features.

Functionality in the trade dress context is commonly assessed through the following types of non-dispositive evidence, as summarized in *Ezaki Glico*:

> "First, evidence can directly show that a feature or design makes a product work better.... Second, it is 'strong evidence' of functionality that a product's marketer touts a feature's usefulness. Third, '[a] utility patent is strong evidence that the features therein claimed are functional.' Fourth, if there are only a few ways to design a product, the design is functional. But the converse is not necessarily true: the existence of other workable designs is relevant evidence but not independently enough to make a design non-functional."[15]

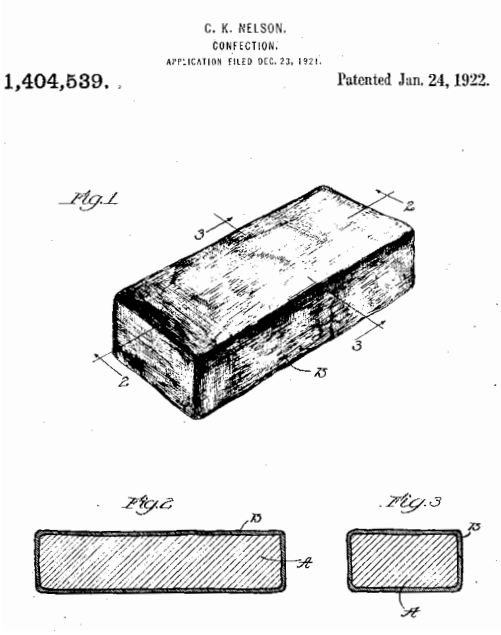
There was evidence of practical functions of holding, eating, sharing, or packing the POCKY treats. Ezaki Glico's internal documents showed a desire to have a portion of the stick uncoated by chocolate to serve as a handle. The court also noted how the size of the sticks allowed people to eat them without having to open their mouths wide and made it possible to place many sticks in a package. Ads for POCKY treats also emphasized the same useful features. Ezaki Glico proffered nine examples of partially chocolate-coated treats that do not look like POCKY treats, but the court found that evidence insufficient to avoid the conclusion that every aspect of POCKY treats is useful.

Finally, the court concluded that Ezaki Glico's utility patent U.S. Pat. No. 8,778,428 for a "Stick-Shaped Snack and Method for Producing the Same" was irrelevant. The court's rationale for that conclusion, however, is rather unconvincing. The utility patent was applied for in 2007, with a 2006 Japanese priority claim, which was long after Ezaki Glico began selling POCKY treats in the U.S. in 1978, and also long before Lotte began selling the accused PEPERO treats in 1983 and the first explicit allegations of misconduct in 1993. That patent was also still in force (i.e., unexpired). The utility patent corresponded to an "ultra thin" version of POCKY treats and Ezaki Glico argued that its patent addressed only one of many embodiments covered by its trade dress.

The lower court discussed utility patent disclosures regarding stick warping formulated like a problem-solution statement[16]—somewhat akin to obviousness analyses in European patent practice. But unmentioned was how the patent's disclosed stick holder necessarily produces a partial chocolate coating.[17] The 3rd Circuit's reasoning about the irrelevance of the utility patent is superficial to the point of being mere tautology. The appellate opinion did not address *Kellogg*'s statement that the form in which a food article was made under an expired "basic" patent was relevant to trade dress eligibility or other circuits' cases that deemed a prior manufacturing method patent to be relevant. Moreover, the court did not address the way mere descriptiveness of just one good bars registration of a trademark for an entire group of goods encompassing additional, different goods.[18] Whether a later-filed patent can ever provide grounds to cancel an earlier trade dress registration for functionality is a question the court essentially avoided deciding.

Something else not discussed in *Ezaki Glico* was the 3rd Circuit's decision nearly a century ago in the *Eskimo Pie* case.[19] There, the validity of U.S. Pat. No. 1,404,539 on the original ESKIMO PIE chocolate-covered ice cream treat was at issue. The court held the utility patent invalid, reasoning with regard to claim 6 (in which the core and casing form a "substantially rectangular solid adapted to maintain its original form during handling") that "[t]here is no invention in merely changing the shape or form of an article without changing its function except in a design patent."[20] The rectangular solid shape was found non-functional and therefore unable to distinguish the prior art in a utility patent claim. The lower court had already pithily reached these same conclusions:

> "The gist of the invention, if there be one, is in sealing a block of ice cream in a sustaining and self-retaining casing of chocolate. A rectangular piece of ice cream is coated with chocolate…. All that the patentee does is to take a small brick of ice cream and coat it with chocolate, just as candies are coated. [In the prior art,] Val Miller took a round ball of ice cream and coated it, just as candies are coated. In one case the ice cream is round in form, and in the other case it is rectangular. In both cases there is a sustaining and self-retaining casing, sealing the core of ice cream…. There is no invention in form alone."[21]


C. K. NELSON.
CONFECTION.
APPLICATION FILED DEC. 23, 1921.

1,404,539. Patented Jan. 24, 1922.

Fig. 1

Fig. 2

Fig. 3

In a fascinating *Wired* article from 2015, Charles Duan located correspondence with the inventor's patent attorney and other pertinent historical information in museum archives.[22] Duan highlighted how the invention, if anything, was really about the particular formulation of chocolate that allowed it to work effectively as a coating on a frozen ice cream treat, while the patent contains no disclosure in that regard and its claims were intended to be preemptive.[23] Invalidation of the ESKIMO PIE patent opened the door for the KLONDIKE® ice cream treat, introduced in 1928, which was later the subject of an 11th Circuit trade dress case about product packaging (as opposed to product configuration) for a wrapper with a pebbled texture, images of a polar bear and sunburst, bright coloring, and square size that, in combination, were held non-functional.[24]

Courts have tended to be more lenient on (food) packaging trade dress when it comes to functionality.[25] This held true when the 11th Circuit later found the unregistered product design of DIPPIN' DOTS® multi-colored flash-frozen ice cream spheres/beads to be functional and thus ineligible for trade dress protection.[26] An unexpired utility patent (U.S. Pat. No. 5,126,156)—later held invalid and unenforceable[27]—was specifically cited as evidence of functionality of the product design, along with judicial notice that certain colors connote ice cream flavor.[28]

So, in 1929, the 3rd Circuit ruled that the configuration of an ESKIMO PIE treat was ornamental and non-functional, and therefore unpatentable in a utility patent; whereas, in 2021, the 3rd Circuit ruled that the configuration of a POCKY treat was functional, and therefore ineligible for trade dress protection. How can these decisions be reconciled?

The only way to square these cases is to say that "functionality" in the trade dress context means something legally different than in the patent context. So, an ice cream treat's shape/configuration was insufficiently functional to support a utility patent claim though a cookie treat's shape and configuration was too functional (useful) to support trade dress protection. But courts and other commentators often stop well short of explaining *why* "functionality" differs in these two contexts, or what specific evidence would differ—aside from the separate need to prove inherent or acquired distinctiveness to establish trade dress rights.[29]

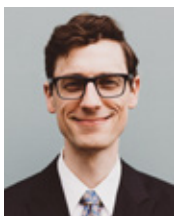
The ultimate conclusions in the two cases, however, are very consistent in seeking to limit overreaching IP assertions. The functionality doctrine for trade dress has long been used to scrutinize attempts to secure a potentially perpetual trademark monopoly on product feature(s) *that consumers desire* apart from any unique but optional source-identifying function(s) of product configuration—as well as manufacturer's concerns about ease and cost of manufacturability.

But the courts have yet to make explicit the precise role, if any, of the relevant consumer's perspective in this analysis, which would seem to be a legitimate inquiry in the trade dress context in a way it would not be in the utility patent context, for instance. Admittedly, the "ordinary observer" test used for infringement of design patents blurs this distinction somewhat, especially given that one appeals court has held that conflation of the trademark likelihood-of-confusion test and the design patent ordinary-observer test is harmless error.[30] But evidence of non-reputational consumer desires, such as a consumer survey or similar expert testimony, would appear to be rather unique to product configuration trade dress considerations and in closer cases might not always be answered or rendered unnecessary by the admissions or conduct of the alleged trade dress owner.

Certainly, many trade dress product configuration cases *do* turn on admissions or statements (such as ads) by the owner that indicate functionality or the failure of the owner to meaningfully rebut the persuasive articulation of functionality

readily observable in the product itself. Additionally, parties aggressively enforcing trade dress have often also pursued or obtained another form of protection, such as a patent, and statements made in or while obtaining a patent on the same or similar subject matter can be relevant to trade dress functionality.[31] The Supreme Court has gone so far as to explicitly note that invoking trademark rights as patent rights expire is suspicious enough to create "a strong implication" the party is seeking to improperly extend a patent monopoly and that summary disposition of anticompetitive strike suits is desirable.[32] This means consumer surveys or the like should not become routinely necessary. Yet cases may arise where consumer perceptions of functionality (or usefulness) are not immediately apparent from the product configuration itself, or the plaintiff has not made damaging statements, making survey evidence informative in the absence of more straightforward grounds for assessing functionality. This seems like a potential additional (fifth) category of functionality evidence not spelled out in cases like *Ezaki Glico*.

Foodstuff product configuration trade dress disputes provide an excellent case study of how courts have sought to preserve consumer access to functional product features, as well as producer access to easy and economical manufacturing techniques. Unless product configurations are relatively easily avoided by competitors making basically the same products, assertions of trade dress protection in pure product configurations have often been rejected. While courts remain sensitive to potential confusion over a product's source, valid product configuration trade dress rights, as a matter of branding, should include a prominent, non-functional feature related to reputation that does not significantly diminish consumer enjoyment or ease of manufacturability. ▲



AUSTEN ZUEGE is an intellectual property attorney & officer with Westman, Champlin & Koehler, P.A. in Minneapolis. Views expressed are the author's own.

AZUEGE@WCK.COM

Notes

[1] U.S. Const., Art. I, §8, cl. 8

[2] *See Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5-6 (1966); *Darcy v. Allein*, 11 Co. Rep. 84, 77 Eng. Rep. 1260 (K. B. 1603).

[3] *Shredded Wheat Co. v. Humphrey Cornell Co.*, 250 F. 960 (2d Cir. 1918).

[4] *Id.* at 964.

[5] *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 122 (1938); *see also* Graeme B. Dinwoodie, "The Story of *Kellogg Co. v. National Biscuit Co.*: Breakfast with Brandeis," Intellectual Property Stories (Dreyfuss and Ginsburg, eds., Foundation Press, 2005) *available at https://works.bepress.com/graeme_dinwoodie/28* .

[6] Kellogg, 305 U.S. at 120-21; *see also* "Henry Perky: Patents," Wikipedia at *https://en.wikipedia.org/wiki/Henry_Perky#Patents* (last visited 1/7/2021); U.S. Des. Pat. No. 48,001.

[7] *See TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 28-32 (2001); *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 213-16 (2000); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164-65 (1995); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 771,775 (1992); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989); *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 850 n.10 (1982); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 228-32 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 238 (1964); *see also Scott Paper Co. v. Marcalus Mfg. Co., Inc.*, 326 U.S. 249, 255-57 (1945).

[8] *Sweet Street Desserts, Inc. v. Chudleigh's Ltd.*, 69 F. Supp. 3d 530, 532-33 and 546-50 (E.D. Pa. 2014) *aff'd* 655 F. App'x 103 (3d Cir. 2016); *see also* 15 U.S.C. § 1064(3).

[9] *Sweet Street Desserts, Inc. v. Chudleigh's Ltd.*, No. 5:12-cv-03363 (E.D. Pa., 1/15/2015) *aff'd* 655 F. App'x 103.

[10] *Ezaki Glico Kabushiki Kaisha v. Lotte Int'l Am. Corp.*, 986 F.3d 250 (3d Cir. 2021) *cert denied* 595 U.S. ___ (11/1/2021).

[11] *Qualitex*, 514 U.S., at 165 (*quoting Inwood*, 456 U.S. at 850, n.10).

[12] *Ezaki Glico*, 986 F.3d at 257.

[13] *Id.* (*quoting TrafFix*, 532 U.S. at 32).

[14] *Dippin' Dots, Inc. v. Frosty Bites Dist., LLC*, 369 F.3d 1197, 1203 (11th Cir. 2004); *Groeneveld Transp. Efficiency, Inc. v. Lubecore Int'l, Inc.*, 730 F.3d 494, 506-09 (6th Cir. 2013); *Schutte Bagclosures Inc. v. Kwik Lok Corp.*, 193 F. Supp. 3d 245, 261-62 (S.D.N.Y. 2016) *aff'd* 699 F. App'x 93, 94 (2d Cir. 2017).

[15] *Ezaki Glico*, 986 F.3d at 258 (internal citations omitted); *but see* James J. Aquilina, "Non-Functional Requirement for Trade Dress: Does Your Circuit Allow Evidence of Alternative Designs?" *AIPLA* (5/5/2020) *available at https://www.quarles.com/content/uploads/2020/05/Non-Functional-Requirement-for-Trade-Dress.pdf* .

[16] *Ezaki Glico Kabushiki Kaisha v. Lotte Int'l Am. Corp.*, No. 2:15-cv-05477, 2019 WL 8405592 at *6 (D.N.J., 7/31/2019).

[17] See holder (61). U.S. Pat. No. 8,778,428, FIG. 5 and col. 5, lines 15-18 & 45-50.

[18] *See* TMEP §1209.01(b) (Oct. 2018).

[19] *Eskimo Pie Corp. v. Levous*, 35 F.2d 120 (3d Cir. 1929).

[20] *Id.* at 122; *see also, e.g., E.H. Tate Co. v. Jiffy Ents., Inc.*, 196 F. Supp. 286, 298 (E.D. Pa. 1961); *James Heddon's Sons v. Millsite Steel & Wire Works*, 128 F.2d 6, 13 (6th Cir. 1942).

[21] *Eskimo Pie Corp. v. Levous*, 24 F.2d 599, 599-600 (D. N.J. 1928).

[22] Charles Duan, "Ice Cream Patent Headache," *Wired* (10/20/2015) *available at https://slate.com/technology/2015/10/what-the-history-of-eskimo-pies-says-about-software-patents-today.html* .

[23] *Id.*; *cf., Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 223-24 (2014); *Mayo Collab. Servs. v. Prometheus Labs, Inc.*, 566 U.S. 66, 72-73 (2012).

[24] *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1535-38 (11th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), *abrogated by Wal-Mart*, 529 U.S. at 216, *but see The Islay Co. v. Kraft, Inc.*, 619 F. Supp. 983, 990-92 (M.D. Fla. 1985).

[25] *E.g., Spangler Candy Co. v. Tootsie Roll Inds., LLC*, 372 F. Supp. 3d 588, 604 (N.D. Ohio 2019); *Fiji Water Co., LLC v. Fiji Mineral Water USA, LLC*, 741 F. Supp. 2d 1165, 1172-76 (C.D. Cal. 2010).

[26] *Dippin' Dots*, 369 F.3d at 1202-07; *see also* 15 U.S.C. §1125(a)(3). The court incorrectly stated unregistered product configuration trade dress can be inherently distinctive, a position abrogated by *Wal-Mart*.

[27] *Dippin' Dots, Inc. v. Mosey.*, 476 F.3d 1337 (Fed. Cir. 2007).

[28] *Dippin' Dots*, 369 F.3d at 1205-06.

[29] *See Keystone Mfg. Co., Inc. v. Jaccard Corp.*, No. 03-CV-648, 2007 WL 655758 (W.D.N.Y., 2/26/2007).

[30] *Unette Corp. v. Unit Pack Co.*, 785 F.2d 1026, 1029 (Fed. Cir. 1986); *see also Converse, Inc. v. Int'l Trade Comm'n*, 909 F.3d 1110, 1124 (Fed. Cir. 2018) (calling the standards "analogous").

[31] *TrafFix*, 532 U.S. at 29-32; *Dippin' Dots*, 369 F.3d at 1205-06.

[32] *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 181 (1896); *Wal-Mart*, 529 U.S. at 213-14; *see also Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942) (misuse of patent on machine to restrain unpatented salt tablet sales); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (improper trademark assertion after copyright expiration); *Korzybski v. Underwood & Underwood, Inc.*, 36 F.2d 727, 728-29 (2d Cir. 1929) (election of protection doctrine bars copyright after obtaining patent).

Landmarks in the Law

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

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CRIMINAL LAW

JUDICIAL LAW

■ **DWI: Totality of circumstances and rational inferences drawn from them must be examined to determine reasonable, articulable suspicion of intoxication.** Appellant was convicted of first-degree DWI and driving with an open bottle of alcohol. He argues the arresting deputy impermissibly expanded the scope of the initial stop of appellant's truck when the deputy asked him if he had consumed any beer from the open case in his truck. The Supreme Court affirms the Minnesota Court of Appeals' and district court's rejections of appellant's argument, finding the deputy had a reasonable, articulable suspicion of other criminal activity sufficient to expand the scope of the traffic stop.

Appellant was first pulled over because his truck did not have a front license plate and the back plate was covered in snow. When the deputy cleared snow off the rear plate, he found that the tabs were expired. After approaching appellant, the deputy noticed an open case of beer, with some cans missing, in the back seat of his truck. Upon running the truck's registration, the deputy found appellant's license was cancelled as inimical to public safety. Appellant confirmed he was aware of his license status and, after being asked by the deputy, admitted to drinking some cans of beer. Two empty cans of beer were later found near the truck's passenger seat.

The deputy had a legitimate reason to initially stop appellant's truck. He was permitted to ask for and search records relating to appellant's driver's license and truck registration. The challenged expansion of the stop is the point at which the deputy asked appellant if he had been drinking. He asked this question after observing the case of beer with missing cans and learning appellant's license was cancelled as inimical to public safety, which the deputy testified he knew was likely to mean appellant was a repeat DWI offender. The Court finds that the combination of these facts established a sufficient reasonable, articulable suspicion that appellant was driving while intoxicated, even in the absence of any noted physical indicia of impairment. ***State v. Taylor***, A20-0245, 2021 WL 4765700 (Minn. 10/13/2021).

SAMANTHA FOERTSCH
Bruno Law PLLC
samantha@brunolaw.com

STEPHEN FOERTSCH
Bruno Law PLLC
stephen@brunolaw.com

EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **FLSA claims; jurisdiction defense not waived, case dismissed.** A collective action brought under the Fair Labor Standards Act (FLSA) for overtime pay was properly dismissed by U.S. District Court Judge Paul Magnuson. The 8th Circuit, affirming the lower court's decision, held that the company did not waive a jurisdictional defense to the claims for certification, and correctly threw out claims with no connection to Minnesota, along with finding that the two claimants in the case were not employees but traveling on their work, and therefore, the company was not obligated to pay for pay them for the time they were traveling. ***Vallone v. CJS Solutions Group, LLC***, 9 F.3rd 861 (8th Cir. 08/18/2021).

■ **FLSA; attorney's fee issue remanded**. An award of $1 in attorney's fees as part of a wage settlement in a collective action brought under FLSA was vacated and remanded. The 8th Circuit held the that the lower court did not err in rejecting a joint motion by the parties for approval of a settlement, but also that the court improperly calculated the lodestar for attorney's fees, which warranted vacating the lower court ruling and remanding it for further proceedings before the trial court. ***Vines***

v. Welspun Pipes, Inc., 9 F.4th 849 (8th Cir. 08/18/2021).

■ **Reinstatement of employee; arbitration award upheld.** An arbitrator's award was upheld on grounds that the arbitrator properly reduced the employee's discharge or suspension. The 8th Circuit affirmed the lower court decision upholding the arbitration award, on grounds that the arbitrator did not exceed his authority in finding that it was just cause for discipline but not termination. ***WM Crittenden Operation, LLC v. United Food & Commercial Workers, Local Union 1529***, 9 F.4th 732 (8th Cir. 08/16/2021).

■ **Noncompete provision nixed; employer terminated agreement.** A noncompete and nonsolicitation provision of an employment contract was no longer in effect after the employer terminated the agreement in writing. Reversing the lower court decision, the 8th Circuit held that the employer's termination of the agreement in writing made the noncompete agreement "inoperable" and that the nonsolicitation provision was too broad in prohibiting the employee from accepting unsolicited business from her former clients. ***Miller v. Honkamp Krueger Financial Services Inc.***, 9 F.4th 1011 (8th Cir. 08/24/2021).

■ **Long-term disability; ERISA claim denied.** A claim for long-term disability benefits by an employee under the Employee Retirement Income Security Act (ERISA) was rejected. The 8th Circuit upheld a lower court determination that the plan did not abuse its discretion in interpreting the provisions of the policy or in denying the claim. ***Harris v. Federal Express Corporation Long Term Disability Plan***, 856 Fed. Appx. 637 (8th Cir. 08/20/2021) (per curiam).

■ **Workers' compensation; noncompliant opiate treatment not compensable.** Treatment of an injured employee with opiate medication that was noncompliant with the long-term opiate treatment protocols promulgated by the Department of Labor and Industry barred compensation under the state's workers' compensation system. The Supreme Court held that the employee's condition did not qualify as a "rare exception" to the treatment parameters developed by the agency. ***Johnson v. Darchuks Fabrications Inc.***, 963 N.W.2d 227 (08/18/2021).

■ **Unemployment compensation; HIPAA violation bars benefits.** An employee of a mental health facility who violated the federal HIPAA law concerning privacy of medical records was denied unemployment compensation benefits. Following a decision by an unemployment law judge (ULJ) with the Department of Employment & Economic Development, the court of appeals held that the employee's accessing of medical records for "personal reasons" constituted disqualifying "misconduct." ***Wilson v. Pines Mental Health Center, Inc.,*** 2021 WL 3722082 (Minn. Ct. App. 08/23/2021) (unpublished).

MARSHALL H. TANICK
Meyer, Njus & Tanick
mtanick@meyernjus.com

ENVIRONMENTAL LAW

JUDICIAL LAW

9th Circuit Court of Appeals develops broad transportation interpretation under RCRA. On 9/29/2021, the United States Court of Appeals for the 9th Circuit issued its opinion in *California River Watch v. City of Vacaville*, vacating the district court's summary judgment in favor of the City of Vacaville and determining triable issues under the Resource Conservation and Recovery Act (RCRA).

The case came before the 9th Circuit after the lower district court issued a summary judgment in favor of the City of Vacaville, with the district court dismissing an imminent endangerment citizen suit brought under RCRA. The 9th Circuit first addressed whether River Watch had forfeited its argument that the hexavalent chromium found in the city's water supply was a "discarded material" that specifically originated from the Wickes Forest Industries, Inc. wood treatment facility in Elmira, California, thus leaving the city liable for transportation of the contaminated water under RCRA. The city argued that because River Watch did not specifically raise the theory that the hexavalent chromium is a "discarded material" from the Wickes site in district court, River Watch effectively forfeited that argument.

The 9th Circuit found that although River Watch did not argue that the contamination came specifically from the Wickes site, River Watch had consistently argued that there was a possibility that the contamination was anthropogenic—meaning it was caused by humans and not naturally occurring—and could have come from any number of sites, including the Wickes site. River Watch further argued that if any of the contamination found was from an industrial source, then it should be considered a solid waste and subject to RCRA. The 9th Circuit found that River Watch had not forfeited its argument because River Watch had always maintained at some level that the Wickes site was a likely source of the contamination.

The 9th Circuit next addressed whether River Watch had a "cognizable legal theory" that the hexavalent chromium found in Vacaville's water supply should be considered a "solid waste" and thus subject to RCRA. River Watch argued that the hexavalent chromium was a "solid waste" because it meets the definition of "solid waste" under RCRA as a "discarded material… from industrial, commercial, and agricultural operations." River Watch established that hexavalent chromium has been commonly used in commercial wood preservation, and it was common practice at wood preservation facilities like the Wickes site to allow wood treated with hexavalent chromium to drip dry, which allowed the contaminant to drip directly into the soil. Further, River Watch, through its expert, argued that large amounts of hexavalent chromium had been dumped directly into the ground at the Wickes site.

The 9th Circuit opined that if River Watch's expert was to be found credible, the hexavalent chromium found in the city's water supply would then meet the definition of a "solid waste" under RCRA, which thus meant River Watch had created a triable issue on whether the hexavalent chromium was a "discarded material."

The 9th Circuit next addressed the issue of whether the city had contributed to the past or present transportation of the hexavalent chromium and therefore would face liability under RCRA. The court found that River Watch's expert had effectively demonstrated that water containing hexavalent chromium and originating from the Elmira Well Field, located near the Wickes site, had been pumped through the city's water-distribution system. In taking this to be true, the court found that River Watch had established that the city had transported solid waste through its water-distribution system.

The court further reasoned that a transporter of solid waste under RCRA doesn't need to play a role in actually discarding the waste. The court looked to the plain language of RCRA, which applies to any person, including a governmental instrumentality, that contributes to the transportation of any waste. Because it was established that the city could be considered to have transported hexavalent chromium, which was found to be a solid waste, River Watch had established another triable issue.

Finally, the court addressed the city's "absurdity doctrine" argument, finding that the city had not provided enough evidence that River Watch's interpretation of RCRA based on its plain meaning would lead to absurd results. The 9th Circuit thus vacated the district court's summary judgment and remanded for further proceedings.

In his dissent, Circuit Judge Tashima rejected River Watch's argument based on previous holdings of the court that require a defendant to be actively involved in or have some degree of control over the waste disposal process to be found liable under RCRA. Tashima's dissent went on to state that the majority's opinion was an unduly broad interpretation of RCRA, and that the purpose of RCRA was to focus on the entities that cause contamination, not those parties whose products or property may be affected by another's waste disposal but who have no involvement in the waste disposal process. Tashima argued that extending RCRA to the case at hand was unprecedented and unwarranted. ***California River Watch v. City of Vacaville***, No. 20-16605 (9th Cir. 2021).

MN Court of Appeals: Water body's absence from DNR public waters inventory does not establish it is not a public water. The Minnesota Court of Appeals issued an opinion holding that Renville County erred by deciding that because a reach (that is, a segment) of Limbo Creek does not appear on the Minnesota Department of Natural Resources (DNR) Public Waters Inventory (PWI) list, it is not a public water. Relator environmental advocacy groups challenged the county's decision to not

prepare an environmental assessment worksheet (EAW) for a proposed ditch-improvement project. Under Minn. R. 4410.4300, subp. 27(A), an EAW is mandatory when the proposed action will "change or diminish the course, current, or cross-section of one acre or more of any public water." Renville County, as the responsible governmental unit for the project, decided that the affected reach of Limbo Creek was not a "public water" and that an EAW was not mandatory. The county concluded that the reach of Limbo Creek was not a "public water" because it was not on the DNR's PWI list.

"Public waters" are all water basins and watercourses that meet the criteria set forth in Minnesota Statutes, Section 103G.005, subd. 15. Public waters are subject to certain unique regulatory requirements that do not apply to nonpublic waters. The DNR maintains extensive Public Water Inventory maps pursuant to Minn. Stat. §103G.201.

Notwithstanding these inventory maps of public waters, the court held, the question of whether a water body is a "public water" must be based on the statutory definition, which the court found to be "plain and unambiguous." The court held that "[n]othing in the statutory definition makes qualifying as a 'public water' dependent on a water's inclusion on the DNR's PWI list or map." The court went on to conclude that the record lacked substantial evidence supporting the county's position that the affected reach of Limbo Creek is not a "public water." Accordingly, the court reversed and remanded to the county for preparation of a mandatory EAW. ***In re MCEA***, No. A20-1592, 2021 Minn. App. LEXIS 276 (Minn. Ct. App. 10/4/2021).

ADMINISTRATIVE ACTION

■ **EPA issues strategic roadmap to tackle PFAS forever chemicals.** On October 18, 2021, the U.S. Environmental Protection Agency (EPA) issued the per- and poly-fluoroalkyl substances (PFAS) Strategic Roadmap, detailing the agency's short- and longer-term commitments, objectives, and goals to address PFAS contamination in the United States. The whole-of-agency integrated approach, set forth by the EPA Council on PFAS—recently established by the current EPA administrator, Michael S. Regan—delegates key actions, and expected deadlines, for EPA's program offices, focusing on the three central directives, as Regan stated in his introductory note to the Roadmap, "to further the science and research [on PFAS chemicals], to restrict these dangerous chemicals from getting into the environment, and to immediately move to remediate the problem in communities across the country."

PFAS substances are a family of man-made chemicals that have been manufactured since the 1940s. These chemicals have been used historically in the production of "nonstick" and "waterproof" manufactured goods and are very resistant to degradation, often persisting in the environment for decades. Studies have found that these chemicals can accumulate in our bodies over time and lead to adverse human health effects. The main pathways of exposure for humans are through drinking contaminated groundwater and eating food contaminated by PFAS, such as the accumulation of the chemicals in fish tissue. Concerningly, EPA monitoring data indicates that approximately 100 percent of fish tested in the Great Lakes show the presence of PFAS at varying levels. However, PFAS can also be found in food packaging and commercial household products like nonstick cookware, beauty products, stain-repellent carpets, and firefighting foam.

With some actions already underway, the Strategic Roadmap outlines current and future key actions that each EPA office will take between 2021 and 2024. The following are some of the significant actions for each office:

- The Office of Chemical Safety and Pollution Prevention will publish a national PFAS testing strategy, review existing PFAS, close down abandoned PFAS uses under the Toxic Substances Control Act (TSCA), and finalize new PFAS reporting under TSCA Section 8.
- The Office of Water will undertake nationwide monitoring for PFAS in drinking water and establish national drinking water limits for certain PFAS under the Safe Drinking Water Act (SDWA), restrict PFAS discharges from industrial sources through effluent limitation guidelines, and use the National Pollutant Discharge Elimination System (NPDES) permitting program to reduce PFAS discharges into waterways.
- The Office of Land and Emergency Management will draft a proposed rule to designate certain PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).
- The Office of Air and Radiation will devise methods to detect and potentially regulate PFAS air emissions as hazardous air pollutants under the Clean Air Act (CAA).
- The Office of Research and Development will develop additional targeted methods for detecting and measuring specific and unknown PFAS in the environment.

Furthermore, on 10/26/2021, EPA announced it would expand the PFAS Strategic Roadmap to include two new rulemakings under the Resource Conservation and Recovery Act (RCRA). First, EPA will begin to propose listing four major PFAS chemicals as RCRA Hazardous Constituents, subjecting the chemicals to corrective action requirements at hazardous waste facilities. And second, EPA will clarify its regulations of the RCRA Corrective Action Program to require investigation and cleanup of wastes and other emerging contaminants that meet the statutory definition of hazardous waste, which would require

PFAS to be cleaned up through RCRA corrective actions.

In the conclusion section of the PFAS Strategic Roadmap, EPA states that the risks posed by PFAS demand that the agency attack the problem from multiple directions, and that EPA will seek to leverage its full range of statutory authorities in order to achieve tangible benefits for human health and the environment. By proposing actions across the foundational environmental statutes, including TSCA, SDWA, CWA, CERCLA, CAA, and RCRA, the Agency is doing just that. **PFAS Strategic Roadmap**, *https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf* . Note that the state of Minnesota published a **PFAS Blueprint**, which was described as a "PFAS planning document," in February 2021. *https://www.pca.state.mn.us/sites/default/files/p-gen1-22.pdf* .

JEREMY P. GREENHOUSE
The Environmental Law Group, Ltd.
jgreenhouse@envirolawgroup.com

JAKE BECKSTROM
Vermont Law School, 2015
jbmnusa@gmail.com

ERIK ORDAHL
Barna, Guzy & Steffen
eordahl@bgs.com

FEDERAL PRACTICE

JUDICIAL LAW

■ **Denial of motion for leave to amend denied; "functional equivalent" of amended complaint.** Affirming a district court's dismissal of a securities fraud action and its denial of a motion for leave to amend a complaint on the merits, the 8th Circuit declined to decide whether new allegations in an attachment to a brief submitted in opposition to a motion to dismiss constituted the "functional equivalent" of a proposed amended complaint. ***City of Plantation Police Officers Pension Fund v. Meredith Corp.***, ___ F.4th ___ (8th Cir. 2021).

■ **28 U.S.C. §1442(a)(1); federal officer defense; some remands reversed.** The 8th Circuit affirmed in part and reversed in part a series of decisions by Chief Judge Tunheim that rejected 3M's removal of claims arising out of its sale of earplugs based on the federal contractor defense, and had remanded those claims, finding that claims arising out of commercial sale of the earplugs were properly remanded, but that claims raised by plaintiffs who obtained their earplugs in the course of their work for defense contractors were properly removed. ***Graves v. 3M Co.***, ___ F.4th ___ (8th Cir. 2021).

■ **Denial of preliminary injunction affirmed; delay; irreparable harm.** Affirming a district court's denial of a motion for temporary restraining order and preliminary injunction, the 8th Circuit agreed with the district court that the plaintiffs' one-year delay in seeking injunctive relief "refuted their allegations of irreparable harm." ***Adventist Health Sys./Sunbelt, Inc. v. United States Dept. of HHS***, ___ F.4th ___ (8th Cir. 2021).

■ **Improper and untimely discovery; no prejudice; abuse of discretion.** Affirming in part and reversing in part Chief Judge Tunheim's decision following a bench trial in a Title IX case, the 8th Circuit found the admission of a property inspection that did not comply with Fed. R. Civ. P. 34 and that was conducted after the close of discovery to be "troubling," but found no abuse of discretion where the defendant "failed to show that it was prejudiced by the admission." ***Portz v. St. Cloud State Univ.***, ___ F.4th ___ (8th Cir. 2021).

■ **Attorney-client privilege; communications between nonlawyers.** Applying both federal and Minnesota privilege law, and agreeing with the defendant that "a corporate communication need not include an attorney to be protected by the attorney-client privilege," Magistrate Judge Wright nevertheless rejected the defendant's claim of attorney-client privilege for a series of emails, finding that none of the disputed emails was sent "for the purpose of securing legal advice" or otherwise met the requirements of the so-called *Diversified* test (*Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1977)). ***Sadare v. Bosch Automotive Servs. Sols. Inc.***, 2021 WL 4317432 (D. Minn. 9/23/2021).

■ **Motion for leave to amend granted; "mere" versus "undue" delay; rejoining of previously dismissed defendants.** Drawing a distinction between "mere" and "undue" delay, Magistrate Judge Docherty granted the plaintiffs' motion for leave to file a first amended consolidated class action complaint, rejecting defendants' argument that the plaintiffs had "unduly" delayed their motion to amend, which was brought on the last permissible day under the scheduling order, but instead found "mere" delay and the absence of any prejudice to the defendants.

Magistrate Judge Docherty also granted plaintiffs' request to rejoin five defendants that were previously dismissed with prejudice, rejecting defendants' argument that the request was governed by a "more restrictive standard" than Fed. R. Civ. P. 15's "liberal amendment standard." ***In re: EpiPen Direct Purchaser Litig.***, 2021 WL 4892231 (D. Minn. 10/20/2021).

■ **Fed. R. Civ. P. 45(f); transfer of motion to quash; dispositive or non-dispositive.** Granting a Fed. R. Civ. P. 45(f) motion to transfer a motion to quash a subpoena to the Western District of Texas, where the underlying FLSA action was pending, Magistrate Judge Wright determined that the motion was nondispositive, while acknowledging that the issue was "not entirely settled." ***De Leon v. Northern Natural Gas Co.***, 2021 WL 4452874 (9/29/2021).

■ **28 U.S.C. §1782; appeal from magistrate judge's order; standard of review.** Affirming Magistrate Judge Thorson's quashing of portions of a subpoena issued pursuant to 28 U.S.C. §1782, Chief Judge Tunheim acknowledged the absence of controlling authority on the standard of review, determined that "most" courts have held that such orders are nondispositive, and reviewed the order for clear error. ***In Re Application of Plowiecki***, 2021 WL 4973762 (D. Minn. 10/26/2021).

■ **Motion to remand; amended notice of removal.** Where the defendants' notice of removal failed to properly identify the citizenship of each of the members of a limited liability corporation, the plaintiff moved to remand, and the defendants then filed an amended notice of removal, Judge Magnuson denied the motion to remand, finding that the amended notice "cured any deficiency" in the removal. ***Hmong College Prep. Academy v. Woodstock Capital, LLC***, 2021 WL 4690978 (D. Minn. 10/7/2021).

■ **Fed. R. Civ. P. 20; motion to sever granted.** Applying the 8th Circuit's two-part test governing severance of claims, and finding that claims by two sets of plaintiffs were "similar but not the same," Magistrate Judge Docherty also found that the claims did not "arise from a single transaction or occurrence," and granted defendants' motion to sever without needing to determine whether the claims involved "common questions of fact or law." ***Bergman v. Johnson & Johnson***, 2021 WL 5028417 (D. Minn. 10/29/2021).

■ **Removal; remand; jurisdictional discovery denied.** Where actions were removed on the basis of diversity jurisdiction, Judge Schiltz "discovered that he lacked sufficient information" to ascertain whether the parties were diverse and ordered the parties to file affidavits identifying their citizenship, one party admitted that it was unable to determine its own citizenship, and Judge Schiltz ordered one defendant to show cause why the cases should not be remanded, that defendant's motion for leave to conduct jurisdictional discovery was denied where the defendant could only offer "speculation" that discovery might alter the result. ***In Re Trust Established Under the Pooling & Serv. Agreement Relating to the Wachovia Bank Com. Mortgage Trust Com. Mortgage Pass-Through Certs., Series 2007-C30***, 2021 WL 4551598 (D. Minn. 10/5/2021).

■ **Sanctions; Fed. R. Civ. P. 11; 28 U.S.C. §1927.** Despite finding that the defendant's Rule 11 motion was "both procedurally and substantively deficient," Judge Wright found that plaintiff counsel had engaged in "bad faith efforts to prolong this litigation" and engaged in a litany of improper conduct; imposed sanctions in an amount to be determined pursuant to 28 U.S.C. §1927; and ordered that the plaintiff's counsel were to be "jointly and severally liable for any award of attorneys' fees." ***Niazi Licensing Corp. v. St. Jude Med. S.C.***, 2021 WL 4947712 (D. Minn. 10/25/2021).

JOSH JACOBSON
Law Office of Josh Jacobson
joshjacobsonlaw@gmail.com

IMMIGRATION LAW

JUDICIAL LAW

■ **Migrant protection protocols (MPP) ("Remain in Mexico"): The saga continues.** As previously reported in the October issue of *Bench & Bar,* U.S. District Court Judge Matthew Kacsmaryk, Northern District of Texas, issued a nationwide injunction on 8/13/2021 (staying implementation of Department of Homeland Security Secretary Alejandro Mayorkas' 6/1/2021 Memorandum terminating migrant protection protocols), ordering the Biden administration to reinstate the preceding administration's MPP program in good faith. According to Judge Kacsmaryk, the Biden administration's termination of MPP violated the Administrative Procedure Act (APA) (5 U.S.C. §706(2)(A) because DHS ignored certain key factors while providing arbitrary reasons for rescinding MPP and, at the same time, failing to consider the effect of its termination on compliance with 8 U.S.C. §1225. The decision was stayed for seven days, allowing the Biden administration to seek emergency relief at the appellate level. ***Texas, et al. v. Biden, et al.***, No. 2:21-cv-00067-Z (N.D. Tex. 8/13/2021). *https://www.govinfo.gov/content/pkg/USCOURTS-txnd-2_21-cv-00067/pdf/USCOURTS-txnd-2_21-cv-00067-0.pdf*

On 8/19/2021, the 5th Circuit Court of Appeals declined to grant the government's request for a stay of Judge Kacsmaryk's order pending appeal. ***Texas, et al. v. Biden, et al.***, No. 21-10806 (5th Circuit, 8/19/2021). *https://www.ca5.uscourts.gov/opinions/pub/21/21-10806-CV0.pdf*

On 8/24/2021, the U.S. Supreme Court denied the Biden administration's request for a stay of Judge Kacsmaryk's order pending completion of appellate proceedings on the matter. ***Biden, et al. v. Texas, et al.,*** 594 U.S. ___ (2021). *https://www.supremecourt.gov/orders/courtorders/082421zr_2d9g.pdf*

On 9/15/2021, the Biden administration filed its first MPP compliance report with the district court, outlining steps it was taking to re-implement the protocols: discussions with the government of Mexico to accept individuals returned from the United States, given the latter's "sovereign right to admit or reject the entry of foreigners into its territory"; rebuilding infrastructure and reorganizing resources and personnel along the southwest border (under the eye of an interagency task force); developing immigration court dockets to schedule hearings for individuals in MPP; planning to operationalize MPP given changed conditions, including ongoing risks presented by covid-19 and the Biden administration's "obligation to implement the Center for Disease Control and Prevention's (CDC) Title 42 Order, which temporarily prohibits the introduction into the United States of certain noncitizens traveling from Canada or Mexico into the United States." *https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.105.0_2.pdf*

On 10/14/2021, the Biden administration filed its first supplemental MPP compliance report with the district court, describing substantial progress in re-implementing MPP: discussions with the government of Mexico; work toward finalizing the operational plans required to re-implement MPP; work with the Department of Justice and other interagency partners to ensure the immigration courts were prepared to hear the cases of those subject to MPP; and work on contracts to rebuild the Immigration Hearing Facilities in Laredo and Brownsville, Texas. The October report also disclosed that the administration was prepared to re-implement MPP by mid-November, contingent on Mexico's agreement to accept returns under MPP at that time. As the report noted, however, "As a sovereign nation, Mexico can deny the entry of all individuals who do not have status in Mexico… Mexico has made clear that it has concerns about aspects of how MPP was previously implemented, and that without certain improvements to the program, it will not decide to accept MPP enrollees." *https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.111.0_5.pdf*

On 10/29/2021, the Department of Homeland Security (DHS) issued a memorandum announcing its termination of MPP after finding the costs of MPP outweighed the benefits of continuing the program. DHS also noted it would continue to comply with the district court's order until such time as is practicable, after a final judicial decision to vacate the injunction has been made. According to DHS Secretary Alejandro Mayorkas, "MPP is neither the best, nor the preferred, strategy for achieving either of these goals [securing our borders and offering protection to those fleeing persecution and torture]… Importantly, the effective management of migratory flows requires that we work with our regional partners to address the root causes that drive migrants to leave their countries and to tackle this challenge before it arrives at our border." *https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf*

On 11/2/2021, in view of DHS Secretary Mayorkas's 10/29/2021 memorandum terminating MPP (while addressing, at the same time, Judge Kacsmaryk's issues with his initial 6/1/2021 memorandum), the administration asked the 5th Circuit Court of Appeals (where the case is currently pending) to vacate the injunction. A decision is imminent. *https://www.courthousenews.com/biden-administration-makes-case-for-end-of-trump-immigration-program/*

ADMINISTRATIVE ACTION

Travel ban lifted and vaccination requirement for noncitizen nonimmigrants. On 10/25/2021, President Biden issued a proclamation (Proclamation 10294: Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic) stating that, as of 11/8/2021, the United States will move away from country-by-country restrictions and adopt an air travel policy that relies primarily on vaccination to advance the safe resumption of international air travel to the United States. The proclamation governs the entry of noncitizen nonimmigrants into the United States, suspending the entry of unvaccinated noncitizen nonimmigrants except in limited circumstances. **86 Fed. Register, 59603-08** (10/28/2021). *https://www.govinfo.gov/content/pkg/FR-2021-10-28/pdf/2021-23645.pdf*

R. MARK FREY
Frey Law Office
rmfrey@cs.com

INTELLECTUAL PROPERTY

JUDICIAL LAW

Copyright: Statutory damages claim entitled to right to jury trial while claims for disgorgement are equitable and not entitled to right to jury trial. Judge Nelson recently limited plaintiff National Presto Industries, Inc.'s claims for a jury trial to its copyright infringement claim seeking statutory damages. Presto sued U.S. Merchants Financial Group, Inc., alleging 11 counts and seeking declaratory and injunctive relief. Presto sought statutory damages under the Copyright Act and disgorgement of profits under all other claims. The court previously granted U.S. Merchants' motion for summary judgment on Presto's trade dress, copyright infringement of instruction manuals, tortious inference, and unfair trade practices claims. The court then ordered the parties to submit briefing on whether Presto held a right to a jury trial for the surviving claims. Presto contended that it had a right to trial by jury on all remaining claims, arguing that the demands for U.S. Merchants' profits were a "proxy" for damages. U.S. Merchants conceded that Presto had a right to trial by jury for the copyright infringement claim that sought statutory damages but argued that Presto was not entitled to a jury trial on all other claims.

A right to trial by jury flows either from a statute or from the 7th Amendment to the United States Constitution. Neither party alleged that the Copyright Act, the Lanham Act, or the various state statutes invoked in the complaint created a jury-trial right. Thus, the question before the court was whether the 7th Amendment entitled Presto to a right to a jury trial on the remaining claims. The court found Presto was entitled to a right to trial by jury for the copyright infringement claim seeking statutory damages under controlling Supreme Court precedent. The court further found that Presto was not entitled to a jury trial on the remaining claims because disgorgement of profits was an equitable remedy, and that Presto's claim for disgorgement was not a "proxy" for damages. ***Nat'l Presto Indus., Inc., v. U.S. Merchants Fin. Grp., Inc., d/b/a Greenmade***, No. 18-cv-03321, 2021 WL 5083934 (D. Minn. 11/2/2021).

JOE DUBIS
Merchant & Gould
jdubis@merchantgould.com

REAL PROPERTY

JUDICIAL LAW

The necessity of convincing evidence to withhold a residential tenant's security deposit. Without convincing evidence to support the reason for withholding the entire security deposit, the amount landlords are entitled to withhold will be limited. In the recent case *Evans v. Niklas,* after terminating a tenancy, a tenant sought the return of her security deposit, which had been withheld to pay for a lock replacement and cleaning costs. The tenant and her roommate paid $1,350 for a security deposit, including a pet deposit. The tenant made a spare key for her boyfriend without the prior authorization of either the landlord or her roommate. The landlord alleged the roommates left the apartment in poor condition, that there was pet damage, and that he needed to replace the lock, and as such, withheld the entire security deposit. One tenant took the landlord to conciliation court to recover the security deposit and the court determined the landlord properly withheld a portion of the security deposit for the lock replacement expense and minor cleaning, but the tenant was awarded the remainder of the security deposit, totaling $675.

The landlord removed the case to district court, where he presented 163 photos and ten videos to support his allegations regarding the damage to the apartment, plus cleaning bills to evidence his expense, but the addresses of the companies were redacted. Despite evidence that replacing the locks cost $330, the district court found that $200 was reasonable. Additionally, the court held that $100 was a reasonable amount for pet-related cleaning services, as opposed to the $450 claimed by the landlord, because any cleaning beyond the pet-related damage was for "normal wear and tear," the costs of which cannot be withheld from the security deposit.

The court of appeals affirmed. The court noted that under Minn. Stat. §504B.178, subd. 3(c), the landlord has the burden of proving, by a preponderance of the evidence, the reason for withholding the security deposit. The court noted that the landlord referred to the cost of $330 to replace the locks in a letter to the tenants as "[m]iscellaneous fix-ups and replace locks." The district court used "[m]iscellaneous fix-ups" to justify its finding that replacing the locks cost under $330. With respect to the cleaning costs for pet-related damage, the court discussed the district court's determination that $450 was excessive based on the photos presented by the landlord and its refusal to rely on the document showing he had been billed for "[e]mergency pet cleaning." The court of appeals deferred to the district court's determination of credibility since the vendor's name and address were redacted from the documents. The landlord then made additional incidental arguments, which the court addressed briefly, but none provided any grounds for relief. ***Evans v. Niklas***, No. A21-0083, ___N.W.2d ___, 2021 WL 4824568 (Minn. Ct. App. 10/18/2021).

Challenging a city council resolution to abate the nuisance. To constitute a nuisance, a condition must materially and substantially interfere with the enjoyment of life or property. In *North Mankato City Council*, a property owner filed a *certiorari* appeal challenging the city council's vote to pass a nuisance resolution that ordered the property owner to abate the nuisance. After a public hearing, the city council found that the property contained a rank growth of vegetation that unreasonably annoys a considerable number of members of the public, was unsightly, and was a public health concern. The threshold issue was whether the court had proper jurisdiction. The court noted it may review quasi-judicial administrative decisions by *certiorari* and found that the city council's action was quasi-judicial and thus, jurisdiction was proper.

Turning to the merits of the case, the court then reversed the city council's resolution because it was found to be unsupported by the record. The court noted the standard for nuisance as an interference with the comfortable enjoyment of life or property that is material and substantial. The court found that the record did provide some support that the vegetation on the property was growing profusely or with excessive vigor, but that it did not support a finding that the growth of vegetation may have harmed public health. Moreover, the court noted that the neighbors' primary complaints about the property involved its appearance and that the property could not be considered a nuisance based primarily on its appearance.

Finally, the court found that the record could not support the conclusion that a considerable number of members of the public were annoyed. Out of all the community members who submitted comments or spoke at the hearing, only two expressed displeasure with the property. The community developer testified that the city had received multiple complaints over the years, but no evidence of the substance or the time frame of the complaints was offered. Ultimately, the court reversed the resolution to abate the nuisance as unsupported by the record. ***In re North Mankato City Council***, No. A21-0143, ___N.W.2d.___, 2021 WL 4517273 (Minn. Ct. App. 10/4/2021).

MIKE PFAU
DeWitt LLP
mjp@dewittllp.com

TAX LAW

JUDICIAL LAW

Green Acres value prevails over alternative Wisconsin law. Petitioners own and operate a family farm in Wright County, where they grow corn, wheat, soybeans, and alfalfa. The farm is made up of 16 parcels, all of which are at issue in this matter. The properties are enrolled in and taxed under the Green Acres program under Minn. Stat. ch. 273 (2020). The petitioners filed a petition to challenge their 2018 assessment. A hearing was held on 7/13/2021. The county moved to dismiss petitioner's

petition under Minn. R. Civ. Pro Rule 41.02(b) for failure to overcome the *prima facie* validity of the assessment. The parties addressed the motion in post-trial briefs.

"In 1967, the legislature enacted the 'Minnesota Agricultural Property Tax Law,' colloquially known as the Green Acres statute. Minn. Stat. §273.111, subd. 1." This provided an exception to the rule that all property shall be valued at its market value and allowed "for a lower value to be attributed to certain types of real estate," like a family-operated farm. The Green Acres statute was implemented to solve the problem of increased land value caused by the sewer and water improvement projects needed to accommodate the rapid expansion and development of the metropolitan areas. The Legislature passed the law to provide tax relief so that land could economically be used for agricultural purposes. *See Elwell v. Hennepin Cnty.*, 221 N.W.2d 538, 541 (Minn. 1974).

Green Acres is framed as a deferment program with two steps. To calculate deferment, "the assessor must first determine the property's value with 'any added values resulting from nonagricultural factors.'" Then, "make a separate determination of the market value" of the property. Tax is then based on that value, without adding values from nonagricultural factors. Minn. Stat. §273.111, subd. 4. When a property no longer meets the criteria for the program, however, the Legislature authorized the recapture of three years of deferred taxes. *Id.*, §273.111. subd. 3(c), 9(a). The Commissioner of Revenue works with the Department of Applied Economics at the University of Minnesota to determine the values for the Green Acres program.

Petitioners "argue that they overcame the presumptive validity" because one presented a spreadsheet and testified to his own calculations of "his desired per-acre value of farmland on the subject properties." Petitioners also argued that the county's assessments were biased and relied on nonagricultural factors by relying on the county's case-in-chief. To overcome the presumptive validity of the county's assessment, the court must only consider the taxpayer's evidence. *Court Park Co. v. Cnty. of Hennepin*, 907 N.W.2d 641, 645 (Minn. 2018). Finally, petitioners argue they met their burden because they presented an alternative method of valuing property based on Wisconsin law.

Because Minnesota assessors are bound by Minnesota law, and because petitioners did not show that the Green Acres value is inaccurate, the tax court affirmed the Wright County assessment. ***Harlan R. Anderson, Mary J. Anderson, Richard A. Anderson, & Mark W. Anderson v. Wright Co.***, 2021 WL 5099906 (MN Tax Court 10/29/2021).

Court dismisses petition for failure to comply with mandatory disclosure rule. Petitioners Forsons Investments LLC and Graham Building LLC filed petitions contesting the 2020 property assessments for each respective property. The properties were income-producing as of 1/2/2020. The county filed a motion to dismiss, asserting that petitioners failed to timely provide the appropriate income and expense information for the subject properties as required by Minn. Stat. §278.05, subd. 6 (2021), also called the "mandatory disclosure rule." The county supported its motion with an affidavit from commercial appraiser Thomas Reineke, stating that the county sent a courtesy letter to petitioner's counsel noting its obligation to provide the required information. Petitioner's counsel responded and requested a two-month extension. The county countered with a one-week extension. Petitioners did not provide the information within the time frame.

When a petitioner files a petition contesting the valuation of an income-producing property, they must provide to the county assessor financial statements for the current and prior year of the assessment date, a rent roll listing the tenant's name and lease details, lease agreements, net rentable square footage of buildings on the property, and anticipated income and expenses for the subsequent year. Failure to disclose this information in a timely manner may result in a dismissal. Minn. Stat. §278.05, subd. 6(a), 6(b).

The county proved that petitioners failed to timely comply with the mandatory disclosure rule and dismissed the petitions. ***Forsons Investments LLC and Graham Building LLC, v. Olmsted Co.***, 2021 WL 5141800 (MN Tax Court 11/2/2021).

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

SHEENA DENNY
Mitchell Hamline School of Law
sheena.denny@mitchellhamline.edu

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MJANGER


STANFIELD

Gov. Walz appointed Siv Mjanger and Jennifer Stanfield as district court judges in Minnesota's 10th Judicial District. Mjanger will be replacing Hon. John C. Hoffman in Washington County. Mjanger is the Criminal Division chief at the Washington County Attorney's Office. Stanfield will be replacing Hon. Barry A. Sullivan in Anoka County. Stanfield is a child support magistrate in the 10th Judicial District.


EHRMAN

Gov. Walz appointed Bryce Ehrman as district court judge in Minnesota's 1st Judicial District. Ehrman will be replacing Hon. Kathryn D. Messerich and will be chambered in Hastings in Dakota County. Ehrman is an assistant Scott County attorney, where he represents Human Services in child protection proceedings.


WHEELOCK

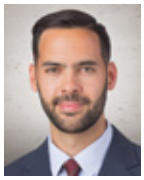
Gov. Walz announced the appointment of Sarah Wheelock, who will be the first Native American judge to sit on the Minnesota Court of Appeals. Wheelock will fill the vacancy occurring upon the retirement of Hon. Carol A. Hooten. Wheelock is legal counsel for the Shakopee Mdewakanton Sioux Community in Prior Lake.


SENNES

Mary Sennes returned to Stoel Rives as of counsel in the corporate practice. Previously a corporate attorney at Stoel from 2007 to 2013, Sennes's practice will focus on energy industry transactions.

James Todd joined DeWitt LLP as a partner and a member of the family law practice group.


BALDUS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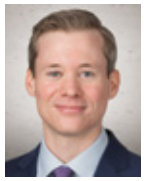
SPANGLER

Fredrikson & Byron announced that the following attorneys have joined the firm: Lynn A. Baldus, Luke P. de Leon, Michelle S. Fitch, William S. Forsberg, Sarah A. Horstmann, Navita T. Lakhram, Aaron C. Nyquist, Steven C. Schaefer, Elizabeth A. Schenfisch, and Wayne M. Spangler.


MAKI

Kim Maki was appointed by the St. Louis County Board of Commissioners to fill the office of St. Louis County attorney.


ZIELSKE

Aidan Zielske joined HAWS-KM law firm. Zielske practices in the areas of product liability defense, transportation litigation, commercial litigation, and toxic torts.


CASE

Andrew Case joined Meagher + Geer with the firm's professional liability – heath care practice group.

In Memoriam

Jon Chester Cieslak, age 72, of St. Paul, died October 11, 2021. Upon graduation from Princeton University in 1971, he was commissioned as a U.S. Army officer and served 23 years. After earning his JD from Lewis & Clark Law School, Cieslak was appointed to the Judge Advocate General's (JAG) Corps. He culminated his military career as lieutenant colonel and legal counsel to the adjutant general of Minnesota.

Joel A. Montpetit, age 77, passed away on October 13, 2021 after navigating life with Parkinson's Disease for 16 years. He earned his law degree from William Mitchell College of Law in 1969. He was the founding partner of his firm in South St. Paul, MN. He served clients with distinction for over 40 years, and routinely went out of his way to help others.

Lauren Michelle Graff, age 32, passed away unexpectedly on October 30, 2021. Lauren received her law degree from the University of Minnesota Law School in 2019, where she met her husband, Mitchell Ness. The couple moved to Chicago, where Graff was an attorney with McGuireWoods LLC. They married on September 4, 2020 and welcomed their first child on October 25, 2021.

Mark Clarence Halverson, age 70, died November 6, 2021. He graduated from Hamline University School of Law in 1980. Halverson practiced law in Mankato until his death. He was a founder and attorney for the Save the Kasota Prairie Organization.

David S. Weissbrodt, age 77, of Minneapolis, died November 11, 2021. He was a Professor Emeritus at the University of Minnesota Law School, and was a distinguished and widely published scholar of international human rights law.


EDELL


MORGAN

Jack Edell and Marisa (Rita) C. Morgan have joined Arthur, Chapman, Kettering, Smetak & Pikala, PA. Both focus in the areas of automobile law, general liability, and commercial transportation.


HOWE


KUHLMANN

Ariel Howe and Nick Kuhlmann joined Patterson Thuente IP. Howe focuses on intellectual property and business litigation. Kuhlmann has more than 15 years of experience representing clients in IP matters.


ENGEL


BOBICH


STEPHANI


HILT


TRAPP

Best & Flanagan welcomed Martha Engel, Joshua Bobich, Michael Stephani, Jake Hilt, and Kristin Trapp.


PILON


JOHNSTON


KLEIN

Cousineau, Van Bergen, McNee & Malone, PA announced the addition of three new lawyers: Amanda R. Pilon, Connor R. Johnston, and Alexander D. Klein.

Classified Ads

For more information about placing classified ads visit: www.mnbar.org/classifieds

ATTORNEY WANTED

ATTORNEY WANTED. If you're wondering what your next big change is, imagine joining Claim Legal at Travelers. We currently have an opening for Senior Counsel, Litigation in our dynamic St. Paul Office. The successful candidate will: Handle higher exposure and complex personal injury defense matters. Offer seven plus years of litigation experience. Hold an accredited law school degree with MN law license in good standing. Travelers offers a hybrid work location model that is designed to support flexibility. Visit: travelers.com/careers and search R-10970 to apply today. Travelers is an equal opportunity employer.

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INTELLECTUAL PROPERTY Patent Agent or Technical Specialist – Biotechnology. Faegre Drinker is actively recruiting an Intellectual Property Patent Agent or Technical Specialist to join our thriving Intellectual Property practice. This position offers the opportunity to be involved with all aspects of patent preparation and prosecution in our Denver, Fort Wayne, Indianapolis, Minneapolis, Philadelphia, Washington DC, or Wilmington offices. Successful candidates should have at least a Masters and preferably a Doctoral degree in a biological science, such as immunology or biochemistry. This position will further enhance our expertise in biotechnology patent work while offering the opportunity to do sophisticated work with excellent clients. Exemplary technologies include immuno-oncology, vaccines, industrial enzymes, plant biology, food science, and nutraceuticals. Candidates must be collaborative and motivated to succeed in a client-focused, team-oriented environment. Preferred candidates will have excellent academic credentials, strong writing skills and professional recommendations. Current status as a registered patent agent is not a requirement, but is preferred as are former patent examiners. If you are looking for an opportunity with a growing, collaborative firm, please apply online at: www.faegredrinker.com and include a cover letter, resume, writing sample and transcripts.Pursuant to Part 2 of the State of Colorado's Equal Pay for Equal Work Act (C.R.S. §§ 8-5-201 to 8-5-203), employers are required to provide expected compensation for posted positions resident in Colorado. The salary range for this position in our Denver office is $103,000-$165,500. Actual salary will vary and may be above or below the range based on experience. The range listed is just one component of Faegre Drinker's total compensation and benefits package for associates, which includes productivity and discretionary bonuses; life, health, accident and disability insurance; and a 401(k) plan.

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JARDINE, LOGAN & O'Brien PLLP is a midsize law firm in the east metro looking for an associate attorney with three to five years of experience in civil litigation and/or workers' compensation. Excellent communication skills and writing skills required. Insurance defense experience a plus. Our firm offers an extensive history of providing excellent legal services to our clients. This is an exciting opportunity for a bright and energetic attorney to work with an established law firm. Salary commensurate with experience. Jardine, Logan & O'Brien PLLP is an Affirmative Action/Equal Employment Employer. Please go to: https://www.jlolaw.com/careers/ to apply.

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CAMPBELL KNUTSON, PA, one of Minnesota's leading municipal law firms, is seeking an associate to start immediately. Our firm's practice is dynamic and growing. We assist our client cities in responding to any legal needs, including labor and employment, contracts, real estate, zoning, ordinance drafting, civil litigation, and prosecution services. Civil Associates will provide legal advice to city officials and city staff; attend meetings; and draft resolutions and ordinances, and contracts, among other varied responsibilities. Prior experience with governmental representation is useful, but not required. Prior legal experience of two to five years is preferred, but not required. Campbell Knutson, PA offers a collegial and team-oriented atmosphere and an excellent benefits program. Salary is based on knowledge, skills, and abilities, and years of practice. Campbell Knutson, PA was founded in 1986 and provides civil representation and prosecution services to cities across the metro area. We value our long history in working with Minnesota municipalities to build strong communities. We also understand the importance, now, more than ever, to collaborate with our clients in building equitable and inclusive communities, which harness the vibrancy of the many varied cultures, communities, traditions, and backgrounds of Minnesotans. Our firm is a proud partner of the Just Deeds project. Furthermore, our firm is a sponsor of the Minnesota City Attorney Association's Facing Forward series on systemic racism. Our firm believes it is paramount that we engage in conversations regarding systemic racism and how cities and their legal counsel, can do better. We are motivated to recruit and retain talented attorneys from diverse backgrounds. Interested applicants should send a resume, cover letter, and writing sample to: Soren Mattick (smattick@ck-law.com). The position is open until filled. Campbell Knutson, PA, 860 Blue Gentian Road, Suite 290, Eagan, MN 55121.

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CONSTRUCTION & REAL ESTATE Litigation Associate. The global law firm of Faegre Drinker Biddle & Reath LLP is actively recruiting an associate to join the Construction & Real Estate Litigation practice group in our Minneapolis office. The associate will be involved in high-stakes and complex construction and real estate litigation throughout the country. Our ideal candidate would have over five years of experience in construc-

tion and real estate litigation. Excellent writing skills, attention to detail, case-management skills, leadership qualities, and very strong academic credentials are required. This position offers competitive compensation and unlimited potential for professional growth. About Faegre Drinker: Faegre Drinker is an international law firm designed for clients. With over 1,300 legal and consulting professionals in 22 locations spanning the globe, we bring our clients fresh, workable ideas to support their most complex business and legal challenges. Our client focus and trust in one another is grounded in a culture of collaboration, collegiality, civility, respect, diversity and inclusion. We welcome colleagues who think creatively, embrace complex challenges and constantly strive to improve. Faegre Drinker Biddle & Reath LLP is an Equal Opportunity Employer and is committed to providing equal employment opportunities to all employees and applicants for employment. We do not discriminate on the basis of race, color, religion, age, national origin, disability, sex, sexual orientation, gender, gender identity, gender expression, marital status, veteran or military status, or any other characteristic made unlawful by applicable federal, state or local laws. Equal employment opportunity will be extended to all persons in all aspects of employment, including retirement, hiring, training, promotion, transfer, compensation, benefits, discipline and termination. We are committed to providing equitable access to employment for all and welcome qualified applicants with disabilities who meet the qualifications of the job, with or without reasonable accommodations. If you need an accommodation for any part of the employment process, please send an email to: recruiting@faegredrinker.com to let us know the nature of your request.

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EMPLOYEE BENEFITS Associate Attorney. Winthrop & Weinstine, an entrepreneurial, full-service law firm, located in downtown Minneapolis has an excellent opportunity for an associate attorney in its fast-paced employment/employee benefits practice. This associate will focus on researching employment related topics; preparing and revising multi-state employment handbooks and policies; preparing employment agreements, non-compete agreements and release agreements for multiple states; responding to charges of discrimination; and providing assistance with projects related to deferred compensation agreements, employee benefits and ERISA-related matters. Two or more years of Employment/Employee Benefits law experience and a strong desire to grow the practice preferred. In addition, candidates must have excellent verbal and written skills, a strong work ethic and strong academic credentials. Winthrop & Weinstine offers competitive salary and benefits and a team approach to providing our clients with top quality service. EOE. https://bit.ly/2YWOhug

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FAEGRE DRINKER is actively seeking an experienced associate to join our thriving Intellectual Property Group. Faegre Drinker Biddle & Reath LLP is an Am Law 50 firm with offices located throughout the U.S., Europe, and China. This position offers the opportunity to play a key role in growing our existing technology transactions and intellectual property licensing practice in Chicago, Minneapolis, Philadelphia or Washington, D.C. Successful candidates will possess two to five years of technology transactions and intellectual property contract drafting and negotiation experience, including technology licensing, outsourcing, and IT transactions, as well as merger and acquisition support. Candidates must be collaborative, have a willingness to learn and be motivated to succeed in a client-focused, team-oriented environment. Work experience in the computer sciences or information technology sector is highly desired. Candidates must have excellent academic credentials and have strong written and oral communications skills. Current firm plans for returning to work include an average of two to three days in the office. If you are looking for an opportunity with a growing, collaborative firm, please apply online at: www.faegredrinker.com and include your cover letter, resume, writing sample and law school transcript.

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FAEGRE DRINKER is actively seeking an experienced transactions associate to join our thriving Intellectual Property Group. Faegre Drinker Biddle & Reath LLP is an Am Law 50 firm with offices located throughout the U.S., Europe, and China. This position offers the opportunity to play a key role in growing our existing technology transactions and intellectual property licensing practice in Chicago, Minneapolis, Philadelphia or Washington, D.C. Successful candidates should have two to five years of experience drafting software related applications with a background and degree in either computer science, computer engineering, software engineering, electrical engineering or physics. Candidates must be collaborative and motivated to succeed in a client-focused, team-oriented environment. Candidates must also have excellent academic credentials and have strong written and oral communications skills. This position offers competitive compensation and unlimited potential for professional growth. Current firm plans for returning to work include an average of two to three days in the office. If you are looking for an opportunity with a growing, collaborative firm, please apply online at www.faegredrinker.com and include your cover letter, resume, writing sample and law school transcript.

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INTELLECTUAL PROPERTY — Litigation Associate. Faegre Drinker is actively recruiting a litigation associate to join our thriving Intellectual Property practice. This position offers the opportunity to focus on patent litigation for a national and international client base from our Chicago, Denver, Indianapolis, Minneapolis, Silicon Valley, Washington, D.C., or Wilmington offices. Successful candidates should have one to four years of patent litigation experience or a federal clerkship and at least one year of patent litigation experience. Candidates must be collaborative and motivated to succeed in a client-focused, team-oriented environment. Preferred candidates will have excellent academic credentials and strong written and oral communications skills. If you are looking for an opportunity with a growing, collaborative firm, please apply online at: www.faegredrinker.com and include a cover letter, resume, writing sample and transcripts. Pursuant to Part 2 of the State of Colorado's Equal Pay for Equal Work Act (C.R.S. §§ 8-5-201 to 8-5-203), employers are required to provide expected compensation for posted positions resident in Colorado. The salary range for this position in our Denver office is $180,000-$225,000. Actual salary will vary and may be above or below the range based on experience. The range listed is just one component of Faegre Drinker's total compensation and benefits package for associates, which includes productivity and discretionary

bonuses; life, health, accident, and disability insurance; and a 401(k) plan.

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INTELLECTUAL PROPERTY Patent Agent or Technical Specialist — Medical Device Technologies. Faegre Drinker is actively recruiting an intellectual property patent agent or technical specialist to join our thriving Intellectual Property practice. This position offers the opportunity to be involved with all aspects of patent preparation and prosecution in our Chicago, Denver, Fort Wayne, Indianapolis, Minneapolis, Silicon Valley, Washington D.C. or Wilmington Offices. Successful candidates should have experience with medical device patent work. This position will enhance our expertise in vascular and cardiac prosthetics, such as stents, grafts, cardiac assist devices, occluders, filters, and catheter-related technologies work, while offering the opportunity to do sophisticated work with excellent clients. Candidates must be collaborative and motivated to succeed in a client-focused, team-oriented environment. Preferred candidates will have excellent academic credentials, strong writing skills and professional recommendations. If you are looking for an opportunity with a growing, collaborative firm, please apply online at: www.faegredrinker.com and include a cover letter, resume, writing sample and transcripts. Pursuant to Part 2 of the State of Colorado's Equal Pay for Equal Work Act (C.R.S. §§ 8-5-201 to 8-5-203), employers are required to provide expected compensation for posted positions resident in Colorado. The salary range for this position in our Denver office is $103,000-$165,500. Actual salary will vary and may be above or below the range based on experience. The range listed is just one component of Faegre Drinker's total compensation and benefits package for associates, which includes productivity and discretionary bonuses; life, health, accident and disability insurance; and a 401(k) plan.

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JONES LAW OFFICE, based in Mankato, Minnesota, provides a wide variety of legal services across south central Minnesota. At Jones Law Office, we know that success stems from a personal commitment to each and every client we represent. Our commitment is to understand each client's unique issues and relationships to achieve maximum results. We are looking for an attorney to join our litigation team. This position provides a wide variety of litigation opportunities in a fast-paced environment. Our attorneys work individually and collaboratively to provide the best results for our clients. The ideal candidate will share our core values: positive attitude, attention to details, team player, and hard working. We offer competitive salary with a bonus structure as well as a benefit package. To apply, please submit your cover letter and resume to: Jeannie@joneslawmn.com.

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JSL SEEKS A SENIOR Associate to join our talented litigation team. This position supports the firm in complex commercial litigation and business disputes, insurance defense, products liability and real estate transactions and related litigation. Excellent opportunity for professional growth and partnership in a collegial work environment. The successful candidate will work independently, yet collaboratively with our strong team representing Fortune 500 and large public sector clients. We are looking for a highly motivated individual to help deliver outstanding service to our clients.Exceptional research and writing abilities a must. Other indicators of ability, motivation, and initiative will be considered. At least five years' litigation experience required. Please email resume and cover letter to: info@JSelmerLaw.com. J. Selmer Law is an active member of the prestigious National Association of Minority and Women-Owned Law Firms (NAMWOLF) and the Claims Litigation Management Alliance (CLM). J. SELMER LAW, PA, 250 Marquette Avenue, Suite 550, Minneapolis, MN 55422, JSelmerLaw.com.

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LITIGATION ATTORNEY Wanted — Borgelt, Powell, Peterson and Frauen SC, an A-V rated law firm with offices in Milwaukee, WI, Madison, WI, and Oakdale, MN, is seeking a highly motivated attorney, preferably with insurance defense experience, to join our Minnesota office. Strong legal research and writing skills are required. License to practice in both MN and WI a plus. Please forward resume with cover letter and references to: kkennedy@borgelt.com.

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LOOKING FOR A CHANGE to something better and the ability to lead your own division of a rapidly growing firm? If so, we invite you to consider a position at Messick Law, PLLC. We are looking for a lateral attorney to head our business services division, representing a wide variety of businesses and associations, from start-ups to well-established entities. The ideal candidate will have existing clients and a desire to manage and mentor other attorneys. We have a collaborative work environment, offer competitive compensation, flexible work hours and location, and opportunity for growth. If our firm sounds like a good fit, we invite you to send a resume, cover letter and references to: christine@messicklaw.com. We strongly invite and encourage attorneys of diverse backgrounds to apply.

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MINNEAPOLIS, MN — Litigation Associate. Fox Rothschild LLP has an opening in the Minneapolis office for a general commercial litigation associate with two to three years of experience. Superior academic record and excellent writing skills required. Large law firm experience preferred. Must be licensed in the state of Minnesota. EEO m/f/vet/disabled/sexual orientation/gender identity. We are currently not accepting resumes from search firms for this position. Link to apply: https://www.foxrothschild.com/careers-for-attorneys/open-positions

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RAJKOWSKI HANSMEIER LTD., a regional litigation firm with offices in St. Cloud, MN and Bismarck, ND, has an opening for an associate attorney with zero to five years' experience to join its team of trial attorneys. Our firm has a regional practice that specializes in the handling of civil lawsuits throughout the State of Minnesota, North Dakota and Wisconsin, including a significant volume of work in the Twin Cities. We offer a collegial workplace with experienced trial attorneys who are recognized leaders in their field of practice. We are seeking an associate who has relevant experience, strong motivation and work ethic along with excellent communication skills. Our lawyers obtain significant litigation experience including written discovery, motion practice, depositions coverage, trial and appellate work. We try cases and are committed to training our younger attorneys to provide them with the skills to develop a successful litigation practice. Competitive salary and benefits. Please submit resume, transcript, and writing sample to: Human Resources, Rajkowski Hansmeier Ltd., 11 Seventh Avenue North, St.

Cloud MN 56302, 320-251-1055, humanresources@rajhan.com, EOE.

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THE FAEGRE DRINKER Trademark, Copyright, Advertising and Media (T-CAM) Team is seeking an attorney to join its thriving Intellectual Property practice. Faegre Drinker Biddle & Reath LLP is an Am Law 50 firm with offices located throughout the U.S., Europe, and China. This counsel-track associate or senior attorney position offers the opportunity to play a key role in growing our existing T-CAM practice in any of our U.S. offices. Reduced hours arrangements are also available. If you are looking for an opportunity with a growing, collaborative firm, please apply online at: www.faegredrinker.com and include a cover letter, resume, writing sample and transcripts. Candidates must list the office they wish to be considered for in the requested cover letter. Successful candidates will have three or more years of experience with U.S. and international trademark clearance, prosecution, and enforcement. Candidates will also have the opportunity to advise clients on a variety of copyright, advertising, licensing, sweepstakes, internet enforcement, anti-counterfeiting and privacy matters. Candidates must be collaborative and motivated to succeed in a client-focused, team-oriented environment. Candidates must also have excellent academic credentials and have strong written and oral communications skills. Pursuant to Part 2 of the State of Colorado's Equal Pay for Equal Work Act (C.R.S. §§ 8-5-201 to 8-5-203), employers are required to provide expected compensation for posted positions resident in Colorado. The salary range for this position in our Denver and Boulder offices is $175,000 - $205,000. Actual salary will vary and may be above or below the range based on experience. The range listed is just one component of Faegre Drinker's total compensation and benefits package for associates, which includes productivity and discretionary bonuses; life, health, accident and disability insurance; and a 401(k) plan.

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WELL-ESTABLISHED law firm in northeastern Minnesota seeks associate attorney. Duties will include general practice work and working with local government units. Depending on experience, a fast partnership track is available. Please contact Joseph Leoni at: jleoni@trentilaw.com if interested.

HALUNEN LAW, a Minnesota top rated employment law firm, is seeking an experienced senior employment litigation attorney. The attorney will work in our Employment Litigation Group representing employees in a wide variety of employment litigation matters, including single plaintiff matters and complex class/collective actions. This is an excellent opportunity for someone who would excel in an environment where they would be encouraged to work independently while running their own portfolio of cases from intake to trial. The attorney would be expected to handle the following types of tasks with minimal supervision: Manage a portfolio of single-plaintiff, collective and class cases. Develop and implement effective case strategies. Negotiate resolutions in cases. Collaborate with team members on case strategy and tactics. Draft legal briefs and memoranda. Interview witnesses. Draft discovery requests and responses to discovery requests. Take and defend depositions. Conduct legal research. First and second chair trials. Represent clients in mediations, arbitrations, and all other types of alternative dispute resolution proceedings Qualified candidates will have: Five to ten years of employment and/or complex litigation experience. The ability to work and excel in a collaborative, fast paced work environment. Entrepreneurial spirit. Exceptional analytical and writing skills. Strong verbal communication and negotiation skills. Trial, mediation, and arbitration experience Admission to the Minnesota bar is required. Bar admission in California is a plus. Job Type: Full-time Compensation Range: $125,000-$250,000/annually. halvorson@halunenlaw.com.

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JOHNSON/TURNER is ready to again add to our attorney team. We are hiring community connected applicants in Rochester, Duluth and the metro area: We are interested in a candidate that has two to five years of experience in family law and/or estate planning. Experience or interest in civil litigation, probate, and real estate is an advantage. We only consider candidates who will be a team player, will have a positive attitude, compassion for clients, a strong work ethic, great communication, and an enthusiasm for innovation. If you enjoy a traditional firm environment, billing by the hour, the sound of your own voice, or complaining about your co-workers, please do not apply. We are a growing law firm that values our culture, strives for excellence, dreams big

and has a lot of fun along the way. Attorneys at Johnson/Turner Legal enjoy the following benefits: Better Compensation plan – High achievers are rewarded. Base salary, plus a formulaic monthly incentive plan that transparently shows you what you'll make based on your performance metrics. Your clients will be provided to you. You have no sales and marketing responsibilities – just focus on serving clients and practicing law well. No hourly billing – our cases are handled with fixed prices per packages. You are part of a team that is second to none. Highly skilled specialists including, paralegals, sales, accounting, and IT work seamlessly together to help you and to optimize the client experience. You are supported by industry-leading training, systems, workflows, software and automation — all making you a better lawyer. Contact Kelly Sater: kelly@johnsonturner.com, 651-464-7292, www.johnsonturner.com.

OFFICE SPACE

FLOUR EXCHANGE BUILDING office in Minneapolis for rent with six other lawyers. On skyway with phone, internet, copier, fax, reception area, conference room and kitchen. Good source of referrals. Ideal for younger lawyer. Contact Rod Hale: rod121451@yahoo.com.

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MINNETONKA SUITES and individual offices for rent. Professional office buildings by Highways 7 & 101. Conference rooms and secretarial support. Furnishings also available. Perfect for a law firm or a solo practitioner. Office with 10 independent attorneys. Call: 952-474-4406. minnetonkaoffices.com.

POSITION AVAILABLE

UNIVERSITY OF MINNESOTA Foundation is seeking a director of legal affairs to serve as the internal legal expert and resource to uphold the Foundation's reputation as a leading philanthropic organization. Learn more at: https://cohentaylor.com/position-profile/umf-director-of-legal-affairs. To apply, send resume to: UMF@cohentaylor.com. All inquiries will remain confidential.

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PROFESSIONAL SERVICES

METEOROLOGICAL CONSULTANT, Matthew Bunkers, provides information and reports pertaining to forensic meteorology, severe storms, rainfall and flooding, fog, winter weather and icing, fire weather, applied climate and meteorology, and ag weather. www.npweather.com, nrnplnsweather@gmail.com, 605-390-7243.

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REAL ESTATE EXPERT. Expert Witness Real Estate. Agent standards of care, fiduciary duties, disclosure, damages/lost profit analysis, forensic case analysis, and zoning/land-use issues. Analysis and distillation of complex real estate matters. Excellent credentials and experience. drtommusil@gmail.com, 612-207-7895.

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ATTORNEY COACH / consultant Roy S. Ginsburg provides marketing, practice management and strategic / succession planning services to individual lawyers and firms. www.royginsburg.com, roy@royginsburg.com, 612-812-4500.

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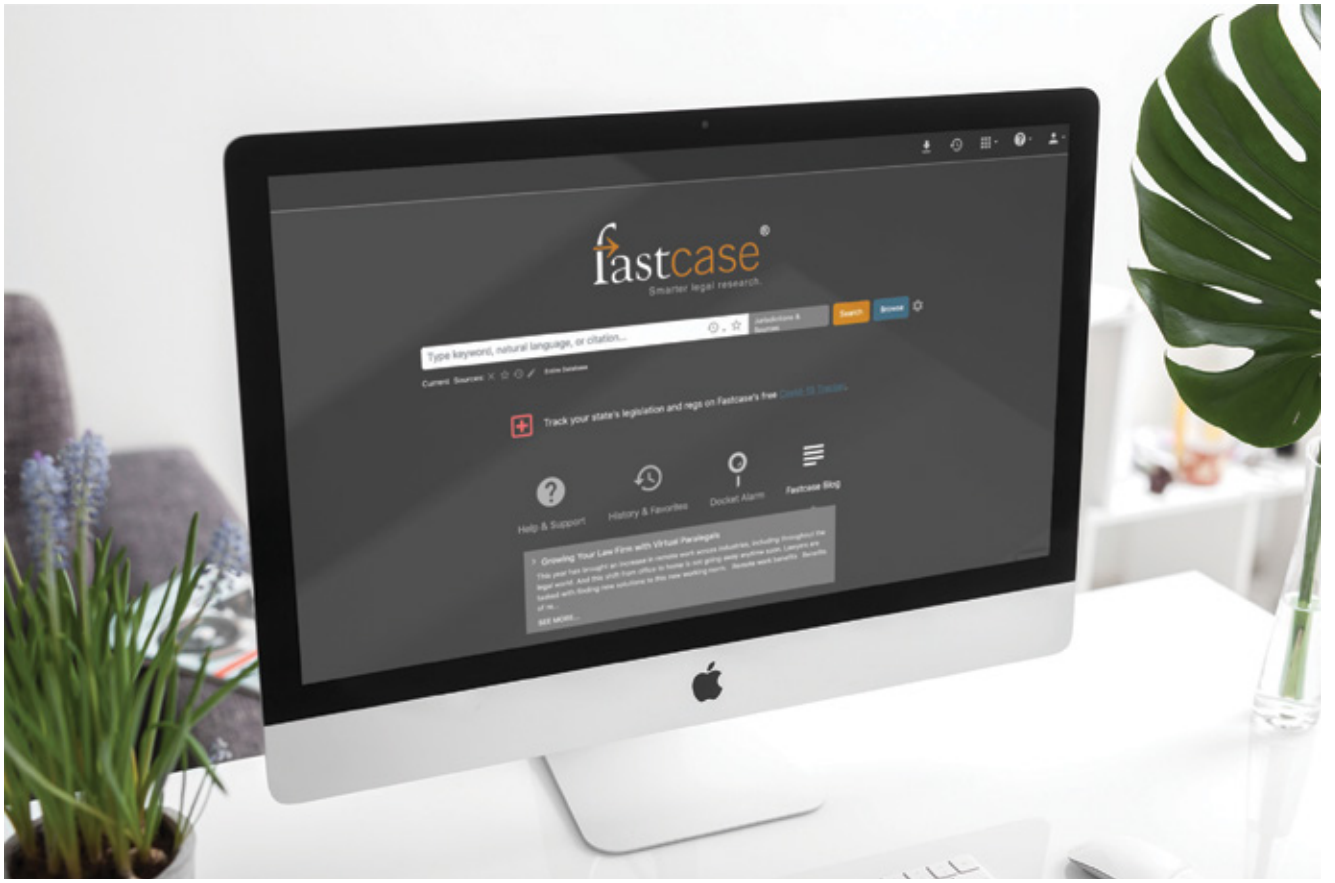
documate

Citrix RightSignature

WordRake
Write to the Point.



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Fastcase is the leading next-generation legal research service that puts a comprehensive national law library and powerful searching, sorting, and data visualization tools at your fingertips.

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you have free access to fastcase.
Login at: www.mnbar.org/fastcase

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Questions? Contact Mike Carlson at the MSBA at 612-278-6336 or mcarlson@mnbars.org