MINNESOTA STATE BAR ASSOCIATION

MARCH 2024

BENCH + BAR of Minnesota

In the Matter of
EQUITY V. FINALITY

Capture the Truth Without Chasing Your Tail.

eDiscovery without the runaround. Maximize your time and resources by partnering with Shepherd Data Services. Our comprehensive eDiscovery solutions combine technical expertise and legal know-how to deliver a defensible, superior product powered by RelativityOne®.

Count on Shepherd for eDiscovery, Digital Forensics, Managed Review, Consultation and Training — all provided with a jump-through-hoops level of service and diligence.

Go ahead, toss us your most complex data challenges. Our team is bred to solve them.

Shepherd Data Services®

612.659.1234 | shepherddata.com

* 2023 Clio Legal Trends Report

Not all firms are the same, so why should they use the same practice management system?

With this in mind, MSBA Advantage brings you discounts from seven practice management partners, each with a different set of practice tools to help improve your productivity and bottom line.

Whether it's Clio, CosmoLex, MyCase, PracticePanther, SimpleLaw, Smokeball, or TimeSolv, find the option that's the best fit for your firm...and SAVE!

Learn more at: www.mnbar.org/Advantage

Clio

CosmoLex by profitsolv

mycase

PRACTICEPANTHER

SimpleLaw.com Simple for Lawyers. Simple for Clients.

SMOKEBALL

TIMESOLV by profitsolv

MINNESOTA STATE BAR ASSOCIATION MARCH 2024

BENCH + BAR of Minnesota

VOLUME 81, NO. 2

columns

features

BENCH+BAR
of Minnesota

Official publication of the
MINNESOTA STATE BAR ASSOCIATION
www.mnbar.org | (800) 882-6722

Bench + Bar of Minnesota (ISSN 02761505) is published Monthly, except Bi-Monthly May/June and Jan/Feb by the Minnesota State Bar Association, 600 Nicollet Mall STE 380, Minneapolis, MN 55402-1641. Periodicals postage paid at St Paul, MN and additional mailing offices. **POSTMASTER:** Send address changes to Bench & Bar of Minnesota, 600 Nicollet Mall STE 380, Minneapolis, MN 55402-1641. Subscription price: $50.00. A subscription is included for members with their annual MSBA dues. Some back issues available at $10.00 each. Editorial Policy: The opinions expressed in *Bench + Bar* are those of the authors and do not necessarily reflect association policy or editorial concurrence. Publication of advertisements does not constitute an endorsement. The editors reserve the right to accept or reject prospective advertisements in accordance with their editorial judgment.

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

SORRY/NOT SORRY FOR INTERRUPTING YOU

BY PAUL M. FLOYD

PAUL M. FLOYD is one of the founding partners of Wallen-Friedman & Floyd, PA, a business and litigation boutique law firm located in Minneapolis. Paul has been the president of the HCBA, HCBF, and the Minnesota Chapter of the Federal Bar Association. He lives with his wife, Donna, in Roseville, along with their two cats.

Much has been written and said about the lack of civility in the practice of law. But sometimes what appears to be a lack of civility is really a clash of conversational styles. Recognizing the difference can avoid unnecessary conflict and cultivate an appreciation for the upbringing and cultural background of the other person.

Here in Minnesota, locals are known for their "Minnesota Nice" manner of communicating—which, according to the 1994 book *Minnesota Nice: A Transplant's Guide to Surviving and Thriving in Minnesota*, boils down to seven characteristics: polite friendliness; aversion to confrontation; not wanting to intrude; emotional restraint; resistance to change; passive aggressiveness; and understatement.

Minnesota Nice can be confusing and even frustrating for those who weren't raised in Minnesota. This is particularly true for law students, lawyers, and their families when they have recently moved to the area. Coming from Ohio, I had no experience with the concept until I arrived here for graduate school. In meetings and small group discussions, I found that others had a tendency to avoid direct confrontation and to use euphemisms rather than address an issue head-on. For example, people would say "isn't that interesting" when they really meant that something was unappealing or even disgusting. Minnesota Nice goes beyond just avoiding confrontations; it is also a common means of indirect communication.

In Minnesota, interrupting another person and talking over them may be perceived as disrespectful and demonstrating a lack of civility, even to the point of feeling bullied. However, to a transplanted East Coaster, interruptions are simply an accepted way to keep the conversation moving along. Native Minnesotans expect conversations to include "positive lag time," a delay of a few seconds between the end of one person's sentence and the start of the other person's sentence. To an East Coaster [yawn], these seconds can feel like an eternity. Instead, they may be used to a "negative lag time" of two to three seconds. In other words, they start talking *before* the other person finishes their thought, and expect that the other person will talk over the end of their sentences as well. A Minnesotan might find this rude but, in fact, it is the opposite of being disrespectful because it means that the listener is actively participating in the conversation and cares enough to enter into a dialogue with the speaker.

Of course, there are times when a lawyer is required to interrupt another person as they are speaking, such as when they have to raise objections in depositions and in court. It is also entirely appropriate for a judge to interrupt a witness's testimony or a lawyer's argument in court, particularly when the speaker blatantly disregards the judge's instructions. In these situations, Minnesota Nice needs to give way to straightforwardness in an attempt to control the situation. A lawyer who cannot bridge that gap may be perceived as timid or lacking competence. But as with so many things, context matters. Carrying over cross-examination techniques into personal relationships has soured more than one friendship or marriage.

For most lawyers, the way we communicate in everyday situations, not just in court or during depositions, is crucial. This includes our interactions with business partners, staff, clients, and others. Our communication styles are significantly influenced by our upbringing

and the prevalent communication norms of our culture. Additionally, family and community expectations shape our communication habits, teaching us when and how to engage effectively. It's challenging to adopt beneficial communication strategies and discard ineffective ones. But just as in many aspects of relationship management, possessing a diverse set of communication tools (that include knowing when and how to speak and when to listen) is essential for achieving professional and personal success.

As a colleague reminded me years ago after leaving a heated board meeting, sometimes we are clueless about how we come across in interacting with others, especially in a more public setting. He said, "You don't know what you don't know." Even the most introspective of us may have blind spots. Consider asking a close friend or someone whose opinion you trust, "How did I do?" "Was I too pushy?" "Did I go too far or not far enough in making my point?" Then listen, and follow up with "How could I have handled that better?" And if you want to take it to the next level, ask yourself, "What is it about my personality that could not let it go?" The answer you come up with may really help you understand how to communicate more effectively in the future.

Of course, even if you come from a culture where interrupting during conversations is normal, it's important to consider whether this style is appropriate for your audience. Interruptions can disrupt and even halt a conversation entirely. It is not enough to understand what your own style is; it is as important or more important to be able to adapt to the communication style of the person you're speaking with. So when you encounter a style that's vastly different from your own, try to be patient and understanding. They may feel the same about your way of communicating. ▲

Congratulations to three new certified specialists

The MSBA is honored to announce three newly certified legal specialists: Stephanie Angolkar and Jeffrey Muszynski in Civil Trial Law and Jeffrey Scott in Real Property Law. These attorneys have demonstrated extensive knowledge and proficiency in their specialty areas.

■ **Stephanie Angolkar** is partner at Iverson Reuvers in Bloomington. Her practice focuses on the defense of government liability claims, products liability claims, and complex litigation, including trial and appellate practice. She was named a Super Lawyer in 2022 and 2023 and a Rising Star in 2019 and 2020. Before joining Iverson Reuvers in 2008, she clerked for the Hon. Harriet Lansing and Kevin G. Ross of the Minnesota Court of Appeals. Angolkar is president of The Infinity Project and a member of the executive committee of the Minnesota Defense Lawyers Association. She also previously held a MSBA-certified real property specialist designation from 2016 to 2023.

■ **Jeffrey Muszynski** has practiced civil trial work for both plaintiffs and defendants throughout his career, trying cases to juries all over Minnesota and Wisconsin and arguing multiple cases to appellate courts in both states. He currently is a solo practitioner working in Minnesota and Wisconsin and mediating cases in both states as well. Muszynski and his wife and two kids live in River Falls, just across the St. Croix River in Wisconsin. Before going to law school at Mitchell Hamline, he was a high school teacher and still enjoys teaching other attorneys and law students.

■ **Jeffrey Scott** is a real estate attorney with Heley, Duncan & Melander who has over 14 years of legal experience in a wide variety of real estate matters. His real estate practice encompasses both transactional and litigation concerns. He represents title insurance underwriters, title companies, property owners, and real estate buyers and sellers. In addition to his real estate practice, Jeff also represents lenders, financial institutions, and creditors.

Interested in becoming a certified specialist? There are upcoming certification exams in 2024. For more information, visit *www.mnbar.org/certification.*

MSBA | HENNEPIN COUNTY BAR ASSOCIATION | RCBA RAMSEY COUNTY BAR ASSOCIATION

CIVIL LITIGATION SECTION ANNUAL DINNER

Recipient of the 2024 Advocate Award: MN Supreme Court Former Chief Justice
LORIE S. GILDEA

THURSDAY, MAY 9, 2024
WINDOWS AT MARQUETTE, MINNEAPOLIS • 5:00 PM

Keynote Speaker: Minnesota Supreme Court Chief Justice Natalie E. Hudson

Join us for an evening of networking and celebrating with attorney colleagues and members of the judiciary! Attendees will enjoy a pre-dinner social hour and a keynote presentation from Minnesota Supreme Court Chief Justice Natalie E. Hudson. We'll also honor this year's Advocate Award recipient, presented to an individual who has made a significant contribution to improving the system of civil justice in Minnesota.

Register for a single seat, or reserve a table for 10 seats.
For more information and to register: www.mnbar.org/cle-events

WE'D LOVE YOUR HELP

MSBA probate forms

The MSBA is updating all the probate documents in MNdocs, our document automation platform, and we're looking for volunteers to help. For those who haven't yet discovered them, PracticeLaw is the MSBA's member-only free form bank, offering static forms, typically in Word or PDF format; MNdocs is a subscription service that automates document creation across various practice areas, including probate, real property, business law, and family law. (You can check out the MNdocs platform at *www.mnbar.org/resources/mndocs*.

The MSBA is seeking volunteers willing to collaborate on this project by reviewing existing documents, providing insights on necessary updates or changes, and suggesting additional documents to be added. Please reach out to Jennifer Carter (*jcarter@mnbars.org*) or Mary Warner (*mwarner@mnbars.org*) for more information or to get involved.

Nominate an Outstanding New Lawyer

Nominations are now open for the 2023-2024 Outstanding New Lawyer of the Year Award! This is a fantastic opportunity to highlight a new attorney in your network who has shown outstanding dedication to MSBA or a local bar affiliate. Consideration is also given to the nominee's pro bono work, community service, contributions to diversity, and professional achievements. To be eligible, a nominee must be a licensed attorney under 36 years of age or in practice less than six years. All licensed attorneys are eligible to submit a nomination. Nominations are due by April 12, 2024. Just scan the QR code to get the form, or visit *www.mnbar.org/members/new-lawyers-section.*

< NOMINATION FORM

A year of public discipline

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

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

Each year a summary of the prior year's public discipline appears in this column. The purpose of this summary is largely a cautionary tale for lawyers—one of the reasons for public discipline, after all, is to deter misconduct by other lawyers. Public discipline also demonstrates to the public that the profession takes ethical misconduct seriously. The legal system's standing in the eyes of the public is harmed when lawyers do not follow the rules, and individual lawyers acting unethically can cause great harm.

Determining the appropriate discipline for misconduct is often difficult. The Minnesota Supreme Court has decades of case law on discipline in particular cases. The abundance of case law, however, does not always yield clear answers. Perspectives on the adequacy of disciplinary measures change over time. Determining the level of discipline to recommend to the Court in public cases is one of the more challenging tasks of the Director's Office, and something that is not approached lightly. Let's review some matters resolved in 2023.

The numbers

The Court issued 46 decisions in public matters in 2023, the majority involving the imposition of discipline. Three lawyers were disbarred, 24 suspended, one reprimanded, and two placed on disability inactive status in lieu of discipline. Four attorneys had their reinstatement petitions denied, while another 12 were reinstated to the practice of law: two following resignations, two after a reinstatement hearing process, and most from short suspensions.

THERE ARE MORE THAN 25,000 LAWYERS IN MINNESOTA WITH ACTIVE LICENSES. OUT OF THOSE THOUSANDS, 28 RECEIVED PUBLIC DISCIPLINE FOR VIOLATIONS OF THE ETHICS RULES IN 2023.

The 2023 numbers are generally in line with the prior year's numbers, but one in particular stands out—there was only one public reprimand, the lowest form of public discipline. Usually there are a handful of public reprimands, often for trust account misconduct. Another notable number involved the reinstatements denied by the Court in 2023. While two lawyers were reinstated following reinstatement proceedings, four were unable to meet the heavy burden of moral change and a renewed commitment to the ethical practice of law that the Court imposes on petitioners.

Disbarment

The three lawyers who were disbarred in 2023 were John Hernandez, Brad Ratgen, and Ignatius Udeani. Mr. Hernandez was disbarred for the type of misconduct that typically leads to disbarment—misappropriation of client funds and dishonest conduct. Across 11 matters, Mr. Hernandez violated numerous ethics rules. Notably, Mr. Hernandez was only admitted to the practice of law in 2017, but in his short legal career, he caused a lot of havoc. He did not have prior discipline, but once complaints started arriving, the situation escalated fairly quickly into several public matters that ultimately culminated in his disbarment.

Mr. Ratgen once enjoyed an extensive personal injury practice, but was indicted and pleaded guilty to conspiracy to commit health care fraud relating to his law practice. In 2023, he was sentenced to 16 months in federal prison for participating in a scheme where he used runners to recruit auto accident victims, who were then billed for chiropractor services not needed or incurred through chiropractors who participated in the scheme.

Mr. Udeani was disbarred for misconduct related to his representation of clients in immigration matters. At one point or another, I believe that Mr. Udeani violated all or almost all of the ethics rules; Mr. Udeani was a particularly troubling case because he was an immigrant to the United States himself and ended up creating havoc in a lot of vulnerable immigrant clients' lives. Mr. Udeani was suspended for three years in 2020, but after his suspension, additional misconduct came to light that led to his ultimate disbarment. The Director's Office was also appointed trustee of Mr. Udeani's client files (which he mostly abandoned after his suspension and subsequent disbarment) and is still in the process of getting hundreds of files back to clients. Even after he was disbarred, we continued to hear from clients who had complaints against Mr. Udeani, and the Minnesota Client Security Board is handling claims from his clients.

Suspensions

Twenty-four lawyers were suspended for periods ranging from 30 days to five years (the maximum suspension short of disbarment). A couple of the matters stand out. Julie Bruggeman was suspended for 90 days for misconduct that occurred in private practice before she became the Mahnomen County Attorney. The misconduct included multiple acts of dishonesty to cover up delay and mistakes in a civil matter. Ms. Brugge-

EACH YEAR, 1,000-PLUS COMPLAINTS ARE FILED WITH THE DIRECTOR'S OFFICE. MOST DO NOT RESULT IN DISCIPLINE BECAUSE MOST LAWYERS TAKE VERY SERIOUSLY THEIR ETHICAL OBLIGATIONS. THANK YOU TO ALL WHO DO.

man offered mitigation evidence that reduced the length of the suspension, but given the extent and nature of the misconduct, a reinstatement hearing was appropriate. The old saying that the coverup is worse than the crime often holds true in discipline cases, and I cannot emphasize enough the advice that if something happens, just acknowledge it. The harm can always be managed, and it is often not as bad as you think. But dishonesty has a way of taking on a life of its own.

Samuel McCloud has been a lawyer in Minnesota since 1977. During his career, Mr. McCloud has received seven admonitions, a public reprimand, one private probation, and two suspensions—one for his conviction for tax evasion, and one for intentional failure to attend court hearings. Mr. McCloud was suspended for 90 days in 2023 for engaging in the unauthorized practice of law while suspended, failing to act with competence and diligence in a matter, and disclosing client confidences in a matter. This misconduct, standing alone, might not warrant a 90-day suspension, but in light of Mr. McCloud's history of misconduct, the Director felt strongly (and the Court agreed) that Mr. McCloud should be required to petition for reinstatement to show moral change and a renewed commitment to the ethical practice of law. Some lawyers are a constant challenge for the discipline system, demonstrating a pattern of failing to follow the rules, while at the same time engaging in the type of misconduct that typically warrants discipline but perhaps not severe discipline. This case is an example of why the Court considers prior discipline to be an aggravating factor in determining discipline.

Ryan McLaughlin was suspended for two years for misappropriation of client funds and dishonest conduct. Although Mr. McLaughlin was admitted to practice in 2012, he did not begin practicing until 2018. When he began practicing, he had a trust account but chose not to use it; instead, he put funds that should have been in trust in his business account, and then, at various points in time, spent the funds he should have been holding in trust, thus misappropriating client funds. Mr. McLaughlin also made false and misleading statements to a judge and during the Director's investigation. This misconduct was particularly serious and often results in disbarment. Mr. McLaughlin offered mitigating factors, and stipulated to a two-year suspension, which the Court approved. Mr. McLaughlin did not have any prior misconduct, and as is often the case, the Director learned of Mr. McLaughlin's trust account violations—the most serious misconduct—while investigating another complaint.

Reinstatement denied

When a lawyer is suspended for a period that meets or exceeds a stipulated length of time (currently 90 days, soon to be 180 days), the lawyer must petition for reinstatement and undergo a rigorous process to be reinstated to the practice of law, not unlike the original character and fitness review required for application to the bar. Reinstatements are different from original admission, however, because the lawyer must not only prove good character and fitness, but also rehabilitation through a showing of moral change and a renewed commitment to the practice of law, to a panel of the Lawyers Professional Responsibility Board, and ultimately to the Court. Last year was notable because the Court denied four reinstatement petitions—those of Mark Greenman, Adam Klotz, Michelle McDonald, and William Mose. Each petition was denied for different reasons, but each shows the care that is taken by the Court and the Board in considering these petitions and ensuring that those who are reinstated following serious misconduct once again merit the court's confidence. Having a law license is a privilege. By that license, the Court represents to the public that the licensed lawyer can be trusted with the client's most personal and serious legal matters.

Conclusion

There are more than 25,000 lawyers in Minnesota with active licenses. Out of those thousands, 28 received public discipline for violations of the ethics rules in 2023. Each year, 1,000-plus complaints are filed with the Director's Office. Most do not result in discipline because most lawyers take very seriously their ethical obligations. Thank you to all who do. The lawyers who receive public discipline are definitely outliers in the profession; at the same time, it could be any one of us. If you need assistance understanding your ethical obligations, please do not hesitate to call our Office. In 2023 we provided 1,792 ethics opinions, and we're available every weekday to help. ▲

Minnesota data breaches

and the ongoing threat of ransomware

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

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

Ransomware continues to have a far-reaching impact. In December, possible victims from 17 Minnesota counties were contacted to alert them to the fact that their personal information may have been compromised in October 2023.[1] Clay County said in its statement that a wide variety of information had been accessed without authorization—from Social Security numbers and birth dates to tribal identification numbers and medical information.[2] While it's been made clear that a ransomware attack was to blame for the breach, specific details about the event are not available as this is being written (including how the attack was initiated and whether any ransom was paid). It is reported that some of the potential victims may have been receiving social services through the counties.

Headlines like this, if not common, are increasingly unsurprising. The 2022 Internet Crime Report (released in March 2023) specified that while the total number of ransomware attacks decreased in 2022, 2,385 complaints had been received "with adjusted losses of more than $34.3 million."[3] Additionally, a private industry notification submitted by the Federal Bureau of Investigation Cyber Division this past September described a new trend of more aggressive ransomware attacks in which dual attacks were occurring in close proximity. "During these attacks, cyber threat actors deployed two different ransomware variants against victim companies... This use of dual ransomware variants resulted in a combination of data encryption, exfiltration, and financial losses from ransom payments."[4] The warning notes that this combination could be especially damaging to those targeted.

In a report to Congress in October 2023, the Federal Trade Commission put forth several recommendations to aid the national effort to thwart ransomware as well as cyberthreats more generally. In addition to data regulation, legislation, and heightened support for encouraging businesses and organizations to strengthen their own security postures, the FTC requested that Congress "amend Section 13(b) of the FTC Act to restore the FTC's ability to provide refunds to harmed consumers and prevent violators from keeping the money they earned by breaking the law."[5] Ransomware attacks continue to be a key threat requiring mitigatory relief for consumers. This is complicated by the fact that responding to this type of attack can be particularly tricky, as payments made to cybercriminals are strongly discouraged (and may even result in an Office of Foreign Assets Control, or OFAC, violation).[6]

While overarching national improvements to the management of ransomware may be pivotal in the long run, present-day consumers are often left with little direction once they find that their information has been compromised. Monitoring credit reports and being vigilant in spotting any fraudulent activity is important; in the case of the recent breaches in Minnesota, monitoring health insurance documentation may also be necessary. But proactive measures may further help mitigate risk. Implementing credit freezes can be helpful, in addition to conducting a personal audit of how accounts are being protected. Organizations are encouraged to prepare for possible ransomware attacks by means such as implementing a strong backup policy, monitoring network access, and regularly reviewing third-party vendor agreements. Staying apprised of recent advisories is also recommended, and so is making adjustments to education and training practices based on current threats. ▲

NOTES

[1] *https://kstp.com/kstp-news/local-news/officials-notify-possible-victims-of-cyberattack-impacting-17-minnesota-counties/*

[2] *https://kstp.com/kstp-news/local-news/officials-notify-possible-victims-of-cyberattack-impacting-17-minnesota-counties/*

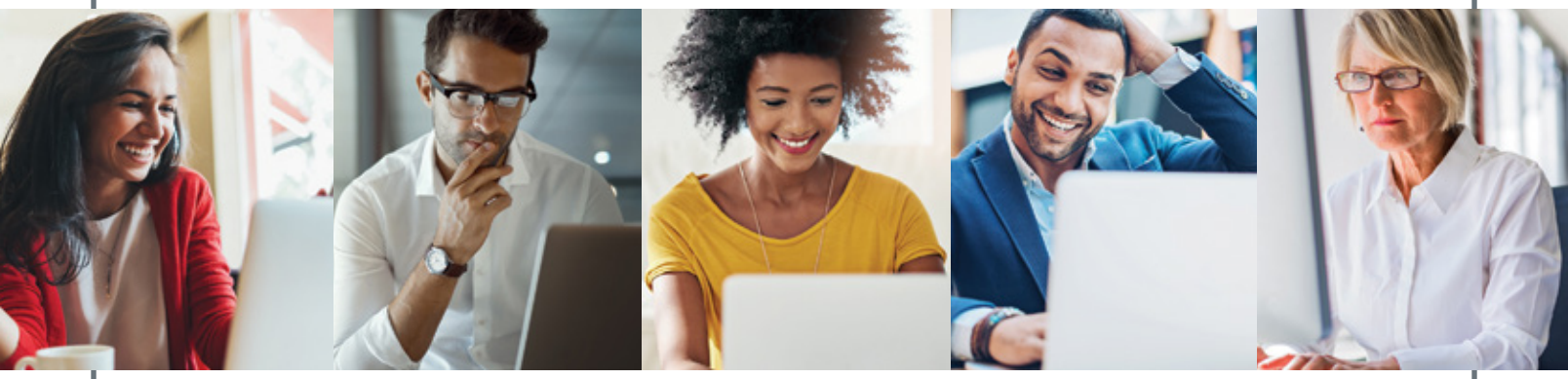
[3] *https://www.ic3.gov/Media/PDF/AnnualReport/2022_IC3Report.pdf*

[4] *https://www.ic3.gov/Media/News/2023/230928.pdf*

[5] *https://www.ftc.gov/system/files/ftc_gov/pdf/ftc_ransomware_report_oct_2023.pdf*

[6] *https://ofac.treasury.gov/media/912981/download?inline*

MSBA Communities

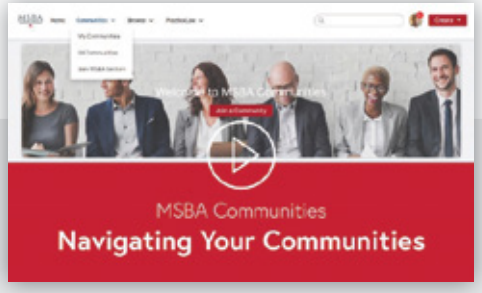


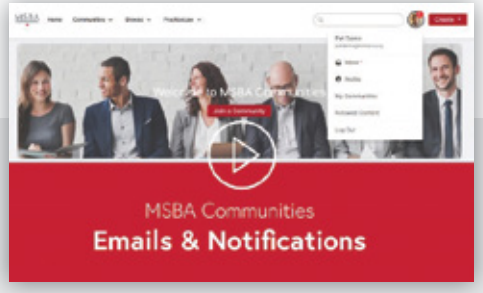
Start reading. Start posting. Start connecting.

Your online Communities are waiting for you. Connect with members of your Section, your district bar, and other groups. **MSBA Communities** are exclusively for members. Ask questions, answer questions, join the conversation.

www.mnbar.org/communities

Have questions? Check out our new tutorial videos.





Need help navigating MSBA's legal tech resources? Schedule a one-on-one virtual walk-through.

Mary Warner, MSBA Legal Technologist
mwarner@mnbars.org

What I learned grieving the loss of my dad

BY CHASE L. ANDERSEN candersen@mnlcl.org

CHASE ANDERSEN, Esq., is a case manager at Lawyers Concerned for Lawyers of Minnesota. He works with lawyers, law students, and judges on issues surrounding well-being, mental health, and substance use.

In the early morning of February 9, 2022, I stood next to my dad's bed in Mitchell, South Dakota, holding his hand tightly as he took his final breath. My father had battled Parkinson's disease for 25 years. The disease had taken a toll on him over the previous few years, and we all knew it was time. We had been planning for this day and knew it was coming. It didn't make his passing any easier.

For the next couple of months, I put most of my grief in an imaginary bottle and placed it on an imaginary shelf where I didn't have to look at it every day. I distracted myself with work, family, and the planning of his life celebration later that spring. I knew that my grief, sitting on that shelf waiting for me, wasn't something I could ignore for long, but it was what I thought I needed to do at that time.

That little bottle, filled to the brim with raw emotions, would occasionally spill out in unexpected ways. Sometimes it would leak feelings of sadness and confusion out of nowhere. Other times, for no apparent reason, it would tip over, resulting in my barking at those closest to me. This is not the type of person I am and it's definitely not the way I wanted to treat others. It became obvious this was all a function of my bottled-up grief and I knew it was time to let it go.

At my father's life celebration, I was finally able to fully open that bottle and flush out so many of the emotions that had been stewing on that shelf for months; I cried more than I ever have in my entire life.

Grief and loss, generally

Common feelings of grief include sadness, disbelief, and fear. Grief is a natural response that most of us face throughout our lives. Whether it's the loss of a parent, a grandparent, or a friend, these times can be some of the most difficult in one's life, like it was for me.

We can experience grief for many reasons: the end of a relationship, the loss of a pet, or the loss of a job. It can even come from the loss of freedom or independence, financial security, our home, or our dreams. We can even experience grief for things that haven't occurred yet (known as "anticipatory grief").

The concept of distinct stages in dealing with grief and loss was first popularized by the renowned psychiatrist Elisabeth Kübler-Ross in her 1969 book *On Death and Dying*. Those stages now are as follows:

1. **Shock and denial.** We begin by struggling to accept the reality of the loss.
2. **Pain and guilt.** This is a time of emptiness in one's life, causing pain and yearning that can be accompanied by a relief that your loved one is not suffering, which in turn can cause feelings of guilt.
3. **Anger and bargaining.** The pain of the loss leads to feelings of frustration and helplessness. Anger can manifest itself in many ways, including irritability or resentment. Then, to regain control or find meaning in the face of loss, one may make promises to a higher power or try to negotiate with fate in hope of undoing the pain.
4. **Depression.** In this stage, one may experience a deep sense of sadness and emptiness as they come to grips with the magnitude of the loss.
5. **The upward turn.** One begins to adjust to life post-loss. People begin to see that they have survived the loss and that they have a future to live.
6. **Reconstruction and working through.** In this stage, one may feel less overwhelmed by emotions and manifest a desire to begin to move forward by finding meaning and growth.
7. **Acceptance and hope.** In this final phase, one begins to find a way to live with the reality of the loss and starts to rebuild and readjust their perspective and life.

These stages are not always linear, and one may experience them in different ways and in a different order. Additionally, not everyone goes through all the stages, and some may experience certain stages multiple times.

Lawyers and loss

I am not an expert in grief and loss, but I can surely relate to others who have lost a loved one. I suspect that my experience is similar to how a lot of other lawyers face grief and loss: Bottle it up and put it on the shelf for later.

Several characteristics commonly found in lawyers and the practice of law can detrimentally affect one's ability to process the emotions that

NEED SOMEONE TO TALK TO?

One great option is Lawyers Concerned for Lawyers (LCL), which provides free, confidential support and services to Minnesota lawyers, judges, law students, and their immediate family members on any issue that causes stress or distress.

CONTACT LAWYERS CONCERNED FOR LAWYERS

www.mnlcl.org
651-646-5590
866-525-6466 toll-free

accompany grief and loss. To start, attorneys often detach themselves emotionally from their clients and their cases, especially when dealing with emotional clients and/or challenging and traumatic issues. Lawyers do this to focus on the factual details necessary to successfully advocate for their client. But when lawyers do this case after case, year after year, they can start to detach in their personal lives as well, making it challenging to express and process their own emotions, including grief.

Additionally, long work hours, competitiveness, and fear of seeming weak can also lead to lawyers prioritizing their professional obligations over their own well-being. Demanding clients and overwhelming caseloads may leave lawyers feeling as though they have little time for self-care. Competitiveness may add additional pressures and time constraints. In some cases, a lawyer may just try to "toughen up" in hopes of fighting through the negative feelings associated with grief and loss.

And to top it off, the rates of mental health and substance use issues among practicing lawyers are about double those of the general population. When faced with a loss, these issues are often exacerbated.

Prioritizing your own well-being

When you're facing a loss, it is critical to prioritize your own well-being. Some may think this is being self-indulgent, especially when we as professional problem-solvers might have to help support those around us dealing with the same loss. However, it's essential that we not only recognize how that loss affects us, but also embrace and process those emotions. Allow yourself to feel and grieve. We are all human and this process is natural.

Additionally, remember that the grieving process takes time and energy. Acknowledge the pain, allow yourself time to heal, and don't impose unrealistic expectations on your own grieving journey. Give yourself patience and recognize and accept the range of emotions you may experience. Everyone grieves differently, at their own pace, and there is no "right" way to navigate the process.

The most important thing is to seek support from family, friends, and/or a mental health professional. Establishing and relying on connections through challenging times will not only help you through your own grieving journey, but it will allow you to pour out your bottle of grief at your own pace.

As for me, I do not know where I am on my own grieving journey, but I'm doing pretty well. I have relied heavily on my wife and family, my friends, my co-workers, and my therapist. On occasion, out of the blue, I will remember my dad's silly jokes or even that final day. But as they say, "We grieve because we love. How lucky we are to have experienced that love." And I was so, so lucky to have my dad's love in my life. ▲

Q:

IF YOU HAD TO DELETE ALL BUT THREE APPS FROM YOUR PHONE, WHICH ONES WOULD YOU KEEP?

COURTNEY ERNSTON

Courtney Ernston, the president of North Star Law Group, focuses her practice on business and construction law. She is a huge advocate for alternative billing methods, including subscription billing and flat fees.

courtney@northstarlaw.com

My three remaining apps would be Outlook, Chrome, and TikTok. As a token millennial, I do the vast majority of my communications through email. Because I am frequently out of the office, the app makes responding to emails so much easier. It also allows me to have more flexibility with my schedule—so if I want to spend the day out and about with my kids or go to events, I am able to still get things done without hauling around a laptop. I definitely would not be able to live without an internet browser, considering all the ADHD-rabbit holes I go down, the ability to look up who is calling me before I answer, and all the other wonderful uses for the internet. Finally, for my mindless doomscrolling, TikTok is my little escape and guilty pleasure.

MAYA SANABA

Maya Sanaba is an associate at Lathrop GPM and primarily practices in the fields of M&A and company formation. She received her BA from Purdue University and her JD from the University of Iowa College of Law. Maya was admitted to the Minnesota bar in 2023.

maya.sanaba@lathropgpm.com

If I could only keep three apps on my smartphone, they would be Google Calendar, Audible, and NYT Games.

When I changed my major as an undergrad, I was very overwhelmed by all the new courses I needed to take. Someone suggested I use a calendar app to stay organized, so I downloaded Google Calendar, and I haven't looked back since. The ability to color-code my commitments based on what part of life they fall into is particularly valuable to me. I haven't found another user-friendly app with as many colors to choose from (workouts are yellow, work is blue, family is bright green, and so on). I also make sure to put everything in my calendar, even if I don't plan to attend the event or do the task. With this time-management system, I can keep myself on track even when life feels chaotic.

Audible is a necessity for me because I have always loved using books to unwind. Unfortunately, as I entered law school and then the workforce, I struggled to find the headspace or time to sit down and read. With audiobooks, I can listen to books while doing my daily activities like working out or walking the dog, rather than having to make time. Going to the gym and listening to a book for an hour has become one of the most calming parts of my day.

The New York Times Games app is one of the "fun" apps I've had on my phone for the past few years. My parents and I love word games, so we try to solve Connections, Wordle, and Spelling Bee every day and send our results to each other. It's given us an easy way to touch base even when we don't have time to talk for a few days.

Though I enjoy seeing what people are up to on Instagram and Facebook, I value these three apps more, as Google Calendar keeps me organized, Audible provides me with a convenient way to do something I enjoy, and the NYT Games app is a bonding tool for my family.

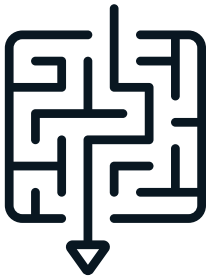
CHRISTOPHER BOWMAN
Christopher Bowman is a shareholder with Madigan, Dahl & Harlan, where he represents individuals and businesses in a wide range of civil litigation and transactional matters across the country. He is a former chair of the MSBA's Appellate Practice Section (2022-2023) and recipient of the MSBA's Award of Professional Excellence (June 2019) for his pro bono appellate service.
bowman@mdh-law.com

The most obvious answer to this is probably a web browser, my contact list, and the various calling, text messaging, and virtual meeting apps that help me stay connected to friends, family, coworkers, and clients. But the obvious doesn't make for interesting reading, so let's set those aside.

First, Google Calendar. Between work commitments, hockey games (Go Gophers), and my kids' basketball games and girl scout meetings (cookie sales now open!), I sometimes feel like I'm headed in 20 different directions at once. Having a single calendar that stays synced with my work-based Outlook calendar and home-based family calendar and that is readily accessible helps me make sure that I'm at least headed in the right direction most of the time.

Second, Spotify. I listen to music and podcasts during my commute to and from downtown Minneapolis and while working on briefing, as I like to have background noise as I write. Plus, my kids will listen to music on my phone as they fall asleep at night.

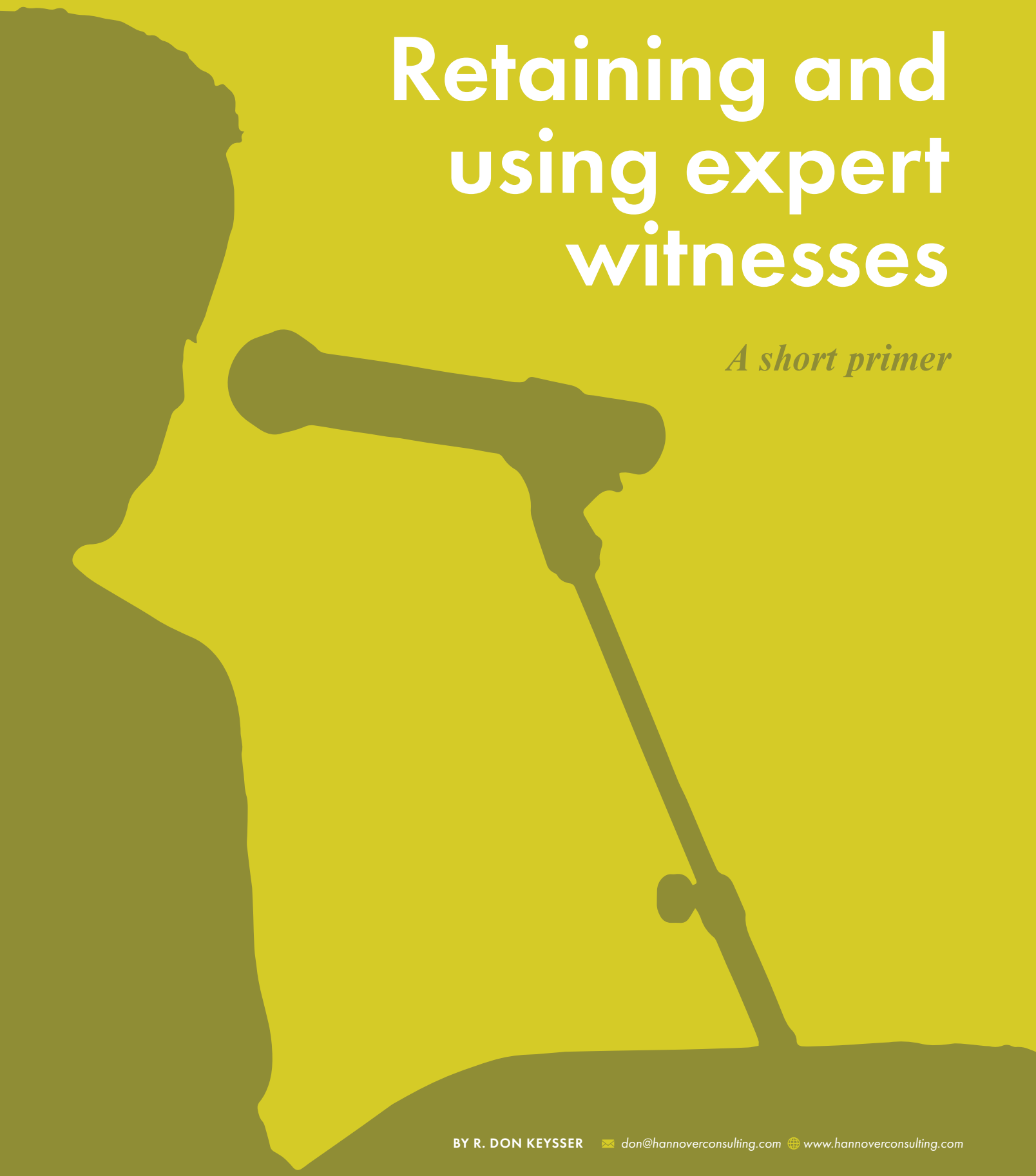
Third, the NYT Games App. I try to start each day with at least Wordle (I've used ADIEU as my start word ever since the game moved over to the Times), Connections, and the Mini. If I can get each of those before the first cup of coffee, it's usually a good sign for the day.



"THE NYT GAMES APP IS A BONDING TOOL FOR MY FAMILY."

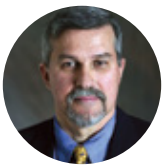
Retaining and using expert witnesses

A short primer



BY R. DON KEYSSER *don@hannoverconsulting.com* *www.hannoverconsulting.com*

DR. R. DON KEYSSER, CM&AA, is the managing principal of Hannover Consulting. He has been an investment banker and business finance consultant for over 40 years, and has testified on financial matters in 49 civil cases to date. He is on the adjunct faculty at the Carlson School, University of Minnesota, and at Saint Mary's University.



Your firm has been retained by a litigant in a civil action. From your prior experience, you realize that this will be a lengthy and complex case, involving a considerable amount of technical information outside your firm's expertise.

At some point, ideally early in the process, you will need to decide whether to recommend to your client that you retain one or more expert witnesses to assist in the case. This decision can have a significant impact on your case, especially if the other side retains expert witnesses.

My own specific experience is in financial matters—defaulted financings, financial damages, shareholder disputes, and the like. But these comments apply to all situations in which understanding complex technical information is critical to the management of your case: medical malpractice, product liability, insurance fraud, insider trading, patent infringement, and financial damages, for example.

What is an expert witness?

Expert witnesses are seasoned experts in a specific area of specialized technical knowledge, such as doctors, engineers, accountants, bankers, and regulators. They have a deep understanding of the subject matter of your case.

As noted in U.S. Federal Rules of Evidence, Rule 702, "A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion..." The underlying logic is that "[a]n intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical or other specialized knowledge... the most common source of this knowledge is the expert witness...."

Expert witnesses assist the court as a source of this expertise, in the court's capacity as the trier of facts. This raises an interesting tension in the position of expert: While experts are objective providers of technical information, assisting the court as the "trier of facts," the experts are also retained and paid by one of the sides in the proceedings. This raises the potential for a conflict of interest, which ethical experts will understand and respect.

Finally, expert witnesses are not advocates for your client; that is your job. It is important to remember this when managing your experts. The following checklists are intended as a brief guide to the considerations involved in making decisions about expert witnesses.

How can experts assist you?

- Bringing in specialized outside expertise about a specific industry or body of technical knowledge.
- Assisting in formulating and analyzing the theory of the case—from an industry perspective rather than a legal perspective.
- Assisting in formulating discovery requests for evidentiary materials.
- Writing a detailed expert report outlining the opinions of the expert—based on industry knowledge, research, and evidentiary material—as to the facts of the case.
- Assisting in structuring the questions for witnesses in depositions.
- Rebutting the testimony of the other side's expert witness; if they have one and you don't, you are at a distinct disadvantage.
- Explaining the case in nonlegalistic, nontechnical terms to the jury during trial.

How and when should you select expert witnesses?

- Select experts early in the process of developing your case; they can be especially valuable in the initial stages of defining your case, requesting discovery materials, and framing questions for witnesses in depositions. Selecting experts early can give them sufficient time to undertake a detailed analysis, conduct industry research, calculate damages, and thereby develop a strong report; a rush job does your client no favors.
- Select carefully. Solicit references and testimonials from other litigators; read the candidates' reports from previous cases to avoid embarrassing changes of opinions; try to interview the prospects, in person or via Zoom, to get a sense of their ability to handle themselves in an adverse situation. Some experts have made video clips of themselves that you can review.
- Consider retaining the experts initially as non-testifying consultants to get a feel for how you can work with them, and then shift them into the role of testifying experts if your particular court will allow that (some do, some don't).

How should you manage your expert witnesses?

- Discuss and clarify your expectations of the experts. Tell them how you view the case, what the key elements are, what you want them to focus on (and not to focus on). Discuss with them the specific opinions you are seeking.
- Discuss the anticipated timeline for the case (in particular, when you will need their report) and the possible timing for depositions and trial.
- Clarify with your experts the rules in your jurisdiction on methods of communication. Are the experts' work product and communications subject to discovery?
- Control your experts. Remind them that they are not advocates (an easy trap to fall into, and the number one concern of many trial judges). Define very carefully their roles and responsibilities, and the limits to those. And remember that if your experts' work is thrown out on a motion *in limine*, you have wasted a lot of time and money. (I have seen it happen.)
- Be sure to review drafts of your experts' reports. If there is no discovery issue, then it is a simple matter to email drafts back and forth; in jurisdictions where there is discovery of experts' communications, there are other ways to maintain confidentiality, such as the use of screen sharing on a Zoom call.
- Rehearse before the deposition and especially before trial. Your experts' report will be the basis for their deposition, which will be the basis for trial testimony, so it is important for the experts to be consistent. That underscores the importance of a rehearsal, perhaps even a 'mock deposition' that includes the role-playing of difficult questions.
- Use the experts to assist in preparing detailed trial exhibits.
- If your case gets to a jury trial, help your experts appreciate that their role has shifted from "expert" to "educator," serving to clarify complex issues to a jury that may be feeling overwhelmed by the last stages of the trial. Make sure your experts understand the need to demystify and explain the case.

Your experts should be an integral part of your legal team, capable of adding considerable value to the ultimate resolution of your client's case, if you manage them well. ▲

10 TIPS

for working effectively with your in-house counterparts

BY MIKE MATHER mike.mather@healthez.com

Now more than ever, developing strong relationships with in-house counsel is vital to success in private practice. In an effort to better predict and control costs, companies are expanding their in-house legal teams and looking for ways to keep more work within their four walls. A recent survey of chief legal officers (CLOs) found that 49 percent of teams expect their outside counsel budget to remain flat for the next year.[1] Another 13 percent expected their external spend to decrease year-over-year.[2] When asked to identify their top three strategic priorities for the next year, 45 percent of CLOs included "right-sourcing of legal services" on that list; 43 percent cited "cost minimization."[3] To achieve these goals, CLOs expect to seek opportunities for "more efficient use of outside counsel" and other ways to "bring work in-house whenever possible."[4]

At the same time, the regulatory environment is only increasing in its complexity. The same survey concluded that two-thirds of legal departments expect industry-specific regulations to create new legal challenges for their organizations in the next year.[5] Nearly as many cited state, federal, and international data protection and privacy rules as another hurdle.[6]

Faced with these pressures, in-house legal departments continue to spend considerable time scrutinizing their outside counsel spend to ensure they are getting maximum value for every dollar. As a result, law firms need to look for ways to provide more than just legal expertise to their corporate client legal teams.

Despite the importance of this relationship, little time is spent identifying exactly how outside counsel can maximize their value to their in-house counterparts and the client they jointly represent. To address this gap, here are ten tips on how firms can more effectively partner with their in-house colleagues.

1 Help "build the bridge." When I first moved in-house, I called a friend of mine, a well-established general counsel, and asked for some advice on how to manage the transition. His advice: Shift your mindset. "You're not a lawyer who works in a company. You're a business executive with legal expertise." This encapsulates the life of an in-house lawyer. We are asked to bridge the gap between the hyper-technical practice of law and the hyper-practical realities of running a business. This often requires advising on legal risk through the lens of corporate strategy, not the other way around. Accept this, and take the time to understand it. Work to bring the same mindset to the table.

2 Understand the business. One of the most important aspects of effective collaboration with your in-house colleagues is understanding the business environment in which they operate. What is their core product? What are their short-, medium-, and long-range goals? Are you working with an organization hyper-focused on growth, or one looking for strategic gains? What is their risk tolerance, and is it static or situational? Are they sophisticated about their legal needs or novices? Take the time, and make the effort, to get this information—and do it without charge.

3 Understand my role. Understanding how your in-house counterpart fits within the ecosystem of their organization is essential to an effective relationship. In small departments like mine, we must be at least conversant in nearly every area of law. In any given week I may be asked to weigh in on commercial contract negotiations, health care regulation, data privacy and security laws, employment matters, intellectual property questions, licensure requirements, insurance coverage, litigation strategy, and more.

Larger in-house teams present differently. Some have their attorneys organized by subject matter, allowing them to become experts in one area of the law or type of transaction, much like a law firm. Others organize their teams by business unit, freeing them to become experts in a particular product, service, or function. These clients may act more like a conglomerate of small legal departments operating under common leadership at the enterprise level. No matter the size of the organization, understand who you are working with, the resources they have, and how their organization thinks about the legal function, then adjust your approach to meet their specific needs.

4 See the big picture. No legal question is ever asked in a vacuum. By the time they pick up the phone, your in-house counterparts have participated in strategy sessions to understand the business case, internalized the client's ultimate goal, spent time analyzing how the company's actions may impact all relevant stakeholders, and given some thought to the legal issues the opportunity presents.

Understand these considerations and tailor your advice and guidance to meet the challenge presented. What's at stake? From the client's perspective, is this a small, medium, or big issue? Is the client looking for proactive guidance as it develops a new product, or reacting to a new regulation? Are the rules black and white, or do they leave room for innovation? How urgently is your advice and guidance being sought, and what's the client's specific timeline? The answers to these questions are often just as important (if not more important) than the legal one we've actually asked.

5 Be practical. To build relationships with our non-lawyer colleagues, in-house attorneys must be practical. Most lawyers can analyze a set of facts, find the applicable statues, and summarize the relevant case law. While these skills are essential to success, it's a different (and much more valuable) skill to know how those rules apply to the organization you're advising and its unique values, needs, challenges, and limitations. Our joint client is looking to us not just to tell it what the law is, but how it can apply the law to solve everyday problems with the resources it has—ensuring compliance without unnecessarily hindering growth.

6 Know the parameters (and stay within them). Sometimes, as in-house lawyers, we're just looking for a quick answer, confirmation of the work we've already done, or a gut check of our instincts. In these cases, don't send a full memo; an email is fine. Your detailed analysis—while undoubtedly well-written—is more than I need, more than I can digest, and (in most cases) more than I am willing (or able) to pay for. Other times, we need to get into the weeds. In these cases, we're leaning on your expertise to identify all the nuances we couldn't find on our own. Work to understand our needs in a particular situation and take care to stay within those parameters.

NO MATTER THE SIZE OF THE ORGANIZATION, UNDERSTAND WHO YOU ARE WORKING WITH, THE RESOURCES THEY HAVE, AND HOW THEIR ORGANIZATION THINKS ABOUT THE LEGAL FUNCTION, THEN ADJUST YOUR APPROACH TO MEET THEIR SPECIFIC NEEDS.

ASK QUESTIONS.
LAWYERS ARE NATURALLY INQUISITIVE.
USE THAT TO YOUR ADVANTAGE.

7 **Ask questions.** Lawyers are naturally inquisitive. Use that to your advantage. While it's often in the financial interest of in-house counsel to present you with everything you need, no one is perfect. Did we give you enough background information? Do you understand the purpose? The audience? The timeline? The budget? If we've left something out, ask for it. Not only will these questions ensure there is alignment; it will also demonstrate your understanding of the challenge, attention to detail, and commitment to the successful completion of the given task, inspiring confidence and trust.

8 **Proactively communicate.** When I was a very young lawyer, I worked with a partner who had a rule: A client should never send you an email about a file. If they are asking for a status update, you have failed to proactively communicate. While this example may take it to the extreme, the direction of the advice is right. In-house counsel is asked to wear many hats and do many things. When we retain outside counsel for a project, we need to trust that it is in good hands. While we'll never fully let go, proactive communication provides a peace of mind that frees us to focus our attention in other directions. The more we can trust you will work diligently, competently, and independently to produce results, the more valuable you become.

9 **Provide cost transparency.** There is no faster way to lose the trust of your in-house counterparts than sending bills that don't meet expectations. About two years ago, we needed to comply quickly with a new regulation that directly affected our core product. I called one of my outside counsel partners—a large, full-service firm—and asked if they had anyone on staff who had researched the law and, if so, could jump on a 30-minute phone call to answer some initial questions. I was assured that they did, and the following week we had a productive call.

About three weeks later, to my surprise, I received a bill that included not only our call, but hours of research by several junior associates, as well as multiple attorneys billing for an internal meeting to prepare for our call. I was quite irritated and now think twice before assigning work to that firm. Before agreeing to a project, budget, or timeline, ask yourself these questions: How long will it realistically take to produce quality work? Do I have the expertise myself, or will I need to bring in other resources? Does my firm bill for third-party legal research tools? (Tip: It shouldn't.) Will there be other costs, such as filing fees or other third-party charges, that my client isn't anticipating?

Spending time assessing what you need to do to deliver a high-quality product and having these conversations on the front end minimizes ambiguity, ensures alignment, and sets you up to ensure you stay on the go-to list.

10 **Help me look good.** Hey, a little flattery never hurt, right? Remember, just because we work in-house, that doesn't mean that our client's expectations change. At the end of the day, our client expects us to deliver timely and sound legal advice in a dynamic environment. We look to our external network to help us achieve that goal. The more I can rely on you to expand my knowledge, provide thoughtful legal analysis, and ultimately help me educate my client to enable them to make the best decisions, the more indispensable you become.

Done right, the outside/inside lawyer combination can be a vehicle to provide unparalleled service. Spending time understanding the unique needs of your client will go a long way toward building an impactful relationship that will directly contribute to earning more business, both from your direct client and from their network of other in-house professionals. ▲

MIKE MATHER is general counsel for HealthEZ, a national health benefits innovator for self-funded health plans located in Bloomington. Before moving in-house, Mike was a shareholder at a law firm in St. Paul, focusing his practice on commercial litigation.

NOTES

[1] Association of Corporate Counsel, "2023 ACC Chief Legal Officer Survey," at 21 *ACC_2023_CLO_Survey_Report.pdf* (last accessed 11/28/2023).

[2] *Id.*

[3] *Id.*, at 7.

[4] *Id.*, at 33.

[5] *Id.*, at 36.

[6] *Id.*

Join us at these Mitchell Hamline School of Law events

Mitchell Hamline Giving Day

Wednesday, March 13, 2024

A dedicated day for alumni and friends to give back by supporting students through our annual fund.

Justice Esther M. Tomljanovich 2024 Celebration of Women in Law Tea

Wednesday, May 1, 2024, on campus

Registration forthcoming

Alumni Golf Tournament

Monday, July 29, 2024

Mendakota Country Club,
Mendota Heights, MN

Registration forthcoming

In the Matter of EQUITY V. FINALITY

Two recent Supreme Court cases shift the emphasis in Minnesota divorce law

BY M BOULETTE, SEUNGWON CHUNG, AND ABBY SUNBERG

mboulette@taftlaw.com schung@taftlaw.com asunberg@taftlaw.com

As divorce lawyers, we can't make many promises. Family court outcomes are notoriously uncertain and the classic lawyerly "it depends" is often the only answer. But there was at least one promise we could always make: By the time this is over, you'll be divorced. Once and for all. But after recent cases from the Minnesota Supreme Court, even that answer may now depend.

In 2022, the Court decided two cases that make finality less certain for divorcing parties—*Bender v. Bernhard*[1] and *Pooley v. Pooley*.[2] In both, the Minnesota Supreme Court prioritized a more equitable approach to relief in divorce over the traditional principles of finality. Now, Minnesota family law practitioners must grapple with *Bender* and *Pooley*'s consequences, finding ways to firmly close the door once more or at least mitigate the risks of leaving it slightly ajar.

With this newfound uncertainty, what's a lawyer to do? We've attempted to boil down 30 years of history into three basic chapters. In the first, we explain how the initial approach to post-decree relief—granting such relief when equity required—left couples at risk of a life spent in litigation purgatory. In the second, we describe the Legislature's solution—Section 518.145, subd. 2—and the Court's prior commitment to limiting grounds for relief in favor of finality. And in the most recent, we illustrate the road back to equity in *Bender* and *Pooley*. We then end with some guidance for lawyers trying to navigate this new world.

Chapter 1: Inherent authority bends toward equity.

When it comes to finality, divorces have always been different. On one hand, ex-spouses can always return to change issues like child custody, support, and maintenance,[3] *res judicata* be damned.[4] On the other hand, the civil rules traditionally omitted divorce decrees from the general rules on post-judgment relief.[5] As a result, parties could only obtain relief from a divorce decree by resorting to the inherent power of courts.[6]

But that inherent authority was limited. While civil rules provided a broad array of grounds for relief from final judgment,[7] courts "ha[d] no authority to open up a divorce decree" unless there was a showing of "fraud on the court and the administration of justice."[8]

For such a simple rule, courts struggled mightily to apply it, as more and more cases arose that cried out for relief but didn't fit traditional notions of "fraud on the court." *Lindsey v. Lindsey*,[9] for instance, involved a wife seeking relief from a divorce decree based on a "severe mental illness" that prevented her from remembering "any event dealing with the dissolution." Though *Lindsey* did not include typical facts that support fraud, the Minnesota Supreme Court in *Lindsey* seemingly broadened the definition of "fraud on the court" to cover equitable circumstances that mirrored some of the grounds in Rule 60.02.[10]

Not long after, *Tomscak v. Tomscak*[11] outlined even more circumstances in which parties would be allowed to "set aside" stipulated divorce decrees on the grounds of "fraud, duress or mistake."

And so it went. While the inherent authority to reopen a divorce was presumably limited in nature, courts struggled to address the variety of "peculiar facts" that seemed to justify reopening.[12] And as more peculiar facts arose, this once-limited power expanded into a far more robust form of equitable relief available to right all manner of wrongs. With each new exception, case law created more and more ways a divorce could unravel, even years after it was supposed to be over.

Chapter 2: Finality ascendant.

In search of a more definitive standard, the Minnesota Legislature adopted a new statute grafting a more limited version of the civil standard for post-judgment relief into family actions (with a notable exception).[13] This 1988 statute, Section 518.145, subdivision 2, thus provided parties with a mechanism to reopen divorce decrees or other family court orders for one of five enumerated reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under the Rules of Civil Procedure, rule 59.03;
> (3) fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party;
> (4) the judgment and decree or order is void; or
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment and decree or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment and decree or order should have prospective application.[14]

At the outset, section 518.145 appeared to provide most of the relief that was available under the Rules of Civil Procedure (with the exception of the general "any other circumstances" bases). And not long after the statute's enactment, Minnesota courts began directing parties away from equitable arguments, and directing them to section 518.145.[15]

Eventually, the Minnesota Supreme Court held that the days of ever-expanding equitable relief were gone and that finality governed. *Shirk v. Shirk*[16] thus involved an ex-wife seeking to amend her divorce decree due to improper behavior by her divorce attorney, who was investigated by the professional board. Just as courts had done in the years prior to section 518.145, the district court and court of appeals vacated the decree based on the "serious violation of trust" and "incompetence of counsel."[17] Yet the *Shirk* Court reversed, finding that the section 518.145, subdivision 2 excluded all relief "not among the listed grounds."[18] In this way, *Shirk* represented a shift away from the equitable principles that sought to provide parties relief and instead prioritized the finality of the divorce decree.

Over the following decades, courts held the line, defending section 518.145's relief as narrowly tailored and limiting. Courts thus distinguished section 518.145's relief from the "open-ended power" granted to Rule 60.02.[19] Thus even seemingly broad relief, such as inequitable prospective application, couldn't be used as a "catchall provision" but had to be applied with "due caution."[20] Following *Shirk*, spouses could no longer seek relief for incompetent counsel, their own lack of capacity, or unanticipated consequences of their decree.[21]

M BOULETTE is an attorney at Taft Stettinius & Hollister LLP. They litigate high-stakes divorce and child custody cases, regularly handling multi-million-dollar divorces involving closely held businesses, commercial real estate valuation, fraud and concealed assets, executive benefits, trusts, and inherited wealth, in addition to high-conflict custody cases with allegations of abuse, alienation, or mental health complications.

SEUNGWON CHUNG is an associate in Taft's domestic relations group. He was part of a team of Minneapolis attorneys recognized as 2022 Attorneys of the Year by Minnesota Lawyer.

ABBY SUNBERG is a Taft litigation associate with experience in commercial litigation, domestic relations, and wealth transfer litigation. She was part of a team of Minneapolis attorneys recognized as 2022 Attorneys of the Year by Minnesota Lawyer.

Finality, it seemed, was the order of the day. And divorced spouses could rest assured that their decree would remain final, subject only to the limited, enumerated grounds set by the Legislature rather than the vast bounds of equity.

Chapter 3: Equity strikes back.

Such was the state of the laws for nearly two decades, until equity's pull began to assert itself once more.

In 2022, the Minnesota Supreme Court chipped away at *Shirk*'s limited view in *Bender v. Bernhard* and *Pooley v. Pooley*, paving two additional pathways to reopening—post-decree evidence and omitted assets.

Favoring the equitable considerations at play, *Bender* undercut the principle of finality by redefining Section 518.145's "newly discovered evidence" ground for relief to include post-decree evidence.[22] Before *Bender*, a party seeking to reopen a divorce decree based on newly discovered evidence could only do so if the evidence existed at the time of the decree. This historical approach preserved finality by barring a reopening due to new or changing circumstances.

Challenging this principle, the mother in *Bender* moved the district court to extend her ex-husband's child support payments based on a Social Security Administration report that post-dated the child support order.[23] After the district court refused to consider the evidence, a 4-3 majority in *Bender* reversed, and directed the lower court to reopen the child-support order to consider the new evidence, dispensing with the "bright-line rule" safeguarding finality and instead valuing equitable considerations most of all.[24] After *Bender*, new evidence (not just newly discovered evidence) may upend a decree without concern for finality. By contrast, three members of the Court argued that finality should remain supreme. Per the dissent, to hold otherwise would undermine the purpose of Section 518.145, subd. 2 and judicial certainty.

Six months later, the Court—dividing along the same 4-3 lines—returned to a similar issue in *Pooley v. Pooley*,[25] further weakening finality by allowing allocation of any assets not addressed in a prior divorce decree.[26] In keeping with *Shirk*'s holding, the district court denied the wife's request to divide husband's previously omitted retirement account.[27] Once again, the Supreme Court reversed, this time holding that despite the six years since the divorce, wife could still seek to divide these assets as "omitted" from the original decree, and thus outside the scope of 518.145 limits.[28] In choosing equity over finality, the *Pooley* Court coined an analogy that explained how one could carve out an equitable result from the principles of finality of section 518.145:

> . . . . If a court's decree is a box that contains everything the parties agreed to and what the court has approved as equitable, that box can only be reopened if the factors of section 518.145 are met. But it is not reopening the box to address items that were never inside the box. Multiple items in this case, including waivers of spousal maintenance, are inside the box and cannot be altered unless a party satisfies the requirements of section 518.145. But the retirement assets were never inside the box, as the dissolution court never approved any division as equitable, and it is therefore not reopening the decree to equitably divide those assets....[29]

Persuaded again by equity, the Court remanded for division of the Pooleys' omitted assets.[30]

Leading the dissent, Justice Hudson asserted that the majority "effectively overruled [the Court's] holding in *Shirk* and destabilized the finality and reliability of dissolution judgments."[31] In divorce, the dissent emphasized, "the need for finality takes on central importance."[32]

The message from the *Bender-Pooley* Court was clear. Going forward, equity would stand (at least) on par with finality, and courts must vigorously exercise their equitable oversight in divorce matters, even at the risk of uncertainty. In so doing, the *Bender-Pooley* duo harkened back more than 30 years to the more expansive use of inherent power available to right a broad range of unfairness and misconduct.

Epilogue: What's a lawyer to do?

While the pivot back to equity will be a welcome relief for some, the fears of opening Pandora's box aren't unwarranted.

As earlier case law illustrates, equity may solve some problems, but it invites others—especially for practitioners. And by ringing in a return to equity, *Bender* and *Pooley* may raise at least as many questions as they answered. Those unanswered questions will likely first be addressed by practitioners, and the district courts, as matters of first impression.

In getting to these answers, practitioners will first address them as drafting issues. And they might begin by retuning an old tool in the box. Even prior to *Pooley*, practitioners would occasionally include a clause to account for items unlisted in the decree.[33] These "omitted asset" clauses should be revisited in light of *Pooley*. In reviewing prior drafts of "omitted asset" clauses, practitioners should consider whether including an "omitted assets" clause puts those assets "in the box" for approval by the district court, and thus, applies the timing requirements of section 518.145.

At the same time, practitioners should be careful when choosing how omitted assets are divided. It's reasonable to conclude that a court could approve an "omitted assets" clause that divides those assets "equitably" or "equally." In choosing between those words, practitioners remember that equitable does not necessarily mean equal.[34] By contrast, it's less likely that a court could approve as equitable an "omitted assets" clause that divides those assets "to each party in their own name," or "to each party who possesses the property."

The drafting issues don't end there. Practitioners will be left to confront what it means for an asset to be "inside the box" under *Pooley*. While *Pooley* provided a framework, *Pooley* did not decide the various permutations in how practitioners address assets in decrees.[35] Parties have offered divorce decrees that exclude the value of their marital assets to protect their privacy. Or parties simply state that personal property and furnishings have been divided equitably between the parties. Is listing the property, but not the value, enough to keep an asset "inside the box"? In confronting these problems, practitioners can revisit (or discover) ways to provide to the district court the necessary information to approve a stipulation as equitable, while preserving the parties' desire for privacy.[36]

Pooley and *Bender* won't just be a challenge for drafting. Those cases will continue to impact how practitioners litigate post-decree issues. For instance, when does finality even begin? Already the appellate courts struggle to delineate between a final decree and post-decree motions, like a motion for amended findings.[37] In a similar vein, practitioners and courts will need to consider when a modification motion is finally decided. Minnesota statute provides that modification of child support and maintenance is retroactive only to the date of service of the motion.[38] *Bender*'s equitable approach to newly discovered evidence may yet extend the reach of that retroactive motion, leaving obligors uncertain as to the finality of their obligations.[39]

Ultimately, the shift from finality to equity might be a matter of trial and error (and breaking old habits). But even as old habits die hard, practitioners will begin reassessing to prepare for what may hopefully be the final chapter in this journey. ▲

NOTES

[1] *Bender v. Bernhard*, 971 N.W.2d 257, 259 (Minn. 2022).

[2] *Pooley v. Pooley*, 979 N.W.2d 867, 870 (Minn. 2022).

[3] *See* Minn. Stat. §518.18 (modification of custody); Minn. Stat. §518.175, subd. 5 (modification of parenting time); Minn. Stat. §518A.39, subd. 2 (modification of support and maintenance).

[4] *See e.g. Loo v. Loo*, 520 N.W.2d 740, 743–44 (Minn. 1994) ("[T]he principles of *res judicata* apply to dissolution proceedings subject to the limitation that either party may petition for modification of maintenance...."); *Kiesow v. Kiesow*, 270 Minn. 374, 383, 133 N.W.2d 652, 659 (1965) (noting that "the doctrine of *res judicata* is not applied with the same degree of finality in a matter involving the amendment of a divorce decree as in some other actions");

[5] *See* Minn. R. Civ. P. 60.02 (applying the rule to "a final judgment (other than a marriage dissolution decree")); *Bredemann v. Bredemann*, 253 Minn. 21, 24, 91 N.W.2d 84,87 (1958).

[6] *Bredemann*, 253 Minn. at 24, 91 N.W.2d at 87; *Lindsey v. Lindsey*, 388 N.W.2d 713, 716 (Minn. 1986).

[7] The six enumerated grounds under Rule 60.02 are:

(a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03;

(c) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(d) The judgment is void;

(e) The judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(f) Any other reason justifying relief from the operation of the judgment.

Minn. R. Civ. P. 60.02.

[8] *Bredemann*, 253 Minn. at 25, 91 N.W.2d at 87.

[9] 388 N.W.2d at 715–16.

[10] *Id.* at 716 ("We must point out, however, that a finding of fraud upon the court and the administration of justice must be made under the peculiar facts of each case.").

[11] 352 N.W.2d 464, 466 (Minn. Ct. App. 1984).

[12] *Lindsey*, 388 N.W.2d at 716.

[13] *Maranda v. Maranda*, 449 N.W.2d 158, 164 n.1 (Minn. 1989); 1988 Minn. Laws. 1007, 1011.

[14] Minn. Stat. §518.145, subd. 2.

[15] *See Maranda*, 449 N.W.2d at 164.

[16] 561 N.W.2d 519, 522 (Minn. 1997).

[17] *Id.* at 521.

[18] *Id.* at 522.

[19] *Harding v. Harding*, 620 N.W.2d 920, 923 (Minn. Ct. App. 2001).

[20] *Id.*

[21] *Anton v. Sparks*, A16-0518, 2016 WL 7337097, at *6–7 (Minn. Ct. App. 12/19/2016); *Hestekin v. Hestekin*, 587 N.W.2d 308, 310 (Minn. Ct. App. 1998).

[22] Supra note 1.

[23] *Id.* at 260.

[24] *Id.* at 266.

[25] The Court split along identical lines in both *Pooley* and *Bender*, with Justices Chutich, Thissen, and Moore joining Justice McKeig's majority opinion and Justices Hudson, Gildea, and Anderson dissenting.

[26] Supra note 2.

[27] *Id.* at 872, 76–77 (citing *Shirk v. Shirk*, 561 N.W.2d 519, 522 (Minn. 1997)).

[28] *Id.* at 877.

[29] *Id.* at 877 (footnote omitted).

[30] *Id.* at 879.

[31] *Id.* at 884.

[32] *Id.* at 881 (citing *Shirk*, 561 N.W.2d at 522) (internal quotation omitted).

[33] For example, a clause might state: "In the event there are any marital assets that are omitted from this Decree, those assets shall be divided equally between the parties."

[34] *See Olness v. Olness*, 364 N.W.2d 912, 915 (Minn. Ct. App. 1985).

[35] 979 N.W.2d at 877.

[36] *See* Minn. Gen. R. Prac. 308.03; Minn. R. of Pub. Access to Records of Jud. Branch 4.

[37] *Wiel v. Wahlgren*, No. A22-0359, 2023 WL 353891, at *5 n.8 (Minn. Ct. App. 1/23/2023); *Blessing v. Blessing*, No. A21-1709, 2023 WL 1093864, at *8 n.4 (Minn. Ct. App. 1/30/2023).

[38] Minn. Stat. §518A.39, subd. 2(f).

[39] *Snyder v. Snyder*, 212 N.W.2d 8669, 875 (Minn. 1973) (commenting that finality is important to allow spouses "to make reasonable plans for the future based on the economic obligations imposed upon [them] by the decree of divorce").

The cannabis-custody conundrum

How the adult-use cannabis law will affect custody matters

BY CHRISTOPHER VATSAAS AND MELANIE NELSON

cvatsaas@chestnutcambronne.com *mnelson@chestnutcambronne.com*

Marijuana use is not a foreign issue to family courts. In Minnesota, however, the legalization of recreational marijuana in 2023 added a new layer to this legal onion. As of August 1, 2023, adults in Minnesota over the age of 21 can possess, use, and grow restricted amounts of marijuana.[1]

The framework guiding custody and parenting time decisions in Minnesota is found in Minn. Stat. 518.17, subd. 1, otherwise known as "the best interest factors." The main factor pertinent to marijuana use is number 5: "any physical, mental, or chemical health issue of a parent that affects the child's safety or developmental needs."[2] The extent to which marijuana use affects a parent's ability to parent and to ensure their child's safety is paramount to the analysis. As with alcohol, other factors may also become relevant depending on the extent of a parent's use of marijuana, such as factor 6 ("the history and nature of each parent's participation in providing care for the child") and factor 7 ("the willingness and *ability* of each parent to provide ongoing care for the child; to meet the child's ongoing developmental, emotional, spiritual, and cultural needs; and to maintain consistency and follow through with parenting time.")[3] (Emphasis added).

In addition to considering how legalization should affect new family law cases, it is important to weigh how *existing* provisions in family law orders are affected. Family law orders routinely incorporate terms completely restricting the use of marijuana, or perhaps more generally "controlled substances," with testing terms that trigger further conditions. The result of testing positive for marijuana use can be very serious. Parents may see their parenting time suspended, supervised, or heavily restricted until conditions are met.

Implicit biases

Implicit biases of parties, attorneys, judges, mediators, and evaluators have always played a role in the drug and alcohol provisions contained in parenting plans. Naturally, everyone is going to treat the legalization of marijuana differently based upon their subconsciously embedded personal viewpoints. These key players in any family law case may have differing views of alcohol use and how to create provisions in parenting plans that safeguard children while also monitoring use in a way that isn't excessive.

But in contrast to marijuana, alcohol involves familiar testing protocols, and those protocols offer a degree of clarity and immediacy that serve to manage implicit biases through data.

Data collection

This implicates an important question: What qualifies as impairment and how do we measure it? There is currently no clear scientific method to determine impairment with marijuana use. While various types of tests can measure THC levels, THC levels are not reliable indicators of marijuana intoxication.[4] THC metabolites linger for weeks after the last time someone uses, and they will still generate positive results using the standard testing methods.

One study in particular, conducted by RTI International, tested cognitive and psychomotor impairment with THC use and ultimately found that the toxicology tests (blood, urine, and oral fluid) showed that levels of cannabis component did not correlate with level of impairment.[5]

One new testing method, brain imaging, has shown through a study to be 76 percent accurate in detecting impairment.[6] Researchers used brain scans to look at the prefrontal cortex. The brains of individuals who have THC in their system look different from those who don't. While brain imaging proved accurate in this study, it is not practical on a large scale, as that would require extraordinary investments in equipment and human resources. Immediacy, cost, and scalability are all important factors for a testing device that could be used in a family law context. But there is as yet no breathalyzer for cannabis intoxication.

Law enforcement is facing the same issue. Currently, law enforcement relies on field sobriety tests to determine whether a driver is impaired due to cannabis use. Some police departments are part of pilot programs to try potential new devices. One such device, OcuPro, gives the test-taker visual stimuli and measures the test-takers pupils' size and movement in response.[7] The test takes about one minute and provides immediate results on the device. This device was created by Minnesotans and is being tested by agencies across the United States. Last fall, Minnesota law enforcement agencies conducted a pilot program involving saliva testing.[8] It will be important to follow the results of these pilot programs to see if any of these testing methods have potential viability in a family law context.

What we can learn from other states

In analyzing how Minnesota should handle the legalization of marijuana, it is helpful to look at how states that have had marijuana legalized for longer handle it. Unfortunately, there is limited appellate case law on the issue and thus few identifiable trends. This doesn't necessarily come as a surprise, since district court judicial officers are given broad discretion; in family law, the justification for those decisions is that they must be in the best interests of the children.

One of the cases regularly referenced is *In re: the Marriage of Catherine Parr and David Lyman*.[9] This is a case out of the Colorado Court of Appeals, a state that was one of the first to legalize marijuana. Father was approved for a medical marijuana license due to back and knee pain from a motorcycle accident. One week prior, the parties signed a parenting agreement that required father to complete ongoing urinalysis tests and drug screenings to demonstrate that he was not using marijuana. Once he was approved for a medical marijuana license, father filed a motion requesting that the court eliminate the drug testing requirement. He admitted that he didn't disclose that he had petitioned for the medical marijuana license.

The district court decided that the parenting plan requiring urinalysis tests would remain in place because father voluntarily and knowingly agreed to the conditions. After months passed, mother filed a motion requesting a restriction of father's parenting time due to failure to provide clean urinalysis tests and his request to the children to keep his use a secret. Father appealed. The district court ordered that father's parenting time be supervised until he shows the court that his medical marijuana use is not detrimental to the child, and he cannot use medical marijuana while he is with the child. It further ordered that unsupervised parenting time is conditioned on father submitting a clean hair follicle test to the court and having weekly clean urinalysis tests. Father appealed. The court of appeals found that father's medical marijuana use did not constitute endangerment and thus did not support a restriction of his parenting time.

Mother did not demonstrate that father's use created a threat to the physical and emotional health and safety of their child. But the court of appeals specifically noted that it was not making a finding that medical marijuana use may or may not constitute endangerment, but rather that it wasn't shown in this case.

Parr demonstrates a correlation to how Minnesota already navigates parental alcohol use. The legality of a substance does not affect the potential presence of an issue from a parenting perspective. The difference with marijuana use now that it is legalized is that it is no longer a question of whether the behavior poses a danger to the children *and* is illegal. Instead, we only need to focus on whether the use poses a danger to the children or otherwise tangibly affects their best interests.

In one case, the California Court of Appeals similarly found that medical marijuana use alone is not sufficient to show that the children are at risk of harm.[10] There, the court of appeals maintained the district court's restriction that father could not use marijuana in the home due to the negative effects of secondhand smoke on the children as well as father's negative behavior changes toward the children and other people when he uses. Specifically, father is more irritable, has less patience, snaps at the children, uses corporal punishment, and is more violent toward his girlfriends. The court also highlighted father's history of domestic violence, father's use of marijuana prior to the doctor's recommendation and his medical marijuana license, and side effects of marijuana smoke.

There are likely many parties to family law cases that now wish to change agreements or orders requiring testing given the change in the law. While the father in *Parr* ended up with a decision in his favor after defying his parenting agreement, it obviously required extensive litigation and presumably the costs attached to it. His parenting time had already been restricted for many months by the time the court of appeals agreed with him. Additionally, parents should not expect that the court will set no restrictions or oversight on their use.

Texas, New York, and New Mexico have passed laws prohibiting child welfare agencies from using marijuana use as the sole factor in determining a parent or guardian is unfit.[11] In California, the Department of Social Services modified its regulations to clarify that use or possession of marijuana is to be treated the same way as use or possession of alcohol or prescribed medications during investigations. Last fall, the Minnesota Department of Human Services revised its Child Maltreatment Intake, Screening, and Response Path Guidelines to reflect the legalization of marijuana in Minnesota. One child safety consultant specifically noted that the Minnesota Department of Human Services is trying to view marijuana and alcohol in a similar way. While child welfare agencies are not always involved in family law cases, their positions can have a major impact on the way a judge perceives chemical health concerns of parties to family law cases.

Looking ahead

Unlike alcohol, marijuana does have meaningful supporting research in relation to its medicinal value. Many states, including Minnesota, recognized as much in legalizing medical marijuana before recreational marijuana. Low doses of THC can help reduce anxiety.[12] In a study completed on medical marijuana patients in Colorado, six out of eleven reported that marijuana use helped them be more calm and patient parents.[13] Conversely, in another study, parents who use marijuana self-reported using more discipline (including physical and non-physical) than parents who do not use.[14] With increased legalization, it will be important to continue to research and monitor the direct effect of marijuana use on parenting, especially with parents who use marijuana less frequently. Finally, another consideration is how a parent's use may affect a child's decision to use in the future. One study found that when mothers used cannabis, 81 percent of adolescents whose mothers used cannabis also used and 78.4 percent of adolescents whose fathers used cannabis also used.[15] Needless to say, the conversation surrounding the intersection of family law and cannabis does not end with its legalization—but rather expands. ▲

CHRISTOPHER VATSAAS is a partner in the family law practice group at Chestnut Cambronne PA with a comprehensive family law practice, including serving as an ADR neutral. He also is an adjunct professor at the University of St. Thomas School of Law, where he teaches advanced family law.

MELANIE NELSON is an associate attorney in the family law practice group at Chestnut Cambronne PA, where her practice focuses exclusively on family law. She also serves as the secretary of the Family Law League, a local family law organization focused on networking and collaboration among family law professionals.

NOTES

[1] Minn. Stat. §342.09

[2] Minn Stat §518.17, subd. 5

[3] *Id.*

[4] *https://nij.ojp.gov/topics/articles/field-sobriety-tests-and-thc-levels-unreliable-indicators-marijuana-intoxication#note2*

[5] *Id.*

[6] *https://www.nature.com/articles/s41386-021-01259-0*

[7] *https://ocupro.com/*

[8] *https://www.minnpost.com/public-safety/2023/07/smell-saliva-and-sobriety-tests-how-minnesota-law-enforcement-agencies-hope-to-prevent-dwis-via-marijuana-use/* .

[9] *In re Marriage of Catherine Parr and David Lyman*, 240 P.3d 509, 511 (Colo. App. 2010)

[10] *In re Alexis E.*, 90 Cal.Rptr.3d 44, 56 (Cal.Ct.App.2009)

[11] *https://imprintnews.org/top-stories/with-cannabis-legalized-minnesota-adjusts-child-welfare*

[12] *https://adai.uw.edu/pubs/pdf/2017mjanxiety.pdf*

[13] *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6706266/.*

[14] *https://www.tandfonline.com/doi/abs/10.1080/1533256X.2019.1640019?scroll=top&needAccess=true* ; *https://www.insider.com/marijuana-use-parents-more-likely-to-discipline-children-research-2019-7*

[15] *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9265425/*

3 Great Options in Minnesota CLE's Popular

SEASON PASS PROGRAM

IT'S THE BEST VALUE IN CLE!

Get more of the best education available! Save a bundle! Fix your education costs!

Find the Pass That Works Best for You!

FEATURES			BEST VALUE! 
Live In-Person Seminars	Unlimited	50% off	Unlimited
Live Online Seminars	50% off	Unlimited	Unlimited
On Demand Seminars	50% off	Unlimited	Unlimited
Skills Training Seminars	50% off	50% off	Included
a $245 value **eCoursebook Collection***	Included	Included	Included
a $545 value **LinkedLaw Deskbook Library***	50% off	50% off	Included
Other Minnesota CLE Publications (includes Automated Document Systems)*	50% off	50% off	50% off
$50 or $150 Discount for Current or Previous Season Passholders**	Yes	Yes	Yes
My CLE Credit Tracks Minnesota CLE courses attended	Yes	Yes	Yes
Price: MSBA Member / Standard	MSBA: $1095 Standard: $1295	MSBA: $1395 Standard: $1595	MSBA: $1695 Standard: $1895

* Applies to annual subscription. ** Depends on previous Pass expiration date and purchase date of new Pass.

MINNESOTA CLE
Your Success Is Our Goal

For more information or to order: www.minncle.org
Questions? customerservice@minncle.org or 800-759-8840

Smarter Legal Research. Free for MSBA Members.

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.

fastcase®
Smarter legal research.

As a member of the MSBA
you have free access to fastcase.

Login at: www.mnbar.org/fastcase

LEARN MORE ABOUT FASTCASE

Live Webinars:
www.fastcase.com/webinars

Topics include:

Exploring Legal Research
with Fastcase

Mastering Advanced
Legal Research Techniques

MSBA

Questions? Contact info@mnbars.org

LANDMARKS IN THE LAW

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

Criminal Law

JUDICIAL LAW

Restitution: Definition of "victim" creates singular class of victims that includes the family members of a minor victim. Appellant pleaded guilty second-degree criminal sexual conduct, using a minor in a sexual performance, and possession of child pornography. After a contested restitution hearing, the district court ordered appellant to pay the victim's mother restitution for her therapy costs and lost wages. The court of appeals affirmed. Appellant argues that, although the restitution statute includes a child victim's family members in the definition of "victim," it does so only for the limited purpose of exercising duties owed to the child. He also argues the victim's mother's losses were not incurred as a direct result of his offenses.

Minn. Stat. §611A.01(b) defines "victim" for restitution purposes as "a natural person who incurs loss or harm as a result of the crime." This definition also specifically notes that "[t]he term 'victim' includes the family members... of a minor..." Minn. Stat §611A.01(b). The Supreme Court finds that this sentence including family members in the definition is subject to more than one reasonable interpretation.

The Court notes that the Legislature inserted the "family member" sentence into the definition of "victim" following a case that held that a prior version of the definition applied only to family members who stepped into the victim's shoes. *See State v. Jones*, 678 N.W.2d 1 (Minn. 2004). The Legislature's response to the case indicates an intent to expand the definition of "victim." The Court holds that the restitution statute's definition of "victim" "creates a singular class of victims that includes the direct victims of a crime and, if the direct victim is a minor, those family members of the minor who incur a personal loss or harm as a direct result of the crime."

As the victim's mother in this case sufficiently proved to the district court that her losses were a natural consequence of appellant's offenses against her minor child, the district court did not abuse its discretion in awarding restitution for the victim's mother. ***State v. Allison***, A22-0793, 999 N.W.2d 835 (Minn. 1/10/2024).

Postconviction: Where the state claims a claim is procedurally barred, the district court must make an explicit determination, with a sufficient explanation, as to whether the claim is barred. Appellant was charged with possession of a firearm by an ineligible person after a handgun was found in the trunk of his car. At trial, he argued the gun belonged to another passenger in the car. DNA analysis from a swab of the gun showed the major DNA profile on the gun matched appellant. Appellant argued his DNA was transferred via indirect contact, but a BCA agent testified that she would not expect an indirect contact DNA transfer to leave a major DNA profile. Appellant was convicted and the court of appeals affirmed. Appellant filed a postconviction petition arguing the BCA agent's testimony was false. The state claimed his petition was procedurally barred under *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976), because the basis of the false testimony claim was known but not raised at the time of appellant's direct appeal. The district court held an evidentiary hearing, after which it granted appellant a new trial. The state appealed, and the court of appeals reversed.

Knaffla held that, where a direct appeal has already been taken, all matters raised in the appeal and all claims known but not raised will not be considered in a later postconviction petition, with two exceptions: (1) a novel legal issue is presented, or (2) the interests of justice require review. In this case of first impression, the Supreme Court considers what record the district court makes in determining whether a claim is procedurally barred under *Knaffla* before granting postconviction relief.

The Court finds the district court's failure to address the state's properly raised *Knaffla* argument was an abuse of discretion. When such an argument is raised, the district court must make an explicit determination as to whether a claim is procedurally barred, with a sufficient explanation, before granting postconviction relief.

The Court concludes that appellant's postconviction petition was procedurally barred, because appellant knew the substance of the BCA agent's DNA testimony, and that it was allegedly false, at the time of his direct appeal. ***Gilbert v. State***, A21-1560, 2024 WL 173117 (Minn. 1/17/2024).

Juveniles: When the state moves to terminate a continuance for dismissal, the district court retains jurisdiction over the termination hearing until the defendant turns 21. Appellant assaulted his nine-year-old niece when he was 15 years old, and a delinquency petition was filed alleging two counts of criminal sexual conduct. One count was dismissed and prosecution on the second was suspended pursuant to a continuance for dismissal (CFD) under Minn. R. Juv. Delinq. P. 14. After multiple violations of the conditions of the CFD and extensions of the CFD period, just days before appellant turned 19, the state moved to terminate the CFD and resume prosecution. Three months later, the district court held a CFD termination hearing at which appellant admitted he violated the CFD agreement. During a stipulated facts trial, appellant argued the court lacked subject matter jurisdiction. The district court ultimately adjudicated appellant delinquent.

Generally, the district court's juvenile jurisdiction ends when a juvenile turns 19. Minn. Stat. §260B.193, subd. 5(a). However, the jurisdiction is extended to "conduct a trial... if: (1) an adult is alleged to have committed an offense before the adult's 18th birthday; and (2) a [delinquency] petition is filed... before the adult's 21st birthday." *Id.* at subd. 5(c). Appellant argues that the district court lost all jurisdiction over the pretrial proceedings when he turned 19 and, as a CFD termination hearing is not a "trial," the court lacked jurisdiction to conduct the termination hearing after he turned 19.

The court of appeals finds that the only reasonable interpretation of section 260B.193 is that "conduct a trial" encompasses pretrial proceedings, including CFD termination hearings. This interpretation is supported by the plain language of section 260B.193 and Rule 14 and the interplay between the statute and rule. The district court is affirmed. ***In the Matter of M.A.B.***, A23-0752, 2024 WL 220371 (Minn. Ct. App. 1/22/2024).

Firearms: "Likely" in the manner-of-use definition for "dangerous weapon" means "probable or reasonably expected." Appellant was charged with second-degree riot for organizing two intersection "takeovers," during which vehicles and pedestrians were used to block off urban intersections to allow drivers to spin donuts while passengers hung out the spinning vehicles' windows. The district court granted appellant's motion to dismiss for lack of probable cause, finding no probable cause for the dangerous weapon element of the offenses. On the state's appeal, the Minnesota Court of Appeals reversed.

Second-degree riot is committed when, among other elements, a person is armed with a dangerous weapon during a riot or knows another participant is armed with a dangerous weapon. Minn. Stat. §609.71, subd. 2. "Dangerous weapon" is defined to include any "device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm..." *Id.* at §609.02, subd. 6.

The Supreme Court examines the statute's use of "likely," finding first that it has not been previously defined in statute or case law. Most dictionary definitions equate "likely" with an unqualified "probable" or "reasonably expected." Based on these definitions, the Court holds that "likely" in the manner of use definition of a dangerous weapon means "probable or reasonably expected."

Here, the district court concluded that the vehicles were not used in a manner calculated to produce death or great bodily harm but failed to address whether the vehicles were used in a manner likely to produce death or great bodily harm. Video evidence showed the spinning cars with passengers hanging out of the vehicles and in close proximity to spectators, with one video showing a vehicle strike and launch a spectator in the air. From this evidence, a reasonable juror could have concluded that death or great bodily harm was a probable or reasonably expected result. Thus, the district court erred when it dismissed the charges against appellant for lack of probable cause. ***State v. Abdus-Salam***, A22-1551, 2024 WL 252951 (Minn. 1/24/2024).

Criminal sexual conduct: Residence of a runaway child's custodial parent determines venue for prosecuting alleged abuse of the child. After meeting a 14-year-old online, 38-year-old appellant chatted with her for two months, lying about his age and engaging her in sexual conversations. The victim ran away from her mother's house in Stearns County to a friend's house in Benton County. Appellant picked up the victim and her friend, brought them to a hotel in Hennepin County, and had sexual intercourse with the victim. Police found the victim at her friend's house, and appellant was later convicted of third-degree criminal sexual conduct. Among other arguments on appeal, appellant claims the state did not offer sufficient evidence of venue in Stearns County.

Under Minn. Stat. §627.15, "[a] criminal action arising out of an incident of alleged child abuse may be prosecuted either in the county where the alleged abuse occurred or the county where the child is found." This statute does not define "child abuse," but the court of appeals looks to section 260C.007, subdivision 5, which does. This definition of "child abuse" includes third-degree criminal sexual conduct, as do the third-degree assault and first-degree murder statutes' definitions of "child abuse." *See* Minn. Stat. §§609.185(d); 609.223, subd 2. The court holds that third-degree criminal sexual conduct qualifies as "child abuse" for determining venue. Thus, the state was required to prove beyond a reasonable doubt that the victim was found in Stearns County.

Previous cases established that a child is "found," among other options, where he or she resides. Case law also indicates a child's residence is generally determined by the custodial parent(s). Here, because the victim resided with her mother in Stearns County, the state offered sufficient evidence to prove she was "found" in Stearns County. The court notes that the victim's runaway status is irrelevant, because (1) this victim was known to run away from home but always returned to her mother's residence, and (2) as a minor, a runaway child has no authority to legally change their residence. Appellant's conviction is affirmed. ***State v. Seivers***, A22-0054, 2024 Wl 315609 (Minn. Ct. App. 1/29/2024).

Harassment: A temporary HRO is in effect before a hearing on a harassment petition, but not after. Appellant was in a romantic

relationship with C.J. that ended contentiously. C.J. was issued an *ex parte* temporary harassment restraining order (HRO) against appellant on 4/30/2020. Appellant requested a hearing, which was held on 8/19/2020. The record contains no evidence the district court issued an HRO on or after the hearing date. On 8/28/2020, C.J. reported appellant for violating an HRO for calling her and leaving three voicemails. The state thereafter charged appellant with stalking and three counts of violating an HRO. A jury found appellant guilty on all counts. The court of appeals considers appellant's argument that the state failed to prove an HRO was in effect at the time of the alleged offenses.

Stalking is committed if an actor commits "two or more acts within a five-year period that violate or attempt to violate," among other things, an HRO, the actor knows or has reason to know the acts "would cause the victim under the circumstances to feel terrorized or to fear bodily harm," and the acts "cause this reaction" by the victim. Minn. Stat. §609.749, subd. 5(a) and (b). To prove a violation of an HRO, the state must prove an order was in effect, the actor knew of the order, and the actor violated the order. *Id.* at §609.748, subd. 6(b).

When a petition for an HRO is filed, the respondent may request a hearing. *Id.* at subd. 4(e). If a temporary HRO was ordered prior to the hearing, the temporary HRO remains "in effect until a hearing is held on the issuance of a restraining order..." *Id.* at subd. 4(d). The court examines the meaning of "until" as used in subdivision 4(d). The most common dictionary definition is "up to the time of." The court notes that subdivision 4(b) provides that a temporary HRO becomes effective upon the referee's signature, which the court finds makes it apparent that subdivision 4(d) specifies when a temporary HRO ceases to be effective. Moreover, practically speaking, an HRO hearing is to determine if a petitioner is entitled to an HRO. If a hearing is held and the petitioner does not establish reasonable grounds for an HRO, there is no reason for a temporary HRO to remain in effect.

In this case, no HRO was issued after the hearing on C.J.'s harassment petition. Thus, when appellant contacted C.J. three times after the hearing date, there was no HRO in place. As such, the evidence was insufficient to support appellant's convictions. ***State v. Ickler***, A22-0079, 2024 WL 315611 (Minn. Ct. App. 1/29/2024).

Samantha Foertsch
Bruno Law PLLC
samantha@brunolaw.com

Stephen Foertsch
Bruno Law PLLC
stephen@brunolaw.com

Environmental Law

JUDICIAL LAW

MN Court of Appeals finds no MEPA EAW needed for Duluth hotel. The Minnesota Court of Appeals recently found in favor of the Duluth City Council's decision not to require an environmental assessment worksheet (EAW) under the Minnesota Environmental Protection Act (MEPA) for a to-be-developed hotel. In doing so, the court grappled with questions involving administrative law, MEPA requirements, and the authority of a municipality's individual boards and commissions.

The Minnesota Legislature enacted MEPA, codified in Minn. Stat. §116D.01 *et seq.*, in 1973 to promote environmental protection. MEPA requires an EAW for development or projects if certain conditions are met. The EAW is "a brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action." An EAW is required upon the submission of a petition signed by at least 100 individuals, and material evidence demonstrating that "there may be potential for significant environmental effect." The petition is submitted to the Minnesota Environmental Quality Board (EQB), which then determines the appropriate responsible government unit (RGU) for review of the petition. The RGU then has 15 days to determine whether an EAW is necessary.

On 3/14/2023, the EQB notified the City of Duluth that it received a petition for an EAW for a new hotel project. Duluth's planning commission evaluated the petition and weighed factors prescribed under Minn. R. 4410.1700. The planning commission heard public comments, and ultimately voted in favor of requiring an EAW.

The developer, Kinseth Hospitality Companies, appealed the decision to the Duluth City Council. The crux of Kinseth's appeal was that the decision should be reversed because the concerns in the petition—hydrology, watershed, floodplain, and thermal impacts—had already been fully considered by Duluth's administrative process. The city council determined that the record did not support requiring an EAW and reversed the planning commission's decision.

A petitioner then filed for a writ of *certiorari* with the court of appeals. The petitioner alleged three errors: (1) Duluth erred when it allowed the city council to step into the role as the RGU; (2) the city council surpassed its authority under the Duluth legislative code by hearing Kinseth's appeal; and (3) the city council's decision in denying the EAW petition was arbitrary and capricious.

On the petitioner's first argument, the court concluded that the EQB properly designated the City of Duluth as the RGU, *not* any specific commission or department of the city. This designation was consistent with MEPA and its associated rules, thereby allowing the city council the ability to act as the RGU.

Regarding the second argument, the petitioner claimed that the Duluth code did not give the city council any review authority. The court disagreed, undertook an analysis of the Duluth code, and determined that the city council had proper authority to review the decision of the planning commission. The court also recognized that state statute and the Duluth city charter gave the city council authority to act as a board of appeal in certain administrative matters.

Finally, the petitioner's third argument fared no better. The petitioner contended that the city council failed to comply with MEPA, and acted arbitrarily and capriciously, when it overturned the planning commission's decision. The court found that the record demonstrated the contrary. The city council reviewed the EAW petition, provided detailed findings and evaluated each factor under the rules, held a public hearing, and adopted council staff findings before voting to reverse the planning commission. There was no evidence in the record that the city council acted arbitrarily or capriciously.

Rejecting all three of petitioner's claims, the court of appeals affirmed the city council's determination that an EAW was not required

for Duluth's hotel project. ***In re Resolution Reversing the Planning Commission's Decision to Grant the Petition for an Environmental Assessment Worksheet (EAW) for a Hotel at Sundby Road and West Page Street***, 2024 WL 321990, Case No. A23-0792 (Minn. Ct. App. 1/29/2024).

U.S. District Court of MN denies MPCA violated farmer's constitutional rights. In January the U.S. District Court for the District of Minnesota issued an opinion granting a motion to dismiss arising from a claim that four employees of the Minnesota Pollution Control Agency (MPCA) violated a Minnesota livestock farmer's due-process and free-speech rights under the U.S. and Minnesota Constitutions.

The plaintiff owns a cow/calf operation, where animals are generally raised on pastures under less regulation, and a separate feedlot, which are regulated by the MPCA. Under its general statutory authority, MPCA is authorized to issue and deny permits for livestock feedlots and may pursue civil penalties in order to promote waste disposal and improve air quality. Minn. Stat. §§116.02, 116.07.

In 2015, the plaintiff applied for a National Pollutant Discharge Elimination System (NPDES) feedlot permit, and the permit was issued in 2016. Subsequently, the plaintiff requested an NPDES permit modification to make changes to some of his buildings and land. However, in 2017, MPCA conducted an inspection, determined the modifications to be "major," and delayed issuing the modified NPDES permit, which resulted in MPCA issuing the plaintiff an alleged violation letter and monetary penalty. In 2018, the plaintiff filed suit against MPCA over the agency's decision to delay issuing the modified NPDES permit.

In 2019, the plaintiff successfully petitioned the Legislature to change the definition of "pastures" in a way that benefited the plaintiff and his permit issues. In 2021, MPCA sued the plaintiff in Douglas County District Court over unauthorized discharges from his feedlot, seeking a civil penalty of over $150,000.

In April 2023, the plaintiff filed the current suit, asserting that the MPCA defendants violated substantive and procedural due process rights guaranteed him under the 14th Amendment to the U.S. Constitution and Article I, Section 7 of the Minnesota Constitution, and that the MPCA defendants undertook enforcement activities in retaliation to plaintiff's 1st Amendment rights. The MPCA defendants moved to dismiss.

The plaintiff argued that the MPCA defendants violated "a constitutionally enforceable liberty interest and a fundamental right to operate his animal feedlot and to engage in farming activities on his property." In rejecting this argument, the court held that the plaintiff had failed to allege facts showing the violation of any fundamental right, stating that the 8th Circuit has explicitly declined to recognize farming as a fundamental right. *United States v. White Plume*, 447 F.3d 1067, 1075 (8th Cir. 2006).

Similarly, plaintiff claimed he was deprived of property in violation of his procedural due process rights, stemming from his claim of a property interest in the modified NPDES permit for which he applied. Again, the court turned to the Supreme Court, which held that to have a property interest under the 14th Amendment, a person must have a "legitimate claim of entitlement" to the property. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). The court emphasized the general rule that when a state gives the issuing agency (in this case, the MPCA) discretion to approve or deny a permit, it does not create a property interest. State regulations make clear that MPCA shall issue a permit if it determines the permittee will achieve compliance with all applicable state and federal pollution control statutes and rules. Minn. R. 7001.0140. Therefore, the court held, MPCA has the discretion to determine whether the applicant will comply with statutes, rules, and conditions before issuing the permit, and thus does not convey a property right when issuing or denying the permit.

Finally, the plaintiff claimed the MPCA defendants retaliated against him, by delaying issuance of the modified NPDES permit and seeking a civil penalty, for exercising his 1st Amendment rights of disputing MPCA's legal authority, contesting MPCA's enforcement activities, and petitioning the Legislature to clarify the law governing pastures, which benefited the plaintiff. Applying the three-part test from *Scheffler v. Molin*, 743 F.3d 619, 621 (8th Cir. 2014), the court held that while the MPCA defendants acknowledged that the plaintiff engaged in constitutionally protected activity, and while it was possible that the withholding of the modified NPDES permit and the penalty sought thereafter would "chill a person of ordinary firmness from engaging in protected activity," the plaintiff had failed to demonstrate "that the adverse action was motivated in part by plaintiff's exercise of his constitutional rights."

As a result, the court granted the MPCA defendants' motion to dismiss, and dismissed (partially with prejudice, partially without prejudice) the plaintiff's claims as asserted in the amended complaint. ***Wagner v. Scheirer***, D. Minn. (1/24/2024) Slip Copy 2024, WL 264660.

5th Circuit applies *Sackett* to find no federal jurisdiction over wetlands. Landowners questioning whether their wetland properties are governed by the Clean Water Act struggled for decades to get an answer to that question. On 12/18/2023, the 5th Circuit said, "Enough is enough." In *Lewis v. United States*, the court held that the Supreme Court's *Sackett v. EPA* decision controlled the determination of what wetlands are "waters of the United States" and therefore subject to the federal Clean Water Act's section 404 "dredge and fill" permitting program. The *Sackett* Court defined "waters of the United States" as including only "wetlands [that] have 'a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands.'" (Quoting *Sackett v. EPA*, 598 U.S. 651 (2023).)

The *Lewis* case began in 2013, more than a decade before it was decided, when Lewis sought a United States Army Corps of Engineers' Approved Jurisdictional Determination—a Corps document stating whether waters of the United States are present on a parcel and identifying the boundaries of waters of the United States on a parcel. *See* 33 C.F.R. §331.2. Lewis wanted to develop two 20-acre lots that had been used primarily as a pine timber plantation. Two years later, the Corps issued an Approved Jurisdictional Determination that effectively subjected all 40 acres to the Clean Water Act. Lewis appealed and received a second, substantially similar determination in 2017.

Litigation followed. The 5th Circuit stayed consideration of the appeal pending

the Supreme Court's determination in *Sackett*. The court heard oral arguments and requested renewed briefing after *Sackett* was released. *See Lewis*, 88 F.4th at 1077.

In its December 2023 opinion, the *Lewis* court swiftly concluded that under *Sackett*, Lewis's property plainly did not include waters of the United States. The court noted that "the nearest relatively permanent body of water is removed miles away from the Lewis property by roadside ditches, a culvert, and a non-relatively permanent tributary." The court also looked to photographs, which, the court found, revealed "no 'continuous surface connection' between any plausible wetlands on the Lewis tracts and a 'relatively permanent body of water connected to traditional interstate navigable waters.'" *Id.* Thus, the court concluded, "There is no factual basis as a matter of law for federal Clean Water Act regulation of these tracts."

The remainder of the court's short decision addressed whether the case was moot because the government attempted to unilaterally withdraw the most recent Approved Jurisdictional Determination. The court concluded that the case was not moot because the voluntary cessation exception applies and because an Approved Jurisdictional Determination is a final agency order subject to appeal. A single judge concurred but would have rested on voluntary cessation and declined to address whether an Approved Jurisdictional Determination was a final agency order subject to appeal.

Although the *Lewis* decision reads like a straightforward application of a U.S. Supreme Court case, it may be a sign of more to come. The EPA has promulgated controversial waters of the United States rules, which in the view of critics encompass substantially more waters than the rule established in *Sackett*. The *Lewis* court did not even consider these rules in its interpretation, which suggests that courts may be willing to move away from deference to the EPA on its interpretation of its own rules. As more circuit courts apply *Sackett* in the coming year, the extent to which each considers EPA's rules will be worth watching for. ***Lewis v. United States***, 88 F.4th 1073, 1076 (5th Cir. 2023).

SCOTUS denies *certiorari*, leaving Minnesota climate case to proceed in state court. In January, the U.S. Supreme Court ruled that the state of Minnesota's lawsuit against major actors in the fossil-fuel industry may proceed in state court. Without comment, the Court denied the petition of ExxonMobil, the American Petroleum Institute, and three Koch Industries entities to review lower-court decisions that remanded the case to state court.

Minnesota is one of several states and municipalities using its consumer protection laws to sue big oil companies, alleging that their deceptive advertising and messaging practices mislead consumers about the harmful environmental effects of fossil fuel burning.

On 6/24/2020, Minnesota Attorney General Keith Ellison sued American Petroleum Institute (API), Exxon Mobil Corporation, ExxonMobil Oil Corporation, Koch Industries, Inc., Flint Hills Resources LP, and Flint Hills Resources Pine Bend in Ramsey County District Court. The state asserted five causes of action for violations of Minnesota common law and consumer protection statutes related to the companies' alleged misinformation campaign: (1) violations of the Minnesota Consumer Fraud Act (Minn. Stat. §325F.69); (2) failure to warn under common law theories of strict liability and negligence, against all defendants except API; (3) common law fraud and misrepresentation; (4) violations of the Minnesota Deceptive Trade Practices Act (Minn. Stat. §325D.44); and (5) violations of the Minnesota False Statement in Advertising Act (Minn. Stat. §325F.67). The state seeks restitution for the harms Minnesotans have suffered and requests that that the companies be required to fund a corrective public education campaign on the issue of climate change.

On 7/27/2020, the companies removed the case to United States District Court for the District of Minnesota on seven grounds: (1) the claims arise under federal common law; (2) the action raises disputed and substantial federal issues that must be adjudicated in a federal forum (the "Grable doctrine"); (3) removal is authorized by the federal officer removal statute (28 U.S.C. §1442(a)(1)); (4) federal jurisdiction arises under the Outer Continental Shelf Lands Act 43 (U.S.C. §1349(b)); (5) the claims are based on conduct arising out of federal enclaves; (6) the action is actually a class action governed by the Class Action Fairness Act (28 U.S.C. §1332(d), 28 U.S.C. §1453(b)); and (7) the court has diversity jurisdiction under 28 U.S.C. §1332(a), on the theory that the real parties in interest are not the state, but the citizens of Minnesota.

On 8/26/2020, the state moved to remand the case to state court, arguing that the federal district court lacks subject matter jurisdiction because (a) neither federal common law nor the Grable doctrine apply; (b) no federal enclaves are implicated; (c) the Outer Continental Shelf Lands Act is not implicated; (d) the federal officer removal statute does not apply; (e) the suit is not a "class action" and therefore not subject to the Class Action Fairness Act; and (f) the suit was brought by the state, which is not a citizen for purposes of diversity jurisdiction. On 3/31/2021, the United States District Court for the District of Minnesota concluded that it lacked jurisdiction over the action and remanded the action to state court.

The companies subsequently appealed the ruling to the U.S. Court of Appeals for the 8th Circuit, and on 3/23/2023, the 8th Circuit affirmed the lower court's decision to remand the matter to state court. In siding with the state, the court joined several other circuit courts that have arrived at similar conclusions in recent months, including the 1st, 3rd, 4th, 9th, and 10th Circuits. On 1/8/2024, the U.S. Supreme Court denied the companies' writ of *certiorari* requesting review of the 8th Circuit decision. ***Am. Petroleum Inst. v. Minnesota***, 601 U.S. ___, 23-A-168 (1/8/2024) (denying writ of *certiorari*).

ADMINISTRATIVE ACTION

EPA imposes a lower health-based standard under the Clean Air Act for greater control of soot pollution. On 2/7/2024, the United States Environmental Protection Agency (EPA) issued a final rule to lower the annual health-based national ambient air quality standard (NAAQS) for fine particulate matter ($PM_{2.5}$), also known as soot, from 12 micrograms per cubic meter to 9 micrograms per cubic meter. Fine particles are emitted directly from sources such as vehicles, smokestacks, and fires. Fine particles also can form from reactions in the atmosphere caused by gases emitted by power plants, industrial processes, and gaso-

line and diesel engines.

The EPA's lowering of the primary NAAQS standard is expected to most benefit those for whom fine particulate matter can be dangerous and even deadly. These include children, older adults, people with health conditions like heart or lung disease, cancer, or asthma, and communities of color and low-income communities overburdened by pollution. The EPA also predicts the change will "make all people healthier."

Although the NAAQS must be reviewed every five years per the Clean Air Act, this is the first time that the EPA has lowered the PM standard in over a decade. In this new rule, the EPA retained a 24-hour standard for $PM_{2.5}$ at the current level because the available scientific evidence and information did not call into question its adequacy. The agency also decided for the same reason not to change the PM_{10} standards, which regulate small and coarse particles as opposed to fine particles.

Although most counties in the United States with monitors already meet the lower $PM_{2.5}$ standard according to 2020-2022 air monitoring data, this new rule will make that attainment mandatory. Nonattainment areas identified by monitoring data collected between 2022 and 2024 will have to be brought into compliance. The EPA generally makes designations of attainment or nonattainment within two years after a new standard is issued. The EPA will work with the states through the designation process, and there will be opportunity for public comment. States will likely have to ensure the new standard is met by 2032 at the earliest.

In connection with this rule, the EPA plans to issue rules to reduce pollution from power plants, vehicles, and industrial facilities to support implementation of the new standard. The EPA has indicated investments under the Inflation Reduction Act and the Bipartisan Infrastructure Law will support this cause as well. The EPA also plans to revise the Air Quality Index and ambient air monitoring requirements to account for the new standard. Revised monitoring requirements will include a particular focus on communities that are subject to disproportionate air pollution risk, such as communities of color and low-income communities.

EPA is considering in a separate review whether to change the secondary NAAQS for particulate matter, as well as for oxides of nitrogen and oxides of sulfur. The secondary NAAQS is designed to address welfare-based concerns, such as haze and effects on the climate, as opposed to health-based concerns. The role of a policy assessment is to present the EPA administrator with a scientific assessment and technical analyses to help with the decision on whether to retain or revise a NAAQS. The next step is publication of a notice of proposed rulemaking that will communicate the agency's proposed decision. Environmental Protection Agency, **"Policy Assessment for the Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen, Oxides of Sulfur and Particulate Matter"** (1/12/2024). *https://www.epa.gov/system/files/documents/2024-01/noxsoxpm-final.pdf*

■ **EPA updates soil lead guidance to protect children from lead exposure in residential areas.** For many years, the Environmental Protection Agency (EPA) has prioritized reducing lead exposure from sources such as paint, water, ambient air, and soil and dust contamination. This is an especially important undertaking for protecting children, who are the people most vulnerable to the effects of lead exposure and lead poisoning.

On 1/17/2024, the EPA released an updated soil guidance aimed at reducing lead exposure at Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) sites and Resource Conservation and Recovery Act (RCRA) Corrective Action Facilities in a manner consistent with the best available science. Specifically, the new guidance lowers the recommended screening levels for lead in soil at residential properties from 400 parts per million (ppm) to 200 ppm. At residential properties with multiple sources of lead exposure such as lead in air and water, the EPA will generally use 100 ppm as the screening level.

The EPA's previous approach for evaluating and cleaning up Superfund and RCRA Corrective Action sites with soil lead contamination was detailed in an EPA guidance issued in 1994 (i.e., the Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities) and was based on a widely recognized scientific understanding that a blood lead level above 10 µg/dL was associated with adverse health outcomes in children. The science on this topic has since evolved and now indicates that adverse health effects occur at lower levels than previously known (i.e., <10 µg/dL) and that exposure comes from additional sources of lead other than contaminated soil and dust (e.g., lead water service lines, lead-based paint, or non-attainment areas where the air lead concentrations exceed National Ambient Air Quality Standards).

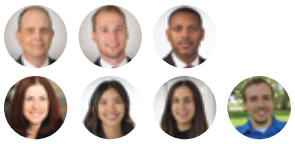
Regarding implementation, the EPA notes that the guidance's new thresholds should apply to both existing and new sites. The agency specifically says that this guidance "should be considered for all residential lead sites subject to CERCLA response and RCRA Corrective Action authorities, including those previously addressed and/or deleted from the [National Priorities List]" and "[e]valuations of previously addressed sites could be conducted in support of a CERCLA five-year review or other technical review."

The agency expects that this update will have the effect of inducing the evaluation and cleanup at a "significant number" of residential properties. Accordingly, the agency does not expect EPA regions to address all properties immediately, and it will prioritize areas based on risks to people and the environment, generally focusing its initial efforts in areas where children currently live and play and where the EPA hasn't already conducted cleanup work.

The guidance provides that during this process of prioritizing residential lead sites for evaluation and potential cleanup, the EPA's Office of Land and Emergency Management will continue to recommend early risk reduction strategies, including a combination of engineering controls (e.g., reliable barriers to mitigate risk from lead exposure) and non-engineering response actions (e.g., education and health intervention programs in conjunction with exposure reduction actions like institutional controls). As part of the overall site management strategy, the EPA recommends that EPA regions collaborate with the legal authorities in federal, local, state, and tribal agencies to address sources of lead exposure in communities.

Updating the residential soil lead guidance is a major milestone in the EPA's Agencywide Strategy to Reduce Lead Exposures and Dis-

parities in U.S. Communities and it aligns with the goals outlined in the Federal Action Plan to Reduce Childhood Lead Exposures and Associated Health Impacts. While the updated guidance goes into effect immediately, the public is invited to submit feedback that the EPA may consider in any future updates to the guidance. Environmental Protection Agency, **"Updated Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities"** (1/17/2024).



Jeremy P. Greenhouse, Cody Bauer Ryan Cox, Vanessa Johnson, Molly Leisen, and Shantal Pai – Fredrikson & Byron P.A.
Jake Beckstrom – Vermont Law School 2015

Federal Practice
JUDICIAL LAW

Attempted second amendment of a complaint as of right denied. Where defendants brought a second motion to dismiss after the case was remanded from the 8th Circuit; the plaintiff attempted to file an amended complaint "as of right" pursuant to Fed. R. Civ. P 15(a)(1)(B), contending that each motion to dismiss triggered a new right to amend; and the defendants moved to strike the amended complaint, Judge Wright "reject[ed]" the amended complaint and granted the motion to strike, finding that "a party is entitled to a single 21-day period for amending as a matter of course." ***Core & Main, LP v. McCabe***, 2023 WL 7017781 (D. Minn. 10/25/2023).

Refusal to permit filing of sur-reply on summary judgment; abuse of discretion. Where the defendant produced "highly probative" discovery several weeks after the plaintiff filed her opposition to the defendant's summary judgment motion, and the district court denied without explanation the plaintiff's subsequent motion for leave to file a sur-reply to present this new information to the court, the 8th Circuit found that the denial of the sur-reply motion was an abuse of discretion, "at least to the extent the denial meant the district court did not consider this highly probative evidence." ***Lightner v. Catalent CTS (Kansas City) LLC***, 89 F.4th 648 (8th Cir. 2023).

28 U.S.C. §1442(a); federal officer removal rejected; no "basic governmental task." The 8th Circuit affirmed a district court's remand of an action removed by a healthcare provider under 28 U.S.C. §1442(a), finding that the provider's creation of an online patient portal was not a "basic governmental task," and that the provider "did not function in practice as a federal instrumentality." ***Doe v. BJC Health System***, 89 F.4th 1037 (8th Cir. 2023).

Awards of pre- and post-judgment interest; no abuse of discretion. Where the prevailing plaintiff failed to move for an award of pre- and post-judgment interest, the 8th Circuit found no abuse of discretion with the trial court's award of pre-judgment interest absent a motion where prejudgment interest was requested in the complaint. Similarly, the 8th Circuit found no abuse of discretion in the trial court's award of post-judgment interest because it is "mandatory" under 28 U.S.C. §1961. ***Conti-tech USA, Inc. v. McLaughlin Freight Servs., Inc.***, ___ F.4th ___ (8th Cir. 2024).

Denial of post-judgment motion for leave to amend affirmed. Finding that the plaintiff's proposed second amended RICO complaint was "both untimely and futile," the 8th Circuit affirmed a district court's denial of the plaintiff's post-judgment motion to amend. ***UMB Bank, N.A. v. Guerin***, 89 F.4th 1047 (8th Cir. 2024).

Diversity jurisdiction; amount in controversy; monthly insurance payments. Where the plaintiff filed an action in the Minnesota courts seeking a declaration that disability insurers had improperly reduced his monthly benefit by $6,000; the insurers removed on the basis of diversity jurisdiction; the plaintiff moved to remand, arguing that at the time of removal he had only received reduced benefits for a single month; and the insurers argued that the amount in controversy was more than $1.2 million based on the disputed monthly payment and the plaintiff's life expectancy, Chief Judge Schiltz determined that the amount in controversy was to be measured at the time of removal, and remanded the action because the amount in controversy fell far short of $75,000. ***Ziman v. Unum Group***, 2023 WL 8868836 (D. Minn. 12/22/2023).

Fed. R. Civ. P. 26(a)(2) and 37(c)(1); untimely supplemental expert report excluded. Judge Tostrud excluded an expert's untimely supplemental report, finding no justification for the late report, and noting that "Fixing flaws exposed at a deposition is not a valid justification for late supplemental report." ***Keller Indus., Inc. v. Eng'g & Constr. Innovations, Inc.***, 2024 WL 198999 (D. Minn. 1/18/2024).

Late disclosures; motion to compel and for sanctions; sanctions imposed. Where several plaintiffs in a series of related employment discrimination actions made late supplemental disclosures, the defendant moved to compel additional information and to reopen depositions, and the plaintiffs failed to oppose the motion, Magistrate Judge Docherty granted most of the motion to compel, granted the defendant's request for sanctions in an amount to be determined, and warned plaintiffs that their failure to comply with the order "*will* result in sanctions, specifically a recommendation that this case be dismissed *with prejudice*." (Emphasis in original.) ***Wingo v. 3M Co.***, 2023 WL 8714499 (D. Minn. 12/18/2023).

28 U.S.C. §1292(b); motion to certify questions for interlocutory appeal denied. Judge Tunheim denied the defendants' motion to certify pursuant to 28 U.S.C. §1292(b), finding that not all controlling questions were issues of law, defendants failed to establish a substantial ground for difference of opinion on most of the claims, and that certification "would not materially advance the ultimate termination of litigation." ***State of Minnesota v. Fleet Farm LLC***, 2024 WL 22102 (D. Minn. 1/2/2024).

Request for post-judgment certification to Minnesota Supreme Court denied. Judge Tostrud denied the plaintiff's post-judgment request to certify a question of Minnesota law to the Minnesota Supreme Court, finding that it was not the "rare case where post-judgment certification is warranted." ***Kuklenski v. Medtronic USA, Inc.***, 2024 WL 165248 (D. Minn. 1/16/2024).

Fed. R. Civ. P. 8(a)(2); "kitchen sink" or "shotgun" pleading. Dismissing all the plaintiff's federal claims with prejudice for multiple reasons, Judge Frank criticized the *pro*

se plaintiff's complaint, which ran 525 paragraphs and included almost 500 pages of exhibits, as not meeting the "short and plain statement" requirement of Fed. R. Civ. P. 8(a)(2). ***Nygard v. City of Orono***, 2024 WL 69927 (D. Minn. 1/5/2024).

Fed. R. Civ. P. 22; interpleader; attorney's fees. Resolving a dispute over the proceeds of a life insurance policy in an interpleader action, Judge Blackwell awarded the insurer only a "modest" portion of its requested attorney's fees, finding that most of its fees could have been avoided had it brought a discharge motion instead of waiting for the case to be decided on summary judgment. ***Banner Life Ins. Co. v. Bultman***, 2024 WL 86313 (D. Minn. 1/8/2024).

Service on registered agent; timing of removal; equitable estoppel rejected. Where the plaintiff attempted to serve the defendant by mail via its registered agent but the registered agent had moved and the mailing was returned, the plaintiff then served the defendant via Commissioner of Commerce and the defendant removed the action more than 30 days after the commissioner was served but within 30 days of when it received the service, Judge Wright rejected the plaintiff's argument that the defendant was equitably estopped from arguing that its removal was timely as a result of its failure to update the correct address of its registered agent with the commissioner, and denied the plaintiff's motion to remand. ***Broadhead, LLC v. AXIS Ins. Co.***, 2024 WL 111137 (D. Minn. 1/10/2024).

Fed. R. Civ. P. 68; FDCPA; request for attorney's fees reduced. Finding that time spent in connection with state court matters was not compensable, that time spent after acceptance of a Rule 68 offer of judgment was excessive, and reducing the attorney's hourly rate from $450 to $350 an hour, Judge Menendez reduced an attorney's fee requested from more than $29,000 to just over $12,000. ***Woodward v. Credit Serv. Int'l Corp.***, 2024 WL 228454 (1/22/2024).

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

Immigration Law

JUDICIAL LAW

BIA failed to meet requirements for reasoned decision-making when it issued a single sentence explanation. On 2/1/2024, the 8th Circuit Court of Appeals reversed the Board of Immigration Appeals' (BIA) denial of the petitioner's appeal to reopen his case. The petitioner, a Liberian citizen, was admitted as an asylee to the United States in 2008. Following several criminal convictions, USCIS issued a Notice of Intent to Terminate Asylum Status and placed him in removal proceedings. The petitioner conceded removability but requested a waiver of inadmissibility for humanitarian purposes, which was denied by the immigration judge (IJ). His appeal to the BIA was also unsuccessful, but the case was remanded to the IJ for the sole purpose of determining if his asylum status should be terminated since the IJ failed to explicitly decide that question.

While on remand to the IJ, the petitioner began to consistently take psychiatric medications for his mental health symptoms—depression, bipolar disorder, schizophrenia, and post-traumatic stress disorder. With an improvement in his condition, the petitioner shared new information with his attorney about his mental health struggles and trauma suffered in Liberia. His attorney followed up with a motion to reopen his case before the IJ. The IJ denied the motion, finding the BIA's remand was restricted solely to the issue of termination of asylum because that body retained jurisdiction. The IJ also formally terminated the petitioner's asylum and ordered his removal to Liberia. The BIA, following an appeal, held that the IJ did indeed have jurisdiction over the new claims and additional evidence. It noted, however, that the petitioner failed to meet the motion to reopen standard requiring him to show "evidence of his mental health issues and of his past and feared harm if returned to Liberia are new, previously unavailable, or would likely change the result in his case."

On appeal to the 8th Circuit Court of Appeals, the petitioner argued the BIA failed to provide a reasoned explanation for its application of the motion-to-reopen standard. The court agreed, noting the BIA's single-sentence explanation did not meet the requirements for reasoned decision-making without spelling out how the elements of a motion to reopen applied to the petitioner's case. The court held the BIA's decision was an abuse of discretion, without rational explanation, and failed to consider all factors presented by the petitioner. The court granted the petitioner's petition for review and remanded the case to the BIA for further proceedings. ***Davis v. Garland***, Nos. 22-3262 and 23-1229, *slip op.* (8th Circuit, 2/1/2024). *https://ecf.ca8.uscourts.gov/opndir/24/02/223262P.pdf*

Guatemalan petitioner denied asylum based on a claim of threats received for father's unpaid debt. On 1/30/2024, the 8th Circuit Court of Appeals held that the petitioner neither demonstrated that he suffered past persecution on account of a protected factor, nor provided credible, specific evidence that a reasonable person in his position would fear persecution if returned to Guatemala. ***Gaspar-Felipe v. Garland***, No. 22-3372, *slip op.* (8th Circuit, 1/30/2024). *https://ecf.ca8.uscourts.gov/opndir/24/01/223372P.pdf*

BIA did not exceed permissible scope of review of immigration judge's decision by engaging in its own fact-finding. On remand from the Supreme Court following its 2023 decision in *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023) (noncitizen need not request discretionary forms of administrative review, like reconsideration of an unfavorable Board of Immigration Appeals (BIA) determination, to satisfy §242(d)(1)'s exhaustion requirement), the 8th Circuit Court of Appeals held that the BIA, while denying discretionary special rule cancellation of removal, permissibly weighed the evidence of nonphysical harm that the petitioner caused to his ex-girlfriend and her daughter differently than the immigration judge – all without impermissibly finding facts or disregarding the immigration judge's factual findings. The court found, furthermore, that it lacked jurisdiction to review the immigration judge's decision denying cancellation of removal as a matter of agency discretion. Nor, for that matter, did the petitioner's claim that the BIA's decision was internally inconsistent and unreasoned prove sufficient to establish jurisdiction. ***Mencia-Medina v. Garland***, No. 20-1724, *slip op.* (8th Circuit, 1/23/2024). *https://ecf.ca8.uscourts.gov/opndir/24/01/201724P.pdf*

■ **Court lacks jurisdiction to review BIA refusal to grant *sua sponte* relief.** In December, the 8th Circuit Court of Appeals held that it lacked jurisdiction to review the Board of Immigration Appeals' refusal to grant *sua sponte* relief to the petitioner while also denying his request for equitable tolling, finding that he attempted to raise new arguments for the first time in his petition for review. "Simply put, [he] petitions us to review issues on which the Board did not rule. Thus, he fails to comply with 8 U.S.C. §1252(d)(1)'s requirement to exhaust all administrative remedies...Whatever the merits, [he] should have articulated these arguments to the Board in either of his two motions, but he did not." ***Essel v. Garland***, No. 22-2615, *slip op.* (8th Circuit, 12/28/2023). *https://ecf.ca8.uscourts.gov/opndir/23/12/222615P.pdf*

■ **No ineffective assistance of counsel: Petitioner failed to show evidence of persecutory motive behind burning of his home in Guatemala.** In December, the 8th Circuit Court of Appeals found the immigration judge's denial of withholding of removal and Convention Against Torture (CAT) protection was supported by substantial evidence. The court concluded that the Board of Immigration Appeals (BIA) properly denied the petitioner's first motion to reopen based on ineffective assistance of counsel, reasoning that the petitioner's failure to know who was responsible for burning down his home in Guatemala foreclosed any reasonable likelihood of a persecutory motive. "Thus any failure of the IJ to further develop the record is immaterial." He was, consequently, not prejudiced by his counsel's presumptively deficient performance. The court held the BIA properly denied the petitioner's second motion to reopen based on *Mendez Rojas* class membership given his failure to qualify for class membership and lack of prejudice. ***Pascual-Miguel v. Garland***, Nos. 20-2397 and 23-1072, *slip op.* (8th Circuit, 12/27/2023). *https://ecf.ca8.uscourts.gov/opndir/23/12/202397P.pdf*

■ **Conviction for sexual abuse of a minor is an aggravated felony.** In December, the 8th Circuit Court of Appeals held the Board of Immigration Appeals (BIA) did not err when it adopted the generic federal definition of sexual abuse of a minor contained within the criminal procedure statute, 18 USC §3509(a)(8)—as opposed to 18 U.S.C. §2243(a)—to determine that the petitioner's Minnesota conviction for sexual abuse of a minor under Minn. Rev. Stat. Sec. 609.324 properly qualified as an aggravated felony. As such, "he is deportable." The court denied the petition for review. ***Aguilar-Sanchez v. Garland***, No. 22-3598, *slip op.* (8th Circuit, 12/4/2023). *https://ecf.ca8.uscourts.gov/opndir/23/12/223598P.pdf*

ADMINISTRATIVE ACTION

■ **USCIS issues initial instructions for FY2025 H-1B cap season.** In late January, U.S. Citizenship and Immigration Services (USCIS) announced updates for the FY2025 H-1B cap season, including, among other things, measures "to strengthen the integrity and reduce potential for fraud in the H-1B registration process." The initial registration period for the FY2025 H-1B cap will open at noon (ET) on 3/6/2024 and run through noon (ET) on 3/22/2024. **News Release**: "USCIS Announces Strengthened Integrity Measures for H-1B Program." (1/30/2024). *https://www.uscis.gov/newsroom/news-releases/uscis-announces-strengthened-integrity-measures-for-h-1b-program* **89 Fed. Reg. 7456** (2024). *https://www.govinfo.gov/content/pkg/FR-2024-02-02/pdf/2024-01770.pdf* For more information about the H-1B process, *see* **USCIS' H-1B Cap Season webpage**: *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-cap-season*

■ **DHS notices extending and/or redesignating TPS.**

Syria: On 1/29/2024, the U.S. Department of Homeland Security announced the extension of the designation of Syria for temporary protected status (TPS) for 18 months from 4/1/2024 through 9/30/2025. Those wishing to extend their TPS must re-register during the 60-day period running from 1/29/2024 through 3/29/2024. The secretary also redesignated Syria for TPS for an 18-month period, allowing Syrians to apply who have continuously resided in the United States since 1/25/2024 and been continuously physically present in the United States since 4/1/2024. The registration period for these new applicants, under the redesignation, runs from 1/29/2024 through 9/30/2025. **89 Fed. Reg. 5562** (2024). *https://www.govinfo.gov/content/pkg/FR-2024-01-29/pdf/2024-01764.pdf*

El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan: On 12/14/2023, the U.S. Department of Homeland Security (DHS) announced the lengthening of the re-registration periods for the extension of TPS designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan for Temporary Protected Status (TPS) from 60 days to the full 18-month designation extension period of each country. According to DHS Secretary Alejandro N. Mayorkas, "DHS is extending the re-registration periods for a number of reasons, including that certain beneficiaries have not been required to re-register for TPS for several years due to pending litigation and related continuation of their documentation, confusion within the beneficiary population, and operational considerations for USCIS." TPS re-registration periods are as follows: **El Salvador:** 7/12/2023 through 3/9/2025; **Haiti:** 1/26/2023 through 8/3/2024; **Honduras:** 11/6/2023 through 7/5/2025; **Nepal:** 10/24/2023 through 6/24/2025; **Nicaragua:** 11/6/2023 through 7/5/2025; **Sudan:** 8/21/2023 through 4/19/2025; **88 Fed. Reg. 86665** (2023). *https://www.govinfo.gov/content/pkg/FR-2023-12-14/pdf/2023-27342.pdf*

R. Mark Frey
Frey Law Office
rmfrey@cs.com

Intellectual Property

JUDICIAL LAW

■ **Copyright: Lack of sufficient creativity not protectable.** A panel of the United States Court of Appeals for the 8th Circuit recently affirmed a decision from United States District Court for the Western District of Missouri holding that copyright holder's asserted work lacked a sufficient degree of creativity to be protectable. Ronald Ragan developed a "guest sheet" intake form for use with prospective automotive customers and received a copyright registration in 1999. Circa 2000, Ragan claimed that a first auto dealership infringed his work. The lawsuit was later dismissed. In 2015, Berkshire Hathaway Automotive Inc. (BHA) acquired the other auto dealer and continued to use the form. Ragan sued BHA, alleging that BHA

copied the single-page car dealership customer intake form. BHA moved for judgment on the pleadings, asserting the guest sheet was not copyrightable. The district court granted BHA's motion and entered judgment against Ragan. Ragan appealed, arguing the district court erred. To meet the Copyright Act's originality requirement, a work must possess at least some minimal degree of creativity. Ragan argued that his guest sheet was elegant and distilled from years of experience. The panel held the guest sheet contained fewer than 100 words seeking basic information. The selection and arrangement of the words used as section headings and question prompts did not make the guest sheet copyrightable. The guest sheet does not tell a car salesperson how to do his or her job and is a form designed to record, not convey, information. For these reasons, the panel affirmed the district court's judgement in favor of BHA. ***Ragan v. Berkshire Hathaway Auto., Inc.***, No. 22-3355, 2024 U.S. App. LEXIS 2307 (8th Cir. 2/2/2024).

■ **Copyright: Court used 5x-fair-market-value multiplier to calculate statutory damages in default judgment.** Judge Brasel recently awarded plaintiff Steven Markos $15,000 in statutory damages in granting his motion for default judgment. In August 2023, Markos, a photographer, sued Downtown Resource Group, LLC (DRG), for use of Markos's copyrighted photograph of poet Henry Longfellow's house in Cambridge, Massachusetts. DRG removed the photograph from the website but did not answer or otherwise respond to the complaint. The clerk of court entered default. Markos moved for default judgment and sought statutory damages. The Copyright Act allows plaintiffs to choose between actual or statutory damages where statutory damages may be a substitute for unproven or unprovable actual damages. Statutory damages for a work range between $750 and $30,000. 17 U.S.C. §504(c)(1). If the copyright owner proves the infringement was willful, the maximum available amount is $150,000. Markos's complaint alleged allegations and facts sufficient to establish willful infringement, which in default must be taken as true. Markos sought $30,000 in statutory damages. In setting the award amount, the court found that courts generally multiply the fair market value of the copyrighted work to arrive at an award that properly compensates the plaintiff for the infringement and deters the defendant from committing future infringements. The court used a 5x multiplier and awarded Markos $15,000, which was five times the annual license fee for using the photographs for two years. ***Markos v. Downtown Res. Grp., LLC***, No. 23-CV-2459 (NEB/ECW), 2024 U.S. Dist. LEXIS 10415 (D. Minn. 1/22/2024).

Joe Dubis
Merchant & Gould
jdubis@merchantgould.com

Probate & Trust Law

JUDICIAL LAW

■ **Trustee removal: Trustee may be removed for a series of small breaches.** On 1/17/2023, the Minnesota Court of Appeals issued its decision in *In the Matter of the Otto Bremer Trust*. The Minnesota Supreme Court recently affirmed. The Supreme Court relied upon the official comments to the Uniform Trust Code in determining: "Under Minnesota Statutes section 501C.0706(b)(1) (2022), a district court may remove a trustee for a 'serious breach of trust,' which may involve a series of smaller breaches, none of which alone would justify removal, but which do justify removal when considered together." The court went further and noted that the intent of the settlor does not prevent a court from removing a trustee for breaching its fiduciary duties. ***In re the Matter of the Otto Bremer Trust***, __ N.W.3d __, 2024 WL 462587 (Minn. 2/7/2024).

Jessica L. Kometz
Bassford Remele
jkometz@bassford.com

State Appellate Practice

MN SUPREME COURT

■ **Notable decisions: A district court does not abuse its discretion by certifying an order as a final partial judgment under Minn. R. Civ. P. 54.02 when the certification order details the reasons for certification, demonstrates that the district court considered the totality of the circumstances, and the claims certified as final were distinct from the remaining claims.** The Supreme Court considered whether the district court abused its discretion by certifying its order dismissing third-party claims pursuant to Rule 12 as a final partial judgment for purposes of appeal. The third-party claims arose when Bolton & Menk, Inc.—having itself been sued by the City of Elk River for breach of contract and professional negligence—brought a third-party complaint for contribution, indemnity, and negligence against other parties involved in the underlying construction dispute. The district court granted the Rule 12 motion brought by the third-party defendants, and Bolton moved to certify the order as immediately appealable under Minn. R. Civ. P. 54.02. The district court did so certify the order as a final partial judgment, but the Minnesota Court of Appeals dismissed the resulting appeal for lack of jurisdiction. The court of appeals reasoned that the district court abused its discretion in certifying the order for appeal because it conflicted with the general policy against piecemeal appeals. The Supreme Court, although recognizing that the "thrust" of the appellate rules is "that appeals should not be brought or considered piecemeal," reversed the court of appeals. The Supreme Court determined that the third-party claims arising in equity were clearly separable from the underlying claims for breach of contract and negligence. And because in certifying the order as immediately appealable, the district court also "documented its reasons for granting certification in a 6-page order," the Supreme Court could not question the district court's exercise of discretion. Nevertheless, the third-party defendants argued the district court abused its discretion, noting that 1) a district court must expressly consider the risk of mootness and (2) because the claims arose out of the same set of facts, the third-party claims could not be considered "distinct" so as to permit a piecemeal appeal. The Supreme Court rejected both arguments. ***City of Elk River v. Bolton & Menk, Inc.***, A22-1771 (Minn. 1/31/2024).

■ **Notable petitions granted: The Minnesota Supreme Court will consider the level of due process that must be afforded to institutions under investigation by the Minnesota Department of Education for alleged criminal wrongdoing.** The Minnesota Supreme Court accepted

review of a case arising out of an audit and investigation conducted by the Minnesota Department of Education (MDE) that resulted in a clawback of over $1.3 million from a charter school organization. That organization—Minnesota Internship Center (MNIC)—came under investigation for allegedly manipulating attendance records. MNIC appealed the MDE's findings and sought to introduce additional evidence. The MDE commissioner rejected MNIC's appeal and refused to consider the additional evidence. MNIC contends that MDE's actions violated the minimum due process to be afforded to institutions investigated for criminal wrongdoing under Minn. Stat. §127A.42. The Minnesota Court of Appeals rejected MNIC's appeal from the MDE commissioner's decision. The Supreme Court accepted review of the following issue: whether respondent/appellee Minnesota Department of Education (MDE) was required to conduct its investigation of petitioner/appellant Minnesota Internship Center's (MNIC) alleged criminal wrongdoing and resulting clawback from MNIC of more than $1.3 million pursuant to and with the corresponding minimum due process protections of Minn. Stat. §127A.42. ***Minn. Internship Ctr. v. Minn. Dep't of Educ.***, A23-0064 (Minn. Ct. App. 11/20/2023), *rev. granted* (Minn. 1/31/2024).

MN COURT OF APPEALS

Notable precedential decision: District court abused its discretion in dismissing wrongful death claim for failure to serve expert-review affidavit within the three-year statute of limitations for a wrongful-death action. The Minnesota Court of Appeals reversed a Rule 12 dismissal of a medical malpractice related wrongful-death claim, finding that, as a matter of first impression, compliance with Minn. Stat. §145.682's expert review requirements was not a jurisdictional prerequisite to commence a wrongful death action. The district court dismissed the action after the plaintiff failed to serve an expert-review affidavit before the statute of limitations expired, despite the fact that the plaintiff submitted an expert-review affidavit within the 60-day safe harbor period. The court of appeals determined that Minn. Stat. §573.02, subd. 1, does not require that an expert-review affidavit under Minn. Stat. §145.682, subd. 2, be served before the expiration of the three-year-limitations period and that, because the plaintiff complied with the expert-review statute within the safe-harbor period, the district court abused its discretion in dismissing the complaint. ***Daulton v. TMS Treatment Center, Inc.***, A23-0483 (Minn. Ct. App. 1/16/2024).

Notable nonprecedential decision: District court abused its discretion in issuing discovery sanction that mandated summary judgment. In an appeal involving insurance coverage, the court of appeals reversed and remanded a grant of summary judgment in favor of the insurer based on a discovery sanction against the insured for a failure to provide information related to the claimed losses. The court found that the district court's imposition of a discovery sanction under Minn. R. Civ. P. 37.02 was an abuse of discretion because there was no evidence of prejudice that would warrant the severe sanction of dismissal. The court of appeals questioned, but did not reach, the issue of whether the district court had authority to issue a discovery sanction where no formal discovery requests had been made. ***Maple Ridge Homeowners Ass'n v. Hiscox Ins. Co., Inc.***, A23-0478 (Minn. Ct. App. 2/5/2024).

Notable special term order: Appeal dismissed as premature due to pending Rule 60 motion, compliance with general rules of practice not required. The Minnesota Court of Appeals clarified the requirements of a post-decision tolling motion in dismissing an appeal as premature in light of a pending Rule 60 motion. Respondents sought to dismiss an appeal from a final judgment to allow the district court to issue a decision on its Rule 60 motion. Appellant challenged the sufficiency of the Rule 60 motion as filed, among other issues. The court of appeals explained that a "notice of appeal filed before the disposition of a post-decision tolling motion listed in Minn. R. Civ. App. P. 104.01, subd. 2, is premature and of no effect, and does not divest the district court of jurisdiction to dispose of the motion" and that while there were some procedural defects in the Rule 60 motion, "compliance with the rules of general practice is not a requirement for a proper postdecision tolling motion." ***Magnuson v. Bone et al.***, A23-1818 (Minn. Ct. App. 12/19/2023).

Notable special term order: Request for writ of prohibition denied, order compelling deposition of out-of-state resident proper. The Minnesota Court of Appeals denied a petition seeking a writ of prohibition that would prevent enforcement of an order compelling an out-of-state resident to sit for a deposition. The petitioner sought a writ on the grounds that the district court exceeded its authority in granting a motion to compel her compliance with a third-party subpoena for two reasons: (1) The district court lacked jurisdiction over her to enforce the subpoena, and (2) she was exempt from service of process while in Minnesota for the purposes of attending an independent medical exam in a separate case. The court of appeals rejected both arguments, finding that existing precedent authorized the district court to exercise "transient jurisdiction" over the petitioner and that she was not exempt from service while attending the IME because she had in fact been compelled to attend the IME by court order and was not voluntarily in the state to participate in the legal proceeding such that she was entitled to immunity from service. ***In re Gracelyn Trimble***, A24-0094 (Minn. Ct. App. 1/30/2024).

Pat O'Neill
Larson King, LLP
phoneill@larsonking.com

Sam Schultz
Larson King, LLP
sschultz@larsonking.com

Tax Law

JUDICIAL LAW

Outpatient substance abuse facility properly classified commercial property. The parties disputed the proper classification and tax valuation of a developed parcel with an outpatient substance abuse treatment facility in Mora. Kanabec County's expert's value consideration was approximately two and a half times that of the petitioner's expert, and the county's assessed value was nearly double the petitioner's expert. First, the plaintiffs argued that the outpatient facilities should have been classified as residential, not commercial. The court disagreed, since the facility did not offer the property to residents "for rent" nor require residents to stay 30 days or more like a typical rental, so the outpatient facili-

ties were properly classified as commercial. Second, after a thorough walk-through, examining the three traditional approaches to value, and weighing each expert's opinions and methods, the court independently determined the assessed value for the property should be decreased from $3,681,600 to $3,150,00 for 2020 and decreased from $3,787,200 to $3,085,000 for 2021. ***RHTC LLC v. Cnty. of Kanabec***, No. 33-CV-21-86, 2023 WL 8817661 (Minn. Tax 12/20/2023).

Increased assessment. Following a one-day trial, the court increased the assessed value of the Burnsville Medical Building located near the 35E and 35W merge point. The petitioner submitted an expert appraisal report, while Dakota County chose not to introduce any evidence at trial and instead relied on the *prima facie* validity of the assessor's original estimated market value. In a thorough opinion, the court first held that the property owner overcame the *prima facie* validity of the assessment by presenting a qualified appraisal. Although the court did not adopt all of the appraisal methodology, it held that the "appraisal contained substantial and credible evidence showing the original assessment was incorrect." The court then turned to the valuation, and agreed with Burnsville Medical's argument that the cost method would not provide credible conclusions, so the court considered only the sales comparison and income approaches. The court generally agreed with the petitioner's expert's sales approach, but the court agreed with the county on the county's occupancy adjustment argument. The court removed the occupancy adjustment, which resulted in a small change. The court made a more significant adjustment after its analysis of the income approach, because it declined to adopt petitioner's reduction for future tenant improvements. Following its final reconciliation and disposition of the county's remaining arguments, the court reached its assessed value of $9.3 million. ***Burnsville Med. Bldg., LLC, v. Cnty. of Dakota***, No. 19HA-CV-21-1303, 2023 WL 8533688 (Minn. Tax 12/8/2023).

Limitations period: No special justification to warrant reversal. Section 6501 governs the limitations on assessments and collections. Subpart (c)(1) governs exceptions on limitations in cases of false returns and specifically provides that "[i]n the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed... at any time." 26 USCA §6501(c)(1). In a case submitted to the tax court for a decision without trial, *Murrin v. Comm'r of Internal Revenue*, the court was asked to determine whether the limitations period for fraudulent returns varies depending on whether it was the *taxpayer* or the *preparer* who had the intent to evade tax.

This was not a novel question. The court previously held that the "limitation period[s] for assessment[s] [are] extended under section 6501(c)(1) if the return is fraudulent, even though it was the preparer rather than the petitioner who had the intent to evade tax." *Allen v. Comm'r of Internal Revenue*, 128 T.C. No. 3, at *42 (U.S. Tax Ct., 2007). The petitioner here urged the court to reconsider *Allen* and asked the court to interpret section 6501(c) as extending the limitation periods for cases where the taxpayer herself (not the preparer) intended to evade taxes. Such an interpretation would prevent the government from extending assessment and collection periods when it was the authorized agent, rather than the taxpayer, who acted with intent to evade taxes.

While the court acknowledged issues of imprecise language, it hung its hat on *stare decisis,* which "generally obviates [its] need to revisit or repeat the statutory analysis that led... to a prior decision, absent special justification." In this case, the special justification the petitioner argued had already been rejected. Although the court determined that *stare decisis* weighed in favor of not reconsidering its decision in *Allen*, the court continued its analysis. The court discussed congressional intent and the precise language of section 6501(c)(1). The provision's language lacked any requirement that the taxpayer themselves must have had the intent to evade taxes, only that the intent to evade be present in the filing of a return. The congressional intent also supported the government's interpretation of the provision. The court entered a decision for the respondent. ***Murrin v. Comm'r of Internal Revenue***, T.C. Memo. 2024-10 (U.S. Tax Ct., 2024).

Section 4973(a), tax or penalty? In a motion for summary judgment, the commissioner asked the court to decide that section 4973 imposes a tax, not a penalty. The IRS issued a notice of deficiency to the petitioner for several tax years for excise tax deficiencies totaling roughly $8,500,000. The deficiencies were assessed under section 4973. The deficiencies occurred when the petitioner incorrectly characterized a $26,000,000 corporate buyout as a nontaxable "rollover contribution" to his IRA. The buyout was not eligible for a tax-free rollover, instead constituting an "excessive contribution" to the petitioner's IRA under section 4973(a)(1).

The court was tasked with determining whether exactions under section 4973 impose a tax or a penalty. Through a swift reading of Section 4973, captioned "Tax on excess contributions to certain tax-favored accounts and annuities," the court reasoned that a textual analysis resolved the question. 26 USCA §4973(a). Within section 4973(a), the word "tax" appears nine times and the word "penalty" does not appear at all. Although the textual analysis was compelling, the court considered other factors for the sake of completeness. The court next weighed the similarity between taxes imposed under section 4973 and extractions that have previously been established to be taxes and not penalties. For this comparison, the court looked to taxes imposed on excessive lobbying expenditures by public charities. This factor supported considering the tax a tax. The congressional history of section 4973 taxes also supported the "tax" determination: "Congress's uninterrupted use of the term 'tax' to describe the exaction[s]" imposed under section 4973 further supported a determination that section 4973 exactions are "taxes."

Finally, the court addressed the petitioner's functional analysis of section 4973. The court was unpersuaded that the taxes were functionally penalties instead of taxes because of

the punitive nature of section 4973 and their design as deterrents. Instead, the court recognized the basic economic theory that taxes can and are used simultaneously as incentives and deterrents. The court's findings, weighing heavily in favor of the respondent, concluded with granting the respondent's motion for partial summary judgment and a conclusion that the excise taxes within section 4973, were in fact, taxes. ***Couturier v. Comm'r of Internal Revenue***, T.C. Memo 2024-6, (U.S. Tax Ct., 2024).

This should have been an email. *Randall Lake and Colleen Keough v. County of Lake* concerned the property valuation of two parcels of land: one along the shore of Lake Superior and the other an adjacent former campground. In 1998 and 2008 respectively, property owners Lake and Keough granted conservation easements over all of the Lake Superior property and 95% of the campground property to the Minnesota Land Trust. Both conservation easements restricted future use and development and caused a decrease in the market value of both properties. In 2021, the assessed value on their properties increased, so Lake and Keough contacted the Lake County Assessor's Office to understand how their property was being valued.

The answers they received were, in the words of the court, "contradictory." In one response, the appraiser supervisor claimed the county valued the properties as "unencumbered fee-simple ownership" properties. In other emails, the supervisor claimed to be valuing the properties based on two comparable local sales of properties also "encumbered by a conservation easement." Both parties asked the tax court for summary judgment to resolve the dispute. The court determined that whether the county's property valuation properly considered the impact of the easements was a material fact of the case and required more "credibility determinations and factfinding, tasks not appropriately undertaken on summary judgment." Summary judgment was denied for both parties. ***Lake and Keough v. Cnty. of Lake***, No. 38-CV-22-153, 2024 WL 315194 (Minn. Tax 1/25/2024).

Morgan Holcomb, Adam Trebesch, Leah Olm
Mitchell Hamline School of Law

Torts & Insurance

JUDICIAL LAW

Entitlement to prejudgment interest under Minn. Stat. §60A.0811. After part of a commercial building owned by plaintiff collapsed, plaintiff opened a claim with defendant, its insurer. Defendant acknowledged receipt of plaintiff's insurance claim the next day. Two months later, defendant paid plaintiff $97,285.31 for the actual cash value (ACV) of the property damage and lost rental income. Nearly a year later, plaintiff commenced suit against defendant for breach of contract, alleging defendant had failed to fully compensate it for its losses. But prior to filing the complaint, plaintiff demanded an appraisal under the insurance policy. The appraisal panel awarded plaintiff a total of $319,342.50 for the ACV of the damage to the building and for lost rental income. Within days, defendant paid the difference between its original payment and the appraisal award to plaintiff. Defendant then paid plaintiff interest on the appraisal award pursuant to Minn. Stat. §549.09. However, plaintiff responded that it was entitled to additional interest pursuant to Minn. Stat. § 60A.0811.The district court determined that plaintiff was not entitled to interest under section 60A.0811 and declined to enter judgment in favor of plaintiff.

The Minnesota Court of Appeals affirmed. The court began by noting that it "is well settled that an insured, such as [plaintiff], who obtains an appraisal award pursuant to an insurance policy is entitled to preaward interest under section 549.09, even without a determination of breach of contract or actionable wrongdoing by the insurer." The question before the court was whether the district court erred when it concluded that plaintiff was not entitled to additional interest from defendant calculated under § 60A.0811, subd. 2, which provides: "An insured who prevails in any claim against an insurer based on the insurer's breach or repudiation of, or failure to fulfill, a duty to provide services or make payments is entitled to recover ten percent per annum interest on monetary amounts due under the insurance policy, calculated from the date the request for payment of those benefits was made to the insurer." The court held that that "for an insured to 'prevail[] in any claim' in 'a court action or arbitration proceeding' under section 60A.0811, an insured must obtain a favorable determination in a court action or arbitration proceeding on a claim (or assertion of rights) 'based on the insurer's breach or repudiation of, or failure to fulfill, a duty to provide services or make payments... due under the insurance policy.'" The court went on to hold that "an insured who obtains an appraisal award, without more, has not 'prevail[ed]' on a claim against an insurer within the meaning of section 60A.0811 because an appraisal does not determine a claim in a court action or arbitration proceeding." Because the district court did not find in favor of plaintiff on its breach of contract claim in this case, it was not entitled to additional prejudgment interest under §60A.0811. ***PSS Properties, LLC v. North Star Mut. Ins. Co.***, No. A22-0738 (Minn. Ct. App. 12/18/2023).

Jeff Mulder
Bassford Remele
jmulder@bassford.com

PEOPLE + PRACTICE

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


Moss & Barnett announced that **Brian T. Grogan** was re-elected and **Brian J. Schoenborn** elected to the firm's board of directors.

Jennifer Zwilling was elevated to principal at Jackson Lewis PC. Zwilling is a trial lawyer defending employers.

Mid-Minnesota Legal Aid announced that **Milo Mumgaard** has been selected as the new executive director. Mumgaard, a native of Nebraska, comes to MMLA having helmed legal aid organizations in Nebraska and Arkansas.

Elizabeth (Lisa) Henry was elected as a shareholder at Chestnut Cambronne PA. Henry currently sits on the firm's board of directors and practices primarily in trust and estate litigation and elder law issues.

Sarah Meyer joined the team of Stadig Johnson. Meyer will be a trust administrator and attorney working with team members.

Jennifer L. Thompson of JLT Law has been certified as Minnesota's first child welfare law specialist by the National Association of Counsel for Children, the only national organization accredited by the American Bar Association to certify attorneys as child welfare law specialists.

Andrew Poole joined Andrew, Bransky & Poole, PA as a partner. His legal practice involves defending the criminally accused. He recently retired as a judge advocate from the United States Army Reserves after 21 years of service.

Michael R. Carey was appointed Dykema's office-managing member in Minneapolis. He also serves as co-leader of firm's electric and autonomous vehicles, and advanced mobility team.


Gov. Tim Walz appointed **Judge JaPaul Harris** to an at-large seat on the Minnesota Court of Appeals. Harris will fill the vacancy that occurred upon the resignation of **Hon. Jeffrey M. Bryan,** who was recently appointed to the U.S. District Court for the District of Minnesota by President Joe Biden.



Michael Hatting, Kim Ruckdaschel-Haley, and **Michael Stephani** were elevated to partners at Best & Flanagan.

Lauri Ann Schmid joined the Minneapolis office of DeWitt LLP as a member of its bankruptcy, business, real estate, and trust & estates practice groups.

Alfred W. Coleman was named chair of Saul Ewing LLP's transactional department. Coleman has served in a number of different leadership roles at the firm, including managing partner of the Minneapolis office, transactional vice-chair, and current member of the executive committee.


Leah K. Jurss was elevated to membership at Hogen Adams PLLC, and **Ellen C. Currier** has joined the firm as an associate. Both practice federal Indian law.

Kimberly Slay joined Maslon LLP as a parner with the firm's litigation group. She represents corporate clients in product liability, insurance coverage, tax law, and commercial disputes.

SEAN EDWARD FROELICH passed on December 31, 2023, at the age of 44. He began his career in law enforcement as an officer with the River Falls Police Department. His drive and commitment to justice led him to the legal arena, where he served as the district attorney for Pierce County, Wisconsin, and later as the Eau Claire County assistant district attorney. At the time of his passing, he was a senior attorney for the Minnesota Department of Human Services, a role in which he continued to live his life in service to others.

RICHARD MICHAEL BELL of Lake Jackson, Texas, died on January 7, 2024. Richard graduated from William Mitchell College of Law. He previously lived in Blooming Prairie, Minnesota, where he practiced law for many years.

JOSEPH D. ROACH passed away on January 15, 2024. Roach was a farmer, beekeeper, master water steward, professional walleye fisherman, and grandfather extraordinaire who found time in between hobbies to work as a banker and lawyer (Hamline University School of Law).

JANET CATHERINE AMPE, age 57, of Paynesville, MN passed on December 29, 2023. She earned a law degree from William Mitchell College of Law and enjoyed a successful career as an attorney before Parkinson's Disease forced her to retire.

WILLIAM ROGER MCGRANN passed away on January 19, 2024. Most meaningful to McGrann was his work as special assistant to U.S. Sen. Hubert H. Humphrey as well as other roles supporting the Democratic Farmer Labor Party. He continued to champion Minnesota working people on legislative and governmental relations as a lawyer in the private sector, first with O'Connor and Hannan and later as a founding partner of McGrann Shea Carnival Straughn & Lamb. McGrann took great pride in his professional contributions to the Hubert H. Humphrey Metrodome, the Minneapolis Convention Center, the Guthrie Theatre, the Itasca Project, and many other endeavors.

PAUL CADY, age 65, of Brooklyn Park, passed away on January 21, 2024. Cady was general counsel for over 25 years at the Anoka-Hennepin School District.

WILLIAM JOSEPH MARKERT JR., age 48, of River Falls, Wisconsin, passed away on January 27, 2024. Markert worked as an attorney for Fluegel Law firm in Hastings as a prosecutor, for Gerlach Law in Hastings as a defense attorney, and later in his own practice, Markert Law. He closed his practice during the covid pandemic, which allowed him invaluable time with his family before joining Collins Aerospace, specializing in contract negotiation.

STEPHEN BURNS SCALLEN, of Deephaven, passed away on January 17, 2024, at the age of 91. After graduating from the University of Minnesota Law School, he began his legal career at the law firm of Covington & Burling in Washington, D.C. He later returned to the Twin Cities, where he joined the faculty at the University of Minnesota Law School. Scallen was very committed to serving nonprofit organizations.

GORDON BRAINARD 'BINKER' CONN, JR. died on January 10, 2024, at age 79. In 1971 Conn joined the Minneapolis law firm of Faegre and Benson, where he became a partner.

JACK WESTON HANSON passed away on January 13, 2024, three weeks after celebrating his 80th birthday. Hanson had a 50-year career as a corporate lawyer specializing in mergers and acquisitions, contracts, and general corporate counseling.

BYRON L. ZOTALEY died on January 15, 2024. He was a practicing attorney in Edina for more than four decades.

WILLIAM M. 'BILL' DRINANE, 72, lost his courageous battle with Parkinson's on January 17, 2024. He was a longtime Twin Cities attorney.

CLASSIFIED ADS

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

ATTORNEY WANTED

LABOR & EMPLOYMENT ATTORNEY

Maslon is seeking a lateral attorney with significant counseling experience (five plus years). Our lawyers represent employers in virtually all aspects of their employee and labor relations. Qualified candidates must have significant counseling experience with superior knowledge of the law, a strong commitment to client service, the ability to work efficiently to help our clients problem solve, the ability to build rapport with clients, fellow attorneys and staff, communication and drafting skills that inspire the confidence of our clients, a willingness to generate publications and speak in public to help our clients stay on top of workplace developments. Depending on a candidate's experience, the candidate will be considered for an associate, counsel or partner level position. The firm is willing to consider small groups for this position. This position offers an opportunity to join a group of colleagues in a commercial law firm with a solid client base and truly collegial atmosphere. What sets Maslon apart has much to do with the quality of our relationships, with our clients and with each other. We are large enough to handle the most challenging legal matters, allowing us to sustain a diverse sophisticated practice, yet we are small enough to recognize and respect the individuality of our clients, lawyers and staff. At Maslon, we emphasize excellence in the practice of law, while maintaining our cherished values of informality, diversity and friendship. Since Maslon's inception in 1956, the founders made respecting and fostering diversity, equity, inclusion, and community involvement an expected practice within the firm—principles which the firm has proudly carried forward. In furtherance of those goals, Maslon is currently pursuing Midsize Mansfield Rule certification. The certification is a program administered by Diversity Lab, an organization that promotes innovative ideas and solutions to boost diversity and inclusion in the legal field. Mansfield Rule certification is another important component of our ongoing efforts to create more inclusive workplaces, recruit year-round for diverse candidates, and support and advance diverse lawyers. For more information, visit us at www.maslon.com. To apply, please submit a resume and cover letter HERE. Questions can be directed to Angie Roell, Legal Talent Manager, at angie.roell@maslon.com. Maslon LLP is an Equal Employment Opportunity and Affirmative Action employer. Our firm continues to be dedicated to providing a workplace that is free of unlawful discrimination, harassment, and retaliation.

ASSISTANT COUNTY ATTORNEY / ASSOCIATE ATTORNEY

Full-time attorney position with the Pipestone County Attorney's Office and O'Neill, O'Neill & Barduson law firm. This is a dual government-private practice position; the attorney will be employed by both the Pipestone County Attorney's Office and O'Neill, O'Neill & Barduson. As Assistant Pipestone County Attorney, duties will include prosecution of adult criminal cases and juvenile delinquency cases, handling child protection cases, civil commitments, and child support matters. As an associate attorney with the law firm, the attorney will be practicing in the areas of estate planning and real estate, with potential to expand to other non-litigation civil practice. This is a unique opportunity to gain government courtroom experience while simultaneously gaining valuable private practice experience with potential rapid advancement. County benefits include health, dental, and vision coverage, Public Employee Retirement (PERA), life insurance, elective long-term and short-term care, and Health Savings Account Contribution. O'Neill, O'Neill & Barduson benefits include sick leave, paid time off, and enrollment in a profit-sharing program. This position is eligible for Public Service Loan Forgiveness. Minimum beginning annual salary of $77,000 or more depending on experience. We are looking for someone who wants to live in Southwest Minnesota, just 50 miles from Sioux Falls, SD. Email resume and references to office@ooblawfirm.com.

ASSOCIATE ATTORNEY

A progressive and dynamic general practice seeks a new associate attorney to join our team. Case work will focus on family law with some exposure to criminal and other practice areas. We offer an open and affirming, family friendly workplace, a competitive salary with bonus potential, full benefits which include health/dental, PTO, sick time, 401(k) with 3% company matching. Our new team member will work from our St. Cloud and Brainerd offices with some flexibility for remote work. Much higher earning potential after one year of employment based on percentage pay scale. MN Law License required. Great pay incentives, insurance benefits, flexible schedule, in a positive team environment. Please send resume and cover letter to lawyer@edshawlaw.com.

CONSTRUCTION LITIGATION ATTORNEY

Fabyanske, Westra, Hart & Thomson, P.A. is looking for exceptional associates to join our construction litigation practice group, which is widely recognized as one of the best in the Midwest. Our construction lawyers have been recognized as leaders in the field by groups such as the American College of Construction Lawyers and Chambers and Partners (one of only two Minnesota firms with a Band 1 ranking in construction law). We offer the opportunity to work on sophisticated legal matters for clients that are leaders in the construction industry, but with the informal atmosphere of a smaller firm. Successful candidates will have one to four years of experience in litigation, excellent communication skills and a demonstrated interest in the construction industry. Prior construction industry experience is preferred, but not required. Interested candidates should send a resume´ in confidence to Robert Smith at rsmith@fwhtlaw.com.

ASSISTANT COUNTY ATTORNEY - NOBLES COUNTY

Assistant County Attorney I or II, Nobles County, Nobles County is a diverse, growing community located in Southwestern Minnesota. We are looking to hire an Assistant County Attorney I or II, dependent on experience. Those interested in working with a diverse community and in attaining jury trial experience are encouraged to apply. This position will focus primarily on criminal prosecution;

caseload will be dependent on experience. Minimum qualifications: Juris Doctorate from an accredited law school, State of Minnesota Attorney's License and Certification to practice before the District Court in the State of Minnesota, or will obtain prior to start date. Visit our website: https://www.co.nobles.mn.us/departments/human-resources/ for application and to view full job description and benefit sheet. Competitive benefits package. Proficiency in a second language may be eligible for extra compensation. Closing Date for Applications: Open until filled. EEO/AA Employer.

ATTORNEY

Miller & Stevens Law is seeking to hire an attorney with experience in civil litigation, family law, and/or criminal defense. Residing in or a close proximity to Forest Lake is preferred. Please submit your resume and cover letter describing your experience and reason for applying to Amber@millerstevens.com.

CORPORATE ASSOCIATE ATTORNEY

Who is Godfrey & Kahn? Godfrey & Kahn provides high-level service and creative legal solutions to its clients. For over 60 years, our firm has been guided by five core values originally set forth by our founders: a focus on our clients' success; trust in one another and our clients; a culture of teamwork that helps us achieve more together; a work ethic to achieve whatever is possible; and an integrity that keeps us focused on the right thing to do for our clients, our employees, and our communities. We have an excellent opportunity for a corporate attorney to join a firm that is recognized for developing and implementing numerous unique and creative solutions to address clients' corporate needs. Key areas of our comprehensive representation and service include advice and assistance on mergers and acquisitions and conducting due diligence in preparation for such transactions. Knowledge and experience preparing closing documents and management of real estate and financing transactions from inception to post-closing is a plus. In this role, you will conduct legal research, analyze and draft complex memoranda related to corporate, real estate, estate planning and financial matters, and work collaboratively with other attorneys and support staff to provide high quality service to our clients. The ideal candidate will possess superior organizational and time management skills, is detail-oriented and capable of a high degree of accuracy and exhibits superior verbal and written communication skills. A J.D. from an ABA accredited law school is required, as well as being admitted to practice in the State of Wisconsin. Cover letter, resume, and law school transcripts (unofficial copies are sufficient) are required. Please visit gklaw.com/Careers.htm to apply.

CORPORATE ASSOCIATE

Messerli Kramer serves individuals and businesses through three unique, yet complementary divisions. We represent a variety of clients across a series of practice groups: Banking and Finance, Business Litigation, Corporate and Estate Planning, Commercial Real Estate and Family Law. This Corporate Associate position will be housed in our renowned Corporate and M&A group. We are looking for an experienced transactional attorney with corporate experience to join our established and growing practice. This individual will manage a range of corporate transactions including mergers and acquisitions, corporate restructuring, succession planning and general corporate advice and counsel. The successful candidate will have extensive experience in all aspects of corporate transactions and the ability to lead and manage projects and negotiate deal terms. Requirements: Three to eight years of experience as a licensed attorney. Ability to handle heavy deal volume and collaborate within the corporate team. Must have strong legal writing skills, analytical skills, and an ability to build relationships. Experience with a wide range of corporate transactions, including direct experience in the past several years with an emphasis on mergers, acquisitions, and business structuring. To apply, please send resume and salary expectations to: Recruiting@MesserliKramer.com.

ASSOCIATE ATTORNEY CIVIL LITIGATION

Trial Group North, a defense firm located in Duluth, Minnesota is looking for an Associate Attorney interested in working with our Civil Litigation team. One or more years of experience is preferred, but will consider recent graduates, especially those with experience clerking. Ability to thrive in a high-volume practice and great organizational skills is a must. The firm offers a competitive salary and benefits along with the opportunity to work with accomplished attorneys and staff in the practice area. Please submit a cover letter, resume and references to peanut@trialgroupnorth.com.

TRIBAL ATTORNEY

Ho-Chunk Nation Department of Justice is seeking full time Attorneys for entry level in-house positions. Salary based on experience. Health, dental, and other benefits after 90-day probation period. For more information on position or application process, contact Marissa Dickey at: 715-284-3170 or Marissa.dickey@ho-chunk.com.

ASSOCIATE WANTED CIVIL LITIGATION

Gries Lenhardt Allen, PLLP, which is a northwest-suburban law firm, has an immediate opening for an attorney in its growing, defense-oriented civil litigation department. Our eight-attorney firm offers challenging work representing a high-level clientele in a collegial, but professional, small-firm atmosphere. The ideal candidate would have at least two years of civil litigation experience, but exceptional applicants with less experience may apply. Ability to handle first-chair responsibility for discovery, depositions and administrative hearings required. Workers' compensation experience a significant plus. Other practice areas in our litigation department include employment law, personal injury defense, insurance disputes, and construction litigation.We offer a competitive, comprehensive benefit package, with substantial opportunity for professional growth as our litigation practice expands. Candidate must be admitted to the Minnesota Bar. Email resume to: info@glalawfirm.com.

LITIGATION ASSOCIATE ATTORNEY– MINNEAPOLIS

Stinson LLP seeks an Associate Attorney with two to four years of litigation experience to join our Minneapolis office. For full position description and to apply, visit: https://www.stinson.com/careers-current-opportunities For questions, contact recruiting@stinson.com. Stinson LLP is an equal opportunity employer.

ASSOCIATE ATTORNEY

Jardine, Logan & O'Brien P.L.L.P. is a midsize law firm in the east metro looking for an Associate Attorney with experience in workers' compensation and civil litigation. 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 P.L.L.P. is an Affirmative Action/Equal Employment Employer. Please go to: www.jlolaw.com to apply.

ASSOCIATE ATTORNEY

Guzior Armbrecht Maher is a general practice law firm with a substantial immigration practice. We are seeking to hire an associate attorney for an entry-level position. We are looking for someone who has had or wants to gain civil and criminal litigation experience. New attorneys are encouraged to apply. Spanish-speaking skills are preferred. Contact us at tmaher@gamlaw.net.

FOR SALE

SALE OF LAW/TAX PRACTICE
A 78-year law and tax practice for sale in southern Minnesota. Two brother attorneys planning to retire after 50 year and 39 year careers, respectively. For information, please contact Roy Ginsburg at: roy@royginsburg.com.

OFFICE SPACE

ANOKA OFFICE SPACE
Three-office sunny suite with space for three to four admin staff available as full time office share, or part time virtual office arrangement. Across from the courthouse, free parking, reception/lobby, copier/scanner, utilities included, rent negotiable. Referrals/mentoring from established practitioner. Tim Theisen: 763-421-0965 theisenlaw.com.

POSITION AVAILABLE

COURT APPOINTED PROBATE COURT VISITOR
Washington County Court is seeking a Court Visitor for Guardianship/Conservatorship cases. Every Court Visitor shall have training and background in psychology, social work, or legal background. If interested, please email a cover letter and resume to: WashingtonCourts@courts.state.mn.us.

PARALEGAL II
Paralegal II will assist with research, drafting, court hearings/assemble evidence and file management for the Tribal Attorneys and Attorney General. Minimum of Associate's degree in certified paralegal/legal assistant program is preferred or ability to obtain degree within three (3) years of employment. Please contact Marissa Dickey at Marissa.dickey@ho-chunk.com or 715-284-3170.

OUTREACH MANAGER
Outreach Manager position at Lawyers Concerned for Lawyers. LCL provides confidential assistance to MN legal professionals and their families. Requires a JD degree from accredited law school, strong public speaking and writing skills, familiarity with presentation platforms, ability to take initiative, manage multiple outreach opportunities, and collaborate with diverse professionals. Position opens April 1, 2024. Full description on: www.mnlcl.org. Submit cover letter, resume, and three references to help@mnlcl.org. EOE.

LAW CLERK JUDGE MICHELLE DIETRICH, MARSHALL, MN
The Honorable Michelle Dietrich, chambered in Marshall, MN, seeks a FT law clerk. Work directly with a Minnesota Judicial District Judge at the Trail Court level with the focus on the administration of justice. Utilize your legal research and writing skills in a multi-faceted caseload drafting legal documents, correspondence and drafting orders. To view the full job description and to apply online visit www.governmentjobs.com/careers/mncourts.

PROFESSIONAL SERVICES

ATTORNEY COACH / CONSULTANT
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.

REAL ESTATE EXPERT WITNESS
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.

MEDIATION TRAINING
Qualify for the Supreme Court Roster. Earn 30 or 40 CLE's. Highly-rated course. St. Paul, 612-824-8988, transformativemediation.com.

PUBLIC NOTICE

NOTICE OF COMMENT PERIOD
The District of Minnesota invites comments from members of the bar and public as to whether incumbent U.S. Magistrate Judge David T. Schultz should be recommended for reappointment. Comment deadline March 14, 2024. View the full public notice: https://www.mnd.uscourts.gov/employment

PLACE AN AD
Classified ads should be submitted online at:
www.mnbar.org/classifieds
or call 612-333-1183

MSBA Members:
$1.50 per word
Non-Members:
$2.25 per word

Display ads:
Erica Nelson
763-497-1778
erica.nelson@ewald.com

THE CHARITABLE-GIVING ARM OF THE HCBA PRESENTS

HENNEPIN COUNTY BAR FOUNDATION EST. 1968

2024 BAR BENEFIT

Our Largest Annual Fundraiser

Thursday April 25, 2024

5:00 - 7:00 p.m.

MOSAIC EVENT VENUE

817 5th Ave S, Suite 300, Minneapolis

AN EXCITING NIGHT OF FUN AND FUNDRAISING!
Silent Auction – Wine Toss – Mystery Prize Bags – Great Networking & More

FEATURING FOOD FROM PARIS DINING CLUB
Founded by James Beard nominated Chef Jamie Malone

Tickets available starting at $100

www.mnbar.org/bar-benefit

THANK YOU FOR SUPPORTING EQUAL ACCESS TO JUSTICE

$10,000

ANTHONY OSTLUND LOUWAGIE • DRESSEN • BOYLAN

DORSEY™ always ahead

$7,500

Moss & Barnett

$250–$5000

Bassford Remele, Brandt Kettwick Defense, Ciresi Conlin LLP, Conlin Law Firm, Dady & Gardner, PA, Faegre Drinker Biddle & Reath, Financial Advisors LLC, Fitch Johnson Larson & Held, Gustafson Gluek PLLC, Hon. Mel Dickstein ADR LLC, Hon. Tom Fraser, Larkin Hoffman, Lathrop GPM , Law Office of Katherine L MacKinnon, Madigan, Dahl & Harlan, PA, Maslon LLP, MLM, Nilan Johnson Lewis, Roy S Ginsburg, JD, Sapientia Law Group, Schwebel, Goetz & Sieben PA, SiebenCarey, Siegel Brill, PA, Soule & Stull, Sykora & Santini PLLC, Trepanier MacGillis Battina PA, Zamansky Professional Association

DONOR OPPORTUITIES
Contact Sabrina Sands at 612-752-6615 or ssands@mnbars.org

1,300+ FIVE STAR REVIEWS | **$67,000,000+** RECOVERED FOR OUR CLIENTS | **16+** YEARS IN BUSINESS

NICOLET LAW

ACCIDENT & INJURY LAWYERS

L - R: Drew Epperly, Keaton Ostir, Ashley Rossman, Braxton Phillips, Jessica Swain, Ryan Muir, Ben Nicolet, Russell Nicolet, Adam Nicolet, John Spiten, Arianna Meehleib, Jordan Miller, Lindsay Lien, C. Anthony Gutta III, Nicholas Angel.

WE CARE. WE WIN. WE NEVER STOP GETTING BETTER.

We have been accepting injury case referrals and co-counseling with other Minnesota attorneys for over a decade. We take pride in delivering life-changing results while providing an excellent client experience. Refer your clients, friends, and family with confidence.

TO LEARN MORE, VISIT **NICOLETLAW.COM/REFERRALS** OR GIVE US A CALL AT **1-855-NICOLET**

NICOLET LAW
ACCIDENT & INJURY LAWYERS

**Fee sharing arrangements where allowed per the rules of professional conduct.*