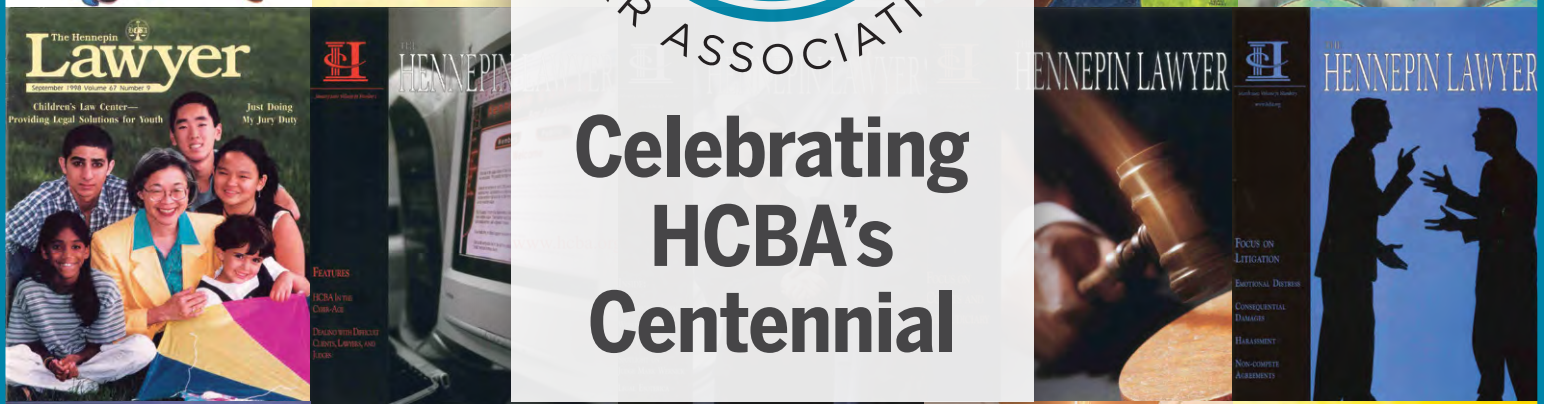
May / June 2019 Volume 88 Issue 3

Official Publication of the Hennepin County Bar Association

HENNEPIN LAWYER



HENNEPIN COUNTY BAR ASSOCIATION
100 YEARS
EST. 1919

Celebrating HCBA's Centennial

Annual Meeting & Awards Luncheon 2019

Thursday, May 30 | 12:00 to 1:30 p.m.

Embassy Suites by Hilton Minneapolis Downtown
Second Floor Ballroom, 12 Sixth Street South

Join Us in Celebrating the HCBA and Kicking Off Our Centennial Year

Program Includes:

- Ceremonial passing of the leadership gavel from our 100th President Adine S. Momoh to incoming President Jeffrey M. Baill, who will begin his term on July 1.
- Celebration of the HCBA's centennial year.
- HCBA leadership will highlight the association's history, the current bar year, and a vision for the future.
- Presentation of the HCBA's Excellence Awards.

HCBA President
Adine S. Momoh

HCBA President-Elect
Jeffrey M. Baill

Chief Executive Officer
Cheryl Dalby

2019 Excellence Award Recipients:

- **Pamela Hoopes**, for Career Contributions to the Profession
- **Blaine Balow**, for Providing Pro Bono Service
- **Jess Birken**, for Advancing Innovation in the Profession
- **Michael Boulette**, for Providing Pro Bono Service
- **Kendra Brodin**, for Serving the Association / Foundation
- **Sybil L. Dunlop**, for Advancing Diversity and Inclusion
- **Loan T. Huynh**, for Advancing Diversity and Inclusion
- **Cynthia Y. Lee**, for Advancing Diversity and Inclusion
- **Lisa Lodin Peralta**, for Advancing Diversity and Inclusion
- **Gloria Stamps-Smith**, for Mentoring in the Profession

Space is limited. Register today!

www.hcba.org or 612-752-6600

Tickets are $50 for HCBA members and $75 for non-members. Reserved tables of 10 with signage are available for $650. Contact Sheila Johnson at sjohnson@mnbars.org or 612-752-6615 for group reservations or to purchase a table. (Registrations must be received by 5/23/19.)

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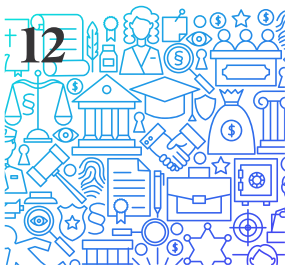

FOCUS ON CONSTITUTIONAL LAW

Hennepin Lawyer
May/June 2019
Volume 88, Number 3
www.hcba.org

The Hennepin Lawyer is published by the Hennepin County Bar Association to educate and inform lawyers about the current issues and events relating to the law and the profession. It allows for the free expression and exchange of ideas. Articles do not necessarily represent the opinions of any person other than their writers. Copies of the editorial policy statement are available upon request or online at www.hcba.org.

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If you are interested in writing or editing, email Nick Hansen, Managing Editor at nhansen@mnbars.org

"It's a Free Country"

"It's a free country." This phrase was popular when I was in school, but it didn't convey the positivity you might assume for an expression of one of the best things about being American. "Can I sit by you?" "[Shrug]. It's a free country." We used the phrase to indicate indifference; while we might prefer another person not do something, we didn't intend to stop them. "Should I wear this lime green ruffled tuxedo for prom?" "Well, I wouldn't, but it's a free country."

We used the phrase flippantly, usually in connection with trivial things, but my classmates and I understood that as American citizens we enjoy freedoms not necessarily guaranteed to citizens of other countries. None of us were constitutional scholars (at least not then), but we knew that the United States Constitution and the constitutions of each of the states set forth the framework for our political system. We were proud when we recited the pledge, confident in the knowledge that our country was uniquely dedicated to providing liberty and justice for all.

As Americans, we are guaranteed certain basic rights. The Constitution protects our individual freedoms while limiting the power of government and establishing a system of checks and balances. This should, in theory, unite us. But constitutional rights are not neatly separated. The intersection of the rights of individuals—even within our free country—can cause intense division.

Courts are increasingly called upon to interpret and adjudicate the complex relationships between, and among, rights granted to each citizen in the Constitution. These rights may be in direct or indirect conflict with one another, so the courts must be careful to avoid dominance of one right over another. Freedom of speech may conflict with privacy rights; the right to a fair trial may be compromised by a free press; freedom of association may negatively impact equal protection. How can various groups simultaneously advocate for what matters to them while living in harmony with groups who disagree about what is important?

"I've always believed that a lot of the trouble in the world would disappear if we were talking to each other instead of about each other."

– Ronald Reagan

Ronald Reagan said, "I've always believed that a lot of the trouble in the world would disappear if we were talking to each other instead of about each other." Discussions concerning constitutional rights can be polarizing, even more so when people refuse to engage with people whose views differ or label opposing views as unworthy of consideration. A difference of opinion can snowball into accusations of one person or group of people attempting to deny another person or group of people their basic rights as American citizens.

People interpret the Constitution in different ways, and some even call for the abolishment of portions they don't like. When two or more rights conflict, who "wins?" Can we unite as "we the people" while recognizing and upholding the rights of each individual? Can we agree to disagree without villainizing those with differing viewpoints?

Abraham Lincoln is quoted as saying, "I don't like that man. I must get to know him better." We can create a more civil society by getting to know people whose views we don't like, recognizing they wish to protect their rights just like we wish to protect ours, and seeking common ground.

This May marks the centennial of the Hennepin County Bar Association. Throughout the issue you will see indications of what has changed, and what has stayed the same in the past 100 years. We've made strides toward achieving social justice, and upholding the liberties granted by the Constitution, but we still have work to do.

We've gathered articles from authors with varying perspectives on constitutional issues, including how constitutional interpretation has changed over time and how it might change in the future. I hope you enjoy this issue and are proud of the wonderful country in which we live and county in which we practice.

Alice Sherren
May/June
Issue Editor
asherren@mlmins.com

Ms. Sherren was a litigator in Minneapolis for a decade before joining Minnesota Lawyers Mutual Insurance Company in 2009. She directs the defense of legal malpractice claims nationwide, speaks on legal malpractice, risk management, and ethics matters, and frequently contributes articles to various legal publications. She lives in Eden Prairie with her husband and daughter. She enjoys playing piano, running and biking, and competing in CrossFit.

100 Candles: Happy Birthday HCBA

It has been my honor to serve as the HCBA's 100th president as we enter our 100th anniversary year. As the HCBA approaches its centennial, we have an opportunity to not only celebrate, but to also reflect, to reset, and to envision what lies ahead.

When the HCBA was incorporated under the laws of the state of Minnesota on May 16, 1919, we only had about 150 members. Now, nearly 100 years later, the HCBA is the largest district bar in the state of Minnesota and one of the largest district bars in the country with over 8,000 members. Our mission is to advance professionalism, ethical conduct, diversity, competence, practice development, and collegiality in the profession, and to improve the administration of justice. Since its founding, the HCBA has helped develop a system of case assignments in the Fourth Judicial District. The HCBA has served as a watchdog on the activities of the bar as a whole through the Model Rules of Professional Conduct and the creation of an ethics committee. The HCBA has worked to bridge the often wide gap between the bar and the general public.

This year, it has been my goal as president to remind us all of the HCBA's roots and to challenge people to stretch their imaginations and to realize that sponsors and champions—the ones you may think of as advancing your career and providing you with opportunities—do not only have to be individuals. The HCBA, as an organization, can be a champion. We can do more by championing newer lawyers and diverse attorneys, and providing attorneys with the resources that they need to be better attorneys, to make the practice of law easier, and to help attorneys better serve the community at all stages of their career. And indeed, the HCBA was created for this very purpose. The HCBA is a champion of the profession and that includes being a champion of the justice system as a whole.

That includes being a champion of the community. And that includes being a champion of the voiceless, those who are oppressed, underserved, and underrepresented.

We have been intentional this year in our work to address the needs of newer lawyers, diverse attorneys and attorneys who have been practicing 7 to 15 years. But we are not done. Centennials only happen once, and while we appreciate your support over the years, we need everyone's help to make this the best year yet and to set us on a strong course for the next 100. As we kick off our birthday celebration, there are many ways that HCBA members can participate in the fun from May 2019 to April 2020:

- Attend a *Then and Now* CLE. Throughout the anniversary year, HCBA sections will be sponsoring *Then and Now* CLEs highlighting changes in certain areas of the law.

- Read the *Hennepin Lawyer.* Each issue of the *Hennepin Lawyer* will have special content devoted to the centennial.

- Share our history. On Facebook, Twitter, and in the weekly e-news, we will run 100 years of history posts during the year with an #HCBA100 hashtag, highlighting important legal/association milestones.

- Celebrate with us. Come celebrate the Association's birthday during our Annual Meeting on May 30, 2019. Since there is only one 100th birthday, make sure to attend this one.

And of course, going back to the HCBA's roots, we will have community outreach-focused activities during our centennial, and we hope to have 100 percent participation from our members. These are just highlights of what the Association has in store. More details to come.

Happy Birthday, Hennepin County Bar Association. Cheers to 100 years!

Adine S. Momoh
2018-2019
HCBA President
adine.momoh@stinson.com

Ms. Momoh is a partner in the Minneapolis office of Stinson Leonard Street where she represents clients in matters involving banking litigation, estates and trusts litigation and creditors' rights and bankruptcy before state and federal courts across the country. As a trusted advisor, she helps clients navigate the entire lifecycle of a case, from case development and strategy, to discovery, to motion practice, to trial, to appeal.

2019 BAR BENEFIT

Our Annual Fundraising Gala








Pro bono publico. "For the good of the public." Lawyers often hear pro bono as a request for free services—be it from deserving charitable causes to clients seeking a discount. But *pro bono publico* reminds us that, as lawyers, our duty is to serve the public at large, whether through direct representation or otherwise.

The Hennepin County Bar Foundation (HCBF) pursues pro bono publico through its mission, "Promoting access to justice for the people of Hennepin County." Each year, the HCBF grants over $200,000 to organizations dedicated to helping close the justice gap. But the HCBF can only do so with your financial support.

Every March, lawyers from the community gather at an annual celebration, the Bar Benefit, to raise money and highlight the HCBF and the HCBA's pro bono arm, Volunteer Lawyers Network (VLN). It is a fun night of networking, playing games, bidding on silent auction items, and celebrating the HCBF's and VLN's work.

This year, over 300 members of the Hennepin County legal community gathered at the annual Bar Benefit. Together, we raised over $149,000 for the HCBF, with additional funds also raised this evening for VLN. This year, we were particularly excited to host a special pre-event reception for the 60 lawyers who have shown their commitment by joining our new HCBF Fellows program and the 15 lawyers who have gone even further by becoming Founding Fellows.

We thank each and every one of you for your continued support, and we hope to see you at the HCBF's fundraisers in the future. With your help, we will continue to serve the public by helping to bring justice for all.

– Cory D. Olson
HCBF Development
Committee Chair

Thank You

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New Lawyers Spotlight:
How has your view of the U.S. Constitution changed since becoming a lawyer?

Travis Allen
Associate Attorney, Meagher & Geer

Before law school, my view of the Constitution was similar to that of the "bill on capitol hill" and other reportedly important social studies topics taught to students in catchy songs designed to churn out upstanding citizens. I did not grasp the enormity of the Constitution's role nor did I understand its effect on my day-to-day life.

During my 1L year, my nascent awareness of the Constitution's role in framing and guiding American law began to solidify. I was awestruck by the gravity of the document and intimidated by the Supreme Court's power of interpretation.

My studies of constitutional jurisprudence ultimately gave me a deep sense of gratitude that I live in this country. As the son of a refugee and as a gay man, the protections the Constitution affords my family are personal, and instill within me a sense of civic pride and patriotism unknown prior to my legal education.

Today, as a new lawyer, I see the constitution in a different light: as the framework that guides and bounds American law, a manifestation of the principles we as Americans hold most dear, and the solid foundation upon which we continue to build our democracy.

Amanda Brodhag
Assistant Hennepin County Public Defender

My view of the Constitution hasn't changed dramatically since becoming an attorney, but I feel more passionate about the views I held. A professor in college told me the Fourth, Fifth and Sixth Amendments were written not for the guilty, but for the innocent. As a criminal defense attorney, I strongly believe it's my job to keep the state accountable and that's exactly why those amendments were written. An infringement into personal liberty is something I do not take lightly and fight every day to protect, especially for marginalized people and poor people – people whose rights others seem to glance over nonchalantly.

One thing I've become more conscious about since becoming a lawyer is the lackadaisical manner with which we as a country treat people who have been charged with crimes. The fight I have made for the release of clients charged with low-level offenses because their speedy trial rights were violated is problematic. These pillars of justice our country was founded on should be held in the highest regard, and experience has taught me unfortunately they are not. Since becoming an attorney, I've become more zealous about making sure these liberties are protected, especially when our own government violates them.

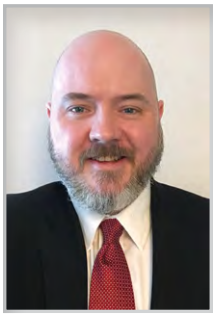
Christopher Jison
Judicial Law Clerk, First Judicial District

I might have a unique perspective as an American who spent his formative years in Germany. I didn't have the benefit of any Civics or American History classes to inform my opinion. To me the Constitution was an ancient document from a distant land that I thought had little impact on my daily life.

Law school brought that document to life. For many, law school Constitutional Law classes might have seemed like a re-hashing of old hat—an archaic lecture given over the span of a couple of centuries. It was all new to me. I saw systems built upon fundamental policies that attempted to balance the liberties of the people and the individual. I found language that, though sometimes ambiguous, still forced the greatest minds of today to grapple with who we are as a nation. Most importantly, I found that the Constitution remains as relevant today as it ever was—not just to me as a lawyer, but also as an individual. As a lawyer, I am grateful to now understand how the Constitution reflects our values as a people.

Cassie Navarro
Attorney, Baillon Thome Jozwiak & Wanta

While I had a clear understanding of the Constitution's purpose and significance in law school, I now have a deeper appreciation for its practical impact on the day-to-day lives of individuals because it is the foundation for several of the protections I help my clients enforce. In my practice, I represent victims of discrimination and retaliation in the workplace, as well as public employees whose Constitutional rights have been violated. The principles set forth within the First and Fourteenth Amendments are particularly critical to my practice because they are the basis for laws that prohibit discrimination and harassment. It is an honor and privilege to assist people in advancing rights that stem from the Constitution.



Sean Cahill

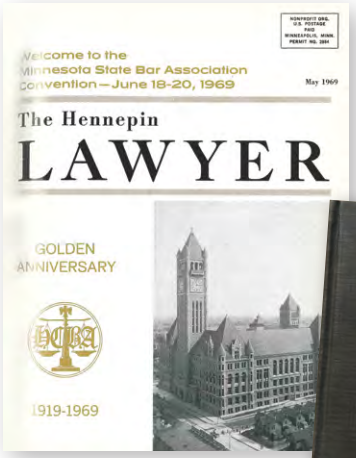
Assistant County Attorney,
Hennepin County Attorney's Office

When I was in law school, I found the Constitution more of an aspirational document. Something that embodied our best values, our vision for justice, an expression of an envisioned utopia. While clearly particular in some respects, its broad, seemingly ambiguous language had little practical meaning in everyday practice. In my years in the criminal justice system, it has become quite the opposite. The Constitution is the most practical document that defines the operation of our society and our endeavor for a just community. The Constitution draws lines—hard lines—that define fairness, freedom, and justice. As a prosecutor, every act I take is shaped by the Constitution. From investigation to trial, I am always thinking about what the Constitution requires of me. Can I use this evidence? Have my officers played fair? Who do I need to testify at trial? Is this conduct criminal or an exercise of a constitutional right? Have I been open and transparent? Have I followed the rules? Am I serving justice? These questions, asked everyday, made me realize the Constitution is not simply a "living document," but the lifeblood of fairness and justice that sustains the life and integrity of the criminal justice system. It has flesh-and-blood ramifications. It has rules. It limits the everyday actions of public servants to ensure their work does not sacrifice the integrity of the people they serve. At times, it tells me I must set aside my goals to maintain the guarantee of another person's personal dignity. To me, the Constitution sets down real, hard rules so that I never lose sight of my own integrity, and in doing so, I never lose sight of the dignity of the citizens I serve.

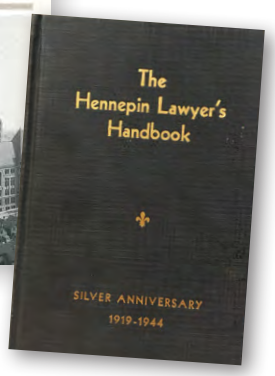
Lily Ansel

Law Student, Mitchell Hamline School of Law

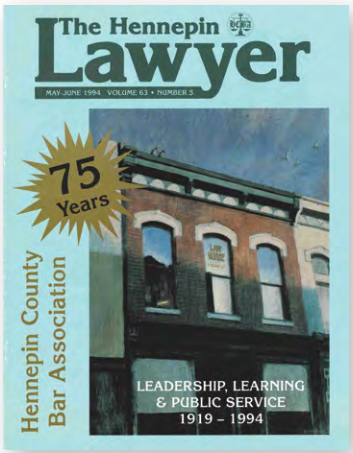
Prior to starting law school, I viewed the U.S. Constitution primarily as a historical document that simply set forth the static rules of our government and the rights of citizens. Since starting law school, I have learned that the Constitution is a flexible document that allows judges to apply the historic principles to evolving modern issues. Additionally, before law school I thought Supreme Court opinions were based solely on political views. I now see that, while political views may shape a particular Justice's reasoning, in order to persuade a majority of the Court to join in the decision, the justice writing the opinion must use principled constitutional arguments and temper partisanship. Doing otherwise may invite dissent and jeopardize precedential value. Opinions must be based on arguments grounded in constitutional interpretation rather than politics. Law school has given me a deeper respect for the complexity, malleability, and durability of our Constitution and the role it plays in the legal profession and in our society.



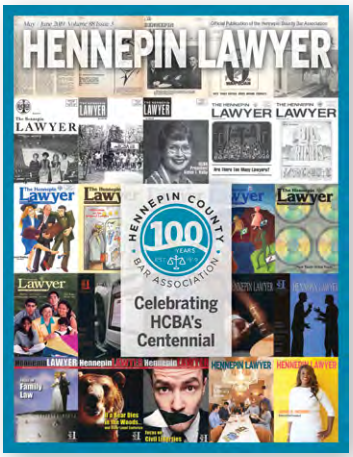
^ **MAY 1969**
Golden Anniversary



v **1944**
Silver Anniversary



^ **MAY 1994**
75th Anniversary



^ **MAY 2019**
Celebrating HCBA's Centennial

HCBA History

Editor's note: This history of the HCBA was taken from an article in the 50th anniversary issue of the Hennepin Lawyer by Edward C. Vavreck. This is the first in a year-long series to celebrate the HCBA's centennial. We hope you enjoy this and future articles documenting the history of the association and the legal community in Hennepin County.

An original Hennepin County Bar Association was organized "in recognition of a demand for an association which shall include all reputable members of the profession in Hennepin County, and for the purpose of advancing the science of jurisprudence, promoting the administration of justice and upholding the honor of the law." Vavreck notes that the association had "no regular time and place of holding meetings" but was "called together from time to time as occasion may require." He states, that since "their purposes were limited, their functions and activities were likewise not grandiose" and the Minneapolis and Hennepin County bar associations could exist "side by side from the birth of the latter to and through World War I."

Vavreck suggests that following World War I, attorneys returning to their practices felt disgruntled with what they found, and this led to a second beginning for the Hennepin County Bar Association, "to supplement the work of the Minneapolis Bar Association." On May 16, 1919, twenty five younger members of the local bar incorporated the Hennepin County Bar Association.

The articles of incorporation and by-laws adopted were based upon similar documents of the Chicago Bar Association from whom advice had been sought. Vavreck reports that 40 members were present at the first meeting of the association, out of a total membership of about 150. At the time of the next annual meeting the membership had increased to 350. Monthly meetings were held, usually as dinner meetings, with topics chosen to appeal to the majority of members.

Through its long and distinguished history, the Hennepin County Bar Association has continued to focus its activities on its original purpose — to maintain the honor and integrity of the legal profession and to serve and educate its members. While much has changed since 1919, the commitment to serve all HCBA members has remained constant. Of those who brought the association into being, probably none could have imagined today's diversity of membership or types of practice. Monthly meetings of the total membership have given way to a wide variety of activities and programs that attempt to match the interests and practices of this diverse membership and address current issues of concern to both bench and bar.


Bar Day is Tuesday

The Hennepin Lawyer

Get that New Member

Vol. 1 MARCH, 1933 No. 2

G. W. C. Ross Discusses Mortgage Foreclosures

CONTINUED FROM LAST ISSUE

Tuesday Noon Programs Feature Prominent Men

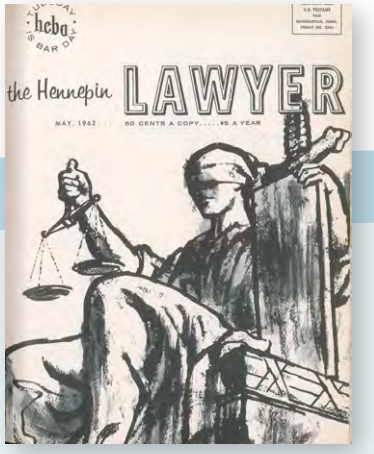
Notes and Memoranda on Moratory Law Problem

^ MARCH 1933
The first volume of the *Hennepin Lawyer* is published as a newspaper style edition.


The HENNEPIN LAWYER

PUBLISHED AT MINNEAPOLIS BY THE HENNEPIN COUNTY BAR ASSOCIATION OCTOBER 1940 VOLUME 7

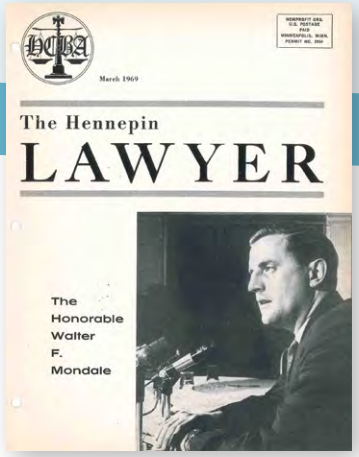
OCTOBER 1961 – OCTOBER 1964 >
The HCBA uses the same cover on every issue for three consecutive years.


hcba BAR

the Hennepin LAWYER

MAY, 1962 ... 50 CENTS A COPY ... $5 A YEAR

< OCTOBER 1940
The first photograph appears on a cover. It is of the old Minneapolis City Hall building. The location is now a parking lot across the street from the Minneapolis Public Library.

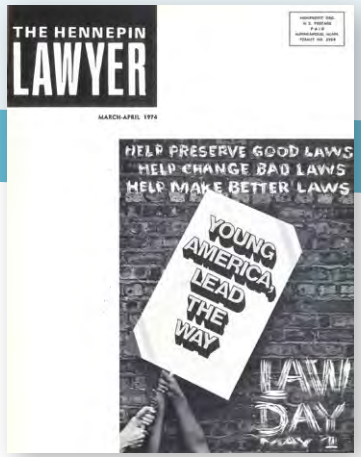

HCBA

March 1969

The Hennepin LAWYER

The Honorable Walter F. Mondale

< MARCH 1969
Walter F. Mondale is featured on the cover. The former vice president became a member in 1956.


THE HENNEPIN LAWYER

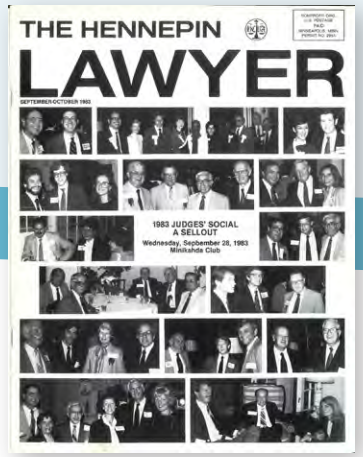
MARCH-APRIL 1974

HELP PRESERVE GOOD LAWS
HELP CHANGE BAD LAWS
HELP MAKE BETTER LAWS

YOUNG AMERICA, LEAD THE WAY

LAW DAY May 1

^ MARCH 1974
The magazine introduces a new cover banner.


THE HENNEPIN LAWYER

SEPTEMBER-OCTOBER 1983

1983 JUDGES' SOCIAL A SELLOUT
Wednesday, September 28, 1983
Minikahda Club

^ SEPTEMBER 1983
The first Judges' Social takes place. It is now one of the most popular events of the year for the HCBA.

HENNEPIN LAWYER
A Cover Story

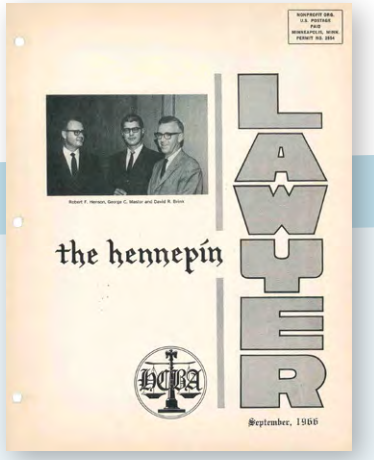
The *Hennepin Lawyer* first appeared 14 years into the association's history. Throughout its 85 years, the *Hennepin Lawyer* has educated and informed HCBA members about the practice of law in Hennepin County. Its authors have included Minnesota Supreme Court justices, U.S. District Court judges, an ABA president, Minnesota Attorneys General, and U.S. senators. Would you like to join this company of contributors? Email Nick Hansen at: nhansen@mnbars.org


THE HENNEPIN LAWYER

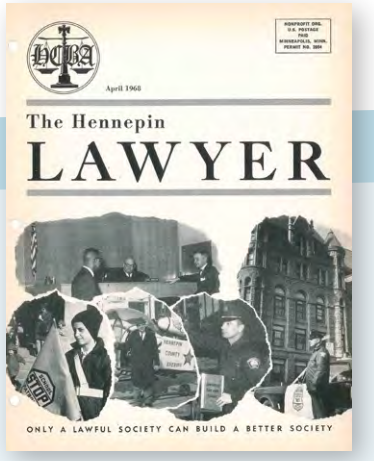
FEATURE

PROFILES

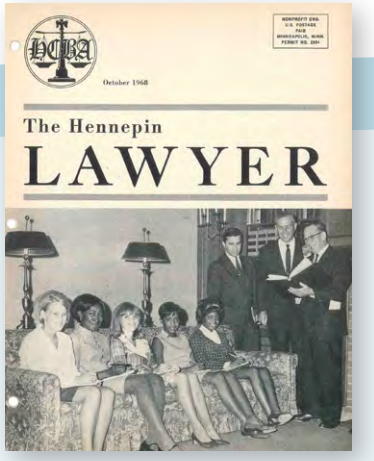
^ JULY 1999
A new HCBA logo and magazine redesign appear.



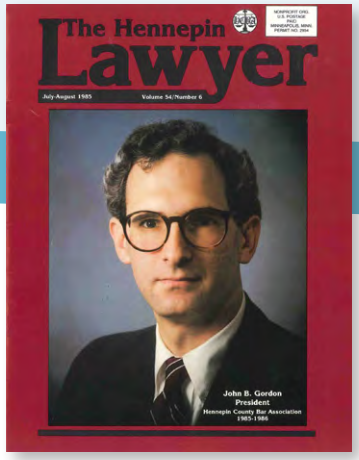
^ SEPTEMBER 1966
Future HCBA and ABA President David R. Brink is featured on his first *Hennepin Lawyer* cover. Brink would go on to appear on the cover a record four times during his career.



^ APRIL 1968
Law Day (traditionally May 1) is celebrated on the cover. The masthead is switched to a serif font.



OCTOBER 1968 >
The Hennepin County Bar Foundation is introduced and featured on the cover. Five recent female high school graduates were selected to receive scholarships to a two-year legal secretary training program at the University of Minnesota.

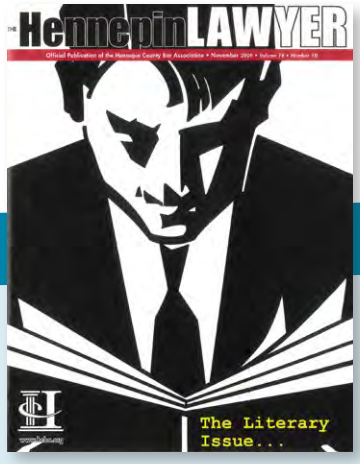


^ JULY 1985
Then HCBA president John B. Gordon is featured on the first color cover of the magazine.

< JANUARY 1987
Substance abuse is featured as a cover story for the first time.

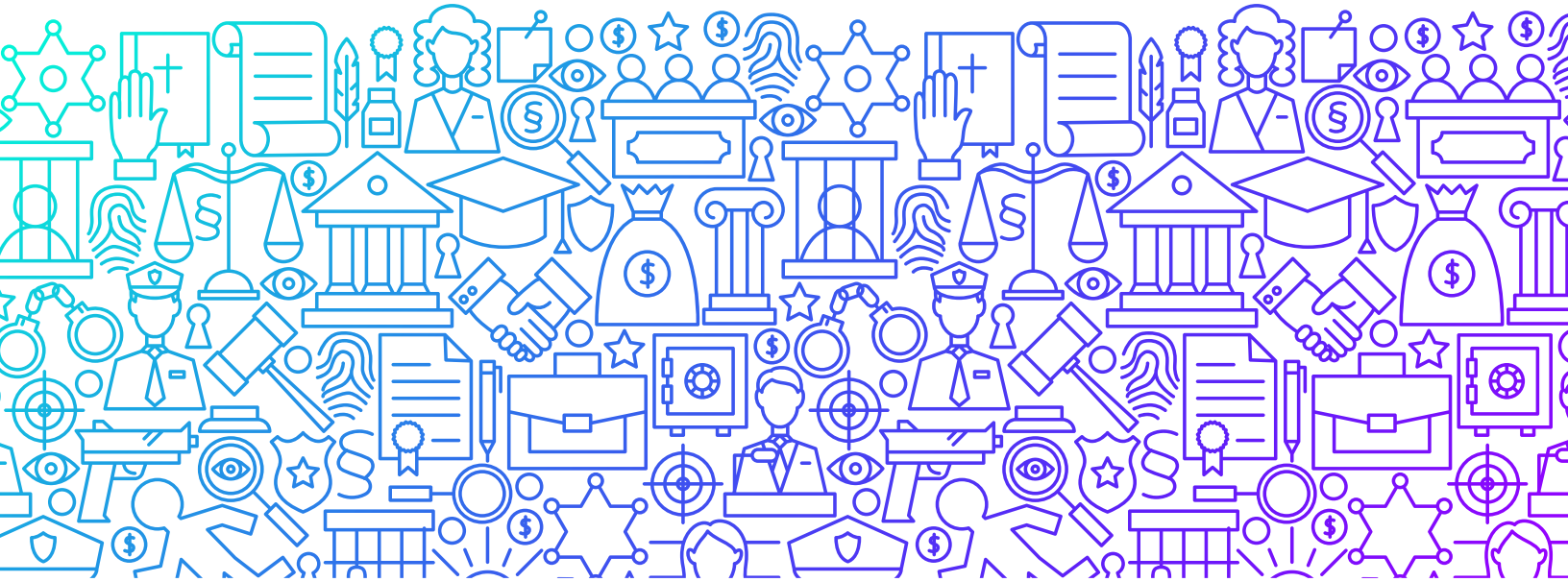
^ OCTOBER 1998
Future U.S. Senator Amy Klobuchar and former HCBA President Sheryl Ramstad Hvass are featured on the cover for the race for Hennepin County Attorney. The accompanying article was written by future Minnesota Supreme Court Justice Lorie Gildea.

^ JANUARY 2007
The magazine is redesigned again with a new masthead.



^ NOVEMBER 2009
The magazine publishes its first-ever literary issue featuring fiction and poetry from members.

< JANUARY 2015
The magazine's current design iteration is launched.



A Sharp Focus on Providing Access to Justice

Article I, Section 8 of the Minnesota Constitution ensures everyone is entitled to "obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws."

By Chief Judge Ivy S. Bernhardson

Hennepin County District Court was founded in 1852—six years before Minnesota statehood. When the court started holding sessions the following year, it was located in a frame building near the still-standing and occupied Crown Roller Mill at 105 5th Avenue South, adjacent to the Stone Arch Bridge. Court was held the first Monday in April and the first Monday of September.

Contrast that with today, when we have about 1,500 hearings daily, and more than 10,000 documents filed each day into the court record. In 1853, and now, our mission remains the same: to provide justice through a system that assures equal access for the fair and timely resolution of cases and controversies. That focus was clearly outlined more than 225 years ago in the Sixth Amendment to the U.S. Constitution, when the framers wisely decided to ensure certain rights for all criminal defendants in the United States.

As judges, we have an independent duty to afford everyone who has a legal interest in a proceeding, or their lawyer, the right to be heard. Judges must uphold and apply the law fairly and impartially, and preserve the principles of justice and the rule of law. This is a tall order we aspire to daily in our courtrooms, and we bring all of our individual energies to bear every day.

We provide access to justice every day in a variety of innovative ways, and some are highlighted below. Because about 89 percent of all cases filed in our court are criminal or traffic in nature, we're always looking for ways to improve effectiveness and efficiency in our criminal division.

In 2015, we joined with other stakeholders in the community to create an Adult Detention Initiative focused on fostering a just, equitable, efficient, and effective criminal justice system. The initiative aims to provide alternatives to detention in jail for the mentally ill; encourage probation compliance to avoid unnecessary arrest and detention orders; provide alternatives to warrants; and ensure that decisions to detain or release are based on the risk of not appearing for court, threats to reoffend, or other public safety considerations. Thanks to these efforts, we've seen a 53 percent reduction in low-level misdemeanor defendants held in jail before trial since 2015.

Criminal cases cannot be resolved if defendants fail to appear for their court hearings. To reduce those failures to appear (FTAs), in the summer of 2017 we implemented an eReminder project that sends emails and text messages to defendants who opt in to receive a notice of their hearing prior to the hearing date. Thanks to this project, bench warrants for FTAs have decreased by 25 percent, resulting in fewer defendants spending time in jail for missing a court appearance.

Since 1996, judges in the Fourth Judicial District have used a pretrial evaluation tool for felonies and certain misdemeanor offenses (gross misdemeanor DWIs and domestic violence-related offenses) which assesses the likelihood of defendants failing to appear for hearings and those who are most likely to reoffend while out of jail before their cases are completed. This tool has been reevaluated regularly, is race-neutral, and ensures income level isn't a factor when considering whether a defendant should be released or should have conditions imposed on their release.

Article I, Section 6 of the Minnesota Constitution ensures defendants "enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed." There were 942 jury trials requested in Hennepin County in 2018, and we summoned 26,572 citizens for jury service. The criminal justice system cannot function without jurors, and we greatly value their service. When bitterly cold weather descended on the Twin Cities at the end of January this year, we were very pleased that all of the jurors showed up and fulfilled their duty, underscoring their understanding of how important that service is to the justice system.

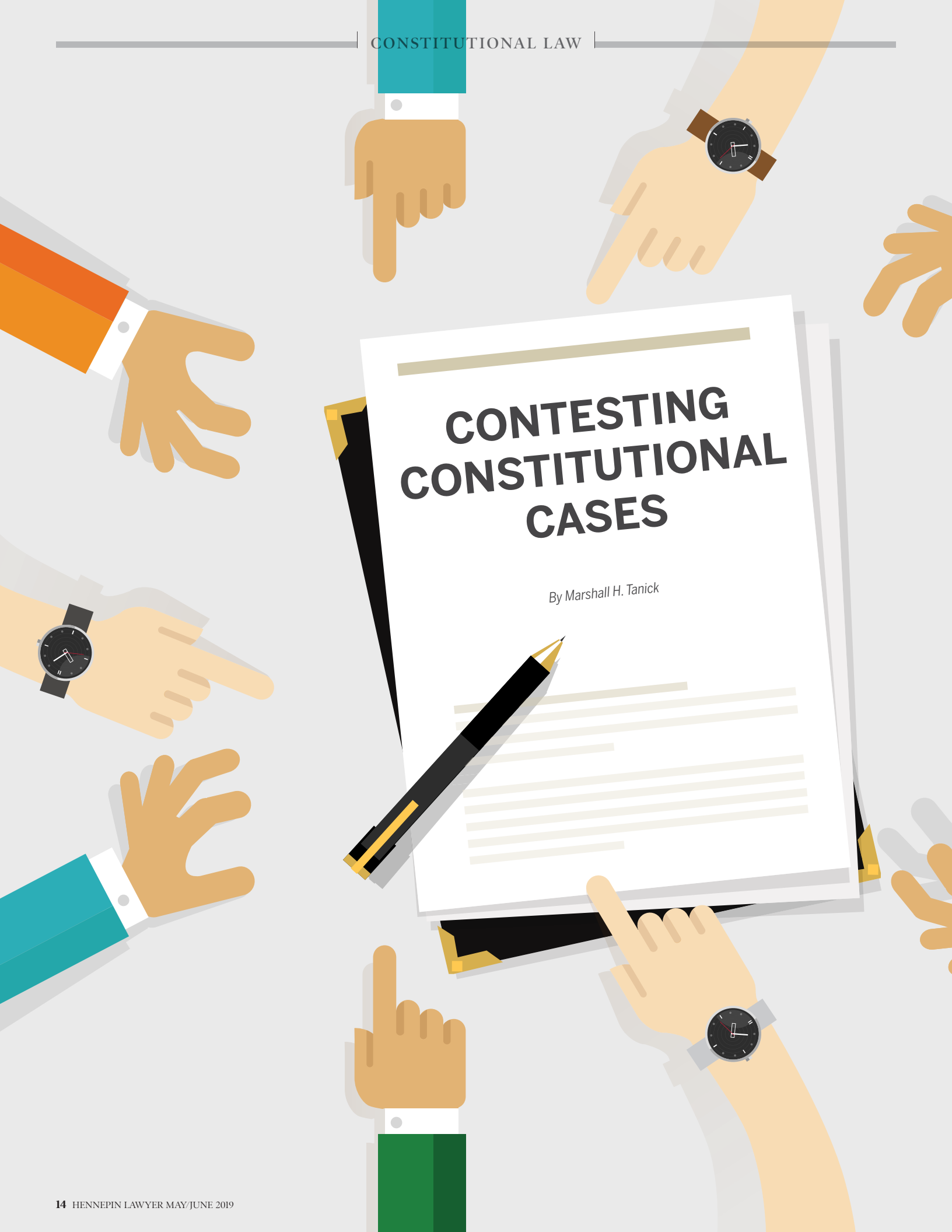
As the largest urban court in Minnesota, we handle nearly 40 percent of all cases filed in the state. Our calendaring and scheduling system ensures judicial resources are used efficiently, and our goal is for cases to move through the criminal justice system in a timely fashion. We regularly review performance measures like time to case resolution, age of pending cases, and clearance rate to ensure cases are being processed on-time and efficiently. Objective measurements help us put our work in perspective, and show us our success in meeting case processing goals. As it is often said, "justice delayed is justice denied."

As Chief Judge, my role is to make sure our judicial resources are allocated to meet case filing needs. For example, the Fourth Amendment to the U.S. Constitution sets out the requirements for search warrants, one of which is that they be issued by a judge and based on probable cause. To meet that requirement, we have a judge on-duty 24/7 to review search warrant applications. A judge reviews cases at the jail each weekend day and holiday to ensure there is probable cause to hold people until they can appear in court with an attorney. Over the last two calendar years we have seen a large increase in the number of serious felony case filings, now exceeding 7,000 annually, so I've added two judges to the teams that handle felony cases. Cases involving serious felonies are complex, time-consuming, and resource-intensive because of the severity of the charges and related consequences.

Article I, Section 8 of the Minnesota Constitution ensures everyone is entitled to "obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws." Today, our stated mission is "To provide justice through a system that assures equal access for the fair and timely resolution of cases and controversies." The wording is a little different, but our focus remains the same.

Chief Judge Ivy S. Bernhardson

Chief Judge Bernhardson was appointed to the Fourth District bench in 2007. She was elected chief judge in 2016.



CONTESTING CONSTITUTIONAL CASES

By Marshall H. Tanick

Litigation of constitutional cases has never been more widespread, nor, perhaps, more misunderstood. Lawsuits challenging federal, state, and local laws, regulations, policies, and practices on constitutional grounds make up a growing portion of cases in Minnesota and elsewhere.

Distorted views characterize, and often impair, constitutional lawsuits, especially controversial litigation. Some of these views include:

"We don't need any discovery because this is a constitutional case."

"Don't worry about the record in the trial court, because the case is going to be appealed anyway."

"Let's not clutter up our case with additional parties who will distract from the issues our clients want to raise."

"We don't have to use expert witnesses because the case will be decided as a matter of law."

These observations, like others about the subject, do contain some half-truths. But because of their flaws, they can get litigators in trouble.

The number 10 has special significance in Constitutional law, denoting the number of amendments making up the Bill of Rights. Here are 10 tips to guide those engaged in pursuing, defending, or contemplating constitutional litigation, accompanied by examples from the author's own potpourri of experiences in constitutional litigation.

1 Plan Properly

Unlike many other forms of litigation, which often arise spontaneously, constitutional litigation usually is subject to advance planning. A prospective constitutional challenge to a law or governmental practice frequently is perceived well before litigation arises. This allows parties anticipating a constitutional lawsuit ample time to prepare in a way likely to maximize a successful outcome.

Prospective litigants and their lawyers can take advantage of this opportunity by trying to create the kind of record that will be best suited to the impending litigation.

Example: A police officer in North Dakota terminated for allegedly leaking information to a television station loses a challenge to the discharge on "just cause" grounds in municipal Civil Service proceedings. While unsuccessful, pursuit of the proceedings establishes an extensive record that is helpful and saves expense for an ensuing constitutional challenge raising issues not addressed in the municipal proceeding.[1]

2 Doubt & Deviation

Challenging the constitutionality of a measure presents an uphill challenge for litigators in state court in Minnesota. For some inexplicable reason, Minnesota courts borrow a criminal law tenet, "beyond a reasonable doubt," in constitutional adjudication.[2] This elevated criterion is not paralleled in federal jurisprudence. Nor is there any logical reason why a party challenging the constitutionality of a measure, particularly in a civil context, is subject to the burden that the prosecution faces in convicting an accused in a criminal case.[3]

Because of this heavy burden, creativity counts more than usual in undertaking a constitutional challenge. Faced with this high standard, those challenging governmental enactments often need to resort to litigation to achieve their objectives.

Another deviation from the norm is Alternative Dispute Resolution (ADR). In Minnesota, arbitrators are not empowered to pass upon constitutional issues in public sector disputes, thus giving claimants two potential bites of the proverbial apple by going to arbitration on some issues, while preserving constitutional issues in a judicial forum, without collateral estoppel preclusion.[4]

Use of expert witnesses can help in meeting the standards, either for the claimant or the defense.

Example: Defense of a statute proscribing commercial sales of vehicles on Sundays, Minn. Stat. § 165.275, averts a Constitutional setback on First Amendment religious freedom grounds. The defense effectively buttresses its legal arguments with an affidavit of a noted Minnesota historian establishing that the origin of Sunday "closing laws" was economic in nature and not primarily for ecclesiastical reasons, which satisfies the "rationale basis" standard in upholding the Constitutionality of the measure.[5]

3 Alternative Avenues

Constitutional litigators should be careful of rushing in where other angles may be better to tread. Many cases that are imbued with Constitutional overtones are more easily subject to resolution on other grounds.[6]

It is a time-honored practice for courts to try to avoid constitutional issues, preferring to resolve issues on other bases whenever possible.[7] Thus, courts should be given an opportunity to resolve issues on other grounds before reaching constitutional issues. In many cases, the measures that are challenged may not be applicable to the conduct at issue as a matter of fact, and cases can be won (or lost) on these grounds, without reaching constitutional questions.

Example: A state legislator sued for defamation in a case pending before the Minnesota Court of Appeals raises alternative defenses of immunity under the "speech or debate" clause of Article IV, 8 of the Constitutional "speech or debate" clause as well as a statutory claim under the parallel, but more expansively worded state statute, §54.13.[8]

4 Pick Parties

The identities and characteristics of parties bringing constitutional litigation can be crucial to the outcomes of the proceedings. Questions of ripeness, standing, and jurisdiction necessitate careful consideration in picking the plaintiffs and, in some cases, the defendants as well. Selection of parties can have a bearing on the emphasis directed to certain issues in constitutional litigation. Particular litigants may be better situated to raise, and succeed, on specific issues or their nuances.

Example: In litigation seeking access to governmental documents, a blended constitutional and statutory case, a trade association with a pecuniary interest in the documentation approaches an academic researcher to join the case. The academician argues for broader access because of prospective research projects, which allows freedom of expression and academic freedom issues to be raised side by side with the more mercantile interests of the business group. This tactic yields a ruling allowing access to all of the materials for both claimants.[9]

5 Fair Forum

The tribunal in which a constitutional challenge is heard often can be as important as the underlying issues themselves. Litigants usually have a choice between federal and state courts to raise constitutional challenges under the Federal Civil Rights Act.[10] One forum is not necessarily better than the other.

The composition of the judiciary also should be taken into account in deciding the forum to commence a constitutional lawsuit. But attention should not be directed solely to the trial court. Consideration also should be given to which appellate system is likely to be more favorable to the issues to be advanced. Procedural issues also must be taken into account. For instance, Minnesota law generally recognizes broader standing rights to organization plaintiffs, compared with the federal system.[11]

Despite an inclination on the part of many constitutional litigators to seek relief in federal court, state court may provide a more strategically sound venue in many instances.

Example: A state law authorizing law enforcement authorities to make prehearing seizures of animals believed to be subject to abuse or cruelty is challenged under federal and state constitutional provisions in state court, rather than the federal system. The challengers fear that a federal court may view issue relating to animal control to be local in nature and, as a practical matter, not worthy of significant federal attention. Their intuition proves to be correct as the statute is invalidated in the state court system.[12]

6 Arouse *Amici*

Amici curiae can play a significant role in adjudication, or can be ignored altogether. Whether *amici* will command attention or be disregarded depends on a number of factors, including the reputation of the *amici* and the quality of their briefing.

Much of the focus of *amici* is directed to appellate proceedings after a constitutional case is decided by trial. But *amici* can be utilized effectively if aroused early in the litigation. Bringing an *amicus* into the case even at the trial court level can boost the posture of the constitutional challenger. This is particularly useful if there are *amici* who want their voices heard in a case but are reluctant to participate as named parties, or learn of the lawsuit too late to intervene. Even as nonparties, their role can be significant, particularly in addressing public interests broader than the narrow concerns of the parties in the case.

Example: An informal group of distinguished college professors participates as amicus in a lawsuit by a student newspaper challenging an administrative restriction of the publication based on content. Their involvement elevates the tenor of the case and helps the student newspaper prevail in its First Amendment challenge.[13]

7 Removal Reluctance

There should be little reluctance in using measures to require removal of trial court judges who are perceived to be antagonistic to the issues raised in a constitutional challenge. Constitutional cases, perhaps more than any others, turn on judicial ideology. Therefore, litigants and their lawyers should be mindful of the predilections of whatever judge is assigned to their case, and be prepared to act swiftly, if applicable rules allow, to remove the judge and seek another one to preside over the case.

This practice is much easier in state court, where Rule 63 allows each party at least one opportunity to remove a judge as a matter of right, and other opportunities for removal for bias or other causes. In federal court, removal is not available as a matter of right, and is more difficult to achieve as a matter of practice.[14]

Example: A municipal labor union challenging a regulation for selection of civil service personnel on Constitutional grounds finds that the case is assigned to a state court judge who is regarded as hostile to labor unions. The union opts to remove the judge under Rule 63, and a new judge, known for more leniency toward labor is assigned. The newly designated judge rules in favor of the union, which probably would have lost before the predecessor jurist.[15]

8 State Solutions

Not all constitutional litigation is resolved under the U.S. Constitution. State constitutions, including the Minnesota Constitution, usually have parallel provisions. Some state constitutional provisions occasionally are construed more broadly than their federal counterparts.[16]

In some cases, however, the lure of state constitutional litigation can be seductive, but unsuccessful. For instance, in Minnesota jurisprudence, claims of freedom of expression under the state constitution are consistently construed equivalent with, but not broader than, their federal parallels under the First Amendment.[17]

Yet this ought not deter litigants from raising state constitutional issues where appropriate, in concert with federal claims. There is danger, however, in excessive reliance on state constitutional claims, which can overshadow federal constitutional issues.

State court adjudication may also be more organized for other reasons. First, pleading requirements are more relaxed in state court compared to the heightened federal requirements.[18]

Second, the ideology of Minnesota state court judges may be more favorable to the constitutional claimants compared to the more connective federal trial and appellate courts, including the Eighth Circuit Court of Appeals. The possibility of a more favorable federal forum may induce defendants to seek removal of constitutional claims to federal court under Minn. U.S.C. §1441 within 30 days of commencement of litigation.

Third, some state constitutional provisions attract additional claims not present in federal litigation, such as the "rights and remedies" clause of Article 1, §8, and the "single subject" provision in Article IV §17.

Example: Terminated public employee pursues parallel claims under state statute for wrongful removal, coupled with federal due process claims. While prevailing in a pretrial motion on both grounds, the claimant is able to recover attorney's fees on the federal claim, which were not available on the state law claim. [19]

9 Respect Record

Another fallacy of constitutional lawsuits is that the trial court record is not very important since the litigation is destined for appellate adjudication. Although constitutional cases often are geared, from the very outset, for appellate adjudication, the appellate outcome may be determined by the record in the proceedings below. Courts rarely pass upon abstract constitutional issues, even at appellate levels. Their decisions are usually grounded on the particular facts giving rise to a controversy, and those facts must be developed in a trial court record that will prove worthy of respect on appeal. A party that fails to develop an adequate trial record acts at its own peril on appeal.

Example: Raising a defense of absence of "actual malice" (meaning lack of knowing falsity or reckless disregard for the truth) in a First Amendment defamation case, a newspaper shows that there was a sloppy mistake made by an inexperienced reporter who was not aware of the error. The plaintiff eschews taking any discovery. As a result, the defendant is able to show, without dispute, that it did not recklessly or intentionally disregard facts in its reporting. A trial court ruling dismissing the defamation case is impervious to appeal because of the absence of discovery. [20]

10 Media Matters

Constitutional lawsuits often grab the public's fancy, usually due to media interest. Because favorable attention can help steer a case to a positive outcome, the media matters when conducting constitutional litigation. Litigators should use creative ways beyond the traditional press conference to attract media attention to augment the outcome. Media focus can help boost the morale and spirits of plaintiffs, and even help shore up contributions to the challenger's finances and fuel litigation.

Example: A litigator's challenge to a Minneapolis ordinance imposing large insurance requirements and other restrictions on particular breeds of dogs is launched by gathering a number of the canines, accompanied by their owners, in a public park across the Mississippi River, in St. Paul. A celebrity spokesperson is on hand to discuss the law and why the owners are reluctant to bring their pets into Minneapolis; the event helps to attract public attention as well as associated funding to preserve the case, which ultimately results in the invalidation of the Minneapolis measure. The victory by the prevailing litigants is celebrated by a parallel event in a Minneapolis park. [21]

Conclusion

Constitutional litigation poses a special challenge for both claimants and defendants and their attorneys, as well.

These 10 tips, with appropriate modifications, are suitable for use by litigants challenging laws and policies on constitutional grounds as well as litigants defending those measures. Not all of them are applicable in any particular case; and, in some cases, none may prove useful. But drawing on these 10 tips could spell the difference between success and failure for constitutional litigants and their lawyers.

Marshall H. Tanick

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Mr. Tanick is an attorney with the Minneapolis-based law firm of Meyer Njus Tanick. He is certified as a Senior Civil Trial Specialist by the Minnesota State Bar Association.

[1] *Nagel v. City of Jamestown*, No. 18-2842 (8th Cir. 2018).
State v. Hamm, 423 N.W.2d 379 (Minn. 1988); *State v. Target Stores, Inc.*, 279 Minn. 447, 468, 156 N.W.29 908, 921 (1968).
[3] *State v. Stallman*, 519 N.W.2d 903 (Minn. Ct. App. 1994).
[4] *County of Hennepin v. LELS*, 527 N.W.2d 821 (Minn. 1995); *New Creative Enterprises, Inc. v. Dick Hume & Associates*, 494 N.W.2d 508 (Minn. Ct. App. 1993).
[5] *Kirt v. Humphrey*, 1996 WL 561249 (Minn. Ct. App. Sept. 9, 1997) (unpublished).
[6] See, e.g., *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J. concurring); *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).
[7] *90th Minnesota State Senate v. Dayton*, 903 N.W.2d 609.624 (Minn. 2017); *Limmer v. Ritchie*, 819 N.W.2d 622 (Minn. 2017) (construe statutes to "avoid Constitutional issues if possible).
[8] *Olson v. Lesch*, No. 18-1694 (Minn. Ct. App. 2019).
[9] *Animal Rights Coalition v. University of Minnesota*, File No. 94-7917, Hennepin County District Court (1995).
[10] 42 U.S.C. §1983.
[11] *Minnesota Council of Dog Clubs, Inc. v. City of Minneapolis*, 540 N.W.2d 903 (Minn. Ct. App. 1995), *rev. denied* (Minn. Jan. 25, 1996); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
[12] *Minnesota Council of Dog Clubs, Inc. v City of Minneapolis*, 540 N.W.2d at 903.
[13] *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983).
[14] *Matter of Welfare of D.L.*, 486 N.W.2d 375 (Minn. 1992), *cert. denied*, 113 S.Ct. 603 (1992); *Gray v. Univ. of Ark.*, 883 F.2d 1394 (8th Cir.), *reh'g denied* (Nov. 7, 1989); *In re City of Detroit*, 828 F.2d 1160 (6th Cir. 1987); *New York City Development Corp. v. Hart*, 796 F.2d 976 (7th Circ. 1986).
[15] *International Ass'n. of Firefighters Local 993 v. City of St. Louis Park*, File No. 86-24397, Hennepin County District Court (1986).
[16] E.g. *Hershberger v. State*, 462 N.W.2d 393 (Minn. 1990) (Minnesota Constitution's freedom of conscience clause, Article I, §17, broader than federal counterpart in treatment of cocaine offenses).
[17] *State v. French*, 460 N.W.2d 2 (Minn. 1990), *reh'g denied* (Oct. 8, 1990) (Minnesota Constitution's freedom of conscience clause broader than First Amendment of U.S. Constitution); *Geraci v. Eckankar*, 526 N.W.2d 391 (Minn. Ct. App. 1995), *rev. denied* (March 14, 1995), *cert. denied*, (116 S.Ct. 75 (1995) (religious institution insulated from wrongful discharge claim); *State v. Wicklund*, 589 N.W.2d 792 (Minn. 1999) (Article 1, §3 co-excessive with First Amendment freedom of expression).
[18] Compare *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 898 (Minn. 2014) ("notice" pleadings permitted) with *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell ATT Corp. v. Twombley*, 550 U.S. 544 (2007) ("plausible" pleadings standard).
[19] *Knutson v. Dept. of Revenue*, File No. C8-94805, Freeborn County District Court (1995).
[20] *Robertson v. Iowa Information, Inc.*, File No. 17519, O'Brien County, Iowa (1990).
[21] *American Dog Owners Assn. v. City of Minneapolis*, 453 N.W.2d 69 (Minn. Ct. App. 1990).

Challenges to the constitutionality of a search can be an important tool in the criminal defense lawyer's toolbox. This is because a challenge to the constitutionality of a search, if successful, results in suppression of evidence, and sometimes the dismissal of a criminal case. This article provides a brief history of the Fourth Amendment and its application, details two successful suppression cases from my own experience, and makes some predictions on the future of the Fourth Amendment and its application.

The 4th Amendment — a 30,000 Foot View From a Criminal Defense Standpoint

By Elliott Nickell

Brief history

In 1914 the Supreme Court unanimously stated: "Where letters and papers of the accused were taken from his premises by an official of the United States, acting under color of office but without any search warrant and in violation of the constitutional rights of accused under the Fourth Amendment, and a seasonable application for return of the letters and papers has been refused and they are used in evidence over his objection, prejudicial error is committed,"[2] recognizing that the remedy for an unconstitutional search is exclusion of evidence. The decision was incorporated to the States in 1961, in a case where police officers entered a woman's house by force, without a warrant and found "obscene materials."[3]

Both of these cases involved the search of a person's home, the most private of places.[4] The Supreme Court recognizes a "search" under the Fourth Amendment when a "person invoking its protection can claim a 'legitimate expectation of privacy' that has been invaded by government action. This inquiry normally embraces two questions: first, whether the individual has exhibited an actual (subjective) expectation of privacy; and second, whether his expectation is one that society is prepared to recognize as 'reasonable.'"[5]

Many well-recognized exceptions to the warrant requirement exist, including: 1) consent (the person agreed to the search)[6], 2) plain view (the officer can see the item in question from a place he or she is legally allowed to be), 3) exigent circumstances (emergency), 4) motor vehicle (the search of a car is lawful if there is probable cause to believe evidence of a crime will be found)[7], and 5) searches incident to a lawful arrest, stop and frisk (short stop and search is lawful if there is "reasonable and articulable suspicion" that a criminal act is "afoot.").[8]

To challenge a search and suppress evidence in a criminal case, there must be a "search" under the Fourth Amendment that does not fit into a qualifying exception. I share two examples below of situations in which Fourth Amendment challenges resulted in the suppression of evidence obtained in violation of my clients' constitutional rights.[9]

Mr. Johnson

Mr. Johnson was arrested for carrying a pistol in a public place without a permit after a gun was found in a storage locker in his apartment building. I defended him in the criminal case, and challenged the lawfulness of the warrantless search that resulted in discovery of the gun. I brought a motion seeking to suppress the pistol.

Mr. Johnson's wife saw her husband leave their basement apartment with a pistol in a locked carrying case. Though she did not fear that he would harm her, she was afraid her husband would harm himself and called the police. When officers arrived, Mr. Johnson's wife opened the outside door to the apartment building to allow them to enter. The officers confronted Mr. Johnson as he was leaving the rear of the apartment building and took him into custody.

The officers did not find a gun on Mr. Johnson's person, but they did find a key to a storage locker area located across the hall from his apartment. The officers did not obtain a warrant to search the storage locker area but instead immediately used the key they found on Mr. Johnson's person to access the storage locker area where they found a pistol outside of a locked carrying case. On this basis Mr. Johnson was charged with carrying a pistol in a public place without a permit.[10]

In challenging the constitutionality of the search that resulted in the gun being found, I focused on the facts that would support a finding that Mr. Johnson had a reasonable expectation of privacy in the storage locker area. Testimony established that the leases for the storage locker and the apartment itself were separate. Mr. Johnson was the only one on the lease for the storage locker (his wife was not on the storage locker lease), and he had the only key. Moreover, video from the arrest showed that Mr. Johnson clearly told the officers that his wife was not on the lease for the storage area and that he did not consent to the search.

The investigating officer testified that the storage locker area in the apartment building was behind a locked door. When asked how she gained access to the storage locker area, she could not remember where the key came from. The police report noted that Mr. Johnson's wife showed the police where the storage locker area was, but there was no mention in the police report that the officers obtained consent from Mr. Johnson's wife or a landlord or property manager to search the storage locker area. The police report also did not state whether the storage locker area was locked.

In granting our motion to suppress the pistol, the court found that Mr. Johnson had an expectation of privacy in the locked storage area because it was not a "common area." The court rejected the State's argument that there was an exception to the warrant requirement based on exigent circumstances, because police could have guarded the door to the storage area while they applied for a search warrant.

Since the court suppressed the pistol, the State did not have evidence to proceed with the case and was forced to dismiss the charges against Mr. Johnson.

Ms. Smith

Ms. Smith was charged with driving while intoxicated. I challenged the constitutionality of the methods used by the police to obtain evidence of her blood alcohol level. Specifically, I developed evidence that the police made inaccurate statements to Ms. Smith concerning applicable law, and either did not obtain consent from Ms. Smith to test her blood alcohol content or obtained such consent under duress.

When Ms. Smith was arrested and taken to the police station, she was read the implied consent advisory and was told that "refusal to take a test is a crime." She was then asked if she would take a breath test.

Ms. Smith consented to the breath test, but the DataMaster machine was not working (twice a year it shuts down for daylight savings time, and this was one of those times). When the police realized the DataMaster machine was not working, they asked Ms. Smith if she would take a urine test. She did not respond in the affirmative but said "whatever we can do to make this process go faster." There was not a second implied consent advisory read for the urine test in the file and no warrant was obtained for the urine test.

Minnesota's DWI test refusal statute at the time provided that it is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under the implied consent law.[11] However, the appellate court in *Thompson* concluded warrantless urine tests were not constitutional.[12] Because officers told Ms. Johnson that refusal to take the test is a crime, and then asked her to take a urine test, the court found the statement "refusal to test is a crime" was not an accurate statement of the law. This, the court reasoned, was coercive and therefore the consent exception to the warrant requirement did not apply. Ultimately, the court suppressed the urine test, leaving no admissible evidence of blood alcohol level.

What could the future hold?

The Supreme Court recently took up the issue of search and seizure in the modern era in *Carpenter v. United States*.[13] The 119-page decision was delivered by Chief Justice Roberts and included four dissenting opinions from Justices Kennedy, Thomas, Alito, and Gorsuch. In this case, the government obtained cell site location data for Timothy Carpenter, who was suspected of robbery. The government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day—without a warrant.[14] The Court explained that the "third party doctrine"—that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties (which the government relied on heavily in arguing Carpenter did not have a legitimate expectation of privacy in the records)—and the Fourth Amendment did not apply.[15] The lower court used this reasoning to find that the Fourth Amendment did not apply and a warrant was not needed for the cell cite location information.[16]

However, the Court declined to extend the "third party doctrine" to cell site location information because "cell phones and the services they provide are such a 'pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society"[17] and "a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up."[18] Ultimately, in the narrow decision, the records were considered a search and were governed by the Fourth Amendment. This case was reversed and remanded to the lower courts.[19]

Justice Roberts took pains to explain that the Court was not overturning the "third party doctrine," and neither was it attempting to call into question conventional surveillance techniques and tools (such as security cameras), to address other business records that might incidentally reveal location information, or to address other collection techniques involving foreign affairs or national security. The Court said: "As Justice Frankfurter noted when considering new innovations in airplanes and radios, the Court must tread carefully in such cases, to ensure that we do not 'embarrass the future.' *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 300 (1944)."

What could the future hold for the Fourth Amendment in the digital age?

Ninety percent of the world's data was created in the past two years.[20] While the *Carpenter* court found that the location data from a cell phone was not necessarily created as an affirmative act on the part of the cell phone user, people affirmatively share very intimate data every day. Twelve million people had their DNA analyzed in 2017, more than all previous years combined.[21] The company 23andme states on its website: "under certain circumstances, your information may be subject to disclosure pursuant to a judicial or other government subpoena, warrant or order, or in coordination with regulatory authorities."[22] Another company similarly disclaims: "FamilyTreeDNA has granted police permission to upload data from crime scene DNA and search the company's more than 1 million records to look for relatives of potential suspects."[23] The police objective is not necessarily to use the data to find someone who has committed a crime, but to find a relative of someone who has committed a crime (someone for whom probable cause for a warrant would likely not exist). The police can then use other investigative techniques, including the use of Facebook, to find their suspect.

If you have Google maps, and location services are enabled, your location is being tracked by a third party.[24] Google has received court orders requiring them to give the location data on its customers.[25] For many of these customers, probable cause likely would not exist to obtain a warrant. In the cases cited, "it's unclear if Google is actively fighting the government on the data demands" because "there were no court filings showing Google actively appealed."[26]

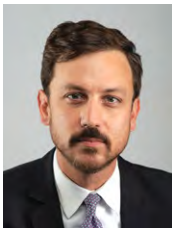
You may remember when the Federal Bureau of Investigation attempted to force Apple to unlock the iPhone of a suspected terrorist.[27] Senator Ron Wyden (D-Oregon) noted: "The FBI's leadership went straight to the nuclear option—attempting to force Apple to circumvent its encryption—before attempting to see if their in-house hackers or trusted outside suppliers had the technical capability to break in to the San Bernardino terrorist's iPhone."[28]

What does all this mean for the Fourth Amendment going forward? The Court is likely to view different types of data differently. Voluntarily giving your DNA to a third party is a much more affirmative act than using a cell phone that automatically records cell site location data. Actively using Google maps or another map application also seems more voluntary and affirmative than simply using a cell phone.

If you have Google maps, and location services are enabled, your location is being tracked by a third party.

This could certainly lead to a decision more consistent with the "third party doctrine" talked about in the Carpenter decision. It is entirely possible that some or all of these companies could cave to government pressure and give the data over voluntarily or decline to fight a subpoena or court order. The Court could find that the Fourth Amendment does not apply to this voluntary sharing of data with these companies. This does not even address the frightening revelations of Edward Snowden, who leaked information showing massive amounts of data were collected by the U.S. government on ordinary innocent citizens.[29]

In an age when people actively share more and more information, the Court could find that there is no expectation of privacy in data that is all around us, including our location, social media usage, email communications, and DNA data. Studies have found that six in ten Americans would like to do more to protect their privacy, and two-thirds believe current laws are not adequate to protect their privacy.[30] Certainly people can push their legislators to make laws safeguarding their privacy, and if there are laws safeguarding this data, people could expect the data to remain private (thereby enhancing Fourth Amendment protections).



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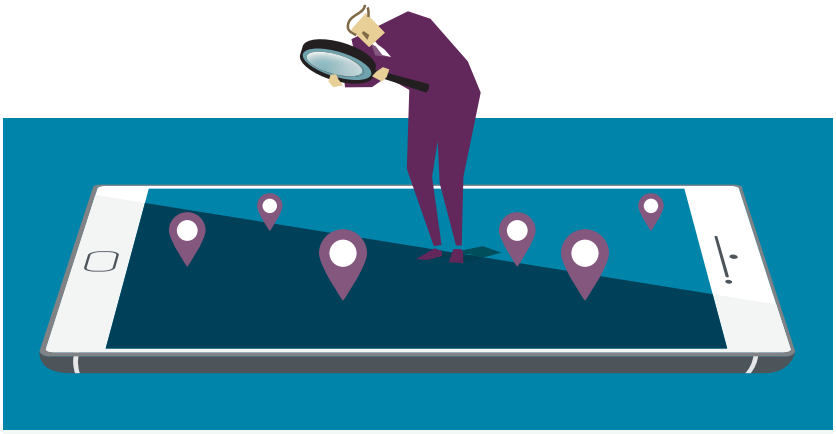

[1] See *Weeks v. United States*, 232 U.S. 383 (1914).
[2] Id. at 384
[3] *Mapp v. Ohio*, 367 U.S. 643 (1961)
[4] Sir Edward Coke, The Institutes of the Laws of England, 1628.
[5] *Smith v. Maryland*, 442 U.S. 735 at 736 (1979) (citing *Katz v. United States*, 389 U. S. 347. Pp. 442 U. S. 739-741.)
[6] *Illinois v. Rodriguez*, 497 U.S. 177 (1990).
[7] *Carroll v. United States*, 267 US. 132 (1925).
[8] *Terry v. Ohio*, 392 U.S. 1 (1968). Widespread use of Stop and Frisk in New York City faced heavy criticism. See https://*www.washingtonpost.com/news/the-fix/wp/2016/09/21/it-looks-like-rudy-giuliani-convinced-donald-trump-that-stop-and-frisk-actually-works/?utm_term=.7a63f0ede591* (accessed March 18, 2019), Floyd, et al. v. City of New York, et al. (case citation of 959 F. Supp. 2d 540 (2013)
[9] Names are fictitious to protect client confidentiality.
[10] Minnesota law requires a permit to carry a pistol in a public place, but allows non permit holders to transport a pistol unloaded in a locked case. See Minn. Stat. 624.714. A permit is not required to possess a pistol in one's home if not otherwise ineligible. See id.
[11] Minn. Stat. § 169A.20, subd. 2 (2015 version).
[12] *State v. Thompson*, 873 NW.2d 873 (Minn. Ct. App. 2015) (The court, in recognizing privacy interest in the passing of urine, stated: "a warrantless urine test cannot be justified under the search-incident-to-arrest exception."). The statute has now been updated to make refusal to take a blood or urine test a crime when the police do obtain a warrant. See Minn. Stat. 169A.20.
[13] *Carpenter v. United States*, No. 16-402, 585 U.S. ____ (2018).
[14] Id.
[15] Id. ("We have previously held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith*, 442 U. S., at 743–744.).
[16] Id. at
[17] Id. (quoting *Riley*, 573 U. S., at ____ (slip op., at 9).
[18] Id.
[19] The convictions were overturned and presumably the government could try Carpenter again without the aid of the cell site location data.
[20] *https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/#28fea30660ba* (accessed March 28, 2019).
[21] *https://www.technologyreview.com/s/610233/2017-was-the-year-consumer-dna-testing-blew-up/* (accessed March 18, 2019).
[22] *https://customercare.23andme.com/hc/en-us/articles/212271048-How-23andMe-responds-to-law-enforcement-requests-for-customer-information* (accessed March 18, 2019).
[23] *https://www.sciencenews.org/article/family-tree-dna-sharing-genetic-data-police-privacy* (accessed March 18, 2019).
[24] *https://support.google.com/maps/answer/6258979?co=GENIE.Platform%3DiOS&hl=en&oco=1* (accessed March 18, 2019).
[25] *https://www.forbes.com/sites/thomasbrewster/2018/10/23/feds-are-ordering-google-to-hand-over-a-load-of-innocent-peoples-locations/amp/* (accessed March 18, 2019).
[26] Id.
[27] *https://www.cnet.com/news/fbi-asked-apple-to-unlock-iphone-before-trying-all-its-options/* (accessed March 18, 2019).
[28] Id.
[29] *https://www.businessinsider.com/snowden-leaks-timeline-2016-9* (accessed March 18, 2019).
[30] *http://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns/* (accessed March 18, 2019).

Civil Forfeiture after *Timbs*

Mission *Not* Accomplished

By John Gordon, David McKinney, and Alanna Pawlowski

Fines and fees and civil asset forfeitures impose crushing debt on the most vulnerable members of our community. Faced with general fund shortfalls, state and local governments have used fines, fees, and forfeitures to balance budgets—increasing fines, imposing fees on individuals for the government's own criminal justice functions, and seizing assets worth far more than the penalties imposed by the criminal justice system—all at the expense of individuals, some of whom are never convicted of a crime and many of whom can least afford it. These burdens fall disproportionately on low-income individuals and people of color. Using fines, fees, and forfeitures to fund general government services also skews incentives in the criminal justice system, prioritizing short-term revenues over public trust and safety.

Neither the federal government nor the state of Minnesota has done much to curb the negative impacts of fines, fees, and forfeitures. In Minnesota, proceeds from forfeitures have nearly tripled (adjusted for inflation) since the mid-1990s, the earliest period with comparable forfeiture data. In 2017 there were 7,852 completed forfeitures, totaling more than $9.4 million in proceeds. Seized property was returned or sold back to the owner 25 percent of the time, but that figure includes instances in which the owner was required to pay for the return of their property, sometimes up to its full assessed value—still representing a loss for the property owner. In terms of proceeds from completed forfeitures, about $600,000 (6 percent) was returned to property owners. Another $2 million (20 percent) went to administrative expenses and property owners' obligations, such as court-ordered restitution and liens against the property. Governmental entities—mostly law enforcement—ended up that year with the remaining $6.7 million (74 percent).

This increase in forfeiture activity comes despite protections against excessive fines in the Eighth Amendment and Minnesota Constitution. Part of the problem stems from a lack of clarity over what constitutes an "excessive fine," generally defined only as fines, fees, and forfeitures that are "grossly disproportional to the gravity of the offense."[1] The Minnesota Supreme Court provides some structure to this determination by a using three-factor test, although no one factor is dispositive.[2]

The Court of Appeals for the Eighth Circuit provides a long, non-exhaustive list of factors to consider to determine gross disproportionality,[3] but such a wide array of factors does little to provide clarity or consistency.[4]

The most recent Supreme Court ruling on excessive fines came in February, in *Timbs v. Indiana*, where the Court ruled unanimously to apply the Excessive Fines Clause of the Eighth Amendment of the U.S. Constitution to states under the Fourteenth Amendment.[5] While *Timbs* is a pivotal case that may help mitigate the abusive government system of fines, fees, and forfeitures, that may take some time, because the Court's opinion did not provide new guidance on when a fine, fee, or forfeiture is "grossly disproportional." The Court's long-held proportionality principle is simply that "[t]he amount of the forfeiture must bear some relationship to the gravity of the offense that

it is designed to punish" and thus "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."[6] *Timbs*'s lack of guidance on proportionality is unfortunate because existing protections against excessive fines have failed to curb the crushing and disparate impact of this system of generating revenue for the state.

To fix this problem, Minnesota lawmakers are considering a bill this session to add procedural safeguards to the forfeiture process by eliminating forfeitures other than those imposed by criminal court orders. This reform would promote fairness and reduce disparities in law enforcement.

The Basics of Civil Forfeiture in Minnesota

Civil forfeiture proceedings are *in rem* proceedings, taken against property instead of the criminal offender. Operating independent of any criminal prosecution, these proceedings allow the state to confiscate and keep property associated with certain "designated offenses."[7] By contrast, criminal forfeiture proceeds *in personam* in criminal court only after conviction for a limited number of offenses, obtained pursuant to the usual safeguards of a criminal proceeding. Not surprisingly, civil forfeiture proceedings are far more common and far more lucrative for the government.

A person's property can be civilly forfeited through either (a) court order (that is, judicial forfeiture) or (b) agency action (administrative forfeiture). In administrative forfeiture, all rights to property seized are transferred to the seizing law enforcement agency upon a lawful arrest or search. To regain the property, the original property owner must challenge seizure by serving a civil complaint within 60 days of a seizure notice, even absent a conviction. Because both judicial and administrative forfeitures are civil proceedings, the property owner has no right to counsel. For low-income individuals who would otherwise have access to a public defender, the high cost of hiring an attorney or missing work for additional court dates to contest a civil forfeiture may dwarf the value of forfeited property.[8]

Revenues from civil forfeiture go to different units of government, depending upon the nature of the related offense. Generally, funds are divided among the seizing law enforcement agency (70 percent), the prosecuting agency (20 percent), and the state general fund (10 percent).[9] For certain crimes, like prostitution and trafficking, a large portion of revenues is directed to particular crime-prevention funds.

Minnesota Has Tried for Years to Rein in Excessive Fines and Forfeitures

The Minnesota Constitution prohibits excessive bail and fines.[10] When Minnesota's first forfeiture law was passed in 1971, it applied only to controlled substance-related crimes. But in the following decades, the range of crimes that could result in forfeiture and the range of property that agencies could seize expanded dramatically. In the 1990s, the Legislature imposed forfeiture-reporting requirements, but soon exempted DUI-related forfeiture from reporting.

Thanks to the lobbying work of the American Civil Liberties Union of Minnesota and the Institute for Justice, statutory reforms followed. In 2010, the Legislature required officers to provide forfeiture receipts upon seizure of property, added a certification process for administrative forfeiture, increased reporting requirements and broadened them to include DUI-related forfeiture, and prohibited sales of forfeited items directly to law enforcement members or their families. And a 2014 statute forbids judicial forfeiture unless there has been a conviction or admission of guilt. But this reform left untouched administrative forfeiture, which accounts for the vast majority of forfeiture activity. As a result, even if people are never convicted of a crime, they may still lose property if they fail to promptly challenge its seizure.

The law was slightly revised in 2017 to allow a vehicle owner to keep their vehicle if someone else used it without the owner's permission or knowledge and was convicted of driving the vehicle while intoxicated.

Now it's Clear that the Excessive Fines Clause Applies to the States

Although the Eighth Circuit had held that the Excessive Fines Clause is incorporated into the Fourteenth Amendment and therefore applies to the states,[11] until February the U.S. Supreme Court had never so held. It did so in *Timbs v. Indiana*.[12] Mr. Timbs challenged Indiana's confiscation of his $42,000 Land Rover in connection with a crime with a maximum fine of $10,000, for which he was assessed fines and costs totaling only $1,203. Although the Court held that the Eighth Amendment applies to the states, it passed up the opportunity to shed light on what the Eighth Amendment limitations specifically are, instead simply remanding the case to the Indiana Supreme Court. Thus, any hope that *Timbs* will provide a cure for unreasonable civil forfeitures is misplaced.

Forfeitures are Running Rampant, both in Minnesota and in Other States

Forfeitures have increased in recent years both in Minnesota and nationally. Five years ago, Minnesota completed 6,955 forfeitures, totaling nearly $8.8 million in proceeds. By 2017 there were 900 more forfeitures and half a million dollars more in revenue.[13] The total value of seized property from completed forfeitures in 14 states more than doubled from 2002 to 2013.[14]

Nearly 90 percent of all forfeiture proceedings relate to controlled substance or DUI offenses. And 96 percent of these proceedings are administrative and therefore untouched by the 2014 Minnesota law making a criminal conviction a prerequisite to a judicial forfeiture.[15] Likewise, administrative forfeiture also dominates the federal forfeiture landscape, with nearly 90 percent processed administratively, rather than judicially.[16]

Forfeitures Have Disparate Impacts and Reduce Public Safety

In *Timbs*, the Supreme Court emphasized the historic importance of being free from excessive fines, as well as the harm caused by local governments' increasing reliance on fines, fees, and forfeitures to bolster law enforcement budgets and general funds.

The Court traced the history of the Excessive Fines Clause from the Magna Carta in 1215, through the English Bill of Rights in 1689, to early state constitutions and the Eighth Amendment. It emphasized that abuses have been occurring for centuries, despite these protections. For example, Black Codes in southern states punished freed slaves with heavy fines for "'vagrancy' and other dubious offenses" and imposed involuntary labor for failure to pay fines.[17]

The poster child for the persistence of these historic abuses is Ferguson, Missouri. The U.S. Department of Justice's 2015 report into court and policing practices in Ferguson rebuked the law enforcement practices as being driven by "revenue rather than by public safety needs."[18]

It found that this revenue-generating focus fueled behaviors that disproportionately harmed Ferguson's African-American residents and undermined community trust. While reading the 105-page report can be daunting, the first nine pages provide a clear and chilling summary of what policing-for-profit looks like in today's America.

The Supreme Court has previously noted that revenue from fines can skew incentives and result in fines out of alignment with "the penal goals of retribution and deterrence."[19] Given the diminished public funding for court systems and the political unpopularity of tax increases, state and local governments have turned to fees, fines, and forfeitures to buoy general funds. Such methods of raising revenue may be more politically feasible in part because the harm they cause disproportionately hurts those who have the least political power: low-income individuals and people of color.[20]

These communities are both more likely to have property seized and more vulnerable to the downstream consequences of fees, fines, and forfeitures. For example, cash forfeiture, which represents approximately 25 percent of forfeitures in Minnesota, disproportionately affects low-income, Black, and Hispanic households, who are five times more likely to be unbanked than White households, according to the Federal Deposit Insurance Corporation (FDIC).[21] Unbanked individuals frequently use cash, which can be seized, rather than checking and savings accounts or credit cards, which are generally not subject to seizure. At least one state, Oklahoma, has even deployed technology to scrape funds off prepaid debit cards, another payment method more likely to be used by lower-income individuals.[22] While some law enforcement officers view cash as evidence of proceeds from criminal activity, it is also the most common method of bill payment for unbanked households.

Minnesota forfeiture law also treats renters more harshly than homeowners. By statute, landlords are directed to evict renters or assign the right to do so to the prosecuting authority within 15 days of any seizure of contraband or controlled substances valued at more than $100 on the property.[23] If a landlord does not evict and there is a second seizure within a year from the same tenant valued at $1,000 or more, then the property is subject to forfeiture. But non-rental residential property is subject to forfeiture only if the seized controlled substance or contraband is worth $2,000 or more.

Once assets have been seized, low-income, Black, and Hispanic households tend to have less access to credit to help withstand the loss: more than 67 percent of Black and 63 percent of Hispanic households making less than $15,000 have no mainstream credit, compared to 48.2 percent of White households at that income level. Looking across income ranges, only 8.5 percent of White households making $50,000 to $75,000 lack mainstream credit, compared to approximately 18 percent of Black or Hispanic households at that income level. A 2018 national survey further found that 32 percent of Americans had no savings and 58 percent had less than $1,000.[24]

The collateral consequences of law enforcement seizing cash meant for bills or a household's sole vehicle for getting to work can quickly mount, all while the property owner is still theoretically presumed innocent in the criminal justice system. A seizure that would have been manageable for a person of higher income becomes an insurmountable source of financial instability for those who cannot make up the loss, ultimately undermining the deterrent and rehabilitation purposes of the justice system.[25]

Finally, focus on revenue collection can harm public trust in law enforcement and make us less safe. In the case of Ferguson, the Department of Justice found that pressure to pursue revenue-raising tickets and arrests diverted resources from community-policing strategies and investigations of officer misconduct. The financial burden of fines, fees, and forfeitures can also create public safety-harming barriers to successful reintegration into the community for those involved with the criminal justice system. This is at odds with the consensus that reintegration helps prevent recidivism and promotes public safety.[26]

[1] *United States v. Bajakajian*, 524 U.S. 321, 322 (1998). In circuits that have considered it, proceeds from illegal activity, such as drug sales, do not receive this protection. *See United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994).

[2] The court considers "the gravity of the offense and the harshness of the penalty;" the fine at issue relative to fines for other crimes in the jurisdiction; and the fine at issue compared to fines imposed for the same crime in other jurisdictions. *Miller v. One 2001 Pontiac Aztek*, 669 NW.2d 893, 895–97 (Minn. 2003) (*citing Solem v. Helm*, 463 U.S. 277, 290–91 (1983) (creating the three-factor test for determining grossly disproportionate sentences)).

[3] *United States v. Dodge Caravan Grand SE/Sport Van, VIN No. 1B4GP44G2YB7884560*, 387 F.3d 758, 763–64 (8th Cir. 2004).

[4] Eighth Circuit precedent at least suggests that if the value of forfeited property exceeds the permissible range of fines under the sentencing guidelines for the relevant crime(s), then it might be excessive. *See United States v. Moyer*, 313 F.3d 1082, 1086–87 (8th Cir. 2002) (holding that if the value of the forfeited property is within the permissible range of fines under the sentencing guidelines, the forfeiture is presumptively not excessive).

[5] *Timbs v. Indiana*, No. 17-1091, 2019 WL 691578 (U.S. Feb. 20, 2019).

[6] *Bajakajian* at 334.

[7] Minn. Stat. § 609.531.

[8] Luis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. Pa. J. Const. L 1111, 1127-29 (2017) (discussing lower-value seizures).

[9] Minn. Stat. § 609.5315 subd. 5

[10] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." Minn. Const. Art. 1, § 5. *See also State v. Rewitzer*, 617 N.W.2d 407, 412 (Minn. 2000) (affirming that "[b]oth the United States and Minnesota Constitutions protect individuals from excessive fines").

[11] *See Qwest Corp. v. Minnesota Pub. Utilities Comm'n*, 427 F.3d 1061, 1069 (8th Cir. 2005).

[12] *Timbs v. Indiana*, No. 17-1091, 2019 WL 691578 at *1.

[13] Yearly reports available at State of Minnesota Office of the State Auditor, Government Information Division, *Criminal Forfeitures*, *https://www 9.auditor.state.mn.us/default.aspx?page=CriminalForfeitures (last updated June 12, 2018).*

[14] Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* (Inst. for Just. 2d ed. 2015), *https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf.*

[15] State of Minnesota Office of the State Auditor, Government Information Division, *Criminal Forfeitures in Minnesota for the Year Ended December 31, 2017* (June 12, 2018), *https://www.auditor.state.mn.us/reports/gid/2017/forfeiture/forfeiture_17_report.pdf.*

[16] Carpenter, *Policing for Profit*.

[17] *Timbs v. Indiana*, No. 17-1091, 2019 WL 691578 at *3-4.

[18] United States Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* (Mar. 4, 2015), *https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.*

[19] *Harmelin v. Michigan*, 501 U.S. 957, 978 (1991).

[20] Sarah Stillman, *Taken*, The New Yorker (Aug. 12 and 19, 2013), *https://www.newyorker.com/magazine/2013/08/12/taken.*

[21] Federal Deposit Insurance Corporation, *FDIC National Survey of Unbanked and Underbanked Households, 2017, Executive Summary* (Oct. 2018), https://www.fdic.gov/householdsurvey/2017/2017execsumm.pdf.

[22] Radley Balko, *New Frontiers in Asset Forfeiture*, Wash. Post (June 8, 2016), *https://www.washingtonpost.com/news/the-watch/wp/2016/06/08/new-frontiers-in-asset-forfeiture/.*

[23] Minn. Stat. § 609.5317.

[24] Cameron Huddleston, *58percent of Americans Have Less Than $1,000 in Savings*, GOBankingRates (Dec. 21, 2018), *https://www.gobankingrates.com/saving-money/savings-advice/average-american-savings-account-balance/.*

[25] *See* Rulli, *Seizing Family Homes from the Innocent*; *see also* Karin D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 Ann. Rev. of Criminology 471 (2018) (discussing the severe negative downstream effects of fines and fees on lower-income individuals).

[26] Council of State Governments & National Reentry Resource Center, *Making People's Transition from Prison and Jail to the Community Safe and Successful: A Snapshot of National Progress in Reentry* (2017), *https://csgjusticecenter.org/wp-content/uploads/2017/06/6.12.17_A-Snapshot-of-National-Progress-in-Reentry.pdf.*

The Path Forward: Legislation and Litigation

Minnesota state legislators have the opportunity this session to pass a bill to rein in these troubling forfeiture practices. HF 1971 would eliminate administrative forfeiture and re-direct the bulk of monies obtained from forfeited property away from the seizing law enforcement agency. Under the bill, property may be forfeited only if the property owner is convicted of a crime and if the state establishes by clear and convincing evidence that the property was derived directly from the underlying offense or its proceeds, or that the property was used to commit the designated offense.

The courts offer another path toward fairness. While both Minnesota state and federal courts have previously found unconstitutional excessive fines, fees, and forfeitures, *Timbs* should encourage such challenges. *Timbs* will also likely serve as fuel for discussing whether, and to what extent, civil forfeiture should continue and, of course, the meaning of the Eighth Amendment's "grossly disproportional" standard.

When Justices Ginsburg and Thomas join each other and the rest of the Court to rein in government overreach, that matters. *Timbs* is likely to stiffen the spines of both state and federal judges and encourage them to curtail the increasing use of fines, fees, and forfeitures, and the harms they cause. These harms include pulling low-income defendants further into poverty, disproportionately hurting communities of color, skewing incentives for law enforcement away from safety and toward profit, and undermining public safety and trust in the criminal justice system.

H.F. 1971 could both be an important step forward itself, and also set the tone for the discussions of this issue that will surely occur throughout this country in courtrooms, administrative agencies, legislatures, and the public square.

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ONE HUNDRED YEARS TEN CONSTITUTIONAL CASES

By Justice David L. Lillehaug and Devin T. Driscoll

The 100th anniversary of the Hennepin County Bar Association is a suitable occasion to look back and appreciate Minnesota's constitutional jurisprudence. To honor the HCBA, we agreed to sift through a century of Minnesota Supreme Court cases and highlight 10 notable decisions.

So, you may ask, how does one decide what is "notable?" It took some work to come up with criteria. We decided that, first, the case must interpret or apply the Minnesota Constitution. So you mavens of the common law looking for a discussion of *Nieting v. Blondell*[1] on the abolition of sovereign immunity or *Springrose*[2] on absolute tort defenses may be disappointed. Our constitutional criterion also rules out *Brayton v. Pawlenty*,[3] the case about the governor's power to unallot—that is, to spend (or not spend) appropriated funds; the Court decided that case on statutory, not constitutional, grounds.

We are aware that limiting this article to state constitutional matters excludes some famous cases in which the Minnesota Supreme Court was affirmed or reversed by the United States Supreme Court on a point of federal constitutional or statutory law. Our exercise of restraint—although not prior restraint—puts *Near v. Minnesota*[4] far afield.

Second, we looked for cases that announced a rule of state constitutional law that was both new and durable. That's why, for example, we chose *State v. Gray*,[5] which recognized a state constitutional right to privacy but will be unfamiliar to most of you. We considered *Doe v. Gomez*,[6] which applied the *Gray* right of privacy to abortion, to be a product of *Gray* and, thus, not a Top 10 case. (By this explanation, we have just demonstrated that we didn't avoid *Doe* because it was, and remains, highly controversial in the political world.)

We also excluded *Coleman v. Franken*,[7] which finally decided the 2008 U.S. Senate election and recount. Although the results of the case were hugely consequential for the balance of power in the United States Senate, the case itself broke no new state constitutional ground. Senator Norm Coleman's due process and equal protection ballot challenges were litigated primarily under the United States Constitution, not the Minnesota Constitution.

Third, we looked for cases that are frequently cited in the Minnesota Supreme Court or that are foundational to recent cases. We did not force ourselves to ensure that every decade of the last hundred years was represented in our list. Important constitutional decisions seem to come in bunches. Several cases on our list involving individual liberties arose in the 1980s and the 1990s, when the Minnesota Constitution—like many state constitutions—enjoyed fresh looks and thoughtful reappraisals.[8]

Finally, we sought an equitable division between cases about individual rights and cases about the structure of government. We chose five cases in each category. As you will discern, the division between the categories is not a clean one. In some cases, the categories are two sides of the same coin; cases highlighting individual rights often say much about governmental structure, and vice versa.

We fully expect that some of you will disagree with at least some of our selections and omissions. We welcome your dissents. The history of the Minnesota Supreme Court is a rich one and the veins of cases to mine run deep. Because we write as individuals rather than on behalf of the court, our decisions are entitled to no deference.

Individual rights and liberties

Thiede v. Town of Scandia Valley, 14 N.W.2d 400 (Minn. 1944)

According to the opinion, the facts of this case could serve as a sequel to Steinbeck's *The Grapes of Wrath*.[9] The case revolved around the efforts of two towns to avoid, in the later stages of the Great Depression, having to pay "poor relief" to an impoverished family, the Thiedes—Louis, Louise, and their six children.

The Thiedes had been receiving public assistance as they moved back and forth between the communities of Fawn Lake, in Todd County, and Scandia Valley, in Morrison County.[10] Eventually, the family acquired a homestead in Scandia Valley.[11] In 1942, a dispute arose between Fawn Lake and Scandia Valley as to which town would bear the responsibility for any further public assistance that the Thiedes might need.

The two towns then reached a deal: Scandia Valley would allow the Thiedes to live within its borders so long as Fawn Lake "continue[d] to make proper provision for the care and maintenance of said paupers."[12] After the settlement had been in force for approximately seven months, "the town of Fawn Lake tired of its bargain," and provided Scandia Valley with notice of its intent to "cease[] to be responsible for [the Thiedes'] care and support."[13] Scandia Valley, pursuant to a state statute, then notified the family that in 10 days the sheriff would "remove" them to Fawn Lake.[14]

"The Thiede family, feeling secure in their home, refused to move."[15] So the sheriff made good on the notice, leaving the Thiedes and all their worldly possessions "on the ground in the farm yard" of Louise's mother-in-law.[16] "The removal was accomplished in sub-zero weather and... [Louise], her husband, and [their] children suffered from extreme exposure and suffered great mental anguish, embarrassment, and loss of sleep."[17]

The opinion of the Court recognized the state constitutional right to the sanctity of the home.[18] Several related, important points of law were announced.

First, the Court held that "[t]he rights, privileges, and immunities of citizens exist notwithstanding there is no specific enumeration thereof in State Constitutions."[19] The Minnesota Constitution "significantly provides" that the enumeration of rights in the constitution "'shall not be construed to deny or impair others retained by and inherent in the people.'"[20]

Second, the Court held that it is a principle of fundamental law that one cannot be disseized from one's freehold except for crime.[21] The Court cited the ancient maxim, "[e]very man's house is his castle," which the court characterized as "a terse statement, in language which everyone should understand, of a legal concept older even than the Magna Carta."[22] Finally, all citizens have a remedy when fundamental law is violated. In this case, town officials could be held personally liable for their unconstitutional acts "if willfulness, wantonness, and malice on their part be shown...."[23]

State v. Gray, 413 N.W.2d 107 (Minn. 1987)

Gray was charged with violation of the criminal sodomy statute for allegedly having sex with a male prostitute. Gray lost the case, but the result was a clear recognition of a state constitutional right to privacy.

The Supreme Court ruled: "[I]t is our opinion that there does exist a right of privacy guaranteed under and protected by the Minnesota Bill of Rights."[24] Further, said the Court, the Minnesota Constitution could be interpreted to provide more fundamental rights than the U.S. Constitution, including for private sexual acts.[25] But patronizing a prostitute by paying compensation was not a private act, so the law did not violate the state constitution.[26]

Ascher v. Commissioner of Public Safety,
519 N.W.2d 183 (Minn. 1994)

Gray reaffirmed that the Minnesota Constitution may provide broader rights than comparable provisions in the federal Constitution. The Fourth Amendment and its Minnesota counterpart, article I, section 10, are materially identical.[27] Yet the protections they afford are not always congruent. *Ascher* is the seminal case applying this principle to the frequently litigated subject of search and seizure.

Although the Fourth Amendment does not prohibit police use of temporary roadblocks to investigate whether drivers are intoxicated,[28] the Minnesota Constitution does, said the court in *Ascher*.[29] The Court acknowledged that "a substantial segment of our society would willingly suffer the short term intrusion of a sobriety checkpoint stop in order to remove drunken drivers from the road."[30] But it struck the "constitutional balance" in favor of protecting the traveling public from stops without "an objective individualized articulable suspicion of criminal wrongdoing."[31]

Ascher has inspired the court to depart from the U.S. Supreme Court's Fourth Amendment jurisprudence in several subsequent cases.[32] Appellate counsel for defendants now routinely argue that article I, section 10, should be independently applied. The argument doesn't always work; in recent years the court has declined to apply a stricter standard to administrative warrants[33] and garbage searches.[34] But we suspect that it will work again.

State v. Scales,
518 N.W.2d 587 (Minn. 1994)

This is the case in which the Court required, prospectively, that all custodial interrogations, including any information about, and waiver of, rights such as *Miranda* rights, be electronically recorded.[35] No such recording was or is required at the federal level. In mandating it at the state level, the Court relied on its "'power to provide broader individual rights under the Minnesota Constitution than are permitted under the United States Constitution.'"[36]

Although the Court cited "the accused's right to counsel, his right against self-incrimination, and his right to a fair trial," as well as the Minnesota due-process clause, the holding is not based on any specific provision in the state constitution.[37] Rather, said the court, it relied on its constitutional "supervisory power to insure the fair administration of justice."[38]

In our opinion, *Scales* was an appropriate invocation of seldom-used judicial supervisory power. Its procedures have enhanced the truth-seeking process and reduced law enforcement misconduct in interrogations. As the criminal justice system continues to confront challenges to the reliability of evidence, we should keep *Scales* front of mind.

State v. Hershberger ("Hershberger II"),
462 N.W.2d 393 (Minn. 1990)

An Amish driver challenged the state's requirement that he display an orange sign on the back of his buggy. The Supreme Court granted relief under the state constitution's article I, section 16, guarantee of religious freedom. This guarantee, which covers "the rights of conscience," is a stronger protection than the First Amendment, which is triggered by "prohibiting" the exercise of religion.[39] As the Court put it, "section 16 precludes even an *infringement* on or an *interference* with religious freedom."[40] Thus, "Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution. ..."[41]

Hershberger II is cited regularly in state constitutional litigation over free exercise. It served as the key precedent for several successful lawsuits against the conceal-carry law.[42]

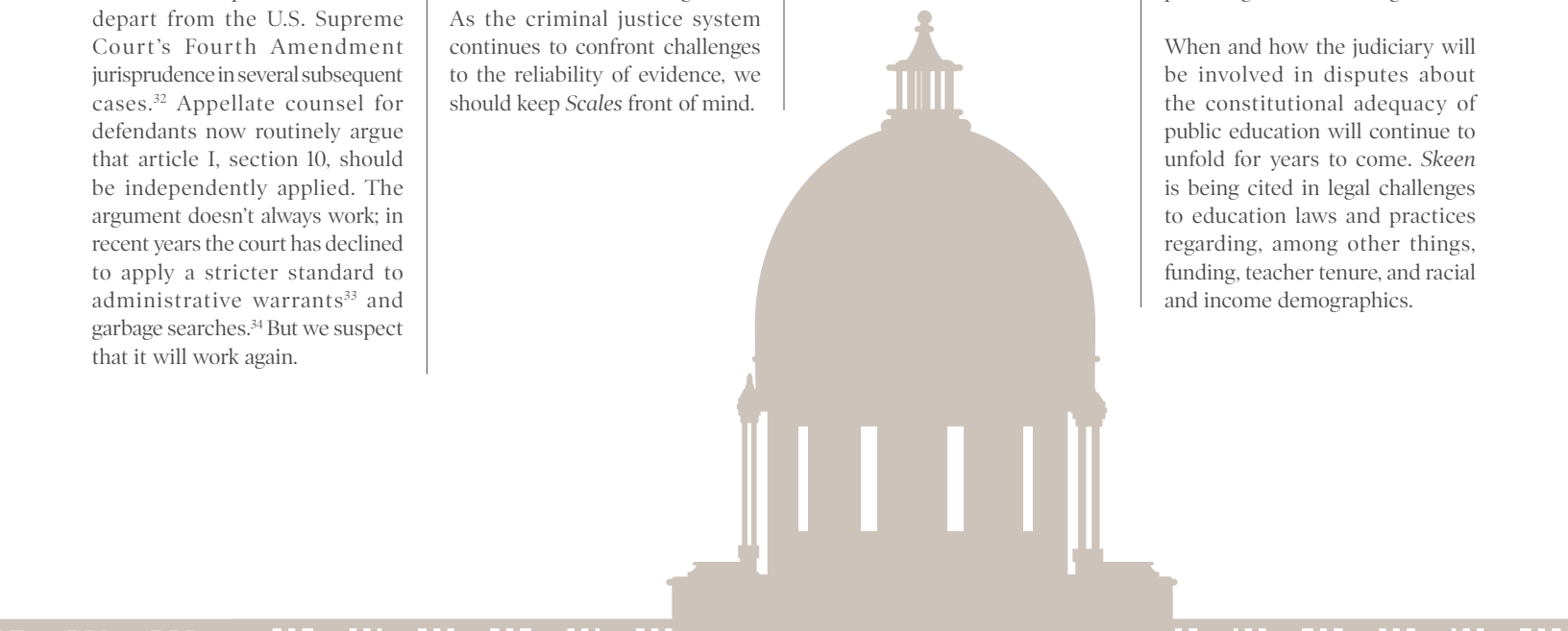
The structure of state government

Skeen v. State,
505 N.W.2d 299 (Minn. 1993)

Like many states—but unlike the federal government—Minnesota has a clause in its constitution guaranteeing a general and uniform system of public schools.[43] The clause is a command to the Legislature—the only such command in our state constitution.[44] It directs the Legislature to "establish a general and uniform system of public schools," and to "make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state."[45]

In *Skeen*, the Supreme Court put some teeth into the education clause, holding that "education is a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate."[46] But, over newly elected Justice Alan Page's first major dissent, the Court held that the fundamental right does not extend to the "funding" of the education system, beyond providing a "basic funding level."[47]

When and how the judiciary will be involved in disputes about the constitutional adequacy of public education will continue to unfold for years to come. *Skeen* is being cited in legal challenges to education laws and practices regarding, among other things, funding, teacher tenure, and racial and income demographics.



Breimhorst v. Beckman,
35 N.W.2d 719 (Minn. 1949)

This case upheld the constitutionality of the workers' compensation framework, which is a "reciprocal yielding and giving up of rights existing at common law for the new and enlarged rights and remedies given by the compensation act."[48] Such a framework is allowable under the state's police power, said the Court.[49] It does not encroach on the judicial power of the courts, so long as the ultimate decision of the administrative tribunal is subject to Supreme Court review.[50]

Nor does the workers' compensation framework violate the state constitution's guarantee of a right to jury trial, the Court held.[51] Article I, section 4, provides that "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law...."[52] The Court held that the Legislature has the power to supersede common law by creating "new, adequate, and fundamentally different" remedies unknown at common law.[53]

Finally, the Court held that the workers' compensation framework does not violate the guarantee in article I, section 8, that "[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs received in his person, property, or character."[54] The Court held that the workers' compensation scheme does, indeed, provide a remedy that is an "adequate substitute" for the common-law remedies.[55]

Lee v. Delmont,
36 N.W.2d 530 (Minn. 1949)

Unlike the federal constitution, the Minnesota Constitution contains an express separation of powers provision.[56] Although not the first case to consider the delegation of legislative power to an agency, *Lee v. Delmont* fixed the boundaries of what we now consider to be the modern administrative state.

Charles Lee, doing business as the Lee School of Barbering, sued the Board of Barber Examiners contending, among other things, that the Minnesota statutes giving considerable regulatory power to the board were an unlawful delegation of legislative power, in violation of the separation of powers.

The Court disagreed. It acknowledged that "purely legislative power" cannot be delegated to any other body.[57] The Legislature, however, can "authorize others to do things (insofar as the doing involves powers which are exclusively legislative) which it might properly, but cannot conveniently or advantageously, do itself."[58] This includes the power to "ascertain facts" and apply the law, but not the power to pass, modify, or annul a law.[59] In other words, administrative agencies may lawfully exercise discretion "[i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies...."[60]

Applying this standard, the Court rejected Lee's challenge to the barbering laws. But it reminded us that there is a judicial remedy for the "abuse" of administrative power.[61] The debate about whether administrative agencies are out of control—or, put another way, need their own haircut—continues to the present day.

Clerk of Court's Compensation for Lyon County v. Lyon County Commissioners,
241 N.W.2d 781 (Minn. 1976)

This case is one of the pillars of state judicial power. The Lyon County district court issued an order setting the minimum salary of the clerk of district court. On the County Commission's appeal from that order, the Supreme Court reversed, holding that the order violated applicable state statutes.[62] That holding is not remarkable.

What is remarkable, though, is the Court's lengthy consideration of whether the judicial branch had "inherent judicial power" to set court employee salaries. The Court explained that article III, the Minnesota Constitution's separation of powers provision, created "inherent judicial power," defined as "that which is essential to the existence, dignity and function of a court because it is a court."[63] The Court tied this inherent power to the "practical necessity of ensuring the free and full exercise of the court's vital function[s]," including fulfilling the remedies clause in article I, section 8.[64]

The Court's opinion included a broad hint to the other two branches. "At bottom," said the Court, "inherent judicial power is grounded in judicial preservation."[65] If the Legislature tries to impede the judiciary's power to hear cases or refuses to provide funding, "the separation of powers becomes a myth."[66] The opinion strongly asserts that the judicial branch reserves the right to protect itself "from unreasonable and intrusive assertions" of legislative or executive authority.[67]

What power is judicial and which of that power is "inherent" arises with some frequency. Fortunately, the other branches have, on the whole, respected the third branch such that the courts have not had to press the red button labeled "inherent power."

Ninetieth Minnesota State Senate v. Dayton,
903 N.W.2d 609 (Minn. 2017)

We finish with the most recent of our chosen cases. We are cognizant of the risk in choosing such a recent decision for a Top 10 spot in a century of jurisprudence. But this was the first case in which the legislative and executive branches were squarely pitted against one another as named adversaries. And the case produced some significant state constitutional law.

The dispute was over whether the governor could use the line-item veto[68] to nix the Legislature's appropriation for its own operations, coupled with a threat not to call the Legislature back into special session unless it compromised on other bills. This was a classic separation of powers showdown. You might reasonably suspect that members of the Supreme Court do not relish such disputes.

In an opinion authored by Chief Justice Lorie Gildea, the Court recognized that the plain language of the line-item veto provision in article IV, section 23, did not exclude a gubernatorial veto of the Legislature's appropriation for itself.[69] That left the question of whether the governor's tactics violated article III, the separation of powers provision. In response, the Court invoked the doctrine of judicial restraint (in this form, grounded in the Minnesota Constitution) to avoid reaching a conclusion on whether the line-item veto violated article III.

The Court put it this way: "our constitution does not require that the Judicial Branch referee political disputes between our co-equal branches of government... when those branches have both an obligation and an opportunity to resolve those disputes between themselves."[70] The Court held that "the way to resolve the parties' dispute is through the usual political process of appropriations."[71] Its decision to invoke the doctrine of judicial restraint was based on facts in the record showing that the Legislature had approximately

$25 million to carry itself over to the next legislative session.[72]

The Court's decisions on the governor's line-item veto power under article IV and its restraint on the question of separation of powers under article III are, of course, important holdings. But what may be its most important constitutional statement in the decision has received little public comment. From time to time, state government has shut down when the governor and the Legislature could not agree on a budget. The effects of those shutdowns have been eased by Ramsey County district court orders directing that state dollars continue to flow for what were termed state agencies' "critical functions," "core functions," or "critical core functions."

Now that option—a judicial bailout, one might say—may well be more difficult. In *Ninetieth State Senate*, the Court said:

> The language of Article XI, Section 1 of the Minnesota Constitution is unambiguous: "No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law." . . . The only conclusion we can draw from the plain language of the constitution and these decisions is that Article XI, Section 1 of the Minnesota Constitution does not permit judicially ordered funding for the Legislative Branch in the absence of an appropriation.[73]

A fair warning, indeed, that the constitution expects compromise for the common good!

Our task of picking constitutional cherries is now complete. Here's to the first century of the HCBA. We hope that, when the HCBA reaches its bicentennial, it will continue to enjoy good health and be held in high regard. And we hope that the Minnesota Constitution will continue to restrain power and protect the rights and liberties of all Minnesotans.

[1] 235 N.W.2d 597 (Minn. 1975).
[2] 192 N.W.2d 826 (Minn. 1971).
[3] 781 N.W.2d 357 (Minn. 2010).
[4] 283 U.S. 697 (1931) (reversing *State v. Guilford*, 228 N.W. 326 (Minn. 1929)).
[5] 413 N.W.2d 107 (Minn. 1987)
[6] 542 N.W.2d 17 (Minn. 1995).
[7] 767 N.W.2d 453 (Minn. 2009).
[8] *See, e.g.*, John E. Simonett, *An Introduction to Essays on the Minnesota Constitution*, 20 Wm. Mitchell L. Rev. 227, 227 (1994) ("In the last fifteen years, our state constitution has found itself the object of considerable attention. No longer the shy wallflower, by itself, alone at the edge of the dance floor, it now finds itself courted, never at a loss for admiring partners, dancing every dance.").
[9] 14 N.W.2d 400, 402 (Minn. 1944).
[10] *Id.* at 402–03.
[11] *Id.* at 403.
[12] *Id.*
[13] *Id.* at 404.
[14] *Id.* (citing Minn. Stat. § 261.09 (1941)).
[15] *Id.*
[16] *Id.* at 404–05.
[17] *Id* at 405.
[18] *Id.* at 406.
[19] *Id.* at 405.
[20] *Id.* (quoting Minn. Const. art I, § 16).
[21] *Id.* at 406.
[22] *Id.*
[23] *Id.* at 408.
[24] 413 N.W.2d 107, 111 (Minn. 1987).
[25] *Id.* (citing *State v. Fuller*, 374 N.W.2d 722, 726–27 (Minn. 1985)). The Supreme Court had decided against a right to private sexual conduct between adults in *Bowers v. Hardwick*, 478 U.S. 186 (1986), only a year before *Gray*.
[26] 413 N.W.2d at 113–14.
[27] *See City of Golden Valley v. Wiebesick*, 899 N.W.2d 152, 158 (Minn. 2017) ("As a threshold matter, we reaffirm that the Fourth Amendment to the United States Constitution is 'textually identical' in all relevant respects to Article I, Section 10 of the Minnesota Constitution." (quoting *State v. Carter*, 697 N.W.2d 199, 209 (Minn. 2005))).
[28] *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990).
[29] 519 N.W.2d 183, 187 (Minn. 1994).
[30] *Id.*at 186.
[31] *Id.* at 187.
[32] *See, e.g.*, *State v. McMurray*, 860 N.W.2d 686, 696 (Minn. 2015) (Lillehaug, J. dissenting) (listing cases).
[33] *Wiebesick*, 899 N.W.2d at 167–68.
[34] *McMurray*, 860 N.W.2d at 693.
[35] 518 N.W.2d 587, 592 (Minn. 1994).
[36] *Id.* (quoting *State v. Murphy*, 380 N.W.2d 766, 770 (Minn. 1986)).
[37] *Id.*
[38] *Id.*
[39] 462 N.W.2d 393, 397 (Minn. 1990).
[40] *Id.*
[41] *Id.*
[42] *See, e.g., Edina Cmty. Lutheran Church v. State*, 745 N.W.2d 194 (Minn. App. 2008), *rev. denied* (Minn. Apr. 29, 2008).
[43] Minn. Const. art. XIII, § 1.
[44] 505 N.W.2d 299, 313 (Minn. 1993) ("[The education clause] is the only place in the constitution where the phrase 'it is the duty of the legislature' is used.").
[45] Minn. Const. art XIII, § 1.
[46] 505 N.W.2d at 313.
[47] *Id.* at 315.
[48] 35 N.W.2d 719, 732 (Minn. 1949).
[49] *Id.* at 733.
[50] *Id.* at 733–34.
[51] *Id.* at 734.
[52] Minn. Const. art. I, § 4.
[53] *Breimhorst*, 35 N.W.2d at 734.
[54] *Id.* at 735–36.
[55] *Id.*
[56] Minn. Const. art. III, § 1 ("The powers of government shall be divided into three distinct departments: legislative, executive and judicial.").
[57] 36 N.W.2d 530, 538 (Minn. 1949). The court defined pure legislative power as "the authority to make a complete law . . . and to determine the expediency of its enactment." *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 539 (citing *State ex rel. Krausmann v. Streeter*, 33 N.W.2d 56 (Minn. 1948)). *Krausmann* is another Board of Barber Examiners case, in which the court granted a writ of mandamus against the Board because it had "acted arbitrarily and failed to exercise a sound discretion in denying [Krausmann] a teacher's certificate" under the relevant statute. 33 N.W.2d at 61.
[62] 241 N.W.2d 781, 787 (Minn. 1976).
[63] *Id.*at 784.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] Article IV, section 23, provides that "[i]f a bill presented to the governor contains several items of appropriation of money," the governor "may veto one or more of the items while approving the bill." Minn. Const. art. IV, § 23.
[69] 903 N.W.2d 609, 617–18 (Minn. 2017).
[70] *Id.* at 624.
[71] *Id.*
[72] *Id.* at 624–25.
[73] *Id.* at 620.

Justice David L. Lillehaug

Justice David L. Lillehaug is an associate justice of the Minnesota Supreme Court. He served as United States Attorney for the District of Minnesota from 1994 to 1998.

Devin T. Driscoll

Devin T. Driscoll is the law clerk to Justice Lillehaug. Driscoll served as editor-in-chief of Minnesota Law Review volume 102.

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Hon. Angela Willms

New to the Bench

By Aaron Frederickson

"When people appear in my courtroom, it is important to me that they know they have been heard, that I have treated them with respect, and that they understand my decisions."

On December 20, 2018, Angela Willms received word that she was being appointed by outgoing Governor Mark Dayton to serve as a District Court Judge in Hennepin County. This appointment became official on January 4, 2019, when she took the oath of office. Judge Willms brings to the bench a wealth of knowledge and dedication to serving all people.

Judge Willms went to high school in Brookings, South Dakota, where she was president of the debate team and played soccer. She later attended the University of Minnesota and received degrees in political science and history. After college, she worked as a regulatory analyst at 3M Corporation, where she reviewed the testing processes for medical equipment to ensure its compliance with strict federal guidelines.

Judge Willms attended law school at William Mitchell College of Law. As a law student, she became interested in public service while working on a task force that examined mental health issues and the law. This work included a review of the standards in Minnesota to successfully assert the insanity defense.

"I like working with the public. It keeps me coming back," said Willms. Her goal as a judge is to make the people of Minnesota proud of the judicial system. Between balancing a fast-paced workload and managing a high-volume calendar that sometimes includes dealing with 40 cases before lunch, Judge Willms wants to make sure litigants receive an explanation of why she reached her decision and ensure it is understood.

Judge Willms is looking forward to the challenge of learning new areas of the law in different judicial assignments. She is currently assigned to a criminal calendar. She hopes to continue her involvement in community outreach as well as her work reducing and eliminating racial disparities within the justice system. According to Willms, "When people appear in my courtroom, it is important to me that they know they have been heard, that I have treated them with respect, and that they understand my decisions." She hopes to be part of ongoing court reform work to make court processes more accessible to the public and to provide better efficiency.

CAREER TIMELINE

> 2013-2019
District Court Referee, Hennepin County Juvenile Court

> 2009-2012
Staff Attorney, Hennepin County Juvenile Court

> 2007-2009
Judicial Law Clerk, Hennepin County District Court, Criminal/Civil/Juvenile Divisions

"Everyone in our community should have equal access to justice."

Prior to serving in her current role, Judge Willms had many experiences that prepared her for the bench. This included serving as a staff attorney for the juvenile court in Hennepin County, where she trained attorneys and judges and handled complex cases involving youth. She used this experience to later serve as a District Court Referee in Hennepin County Juvenile Court. She served in this capacity from 2013 until her appointment at the beginning of this year. "Serving as a District Court Referee taught me how to manage high volume caseloads and complex legal matters – experience that has been invaluable to me as a judge," said Willms.

Public service was a large part of Judge Willms's life leading up to service on the bench. Her resume includes several committee appointments involving the effective administration of justice and ensuring the courts deal with all people in an equal and unbiased manner. Judge Willms served on several committees for the Juvenile Detention Alternatives Initiative and was a Minnesota Supreme Court Appointee to the School Safety and Technical Assistance Council (2014-2017).

In addition to her duties on the bench, Judge Willms is sharing her knowledge and insight on juvenile justice matters in the law school classroom at Mitchell Hamline School of Law. As an adjunct professor, she teaches a class about juvenile delinquency law. She enjoys spending time with her family, which include two youth soccer players. She looks forward to advancing initiatives that will improve the court process and better the community.

Aaron Frederickson
aaron@mspcompliancesolutions.com

Mr. Frederickson of MSP Compliance Solutions, has been practicing law since 2002. He works in the area of Medicare/Medicaid coordination of benefits in workers' compensation and personal injury matters. He is involved in many charitable causes, including *Project Irie!*, which promotes education, community involvement and personal responsibility through soccer in the United States, Jamaica, and beyond. He also co-chairs the HCBA Craft Beer Club.

The More Fee Agreements Change, the More they Stay the Same

By Eric T. Cooperstein

In 1944, the Hennepin County Bar Association published its "Minimum Fee Schedule," setting forth the permissible rates for various types of legal services. Although office consultations could be charged at the very reasonable rate of $10 per hour, minimum fees attached to lawyers' charges, such as a minimum of $250 for appearing before the Minnesota Supreme Court, $100 minimum for preparing a bankruptcy petition and schedules, and 15% of the first $500 in a collection action. Estate planning, family law, and criminal matters are conspicuously absent from the schedule.

No "competent and conscientious lawyer" could go below the minimum fees without "incurring the temptation to slight his [sic] work . . . thus injuring his [sic] reputation" and "being unfair to his brother [sic] lawyers who are endeavoring to maintain proper standards of professional competency and diligence."

Much about lawyers' billing practices have changed in the last 75 years. Mostly gone are the days when a lawyer would send out an invoice listing fifteen or twenty tasks that had been accomplished in the past month, single-spaced with no paragraph breaks, followed by an apparently arbitrary dollar figure at the end. "Block billing," as it is sometimes called, has been banned by insurers and corporate clients, even when all the tasks in question were completed on a single day. More common is that lawyers are expected to break out tasks and time separately or at least indicate within a paragraph of billing how much time has been devoted to each task.

And yet, despite the declaration in 1975 that fee schedules violated anti-trust laws, few lawyers advertise their fees or attempt to compete with each other on price. Anecdotal evidence suggests that clients seeking to file a Chapter 7 bankruptcy or defend a DUI may price-shop by calling multiple lawyers, but one is hard-pressed to find an attorney's website that states the lawyers' hourly rates.

Flat fees

A 1994 *Hennepin Lawyer* article, titled "Is Hourly Billing Proper?" quoted a recent New York Times piece that declared "The billable hour as we know it is dead in the practice of law." Flat fees, contingent fees, and other alternatives would soon displace the odious hourly fee. Apparently, the future is not here quite yet. The Clio Legal Trends report for 2017, which aggregated data on the tens of thousands of attorneys using Clio's on-line practice-management software, showed that roughly 18% of lawyers used flat fees to bill clients, an amount that had not changed materially over the past five years. Flat fees tend to be used in the same areas of practice that have relied on flat fees for several decades: criminal law, estate planning, immigration, and bankruptcy work.

The problem here, if there is one, cannot be laid solely at the feet of lawyers. When pundits talk about how great flat fees are, they tend to overlook several factors. Hourly rates are a standard way of charging for time across our economy, from non-exempt hourly workers, to trades, to professional services. A large body of federal and state case law interpreting statutory attorny-fee provisions measures a lawyer's work by the hour, with perhaps a lodestar applied to the hourly rate. Insurance companies have rigid rules for paying attorneys to defend cases, all based on hourly rates. The value of discharged attorney's work in a *quantum meruit* claim on an attorney lien may be measured on an hourly basis.

At the same time, some lawyers are becoming more creative in designing fee structures to meet their client's needs. These include blended hourly rates, fee collars, success fees, minimum fees, and fee caps. Contrary to popular belief, it is medium and large-sized firms, rather than solos and smalls, that have shown some of the greatest creativity in fee arrangements.

Costs

Photocopy and phone charges seem to have mostly disappeared from lawyers' invoices. Charges for photocopies may be subject to sales and use taxes; few firms seem to want to go through the administrative burden of charging and reporting sales taxes for a few photocopies. The days of charging $1 / page for faxes printed on special thermal paper are, thankfully, long behind us.

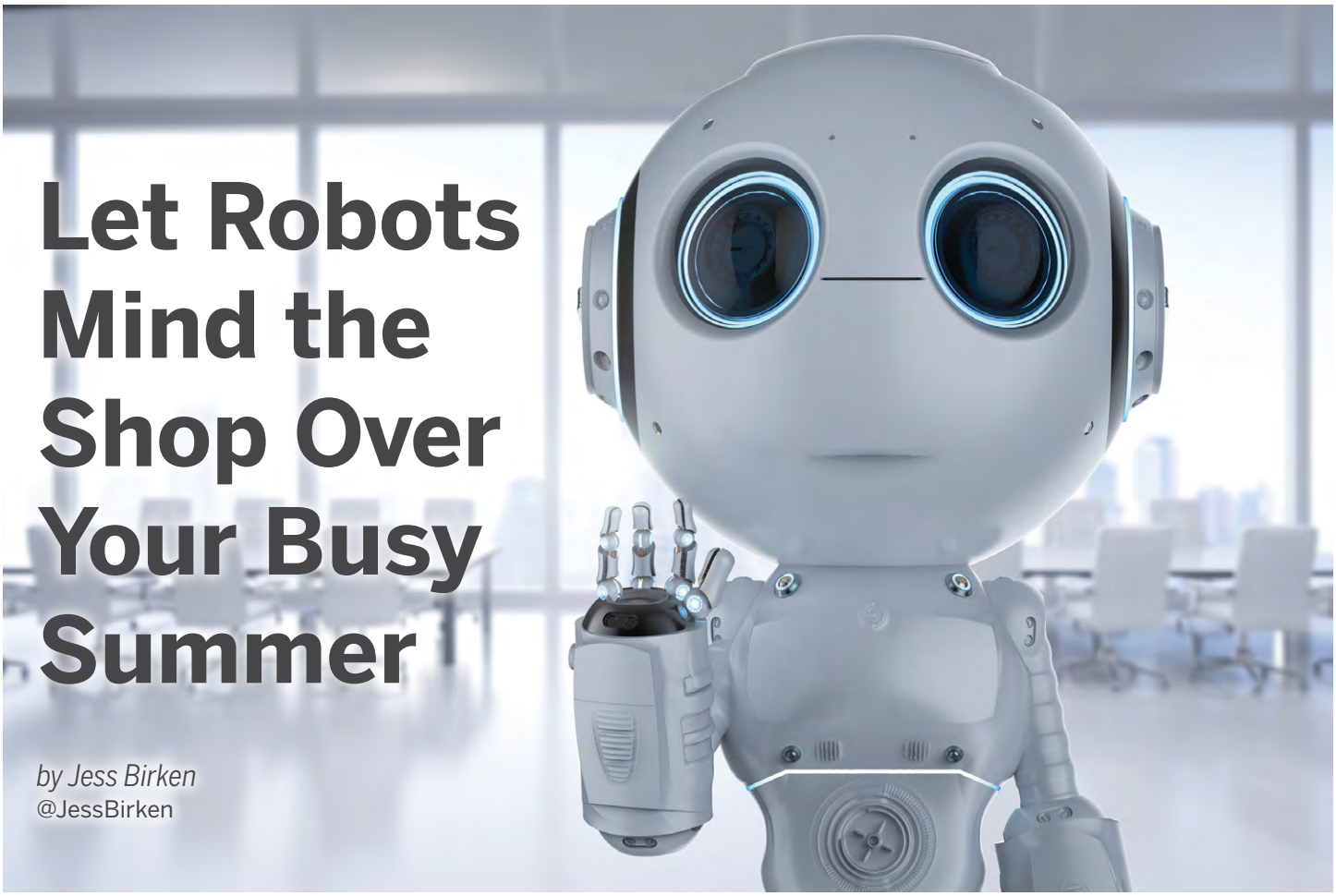
Instead, one concerning trend is that some lawyers impose an "administrative fee," typically between $100 and $250, to cover some of the photocopy, legal research, and other expenses they may incur but cannot otherwise recapture from clients. These administrative fees are fraught with ethical pitfalls. First, if the fee is intended as a flat fee that will not be placed in trust, then it probably must comply with Rule 1.5(b), MRPC, which means there must be a specific set of disclosures in the representation agreement. The Office of Lawyers Professional Responsibility strictly construes Rule 1.5(b), causing angst to many well-meaning lawyers. Second, if the representation ends prematurely, the unused balance will have to be refunded. It is not clear whether lawyers charging these administrative fees have contemplated how such a refund would be determined. Even if not clearly a violation of an ethics rule, I have seen questions about administrative fees prolong ethics investigations. The better practice is clearly to just incorporate any administrative costs into the lawyer's hourly rate or flat fee for the representation, just like you do for the lights, the rent, Keurig cups, etc.

My prediction for 2044: attorneys will charge for their time pretty much the way they do right now.

Eric T. Cooperstein

etc@ethicsmaven.com

Eric T. Cooperstein, the "Ethics Maven," defends lawyers and judges against ethics complaints, provides lawyers with advice and expert opinions, and represents lawyers in fee disputes and law firm break-ups.



Let Robots Mind the Shop Over Your Busy Summer

by Jess Birken
@JessBirken

Being a lawyer is not easy. You may have a billable hour goal or trial schedule that's soul crushing. Solo and small firm lawyers in particular are pulled in a hundred different directions. Not only are we wearing the lawyer hat, but we are also the marketing director, bookkeeper, lead outside sales agent, administrative assistant, front desk receptionist, customer service representative...oh yeah and don't forget to do the legal work for the clients!

Yeah— it's a lot. Especially when the sun finally comes out after a LONG Minnesota winter, and all you can think of is escaping to the cabin or planning a vacation.

There's only so much you can delegate. When you *are* your law practice, taking time away from work feels like a huge choice. Without you, it feels like everything grinds to halt, no matter how much you deserve that vacation or time off.

But taking care of yourself IS taking care of your practice. Enjoying your lawyer-life and your life-life is totally possible, if you're willing to make some small changes. What if you ended up loving your law practice a little bit more? Or maybe you start loving it for the first time. What if you were 10 percent happier just by changing a few things?

Here's the thing – all of that is possible. How, you ask? Well, I've been working on harnessing the power of automation and delegation. Here are four tips that'll help you get lakeside this summer.

Tip #1: Protect your time with online scheduling

I could sing my praises for online scheduling anytime, anywhere. And I have! (Check out my YouTube channel.) Online scheduling can help you before you go out of town:

1. Send clients a scheduling link a week before you head out of town letting them know you're going to be gone and if they want to check in they could schedule a time before you leave (or after you get back)
2. Now sit back and relax while people schedule those calls on their own (that's 47 emails you're suddenly not getting – hallelujah!)
3. Rest easy knowing your online scheduling tool has automated sending meeting reminders and follow up information so you don't have to
4. Watch with glee as a few people reschedule their meeting to a time that works better for both of you - without bugging you about it

But one of my favorite features is a SUPER basic function – setting availability to protect my time.

When you're looking at a calendar, it's easy for you (or your assistant) to just fill up any blank space you see. But when you allow that to happen do you really make the most of summer? You only get 18 summers with your kids and golf season only lasts so long. Make the most of it.

With Acuity, I can really easily set some basic rules. One good example is networking – I've had SO many weeks somehow get swallowed by too many meetings. So I set a rule in Acuity that I can have a couple networking meetings each week. Once two are scheduled, Acuity stops showing that week as available for networking regardless of what my calendar really looks like.

Maybe you want to be able to leave early on Fridays during the summer to beat cabin traffic. Great, you can set your availability from the back end of Acuity so clients just think you're already busy at 3pm on Friday – no need to explain your reasons!

Tip #2: Have someone else answer your phone and/or manage your inbox

This is a realistic option for almost everybody – get over your fear and JUST DO IT. You won't believe how much time this saves! Plus, if you're going to be out on vacation, you don't have to worry so much (or worse – be answering calls from the beach) Once over a long holiday I had a potential client call that sat in my voicemail for three weeks. People who call you want to talk to a human, so the least you can do is use an answering service.

At Birken Law, my firm manager Meghan manages my email inbox – she answers all the emails that don't require my lawyer-brain and clears out the clutter. So, when I head to my inbox, I have an orderly little list of emails to reply to. How much better would your 5 day summer stay-cay be if you knew your email had been triaged for you while you were gone?! LIFE. CHANGING.

And remember online scheduling and call answering can work together. We use Smith.ai's Virtual Receptionists –they answer every call that comes in. You can set up instructions for what they should do with a current client, a potential client, a colleague, etc. If we're unavailable, they can use my online scheduling page to set up a client meeting. Genius!

Tip #3: Pre-draft (and even automate) follow-ups with potential clients

Do you ever have those moments where you realize a potential client reached out and...you never followed up? It was probably because their email got buried in your inbox, see tip #2 Yeah, it's not a good feeling.

So one day we sat down to draft a list of the things we'd want *every* potential client to know about Birken Law. Who we are, how we work, how we can help, and so on. We built a short series of emails, and then we loaded it into our email marketing tool (we use Active Campaign and love it).

Now, whenever a potential client reaches out, we just have to respond and add their email to this list in Active Campaign. I could be sitting on the dock o' the bay while they're learning about working with me.

Email marketing sound too complicated? No worries, even having pre-drafted emails ready to go makes a huge difference. No more time wasted.

Tip #4: Embrace the cloud

Sometimes completely leaving work behind just isn't realistic. But that doesn't mean that you shouldn't head to Aunt Georgia's this summer.

I've set up my practice so that I can get at my stuff from anywhere. Maybe I'm at my mom's house and I forgot my laptop. Who cares? I can just log into my practice management software and online file storage system from her computer. I can access my email online. I can almost run my entire firm from my smartphone if I have to. Imagine what kind of freedom that gives me to go on vacation or work from a friend's kitchen.

Making some small changes really can improve your life and your law practice. So, what are YOU going to do to make sure you get outside this summer? Want my step by step guide to using Acuity for online scheduling? Grab your copy at *www.hackyourpractice.lawyer/gift* and enjoy your summer!

Already stressed about your summer schedule? Robots can help.

Jess Birken

jess@birkenlaw.com

When she's not helping lawyers use tech tools, Jess Birken is the owner of Birken Law Office—a firm that helps nonprofits solve problems so they can get back to their mission.

We Are Family

and Business

and Intellectual Property

and Immigration

and Personal Injury

and Real Property

and Bankruptcy

and Wills & Probate

and Tax Law

and Employment

and Criminal Defense

and Landlord/Tenant

and Workers' Compensation

and the list goes on ...

When current clients or new callers to your office have legal needs outside of your practice area, remember that your colleagues in the Hennepin County Bar Association can help. With 200 participating attorneys—representing nearly every practice area—the **HCBA Lawyer Referral and Information Service** is the best place to refer those that you can't assist.

Lawyer Referral has been recognized for its quality by the ABA, and the excellent work provided by our experienced panel attorneys strengthens the reputation of all HCBA lawyers. Make referrals to your bar association colleagues with confidence. Think of us as family.

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HENNEPIN COUNTY BAR ASSOCIATION EST. 1919

A TABLE FOR 10

ON MARCH 29, ten HCBA members gathered at the Dancing Ganesha restaurant for "A Table for 10." HCBA President Adine Momoh was joined by Esther Agbaje, Christine Eyal, Amran Farah, Judge Mark Kappelhoff, Denise Martineau, Sarah Morris, Eric Richard, Saraswati Singh, and Gloria Stamps-Smith. The goals of this new initiative are to help diverse HCBA members expand their professional networks and increase their social circles. All are welcome. "While there are lots of programs designed to educate the legal community about issues affecting diverse attorneys, fewer events are offered to foster inclusive environments for diverse attorneys, particularly attorneys of color and LGBTQ attorneys," President Momoh said. HCBA members connect over breakfast, lunch, or dinner at minority-owned restaurants. There's no set agenda or topic to be covered at each meal. Discussion is open to whatever is on the minds of each group of diners. Everything is on the table–from the trivial to the trial, and all that's in-between. Keep an eye on your HCBA e-news and HCBA social media accounts for information on the next "A Table for 10" event.

Events and Meetings

Visit **www.hcba.org/events** for more information

MAY 8
Family Law CLE:
Spring 2019 Family Court Bench and Bar Round Table

Bench and Bar CLE:
Evidence in the Courtroom

MAY 9
Real Property CLE:
Pave the Way to a Smooth Commercial Closing

HCBA, MSBA, FBA, and MWL New Lawyers CLE: Triumphing Over Failure: Sharing Lessons from Minnesota's Accomplished Attorneys

MAY 10
Professionalism & Ethics CLE:
#MeToo Meets Legal Ethics: Best Practices in Building a Culture of Equality and Respect

MAY 15
Debtor Credtior CLE:
Bankruptcy Essentials: A Friendly Dialog Among the Players

Tech Practice Project:
Get help on law practice tech from experts

MAY 16
Law & Literature CLE:
Legal Ethics and Elimination of Bias

Corporate Counsel CLE:
Crisis Communications: Managing the Media Storm

MAY 17
HCBA, MSBA, RCBA, and MWL Solo & Small Firm CLE:
Solos Moving Forward Together

MAY 21
New Lawyers Section Meeting

MAY 22
Eminent Domain CLE:
Is Evidence Admissible...

MAY 23
Real Property CLE:
Mid-Year Case Law Update

Solo/Small Firm Happy Hour

MAY 23
HCBA Annual Meeting & Awards Lunch

JUNE 12
HCBA/RCBA Family Law CLE:
Even the Best Make Mistakes: Common Mistakes Attorneys Make in ADR Processes

JUNE 27
Real Property CLE:
Legislative Update

Bar Memorial 2019

Continuing our century-old annual tradition, on May 1, the Hennepin County legal community will honor and celebrate the lawyers and judges who passed away during the prior year or so. Chief Judge Ivy S. Bernhardson will call to order this special session of the Hennepin County District Court. Judge Bernhardson will welcome family members, colleagues, and friends of the members of our profession whose good deeds and service we recall that day, and she will introduce justices and judges from Minnesota's state and federal courts who are in attendance. Collaboration between the Hennepin County Bar Association and the Hennepin County District Court has always been and will always be the key to a successful Bar Memorial year after year. We are grateful for this good will.

Volunteers on the Bar Memorial planning committee have served for many years because of the satisfaction we derive from recognizing the professional and personal achievements of those whom we will remember. Our profession is much better for their good deeds and work, and for their unique contributions to the law and the greater community. Every year, family and friends leave the Bar Memorial feeling quite moved by our tribute to the person who was special to them.

The HCBA's Bar Memorial Committee requests your assistance in its plans for the 2020 Bar Memorial. Let us know of Hennepin County lawyers and judges who pass away during 2019. Also, if you are interested in serving on the committee to help plan the 2020 Bar Memorial, we welcome your participation. For more information, contact HCBA Events Director Sheila Johnson at *sjohnson@mnbars.org* or 612.752.6615.

"The past informs the present. The present informs the future. Today, we remember our colleagues who have gone before us. Tomorrow, we will apply the lessons learned."

Kathleen Murphy
Chair, Bar Memorial Committee

Wednesday, May 1, 2019

9:00 a.m. to 10:00 a.m.
Thrivent Financial Auditorium
625 Fourth Avenue South, Minneapolis

Invocation: Judge Luis A. Bartolomei

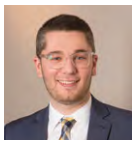
Main Address: Retired Minnesota Supreme Court Justice Christopher Dietzen

To Be Memorialized

Richard B. Abrams
Robert Vollmar Atmore
David M. Beadie
Gregory Allen Bruns
John W. Carey
Norman Roblee Carpenter
Hon. John J. Connelly
Hon. Diana (Standahl) Eagon
Stanley Efron
Michael Perry Gallagher
Harry Gustafson
David K. Hackley
William J. Hanley
Victor C. Johnson
Vincent E. Johnson
Robert W. Kettering, Jr.
Paul Klaverkamp
Barbara 'BJ' Kuhn
C.D. 'Jerry' Mahoney, Jr.
James Phillip Martineau
Ronald Meshbesher
Robert G. Mitchell, Jr.
William Edward Mullin
Hon. Diana Murphy
Scott M. Nelson
Harding A. 'Bud' Orren
Roger A. Peterson
Hon. William Scott Posten, Sr.
Curtis Lloyd Roy
Connor Schmid
William S. Seeley
Donald Wright 'Tad' Selzer, Jr.
Ronald L. Simon
Jerry Wayne Snider
Ralph Strangis
Peter F. Walstad
Michael Kent Walz
Clifford Lane Whitehill
Rolfe Allan Worden
Barbara A. Zurek

Member News

Submit your HCBA member news to thl@hcba.org for consideration.

Heimerl & Lammers announces that **Jenna Eisenmenger** has been promoted to partner. The firm also introduces their newest personal injury and employment law attorney, **Taylor Cunningham.**

Beisel & Dunlevy welcomes **Thomas M. Hart** to the firm's Minneapolis office.

Attorney **Kenneth S. Levinson** has joined Fredrikson & Byron as senior of counsel.

Fredrikson & Byron attorney **Lousene M. Hoppe** was named a member of the 2019 class of Fellows, participating in a landmark program created by the Leadership Council on Legal Diversity (LCLD) to identify, train, and advance the next generation of leaders in the legal profession. Fredrikson attorney **Gauri S. Samant** was named a member of the 2019 class of Pathfinders, an LCLD program designed to train high-performing, early-career attorneys in critical career development strategies including leadership and the building of professional networks.

Henson Efron announces that family law attorney and shareholder, **Melissa Nilsson** is now a qualified neutral under Rule 114 of the Minnesota General Rules of Practice by Minnesota's Judicial Branch's Alternative Dispute Resolution Program.

Henson Efron announces that tax attorney **Scott Emery** has joined the firm.

Lapp, Libra, Stoebner & Pusch announces that **Gordon Conn** has joined the firm in an of-counsel capacity.

Tuft, Lach, Jerabek & O'Connell announces that **Letty M-S Van Ert** has become a shareholder.

Aaron Frederickson of MSP Compliance Solutions, helped build a home in Puerto Peñasco, Mexico, over spring break. The project was sponsored by 1Mission, a community development nonprofit, and Summit Community Church in Buckeye, Arizona. Aaron also donated soccer equipment to that community through Project Irie!, as part of his efforts to assist players around the world.

Larkin Hoffman announces that **Tim Rye, Henry Pfutzenreuter, John Kvinge** and **Andrew Moran** have been elected as shareholders of the firm.

Andrea Derby Workman has been elected a shareholder at Henschel Moberg.

10 THINGS I Enjoy About Being Associate Counsel for the Minnesota Vikings

by Demeka Fields

1 Football: I love sports, especially football, so working in the NFL has always been one of my dreams. Witnessing the magic of the NFL season on Sundays in the fall never gets old. Once the summer comes and training camp begins, the joy of football season starts all over again. Just thinking about the season makes me excited.

2 Using My Platform to Promote Diversity: Being involved in the sports industry has given me access to a platform that most people do not have. I feel it is my duty to use this platform to promote diversity in the legal profession and the front offices of a professional sports team. The lack of racial and gender diversity in both of these areas is alarming, but I believe we can start to change the narrative and increase diversity by recognizing the disparity and making it our responsibility to give minorities an opportunity to succeed. I am glad that I am able to help my organization recruit and retain minority employees.

3 Diversity Mentorship: As an African American female attorney, it is my responsibility to pay it forward to other minority attorneys and aspiring attorneys, especially African American females, by becoming a mentor and helping these individuals witness that it is possible to succeed in this space. I would not have made it this far without great mentors, and I aim to mentor others in my community to go after their dreams and achieve their goals.

4 The Business: I am passionate about the game of football, but I am also amazed by the business of football. In my position, I am able to touch almost every department within the organization, from sponsorships to branding to youth marketing initiatives, which helps me understand how each department's success leads to the success of the organization as a whole, on and off the field. NFL organizations are so much more than football games on Sundays.

5 The Projects: One of the best parts of my job is being able to see a project that I have worked on or championed come to fruition. I have had the opportunity to be a part of so many interesting projects, such as the planning of Super Bowl LII celebrations and the creation of our Minnesota Vikings Foundation Food Truck. One of the most fulfilling feelings is witnessing each project come to life successfully.

6 The Worldwide Fans: I am always amazed by how many Vikings fans I encounter when I am traveling around the country. In almost every city that I have visited in the United States, I have found a diehard Vikings fan. My mother always tells me stories of people she meets that have expressed their love for the Vikings and some of our current players or legends. We have some of the greatest fans in the game.

7 The Organization: I can honestly say that I enjoy the people that I work with. Many times, my colleagues are the reason I am excited to come to work each day, and they are the reason I leave work with a smile. We have passionate employees who support one another and work hard, but also have fun together. I believe that the joy and passion of our staff is evident in everything that we do.

8 Impacting the Community: One of the most enjoyable and exciting parts of working for the Vikings is being able to change the lives of people in the community. Through our organization's community service projects and our Vikings Foundation, we are able to positively impact so many people throughout Minnesota and the surrounding states. Between donating clothing, refurbishing high school weight rooms, sending youth on college tours, or reading to elementary school students, we are always looking for ways to give back to our community.

9 The Journey: My journey to becoming associate counsel was difficult at times, but I appreciate the struggles because they have helped me become the attorney I am today. From starting with the Vikings as a legal intern to passing the Minnesota bar exam two years after I passed the Louisiana bar exam, there are so many lessons that I learned during the challenging times. It also reminds me to appreciate where I am now and to "respect the grind" of others who want to achieve their dreams.

10 Witnessing the Minneapolis Miracle: One of my favorite memories as a Vikings employee was watching Stefon Diggs score on a 61-yard game-winning catch and run into the end zone during the 2018 playoffs at U.S. Bank Stadium.

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