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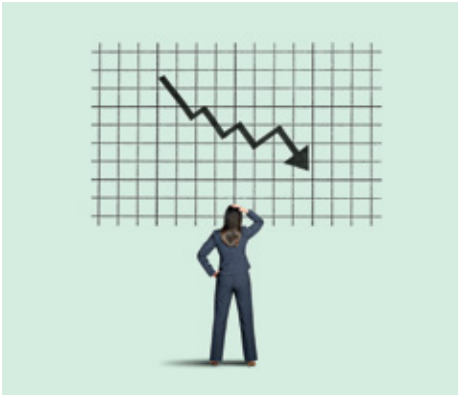

features

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I HAD A SECRET

BY PAUL FLOYD

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

When I was in fourth grade I was shy and reserved. If you know me now, you might wonder how this was possible. But at the time, I was that kid in class who was always staring out into space, daydreaming. Probably not surprising, given that I also could not see the blackboard, but I kept that a secret. When the teacher wrote words or math problems on the board, I was lost. Eventually, it dawned on my teacher that I needed glasses. I did not want to wear glasses in elementary school for fear of being called Four Eyes. But, being extremely nearsighted, I needed what we call today an accommodation. With that accommodation, I could see.

We soon moved across Ohio. And while my eyesight improved with new glasses, I continued to struggle with reading. But I kept it a secret until the 6th grade, when my teacher asked each student to stand and read from our English textbook. When it was my turn, I read my part. My teacher said, "Paul, read it again." So I read it again. This time she said, "Paul, slow down and read what is written on the page." To which I replied, "I don't care what is written, what I read is what it should say." My teacher did not take my insolence lightly. It was what we in my family called "sass," and you did not sass your teacher.

Instead, she sent me home with a note to my mother suggesting that I read out loud every night as a part of my homework. For the next few months, I would do my best to read to my mother. I was unaware at the time that I was struggling with undiagnosed dyslexia—which means that my brain periodically inverts letters and numbers. So I learned to read phonetically to make sense of it all. But after a few months, I was back to keeping my reading problems a secret (or so I thought). It worked pretty well until high school, when my math and reading deficiencies caught up with my grades (Cs and Ds).

In college, one of my first classes was creative writing. Being dyslexic, I liked the creative part. I was very creative in hiding my dyslexia and in coming up with ways to learn the material without reading a lot. My professor recognized that I had a problem and took the time to teach me grammar, spelling, and writing. By then I had learned to type my written submissions, which helped me succeed in college, seminary, and law school.

You may have guessed that not all my problems were solved. During one of my first months as a young associate at a new law firm, a partner called me into his office and asked me: "Did you send this letter out?" I said yes and he said read it. I read it. He asked: "Do you see anything wrong with it?" I said no, sensing that I must have missed something crucial. It was then he said, "You missed a 'not' in one conclusion. From now on all of your correspondence will need to be proofread by Becky." I was so relieved! I thought he was going to fire me. Instead, he provided me with an accommodation.

Finally, I learned an important lesson. I had to admit to myself that I had a reading impairment and stop being afraid to seek help. It was actually quite liberating. With my secret out in the open, I could now ask for help so that my work product would be the best it could be.

Recently, I have noticed that my hearing is not as sharp as it once was. I find myself straining to hear my law students' answers in class. While it is hard to admit that I need help with my hearing, I realize that I need another accommodation to help me continue to be the best lawyer I can be.

All around me, I find other lawyers and law students who face similar challenges in seeing, reading, learning, hearing, and mental health issues that demand accommodations and accessibility. This is a great example of the legal profession changing for the better. So, whether you need glasses, a hearing aid, or an accommodation for depression, bipolar disorder, autism spectrum disorder (ASD), ADHA, dyslexia, or any other disability, know that you are not alone. In fact, your particular neurodiversity is a plus instead of a deficit.*

If you are neurodivergent, know you have a neurodiverse MSBA president. Let's all partner to be a more diverse, equitable, and innovative bar association and legal profession. And remember to be kind, because the person next to you may have a secret. ▲

* Teams that include both neurodivergent and neurotypical colleagues have the ability to look at problems from different angles, leverage the unique and more widely varied strengths of team members, and envision new possibilities. See Neurodiversity in the Workplace at *https://nitw.org.* Cognitively diverse teams have been shown to solve problems faster *(https://hbr.org/2017/03/teams-solve-problems-faster-when-theyre-more-cognitively-diverse).*

JUDGES SOCIAL

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MEET THE 2023 NLS OUTSTANDING NEW LAWYER OF THE YEAR

The MSBA New Lawyers Section has named Roxanne N. Thorelli its 2023 Outstanding New Lawyer of the Year. The award recognizes the exceptional achievements of one new lawyer each year, with a focus on involvement with local bar organizations, pro bono and community service work, contributions to advancing diversity, and professional accomplishments.

Thorelli is a senior associate at Fredrikson & Byron, where her practice is focused on mergers and acquisitions, debt and equity financing, corporate restructuring, and general corporate matters. She has been an engaged member of the Minnesota State Bar Association and the Hennepin County Bar Association since law school and is the current chair of the HCBA New Lawyers Section. She has also been recognized as a 2023 Minnesota Rising Star in mergers and acquisitions by Super Lawyers.

Thorelli is likewise engaged with the legal community at a national level, serving as a delegate to the American Bar Association's Young Lawyers Division. She dedicates a significant amount of time to pro bono representation through the Volunteer Lawyers Network Employment Advice Clinic and the LegalCORPS Business Law Advice Clinic. She is also a member of the pro bono committee at Fredrikson & Byron and the pro bono coordinator for her department.

Thorelli further serves her community by mentoring law students, acting as an advisor to the Golden Key International Honour Society at University of Minnesota, sitting on the Board of the Calumet Lofts Homeowners Association, and volunteering with Feed My Starving Children and the Salvation Army. ▲

A new wrinkle in mock trial

2023 First Place National Courtroom Artist
Taelyn Baiza, Boise High School

The MSBA's high school mock trial program is expanding its program to include a courtroom artist competition. High school students will be able to compete even if their school does not have a mock trial team. Participants will create a drawing depicting a moment in the trial they attend and submit it for judging. A limited number of participants will advance to participate in the state tournament, where they will be assigned to one of the trials to create a drawing that will be evaluated by a panel. All entries will be displayed at the awards banquet and participants will be introduced. The artist selected as having created the best drawing will be eligible to accompany the state champion team to the National High School Mock Trial Championship in the spring of 2024. Please visit ***www.mnbar.org/mocktrial*** for additional information or contact Kim Basting (***kbasting@mnbars.org***). ▲

GOT A CLE IDEA?

Save the dates

PUBLIC LAW CLE SERIES ON LEGAL CANNABIS

On September 26-28, the Public Law Section will offer a CLE series, "It's a Joint Effort: Navigating Minnesota's New Cannabis Laws," focusing on the impacts that this spring's cannabis legalization will have on various areas of the public law sector.

■ On Tuesday 9/26, Kyle Hartnett, assistant research manager/staff attorney at League of Minnesota Cities, will present an overview of the changes to Minnesota law. He'll provide some insights about regulation and what public entities are doing now to prepare.

■ On Wednesday 9/27, attorney Kate Bischoff of k8bisch LLC will focus on the impact on public employers. She'll address policies that may need updating and workplace scenarios you should be ready to tackle.

■ On Thursday 9/28, Kacy Wothe of the Hennepin County Attorney's Office will talk about the new law from a criminal justice perspective. She'll discuss what's changed, how expungements will work, what the federal law implications are, and whether the law will bring relief to caseloads in the criminal justice system.

You can get more details and register for one or more of the programs by visiting our CLE page at ***www.mnbar.org/cle-events.*** ▲

WE WANT TO HEAR FROM YOU

The Tri-Bar Signature CLE Committee plans and executes Signature CLE programs that are timely, relevant, interesting, and broadly applicable to the members of the MSBA, HCBA, and RCBA—and we're looking for new members to contribute ideas and work with us on getting speakers and presenters involved.

The committee seeks to provide value to legal professionals through featured presentations of current legal issues and hot topics, while supporting fair and equitable law practice and attorney well-being. Individuals should be willing to lead or assist on program planning and be resourceful in connecting with legal professionals. Committee meetings are informal and monthly. Interested members should contact Geen Mui at ***gmui@mnbars.org.*** ▲

DO YOU HAVE A FILE RETENTION POLICY? IF NOT, YOU SHOULD PUT ONE IN PLACE.

FILE RETENTION AND RETURN

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

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

File retention and return is a frequent topic on our attorney ethics help line.[1] The Office of Lawyers Professional Responsibility has addressed the topic in this column on previous occasions,[2] but refreshers are helpful, and new readers likely have questions.

The starting point

You should start from the perspective that the client's file belongs to the client. While the ethics rules do not use the term "file," the Minnesota Supreme Court did in the course of a discipline case almost 30 years ago (*In re XY*, 529 N.W.2d 688 (Minn. 1995)), stating: "[t]he file belonged to the client and was appropriately returned to her upon her request." The Court further stated that copies of the file were for the *lawyer's* benefit. Starting from the proper perspective about whose property it is usually helps resolve a lot of client-lawyer issues relating to the return and retention of the client file.

The rules

The issue of document retention often comes up when addressing an attorney's obligation to return the client file after termination of representation, covered by Rule 1.16(d), Minnesota Rules of Professional Conduct (MRPC).[3] In 2005, Minnesota adopted ABA model rule 1.16(d) for the most part but went on to adopt additional provisions, not contained in the model rule, to provide further ethical guidance to lawyers on the topic of file return obligations. This guidance was framed with the phrase "papers and property to which the client is entitled," which is defined in Rule 1.16(e), MRPC. You should review that rule, as well as my 2018 article and Martin Cole's 2015 article (see note 2) on the topic, if you have questions about what to return.

One thing we get a lot of questions about is whether providing copies of documents to the client as the representation progresses as necessary under Rule 1.4 (your communication obligation), relieves you from providing a copy of the entire client file upon their request at the conclusion of the representation or at a time thereafter when the client seeks a copy of their file. This Office has consistently taken the position that it does not. Even if you have provided copies as you go, if the client requests a copy of their file, you should provide it, most notably because the papers and property to which the client is entitled under the rule are broadly defined, and may not be co-extensive with what has already been provided.

Because of your Rule 1.16 obligation, you should have good systems in place to be able to convey the client's file to them easily and accurately at the conclusion of the representation. We see so many complaints that start with the allegation that the lawyer did not timely provide a copy of the file upon request. Such a complaint will prompt an investigation, and can be a basis for discipline, but it can also lead us to uncover additional issues. Thus, good file return practices allow you to comply with the ethics rules and can serve as an effective risk management technique.

Retention obligations

The ethics rules do not, however, expressly tell you how long you must keep the client's file. You should be careful not to read into this absence of a specific timeline the prerogative to destroy client files at will because, as noted above, the file is presumptively the client's and they have a right to obtain it upon request. What should a lawyer do?

The best advice I can give you on this topic is to establish reasonable file retention procedures in your retainer agreement so that the client knows what your practices are and can plan accordingly. You can reiterate those retention policies in your file-closing letter, if you send one. With more and more files being maintained electronically, storage capacity is usually not an issue, but it's also important to have in place safeguards for backing up electronically stored files and procedures for ensuring that files are not inadvertently deleted. Your malpractice carrier may have retention guidelines that you can take into consideration, usually dictated by the time period under which a malpractice claim can be stated against the lawyer. In setting retention time policies, however, do not forget to consider the client's potential need for the documents.

If you do not have retention policies that have been clearly communicated to your client, you may be left to wonder whether you are able to ethically destroy client files, and if so, when you may do so. Kenneth Jorgenson's article from 2004 (see note 2) provides some good guidance for your consideration.

You should also take care with original items provided to you by the client or items that you prepare that have intrinsic value or legal effect. Rule 1.15(c), MRPC, requires you to safekeep client property provided to you; this rule is not limited in time. You should always return client originals or other property you received from the client or a third party to the client or third party at the time the representation ends, so that you are not ethically obligated to safekeep them indefinitely. The same goes for items created by you where the original has independent value or legal effect. This is the client's property. Wills and trusts are the main items that come to mind for me in this category. I recommend you do not keep them for the client because, if so, you are undertaking a commitment that will be difficult if not impossible to modify as time goes by.

Do you have a file retention policy? If not, you should put one in place.

Other related questions

A couple of other questions that we get frequently: Do the ethics rules require you to provide multiple copies of the client's file to the client? The answer is no. If you have provided to the client a complete copy at the conclusion of the representation, we have taken the position that you are not ethically obligated to keep providing file copies to the client. That said, having good records of prior file productions is a good idea to avoid a dispute regarding what was produced and when.

Am I required to provide a paper copy of the client file since it is maintained electronically? The ethics rules do not expressly address this question, but we have generally taken the position that providing a copy of the file as maintained by the lawyer, provided it is usable and accessible to the client, satisfies the ethics rules. Thus, if you only have an electronic copy of the file, you can provide the file electronically provided it is produced in a form that is accessible and usable by the client. Similarly, if you only have a paper copy of the file, the rules do not require you to scan it and provide an electronic copy just because the client asks for an electronic copy.

Can I charge the client for providing copies of their file, whether in paper form or electronically? The answer is maybe. Pursuant to Rule 1.16(g), MRPC, you may charge for copies only if the client, prior to termination of the lawyer's services, has agreed in writing to pay such a charge. Having this provision in your fee agreement may also moot a lot of disputes regarding production of the file. Most lawyers are happy to accommodate multiple and varied requests relating to return of the client file if they can charge for duplicating and retrieving the file.

Finally, always remember that you cannot condition payment of fees or copying costs on the return of the client file. In 2005, Minnesota adopted Rule 1.16(g), MRPC, which makes such conduct unethical. Notwithstanding this express prohibition, lawyers continue to receive discipline for requiring payment on production. I know it is frustrating to be required to provide the client with their file when they owe you money, but it is short-sighted to pick this battle with your client.

Conclusion

Lawyering creates a lot of paper, mostly electronic nowadays. Having good policies and procedures regarding the handling of that paper for your law practice—particularly relating to file return and retention—really pays dividends. It is not only a crucial element of customer service, but part of your ethical obligation. If you have questions regarding this topic, please call our Office. ▲

NOTES

[1] Attorneys who have questions about their ethical obligations under the Minnesota Rules of Professional Conduct may call us at 651-296-3952 for confidential ethics advice free of charge.

[2] Prior Director columns on this topic can be found on the *lprb.mncourts.gov* website under Articles. For example, Susan Humiston, *File Contents and Retention*, Bench & Bar (August 2018); Martin Cole, *Client Files: The ABA Weighs In*, Bench & Bar (September 2015); Kenneth Jorgensen, *File Retention Policies and Requirements*, Bench & Bar (December 2004).

[3] Rule 1.16(d), MRPC, provides "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, *surrendering papers and property to which the client is entitled*, and refunding any advance payment of fees or expenses that has not been earned or incurred." (emphasis supplied)

PROTECTING OUR JUDGES

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

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

In July I had the honor of co-presenting with the Hon. Esther Salas, a federal judge from New Jersey, at the 8th Circuit Judicial Conference in Minneapolis.[1] During her remarks Judge Salas gave the audience an update on the Daniel Anderl Judicial Security and Privacy Act.[2] This past December, Congress passed the legislation, also known as Daniel's Law—a pivotal moment in improving protections for the federal judicial community and their families. The law protects judges' information from being sold on data broker websites, enables them to request that personally identifiable information be removed from federal government websites, and prevents businesses or individuals from publishing their personal information with "no legitimate news media or other public interest."[3]

The law was named after Judge Salas's own son. Tragically, in July 2020, an attorney posing as a FedEx driver killed Daniel in the family's home while seeking to target Judge Salas. Judge Salas's husband, attorney Mark Anderl, was also critically wounded. Leading up to the attack, the gunman had argued a case before Judge Salas and had repeatedly made hateful and misogynistic statements on his personal website.[4] The murderer obtained her home address online and had planned other attacks.

The events suffered by Judge Salas and her family have also been experienced by other members of the judicial community. In 2005, federal judge Joan Lefkow returned home to discover that her husband and mother had been murdered in her home by a troubled litigant.[5] In 2021, former Wisconsin judge John Roemer was killed by an individual who had had a case involving armed burglary and firearms charges before the judge over 15 years prior.[6] With threats against judges and their families now commonplace, implementing protective measures is increasingly pressing. New York City Bar Association President Susan J. Kohlmann described the reality of the situation: "Over the past several years, threats and attacks against judges in the United States have increased in both number and intensity. Regrettably, we seem to be living in a culture where judges—and, in fact, all manner of public officials... are confronted with threats, intimidating behavior, and menacing rhetoric simply for doing their jobs. Indeed, death threats against public officials have become shockingly ordinary."[7] The internet enables individuals to locate the personal information necessary to carry out attacks and provides a public forum to voice threats. The Daniel Anderl Judicial Security and Privacy Act aims to give judges greater authority over their personal information online.

While most tend to agree with the common-sense approach put forward in this bill, others argue that the bill offers a false sense of security for those it protects. As a security expert, I often discuss the dangers of doxxing ("Doxxing redux: The trouble with opting out," Dec. 2019 B&B) and the tough task of managing your online presence. Unfortunately, there are inherent limitations to how well an individual can erase themselves from the internet. But there is nonetheless value in security measures that seek to mitigate the risk of doxxing-related attacks. Just like seat belts or life vests, no one security measure is perfect in guaranteeing your safety. But I think most of us would agree that the possible benefits of simple security measures make them not only sensible but necessary.

Similarly, while the Daniel Anderl Judicial Security and Privacy Act cannot guarantee that a judge's personal information will be unavailable everywhere, it is an important tool in limiting what information can be easily gathered about members of the judicial community and their families. As with other protections, such as those offered by the U.S. Marshals Service, the legislation is one very important piece of how threats against the judicial community can be anticipated and proactively managed. In addition to doxxing-related crime, judges are at risk of cybercrime more generally, including social engineering attacks.

While legislation like Daniel's Law is effective in directly limiting the personal information about judges in the public domain, judicial officers remain especially vulnerable to social engineering. A criminal may go directly to the source, tricking a victim into providing personal information. These attacks are often made possible by some piece of information found online. For example, sharing details about upcoming travel to a legal conference on social media can open the door to a phishing (or smishing, or vishing) attack. Based on even one detail willingly provided in a post, cybercriminals can piggyback to even greater amounts of information. When posting, consider

whether you would want to tell what you're sharing directly to a threat actor. And importantly, this advice should extend to everyone within a family or household. Staying apprised of current threats (for example, those posed by criminal uses of ChatGPT) should also be prioritized as both a personal and professional security step. Social media monitoring services can be helpful in identifying and reporting potential threat actors.

As Judge Salas stated following the passing of Daniel's Law this past year, "Judges, and their families, should not live in fear for doing the job they are sworn to do. As a nation and as a people, we cannot accept this. This legislation will make it harder for violent individuals to find judges' addresses and other personal information online. By better protecting judges, the bill also helps safeguard the judicial independence guaranteed by the Constitution."[8] Protecting judges by appropriately accounting for the risks of our cyber landscape is critical to upholding the democratic right to a fair trial. Increased threats and intimidation toward the judiciary impede the judicial process for all. In Minnesota and throughout the United States, the safety of both federal and state judges ought to be everyone's concern. While the Daniel Anderl Judicial Security and Privacy Act is undeniably a milestone in judicial security, this act is not the end of these efforts. Judge Salas, as well as every member of the judicial community, needs the support of our nation and its lawmakers. ▲

NOTES

[1] Judge Salas and I co-presented on judicial security at the invitation of the Hon. Patrick J. Schiltz and the Hon. Lavenski R. Smith.

[2] *https://www.uscourts.gov/news/2022/12/16/congress-passes-daniel-anderl-judicial-security-and-privacy-act*

[3] *Id.*

[4] *https://www.cnn.com/2020/07/20/us/suspect-shooting-at-judge-salas-home/index.html*

[5] *https://www.chicagotribune.com/opinion/commentary/ct-opinion-federal-judges-threats-lefkow-20201209-4vypwpafvfb35jy7x5tjkhlutm-story.html*

[6] *https://www.cnn.com/2022/06/04/us/wisconsin-judge-killed-targeted-attack/index.html*

[7] *https://www.nycbar.org/media-listing/media/detail/the-disturbing-trend-of-threats-and-violence-against-judges-and-the-vital-importance-of-judicial-security*

[8] Supra note 2.

Lessons from a meditation retreat

TURNING TOWARD THE QUIET

BY PATTY BECK ✉ *patty@abalancedpracticellc.com*

PATTY BECK is the president and owner of A Balanced Practice, LLC, where she teaches attorneys, judges, and other legal professionals practical strategies for incorporating well-being into their personal and professional lives.

"It's too quiet." This was the thought that plagued me during the first two days of the five-day silent meditation retreat I completed last year. Despite my best efforts to prepare myself to unplug leading up to what had unexpectedly become my busiest time of year, I was not prepared for how difficult it would be learning to embrace silence and regain a sense of calm in what had otherwise been an overwhelming time in my life.

I initially signed up for the silent retreat as a prerequisite to a certification I was considering. Conveniently conducted via Zoom and scheduled during the holidays when my calendar was otherwise open, it seemed like a great way to challenge myself while developing my meditation skills. What I did not anticipate was how busy life and work would become in the months leading up to the retreat, or that I would begin a series of speaking engagements and family obligations two days after the retreat.

A few days before it began, the idea of being unplugged from clients, family, and friends for five days seemed impossible. It felt like I should be available: "What if someone needs me?" was a thought I could not shake. At the same time, I knew I was exhausted and needed time away to reset.

To prepare for the retreat, I set a detailed autoreply and contacted my clients to share about my retreat and how to reach me in an emergency. Since I don't have an assistant, my husband agreed to monitor my phone daily for new voicemails. My clients were wonderful, sending several messages of support, curiosity, and enthusiasm that allowed us to deepen our relationships in a way that I hadn't anticipated.

As the retreat began, I struggled to be away from technology apart from our Zoom sessions. I didn't like how quiet the house was or how anxious I felt being unable to check in with anyone. I agonized about whether my plan was working, but my husband assured me each evening that I had no new voicemails (which, of course, made me feel like a cell tower must be down). It was also hard being in the quiet of my thoughts and emotions with nothing to drown out the sound of my inner critic, which was constantly saying that I should be working.

Then something changed.

One morning, my husband put on Christmas music in the kitchen so that I wouldn't miss out on the festive feeling of my favorite season. While I appreciated the sweet gesture, I found myself going upstairs to be in the quiet of our bedroom. As I wrapped myself in a blanket and sipped my coffee, I suddenly felt a new appreciation for the quiet.

I found that the quiet allowed me the space to slow down and pay attention to what I was thinking and feeling, and to navigate challenging thoughts about work and life in a supportive rather than judgmental way. I spent time considering changes I could make to manage how overwhelmed I had been feeling. I also noticed that my body relaxed in places I didn't realize were tense.

More than anything, the quiet had become a space where I could turn and simply breathe—without the relentless pressure to always be doing something. I embraced the silence the last few days, and after the retreat ended, my mind felt clearer. I was able to deliver my speaking engagements with ease.

Over six months later, I have found myself better able to recognize when I'm feeling overwhelmed, and I have learned to turn toward the quiet moments to re-center myself during busy days. I often take a few minutes to meditate (the Insight Timer app is my favorite) and notice how my body feels. I pay more attention to my thoughts and approach them with curiosity rather than criticism or avoidance. When I need time away, I share what I'm doing in my autoreply, which often sparks authentic discussions about well-being with clients and friends.

If you are feeling overwhelmed by life or struggling to take time for yourself, please know that you are not alone. We are all fighting our own battles, and sometimes life and work catch up with us in unexpected ways. Taking a few deep breaths, doing a quick meditation, or simply taking a break from checking email can often help to regain focus during a busy day. While I recognize that not everyone has the ability to unplug completely for five days, I encourage you to look for the quiet moments where you can simply be with yourself and take a moment to breathe one day at a time. ▲

NEED SOMEONE TO TALK TO?

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

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TIPS FOR MEDITATION

- Start small. Short meditation sessions a few days a week are more valuable than one long session on the weekend.
- Find a consistent time of day to practice meditation and use an app for guidance (such as Insight Timer, Calm, Headspace).
- Try different postures to find what resonates with you (sitting in a chair, lying on the floor, resting on a cushion, etc.).
- Explore different meditation anchors (breath, body movement, sounds of your environment, etc.).
- Be patient with yourself. What you experience today may be vastly different from tomorrow, and that's okay.

TIPS FOR TAKING TIME OFF

- Think about what you hope to achieve with your time away.
- Decide how "unplugged" to be (completely? available by voicemail only? checking email intermittently?).
- Arrange for back-up coverage on active files to avoid client interruptions.
- Communicate! Tell colleagues and clients what to expect and consider sharing what you're doing. It adds a personal connection that can enhance relationships.
- Be patient with yourself; taking time off can be challenging, so be kind to yourself with whatever you're able to do.

Q WHAT'S THE MOST IMPORTANT THING YOU HAVE ON OR NEAR YOUR DESK RIGHT NOW?

JOE DAMMEL

Joe Dammel is the managing director of the Buildings department at the St. Paul-based nonpartisan energy policy organization Fresh Energy. He advocates for policy change at the Legislature and before governmental agencies.

I have a Polaroid of the lake in Canada that I used to visit every summer growing up. My grandparents had a cabin on the lake and I have many fond memories of spending time with them and my dad. Much of that time was spent on the water. Because the water was so clear, the fish only bit at sunset. We would head out to the fishing spot after dinner and wait for the walleye to begin biting, which they usually did just as the sun dipped below the horizon (which was also when the mosquitoes decided to come out, too).

The last time I was up there, which is going on 15 years ago now, I remember my dad was driving the boat back to shore and I turned around to watch the wake of the boat cut through the glassy water and expand outwards, toward the sunset behind us. I raised my camera and pressed the shutter.

I started law school at the University of Minnesota a few weeks later.

I credit the trips we took to that lake in Canada with igniting a passion for working to protect our natural world. The photograph on my desk serves as a reminder of why I pursued a career in energy and environmental law and policy. I hope that future generations can also experience nature by enjoying its wildness and beauty.

MADELINE GUSTAFSON

Madeline Gustafson is a litigation attorney at Bassford Remele, PA, where her primary practice areas include commercial litigation, professional liability litigation, general liability, and employment litigation. She was recently appointed secretary of the New Lawyers Section for the MSBA.

Uff da. (I'm practicing my Minnesota mannerisms because as a native Iowan, I'm working on fitting in here.) Asking me about the "most important thing" on my desk right now gives me slight anxiety, as the logical answer would be my cell phone and laptop—which keep me way too plugged in to my job—but I'd like to reframe the question slightly to what I'm "most proud of" on my desk (not counting the photos of my family and husband, that is).

The thing I am most proud of on my desk is a traveling trophy awarded amongst the Bassford associate attorneys called "the Willems Whale." The Willems Whale is an award you can only get from your peers at Bassford. When an associate does something "profound"—such as winning a dispositive motion, taking their first deposition, or rockin' it at a CLE, the former trophy winner of the Willems Whale nominates another associate for the award. The first time I received the award, it was for speaking for the first time at a CLE. More recently, my friend and colleague Michael Pfau gave it to me as inspiration for this article, so I'll have to give it back to him—he's the real rock star and current holder of the Willems Whale.

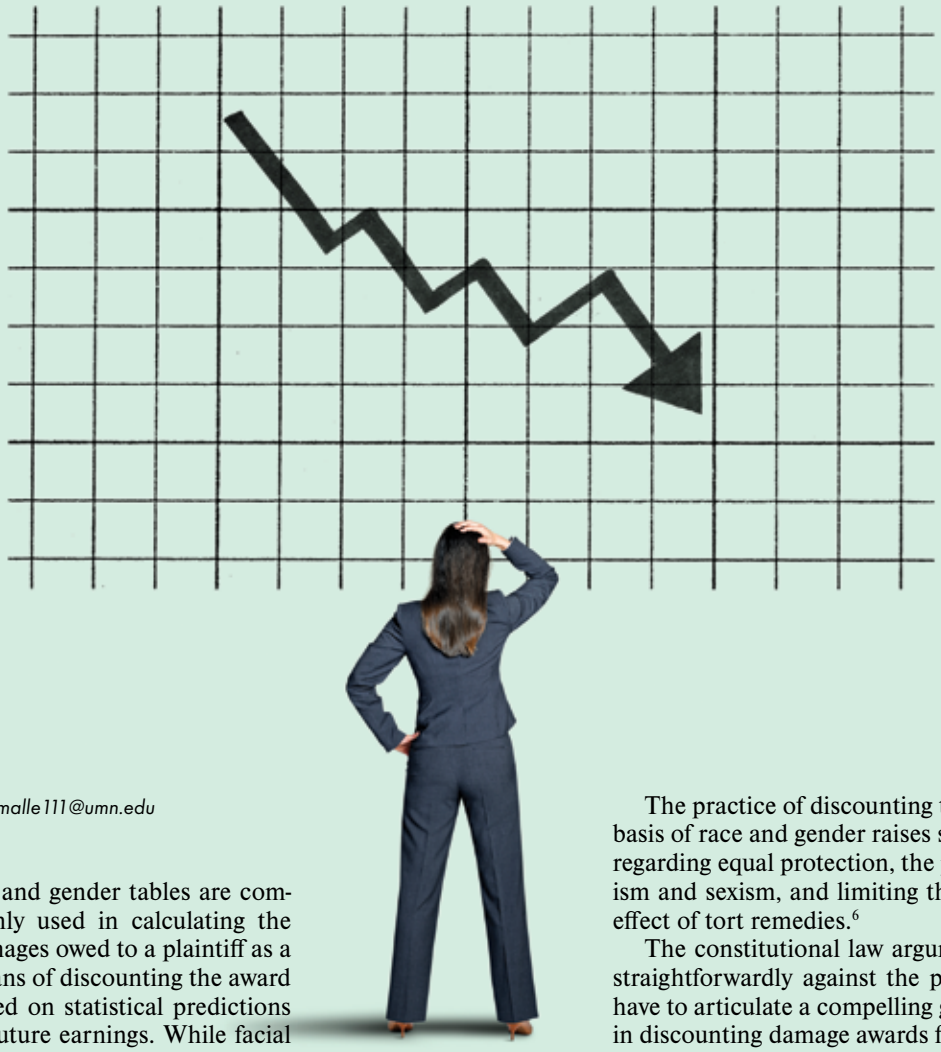
The traveling award is a bit of a tradition around Bassford—the shareholders have their surfboard for winning trials (don't ask me how that started) and the associates have the Willems Whale. Named after an iconic new[er] shareholder of the group, Kyle Willems, it features a picture of Kyle happily riding an Orca whale with one hand waving frantically in the air, the other clinging on to the Orca. The image is a bit reminiscent of what it's like practicing litigation—a little crazy, a little fear-inspiring, and a little fun. It keeps things light when the job can be stressful. The traveling award also plays its part in building camaraderie amongst the associate class. As a result, it's the trinket I'm most proud of on my desk.

FARIS RASHID

Faris Rashid is a partner at the law firm of Greene Espel, where he practices business litigation with a focus on technology, trade secrets, and product liability disputes.

I actually have two answers. First, I clutter both my home and office desks with family photos. When I'm busy at work, or waiting for an oral argument to start by Zoom, for example, they remind me to lighten up and focus on what matters. I keep a rotating collection of my children's artwork on my desks for the same reason—and because it makes them so proud to see it there. My second answer is a scented candle that my friend Katrina, also an attorney, sent at the very start of the pandemic, when we all suddenly started working from home. The candle's scent is labeled "Cancelled Plans." I generally don't use scented candles and I've never burned it, but it's stayed on my home office desk since March 2020, as a reminder of how much life—and the practice of law—has changed. And to take nothing for granted.

WHY ARE WE USING RACE AND GENDER TABLES TO SET TORT DAMAGES IN 2023?



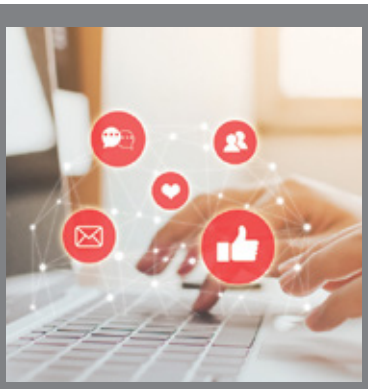
BY IAN MALLERY malle111@umn.edu

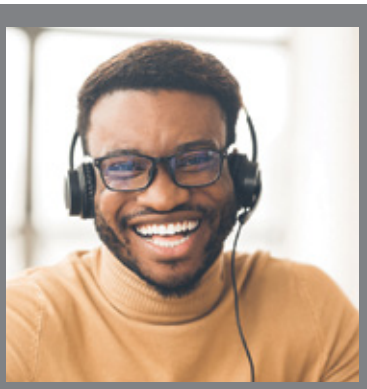
Race and gender tables are commonly used in calculating the damages owed to a plaintiff as a means of discounting the award based on statistical predictions of future earnings. While facial race classifications receive strict scrutiny in almost every other area of the law,[1] they are almost universally accepted in American courts when calculating tort damage awards.[2] Once liability is found, both parties call expert witnesses who utilize actuarial tables to calculate past damages and future income loss.[3] In most cases, these experts will use race and gender as a variable in this calculation.[4] In practice, this discounts awards to minorities and women simply due to expected life outcomes of their groups as a whole.[5]

IN PRACTICE, THE TABLES DISCOUNT AWARDS TO MINORITIES AND WOMEN SIMPLY DUE TO EXPECTED LIFE OUTCOMES OF THEIR GROUPS AS A WHOLE.

The practice of discounting tort damages on the basis of race and gender raises significant concerns regarding equal protection, the perpetuation of racism and sexism, and limiting the desired deterrent effect of tort remedies.[6]

The constitutional law argument is, on its face, straightforwardly against the practice. One would have to articulate a compelling government interest in discounting damage awards for different races of people, which would require a court to accept that determining the most "statistically accurate" compensation owed by a defendant is more valuable than awarding equal damage for equal harm.[7] An added wrinkle, however, is that we are unlikely ever to see this argument raised past the trial court level. It is highly unlikely that the type of defendant with the means to pursue an appeal would be willing to accept the negative publicity that would result from advancing an argument in favor of facial race or gender discrimination.





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Race and gender discounting acts to perpetuate racial disparities. The disparities that appear in actuary tables are the result of decades of socioeconomic discrimination faced by women and minorities.[8] For example, in lead paint litigation, victims tend to live in low-income neighborhoods and are disproportionately Black and Hispanic children, and defendants pay far less than they would if their victims were white, middle-class children.[9] Rather than reflecting the capacity of a race or gender group member to achieve a certain outcome, they reflect the past injustices that have limited the outcomes of those members up to the present.[10] This injustice is even more apparent in cases involving children. If two otherwise identical children, one White and one Black, are irreparably harmed from lead poisoning, the Black child would be likely to receive a significantly lower damage award because he is statistically less likely to obtain a bachelor's degree or live as long as the white child.[11] Allowing these calculations to proceed on a regular basis fails to account for both the variety of life outcomes that are independent of race or gender and social progress that could possibly diminish the disparities these statistics reflect during a plaintiff's lifetime.

Tort law targets three primary objectives: compensatory justice, corrective justice, and deterrence.[12] Discounting damages based on race and gender minimizes the deterrent effect of tort liability upon the government and companies that operate in low-income and minority communities. Especially when considered in conjunction with insurance policies, race-based actuarial tables increase moral hazard because they increase the likelihood that corporations will engage in riskier behavior in communities of color because the costs are lower and therefore more appealing to insurance providers.[13] By allowing these race-based classifications to proceed, the courts are effectively encouraging harm to proceed and creating a feedback loop between harm done to minority communities and lower damage awards based on lower life expectancy and educational outcomes.

A final issue that arises from the use of race tables in tort litigation is actually determining someone's race. In *McMillan v. City of New York*, Judge Jack Weinstein found that question damning enough to bar the use of race in the first place.[14] The claimant was made quadriplegic by the negligent crash of the Staten Island Ferry. The expert for the city used a race actuary table to discount McMillan's damages.

On cross-examination, McMillan's attorney asked a simple question: "How do you know McMillan is Black?" The expert was unable to provide an acceptable answer, and Judge Weinstein threw out consideration of McMillan's race. The opinion provided a terse but simple explanation: "The question posed is whether such 'racially' based statistics and other compilations may be relied upon to find a shorter life expectancy for a person characterized as an 'African-American,' than for one in the general American population of mixed 'ethnic' and 'racial' backgrounds. The answer is 'no.'"[15]

Other litigators have found success in raising this question to juries and some jurisdictions have acted to ban the use of race and gender tables.[16] Notably, in 2019 California enacted a law that banned the calculation of damages based on race, ethnicity, and gender.[17] Because this issue is largely confined to the district courts and unlikely to be appealed to the Supreme Court, it will be up to the Legislature to enact a ban statutorily. Ridding the courts of this practice will better serve the purposes of tort law by decreasing moral hazard and creating a more just compensation scheme that does not utilize past injustices to justify discounted awards today. ▲

IAN MALLERY is a third-year law student at the University of Minnesota focusing on labor and civil rights law. He is a student director for the Clemency Project Clinic and a member of the executive board of the University of Minnesota National Lawyers Guild.

NOTES

[1] "All racial classification imposed by government must be analyzed by a reviewing court under strict scrutiny... such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

[2] While some states have banned the practice legislatively, it remains in widespread use. Goran Dominioni, *ARTICLE: Biased Damages Awards: Gender and Race Discrimination in Tort Trials*, 1 Cardozo Int'l & Comp. L. Rev. 269, 271 (2018).

[3] Forensic economists utilize life expectancy, work-life expectancy, and average wage tables compiled by the U.S. Department of Labor. *Id.*

[4] A 2009 survey by the National Association of Forensic Economists showed that 44% considered race while 92% considered gender. Kim Soffen, *In One Corner of the Law, Minorities and Women are Often Less Valued*, The Washington Post (2016).

[5] Jesse Schwab, *ARTICLE: The Problem with Defining Tort Damages in Terms of Race and Gender*, 2019 Harv. C.R.-C.L. L. Rev. Amicus 1, 2 (2019).

[6] Martha Chamallas, *SYMPOSIUM: Access to Justice: Can Business Co-Exist with the Civil Justice System?*, Loy. L.A. L. Rev. 1435, 1439.

[7] *Bollinger*, 539 U.S. 306, 326 (2003).

[8] Schwab, *supra* at 3.

[9] Chamallas, *supra* at 1440.

[10] *Id.*

[11] *See e.g. G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 140 (E.D.N.Y. 2015) (finding the use of race-based statistics to calculate a reduced life expectancy for tort damages unconstitutional).

[12] Benjamin Shmueli, *ARTICLE: Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice*, 48 U. Mich. J.L. Reform 745, 747 (2015).

[13] Dhruti J. Patel, *NOTE: Policing Corporate Conduct Toward Minority Communities: An Insurance Law Perspective on the Use of Race in Calculating Tort Damages*, 53 U. Mich. J.L. Reform 227, 233 (2019).

[14] 253 F.R.D. 247, 248 (E.D.N.Y. 2008).

[15] *Id.*

[16] Chamallas, *supra* at 1443.

[17] Schwab, *supra* at 1.

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FROM 0 TO HF100

LEGAL CANNABIS COMES TO MINNESOTA

BY JARED M. REAMS AND RACHEL S. KURTH
jreams@ecklandblando.com rkurth@ecklandblando.com

Gov. Tim Walz signed HF100 on May 30, 2023, after a nearly six-month journey through numerous committees and revised engrossments in the Minnesota House and Senate, making Minnesota the 23rd state to legalize recreational-use cannabis. To get the bill to his desk, the Legislature had to balance a surprising number of competing interests and stakeholders, including consumers, medical patients, social equity advocates, state and local government entities, law enforcement, hemp businesses, medical cannabis businesses, prospective in-state cannabis businesses, and out-of-state players in the cannabis industry.

Fitting a state-sanctioned cannabis market neatly within a federal system in which cannabis remains an illegal controlled substance was also no small hurdle. Overall, the Legislature was thoughtful in its undertaking and left Minnesotans with one of the most comprehensive and, in certain respects, progressive cannabis laws in the nation. Nevertheless, certain gaps and potential conflicts remain in the bill and may require action by the Legislature, newly created Office of Cannabis Management, or both to remedy.

Recreational possession and use

While conflicting information has been widely publicized—and generally accepted as correct—Article 1, section 75 of the bill makes clear that its adult possession and use provisions became effective July 1, 2023. Accordingly, starting in July, individuals over the age of 21 had the legal ability to possess, use, transport, gift (for no remuneration), and cultivate cannabis at home under Minnesota law. The limits are also quite permissive: In public, an adult can possess, transport, or gift up to two ounces of cannabis flower, eight grams of cannabis concentrate, or edibles containing up to 800 milligrams of THC. While a person is at their own residence, the possession limit for cannabis flower increases to two pounds.

Adults can also grow cannabis at home—but unlike limits on possession, plant limits are tied to the residence itself and not to the number of persons 21 and over who live there. Up to eight plants can be cultivated at a single residence by one or more adults, but only four of those can be mature (flowering) at any one time. The plants must also be grown in an "enclosed, locked space that is not open to public view," so raised beds in the front yard will not be a viable option. Even so, cannabis pollen floating naturally in the air can affect final yield, and most people interested in cultivation will likely be growing indoors for better control.

It appears that in setting the at-home possession limit at two pounds, the Legislature was operating under the belief that each of the four allotted mature plants will produce roughly half a pound of cannabis flower when harvested. This is certainly debatable. Not only is the yield of a single plant highly variable, but the definition of "cannabis flower" under HF100 exacerbates the problem, as it includes "the harvested flower, bud, leaves, and stems of a cannabis plant." Consequently, a person may violate the two-pound possession limit the instant they pull their four mature plants out of the ground. With this said, the cultivation limits may be intended to account for multiple adults living at the same residence, each of whom would have their own two-pound cannabis flower allowance under the statute and also want to grow their own plants.

The areas in which cannabis products can be legally used are significantly more restricted than where they can be possessed—especially with respect to smoked or vaped products. The law expressly allows adult cannabis use at a private residence (including the yard and curtilage), on private property that is not generally accessible by the public (unless the property owner prohibits it), and at a venue or event that is licensed for on-site consumption. An added restriction on smoking and vaping in these areas is almost hidden within a portion of the bill mostly concerned with medical cannabis:

"Except for the use of medical cannabis flower or medical cannabinoid products, the vaporizing or smoking of cannabis flower, cannabis products, artificially derived cannabinoids, or hemp-derived consumer products is prohibited in a multifamily housing building, including balconies and patios appurtenant thereto." Additionally, as with tobacco, smoking or vaping cannabis products is prohibited in locations covered by the Minnesota Indoor Clean Air Act (MICAA), which, importantly, the Minnesota Department of Health interprets to include private social clubs. And unlike tobacco shops, smokable cannabis retailers were not given a "product sampling" exception for on-site use akin to Minn. Stat. §144.41467(4).

Interestingly, while those areas listed above may be called "protected" locations for use, revisions to the state criminal laws effective August 1, 2023 leave no legal penalty for using cannabis outside of them (namely public spaces not subject to the MICAA). Nevertheless, municipalities can ban that practice by ordinance, and it remains an open question how many Minnesota cities will do just that.

By completely eliminating the ability of multifamily housing tenants to smoke or vape recreational cannabis products at their homes, allowing landlords to forbid *all* cannabis products (including edibles) on their rental properties, and allowing municipalities to ban use in all public spaces, there is a legitimate criticism that the Legislature has legalized cannabis only for the wealthy (or at least those wealthy enough to be homeowners). The concern is even greater for medical cannabis patients, because while the bill does not outlaw smoking or vaping medical cannabis in multifamily residences as it does for recreational users, it does not protect medicinal use either, and it appears that HF100 would still allow landlords to prohibit the practice. It remains to be seen whether a property owner must allow medical patient tenants to use edible products, at a minimum, as a reasonable accommodation under Minnesota Human Rights Act. Unfortunately, patients should expect no additional protections under the Federal Fair Housing Act, since cannabis remains a controlled substance federally.

MEDICAL CANNABIS WILL CONTINUE TO BE REGULATED BY THE OFFICE OF MEDICAL CANNABIS UNDER THE DEPARTMENT OF HEALTH UNTIL MARCH 1, 2025. THEREAFTER, THE MEDICAL PROGRAM WILL BE CONTROLLED BY THE DIVISION OF MEDICAL CANNABIS UNDER THE OFFICE OF CANNABIS MANAGEMENT.

Medical cannabis

Medical cannabis has been legal in Minnesota since 2014, although the program was exceedingly restrictive as to the conditions that cannabis could be used to treat and the forms of cannabis that could be used for the treatment itself, namely pills and derivatives that were not plant material. HF100 greatly expands the forms medical cannabis can legally take, including flower, concentrates, and edibles. While it does not expand Minnesota's list of qualifying medical conditions for cannabis treatment, it does allow the Office of Cannabis Management to add conditions to the list. The law also prohibits sales tax on medical cannabis products.

Medical cannabis will continue to be regulated by the Office of Medical Cannabis under the Department of Health until March 1, 2025, to avoid interruption for medical cannabis patients while the Office of Cannabis Management is being implemented. Thereafter, the medical program will be controlled by the Division of Medical Cannabis under the Office of Cannabis Management.

Changes to criminal laws

While the legal adult use provisions of HF100 became effective July 1, changes to criminal laws surrounding cannabis in Minnesota were awkwardly delayed until August 1, 2023. In most circumstances, however, the provisions of the statute that permit adult use and possession may nullify vestigial laws that would criminalize the same conduct during the month of potential conflict.

For example, under prior law it was a controlled substance crime in the fifth degree under Minn. Stat. §152.025, subd. 2(1) to "unlawfully possess[] one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV, except a small amount of marijuana." Come August 1, HF100 amended that offense to exclude all cannabis products, regardless of amount. But for any cases brought between July 1 and August 1, the use of the word "unlawfully" by the statute will be important. "Unlawfully" is defined to mean "selling or possessing a controlled substance in a manner not authorized by law." Because HF100 legally authorized adult possession of cannabis on July 1, 2023, that possession cannot violate the statute.

The revisions to Minnesota's cannabis-related crimes reduce previous penalties for sales crimes across the board, with a maximum penalty of imprisonment of up to five years and fines of up to

$10,000 for unlawfully selling more than two ounces of flower, eight grams of concentrate, or edibles containing more than 800 milligrams of THC. Changes to possession crimes are less easily summarized. Penalties will be reduced for the unlawful possession of less than 10 kilograms of cannabis flower, two kilograms of concentrate, or 100 grams of THC within edibles, with corresponding penalties ranging from petty misdemeanors for possession of lower amounts to felonies allowing up to five years imprisonment and fines of up to $10,000 for higher-level violations within those thresholds.

The penalties for possessing amounts greater those discussed above remain unchanged for possession of cannabis flower, while they are harsher for concentrates and may be more lenient for edibles. This is because the previous regime treated all "mixtures" "containing marijuana or [THC]" the same. As an example, under the previous Minn. Stat. §152.021, one would need to possess 25 kilograms of concentrates to be charged for the same first-degree controlled substance offense as a person with 25 kilograms of cannabis flower. Under the revised law, only 10 kilograms of concentrate is sufficient. While edibles containing just one kilogram or more of THC will also qualify for the same offense, the revised law may actually be more permissive because it only takes into account the weight of the THC itself, as opposed to the weight of the entire "mixture" or edible.

As for motor vehicle crimes, the Legislature wisely declined to tie DUI offenses to the mere presence of a THC metabolite in a driver's system, given that these metabolites may persist in the body for up to 30 days, long after intoxicating effects have subsided. Instead, it will simply be a crime to operate a vehicle under the influence of cannabis, regardless of how that may be proved. Having open cannabis packaging or "hot boxing" in a motor vehicle that is on a street or highway will also remain illegal, just as a similar possession or use of alcohol is proscribed. Keep it in its original packaging or the trunk.

Expungement

In recognition of the past severity and disparity of cannabis crime enforcement in Minnesota, HF100 establishes a temporary Cannabis Expungement Board (under the Office of Cannabis Management); provides for the automatic expungement of certain cannabis offenses, including misdemeanor sale and possession crimes; and allows the possibility of expungement or resentencing for felony offenses on a case-by-case basis. The "automatic" expungement track does not require any action by affected persons to take effect, but it is unclear whether those with felony convictions will need to petition the board or follow some other procedure for board review. Future rulemaking should resolve that question. To be eligible for felony expungement or resentencing to a lesser offense, the cannabis crime at issue (1) must not have involved a dangerous weapons, battery, or assault; (2) must be a non-felony offense or no longer a crime after August 1, 2023; and (3) must have no appeal pending and no further opportunity for appeal.

Cannabis business licensing

Given that Minnesota took 23rd place in the race to legalization, the Legislature faced a real concern that out-of-state entities in established markets would have a competitive advantage over in-state newcomers to the cannabis industry. The dormant commerce clause would likely prevent any residency restriction on licensing, regardless of whether such a policy would be wise in the first place. The Legislature thus confronted the issue with a double-edged sword: It struck down opportunities to monopolize, but with the same blow may have cut the ability for small cannabis businesses to become anything but.

Features of HF100 include a limited pool of licenses, caps on size and production, and vertical integration limits. Size caps limit the square footage of canopy size for cultivators, production numbers for manufacturers, and storefronts for retailers. Vertical integration limits force businesses into one of 16 discrete license types and disallow businesses from holding more than one type of license, with limited exceptions. For example, a cannabis manufacturer could not obtain a cannabis retailer license (which would allow sales directly to consumers) but could obtain a cannabis cultivator license to grow its own supply, as well as an "edible cannabinoid product handler endorsement" to produce edibles. Restrictions on license holders that are businesses will also apply to each of the businesses' cooperative members, managers, directors, and general partners.

Licenses that allow for vertical integration, such as micro- or mezzo-business licenses, trade the additional permissions for lower size caps. Additionally, while lower-potency hemp edible businesses will not have any vertical integration limits or size caps, they cannot hold any cannabis (read: non-hemp) license, while cannabis businesses can deal in hemp or cannabis products.

The number of licenses to be issued, as well as size caps and the application process itself, has yet to be decided by the Office of Cannabis Management.

Social equity

In addition to expungement, the state has also provided social equity redress within the licensing process. While the Office has yet to decide how many points to attribute to each cannabis business license application criteria, HF100 does require that at least 20 percent of the total awardable points be reserved for social equity applicants. These are individuals who (1) were convicted of a cannabis possession or sale offense prior to May

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RACHEL KURTH is an associate attorney at Eckland & Blando, where she assists clients, including hemp and cannabis businesses, in all matters related to contracts and regulatory compliance, from initial negotiations to contractual disputes. She graduated from Mitchell Hamline School of Law in 2022.

1, 2023; (2) have a parent, guardian, child, spouse, or dependent who was convicted of a cannabis possession or sale offense prior to May 1, 2023; (3) were the dependent of someone who was convicted of a cannabis possession or sale offense prior to May 1, 2023; (4) are service-disabled veterans or veterans who lost honorable status due to an offense involving the possession or sale of marijuana; (5) for at least the past five years, have been a resident of a census tract or neighborhood disproportionately targeted by cannabis enforcement; (6) are emerging farmers; or (7) for at least the past five years, have lived in a census tract where the poverty rate is 20 percent or more, or in which the median family income did not exceed 80 percent of the statewide median family income (if in a metropolitan area, then 80 percent of the metropolitan median family income).

In determining how many points to award to a business based upon social equity factors, the Office will consider the number or ownership percentage of its cooperative members, officers, directors, managers, and general partners who qualify as social equity applicants. Additionally, while a conviction for a cannabis offense remains a social equity category, the Office has authority to decide whether any *felony* conviction would be entirely disqualifying for an applicant.

IN DETERMINING HOW MANY POINTS TO AWARD TO A BUSINESS BASED ON SOCIAL EQUITY FACTORS, THE OFFICE OF CANNABIS MANAGEMENT WILL CONSIDER THE NUMBER OR OWNERSHIP PERCENTAGE OF ITS COOPERATIVE MEMBERS, OFFICERS, DIRECTORS, MANAGERS, AND GENERAL PARTNERS WHO QUALIFY AS SOCIAL EQUITY APPLICANTS.

Quasi-social equity factors will also play into the application process, with an undetermined amount of points awardable to retired military personnel who do not otherwise qualify as social equity applicants, as well as those who would expand cannabis-related services to an underrepresented market, including the medical cannabis market.

Sunset period for hemp businesses

To avoid interruption for businesses selling hemp products, such as the THC seltzers and gummies presently found on shelves in Minnesota, the Legislature decided to keep the "edible cannabinoid product" law passed last summer on the books until March 1, 2025. After that date, the Office of Cannabis Management will issue licenses to make and sell the revised version of these products, called "lower-potency hemp edibles." Importantly, all retailers that wish to continue selling edible cannabinoid products to consumers during the interim period must register with the Minnesota Commissioner of Health by October 1, 2023 (through a process that has not been established at the time of this writing).

Because the product and registration requirements are different for edible cannabinoid products than for lower-potency hemp edibles, there may be a heightened risk of confusion by law enforcement authorities investigating compliance. As an example, lower-potency hemp edibles cannot contain delta-8 THC, while edible cannabinoid products can, and while sellers of edible cannabinoid products must register with the Office of Cannabis Management, as discussed above, lower-potency hemp edible retailers must register with local units of government.

Despite their differences, the competing regimes are intended to regulate the same kinds of products (hemp-derived edibles), and there is nothing about those products or their packaging that indicates which set of laws they are being sold under. Additionally, because HF100 is less than forthcoming in its text regarding the sunset period for edible cannabinoid products and continuation of Minn. Stat. §151.72, it is possible that some law enforcement entities acting in good faith will have no idea that the edible cannabinoid product statute is still effective. Attorneys representing hemp businesses should apprise their clients of this unfortunate situation.

Tribal compacts

Despite personal use provisions having become effective in July, it is not expected that retail cannabis locations will be licensed and able to offer products for sale until early 2025. To those looking for cannabis products before then, keep an eye out for tribal governments exercising their sovereignty to regulate cannabis within their tribal jurisdiction, or for compacts between tribal governments and the state of Minnesota, which can allow for an accelerated path to retail sales across jurisdictional lines. Certain tribal governments have already begun the negotiation process. A tribal government (with more agility than the state) could begin regulating a cannabis market within its borders without waiting for the Office of Cannabis Management's bureaucratic formation and provide options to consumers that do not exist elsewhere in Minnesota. (Shortly after this article was completed, Red Lake Nation announced that it would begin selling recreational cannabis in August. Without a compact, products are legal for sale and use only within tribal boundaries.)

The waiting game

While HF100 accomplished much in its 300-or-so pages, the newly created Office of Cannabis Management has its work cut out in the coming months. Rulemakings related to personal use, business licensing, expungement, and several other key provisions of the bill can be expected in the near future, and the decisions will be impactful. In the meantime, Minnesota has fallen into limbo, with legal possession and use but no legal sales, and an excited (or perhaps anxious) prospective industry that is unsure how to direct its energy. But when the law is at its most obscure, one thing becomes clear: Lawyers are important. ▲

UNDERSTANDING EXPUNGEMENT

under the new cannabis law

BY DEA CORTNEY AND SAMUEL EDMUNDS

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With the recent passage of HF 100,[1] Minnesota became the 23rd state to decriminalize or legalize some recreational uses of cannabis.[2] In so doing, the state also recognized the need for justice reform by implementing significant changes related to expungement and resentencing. Expungement allows individuals with past convictions for certain cannabis offenses to have their records sealed, offering them a clean start and a chance to rebuild their lives. In this article, we will discuss the recent marijuana law changes in Minnesota, with a focus on expungement and its impact on individuals and communities.

Minnesota's journey toward marijuana legalization has been gradual. As far back as 1976, Minnesota decriminalized the possession or sale of a small amount of marijuana, defined as less than 42.5 grams.[3] In 2014, the state passed a law allowing the use of medical marijuana for certain qualifying conditions.[4] This initial step toward recognizing the medicinal value of cannabis laid the foundation for future reforms. Last year, the Legislature legalized certain low-dose, hemp-derived edible THC products.[5]

This year's final legislation-turned-law is a 300-plus-page bill that made its way through 30 committees in the House and Senate and a trip to the conference committee before passage in both bodies. Upon signing the bill, Gov. Tim Walz stated: "We've known for too long that prohibiting the use of cannabis hasn't worked. By legalizing adult-use cannabis, we're expanding our economy, creating jobs, and regulating the industry to keep Minnesotans safe.... Legalizing adult-use cannabis and expunging or resentencing cannabis convictions will strengthen communities. This is the right move for Minnesota."[6]

The new cannabis statute repeals, amends, and adds over 100 provisions to our law books.[7] The new law contains nine articles, many of which focus on business and regulatory matters associated with the cannabis industry. This analysis will focus on Article 5, which deals with expungement and resentencing.

Understanding expungement

Article 5 of the new law focuses on the expungement of criminal records associated with Minnesotans' prior cannabis convictions and the resentencing of certain prior marijuana criminal convictions.

Expungement is a legal process that allows individuals to clear their criminal records of certain offenses,[8] giving them a fresh start and removing the barriers associated with past convictions. In the context of marijuana law changes in Minnesota, expungement is an essential aspect of promoting fairness and equity. Expunging marijuana-related convictions means that individuals can end or avoid long-term consequences that hindered employment prospects, housing opportunities, and access to educational and financial resources caused by prior convictions.

One of the primary motives for revising expungement laws related to marijuana was to rectify the disproportionate impact of cannabis-related convictions on marginalized communities, especially communities of color.[9] Nationwide, it has been well-documented that individuals from such communities are more likely to be arrested and convicted for marijuana offenses despite similar usage rates compared to other racial groups.[10] For instance, the ACLU found that Black Minnesotans are more than five times more likely to be arrested for a marijuana-related offense than white Minnesotans.[11] These convictions often result in lifelong consequences, hindering employment prospects, housing opportunities, and access to education.[12]

Minnesota's legislative reforms were aimed at addressing these systemic inequities by providing a pathway for individuals to clear their records and escape the cycle of discrimination perpetuated by past marijuana convictions.[13] Another significant motivation for expungement reform is to align Minnesota's laws with the changing legal landscape of cannabis. As more states across the nation embrace recreational marijuana use, it becomes increasingly evident that individuals with prior convictions face unfair consequences in a system that no longer considers their actions criminal.

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Recognizing this discrepancy, Minnesota sought to remove the barriers associated with past convictions and allow individuals to fully participate in the emerging legal cannabis market. Expungement reforms can serve as a bridge between the past and present, acknowledging the evolving acceptance of cannabis in society.

Expungement criteria and process

Article 5 of HF 100 (now 2023 Session Law Chapter 63) sets forth a process for the automatic expungement of certain lower-level cannabis offenses (essentially those convictions that will no longer be crimes) and creates a Cannabis Expungement Board to review felony offenses for potential expungement.

Automatic expungement

Beginning August 1, 2023, prior offenses that will receive automatic expungement include:

1. Cases resolved with a §152.18 dismissal and discharge of proceeding (stay of adjudication) for a violation of fourth-degree sale or possession, fifth-degree sale or possession, or marijuana in a motor vehicle/possession of a small amount (Minn. Stat. §§152.024, 152.025, and 152.027, respectively).
2. Convictions or stayed sentences for marijuana in a motor vehicle/possession of small amount (Minn. Stat. §152.027, subd. 3 or 4).
3. Charges that resulted in dismissal prior to a finding of probable cause or resolutions in favor of the petitioner.[14] Note also that a verdict of not guilty by reason of mental illness is not a resolution in favor of the petitioner.[15]

Although the process is "automatic," meaning individuals do not need to submit an application, petition, or motion, it won't be instantaneous. The BCA first has to run background checks and then notify the judicial branch of the expungement, which then has 60 days to seal the records.[16] Upon receiving notice, the judicial branch shall also order all related records to be sealed, with the exception of Department of Health and Department of Human Services records.[17] The BCA has estimated that it could take up to a year for the agency to process the automatic expungements.[18]

The new law specifically states that the BCA must provide information on its website regarding noncitizens' potential need to obtain copies of records affected by expungement in advance, details on how to obtain these copies, and advising that a noncitizen should consult with an immigration attorney regarding expungement of records.[19]

Review by Cannabis Expungement Board

The new law established the Cannabis Expungement Board, comprising the chief justice of the Minnesota Supreme Court, the Attorney General, the Commissioner of Corrections (or their designees), a public defender, and a member of the public.[20] The board will obtain and review all available records to determine whether a person committed an act involving the sale or possession of cannabis that would either be a lesser offense or no longer a crime after August 1, 2023.[21]

The new statute specifically delineates eight felony marijuana sale and possession offenses[22] that may be eligible for expungement or resentencing to a lesser offense if:

1. the offense did not involve a dangerous weapon, the intentional or attempted infliction of bodily harm, or an act committed with intent to cause fear of immediate bodily harm or death;
2. the charge would either be a lesser offense (i.e. non-felony) or not a crime after August 1, 2023; and
3. the conviction was not appealed, any appeal was denied, or the deadline to file appeal has expired.[23]

For both automatic expungements and those that go through the review board process, expungement is "presumed to be in the public interest unless there is clear and convincing evidence that an expungement or resentencing to a lesser offense would create a risk to public safety."[24] This represents a lowered burden for petitioners compared to the standard under Minnesota's general expungement statute, 609A, which provides that "expungement of a criminal record is an extraordinary remedy to be granted only upon clear and convincing evidence that it would yield benefit to the petitioner commensurate with the disadvantages to the public and public safety..."[25]

The new procedures for automatic expungement and review by the Cannabis Expungement Board do not preclude the use of preexisting pathways to expungement. Under prior expungement law in chapter 609A, petitioners may file a petition for expungement directly with the district court. Depending on the outcome of the individual case, applicant may have a presumptive-expungement-type case, or a burden-on-the-petitioner-type case. In either case, the applicant may be able to obtain expungement relief from a prior marijuana conviction faster than the automatic or review board processes might achieve. Members of our bar who are experienced in expungement litigation should be able to offer this legal service.

THE NEW PROCEDURES FOR AUTOMATIC EXPUNGEMENT AND REVIEW BY THE CANNABIS EXPUNGEMENT BOARD DO NOT PRECLUDE THE USE OF PREEXISTING PATHWAYS TO EXPUNGEMENT. UNDER PRIOR EXPUNGEMENT LAW IN CHAPTER 609A, PETITIONERS MAY FILE A PETITION FOR EXPUNGEMENT DIRECTLY WITH THE DISTRICT COURT.

Expungement's impact on individuals and communities

Expungement has far-reaching implications for individuals and communities affected by past marijuana convictions. For individuals, expungement offers a new lease on life, removing the stigma and barriers associated with a criminal record. It opens doors to employment, housing, education, and other opportunities that were previously out of reach.

Moreover, the expungement of marijuana-related convictions benefits communities. By allowing individuals with past convictions to reintegrate into society more successfully, it reduces the burden on social services and decreases the likelihood of recidivism.[26] Expungement also helps address the racial and social disparities that have disproportionately affected marginalized communities due to the war on drugs.[27]

The Minnesota Bureau of Criminal Apprehension (BCA) estimates that 60,000 misdemeanor marijuana cases will be eligible for automatic expungement under the new law.[28] It is unclear how many felony cases will qualify for review by the Cannabis Expungement Board once it is created. A manual review of cases will be required because the state's criminal history system is unable to sort felony drug possession and sale cases by the type of drug involved.[29]

Challenges and future considerations

While Minnesota's expungement reforms are a significant step forward, challenges and considerations remain. One challenge is ensuring access to information and resources for individuals who may not be aware of their eligibility for expungement. Education campaigns and outreach efforts are crucial to reach those who could benefit from the law changes.

It will also be vital to monitor the implementation of expungement laws to ensure fairness and equal access. Evaluating the effectiveness of the expungement process, addressing any potential biases, and making necessary adjustments are key to ensuring that the benefits of expungement reach all affected individuals.

Minnesota's recent marijuana law changes, particularly those related to expungement, reflect a commitment to justice reform and addressing the long-term consequences of outdated drug policies. By legalizing recreational marijuana and allowing for expungement of certain cannabis-related offenses, the state is providing individuals with a second chance and dismantling barriers to opportunity. Moving forward, continued efforts to educate, support, and evaluate the expungement process will be essential to maximizing the positive impact of these reforms on individuals, communities, and the overall criminal justice system. ▲

NOTES

[1] Minnesota House of Representatives 2023 House File 100, now known as Minnesota Session Laws 2023, Regular Session, Chapter 63, H.F. No. 100. *See https://www.revisor.mn.gov/laws/2023/0/Session+Law/Chapter/63/*

[2] Matt DeLong, Ryan Faircloth, and Brooks Johnson, *What You Need to Know about Minnesota's Marijuana Legalization Bill*, StarTribune, 5/20/2023 *https://www.startribune.com/minnesota-marijuana-legalization-bill-law-cannabis-cultivation-dispensaries-business-pot-weed-legal/600275325/#:~:text=It%20legalizes%20the%20possession%20and,cannabis%20and%20hemp%2Dderived%20markets.*

[3] Laws of Minnesota 1976 Chapter 42.

[4] Minnesota Department of Health, *Medical Cannabis Program Key Dates*, 3/22/2023, *https://www.health.state.mn.us/people/cannabis/about/timeline.html* . *See also* Minn. Stat. §§152.21 – 152.37.

[5] J. Patrick Coolican, *The Legislature Stumbles into Legalizing THC, for Better or Worse*, Minnesota Reformer, 7/1/2022 *https://minnesotareformer.com/2022/07/01/the-legislature-stumbles-into-legalizing-thc-for-better-or-worse-column/*. *See also* Minn. Stat. §151.72.

[6] WCCO Staff, *Gov. Tim Walz Signs Recreational Marijuana Bill into Law*, CBS NEWS MINNESOTA, 5/30/2023, *https://www.cbsnews.com/minnesota/news/gov-tim-walz-signs-recreational-cannabis-bill-into-law/*.

[7] Minnesota Session Laws – 2023, Regular Session, Chapter 63, H.F. No. 100, *infra*, note 1.

[8] *See* Minn. Stat. ch. 609A.

[9] *See* Grace Birnstengel, *If Minnesota legalizes weed, will marijuana-related criminal records be cleared?* MPR NEWS, 5/1/2023, *https://www.mprnews.org/story/2023/05/01/if-minnesota-legalizes-weed-will-marijuana-related-criminal-records-be-cleared*.

[10] *See e.g. Racial Disparities in Marijuana Arrests*, NORML, 2023, *https://norml.org/marijuana/fact-sheets/racial-disparity-in-marijuana-arrests/*.

[11] Lynette Kalsnes, *Black People Five Times More Likely to Get Arrested for Marijuana in Minnesota,* ACLU Minnesota, 4/20/2020, *https://www.aclu-mn.org/en/press-releases/black-people-five-times-more-likely-get-arrested-marijuana-minnesota*.

[12] R. Allyce Bailey, *Serving Time and It's No Longer a Crime: An Analysis of the Proposed Cannabis Administration and Opportunity Act, Its Potential Effects at the Federal and State Level, and a Guide for Practical Application by Local Government,* 25 UDC/DCSL L. REV. 5 (2022).

[13] *See* Briana Bierschbach, *Minnesota Legal Marijuana Advocates Focus on Racial Equity*, Star Tribune, 5/11/2021, *https://www.startribune.com/minnesota-legal-marijuana-advocates-focus-on-racial-equity/600056064/*.

[14] Minnesota Session Laws – 2023, Regular Session, Chapter 63, H.F. No. 100, *infra*, note 1.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] DeLong, Faircloth, and Johnson, *infra*, note 2.

[19] Minnesota Session Laws – 2023, Regular Session, Chapter 63, H.F. No. 100, *infra*, note 1.

[20] *Id.*

[21] *Id.*

[22] Minn. Stat. §§152.021, subd. 1(6); 152.021, subd. 2(6); 152.022, subd. 1(5) or 152.022, subd. 1(7)(iii); 152.022, subd. 2(6); 152.023, subd. 1(5); 152.023, subd. 2(5); 152.024, subd. 1(4); and 152.025, subd. 2(1).

[23] Minnesota Session Laws – 2023, Regular Session, Chapter 63, H.F. No. 100, *infra*, note 1.

[24] *Id.*

[25] Minn. Stat. §609A.03, subd. 5.

[26] Bailey, *infra*, note 12.

[27] *Id.*

[28] DeLong, Faircloth, and Johnson, *infra*, note 2.

[29] *Id.*

IN THE WEEDS

FIREARM OWNERSHIP, CANNABIS, AND THE HEMP EXCEPTION

BY AARON EDWARD BROWN

In 2022, much to the surprise of many Minnesotans—and even certain lawmakers—the Legislature passed a law that provided guidance on the now-permissive use of certain forms of psychoactive hemp.[1] Specifically, the law provided greater clarity concerning the use of hemp products that became legal under federal law through the Agricultural Improvement Act of 2018—aka the farm bill.[2] The farm bill allowed these psychoactive products through an exception that defines hemp as c*annabis containing less than .3% tetrahydrocannabinol (THC) by dry volume*, and removed hemp from the Controlled Substances Act of 1970.[3] To be clear, hemp and "marijuana"[4] are both cannabis sativa plants and visually indistinguishable from one another.[5] They do, however, have one critical difference, which becomes abundantly clear if your main goal in using the plant is to experience its mind-altering effects: Hemp contains very low amounts of the psychoactive ingredient THC, whereas cannabis contains relatively high levels of THC.[6] To put it more simply, in its pure form the latter will get you high and the former will not.

Because federal and Minnesota state law exclude hemp from the applicable statutes that implicate cannabis generally, enterprising individuals have been able to grow hemp and extract or otherwise isolate the minimal amounts of THC inside, which can then be used to create any number of consumable items (such as gummies, beverages, and tinctures). These various products technically still fall under the 2018 farm bill's definition of hemp even though the actual THC content can be at a level similar to that of many cannabis products.[7] And like that, in July 2022 people in Minnesota interested in the mind-altering effects of THC no longer needed to visit their former high school classmate or aspiring local musician to score technically illegal cannabis. Instead, Minnesotans can now go to their local smoke shop, gas station, or even microbrewery to participate in the age-old experience of consuming THC, overeating some snacks, and passing out to Netflix a little too early in the evening. But with this newfound ability to get high in Minnesota without breaking the law,[8] many may be wondering what the implications are for firearm owners who are also interested in the THC experience.

Firearms & THC use

Under federal law, individuals who "habitually use"[9] cannabis are legally prohibited from buying or possessing[10] firearms. The penalty is up to 15 years in prison.[11] Minnesota had a parallel restriction under state law until this summer.[12] The federal prohibition continues to exist even in light of the fact that nearly one half of the population of the United States lives in a state that has expressly legalized the recreational use of cannabis (and two-thirds live in a state that has legalized medicinal cannabis).[13] To add injury to inconvenience, the federal firearm prohibition (922(g)(3)) does not distinguish between a medicinal user and a recreational user because the Controlled Substances Act (CSA) classifies cannabis as a Schedule I drug with no redeeming medicinal value, a lack of accepted safety for use under medical supervision, and a high (no pun intended) potential for abuse.[14] In comparison, cocaine, fentanyl, and oxycodone are all considered to have at least some medicinal value—and are on a lower schedule than cannabis, which exempts medicinal users of these substances from the prohibitions in 922(g)(3).[15]

This scheduling determination regarding cannabis, which can only be described as completely untethered from reality, has created many obstacles for individuals with serious medical ailments who could benefit by medicinal cannabis use. For some, chief among these obstacles is the patient's loss of their Second Amendment rights, which has dissuaded patients from engaging in otherwise beneficial cannabis-related therapies.[16] To combat this quagmire, several different strategies have emerged, including lawsuits[17] and Minnesotans lobbying the Department of Health to petition the federal government to exempt cannabis from Schedule I of the CSA.[18] To date, these strategies have been unsuccessful, notwithstanding the fact that the scientific consensus is that cannabis has medicinal benefits.[19]

Medicinal and recreational users alike can face many collateral consequences related to their cannabis use. Although the industry is by and large heavily regulated in the states that allow cannabis some legal status, the consequences include housing discrimination in certain instances, as well as potential employment discrimination in certain states.[20] Interestingly, far less regulated[21] and researched[22]

UNDER FEDERAL LAW, INDIVIDUALS WHO "HABITUALLY USE" CANNABIS ARE LEGALLY PROHIBITED FROM BUYING OR POSSESSING FIREARMS. THE PENALTY IS UP TO 15 YEARS IN PRISON.

SIMPLE MARIJUANA POSSESSION IS NO LONGER CRIMINALIZED IN MOST STATES AND IT IS APPARENTLY NO LONGER BEING TREATED AS A CRIMINAL OFFENSE IN THE VIEW OF THE FEDERAL GOVERNMENT.

hemp products that provide a similar ability to become intoxicated also provide less risk[23] in terms of collateral consequences—including for firearm owners—than more regulated cannabis products in states that allow both. Even more absurd, however, is that the risk profile for a recreational hemp user who owns a firearm in Minnesota is lower than for a firearm-owning medicinal cannabis patient. Of course, there are still rules, including around carrying or actively possessing a firearm while intoxicated, which (for good reason) Minnesota law prohibits.[24] This is true regardless of whether the individual carrying a firearm is intoxicated because of hemp, cannabis, alcohol, or some other mind-altering substance.[25]

Future outlook in light of *Bruen*

Perhaps one of the most impactful Second Amendment cases in the history of our country was decided this past summer. The case, *New York State Rifle & Pistol Assn., Inc. v. Bruen*,[26] rejected the consensus two-step legal analysis that developed after the Supreme Court's prior significant Second Amendment case, *Heller*.[27] Under *Bruen*, a regulation that the Second Amendment's "plain text covers" can only be found constitutional if the regulation is "consistent with the nation's historical tradition of firearm regulation."[28] The *Bruen* test—in its relatively short existence—has led federal courts around the country to declare many decades-old laws unconstitutional, including certain federal firearm prohibitions for individuals subject to civil domestic violence prevention orders,[29] felony indictments,[30] or who knowingly possessing a firearm that has had the serial number removed.[31] But other federal courts have come to the exact opposite conclusion on many of these same issues,[32] teeing up what seems to be an inevitable SCOTUS fight to further interpret the limitations articulated in *Bruen*.[33]

With respect to cannabis use and firearm possession, there has been a budding disagreement among federal courts in the preceding months concerning whether 922(g)(3) can ever be constitutionally applied to a habitual cannabis user. As of now, a number of federal courts who have heard a post-*Bruen* challenge to 922(g)(3) (as it relates to cannabis) have upheld the prohibition,[34] but others have found it incompatible with *Bruen's* demands.[35] The decisions upholding 922(g)(3) as applied to cannabis users have largely arrived at their conclusions under two separate theories.

The first is that violators of 922(g)(3) are not covered by the plain text of the Second Amendment because the plain text only covers "ordinary, law-abiding citizens."[36] There are several reasons why the author views this reasoning as problematic in this context. First, the plain text of the Second Amendment doesn't qualify who can own a firearm and instead uses the term "the people."[37] In other places in the bill of rights where the term "the people" is used, such a qualification wouldn't make sense.[38] Second, simple marijuana possession is no longer criminalized in most states and it is apparently no longer being treated as a criminal offense in the view of the federal government.[39] Thus, even if the Second Amendment protection only applies to "ordinary, law-abiding citizens," cannabis users would still be covered by the plain text of the Second Amendment.

The second is that 922(g)(3) is consistent with the historical tradition of firearm regulation in the United States. Courts upholding 922(g)(3) under this reasoning do so by comparing several sets of "analogous" laws—the first being state restrictions on carrying a firearm while intoxicated and the second being laws aimed at preventing people considered to be dangerous from possessing firearms.[40] In the author's view, these comparisons are flawed because both sets of past laws don't resemble historical analogues that are "relevantly similar" when applied to recreational cannabis users—and especially when applied to medicinal cannabis users.[41]

With respect to 17th and 18th century laws governing intoxication and firearm possession, 922(g)(3) is simply way too broad, as it criminalizes all active and *constructive* possession of firearms regardless of whether the individual is presently intoxicated. This criminalization of even constructive possession of a firearm is not analogous to prohibiting carrying a firearm while intoxicated. It is, however, perfectly analogous to Minn. Stat. §624.7142, subd. 2 (or any number of other states' variations), which does prohibit active firearm possession *while intoxicated*.[42] Importantly the historical justifications for these laws similarly show that the concern was related to the danger created by people who were actively intoxicated, and not people who sometimes drank alcohol and also constructively possessed or sometimes used a firearm legally while sober. In other words, these laws (much like our current ones) acknowledge people who drink alcohol on a regular or habitual basis generally don't need to have their firearm access restricted at all times and in all places, but rather just when they are intoxicated.[43]

With respect to historical laws disarming people with a proclivity for violence, the idea that tens of millions of recreational and medicinal cannabis users are all inherently dangerous solely because they sometimes use cannabis for medicinal or recreational purposes is borderline offensive and factually inaccurate in any reality other than the 1936 propaganda classic *Reefer Madness*. These laws are not the "relevantly similar" historical analogues that *Bruen* demands[44] because there is nothing inherently dangerous about someone who uses cannabis recreationally or medicinally one day and then constructively owns, or uses in a lawful manner, a firearm the next day. But even if there was, the government would need to show that an individual's dangerousness exists *through violent, forceful, or threatening conduct*, to get the correct "relevantly similar" fit under *Bruen*.[45] And to state the obvious, consuming a cannabis gummy is not in and of itself real or attempted violent, forceful, or threatening conduct. Although many rounds of briefing will undoubtedly be held on this specific issue, it would not surprise the author if many circuits (including the 8th Circuit) eventually struck down 922(g)(3) when applied to cannabis users.

Conclusion

The questionable constitutionality of 922(g)(3) and its state-law equivalents is not the only reason to suspect potential change. Recently, the Biden administration issued a statement noting that the Secretary of Health and Human Services and the U.S. Attorney General were both being asked to initiate a review of how cannabis is scheduled under federal law.[46]

On the state level, Minnesota's new Democratic trifecta recently passed a legal framework for the recreational use of cannabis.[47] Included in this framework is an amendment to Minnesota's ineligible-persons statute, which provides that recreational or medicinal users above the age of 21 are not prohibited from firearm possession solely because of their cannabis use. This is an important step. But further state-level measures could go a long way in reducing the associated risks, in particular for Black Minnesotans who have been nearly five times more likely to face a cannabis-related charge than white Minnesotans.[48] These measures could include prohibiting state law enforcement from aiding federal authorities in investigating or prosecuting potential actions under 922(g)(3) (related to cannabis use), or requiring the Minnesota commissioner of health to apply for a federal exemption to the CSA's scheduling of cannabis on behalf of Minnesota's medicinal patients.

We have learned a lot in the intervening 50 years since the federal government officially criminalized cannabis use. One thing we have learned is that the health, safety, and financial costs associated with alcohol use far exceed the costs associated with cannabis use.[49] Another is that many people find a tremendous amount of relief in their cannabis treatment,[50] with some reporting that the impact is literally life-changing.[51]

To recap, although the law has recently changed in Minnesota, the federal firearm prohibition exists for all cannabis users (medicinal or otherwise) even though the same cannot be said about recreational users of similarly intoxicating hemp products.[52] It is important to recognize the Minnesota Legislature's bold action in setting up a thoughtful and well-regulated legal marketplace for cannabis and ending the catastrophic damage brought about by prohibition. But it is also important to recognize that the work is not finished, as the federal firearm prohibition as applied to cannabis users creates an unreasonable risk for Minnesotans who own firearms. This risk remains particularly intolerable for the nearly 40,000 (and growing) medicinal users[53] in Minnesota. Simply put, our society should be removing obstacles—not maintaining them—for people to access the medicinal help they need. Hopefully with some continued bold action on the state and federal level, we won't be in the weeds on this issue for much longer. ▲

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NOTES

[1] Shaueneen Miranda, *Minnesota lawmakers voted to legalize THC edibles. Some did it accidentally*, NPR (7/2/2022), *https://www.npr.org/2022/07/02/1109576113/minnesota-thc-edibles-accident-delta-8*.

[2] *See* H.R. 2 – 115th (2017 – 2018): Agricultural Improvement Act of 2018, H.R. 2, 116th Cong. (2018), *https://www.congress.gov/115/plaws/publ334/PLAW-115publ334.pdf.*

[3] *Id.*

[4] Although the state of Minnesota and the U.S. federal government continue to use the term "marijuana" to define cannabis sativa plants that contain high levels of THC, the author will instead refer to cannabis sativa plants with high levels of THC as "cannabis." This preferred naming convention is due to the history of the term marijuana and its connection to propaganda designed to criminalize cannabis use and disparage certain groups of people. For a further discussion please see, Alex Halperin, *Marijuana: is it time to stop using a word with racists roots?*, The Guardian (1/29/2018), *https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism*.

[5] Matt Shipman, *Is Hemp The Same Thing As Marijuana?*, NC State University News (2/14/2019), *https://news.ncsu.edu/2019/02/is-hemp-the-same-thing-as-marijuana/#:~:text=Hemp%20and%20marijuana%20are%2C%20taxonomically,genus%20(Cannabis)%20and%20species*.

[6] *Id.*

[7] For more information on the two common ways manufacturers produce hemp-derived THC, *see* Elena Schmidt, *Legal Delta-9: How is It Made, and How is That Possible?,* ACS Laboratory (6/2/2022), *https://www.acslabcannabis.com/blog/retail-legal-delta-9-how-is-it-made-and-how-is-that-possible* (discussing isomerization and extraction as the two main ways manufacturers produce hemp-derived THC).

[8] Technically vendors could already sell psychoactive hemp-derived products, but the legal status was brought into question by a Minnesota Court of Appeals opinion. *See* Rep. Tina Liebling, *Regulating the sale of edibles containing hemp-derived THC* (7/20/2022), *https://www.house.mn.gov/members/Profile/News/12268/35938*.

[9] "Habitually use" has most commonly been defined as the individual (i) using drugs regularly or habitual; and (2) close in time to the prohibited action; however, some courts have found that even a onetime use of an illicit substance like cannabis can make someone a "habitual user" for purposes of 922(g)(3) under certain circumstances. *See United States v. Carnes*, 22 F.4th 743, 748 (8th Cir.), *reh'g denied*, No. 20-3170, 2022 WL 540599 (8th Cir. 2/23/2022), and *cert. denied*, 214 L. Ed. 2d 180, 143 S. Ct. 370 (2022).

[10] For purposes of 18 USC §922(g) "possession" means both active and constructive possession and prohibits ownership generally unless the owner doesn't actively or constructively possess the firearm. *See Henderson v. United States*, 575 U.S. 622 (2015). For ease, I will use the terms "ownership" and "possession" interchangeably in this article.

[11] 18 USC §922 (g)(3); 18 USC §924(a)(8).

[12] Minn. Stat. 624.713, Subd. 1(10)(iii), amended by HF 100 (2023).

[13] Natalie Fertig, Mona Zhang and Paul Demko, *Nearly half of Americans to reside in states where Marijuana is legal*, Politico (11/9/2022), *https://www.politico.com/news/2022/11/09/half-americans-state-marijuana-legal-00065987*.

[14] 21 USC §812.

[15] *Id.*

[16] *See, e.g.*, Briana Bierschbach, *Medical Marijuana advocates pushing for Second Amendment rights,* Star Tribune (6/17/2021), *https://www.startribune.com/medical-marijuana-advocates-pushing-for-second-amendment-rights/600068875/* (noting that individuals are prioritizing their Second Amendment right over cannabis treatment).

[17] *See, e.g.*, *Wilson v. Holder*, 7 F. Supp 3d 1104 (Nev. 2014); *Fried v. Garland*, 2022 WL 16731233 (N.D. Fla. 11/4/2022).

[18] *See supra* Note 16.

[19] See *UN Commission on Narcotic Drugs reclassifies cannabis to recognize its therapeutic uses*, World Health Organization Press Release (December 4, 2020), *https://www.who.int/news/item/04-12-2020-un-commission-on-narcotic-drugs-reclassifies-cannabis-to-recognize-its-therapeutic-uses; see also*, Jonathan N. Adler, M.D. & James A. Colbert, M.D., *Medicinal Use of Marijuana—Polling Results*, N Engl J Med, 368:e30 (2013), *https://www.nejm.org/doi/10.1056/NEJMclde1305159* (noting that around 8 in 10 doctors approved the use of medicinal cannabis).

[20] *See* Sophie Quinton, *Workers Who Legally Use Cannabis Can Still Lose Their Jobs*, Pew (3/2/2022), *https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/02/28/workers-who-legally-use-cannabis-can-still-lose-their-jobs* (noting only MN, DC, and 13 other states ban employer discrimination against workers who use cannabis for medical reasons).

[21] *See* Gary S. Kaminsky & Neil M. Willner, *The Tip of the Spear Piercing the Regulated Cannabis Industry: How Intoxicating Hemp Cannabinoids and the Illicit Market Pose Significant Challenges to the Emerging Industry,* JDSupra *(4/21/2022). https://www.jdsupra.com/legalnews/the-tip-of-the-spear-piercing-the-4104795/* (noting that hemp-derived cannabinoids are free from oversight and the stringent testing mandates governing similar intoxicating products in the regulated cannabis marketplace).

[22] For example, certain states have blocked the sale of hemp derived Delta 8 in part because the lack of research into its psychoactive effects. *See* Kaitlin Sullivan, *Delta 8 THC is legal in many states, but some want to ban it*, NBC News (6/28/2021), *https://www.nbcnews.com/health/health-news/delta-8-thc-legal-many-states-some-want-ban-it-n1272270.*

[23] This remains true under federal law for naturally derived hemp products; however, the DEA recently provided guidance that synthetically created compounds (e.g., Delta 9 THCO) do not fall under the hemp exception. Dario Sabaghi, *Delta-8 and Delta-9 THC-O are Controlled Substances, DEA Says*, Forbes.com, *https://www.forbes.com/sites/dariosabaghi/2023/02/16/delta-8-and9-thc-o-are-controlled-substances-dea-says/.*

[24] Minn. Stat. §624.7142, subd. 1(3).

[25] *Id.*

[26] *New York State Rifle & Pistol Assn., Inc. v Bruen*, 142 S. Ct. 2111 (2022).

[27] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[28] *Bruen*, 142 S. C.T. at 2129-30.

[29] *See United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023).

[30] S*ee United States v. Stambaugh*, 2022 WL 16936043 (W.D. Okla. 11/14/2022)

[31] *See United States v. Price*, 2022 WL 6968457 (S.D.W. Va. 10/12/2022).

[32] *See, e.g., United States v. Rowson*, 2023 WL 431037 (S.D.N.Y.) (finding statute prohibiting persons under felony indictment from receiving firearms is constitutional under *Bruen*); *United States v. Holton*, 2022 WL 16701935 (N.D. Tex. 11/3/2022) (finding statute prohibiting possession of firearm with serial number removed is constitutional under *Bruen*).

[33] The main tension is that two separate courts can come to two separate conclusions on the same exact issue based solely on how tightly each court draws the analogous historical law to the challenged law. This issue should be resolved (or at least explored) in *United States v. Rahim*i, Docket No. 22-915, which the Supreme Court agreed to hear next term.

[34] *See, e.g.*, *United States v. Black*, 2023 WL 122920 (W.D. La. 1/6/2023);
United States v. Sanchez, 2022 WL 17815116 (W.D. Tex. 12/19/2022); *Fried,* WL 16731233.

[35] *See, e.g., United States v. Harrison, 2023 WL 1771138 at *8 (W.D. Oklahoma 2/3/2023); United States v. Connelly, 2023 WL 2806324 (W.D. Tex. 4/6/2023).*

[36] *Sanchez*, 2022 WL 17815116 at *2-3 (holding that the language of § 922(g)(3) is not covered by the plain text of the Second Amendment because the Second Amendment only covers ordinary, law-abiding citizens).

[37] *See* U.S. Const. amend. II.

[38] Compare U.S. Const. amend. II. with U.S. Const. amend. I ("Congress shall make no law...[prohibiting]... the right of *the people* peaceably to assemble..."); U.S. Const. amend. IV ("The right of *the people* to be secure in their persons..."); U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by *the people*") (emphasis added). *See also*, Justice Stevens dissent in Heller pointing out that this type of limitation would negate the Fourth Amendment entirely. *Heller*, 554 U.S. at 644 (Stevens, J., dissenting).

[39] *See* Joseph R. Biden, *A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana*, The White House (10/6/2022), *https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana/* (granting a full unconditional pardon under both DC and federal law for every United States citizen who committed the offense of simple possession of cannabis in violation of the CSA).

[40] *See, e.g., United States v. Posey*, 2023 WL 1869095 (N.D. Indiana 2/29/2023); *Fried,* WL 16731233 at *7.

[41] *Bruen*, 142 S. C.T. at 2123.

[42] Minn. Stat. §624.7142.

[43] *United States v. Harrison, 2023 WL 1771138 at *8 (W.D. Oklahoma 2/3/2023).*

[44] *Bruen*, 142 S. C.T. at 2132.

[45] *See Harrison,* 2023 WL 1771138 at *17 (citing *Binderup v. Att'y Gen. United States of Am.*, 836 F.3d 336, 375 (3d Cir. 2016) (noting that "because longstanding prohibitions focused on dangerousness exhibited by past violent, forceful, or threatening conduct, '[d]ispossession on the basis of a conviction for these sorts of crimes comports with the original public understanding of the scope of the right to keep and bear arms.'").

[46] *Supra* note 39.

[47] HF 100 (2023).

[48] Christopher Ingraham, *Minnesota's Black Marijuana Users Far More Likely to Face Arrest than White Ones*, Minnesota Reformer (9/7/2022), *https://minnesotareformer.com/2022/09/07/minnesotas-black-marijuana-users-far-more-likely-to-face-arrest-than-white-ones/.*

[49] Adie Rae, PhD and Mandy Armitage, MD, *Are Marijuana and Alcohol Equally Dangerous, or Is One Safer Than the Other?*, GoodRx Health (October 2021), *https://www.goodrx.com/well-being/substance-use/is-cannabis-safer-or-healthier-than-alcohol.*

[50] Christopher Ingraham, *92% of patients say medical marijuana works*, The Washington Post (10/1/2014), *https://www.washingtonpost.com/news/wonk/wp/2014/10/01/92-of-patients-say-medical-marijuana-works/.*

[51] Joanna Ing and Cheryl Varley, *Medical cannabis 'saved my life'*, BBC News (5/18/2021), *https://www.bbc.com/news/health-57098858.*

[52] *Supra* note 3.

[53] Jay Kohls, *Advocates say legalized marijuana could help Minnesota medical cannabis program*, KSTP-TV (11/27/2022).

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LANDMARKS IN THE LAW

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

Administrative Law
JUDICIAL LAW

Supreme Court overturns MPCA grant of water pollution permit. A unanimous Minnesota Supreme Court found the MPCA's decision to issue a water pollution permit for PolyMet's proposed NorthMet mine to be arbitrary and capricious based on "danger signals" in the agency's handling of EPA comments on the project. In reaching this result, the Court provided guidance on the Minnesota Administrative Procedure Act's section 14.68 process for investigating "alleged irregularities in [agency] procedure" and on the "arbitrary and capricious" standard for challenging agency action in section 14.69(f).

The dispute concerned a series of conversations between MPCA and EPA officials about PolyMet's draft permit. In a special fact-finding process requested under section 14.68 by environmental groups and the Fond du Lac Band of Chippewa, a district court determined that MPCA officials had asked EPA officials to withhold their written comments on the draft permit until after the close of the public comment period. The district court found that "the MPCA's primary motivation was its belief that there would be less negative press about the NorthMet Project if EPA comments were delayed until after public comments and verbally expressed EPA concerns were incorporated into the draft permit." Additionally, the district court found that MPCA failed to preserve notes and emails relating to its arrangements with EPA. And although EPA officials verbally raised concerns with MPCA about the draft permit, EPA ultimately never submitted any written comments, either before or after the public comment period.

Based on these findings, the environmental groups and Band challenged the permit decision as "made upon unlawful procedure" under section 14.69(c) and as "arbitrary and capricious" under section 14.69(f). But the district court largely rejected these challenges on the grounds that that although MPCA's actions may have been "irregular," they did not rise to the level of "unlawful." The district court stated that there "is no statute, rule, regulation, or other formally adopted policy or procedure that prohibited MPCA from asking EPA to delay its comments." The court of appeals affirmed, holding that even if there had been unlawful process, the challengers had not shown that MPCA's actions had caused them "actual prejudice" under section 14.69, which empowers courts to "reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced" because of unlawful, unsupported, or arbitrary and capricious agency action.

The Supreme Court reversed, describing the approach of the lower courts as "too constrained." The Court explained that the phrase "arbitrary and capricious" functions as a "catchall, picking up administrative misconduct not covered by the other more specific paragraphs" for judicial review under the Minnesota Administrative Procedure Act. Thus, even if a procedural irregularity uncovered under section 14.68 doesn't rise to the level of being unlawful under section 14.69(c), it may nevertheless constitute what the court described as a "danger signal" that the agency has acted arbitrarily and capriciously under section 14.69(f). The Court emphasized that "agency's procedures are at the heart of the Minnesota Administrative Procedure Act," which "focuses on 'procedural rights with the expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained.' Minn. Stat. §14.001."

Applying this reasoning, the Supreme Court stated that the "motivation of the MPCA—to avoid public awareness and scrutiny of the EPA's concerns because of the intense public interest in the NorthMet project—is contrary to the express 'purposes of the Administrative Procedure Act' to increase transparency and 'public access to governmental information.' Minn. Stat. §14.001(4)." The Court concluded that "the MPCA's request that the EPA refrain from providing written comments on the draft permit during the public comment period is an irregularity in procedure that constitutes a

danger signal of arbitrary and capricious decision-making."

The Court also rejected the court of appeals' conclusion that persons challenging agency action must demonstrate actual prejudice to their substantial rights. The Court emphasized that the statute authorizes courts to reverse agency action where the challenger's substantial rights "*may* have been prejudiced" and concluded that challengers "need not show *actual* prejudice." (Emphasis in Court's opinion.) The Supreme Court observed that the "court of appeals recitation of the prejudice requirement of section 14.69 placed a higher, and therefore improper, burden on appellants." The Court concluded that based on the circumstances, there was ample basis to conclude that the challengers' interests may have been prejudiced by MPCA's conduct because EPA's concerns were not adequately reflected in the administrative record. The Court remanded the matter to MPCA to receive EPA's comments into the record. ***In re Denial of Contested Case Hearing Requests and Issuance of NPDES Permit for the Proposed NorthMet Project***, No. A19-0112 (Minn. 8/2/2023).

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Criminal Law

JUDICIAL LAW

Probation revocation: The need for confinement outweighs policies favoring probation when a defendant repeatedly violates probation by having contact with a minor after a criminal sexual conduct conviction. Appellant pleaded guilty to first-degree criminal sexual conduct in 2018. He was sentenced to a stayed sentence of 144 months in prison, with a 30-year probationary term. Conditions of his probation included completing sex offender treatment, no unsupervised contact with minor females, and no use of sexually explicit materials. He violated all these conditions, including multiple violations of the no-unsupervised-contact condition, so the district court revoked his probation and executed his sentence.

Appellant argues the district court did not make sufficient factual findings to support the revocation, but the court of appeals disagrees. The district court designated the specific conditions that were violated, found the violations intentional and inexcusable, and found the need for confinement outweighed the policies favoring probation ("*Austin* factors"). *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). As to the third *Austin* factor, the court specifically found that confinement was necessary to protect the public from further criminal activity by appellant (*State v. Motland*, 695 N.W.2d 602, 607 (Minn. 2005)), pointing to specific evidence presented regarding appellant's behavior and the risks of such behavior. ***State v. Smith***, A22-1715, 2023 WL 441161040 (Minn. Ct. App. 7/10/2023).

Postconviction: Statute of limitations for petition does not restart when a stayed sentence is executed. After his conviction in June 2019 for felony domestic assault, appellant's 15-month sentence was stayed for five years. In August 2021, appellant's probation was revoked, and his sentence was executed. In July 2022, appellant filed a postconviction petition, arguing prosecutorial misconduct deprived him of a fair trial. The district court denied appellant's petition, finding it time-barred.

Postconviction petitions must be filed within two years of the entry of judgment of conviction or sentence, if no direct appeal is filed, or an appellate court's disposition of the petitioner's direct appeal. Minn. Stat. §590.01, subd. 4(a). Appellant argues the two-year period began in his case when the district court executed his sentence in August 2021, because the execution of his sentence was a modification of his sentence.

The court of appeals disagrees. The district court executed the sentence it had previously imposed per the requirements of Minn. Stat. §609.14, subd. 3(2), which governs revocation of a stay of execution. Appellant's sentence remains unchanged from when it was imposed in 2019. As appellant did not file a direct appeal, the postconviction statute of limitations expired two years after he was sentenced in June 2019, and his July 2022 petition was untimely. ***Brouillette v. State***, A23-0020, 2023 WL 4411614 (Minn. Ct. App. 7/10/2023).

4th Amendment: A vehicle impounded following a lawful search that revealed controlled substances may be searched again while in law enforcement's custody and control. Police had stopped appellant's vehicle for brake light and license plate violations when they noticed a firearm in the vehicle. As neither appellant nor his passenger had permits to carry, the vehicle was searched for weapons, turning up heroin and methamphetamine. Appellant and his passenger were arrested, and the vehicle was impounded. After the passenger posted bail, she asked to retrieve items from the vehicle. When brought to the vehicle, she acted suspiciously and tried to conceal something from the vehicle in her jacket. Police found a black plastic lockbox in the jacket, which contained a variety of controlled substances. Appellant was thereafter charged with first-degree and fifth-degree controlled substance offenses. His motion to suppress evidence in the lockbox was denied. After a stipulated facts trial, appellant was convicted of the first-degree offenses.

Appellant does not argue the initial search of the vehicle was unlawful, and the court of appeals notes that the automobile exception to the warrant requirement authorized police to conduct the search for concealed firearms or controlled substances. Appellant argues, however, that the lockbox was removed from the vehicle before any probable cause arose to believe it contained contraband.

The court explains that probable cause to search a vehicle does not expire when it is impounded. As police had probable cause to search the vehicle for weapons and controlled substances when it was first impounded, the vehicle remained in the custody and control of police, and no other circumstances dispelled probable cause to believe additional contraband could be found in the vehicle, police were authorized by the automobile exception to search appellant's vehicle at the time the passenger arrived at the impound lot to remove property from the vehicle.

The court also rejects appellant's argument that the passenger's removal of the lockbox from the vehicle rendered it unsearchable. Under the automobile exception, police are permitted to search any container that was inside a vehicle at the time there was probable cause to search it. Police were authorized to search the lockbox even after it was removed from the vehicle because they had probable cause to search the vehicle when the lockbox

was removed. ***State v. Schell***, A22-1115, 2023 WL 4692914 (Minn. Ct. App. 7/24/2023).

Public trial: Excluding public from a courtroom due to covid-19 implicates the right to a public trial. Appellant was charged with first-degree aggravated robbery and all spectators were excluded from the courtroom during his trial, pursuant to a covid-19 trial plan. The trial was broadcast via a one-way video feed in a nearby courtroom. Appellant was convicted and argued for a new trial, claiming his right to a public trial was violated. The court of appeals found the trial was partially closed, but ultimately concluded appellant's public trial right was not violated.

The Supreme Court first determines that the district court's complete exclusion of the public from the trial courtroom was a "true closure subject to constitutional scrutiny." Not a single member of the public was allowed into the trial courtroom. Although a video feed was provided, "[t]he constitutional values of having trial participants understand they are being observed and providing the support of family to the defendant... are undermined when the public is only allowed to view the proceedings from a secondary location via a one-way video feed."

The Court goes on to recognize that protecting trial participants and the public during the covid-19 pandemic was an overriding interest that justified some restrictions on attendance at the trial. However, even if an overriding interest is present, the district court must make specific detailed findings showing how the restrictions are no broader than necessary to protect the overriding interest and that the district court considered reasonable alternatives to closure.

Here, the district court's decision to exclude all spectators was supported by adequate findings regarding the size of the courtroom and social distancing guidelines. However, the district court did not make adequate findings for the Supreme Court to assess whether the district court considered reasonable alternatives to closure or made any findings explaining why a one-way video feed to another courtroom made the closure no broader than necessary. The case is remanded to the district court to make a record on the reasonable alternatives to closure it considered and on whether the trial closure was broader than necessary. ***State v. Bell***, A20-1638, 2023 WL 4750955 (Minn. 7/26/2023).

Evidence: Victim's statements did not fall within excited utterance exception to hearsay rule. Respondent was charged with misdemeanor domestic assault. The state moved to introduce a body-worn camera recording showing the victim's statement regarding respondent's physical abuse after the victim refused to respond to the state's subpoena. The district court granted respondent's motion to suppress the recording, concluding the victim's statements did not fall within the excited utterance hearsay exception and that her statements were testimonial under the confrontation clause. The court of appeals affirmed, finding that admission of the recording would violate respondent's right to confrontation.

The Supreme Court first concludes that the district court properly found the excited utterance hearsay exception inapplicable. Courts are to consider a number of factors, including the length of time between the utterance and the event at issue, the nature of the event, the declarant's physical condition, and any possible motive to falsify. The Court notes that, while not required, a physical manifestation of stress is often a key indicator of "an aura of excitement." The district court found here that the victim had an unexcited demeanor, enough time had passed for the victim to suggest that respondent may have fallen asleep, and nearly all the victim's recorded statement was made in response to questions by the police. Under these findings, the Court decides the district court properly excluded the body-worn camera recording of the victim's statement as inadmissible hearsay. The Court does not address respondent's claim of a confrontation clause violation. ***State v. Tapper***, A22-0161, 2023 WL 4751211 (Minn. 7/26/2023).


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Employment & Labor Law

JUDICIAL LAW

Fair Labor Standards Act; nominal attorney's fees. An award of nominal attorney's fees to a prevailing party in a claim under the Fair Labor Standards Act for nonpayment of wages was upheld by the 8th Circuit, based upon the "egregious" conduct by the attorney for the class action claimants. Affirm-

ing a lower court ruling, the 8th Circuit held that the attorney's fees should be substantially reduced from the lodestar amount because of the wrongful behavior of the attorney for the class. ***Vines v. Welspun Pipes, Inc.***, WL 2023 4685888 (8th Cir. 7/21/2023) (unpublished) (*per curiam).*

Misconduct in wage case; dismissal upheld. Litigation misconduct also was central to dismissal of a claim for unpaid wages, based upon the counsel for claimant repeatedly filing premature, meritless motions; making *ex parte* calls to the district court in a discovery dispute; asserting improper objections during depositions; and instructing a witness not to attend a deposition. That behavior warranted the trial court to dismiss the lawsuit as a sanction for "bad faith" litigation conduct, which the 8th Circuit affirmed. ***Bachman v. Bachman***, WL 2023 4286722 (8th Cir. 6/30/2023) (unpublished) (*per curiam).*

Race discrimination claim, termination upheld. A delivery driver who was fired after striking a homeowner's mailbox with his truck, which he denied, lost his claim of race discrimination after he was terminated due to the incident. The 8th Circuit upheld summary judgment on grounds that the termination was due to the driver's failure to report the accident and being dishonest about it and the claimant did not show that there was any pretext in the decision-making process. ***Cross v. United Parcel Service, Inc.,*** WL 2023 3858611(8th Cir. 6/7/2023) (unpublished) (*per curiam).*

ERISA benefits; claim denied. An employee who was denied health insurance benefits under his employer's ERISA plan after he had surgical treatment in connection with weight reduction lost his claim on summary judgment. The 8th Circuit upheld the dismissal on grounds that the ERISA plan expressly excluded medical services in connection with weight reduction, and no federal or state law ordered coverage for that type of treatment. ***Schafer v. Zimmerman Transfer, Inc.***, 70 F.4th 471 (8th Cir. 6/7/2023).

Social Security denied; claimant able to work. A claim by an employee who sought Social Security disability (SSI) benefits due to chronic fatigue was denied by an ALJ with the Social Security Administration. Upholding the ALJ's ruling, the 8th Circuit held that the claimant's medical report did not establish any disability to work and she could still perform work that included mostly computer-related tasks. ***Bentley v. Kijakazi,*** 2023 3862562 (8th Cir. 6/7/2023) (unpublished).

Federal vaccination requirement; dismissed for mootness. Revocation of an executive order signed by President Biden to require federal contractors to have their employees vaccinated for covid made a lawsuit over that policy moot. The 8th Circuit dismissed an appeal by the government of an adverse lower court decision on grounds that, due to revocation, the executive order could no longer be enforced, which made the case moot and warranted dismissal of the appeal. ***State of Missouri v. Biden***, 2023 WL 3862561(8th Cir. 6/7/2023) (unpublished) (*per curiam).*

Paid time off (PTO); no right to accrued amount. An executive director of a nonprofit organization who resigned and then sought his accumulated paid time off (PTO) lost his case. Affirming a decision of the Ramsey County District Court, the Minnesota Court of Appeals held that the claims consisting of breach of contract and violation of Minn. Stat. §181.14, the Payment of Wages Act (PWA), were not actionable because the claimant did not have a contractual right to a payout of accrued PTO and the statute does not provide any "independent" right to such a payment. ***Hightower v. Community Action Partnership of Ramsey & Washington Counties***, WL 2023 4199084 (Minn. Ct. App. 6/26/2023) (unpublished).

Unemployment compensation; translation claim fails. An employee who worked at stocking shelves for Walmart lost his claim for unemployment compensation benefits after he was discharged. The court of appeals affirmed a decision of an unemployment compensation judge with the Department of Employment & Economic Development (DEED) on grounds that the employee committee disqualifying "misconduct." It further rejected the contention that the claimant was not provided with adequate translation services during the hearing, an issue that was raised for the first time on appeal. ***Guffe v. Wal-Mart Associates, Inc.***, WL 2023 4167863 (Minn. Ct. App. 6/26/2023) (unpublished).

Former police officer prevails. A former police officer successfully challenged the decision of an administrative law judge (ALJ) who had denied his request that the claimant city must provide continuing health insurance coverage to him because he suffered a duty-related disability, as required under Minn. Stat. §352B.10. Reversing a denial by an ALJ, the appellate court held that the ALJ improperly imposed a burden of proof on the employee to establish eligibility, which was arbitrary and capricious. ***City of Waite Park v. Weeks***, WL 2023 393565 (Minn. Ct. App. 6/12/2023) (unpublished).

Unemployment compensation; covid vaccination denials. The Minnesota Court of Appeals recently addressed a quartet of covid-related unemployment claims.

An employee who refused to comply with the employer's covid vaccine requirement was denied unemployment compensation benefits because her refusal was based on "purely secular reasons" regarding the efficacy and safety of the vaccine, rather than a "sincerely held religious belief." Reiterating the standard for the determination of these type of cases, the appellate court, in a published decision, ruled that vaccination-refusing employees cannot successfully assert a claim of violation of their exercise of religious freedom rights under the First Amendment unless they show that their resistance is based upon "sincerely held" religious beliefs, rather than questioning the validity of the testing or the vaccination process. ***Goede v. Astra Zeneca Pharms., LP***, 992 N.W.2d 700 (Minn. Ct. App. 6/7/2023).

But the appellate court reversed a pair of denials of benefits by an unemployment law judge (ULJ) with the Department of Employment & Economic Development (DEED). Benefits were proper because the employees had "sincerely held religious beliefs" that supported their position, and there was insufficient evidence in the record to support the ULJ's contrary determinations. ***Benish v. Berkley Risk Administrators Co., LLC, 2023***, WL 3938996 (Minn. Ct. App. 6/12/2023) (unpublished) and ***Millington v. Fed. Reserve Bank of Minneapolis***, 2023 WL 3939525 (Minn. Ct. App. 6/12/2023) (unpublished).

An employee who claimed that it was too burdensome

for him to submit to covid testing and was not able to establish that his refusal to participate in testing was based on his sincere religious belief lost his claim. ***Daniel v. Honeywell International, Inc.***, 2023 WL 3941697 (Minn. Ct. App. 6/12/2023) (unpublished).

■ **Unemployment compensation; availability for employment.** An employee who suffered a significant job-related injury during a relatively short time working won her claim for unemployment benefits. Reversing a decision of an ALJ, the appellate court held that the record did not support the ALJ's determination that the employee had not made herself "available" for suitable employment, as statutorily required under Minn. Stat. §268.085, subd. 1(4) to obtain benefits. ***In re Merrell,*** WL 2023 3943608 (Minn. Ct. App. 6/2/2023) (unpublished).

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Environmental Law

JUDICIAL LAW

■ **Minnesota Supreme Court rejects PolyMet's NPDES permit on procedural and groundwater issues.** On 8/2/2023, the Minnesota Supreme Court affirmed in part, reversed in part, and remanded the National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) permit issued by the Minnesota Pollution Control Agency (MPCA) for a new copper mining project in St Louis County, MN, proposed by New Range Copper Nickel (formerly PolyMet Mining).

In January 2019, several environmental groups and the Fond du Lac Band of Lake Superior Chippewa challenged the permit to the Minnesota Court of Appeals. Among other things, appellants alleged that MPCA had followed irregular and unlawful procedures by pursuing and entering into an agreement by which the U.S. Environmental Protection Agency (EPA) would not submit written comments on the permit during the public-comment period but would read the proposed comments to MPCA staff in a conference call. In May 2019, the court of appeals transferred the case to the district court to examine the alleged unlawful procedures. The district court determined that while MPCA had followed several procedural irregularities, the agency's conduct, including MPCA's efforts to persuade the EPA not to submit written comments during the public comment period, was not procedurally improper or otherwise unlawful.

In reviewing the district court's decision, the court of appeals determined it did not need to determine whether the challenged procedures were unlawful because appellants had not demonstrated that the procedures prejudiced their substantial rights. For example, the court noted that MPCA's actions did not prevent appellants from submitting comments on the permit, and even if EPA had submitted comments during the public comment period, they likely would have come toward the end of the

comment period such that appellants could not have considered EPA's comments in drafting their own comments. Plus, EPA did communicate its comments to MPCA. The court of appeals also evaluated appellants' other arguments challenging the permit, including whether the permit should have included water-quality-based effluent limits (WQBELs) in addition to technology-based effluent limits, and whether the permit properly regulated seepage discharges to groundwater from the proposed project's stockpile and tailings basin.

The Minnesota Supreme Court granted appellants' petition for review to address three primary issues: (1) whether the permit must be reversed or remanded because of the procedural irregularities described above; (2) whether the permit should have included water quality-based effluent limitations (WQBELs); and (3) whether the permit complies with a Minnesota rule addressing wastewater discharges to groundwater, Minn. R. 7060.0600 (2021).

On the issue of procedural irregularities, the Court held that even if an irregular procedure of an agency does not rise to the level of an unlawful procedure under the Minnesota Administrative Procedure Act (MAPA, Minn. Stat. ch. 14), an irregularity in procedure nonetheless may constitute a "danger signal" that may be considered in determining whether an agency decision is "arbitrary or capricious." Here, the Court found several "danger signals" in MPCA's interaction with EPA during the permitting process, including: (1) arranging to delay EPA comments on the draft permit; (2) failing to document in the administrative record either its request or EPA's concerns about the draft permit; (3) not explaining if or how the MPCA resolved EPA's concerns; and (4) general deficiencies in the administrative record regarding communications between the MPCA and the EPA. These danger signals, the Court held, rendered the MPCA's decision on the permit arbitrary and capricious.

In determining whether MPCA's arbitrary and capricious permit decision required reversing or modifying the decision, the Court emphasized that the relevant inquiry is whether appellants' substantial rights "*may* have been prejudiced." Minn. Stat. §14.69 (emphasis added). Here, the Court held that appellants had met the standard. For example, the Court concluded that the lack of documentation in the administrative record regarding EPA's concerns with the permit—particularly on issues of greatest concern to appellants, such as the need for WQBELs—"may" have limited appellants' right to engage in meaningful review of the proposed permit. Accordingly, the Court remanded to MPCA for the limited purpose of giving EPA an opportunity to provide written comments on the final permit and for MPCA to respond to any comments submitted by EPA. The Court also directed MPCA to amend the permit, if warranted by EPA's comments, to add WQBELs and ensure compliance with state and tribal water quality standards.

Regarding compliance with Minnesota groundwater requirements, at issue was an MPCA rule prohibiting, in relevant part, the discharge of industrial waste to the "unsaturated zone" in a manner that may "pollute the underground waters." The rules define "unsaturated zone" as "the zone between the land surface and the water table." Minn. R. 7060.0300, subp. 7. The Court evaluated the application of this prohibition to the proposed category 1 stockpile and tailings basin at New Range's proposed mining operation. Both the stockpile and the tailings basin would allow pollutants from the mining waste materials to infiltrate to the underlying groundwater; however, in both cases, New Range proposed to construct cut-off walls from surface to the bedrock that would contain the polluted groundwater and minimize the groundwater escaping outside of the containment system. The polluted groundwater in the containment system would then be collected and sent to a wastewater treatment system. No party disputed that the groundwater in the containment systems underlying the stockpile and tailings basin would be polluted; rather, the core issue was whether the groundwater in the containment systems was part of "the underground waters" that may not be polluted under Rule 7060.0600, subpart 2.

The Supreme Court held that it was. Looking to the broad definition of "underground water," Minn. R. 7060.0300, subp. 6, the Court held that the term's unambiguous language contemplates no exclusions. The Court thus held that the prohibition on discharges to the unsaturated zone in a manner that may pollute the underground waters "applies with equal force to groundwater within the planned containment systems" at the proposed mining project, "as it does to groundwater outside the planned containment system." And because the language was unambiguous, the Court determined it did not need to defer to MPCA's contrary interpretation. The Court noted that its holding does not necessarily preclude MPCA from issuing a permit for the project, as the MPCA could consider granting a variance, which the rules allow in "exceptional circumstances." Minn. R. 7060.0900. The Court reversed the court of appeals on the groundwater issue and remanded the permit to MPCA for consideration of whether a variance is appropriate for the project. The Court's holding raises the possibility that other infiltration-based wastewater management facilities could likewise require a variance. ***In re Contested Case Hearing Requests & Issuance of Nat'l Pollutant Discharge Elimination Sys.***, ___ N.W.2d ___ (2023).

U.S. Court of Appeals upholds EPA's aircraft GHG emissions rules. In a recent ruling, the United States Court of Appeals for the D.C. Circuit upheld the 2021 EPA standards regulating greenhouse gas (GHG) emissions from domestic aircraft. The EPA's standards aligned with those adopted by the International Civil Aviation Organization (ICAO). Petitioners—made up of 12 states, the District of Columbia, and three environmental groups—challenged the EPA's regulations, claiming they should have been more stringent than those promulgated by ICAO in an effort to combat climate change.

Petitioners first asserted that the EPA failed to apply factors required by Section 231 of the Clean Air Act. The court rejected this argument, citing to the language of Section 231, which provides that "[t]he Administrator shall, from time to time, issue proposed emission standards applicable to the emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare." The court, examining the plain language of Section 231, explained that the statute

is "relatively simple," and does not mandate consideration of certain factors (such as a "latest-technology" approach), nor contemplation of substantive content of aircraft emissions standards. The EPA relied upon an earlier 2016 endangerment finding related to emissions of GHG from aircraft over a certain size. The EPA concluded that "elevated concentrations of these substances were reasonably anticipated to endanger the public health and welfare by contributing to climate change." Having made the endangerment finding, the EPA was within its authority under Section 231 to "issue proposed emissions standards" related to GHG emissions from aircraft.

Petitioners next contended that the EPA acted arbitrarily and capriciously in passing the aircraft emissions standards. They asserted three prongs to this argument: (1) by aligning domestic aircraft standards with ICAO, the EPA did not account for harms of climate change; (2) the EPA failed to consider alternatives that would reduce GHG emissions; and (3) the EPA did not consider effects of the emissions standards on minority and low-income populations as required by executive orders. The court rejected all three prongs. First, the court found it beneficial to align domestic emissions standards with global ICAO standards, citing to a history of consistent harmonization between the EPA and ICAO. Next, the court held that the EPA reasonably concluded that implementing alternative standards like those proposed by petitioners would result in delay and undue hardship to American aircraft manufacturers, which the court recognized already "navigate lengthy timelines for the certification and sale of new aircraft." Finally, the court rejected the third claim, explaining that petitioners' claim was foreclosed by the executive orders, and not subject to judicial review.

The court concluded that the EPA has substantial discretion to regulate GHG emissions from aircraft under Section 231 and acted properly in aligning domestic standards with those of ICAO. ***California v. Environmental Protection Agency***, 72 F.4th 308 (D.D.C. 2023).

ADMINISTRATIVE ACTION

EPA rescinds Trump-era rule on evaluation of benefits and costs in Clean Air Act rulemaking. On 7/13/2023, the EPA published a final rule rescinding the agency's 2020 Trump-era rule titled "Increasing Consistency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process" (the benefit-cost rule).

In many instances, the EPA is required to prepare an economic impact assessment (EIA) prior to promulgating or revising a standard or regulation under the Clean Air Act (CAA) (42 U.S.C. §7401 *et seq.*). *See* 42 U.S.C. §7617(a) (requiring consideration of, e.g., the costs of compliance, the potential inflationary or recessionary effects of the standard or regulation, the effects on competition with respect to small businesses, and the effects on consumer costs and energy use). In addition, EPA is subject to various executive orders that require the estimation of costs and benefits any time an agency develops "economically significant" regulations. For example, in 1993, President Clinton issued Executive Order 12866, which mandates that agencies "assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are

difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs," and "base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation."

Executive Order 12866 defines an "economically significant" regulation as any rule that may "have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." In addition the Office of Management and Budget's (OMB's) Circular A–4 provides guidance to federal agencies on the development of regulatory analysis as required under Executive Order 12866 and a variety of related authorities, and the EPA's Guidelines for Preparing Economic Analyses complements Circular A-4 by providing guidance on analyzing the benefits, costs, and economic impacts of regulations and policies, including assessing the distribution of costs and benefits among various segments of the population.

On 12/23/2020, the EPA attempted to revise, update, and codify these practices in the final benefit-cost rule, which established procedural requirements governing the preparation, development, presentation, and consideration of BCAs, including risk assessments used in the BCA, for significant rulemakings conducted under the CAA. The rule defined BCA as "an evaluation of both the benefits and costs to society as a result of a policy and the difference between the two." 85 Fed. Reg. 84130 (2020).

The benefit-cost rule consisted of four elements. First, it required EPA to prepare a BCA for all significant proposed and final regulations under the CAA. Second, the rule required EPA to develop the BCA using the best available scientific information and in accordance with best practices from the economic, engineering, physical, and biological sciences. The rule codified best practices for the preparation, development, presentation, and consideration of BCAs, and required that risk assessments used to support BCAs follow best methodological practices for risk characterization and risk assessment. Third, the rule imposed additional procedural requirements to increase transparency in the presentation and consideration of the BCA results. Specifically, the rule required the preamble of significant proposed and final CAA regulations to include a summary presentation of the overall BCA results for the rule, including total benefits, costs, and net benefits. Fourth, the rule required the EPA to consider the BCA in promulgating regulations, except where prohibited.

After publication, several parties filed petitions for review of the benefit-cost rule in the U.S. Court of Appeals for the District of Columbia. These consolidated cases are currently in abeyance.

On 1/20/2021, President Biden signed Executive Order 13990, directing the EPA to review all regulations and policies undertaken by the previous administration and rescind or revise any that do not protect public health and the environment. The EPA conducted a comprehensive review of the benefit-cost rule and concluded that regulations promulgated in the rule were inadvisable, not needed, and untethered to the CAA. The EPA stated that, in some cases, the rule could have hindered the EPA's compliance with the CAA and may not have even furthered the rule's stated purposes of consistency and transparency.

On 5/13/2021, the EPA issued an interim final rule to rescind the benefit-cost rule as well as a press release stating that the rule "imposed procedural restrictions and requirements that would have limited EPA's ability to use the best available science in developing Clean Air Act regulations, and would be inconsistent with economic best practices."

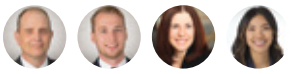
In its final rule rescinding the benefit-cost rule, the EPA explained that it would rescind the rule for several reasons:

(1) First, it failed to articulate a rational basis justifying its promulgation. EPA explained the rule did not provide any recorded evidence that the guidance and administrative processes already in place presented problems that justified the mandate imposed by the rule, and there was no discussion of how the rule would have improved the agency's ability to accomplish the CAA's goals to protect and enhance air quality.
(2) Second, the rule's expansion of BCA to all "significant" CAA rulemaking would require EPA to conduct resource-intensive BCAs without justifying why such expansion was necessary or appropriate.
(3) Third, best practices for conducting a high-quality BCA evolve over time and cannot be established using a set formula. The EPA explained that the codification of specific practices would have prevented situation-specific tailoring of the regulatory analysis to proposed policies. In addition, the rule contained a number of provisions that promoted particular types of data that could have conflicted with the use of best scientific practices or arbitrarily caused the agency to disregard important or high-quality data.
(4) Fourth, the rule required the EPA to present net-benefit calculations in regulatory preambles in a manner that would have been misleading and inconsistent with economic best practices. Specifically, the rule required a presentation of only the benefits "that pertain to the specific objective (or objectives, as the case may be) of the CAA provision or provisions under which the significant regulation is promulgated" (85 Fed. Reg. 84130 (2020)). The rule also required that if any benefits and costs accrue to non-U.S. populations, they must be reported separately to the extent possible. EPA also explained that the "purpose of a BCA is to assess the economic efficiency of policies, and in order to do so accurately, net benefits are calculated by subtracting total costs from total benefits, regardless of whether the benefits and costs arise from intended or unintended consequences and regardless of the particular recipients of the benefits or costs" (88 Fed. Reg. 44710 (2023)).
(5) Fifth, the rule did not reconcile its requirement that the agency consider the BCA in promulgating regulations with the substantive mandates of the CAA. The EPA explained that statute, not agency procedural rules, dictate what the agency may or may not consider in the context of exercising authority, and that the rule failed to align with the varied ways in which Congress either granted authority to or directed the EPA to consider benefits, costs, and

other factors.

(6) Sixth, the rule failed to provide any support for its contention that the pre-existing process was deficient. The EPA explained that the agency's pre-existing administrative process and procedures provide ample consistency and transparency, and that the rule's new procedures were unwarranted.

In its final rule, the EPA asserted that the administrative processes already in place before the benefit-cost rule was promulgated provided ample consistency and transparency in the rulemaking process. **"Increasing Consistency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process,"** 88 Fed. Reg. 44710 (2023). This final rule took effect on 8/14/2023.



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JUDICIAL LAW

Final judgment rule; attempt to manufacture appellate jurisdiction rejected. An 8th Circuit panel appears to have retreated from previous decisions by the court that allowed litigants to manufacture appellate jurisdiction by dismissing certain claims without prejudice.

After Judge Ericksen dismissed all claims against one group of defendants, dismissed most (but not all) of the claims against another group of defendants, and denied a motion for the entry of a final judgment on the claims against the first group of defendants under Fed. R. Civ. P. 54(b), the remaining parties entered into an agreement for the conditional dismissal of the remaining claims, under which the plaintiffs' claims against the second group would be "reinstated" if the 8th Circuit reversed the dismissal of the claims against the first group.

Noting that the 8th Circuit "repeatedly has expressed concerns about attempts to circumvent the final judgment rule," the majority of the panel found that "the form of conditional dismissal presented here does not create a final decision." Accordingly, the appeal was dismissed for lack of jurisdiction.

Judge Kelly dissented, asserting that previous 8th Circuit decisions allowed litigants to dismiss claims without prejudice in order to create appellate jurisdiction. ***In Re: Municipal Stormwater Pond Coor. Litig.***, ___ F.4th ___ (8th Cir. 2023).

No personal jurisdiction; single sale of product. Affirming a district court's dismissal of an action for lack of personal jurisdiction, the 8th Circuit held that a single sale of the subject product to the plaintiff was insufficient to establish personal jurisdiction over the corporate defendant, even where the defendant maintained a nationally available website. ***Kendall Hunt Publ'g Co. v. Learning Tree Publ'g Corp.***, ___ F.4th ___ (8th Cir. 2023).

Waiver; failure to raise argument before district court or in previous appeal. Where the appellants cited a case only in passing in the district court and on appeal, the 8th Circuit found that the appellants had waived an argument that was not "meaningfully" raised, noting that citing a case "without developing an argument is not enough to preserve an issue for appeal." ***Karsjens v. Harpstead***, ___ F.4th ___ (8th Cir. 2024).

Motion to disqualify judge and magistrate judge, and motion to reassign motion to disqualify denied. Judge Ericksen denied a motion to disqualify both her and Magistrate Judge Schultz, and also denied a motion to reassign the motion to disqualify in a long-running product liability MDL, finding that the motion was "meritless," and also finding that the motion was untimely when it was not filed until "at least 16 months" after plaintiffs first indicated that they intended to move for recusal. ***In re: Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.***, 15-md-2666 (JNE/DTS) (D. Minn. 7/10/2023).

Fed. R. Civ. P. 62(b); defendant ordered to post bond in excess of $1 billion. Where the defendant sought a stay of a judgment pending appeal and asked that the court "exercise its discretion" to waive the required bond, Judge Wright denied the stay request and approved the defendant's alternative request that it be allowed to post a bond in the amount of $1,158,806,436.37. ***Kelley v. BMO Harris Bank N.A.***, 2023 WL 4740927 (D. Minn. 7/25/2023).

Fed. R. Evid. 702; summary judgment granted; expert witness excluded. Granting the defendant's motion for summary judgment in a Title IX/ADA action, Judge Tostrud excluded the testimony of one of the plaintiff's experts in its entirety, finding, among other things, that her opinions regarding the defendant's interviewers' failure to use "best practices" were "not reasonably tethered" to relevant legal standards, and that her opinions regarding interviewers' alleged bias were not "based on expertise." ***Olson v. Macalester College***, ___ F. Supp. 3d ___ (D. Minn. 2023).

Motions to quash subpoenas; burden. Granting in part and denying in part a series of motions to quash subpoenas for personal cell phones in the *In Re Cattle and Beef Antitrust Litig.* brought by former employees of a Cargill affiliate, Magistrate Judge Docherty found that the subpoena recipients' privacy interests would be "adequately protected by the existing protective order," and that their "only real burden" would be that they would be without their cell phones for no more than two days. ***In Re Rule 45 Subpoena to Lucas***, 2023 WL 4561320 (D. Minn. 7/17/2023).

Fed. R. Civ. P. 26(a)(2)(B) and 37(b)(1); untimely disclosures; sanctions. Where plaintiff's experts failed to make the timely disclosures required by Fed. R. Civ. P. 26(a)(2)(B) and defendants moved to exclude the experts, Judge Davis declined defendants' request to exclude the experts, and instead held that both experts could be deposed by the defendants, with the plaintiffs required to pay the "reasonable costs and attorney's fees" associated with both depositions, but denied the defendants' request for the costs and fees associated with their motion to exclude the experts. ***Evans ex rel. Evans v. Krook***, ___ F. Supp. 3d ___ (D. Minn. 2023), *appeal filed* (No. 23-2753, 8th Cir. 8/1/2023).

Request for leave to amend denied; failure to comply with Local Rule 15.1(b). Granting the defendants' motion to dismiss claims with prejudice in a securities fraud action, Chief Judge Schiltz denied plaintiffs' request for leave to amend their complaint where they had "not identified any additional facts that they could allege," and where they failed to submit the proposed amended complaint required under Local Rule 15.1(b). ***Steamfitters Local 449 Pension & Retirement Sec. Funds v. Sleep Number Corp.***, 2023 WL 4421688 (D. Minn. 7/10/2023).

Forum selection clause; courts "in" or "of" a particular state. Dismissing an action on the basis of *forum non conveniens*, Judge Tostrud determined that a forum selection clause designating the "Courts of the State of New York" required litigation in the New York state courts, meaning that the action could not be transferred to a New York federal court. ***Persaud-Bramante Apts., L.L.C. v. Underwriters at Lloyd's of London***, 2023 WL 4473424 (D. Minn. 7/11/2023).

Local Rule 5.6(d)(3); motion for further consideration of continued sealing; presumptive right of access. Judge Tunheim rejected a challenge to a decision by Magistrate Judge Docherty that had denied a motion for further consideration of continued sealing of a contract, where the magistrate judge found that most of the contract was not "sensitive," that the confidentiality provision in the contract did not weigh in favor of sealing, and that the presumption of public access was strong. ***Cambria Co. v. Disney Worldwide Servs., Inc.***, 2003 WL 4545066 (D. Minn. 5/8/2003), *aff'd*, 2023 WL 4559436 (D. Minn. 7/17/2023).

Doe pleadings; privacy interests. Magistrate Judge Foster granted the plaintiffs' motion to proceed under pseudonyms on their claims arising out of the sex trafficking of a minor, finding that "all" of the relevant factors weighed in favor of allowing plaintiffs to proceed pseudonymously. ***Doe v. Lazzaro***, 2023 WL 4545066 (D. Minn. 7/14/2023).

Local rules amended. Amendments to Local Rules 83.5 and 83.7, relating to the requirement for local counsel and *pro hac vice* admissions, took effect on 8/1/2023. In a somewhat unusual move, Chief Judge Schiltz issued a letter the same day addressing and explaining the amendments.

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Intellectual Property

JUDICIAL LAW

Trade secret: Denial of preliminary injunction to enforce noncompete agreement. Judge Blackwell recently denied a motion for preliminary injunction that sought the enforcement of a noncompetition provision. Plaintiff Cookie Dough Bliss Franchising, LLC owns and licenses businesses that sell edible cookie dough products under the Cookie Dough Bliss trademark. In 2021, Cookie Dough entered into an agreement with defendants Feed Your Soul, granting them a non-exclusive license to operate a franchise using Cookie Dough's products, recipe, resources, and trademark in Minnesota. The agreement also included a noncompetition provision that prohibited defendants from being involved in any competitive business within a 30-mile radius of

the franchise location for two years after the franchise agreement terminated. Both parties allege that the opposing party materially breached the franchise agreement, leading to its termination.

Once the agreement was terminated, defendants began operating their own newly named cookie dough treat business in the same location using the same Facebook website. Cookie Dough filed suit alleging trade secret theft and simultaneously filed a motion for a temporary restraining order and preliminary injunction seeking to enforce the noncompetition provision of the franchise agreement. The four-factor test weighed against the issuance of a preliminary injunction. The first factor, threat of irreparable harm, was not present, as most of the harm Cookie Dough cited was speculative. For non-speculative harm, Cookie Dough's own actions created culpability by creating customer confusion, and Cookie Dough was not licensed to sell franchises in Minnesota. The court found against Cookie Dough on the next factor, finding that Minnesota law disfavors noncompete agreements, and Cookie Dough has not provided enough facts to prove the provision serves a legitimate purpose. In evaluating the balance of harms, the court found against Cookie Dough, citing that the injunction would put defendants out of business and would end their family's primary income. The final factor, the public interest, did not benefit either party as the public interest supports upholding contracts and unrestrained competition. The court, in finding three of four factors weighing against Cookie Dough, denied the motion for preliminary injunction. ***Cookie Dough Bliss Franchising, LLC v. Feed Your Soul Minn.***, LLC, No. 23-1552 (JWB/TNL), 2023 U.S. Dist. LEXIS 132808 (D. Minn. 8/1/2023).

Copyright: Lack of personal jurisdiction in view of single sale into district. The 8th Circuit recently affirmed a dismissal for lack of personal jurisdiction. Plaintiff Kendall Hunt Publishing is a textbook publisher located in Iowa. Hunt employed the defendants remotely from their homes in California, and the parties had regular contact by email and phone. From 2014-2016 the defendants successfully negotiated a publishing deal with a California teacher for an online ethics textbook—negotiating and editing solely in California. In 2019, the defendants incorporated their own business, Learning Tree Publishing Corporation, which sells online textbooks, including an ethics textbook by the aforementioned California teacher. Hunt filed suit against Learning Tree alleging claims of copyright infringement, tortious interference with contract, and unfair competition. Learning Tree countered by moving to dismiss the case due to lack of personal jurisdiction. The Iowa district court granted the motion for lack of personal jurisdiction and Hunt appealed. The 8th Circuit in response held that the district court lacked personal jurisdiction over Learning Tree. The court in its reasoning opined that Learning Tree did not have the requisite contacts with Iowa. Learning Tree did not advertise in Iowa and only had one online sale in Iowa, conducted by Hunt's employee in anticipation of litigation. The court also rejected the argument that the defendants' personal contacts with Iowa should be imputed to the corporation. The court reasoned the copyrighted material was not derived from prior contacts in Iowa and that the alleged wrongful conduct—working with the teacher and publishing and selling the book—took place in California. The 8th Circuit affirmed the district court's dismissal for lack of personal jurisdiction. ***Kendall Hunt Publ'g Co. v. Learning Tree Publ'g Corp.***, No. 22-188, 2023 U.S. App. LEXIS 18688 (8th Circ. 7/24/2023).

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Probate & Trust Law

JUDICIAL LAW

No presumption of undue influence in Minnesota. The trustee of a trust agreed to lease a farm to her grandson and his business. The beneficiaries of the trust later filed an action to invalidate the lease. The district court, after a trial, concluded that the lease was invalid as it was the product of undue influence and as it was unconscionable. While the district court appeared to analyze the relevant factors to prove undue influence in relation to the sale of real property, it relied on a New Jersey case for the proposition that "courts presume undue influence in certain cases and shift the burden of proof onto the party opposing a determination of undue influence to rebut that presumption." The court of appeals found that the New Jersey case was not binding authority, that it was not aware of any precedential case in Minnesota applying a presumption of undue influence, and that such a presumption of undue influence conflicts with at least one Minnesota Supreme Court case. For that reason, the court of appeals held that a confidential relationship does not create a presumption of undue influence or shift the burden of proof. Rather, the burden of proving undue influence remains on the party asserting undue influence. ***In re Ursula E. Nelson Tr. under Agreement dated 3/21/2014, as Amended***, No. A22-1781, 2023 WL 4418643 (Minn. Ct. App. 7/10/2023).

Common law supports striking unenforceable trust provisions. A grantor executed a trust containing a specific provision relating

to amendments that did not include a requirement that amendments be witnessed or notarized. Fourteen years later, the grantor amended the trust. The grantor signed and delivered the amendment, but it was not notarized or witnessed. Two years later, the grantor similarly amended the trust. In the final amendment, the grantor included a penalty provision that provided that "percentages will only be paid out if [the beneficiaries] start acting [like] family again to my son..." After the grantor died, one of the beneficiaries petitioned to invalidate the two amendments on the basis that the amendments were not witnessed or notarized, among other reasons.

Initially, the district court found that the first amendment was validly executed but found that the second amendment was too ambiguous to enforce. The trustee moved the court for amended findings, arguing that the penalty provision should be struck and that the remainder of the second amendment should be enforced. The district court agreed and "reformed" the trust by striking the penalty provision. On appeal, the court of appeals agreed that the amendments were validly executed and concluded that the district court properly struck the penalty provision and reformed the trust under Minn. Stat. §501C.0415 because the grantor made a mistake of law in believing that the penalty provision was enforceable.

The Supreme Court also found that the trust amendments had been validly executed. However, Minn. Stat. §501C.0415 "was not the correct provision to use in construing the second trust amendment." Specifically, "[e]quating an ambiguous trust provision to a mistake of law is not supported by pertinent precedent or statute." However, the analysis did not end there. The Supreme Court went further and noted that "Minnesota common law supports the equitable remedy of striking a provision that is unenforceable but upholding otherwise clear language in an instrument..." Because the penalty provision was not so intertwined with the rest of the trust provisions that it could not be severed, the Supreme Court determined that the district court acted within its equitable powers in construing, interpreting, and enforcing the second amendment to the trust. ***Matter of Tr. of Robert W. Moreland***, 993 N.W.2d 80 (Minn. 7/12/2023).

Presumption of revocation appropriately overcome. The decedent executed a will that left his assets to his descendants or to charity (if his descendants did not survive him). The decedent's descendants predeceased him. It was undisputed that the decedent's individual will was in his possession prior to his death, but it was not located after his death. The nominated personal representative, therefore, filed a petition for formal adjudication of intestacy. A copy of the decedent's will was thereafter provided to the district court by the decedent's attorney. Learning that it was a beneficiary, the charity objected to the nominated personal representative's petition. At trial, the nominated personal representative claimed that the decedent told her that he was going to change his will on one occasion and that the decedent told her he had destroyed his will on another. The decedent's attorney, however, testified that he had spoken with the decedent periodically about his estate plan and the decedent never indicated that he wanted to change it—despite changing other parts of his estate plan. The charitable beneficiary further introduced two letters that indicated that the decedent was comfortable with his will. Ultimately, the district court admitted the will to probate. The court of appeals affirmed, finding that the record contained extensive circumstantial evidence that the decedent did not revoke his will and that the charitable beneficiary made a *prima facie* showing of non-revocation. ***In re Estate of Andersen***, No. A23-0042, 2023 WL 4553437 (Minn. Ct. App. 7/17/2023).

Decision to appoint manager to govern land owned by a trust and individual affirmed. Married tenants in common who owned farmland executed identical wills. The wills contained a provision that prohibited the surviving spouse from revoking his or her will after the other died. The wills also contained a provision bestowing their interest in the land to a trust and granting one of their children the option to lease the land at a specified rate. After the husband died, the wife attempted to lease the land to her son at a rate lower than that designated in the husband's will. The trustee of the trust petitioned the district court to appoint a manager to make all decisions concerning the land. The district court granted the petition and the wife appealed. The wife argued that the district court lacked subject matter jurisdiction to issue an order relating to the farmland, as the scope of the court's authority was limited to the portion of the land that the trust owned.

The court of appeals disagreed and indicated that the district court was authorized to order the trustee to act consistently with the trust. However, the court of appeals noted that the district court's order could be read to exceed the trustee's authority and was potentially too expansive, as the district court only had authority to appoint a person to manage the land on the trust's behalf (not the wife's behalf). Therefore, the court of appeals modified the district court's order to specify that the manager's authority could extend no further than the trustee's power under the terms of the trust. The wife also argued, among other things, that her agreement with her husband that prohibited her from changing her will after his death did not result in the terms of her will becoming effective during her lifetime. The court of appeals agreed but also found that the terms of the husband's will fixed the trust's position as to any land lease terms with the couple's son. The court of appeals found that the couple's arrangement displayed an intention that the husband's will would govern the lease option and the lease terms that the trust was required to extend to their son on the husband's death. ***Matter of Will of Hemish***, No. A22-1569, 2023 WL 4554653 (Minn. Ct. App. 7/17/2023).

Attorneys' fees awarded to personal representative, not to beneficiary. A decedent's son filed a petition for formal probate of will and appointment of personal representative. The son served notice to all interested parties. After a hearing, the son was appointed as personal representative. Months later, the personal representative filed an *ex parte* petition to release funds from a nonprobate account. The petition noted that four of the account's beneficiaries were prepared to submit documentation required to release the funds, but the appellant could not be reached. Because there was not unanimity, Merrill Lynch had refused to release the funds. Shortly thereafter, the appellant filed an objection to the probate petition and the petition for the release of funds.

Ultimately, the district court dismissed the appellant's objections on summary judgment. In doing so, the district court directed the parties to file motions relating to any request for reimbursement of attorneys' fees. After motions were filed by both the personal representative and the appellant, the district court found that the personal representative's actions benefitted the estate and that his attorneys' fees were fair and reasonable, and awarded the personal representative almost $25,000 in attorneys' fees. The court denied the appellant's request for attorneys' fees, finding that she did not benefit the estate and that her litigious behavior caused substantial delays. The court of appeals found that the district court did not abuse its discretion in awarding the personal representative attorneys' fees, that the district court did not err in finding that the attorneys' fees were fair and reasonable, and that the record supported the district court's finding that the appellant's actions did not benefit the estate. ***Estate of Donald J. Kellett, a/k/a Donald Jean Kellett, Decedent***, No. A23-0289, 2023 WL 5013537 (Minn. Ct. App. 8/7/2023).

Agreement to proceed with a civil action amounts to waiver of *in personam* jurisdiction defense. The testators executed trusts in which their assets were to be distributed equally to their three children. One testator died in 2012 and the other died in 2017. At the time of the last testator's death, the value of the trust's assets was approximately $3 million. But because of actions taken between 2012 and 2016, one of the children (the trustee of the trust) received almost $1.7 million in assets, while the others received only about $350,000. The two beneficiaries who received less sought court intervention. The district court found that the trustee influenced his parents to take out personal loans on his behalf that were collateralized by assets in the trust. However, instead of later repaying the loans personally, the trustee used the trust's assets to repay the loans.

The district court determined that the trustee had breached his fiduciary duties, appointed an independent accountant to determine damages, and awarded prejudgment interest. After the forensic accountant's review, prejudgment interest was awarded from the date of each identified transaction. On appeal, the trustee argued, among other things, that the beneficiaries could not pursue claims that were personal to the testators because they had not been appointed as personal representatives of their estates. The court of appeals disagreed, finding that because the district court concluded that the breach of fiduciary duty only occurred when the trustee failed to repay the loans (in 2017), the beneficiaries had standing to pursue claims against the trustee. The trustee also argued that the district court lacked *in personam* jurisdiction over him, pursuant to *Swanson v. Wolf*. The court of appeals similarly rejected this argument, finding that the trustee waived any jurisdictional challenge he may have had when he affirmatively invoked the district court's jurisdiction (by agreeing to allow the case to proceed as a civil action versus a trust action, asking the court to order mediation, and filing a motion for a new trial). Additionally, the trustee argued that the district court miscalculated its award of prejudgment interest. The court of appeals agreed and found the district court's calculation to be erroneous, as it calculated interest from the date of the transaction rather than from the commencement of the action. ***Jorgensen v. Jorgensen***, No. A22-1652, 2023 WL 5012216 (Minn. Ct. App. 8/7/2023).

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Tax Law

JUDICIAL LAW

Tax court ordered to explain narrow aspect of hotel valuation. In an extensive opinion concerning the valuation of a hotel property, the Minnesota Supreme Court vacated and remanded to the tax court a single issue: "the tax court is directed to revisit and explain its adoption of the percentage reduction to the sales price of one of the comparator hotels that it used in its sales comparison analysis to account for non-taxable assets included in the sales price." The Court otherwise affirmed the tax court's opinion. ***Bloomington Hotel Invs., LLC, v. Cnty. of Hennepin***, No. A22-1201, 2023 WL 5065419 (Minn. 8/9/2023).

Following "*Erie* shuffle," tax court deems Minnesota's frivolous return penalty not unconstitutional. The Minnesota Tax Court has "sole, exclusive, and final authority for the hearing and determination of all questions of law and fact arising under tax laws of [Minnesota]," but the court does not have original jurisdiction to decide constitutional issues. For nearly 40 years, however, the tax court has been able to acquire such authority through what has become known as the *Erie* shuffle, so named after *Erie Mining Company v. Commissioner of Revenue*, 343 N.W.2d 261, 264 (Minn. 1984).

In a case involving taxation of Minnesota apportionable income for a nonresident taxpaying couple, the tax court engaged in an *Erie* shuffle to address the taxpayer's constitutional challenge to Minnesota's frivolous return penalty. The court construed the self-represented taxpayer's constitutional challenge as raising three arguments concerning (1) due process; (2) excessive fines; and (3) equal protection. None was successful.

First, the court rejected the taxpayers' argument that

the frivolous penalty clause violated due process for lack of notice. Well-established law put the taxpayers on notice that calling wages another name for the purpose of not including them on a return has "no basis in fact or law" and is frivolous. E.g., *Brintnall v. Comm'r of Revenue*, No. 7495-R, WL 1877239 (Minn. Tax 4/8/2003). Since the court in a prior opinion found that the taxpayers attempted to avoid taxation by calling wages another name, they were on notice and their due process claim failed.

The court then turned to the excessive fines argument. Both the United States and the Minnesota Constitution protect individuals against excessive fines, and that protection extends to civil as well as criminal proceedings. Justice Gorsuch, concurring in the recent Supreme Court case involving Hennepin County's forfeiture system, reminded litigants that "[e]conomic penalties imposed to deter willful noncompliance with the law... cannot be excessive." *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1382 (2023) (Gorsuch, J., concurring). The Minnesota Tax Court applied the established three-part test set out in Minnesota case law (*State v. Rewitzer*, 617 N.W.2d 407 (Minn. 2000)) to conclude that the challenged penalty met the constitutional requirements. The three-part test includes inquiries into (1) the gravity of the offense and the harshness of the penalty, (2) a comparison of the contested fine with fines imposed for the commission of other crimes in the same jurisdiction, and (3) a comparison of the contested fine with fines imposed for commission of the same crime in other jurisdictions.

Finally, the court summarily rejected the taxpayers' equal protection claim as "nonsensical." The court concluded that the frivolous return penalty is not unconstitutional, and that summary judgment was appropriate to the commissioner. ***Wendell v. Comm'r of Revenue***, No. 9488-R, 2023 WL 4441638 (Minn. Tax 7/10/2023).

Request for attorneys' fees denied. Warning that "a taxpayer's subjective belief that its gross receipts are nontaxable does not alter the consequences of its refusal to provide records in response to an audit," the Minnesota Tax Court denied a taxpayer's request for over $20,000 in attorney's fees. The court articulated the "gist" of the taxpayer's claim to fees as follows: The disputed sales tax assessment order was not "substantially justified," the taxpayer asserted, because the court granted summary judgment in the taxpayer's favor on an unopposed basis. The unopposed nature of the summary judgment, the taxpayer continued, proved that "[t]here never was the slightest factual basis" for the tax order. The court explained that "the question is not whether [the taxpayer] ultimately provided adequate... support for its sales tax reporting," but whether the commissioner's position had a reasonable basis in fact or law. Since the commissioner's position had a reasonable basis, the requested attorney fee award was not appropriate. The court did, however, award several hundred dollars in requested costs. ***Bugg Prod. LLC v. Comm'r***, No. 9516-R, 2023 WL 4983130 (Minn. Tax 8/2/2023).

Summary judgment not appropriate to resolve tax-exempt nature of medical clinics. Minnesota exempts public hospitals from property taxation. "Public" hospital includes hospitals owned by the public (like county hospitals) but also any hospital that is not "operated for the benefit of a private individual, corporation, or group of individuals." *State v. Browning*, 255 N.W. 254, 256 (Minn. 1934). In addition to excluding public hospitals themselves, the property tax exemption extends to certain auxiliary properties. Auxiliary properties are exempt if they are "owned by a public hospital *and* [are] used for the accomplishment of the purposes for which the hospital was organized." *Abbott-Northwestern Hosp., Inc. v. Cnty. of Hennepin*, 389 N.W.2d 916, 919 (Minn. 1986).

At issue in these cross motions for summary judgment was whether two clinics in Pine County (one in Pine City and one in Hinckley) are exempt as "auxiliary property" of a public hospital. The taxpayer argued that the two clinics qualified as exempt because both clinics were "essentially a hospital" and both were reasonably necessary to the hospital. The county countered that the clinics do not rise to the level of "functional interdependence" required for exemption. *See Chisago Health Servs. v. Comm'r of Revenue*, 462 N.W.2d 386, 390 (Minn. 1990) (discussing functional interdependence and explaining that "Auxiliary facilities to qualify for tax exemption must, first, be devoted to what it is that a public hospital does and, secondly, be reasonably necessary to accomplish that purpose. The test, in a sense, measures the degree to which the auxiliary facilities and the public hospital are functionally interdependent.")

The court determined that the factual record was not sufficiently developed to establish either that the Pine County clinics operate as auxiliary properties to a public hospital or that they do not. The parties' cross motions for summary judgment were denied. ***Welia Health v. Cnty. of Pine***, No. 58-CV-22-196, 2023 WL 4917278 (Minn. Tax 8/1/2023).

Expert exclusion too extreme for counsel's calendaring error. A calendaring error by counsel resulted in untimely disclosure of an expert. In some circumstances, untimely disclosure can result in exclusion of the expert's testimony. However, "the most compelling circumstances" are necessary to warrant the exclusion of expert testimony. In this instance, the untimely disclosure was not the result

of an inexcusable dereliction or tactical maneuvering. Because the county suffered no prejudice (trial was months away and the county had additional discovery opportunities), the county's motion to exclude was denied. ***MinnStar Bank, N.A. v. Cnty. of Blue Earth***, No. 07-CV-22-1402, 2023 WL 4751797 (Minn. Tax 7/25/2023).

Continued crackdown on tax protester "gibberish." The federal tax courts continue to warn taxpayers to refrain from making frivolous arguments. Petitioners who continue to embrace arguments deemed frivolous are subject to penalties per Section 6673(a)(1), which authorizes those penalties "[w]henever it appears to the Tax Court that—(A) proceedings before it have been instituted or maintained... primarily for delay, [or] (B) the taxpayers positions in such proceedings is frivolous or groundless." *Saccato v. Comm'r of Internal Revenue*, T.C.M. (RIA) 2023-096 (T.C. 2023).

Before the court for a second time, the petitioner in the first case this month "excluded all wages paid... on their joint 2018 federal income tax return and contend that wages of U.S. citizens do not constitute taxable income." *Hatfield v. Comm'r of Internal Revenue*, T.C.M. (RIA) 2023-093 (T.C. 2023). Within an IRS notice and before the court many times already, the "Petitioners' assertion that wages are not taxable income has been identified as a 'frivolous position.' *Frivolous Positions*, 2010-17 I.R.B. 609 (2010), *see, e.g., Walker v. Comm'r of Internal Revenue,* 123 T.C.M (CCH) 1336 (T.C. 2022); *Briggs v. Comm'r of Internal Revenue*, 111 T.C.M (CCH) 1389 (T.C. 2016); *Lovely v. Comm'r of Internal Revenue*, 110 T.C.M. (CCH) 98 (T.C. 2015), *aff'd sub nom. Lovely v. Comm'r of Internal Revenue*, 642 F. App'x 268 (4th Cir. 2016).

The tax court concluded by taking the "opportunity to warn petitioners again that assertions of such frivolous arguments in any future appearance before this Court may result in an additional penalty." *Hatfield*, T.C.M. (RIA) 2023-093, *3 (T.C. 2023).

In the second case, the court rejected petitioner's entreaty that he was not a tax protester. *Saccato*, T.C.M. (RIA) 2023-096 at *11. From the outset, the petitioner asserted what can only be described as tax protester arguments, starting with a claimed exemption from federal income tax. His reasoning: "[H]e is 'a citizen of the State of Oregon' and 'not a federal citizen.'" *Id*. at *10. Further, the court cited additional "gibberish commonly embraced by tax protesters—e.g., that he 'never knowingly elected to be treated as a 'taxpayer',' that he 'was protected through the doctrine of estoppel,' and that 'the notice of deficiency lacked the required jurat signed under the penalties of perjury.'" *Id.*

Since "[f]rivolous arguments and groundless claims divert the Court's time, energy, and resources away from more serious claims and increases the needless cost imposed on other litigants," the purpose of imposed penalties is quite clear. *Kernan v. Comm'r of Internal Revenue*, 108 T.C.M. (CCH) 503 (T.C. 2014), *aff'd sub nom. Kernan v. Comm'r of Internal Revenue*, 670 F.App'x 944 (9th Cir. 2016). Penalties "compel taxpayers to conform their conduct to settled tax principles and to deter the waste of judicial and IRS resources." *Coleman v. Comm'r of Internal Revenue*, 791 F.2d 68, 71–72 (7th Cir. 1986); *Salzer v. Comm'r of Internal Revenue* T.C. Memo. 2014-228, 108 T.C.M. 503, 512 (T.C. 2014), *aff'd sub nom. Kernan v. Comm'r of Internal Revenue*, 670 F.App'x 944 (9th Cir. 2016).

In *Saccato*, the court's warning to future petitioner's was quite clear as the court chastised the "[petitioner's] persistent filing of frivolous papers" which "has wasted the Government's time and ours." The court imposed a $10,000 penalty. *Id*. at *11.

Unclean hands not tenable as an affirmative defense. In this case, the petitioner claimed that the government's action in response to the COVID pandemic caused him direct harm and further that such government-induced harm should estop collection efforts under the unclean hands doctrine.

Upon review of the petitioner's federal income tax for 2013 and 2017, the IRS determined deficiencies were attributable to the petitioner's capital gains in cryptocurrency transactions during those years. In 2020, during the early days of the pandemic, however, the petitioner suffered large losses after having to liquidate assets at a substantial loss. The petitioner claims these losses were exacerbated—if not caused—by the government's response to the covid pandemic.

The petitioner's defense of unclean hands, however, had no legal basis. Fundamental to a defense of unclean hands is that "'the alleged misconduct by the [party] relate directly to the transaction concerning which the complaint is made.'" (*Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.,* 890 F.2d 165, 173 (9th Cir. 1989) (internal quotation omitted)). Further, "unclean hands does not constitute 'misconduct in the abstract, unrelated to the claim to which it is asserted as a defense.'" *Jarrow Formulas, Inc. v. Nutrition Now, Inc.,* 304 F.3d 829 (9th Cir. 2002) citing *Republic Molding Corp. v. B.W. Photo Utils.,* 319 F.2d 347, 349 (9th Cir. 1963). The petitioner's defense thus had no basis, as petition failed to substantiate any relationship between the government's 2020 alleged misconduct and a determination of federal income tax deficiencies in 2013 and 2017. ***Kim v. Comm'r of Internal Revenue***, T.C.M. (RIA) 2023-091 (T.C. 2023).

Morgan Holcomb
Adam Trebesch
Mitchell Hamline School of Law

PEOPLE + PRACTICE

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


Peter J. Kaiser and **Taylor D. Sztainer** were appointed adjunct directors of Moss & Barnett's board of directors. Adjunct directors are shareholders who serve as non-voting members of our board of directors for one year. The adjunct director program is intended to train future leaders of the firm. Kaiser is a corporate lawyer and Sztainer leads the firm's professional liability team.


Liz Dillon and **Ryan C. Gerads** were elected to the executive committee of Lathrop GPM LLP. Dillon is a partner in the firm's Minneapolis office and leads the franchise & distribution practice group. Gerads is a partner in the firm's St. Cloud office. He practices corporate, business, and tax law.

Michael J. Pfau joined Bassford Remele. Pfau is a litigator, focusing his practice in the areas of commercial litigation, consumer law defense, construction, and employment litigation/advice.

David R. Schaps was named shareholder at Barna, Guzy & Steffen, Ltd. Schaps is part of the government, labor & employment law department. He works closely with cities, the state, and municipalities in many areas of law.


Edward "Teddy" Fleming and **Zachary Wall** joined Winthrop & Weinstine. Fleming joined the corporate & transactions practice, and Wall joined the commercial lending practice.

Brian Clausen joined Dougherty, Molenda, Solfest, Hills & Bauer PA as a shareholder. He has over 24 years of practice and works exclusively in the area of family law.

Elizabeth "Ellie" Orrick joined Brandt Kettwick Defense after clerking for the Minnesota Court of Appeals. Orrick's time will be dedicated to helping those facing criminal charges.

Tyler J. Martin joined Arthur, Chapman, Kettering, Smetak & Pikala, PA. His practice is focused in automobile law and general liability.

Joseph Graen joined DeWitt LLP as a member of the litigation and intellectual property litigation practice groups, practicing in the firm's Minneapolis office.

Michael Bondi joined Spencer Fane LLP in the intellectual property practice group as a partner. Bondi focuses his practice on the preparation and prosecution of U.S. and foreign patent and trademark applications.


V. John Ella and **Anna Swiecichowski** joined Fafinski Mark & Johnson, PA. Ella joins as a shareholder, practicing in all aspects of commercial litigation, employment law, business law, and appeals, with an emphasis on unfair competition and defending employment claims. Swiecichowski joins as an associate, practicing in all aspects of commercial litigation, appeals, employment law, and business law.


Gov. Walz appointed **Justice Natalie Hudson** to serve as chief justice of the Minnesota Supreme Court. Justice Hudson will fill the vacancy that will occur upon the retirement of Chief Justice Lorie Gildea. **Karl Procaccini** was appointed to serve as associate justice. Procaccini will fill the vacancy that will occur upon Justice Hudson's elevation to chief justice. Procaccini teaches law at the University of St. Thomas School of Law.

Robert P. Abdo was elected to a two-year term on Lommen Abdo's board. Abdo is executive vice president of the firm and chair of the business, mergers and acquisitions, estate planning, and real estate group.

Leanne Litfin joined Maslon LLP as an attorney in the labor & employment group. Litfin counsels clients in labor law, including labor standards, wage and hour law, data practices, discrimination claims, employment contract disputes, compliance issues, and employee discipline.

Gov. Walz appointed **Kathryn Hipp Carlson** as a judge on the Minnesota Workers' Compensation Court of Appeals. Carlson will replace the Hon. David A. Stofferahn, who retired in July, and will serve the remainder of his term, which expires in January 2027. Carlson is an attorney at Hipp Carlson, PLLC, where she has practiced exclusively in workers' compensation since 1993.

Former Hamline Law Dean Donald Lewis retires from firm he co-founded

BY MARLA KHAN-SCHWARTZ

Donald Lewis, an accomplished attorney who served as dean of Hamline University School of Law from 2008 to 2013, recently retired from the Minneapolis firm he co-founded, Nilan Johnson Lewis. The 70-year-old has shifted to part time arbitration and mediation work with JAMS, a private company that provides alternative dispute resolution services

Lewis's tenure at Hamline Law was a career midpoint, sandwiched between stints in private practice. He also worked for the U.S. Justice Department after law school and as a federal prosecutor in Minnesota.

While he was serving on the William Mitchell board of trustees in 2007, he became interested in leading an academic environment. A year later, as he prepared to become dean at Hamline Law, the economy collapsed.

Lewis would serve as dean for five years. His tenure was marked by improving national rankings and being placed in the top five for "best value" by National Jurist magazine. Providing access and helping ensure students were equipped with tools and skills that would help them following law school provoked changes to the curriculum. Some classwork included helping students develop skills to build their own profitable law practices following law school.

"I made it a major focus of my administration of law school to do everything I could to enhance the career opportunities that students would have," said Lewis.

Strategic planning and creative thinking also led to the first discussions of what would become the combination of Hamline Law and William Mitchell College of Law. The merger didn't happen during his tenure, "but it became pretty apparent that was something in our future.

"I wasn't sure that St. Paul could sustain two law schools or that Minnesota could necessarily sustain four law schools, and I felt that we should explore a path to a combination that ultimately occurred."

Professor emerita Marie Failinger said Lewis' tenure was "probably the most challenging time for admissions in legal education in memory."

Lewis, Failinger recalled, was "realistic about the need for the law school to 'right-size,' and he set about making it happen in a careful way that respected our faculty and staff. But he also brought a new emphasis on courses and opportunities that would prepare students for the practice of law, and improved Hamline's job placement ranking in the Twin Cities especially."

Most importantly, Failinger added, Lewis "always acted with integrity and with concern for our faculty, staff, and students."

In memoriam

KENNETH DAVID BUTLER of Duluth died on August 8, 2023. In 1973, Ken graduated from the Saint Louis University School of Law. He subsequently established a law career in Duluth and started his own solo practice in 2000.

NICOLE ROCHELLE HITTNER of Inver Grove Heights passed away on July 8, 2023 at the age of 45. She attended William Mitchell College of Law 2005-2008. She was brought on as a summer associate during law school at Lindquist and Vennum and ultimately became a partner. In 2021 she moved to Taft Stettinius & Hollister LLP.

BARNETT IAN "BUD" ROSENFIELD passed away suddenly on July 10, 2023. Rosenfield was the state's ombudsman for mental health and developmental disabilities as well as a former supervising attorney at the Minnesota Disability Law Center.

CHRISTOPHER "CHRIS"RYAN BRADEN died June 29, 2023 at age 39. Braden's dream was to become a lawyer and he eventually became his dad's law partner in 2017. He loved practicing law and concentrated on family, juvenile, and guardianship/ conservatorship cases. Braden, who enjoyed judging MSBA mock trial competitions, was a SMRLS (legal aid) volunteer attorney and a past president of the Rice County Bar Association.

JAMES HINCHON MANAHAN, 86, died on April 18, 2023. Manahan was active in many legal organizations, including service as president of the American Academy of Matrimonial Lawyers (Minnesota Chapter), dean of the Academy of Certified Trial Lawyers of Minnesota, president of the Sixth District Bar Association, and president of the Harvard Law School Association of Minnesota. For 25 years he was board-certified by the National Board of Trial Advocacy as both a civil and a criminal trial specialist. He was a part-time public defender for 20 years in Mankato. After moving to the North Shore, he was the victim witness coordinator for the Lake County Attorney's Office in Two Harbors.

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Personal Injury Attorney for Bolt Law Firm. We are a growing, entrepreneurial law firm looking for another experienced Personal Injury Attorney to support and expand that practice. The candidate would be involved significantly with our nation-wide railroad litigation practice, which includes FELA claims, as well as injury/wrongful death claims associated with crossings, pedestrians, and rail passengers. Candidate will assist with the partners' cases as well as maintain their own caseload. For more information about the firm see our website: www.boltlawfirm.com. Benefits package includes salary, performance incentives, employee health, dental, vision and disability insurance, paid parking, as well as a 401k/profit sharing plan. Requirements and Qualifications: The candidate must: Be highly motivated to learn our railroad litigation and personal injury practice, and eventually develop new business opportunities. One to three years prior experience as an attorney, or a judicial clerkship is preferred. Be able to demonstrate good writing skills. Have good verbal communication skills. Please send your cover letter, resume and salary expectation to: eric.wiederhold@boltlawfirm.com

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