OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVI NUMBER II
FEBRUARY 2019
www.mnbar.org

Bench&Bar OF MINNESOTA

IN EVICTION PROCEEDINGS, LAWYERS = BETTER OUTCOMES

Common sense, the Golden Rule, and new lawyers

Gender pronouns

Alt-remedies to paying student loans

So long, Tim Groshens

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The profession needs us. Let's step up.

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

In July part of my message in this president's page was about the One Profession program that the MSBA has launched. As you may recall, One Profession consists of a series of one-day meetings. In 2019 we will be holding a meeting in each of the judicial districts in greater Minnesota. Each of the meetings is planned with an eye toward the issues and concerns of that district. All of them will provide an opportunity for you to gather with lawyers and judges in your judicial district. The goal is for all the lawyers in the district, including those in private practice, county and city attorneys, public defenders, corporate counsel, and unemployed lawyers, to talk about issues facing your district. For example, there is a tremendous unmet legal need that can't be handled by legal aid, and Chief Justice Gildea is reexamining the possibility of allowing Limited Liability Legal Technicians (LLLTs) to provide legal services. If you are interested in that topic, or other topics in your area, you should plan to attend the One Profession event in your judicial district.

The dates and locations for the One Profession meetings are listed below. Please join me at one of these meeting to help improve our profession.

DATE	JUDICIAL DISTRICT *(bar districts)*	LOCATION
THURSDAY, JANUARY 24	**6th** *(11 & Range)*	*Greysolon Ballroom,* Duluth
FRIDAY, MARCH 1	**8th** *(12 & 16)*	*Willmar Conference Center,* Willmar
FRIDAY, MARCH 22	**9th** *(14 & 15)*	*Sanford Center,* Bemidji
THURSDAY, MARCH 28	**5th** *(6, 9, 13 & 17)*	*Country Inn & Suites,* Mankato
FRIDAY, APRIL 26	**3rd** *(3, 5, & 10)*	*Doubletree, Rochester*
FRIDAY, MAY 17	**7th** *(7)*	Long Prairie
THURSDAY, JULY 11	**10th** *(18, 19 & 21)*	Anoka
FRIDAY, OCTOBER 25	**1st** *(1 & 8)*	TBD

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'Our members will begin to notice subtle improvements'

CEO Cheryl Dalby talks about leading in a time of change

B&B: You're taking the helm during a time of change at the MSBA and Minnesota's two biggest county bars. Will members see any differences in the services they receive from a combined bar staff in the near term?

Cheryl Dalby: In the short term, members should see very little change. Most staff will continue to provide the same services they always have. Over the next few months, our members will begin to notice subtle improvements in the way we deliver our services and programs. They will see increased efficiency, less duplication, and more consistent communications. Members will be able to contact a staff person and feel confident that person will either know the answer to a question or know who will have that information. Members will also notice improvements in our communications. A combined staff will help everyone on staff to concentrate more on the areas in which they excel. This will be a benefit in all areas, but especially for our communications team, where each person will be able to focus on the areas they know best. We're hopeful that members will fairly quickly see that information and programs are more accessible than they have been before.

B&B: What are your longer-term goals in implementing this staff restructuring?

Dalby: Longer term, we will begin looking at whether there are any programs that would benefit from consolidation or more collaboration between bars. Maintaining the separate identities and cultures of the three organizations will always be a top priority for us. But there are some programs and services that could be improved by consolidating them. For example, we will be looking fairly soon at consolidating our databases, so that members will have an easier, more streamlined experience registering for events and updating their professional information at any of the three associations. This will allow all of our members to access information and participate in bar events more easily.

We will also consider whether it makes sense to consolidate our lawyer referral services. We want to make sure we are connecting lawyers to potential clients in the manner that is most helpful to both our members and the public. These kinds of changes will directly benefit members and allow staff to be more efficient at the same time.

With a combined staff, we'll also be able to work more collaboratively toward goals that all three organizations share, such as increasing diversity and inclusion within the bars, promoting lawyer wellness, and increasing access to justice. We'll be more easily able to share information and work toward these goals together with our new, unified staff.

As we work through this transition, we'll be constantly looking for more ways we can improve our service to our members.

B&B: You served as executive director of the Ramsey County Bar Association for 18 years before taking this position. What are the challenges in transitioning to a role in which you'll be overseeing the work of the MSBA and the Hennepin County Bar Association as well?

Dalby: The RCBA, MSBA and HCBA all have distinct identities and cultures. We want to make sure we're maintaining the unique personalities of the organizations. Maintaining those distinct personalities while also getting the organizations to work toward bigger goals collaboratively will take some time.

CHERYL DALBY'S FAVORITE…

HOBBY	BOOK	WRITER	MOVIE	MUSICAL ARTIST	VACATION DESTINATION	RESTAURANT	SMARTPHONE APP
Playing piano	Saving Fish from Drowning	Amy Tan	The Crying Game	Brandi Carlile	New York City	Broder's Deli	LastPass—it keeps all of my passwords in one secure location

We have great volunteer leaders and staff to make that happen.

B&B: Change is a central theme in the legal profession now—changing legal business models, changing technology tools, changing employment options for people with JDs. What's the role of bar associations in helping members to negotiate so much flux in the profession?

Dalby: This is absolutely a time of great change throughout the profession. Lawyers are finding it necessary to adapt to changing economics and new technology. And I think this is an area where the bars can really make a difference for our members. We can help our members not only survive these challenges, but even benefit from them. We can be the resource our members need to remain relevant in the changing economy. And we can offer help adapting to new technology.

I think it's really important to encourage and support new ideas. We have so many talented volunteers and staff working for the bar associations. They are crucial to helping us find creative new solutions to the issues that will face lawyers and bar associations as the practice of law continues to change. And with this bigger, combined staff, we will have so many more opportunities for creativity and efficiency.

These are exciting times for the profession, and especially for our bar associations. No other bar association in the country has made this kind of a change. As we move through this transition, I expect we will see benefits we haven't even imagined yet.

B&B: What's the best—or most memorable—advice you ever got?

Dalby: The best advice I have ever received is to prioritize value over volume. Just creating a to-do list isn't enough for me. I need to identify the tasks that will create the most value for the organizations and focus on those. It's easy to spend too much time on easier tasks that don't have as big an impact on the organization. But when I focus on the work that is actually most important, I know I've moved the organization forward, at least in some small way. And those tasks that don't make the high-value list go on a "do later" list. Things that don't move from that list to the high priority list usually end up being things that would be better done by someone else or don't need to be done at all.

The other great piece of advice I've always held onto is that almost every conversation is easier with a cup of coffee, and maybe a donut. ▲

Court hears MSBA petition on MRPC

On January 15, the Minnesota Supreme Court held a public hearing on MSBA's petition to amend Minnesota Rules of Professional Conduct 1.6 and 5.5. The proposed amendments to 1.6(b) provide clarity as to how lawyers may respond to public criticism from clients or former clients. Recommended changes to 5.5 address the realities of modern interstate practice of law and reflect the bar's understanding of practice areas that are "reasonably related" to a lawyer's field of practice.

Special thanks are due Ken Jorgensen and Eric Cooperstein, who argued on behalf of the MSBA in support of the petition. (The hearing may be viewed at the Court's oral arguments webcast page: *www.mncourts.gov/SupremeCourt/OralArgumentWebcasts.aspx*.) Several justices were active in questioning the presenters, in particular Justices Anderson, Hudson, and Lillehaug, who questioned attorneys arguing both sides. Susan Humiston from the OLPR and Robin Wolpert, chair of the Lawyers Professional Responsibility Board, spoke in opposition to some of the proposed amendments. We now await the court's decision.

Save the date: One Profession coming to Mankato

The MSBA's One Profession event in the 5th Judicial District is set for Thursday, March 28, at the Country Inn and Suites Conference Center, 1900 Premier Drive, Mankato. The program brings together attorneys from all segments of the legal profession. This is a great opportunity to earn CLE credits, discuss developments in the practice of law, and network with your colleagues. At least one of Minnesota's Supreme Court justices will be in attendance, along with several Court of Appeals judges, and the local bench will join us for lunch. The cost for the day is $25, including lunch. Put the date on your calendar and register here: *www.mnbar.org/one-profession*

MSBA helps underwrite professional services tax study

The MSBA is contributing financially to an economic study of the impact a sales tax on professional services would have on Minnesota's economy. The Minnesota Society of Certified Public Accountants is coordinating the study.

The MSBA adopted its legislative position opposing a sales tax on professional services in 2000. Such a tax was seriously considered by the Minnesota Legislature in 2013, and there are signs that the tax may be reconsidered in the future.

The MSBA opposes the tax because it would put Minnesota lawyers at a competitive disadvantage in the national and global economy. Such a tax is also regressive, putting a burden on people of lower income who have less ability to pay, especially during times that they experience vulnerability in their lives. Taxing legal services could push citizens to either forego their legal rights or attempt to represent themselves in the complex legal system, often to their disadvantage. Problems stemming from a lack of counsel, in turn, place further strain on overburdened courts.

2018 year in review: Public discipline

Public discipline in professional responsibility cases is imposed not to punish the attorney, but to protect the public, the profession, and the judicial system, and to deter future misconduct by the attorney and others. In 2018, 45 attorneys were publicly disciplined, up slightly from the 2017 number (40 attorneys) but commensurate with the 2016 number (44 attorneys). Two particular statistics jumped out at me when I was reviewing 2018 public discipline statistics: the number of disbarments, and the number of transfers to disability inactive status.

Disability inactive status is not discipline, and transfers to disability inactive status are not included within the numbers referenced above, but these transfers play an important role in public disciplinary proceedings. When a lawyer asserts a disability in defense or mitigation of a disciplinary proceeding—and is unable to participate in the defense of the proceeding because of this disability—the professional responsibility rules allow attorneys, upon court approval, to transfer to disability status and have disciplinary proceedings stayed.[1] In 2018, six attorneys were transferred to disability inactive status. Over the past 10 years, one or two attorneys have typically transferred to disability inactive status annually (though four attorneys transferred in 2010). I do not know what accounted for the sharp uptick in 2018. The reasons for transfers varied from mental health to substance use disorders to serious physical disabilities, or some combination of the foregoing; no one set of circumstances emerged as a pattern.[2] Hopefully this is a one-year spike, but I worry in light of the increasing evidence of serious well-being issues among lawyers.

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

Disbarments

Eight attorneys were disbarred in 2018. This number is up from 2017 (when five attorneys were disbarred), and more than is typical. The attorneys disbarred were:

- Joseph Capistrant, who was disbarred for misappropriating filing fees and costs, failing to place client funds in trust, failing to file an action as promised, abandoning a client file, and failing to cooperate in the disciplinary proceeding;

- Roy Henlin, who was disbarred for misappropriating significant funds from a trust while acting as trustee, and other client misconduct. The beneficiaries of the trust were teenage children at the time the trust was formed, and the trust had been funded by the children's mother before her death. As of the writing of this column, Mr. Henlin is a defendant in a felony theft by swindle criminal case pending in Hennepin County;

- George Hulstrand, who was disbarred for misappropriating $685 in client funds, but also engaged in multiple acts of misconduct across multiple matters, and had prior similar public and private discipline involving incompetency and client neglect;

- Ian Scot Laurie, who was disbarred following his conviction in federal court for distribution of child pornography;

- Jeffrey Olson, who was disbarred for fraudulent use of his trust account during a suspension from the practice of law for similar misconduct. Mr. Olson also pleaded guilty to aiding and abetting felony mail fraud for some of the misconduct that had led to the prior suspension;

- Amoun Sayaovong, who was disbarred for conduct in Wisconsin and Minnesota, including misappropriation of third-party funds he had garnished, and other misconduct across several files;

- Barry VanSickle, who was disbarred as a matter of reciprocal discipline due to misconduct in California in four separate disciplinary proceedings; and

- Richard Virnig, who was disbarred for misappropriating funds from two clients, and other client misconduct.

The common thread once again this year is misappropriation of funds—which, absent significant mitigating circumstances, generally leads to disbarment. Also notable this year is the incidence of felony-level misconduct by several attorneys.

Suspension

Twenty-three attorneys were suspended for periods of 30 days to four years. This figure continues the trend of rising suspension numbers. A few things struck me when reviewing suspensions as a whole for 2018. Misappropriations of client funds was a basis for discipline in five additional cases. But unlike the disbarment cases, the suspension cases contained evidence of mitigating circumstances such that the court imposed less than disbarment. Combined with the number of disbarment cases involving misappropriations of client or third-party funds, though, 2018 was a big year for misappropriations.

Two cases also involved significant misconduct through lies. One case, that of Mark Novak, involved a pervasive pattern of lies to clients in multiple matters, including falsifying documents. Mr. Novak was suspended for four years, and in fact, had previous misconduct for not telling a client the truth. The case of Bradley Mann also involved a pattern of lies to clients, opposing counsel, and the courts, as well as settling claims without client consent, including one claim for almost six figures.

Perhaps also notable is the fact that two lawyers this year were administratively suspended for failing to pay child support or maintenance. The professional rules contain an administrative suspension provision that allows the court to suspend attorneys who fail to remain current with payment plans.

There are procedural protections in the rule, and at first I thought it counterproductive to take away someone's ability to earn money because they are not paying money when due, but it really is a very effective way to get the attention of the most recalcitrant lawyer non-payers.

Public reprimands

Fourteen attorneys received public reprimands (six reprimands only, eight reprimands and probation), compared to nine reprimands last year. A public reprimand is the least severe public sanction the court generally imposes. Reprimands are appropriate for rule violations that are more than "isolated and non-serious" (conduct that would warrant a private admonition) but not so serious that suspension is needed to protect the public and deter future misconduct.

The most common misconduct leading to a public reprimand was trust account errors that resulted in shortages and negligent misappropriation of client funds. Eight attorneys were reprimanded for trust account books and records misconduct. As I discussed in my October 2018 column, the State Law Library noted this trend and sponsored a free on-demand 1.5-hour trust account CLE entitled "Everything you need to know about trust accounts." You can access it from our website and the state law library's website, where it will be available for the next two years.

Also receiving public reprimands in 2018 were Pamela Larson, for prosecutorial misconduct that led to a new trial in a malicious punishment of a child case, and Joshua Williams, for physical contact with opposing counsel during a deposition.

The OLPR maintains on its website (*lprb.mncourts.gov*) a list of disbarred and currently suspended attorneys. You can also check the public disciplinary history of any Minnesota attorney by using the "Lawyer Search" function on the first page of the OLPR website. I have now been in my position for almost three years, and I continue to be surprised by the serious misconduct of attorneys. I am glad to note, however, that the 45 attorneys disciplined in 2018 represent a *de minimus* portion of the 25,000 active lawyers practicing in Minnesota.

Notes

[1] Rule 28(c), Rules on Lawyers Professional Responsibility (RLPR).

[2] Please note that disability inactive status under Rule 28, RLPR, is different from Inactive Status—Permanent Disability, under Rule 2(C)(6), Rules of the Supreme Court on Lawyer Registration.

The Marriott breach: *four years?*

The recent Marriott breach resulted in the theft of data regarding 500 million guests. To many, however, the most troubling aspect of the breach is not the sheer number of people affected, but the fact that the breach was ongoing for four years. For four years, Marriott did nothing to stop the leak of customer information to cybercriminals.

In its official statement this past November, Marriott explained some elements of the information that had been compromised: "For approximately 327 million… guests, the information includes some combination of name, mailing address, phone number, email address, passport number, Starwood Preferred Guest account information, date of birth, gender, arrival and departure information, reservation date, and communication preference." Financial information was also compromised; it was encrypted, but Marriott does not know whether the criminals also obtained the encryption key. This breach is definitely noteworthy because it was determined that the affected properties were being accessed since 2014.

For most of us, keeping up with the latest large-scale data breaches and checking on the status of our personal information in each case would be a full-time job. As you read this article, there is probably another huge data breach happening that will not come to light for a year or two. But there is always something to be learned from these breaches and they should always inspire a renewed commitment to cybersecurity measures.

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 trials. He is a member of the MN Lawyers Professional Responsibility Board.

The length of time that this breach was happening indicates to me that Marriott now needs to work on developing a culture of security at every level of management. From the person at the front desk taking reservations to the people working in giftshops to the CEO, cybersecurity needs to be a priority. This company is a prime example of an organization whose apologies are only drops in the bucket in view of what needs to be done to restore customer confidence.

From a technical perspective, it is possible that Marriott had very strong defense practices in place. But strong cybersecurity practices require much more than technology and network defense. No matter what Marriott had in place to protect itself, it is clear that the security setup was a "set it and forget it" affair, with very little done to maintain it or support employee education about the human element of security.

The weakest link in any cybersecurity plan containing both proactive and reactive measures is always going to be the human element. No matter how strongly you defend your networks and critical systems, one click by an employee on a malicious link in a phishing email can easily undo all of that. Without education, organizations cannot marshal the resources necessary to develop strong cultures of security. Reactive strategies for when things like this do happen are just as important as investing in prevention.

For organizations and businesses, investing in cybersecurity and paying attention to news of large data breaches like this is important to learn lessons about defense and appropriate response. Allowing a breach to continue for four years is totally unacceptable and organizations can learn from Marriott's mistakes in that regard.

For individuals, I think the lessons for personal security are a bit different. Reviewing Marriott's webpage, I discovered that they offer a call center for people to check up on their personal information, as well as a dedicated website, email notification services, and a service called WebWatcher to scan the internet for one year and alert affected guests of any traces of their personal information.

While it is critical that Marriott take responsibility, and offering these services seems appropriate, the average person should realize that if their personal information hasn't been compromised by this breach, odds are it has already been compromised through one or more of the other breaches that has occurred or is occurring right now. To be proactive about personal cybersecurity, taking advantage of the many services that breached companies offer may seem like the right thing to do in order to best secure your information. But it is ultimately difficult to determine how useful these options are—and important to bear in mind that once your information is out there, no measure is going to get it back.

While I have mixed feelings about any service that scans the internet for personal information, being mindful of signs of fraud is important. In the wake of the Equifax breach, many froze their credit reports and became more mindful about monitoring their credit for any signs of fraud—such as new credit lines of which they were unaware.

Many are frustrated with the continually growing list of companies and organizations that cannot seem to keep our data and personal information safe. As we head into 2019, it may be advisable for our nation to think more seriously about cybersecurity-related regulations for handling consumer data. Even if we can't expect a 100 percent success rate, consumers should be able to have some faith that if a breach like this does happen, it will be addressed immediately—not four years after the fact. ▲

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Common sense, the Golden Rule, and new attorneys

Being new at anything—let alone something as demanding as being an attorney—can be disconcerting. Though the long years of law school and running the gauntlet of bar prep undoubtedly help to mold individuals from student to professional, there are some lessons that can only be learned outside the classroom, and some of them are so basic they're easy to overlook. Whether you're establishing a solo practice, signing on as corporate counsel to a Fortune 500 company, or joining the ranks of an established law firm, a few common sense rules will serve you in your career for years to come.

First, ***be nice to the staff***! This is a particularly important lesson for new attorneys who are joining well-established law firms and corporate organizations. More times than not, those office assistants, paralegals, and secretaries have been doing their jobs, or working in that office, for a long time. If you employ the golden rule and treat others as you wish to be treated, these individuals can become a valuable resource in the workplace and a saving grace in critical moments. Treat them rudely or disrespectfully, though, and they may not be quite so quick to lend a hand when you could really use it. This tip also applies to opposing counsel in the courtroom. Your career does not start and end with one case and, particularly in smaller communities, it is likely that you will face off against many of the same adversaries time and again. Don't earn a reputation for being rude.

ERIKA M. GNAZZO currently serves as pro bono legal counsel for the United States Air Force Judge Advocate General's Corps in Tokyo, Japan. She has a variety of experience, ranging from commercial litigation to criminal defense.

Learn to recognize when you can find the answer to a question, and, as importantly, when you can't.

You must also learn to ***recognize when you can find the answer to a question, and, as importantly, when you can't***. Often, new attorneys hesitate to ask a question or seek help for fear of looking incompetent or unknowledgeable. Refusing to ask for help will cause you to waste valuable time going down rabbit holes. Conversely, though, a partner at your law firm will likely not be pleased if you come to them with a question that could have been answered easily with some due diligence. When you have reached a point where you simply don't know what to do or where to look, then recognize that it is time to seek reinforcements. When you approach your boss or the partner you're working with, be sure to tell them everywhere you've already looked in an attempt to solve this problem yourself. This will demonstrate that you didn't just run for help, but instead possess the motivation to try to answer the question before coming to them. If you find yourself confused from the get-go on a particular task, it would behoove you to seek additional guidance from the assigning party before getting started.

Finally, keep in mind that you must ***always work to understand how your clients' objectives fit within the larger picture of their lives or businesses.*** At the beginning, many young attorneys focus solely on winning the legal argument without fully understanding or appreciating a client's objectives, or the impact that a judgment either way may have on the client. Having an honest conversation with a client prior to any court proceeding can help to set expectations, defuse high emotions, and aid the client in developing realistic expectations about the outcome of the case. Remember, a majority of clients only hire an attorney because they are going through a very hard time in their lives. By being frank with them from the outset, you can help to curb expectations and, potentially, disappointment down the road. On the other hand, you'll have even more reason to celebrate a client's victory should the case go your way.

The job of lawyer is unique. Few professions require individuals to delve so deeply into the personal lives of others, to so critically analyze the placement of a comma, or to review hundreds of thousands of pages to find the one anomaly. It truly is not a job for the faint of heart, but neither can we afford to lose our hearts in the process. By treating others as we wish to be treated, recognizing when it's time to seek help, and reminding ourselves that someone else's expectations are more important than our own, we can establish ourselves as the kind of attorney that others want to work with and to work for, regardless of our hourly rates or practice areas. ▲

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MSBA

'You have to be able to adapt'

Why did you go to law school?

I went to law school with a genuine interest in pursuing study in international law. While there, however, I quickly realized how much I enjoyed trial work and appellate advocacy. I suppose you could say that I found my voice and became quite comfortable in that environment, whether in front of a mock panel of judges or court proceeding. It's ultimately what led me to a successful national moot court championship and pursuing a litigation career, first in prosecution and now in the private sector.

You recently moved to private practice after working as a prosecutor in the Dakota County Attorney's office. Is it difficult transitioning between such different kinds of legal work?

It would certainly appear to any objective observer to be quite the challenging jump. But when you have the underlying skills to do the work, learning the law can be both fun and intellectually stimulating. In many ways, it reminds me of law school, especially in those second and third years, where you can survey and learn about many areas. I think transitioning from a purely transactional to a litigation position would pose a greater challenge.

What are the most challenging facets of your job?

For the most part, prosecution work is very direct. Generally, you have your facts, reports, statements, and underlying criminal statute. With civil litigation, the cases are complex and oftentimes involve thousands of documents, extensive discovery, and substantial pretrial motion practice. The stakes are high and cases go on for years. Having a command of the current procedural posture and facts while simultaneously crafting a long-term goal and strategy can be difficult. When cases heat up or some unforeseen event occurs, you have to be able to adapt accordingly.

This year you're serving as the chair of the New Lawyers Section. What have you found most valuable about your involvement in the bar association?

The Minnesota State Bar Association does incredible work and offers so many resources to its members. What is unfortunate is that many members are not aware of how many opportunities are afforded. Understandably, all lawyers are busy and there is only so much time you can spare outside of work and family obligations, but it is my sincere hope that the NLS in particular does a better job communicating those benefits to our members.

How do you like to spend your time when you're not working?

I currently play on two hockey teams and try to spend most of time away from work with my wife and dog. This sort of work can be stressful, and it is important to find time for the most important things. ▲

RYAN McCARTHY *is the chair of the New Lawyers Section of the MSBA, a member of the MSBA Executive Committee and Council, and an associate at the law firm of Bowman and Brooke, LLP. Prior to joining the firm, Ryan served as an assistant county attorney with the Dakota County Attorney's Office, prosecuting felony person and property crimes. In addition to his practice, Ryan is active in the legal community and holds leadership roles in the Minnesota State Bar Association, Minnesota Alliance with Youth, Warren Burger Inn of Court, and the Federal Bar Association.*

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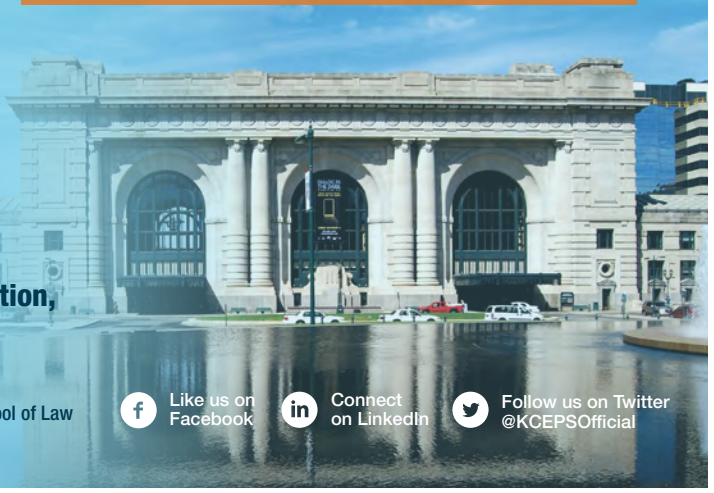

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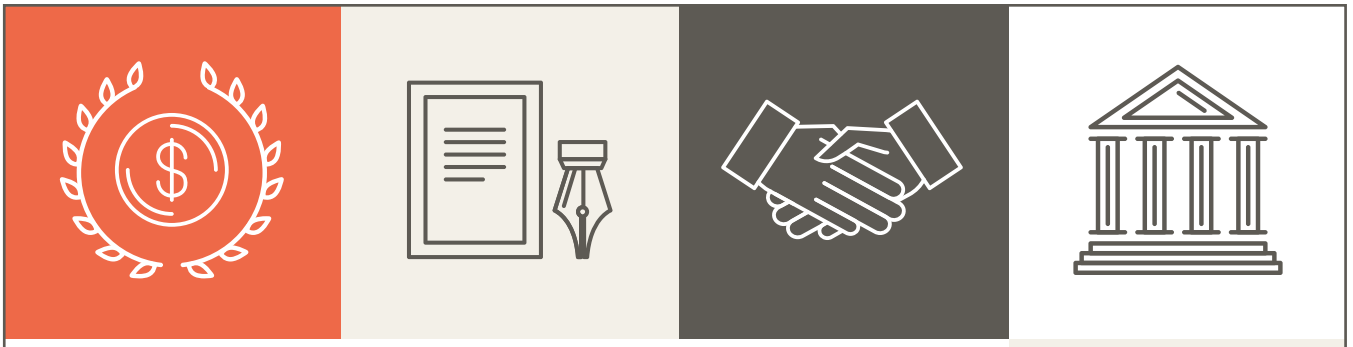

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SO LONG, TIM

When Tim Groshens was named executive director of the Minnesota State Bar Association in 1985, Ronald Reagan was president, big hair was stylish, and desktop computers were still just an unsettling rumor in most lawyers' offices.

Amid the myriad changes of the ensuing 34 years, Groshens' leadership of MSBA staff and his service to officers and members remained constant. On the occasion of his retirement this winter, MSBA member, legal ethics expert, and longtime friend Chuck Lundberg volunteered to solicit recollections about Tim and his legacy at the bar, and we're pleased to present them here.

Bon voyage and the best of luck, Tim —and thank you.

WILLIAM J. WERNZ
Dorsey & Whitney
(ethics partner, 1992-2012) (retired);
director of the Lawyers Professional Responsibility Board, 1985-1992

Around the start of the new millennium, Tim Groshens began pestering me in his typically quiet but persistent way. Tim was recruiting lawyers to provide for MSBA members short, useful summaries of common issues and solutions in their practice areas. Tim's idea was to post this material on the MSBA website regularly—desk books for the new era.

My own work in legal ethics, at Dorsey & Whitney and the Lawyers Board, had persuaded me that lawyers badly needed knowledge management, including legal ethics. When I started in the field in 1981, the problem was that there were few good, useful, well-stocked resources. Two decades later, the problem had become that there were too many rules and opinions to store in human memory. Tim was preaching to the choir.

This chorister, however, had his own views on how to organize legal ethics knowledge. I told Tim I could not do short, useful summaries. If he would be patient, and provide some essential help, we would do the job right.

He didn't let me forget. Thus began the development of my treatises, *Minnesota Legal Ethics* and *Dealing With and Defending Ethics Complaints*. Tim was patient but persistent. I finally retired from Dorsey and found the time needed.

Tim found editors, layout specialists, a website for MSBA's hosting, and publicity. He made helpful suggestions about tone, audiences, uses, and many other things. We agreed that the treatises would be free and available to all, not just to MSBA members. I believe that together Tim and I created very useful resources for Minnesota lawyers.

Tim keeps after me: "Who is going to take over the treatises when you're done?" I haven't figured that out. Now that Tim has answered the question for himself, perhaps he will find an answer for me. ▲

SUSAN M. HOLDEN
SiebenCarey;
MSBA president 2005-2006

I really got to know Tim Groshens after I started in the MSBA officer track. Over those years, Tim and I spent hundreds of hours together at meetings and conferences in Minnesota and nationally. And I began to appreciate how truly fortunate the Minnesota bar was to have Tim at the helm.

One of Tim's strengths has been his ability to gently manage the change that comes with having a new president every year. These incoming presidents, as well-intentioned as can be, generally have a few ideas of what they would like to accomplish during their one-year term. But it doesn't always serve the best interests of a bar association to have its focus shifted every 12 months when a new president takes office, or to devote resources to a new "signature program" dreamed up by the most recent volunteer leader who is "in charge." Tim managed that tension well.

During the years that I was an officer, Tim's guidance helped the MSBA generally avoid the dizzying whipsaw that can occur with annual leadership change. My term as president came at a time of transition in the MSBA's governance structure: The Executive Committee had become the Council and the Board of Governors had become the Assembly, and both bodies included expanded representation of multiple groups from within the MSBA and outside entities. I planned and prepared to continue the efforts of the presidents before me, with no major programmatic initiative of my own; the idea was to implement the new governance structure intentionally to engage more members in the MSBA.

Mission accomplished from Tim's perspective. Then, while we were deciding what we would be doing that bar year, the events of the day changed our plans. On August 29, 2005, Hurricane Katrina struck the Gulf Coast, devastating the region and creating a huge need for humanitarian aid and legal assistance. Suddenly there was a new agenda to address. When I went to him to discuss how I wanted to respond to this disaster, Tim's approach revealed another one of his significant strengths as executive director—the ability to engage a talented staff in support of the volunteer leaders. Tim reassigned personnel to assist in designing and implementing a fundraising effort to collect money and law office furnishings to support lawyers and legal services providers on the Gulf Coast. With this help, we raised more contributions than any other state bar association in the country.

And that was typical of Tim—always committed to the success of MSBA leadership. He wanted each president to enjoy their term and to accomplish the maximum they could on behalf of the MSBA and its members. But while much of the credit for the MSBA's success in Katrina relief was given to me, most of that credit belongs to Tim and the staff of the MSBA, without whom our success (and my success) could never have been achieved.

As an officer of the MSBA, I gained experience that could not be duplicated in any other way in our profession, and all of it was enabled and enriched by Tim Groshens. Our weekly meetings ended, of course, at the end of my term. But I am thankful for the continuing friendship we forged. I wish Tim a long and satisfying retirement, and I thank him for his many years of effective service. ▲

KENT GERNANDER
Streater & Murphy PA (retired);
MSBA president, 2000-2001

Tim Groshens' challenge was to serve as CEO of an organization whose members—all lawyers—annually choose a new board and chair, who take office in turn with ambitions to change the organization and improve the world. During Tim's 34 years as executive director, bar presidents came and went, with varying styles, temperaments, and wisdom. Tim accepted and supported their initiatives, while managing staff, operations, and budget, and seeing that the work of the organization was carried out and its members were served.

I enjoyed Tim's support during my time in office. Calls from Tim to me would begin "Hi, it's Tim, do you have a minute?" and continue with reminders and questions about things to be done. His unassuming query "Do you want to..." would suggest a course of action while leaving the feeling that it was my idea. At assemblies, his quiet presence at the back of the room—arms folded across his chest, surveying the scene—offered assurance that things were under control.

We once undertook a project to build a house with Twin Cities Habitat for Humanity. Tim (a hobbyist carpenter) supported the project enthusiastically, helping to obtain board approval, raise funds, engage Jerry Regnier (a former executive director) and Ted Collins to supervise the construction crew, and recruit lawyers and judges as volunteer workers. The MSBA completed three family houses over a three-year period, demonstrating the organization's commitment to public service and Tim's management skills.

If you ask Tim what he valued in his tenure, he will say that he likes lawyers, finds them intelligent and committed, and enjoys their company. His legacy is a strong organization that does its work well through sometimes-challenging times. ▲

FRED FINCH
Bassford Remele PA (retired);
ABA Board of Governors, 2009-2012;
MSBA Assembly 2005-2019

I was admitted to practice in the fall of 1973 and immediately joined the Minnesota State Bar Association. My law firm virtually required attorneys to join the MSBA. But it didn't pay our dues. The theory was that we could easily deduct our dues on our individual tax returns—the firm would pay for expenses that might be challenged by the IRS if we were audited.

As a new associate, I was actually making less than I had made in a non-legal job. I had a family and a mortgage. I found out that I could ease my cash flow problems by paying my bar association dues semiannually. I did so for several years.

In the fall of 1980, I sent in my payment of half my bar dues for 1980-1981. I got back a letter returning my check and saying that I had to pay my dues in full. It was signed by a guy named Timothy Groshens. I didn't know who he was, so I looked him up in the bar directory.

Younger lawyers won't know about the bar directory. One issue of Bench & Bar each year was an annual bar association directory. It contained names, addresses, and telephone numbers for the bar association staff, judges, court officials, and bar association members. For many years, that issue stayed on the top of my desk, next to my phone. When I needed to talk to a lawyer or judge, it was the first source for contact information.

Tim Groshens wasn't in the directory. He wasn't listed as a judge, as a lawyer, or as bar association staff. He was a nonentity.

I don't remember if I wrote a letter to Mr. Groshens telling him what he could do with his letter or if I just called the MSBA office and asked to talk to him. I think I sent him a letter. In those days, downtown law firms used letterheads that bore the names of all the members of the firm. My firm's letterhead had an impressive list of names. I wasn't even on the bottom of the listing. I thought that might impress him into relenting. It didn't.

Eventually, we agreed to meet. I walked from my office high in the IDS Tower over to the MSBA offices in the basement of the Minnesota Federal Building. It's now known as 6 Quebec. In those days it was the home of a savings and loan association. If you don't know what a savings and loan association was, ask an old lawyer.

Timothy Groshens turned out to be a new lawyer. I later learned that he had been hired as the Association's director of legal services and legislation. He had lots of fashionable long hair, a moustache, and was wearing a suit and a tie. (In those days all male lawyers wore suits and ties in the office. Every day.)

When we met, Mr. Groshens insisted that I had to pay my full bar dues in one payment at the beginning of the bar year. I told him that I had been paying in two installments for several years and didn't have the cash to pay the oppressively large bar dues in a single payment. Groshens told me that if I failed to pay the full amount it would mean the end of the bar association—indeed, the end of life on earth as we know it. And it meant that they would kick me out of the bar association!

Well, I took my bar association memberships pretty seriously. I was a volunteer lawyer with Legal Advice Clinics—the predecessor of Volunteer Lawyers Network—and I served on its board of directors. I served on two or three committees of the Hennepin County Bar Association and regularly attended functions of the MSBA Litigation Section and Labor Law Section.

But I stuck to my guns. I pointed out that the bar association needs young lawyers to join and remain active to maintain its viability. I told him that with the outrageously increasing cost of living, young lawyers were having a hard time meeting their financial obligations. (At the time, the cost of living had been increasing by over 14 percent per year). Forcing lawyers to make full payment would prevent or discourage membership.

Mr. Groshens was not impressed. What if we let everyone pay their dues in installments? It would lead to financial ruin. The increased accounting costs of keeping track of installment dues payments alone would be ruinous! He wouldn't relent.

I gave Mr. Groshens my check for half the annual bar dues. I told him to give it to his boss. I told him that if he wanted to kick me out of the bar association and reject a young lawyer who was active in bar association activities, that would be a rational choice. I could accept it. But I was willing to live with it. (By this time, I had convinced myself. I believed that it was not a matter of half the bar dues but rather a matter of principle!) (As you know, lawyers make a lot of money out of people who believe in a matter of principle.)

Groshens (top row) with the MSBA staff in 1981.

Groshens told me that I would be hearing from the Association.

I don't think I ever heard anything more from the MSBA about the matter, but my check cleared! In the May-June 1981 issue of Bench & Bar, there was a brief notice stating that the Executive Committee, in responding to numerous requests from the membership, had determined to allow members to pay annual dues in two installments, on or before October 1 and February 1 of each bar year, so long as they paid a service fee of $2.50 per payment for the privilege.

Despite his failings as a dues collector, young Mr. Groshens must have had some positive qualities. By October 1982, Bench & Bar listed him as the associate executive director of the Association. In July 1983, he was designated as the editor of Bench & Bar. And when Celene Greene left in April, 1985 to become executive director of the Oregon Bar Association, Leonard Keyes, the MSBA president, announced that out of 231 applicants for the position in a nationwide search, Timothy Groshens had been hired as the new executive director of the MSBA.

In later years, I have had the privilege of working extensively with Tim Groshens on matters public and private. I have come to have a very high regard for his low-key leadership style. I could even manage a smile when, in 2005, after laboring for the better part of a year to improve the efficiency of the governance structure of the association, Tim pointed out that our governance committee had managed to increase the size of our governing body from 125 to 142. Up to now, however, I have managed to avoid reminding him that our first encounter was his effort to kick me out of the Minnesota State Bar Association. ▲

PATRICK J. KELLY
Kelly & Lemmons, P.A.;
MSBA president, 2006-2007

On one occasion, Tim and some of the officers of the MSBA attended a small conference in the Southwest with 15 bar directors and their presidents. It took place over a weekend, and after a 10-hour discussion in a windowless room, the host state held an intimate formal dinner on an outside patio on a warm desert night; spouses were also invited, on the condition that all their expenses were not charged to any bar association. The host posed a question to the group: Who was or is the most important person in your practice of law or as an executive director? The group consisted of alpha individuals—all successful, aggressive, coldly pragmatic people. After an intense day, I knew the lawyers were thinking of law partners, judges, former professors or clients. The executive directors, always thinking in the present, were faced with couching an answer that would include the current officers at their table.

A certain amount of time was elapsing and no one was volunteering an answer, and as I looked around the patio, I saw the spouses—the true partners in life's journey. I stood up and simply stated from the heart that my true love was my spouse and confidant throughout the years. Tim, rubbing his forehead—and with just a bit of a smile—leaned over and told me, "I don't think this is the direction he wanted, but you just may have won the hearts of many."

Then Tim stood up and declared that there was no question that his wife, Mary, and his children were the most important factors in his career. Tim always had your back, and after he spoke, 14 directors and presidents offered unbelievable statements about their life partners, families, and eventually, other individuals in their career. The last president got up and stated that she was announcing her separation from her spouse tonight because he had no impact. A dark silence followed. I looked at Tim, who whispered, "Patrick, you always make things more than interesting." Then she smiled in the silence, gently kissed her spouse, and proclaimed that she was just kidding—and added, "Way to go, Minnesota, you just made my weekend!" ▲

"Under Tim Groshens' long and excellent leadership, the MSBA has achieved new heights of success. He is a respected leader of bar executives throughout the nation."

—Robert Stein, Everett Fraser Professor of Law, University of Minnesota; former ABA executive director

"I have always been impressed by Tim's wise counsel when wisdom was needed; his unflappability when others would be close to collapse out of anger and frustration; and his adaptability to different personalities (a new MSBA president every year) and to changes to the legal profession, when many would be unable to adjust and change as the situation required. To do so at a high level for all of these years is very impressive. To accomplish this while remaining well-liked and respected is unusual indeed."

—Chief Judge Edward Cleary, Minnesota Court of Appeals

"From the minute I met Tim in October of 1992, Tim has been someone I could depend on for sound, well-reasoned advice. Tim is as professional as any executive director I ever worked with in my 25 years on the job. He is quick to analyze situations, and quick to develop a course of action. A no nonsense guy, Tim would always tell me, when asked, whether we were off course or not. Once when I was frustrated about how to handle an issue concerning very young employees, Tim rocked back in his chair and said, 'Tom, you just have to get over it.' The simple, common sense nature of Tim's advice was always present. Minnesota was fortunate to have his services for those many years."

—Tom Pryz, executive director emeritus, Indiana State Bar Association

"Tim has a quietly self-confident, droll sense of humor that he uses to laugh with you and at himself, but never at you. He's quick to evaluate, but never judge; knowledgeable, but never acted like he had to let you know that. He is genuine, a trait whose importance in leadership I learned from him. The way he entered the room was telling. He was always unobtrusive, and you would think him a wallflower, but if you watched him, he quietly worked the entire room like a master politician, greeting people warmly, always with that quiet, welcoming face."

—George Brown, State Bar of Wisconsin executive director 2000 – 2017

Tim Groshens at the time of his appointment as MSBA executive director in 1985.

IN EVICTION PROCEEDINGS, LAWYERS = BETTER OUTCOMES

By Luke Grundman,
Muria Kruger,
and Tom Tinkham

A study arising from the Housing Court Project in Hennepin County proves that legal representation in housing court helps prevent homelessness.

Evictions have significant and often tragic consequences for tenants and their families. An eviction notice can spell a nearly immediate need to move out with nowhere to go but to double up with a friend or relative—or worse, end up in a shelter, the car, or the street. For the children, this is likely to mean significant emotional instability as well as absence from school and the search for a new school. For the county, an eviction may mean the tenant must apply to live in a publicly supported shelter.

The longer-term consequences of an eviction for the tenant are severe. In this tight housing market, most landlords with decent properties will not consider a tenant with an eviction history, relegating those unfortunate families to substandard housing at best. Despite these significant legal and practical consequences, tenants have no right to legal representation—and almost by definition cannot afford an attorney. The Housing Court Project in Hennepin County provides some representation to some tenants. This article describes the project and a recent study examining its effectiveness. The lessons learned in Hennepin County from this program are applicable in varying degrees to the other Minnesota communities.

The eviction process

In Hennepin County and elsewhere in Minnesota, the eviction process is circumscribed by statute. The plaintiff, usually a landlord, serves a summons on the defendant requiring the defendant to appear at a hearing in not less than seven days (often *exactly* seven days later).[1] Since the law does not require personal service, some tenants receive only a few days' warning when they find a summons taped to their door. In Hennepin County these hearings are held on the third floor of the Hennepin County Government Center three afternoons each week. The study revealed that the number of evictions set each day ranged from 17-45. Failure to appear at the initial hearing results in a default and the issuance of a writ of recovery to remove the tenant.

It is eye-opening to walk through the third floor hallway just before housing court opens to see who is being summoned to this unhappy event. Legal Aid and Volunteer Lawyers Network keep demographic statistics on the families represented at housing court. Of tenants who receive full representation, 79 percent self-identify as people of color or mixed-race families. More than half (52 percent) identify as black or African American. Almost 70 percent are families led by women, most of which constitute single-adult households. The large majority (87 percent) of families have at least one minor child in the home. 80 percent of represented families make less than the federal poverty guidelines (currently about $400 per week for a family of three). The remaining 20 percent make less than twice the federal poverty guidelines.

At this initial hearing, the court determines whether there are contested issues requiring a trial. If a trial is required, the court normally must set that trial within six days.[2] If the landlord prevails, the court issues the writ of recovery but can stay its execution for a reasonable time not to exceed seven days.[3] At the expiration of any stay, the sheriff serves the writ, giving the tenant 24 hours to leave or be forcibly removed.[4] Depending on the circumstances, a tenant who is evicted will have two to four weeks from service of the summons to move and find a new residence.

In the year from July 1, 2017 to June 30, 2018, 5,182 eviction cases were filed in Hennepin County. Landlords are frequently represented by attorneys. Even when they aren't, the landlord is often represented by an agent knowledgeable about the eviction process. About 75 percent of documents filed in Housing Court are efiled.[5] *Pro se* tenants are not required to efile, so that figure suggests that most landlords are sufficiently sophisticated to efile. Very few tenant defendants are represented by private counsel. Of the 5,182 eviction cases filed, court records indicate that only 163 tenants had an attorney of record.

The Legal Aid and VLN Housing Court Project

Mid-Minnesota Legal Aid and Volunteer Lawyers Network have maintained a legal clinic at the Hennepin County Courthouse for 18 years. Mid-Minnesota is funded by the state of Minnesota, foundations, and many individual contributions. VLN, the pro bono arm of the Hennepin County Bar Association, is funded by the bar, foundations, and many individual contributions derived mostly from the legal community. The city of Minneapolis, Hennepin County, and the Pohlad Family Foundation have recently provided significant additional financial support to enhance the court project. Currently, 11 fulltime equivalent attorneys from Legal Aid see clients at the housing court clinic and provide advice and full representation where time and resources permit. In 2017, 149 volunteer attorneys with VLN provided over 1,400 hours of legal service at the clinic. Generally, VLN attorneys provide brief advice on evictions, help in negotiating settlements, and assistance in preparing expungement petitions.

Services currently provided by the court project

SERVICES PROVIDED	Totals
Expungements	**746**
Lockout petitions	**101**
Emergency repairs	**178**
Evictions	**1,376**

The project provides brief advice service in fewer than one-third of eviction cases filed (1,376 of 5,182).[6]

The study method

The study compared the results for tenants who were unrepresented to those who received limited advice or assistance and then to those who received full representation. Eleven random court calendar days were selected for full review. For each of the 11 days, the entire docket was downloaded. Volunteers then reviewed the court records for the 274 cases opened on those days.[7] Cases where a tenant received brief advice in that group (29) were identified and compared.[8] The results for unrepresented persons were also compared to cases from the first six months of 2018 in which tenants received full representation from Legal Aid (100).

Study results

Fully represented tenants win or settle their cases 96 percent of the time. Clients receiving limited representation win or settle their cases 83 percent of the time. That figure falls to just 62 percent of tenants without any representation.

The relative differences in the rate at which tenants remain in the home at the end of the case were examined. We computed this number by adding the number of cases in which the tenant won, plus settlements that did not provide for a move-out date and did not result in the issuance of a writ of recovery. (When a case involves a settlement, a writ of recovery indicates the tenant did not comply with the terms of the settlement.)

The project also analyzed some of the cost savings to the public from having fewer families evicted and thereby forced to apply for public shelter. Public money pays on average $6,419 per each four-person family when that family uses a shelter.[10] A recent study showed that 55 percent of Hennepin County tenants removed from their homes by a deputy sheriff used an emergency shelter.[11] While it is difficult to quantify the savings in shelter costs when a tenant family can remain in its residence, that savings is undoubtedly substantial. And though it is even more difficult to measure, the benefit to children from avoiding this disruption is huge.

Many settlements result in move-out agreements. Some tenants simply cannot pay their rent. This study sought to differentiate between a move-out agreement that gives a tenant a matter of hours or days to move, compared with one that gives a family weeks or months to move. All the data showed a wide range. Many tenants—mostly unrepresented ones—received just one or zero days to move. Some tenants received as many as 75 days to move.

Table 3 shows both the median and the average number of days for each group of tenants. It confirms that represented tenants fared much better than unrepresented tenants in the length of move-out agreements. Fully represented tenants received an average (and a median) of twice the number of days before a move-out becomes effective than unrepresented tenants.

In an eviction case, courts issue writs of recovery as the final act of delivering the property to the landlord. A writ of recovery instructs the Hennepin County sheriff to remove a family from a home. Once deputies tape the writ to a family's door, the family has 24 hours before the deputies may return to forcibly remove them from the premises. The execution of a writ of recovery by deputies constitutes the least desirable—and most jarring—outcome of an eviction case. Families lose possessions, undergo significant stress, and have almost no time to plan for alternate living arrangements.

Table 4 shows that, with respect to avoiding the issuance of a writ, represented tenants fare significantly better. Unrepresented tenants are three times more likely to have a writ issued than fully represented tenants. Even when the analysis focuses only on settlements (excluding wins and losses), unrepresented tenants are more than twice as likely as fully represented tenants to find a deputy sheriff at their door.

This project also focused on eviction records as a clear indictor of housing stability. Landlords identify evictions as a highly determinative bases for denying housing application—more determinative, in fact, than most types of criminal records. **Table 5** shows stark differences in eviction records for represented versus unrepresented tenants.

Very few unrepresented tenants leave court with a clear eviction record. Between 73-78 percent of fully represented tenants do. Failure to remove the record of an eviction filing leaves a detrimental mark on even successful unrepresented tenants, making it more difficult for them to find stable, safe, and healthy housing going forward. It is likely that the longer-term clearance record for both represented categories would be much higher if records were examined longer after the eviction process. Both Legal Aid and volunteer lawyers will schedule expungement motions after the eviction for tenants who qualify. These hearings are typically held, at the earliest, two or three months after the eviction action was filed.

Table 1: Results of the cases

	Totals	Tenant Win	Landlord Win	Settlement	Redemption[9]
Unrepresented	219	24 (11%)	80 (37%)	111 (51%)	4 (2%)
Represented	100	21 (21%)	5 (5%)	74 (74%)	0 (0%)
Limited Representation	29	7 (24%)	4 (14%)	17 (59%)	1 (3%)

Table 2: Proportion of tenants who remain in the home

	Remained
Unrepresented	31%
Represented	52%
Limited Representation	48%

Table 3: Length of move-out agreements

	Median Days	Average Days
Unrepresented	10	14
Represented	20	31
Limited Representation	17	20

Table 4: Rate of forced departure

	Writ Issued Settlements	Writ Issued All Cases
Unrepresented	32%	45%
Represented	15%	15%
Limited Representation	24%	28%

Table 5: Effect on eviction records

	Record cleared
Unrepresented	6%
Represented	78%
Limited Representation	17%

The data and conclusions from this study align with other recent analyses of eviction representation.[12] As a result, more jurisdictions have implemented programs to provide all low-income tenants with lawyers in housing court. New York City, San Francisco, Los Angeles, and the District of Columbia are all in stages of implementing complete right to counsel. Many more are poised to take the step.

Conclusion

The study demonstrated that tenants who are represented in eviction proceedings have better outcomes and tenants who are fully represented have even more positive outcomes. Until there is a recognition that all tenants in eviction actions should have access to counsel, we can all take steps to give more tenants an equal chance in housing court:

■ Volunteer with your local pro bono group to represent tenants in housing court. In Minneapolis, Mayor Jacob Frey has supported an initiative to add more attorneys. Call VLN and join the effort.

■ Support your local Legal Aid office financially so it can provide more representation.

■ Encourage your local public officials to even the field in housing court by providing financial support for pro bono and Legal Aid representation. ▲

The authors of this article wish to thank the many public officials who recognize the importance of housing court to community well-being and have supported efforts to represent tenants who cannot afford an attorney. In particular, we thank Mayor Jacob Frey of Minneapolis, Commissioners Marion Greene and Peter McLaughlin of Hennepin County, and members of the Minneapolis City Council.

Notes

[1] Minn. Stat. §504B. 331.
[2] Minn. Stat. §504B. 341.
[3] Minn. Stat. §504B. 345 Subd 1(d).
[4] Minn. Stat. §504B. 365 Subd 1.
[5] Hennepin County efiling monthly reports.
[6] Although 1,376 persons with eviction issues received assistance during this period, many of them come to the clinic with eviction issues even though no eviction action was filed. The project currently represents fewer than one-quarter of the defendants served with an eviction summons.
[7] Volunteers received written instructions and in person training. Thanks to the 15 volunteers—summer associates from large law firms, paralegals, and law librarians—who collected all of the data.
[8] Certain types of scheduled cases, such as commercial disputes and non-rental real estate disputes, were excluded from the study.
[9] Redemption refers to a relatively rare circumstance where there is no settlement but the tenant pays the rent in arrears plus court costs and is able to stay in the home.
[10] Homeless shelter costs were surveyed and averaged for a family of four.
[11] Holdener, et al., *Eviction and Homelessness in Hennepin County* (May 19, 2018) at 3.
[12] RJ Vogt, *Philly Sees New Push to Provide Attorneys for Poor,* (*accesstojusticelaw360.com* (11/18/2018) (Study finds Philadelphia could save $3.5 million by spending $3.5 million to represent poor tenants in eviction cases.)) Julian Birnbaum, *Chicago's Eviction Court: A Tenants' Court of No Resort.* 435 (Represented tenants were more than twice as likely to have their cases dismissed. When tenants were represented the rate of landlord summary possession awards dropped from 84.2 percent to 38.7 percent);

- Boston Bar Association Task Force on Expanding the Civil Right to Counsel, "The Importance of Representation in Eviction Cases and Homelessness Prevention," *http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf*. (At Quincy court, two-thirds of tenants receiving full representation were able to stay in their homes, compared to one-third of those who lacked representation.);
- Housing Help Program, Homelessness Prevention Pilot Final Report, *http://seedco.org/wp-content/uploads/2011/11/Housing-Help-Program.pdf*. (1,059 families facing eviction in the South Bronx enrolled in the project. The project prevented an eviction judgment for 85.6 percent of clients. Addressing other long term intended goals, HHP prevented shelter entry for 94.3 percent of clients.);
- John and Terry Levin Center for Public Service and Public Interest, Stanford Law School, San Francisco Right to Civil Counsel Pilot Program Documentation Report, *https://sfbos.org/sites/default/files/FileCenter/Documents/49157-San%20Francisco%20Right%20to%20Civil%20Counsel%20Pilot%20Program%20Documentation%20Report.pdf*. (117 full-scope cases and 692 limited scope cases. 63 percent (56) of full scope cases resulted in the tenant retaining their home, and 35 percent (31) resulted in favorable negotiation of move-out date to prevent homelessness.);
- Carroll Seron, "The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Random Experiment" *https://www.jstor.org/stable/3185408?seq=1#page_scan_tab_contents*. (268 participants—134 in the control group and 134 in the treatment group. Judgments were issued against 52 percent of control cases but only 32 percent of treatment cases.);
- Jessica Steinberg, "In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services" *https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2112&context=faculty_publications*. 96 low-income tenants received unbundled one-time legal services; 20 low-income tenants received full legal representation; 305 tenants had no legal representation. Tenants who received unbundled one-time legal services retained possession of unit 18 percent of the time; tenants who received full legal representation retained possession of the unit 55 percent of the time; tenants who had no legal representation retained possession of the unit 14 percent of the time.

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BEYOND THE BINARY

Practical advice for using gender pronouns

By Christy Hall and Conner Suddick

Misgendering a person—such as referring to someone as "sir" or "she" when they are not—is an act of gender violence. It may seem like an innocent mistake, or not a big deal. But for a transgender person, being misgendered cuts to the core of their identity. "That sensation is a potent split-second mixture of anxiety and helplessness and fury and shame and dread and resignation," writes Joli St. Patrick.[1] Samara Ballen explains, "Misgendering someone is... a window into your perception of a person. It's unconscious honesty that you see a person as nothing different than their birth sex."[2]

In the English language, pronouns are used to replace a noun or phrase. Through formal education, we are taught to refer to people in a binary, which assumes that all people use "he" or "she" singular pronouns ("He went to catch the ball" or "She ran to catch the bus"). In reality, there is a broader spectrum of pronouns that people may use. Over the past two decades, for example, using "they" as a singular pronoun has become more common in the transgender community.

Pronouns are not just an elementary grammatical concept. Pronouns are a fundamental element of recognizing and affirming a transgender person's identity. This article aims to provide more information on transgender identities and offer practical advice to those who want to prevent misgendering and be more inclusive in their language.

Transgender 101: Fundamental terminology

Understanding transgender identities and language is a crucial first step in learning how to use the correct pronouns. In our society, we often conflate sex and gender when they are, in fact, very different. Sex is a label, determined by an observer's interpretation of a person's anatomy at birth. Usually, sex is medically defined as male, female, or intersex.[3] Gender is more complex and is influenced by social, cultural, and psychological factors. Everyone has a gender identity, which is an internal knowledge of your own gender; this is how you know you are a man, woman, or a different gender.[4]

Given all these terms, "transgender" describes a person whose gender identity is different from their sex assigned at birth.[5] Transgender is an umbrella term that encompasses the wide variety of gender identities that exist across cultures. An example of one used in the United States is gender-nonconforming. This term is used by a person who knows their gender does not fit in either binary category of man or woman. They do not conform to the traditional western gender binary, thus, they use "gender-nonconforming" or "non-binary." The terms of self-identification may vary with transgender, gender-nonconforming, or nonbinary people. It is important to never use "transgender" as a noun, but as an adjective. Do not say "Barbara is a transgender" or "Barbara is transgendered." Instead, say, "Barbara is a transgender person."

Ultimately, language is dynamic, and meanings change as society progresses. Be sure to continue researching and staying up to date with the terminology that we present in this article, because one day, how we define something now may no longer apply.

Why is using correct gender pronouns important?

As discussed, we have been brought up in a society that perpetuates the gender binary through our language. Misgendering, or referring to a transgender person with incorrect pronouns, may seem like a harmless occurrence to a cisgender person (a person whose gender identity aligns with their sex at birth). However, misgendering can make a transgender person feel disrespected, invalidated, dismissed, distressed, and cause psychological harm.[6] Continually invalidating a transgender person's identity is oppressive, problematic, and toxic in a work environment.

Use your voice

To prevent this, the answer is simple: Take the time to learn and use the correct pronouns. To be an ally to transgender people, advocating for a more trans-inclusive workplace through sensitivity to pronouns is a good first step. If you encounter people using anti-transgender humor or rhetoric, challenge them on it to prevent future conduct of that nature. Although we, the authors, do not identify as transgender, we want to use our privilege as members of the LGBTQ+ community to educate people about transgender disparities and practical steps to be more inclusive. As allies, all of us need to take the responsibility to normalize trans-people's existences instead of expecting them to do all of this exhausting work. If you do not understand the terminology that pertains to transgender people, the internet has a wide variety of sources that will give you the tools you need; being an ally requires putting in the time to learn about transgender people.

FREQUENTLY ASKED QUESTIONS

Q: How do I find out a person's pronouns?

Do not expect people to always introduce themselves with their pronouns. Instead, when meeting someone, introduce yourself with your gender pronouns (e.g. *Good morning! It is nice to meet you. My name is Conner, and I use he/him pronouns.*) Sometimes, asking directly is ideal! Some questions you can ask include "I do want to make any assumptions, what gender pronouns do you use?" or "What gender pronouns should I use to refer to you?"[7] This can be awkward at first, but it is less harmful than making assumptions. If you are doing an exercise to get to know a large group of people, and having people go around the room to introduce themselves, have people state their gender pronouns as part of the exercise if people are comfortable (e.g. *My name is Christy Hall, I use she/her pronouns, and I work at Gender Justice in St. Paul*). By giving people the opportunity to share their pronouns, you are demonstrating one way that you are committing to being inclusive to transgender people.

However, it is imperative to note that transgender people should never be required to disclose information about their gender identity. This can lead to uncomfortable situations where transgender people feel tokenized or coerced to divulge their identity. If someone seems reticent on sharing their pronouns, or does not share their pronouns with you, simply move on and try not to use pronouns when referring to that person. For some people, asking for pronouns may be uncomfortable because it may force them to confront their identity in a space where they do not yet feel safe. This may seem frustrating or counterintuitive, but providing the space is important, and will allow you to build trust.

Moreover, transgender people are not required to educate you about their gender identity or why they use certain pronouns. Often, transgender people need to validate their identity to many people, which is exhausting. When being an ally, speak up, but do not speak on behalf of the transgender community, since not all transgender people are the same.[7]

Q: How do I normalize using inclusive gender pronouns in my workplace?

To normalize pronoun use in your workplace, make your support visible! Here are some tips that we recommend:

- Introduce yourself with your pronouns when meeting with new clients or new coworkers.
- Put your pronouns in your email signature.
- Compile a list of resources for people who want (or need) to learn more about why respectful pronouns use is important.
- Include your pronouns on name tags.

While these actions may seem insignificant, they prompt people to ask questions or follow your lead.[8] It is imperative to establish a culture of trans-inclusivity to welcome and call more people into your practice. To do this involves using pronouns proactively, instead of as a reaction to a new trans-client or attorney. Having these practices in place helps people who currently have the privilege of not worrying about what pronouns they use to become aware.

When being an ally, speak up, but do not speak on behalf of the transgender community, since not all transgender people are the same.

Using the correct pronouns is a sign of respect and affirmation.

Q: I made a mistake and misgendered someone! What do I do?

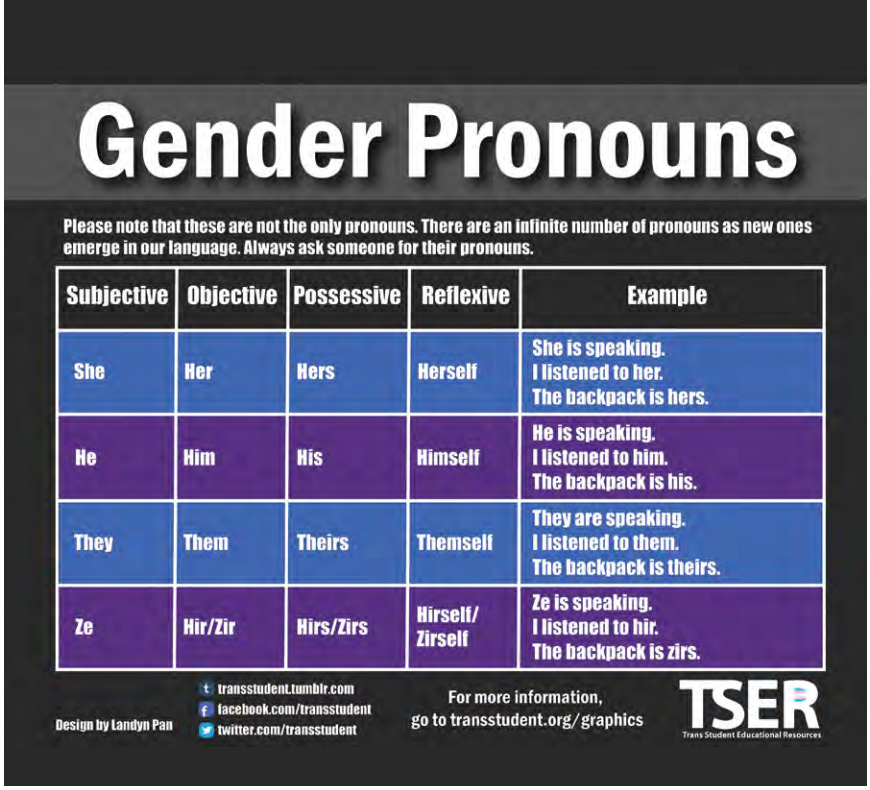
It's okay! The important thing is that you are trying. In these situations, it is important to not make a big deal out of it. Do not push your guilt onto the other person and expect them to reassure you that it is okay, and that you are a good person. Making a big deal out of misgendering someone is really uncomfortable for all involved. If you misgender someone by mistake, apologize, correct yourself, and move on. Mistakes are part of the learning process, but do not expect transgender people to comfort you for your mistake.[9]

Q: I am struggling with using they/them; how I do get more comfortable?

For someone who is not accustomed, using they/them pronouns is challenging! As with most new skills, practice makes perfect. Take the time to practice using they/them pronouns. If you have any issues, there are helpful infographics you can use that provide different ways that these unfamiliar pronouns, like this one from the Transgender Student Educational Resources.[10]

Some final thoughts

Using the correct pronouns is a sign of respect and affirmation. Though this requires a shift in language use, changing language can change culture for the better. Only a few decades ago, people were uncomfortable when women began to use Ms. instead of Mrs. as a title. Now it's common on forms and in other daily usage. Similarly, pronouns are a first step to show respect, but it is not the only thing to do as an ally to transgender people. Continue to educate yourself, and show up in other ways. Ultimately, changing a discriminatory culture starts with conscious efforts to validate and humanize a person. ▲



Notes

[1] Joli St. Patrick, *What You're Really Saying When You Misgender*, The Body is Not An Apology (5/26/2017), *https://thebodyisnotanapology.com/magazine/what-youre-really-saying-when-you-misgender/*.

[2] Samara Ballen, *Why it Hurts so Badly to be Misgendered, and How to Avoid Accidentally Doing It* (6/19/2018), *https://www.samplingsblog.com/originals/2018/6/why-it-hurts-so-badly-to-be-misgendered-and-how-to-avoid-doing-it-to-someone-you-love*.

[3] Planned Parenthood, *What Are the Differences Between Sex, Gender, and Gender Identity* (last visited 12/5/2018), *https://www.plannedparenthood.org/learn/sexual-orientation-gender/gender-gender-identity*.

[4] Nat'l Ctr for Transgender Equal., *Understanding the Basics: The Basics* (last visited 12/5/2018), *https://transequality.org/sites/default/files/docs/resources/Understanding-Trans-Short-July-2016_0.pdf*.

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[6] U. of Wis. Milwaukee LGBT Res. Ctr, *Gender Pronouns* (last visited 12/5/2018), https://uwm.edu/lgbtrc/support/gender-pronouns/. *See also* Ranna Parekh, *What is Gender Dysphoria?* Am. Psychiatric Ass'n (Feb. 2016), *https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria*. (explains the mental health implications that may stem from misgendering and trans-exclusionary conduct)

[7] N.Y.C. Dep't of Social Serv., *Gender Pronouns: How to Take Steps in Becoming a TGNC Ally!* (last visited 12/5/2018), *https://on.nyc.gov/2EdHzVh*.

[8] David Galowich, *How to Respectfully Use Gender Pronouns in the Workplace*, Forbes (8/2/2018), *https://www.forbes.com/sites/forbescoachescouncil/2018/08/02/how-to-respectfully-use-gender-pronouns-in-the-workplace/#4706a6af6c40*

[9] GLSEN, *Pronouns: A Resource* (last visited 12/5/2018), *https://www.glsen.org/sites/default/files/GLSEN%20Pronouns%20Resource.pdf*.

[10] Trans Students Educ. Res. *Gender Pronouns* (last visited 12/5/2018), *http://www.transstudent.org/pronouns101/*.

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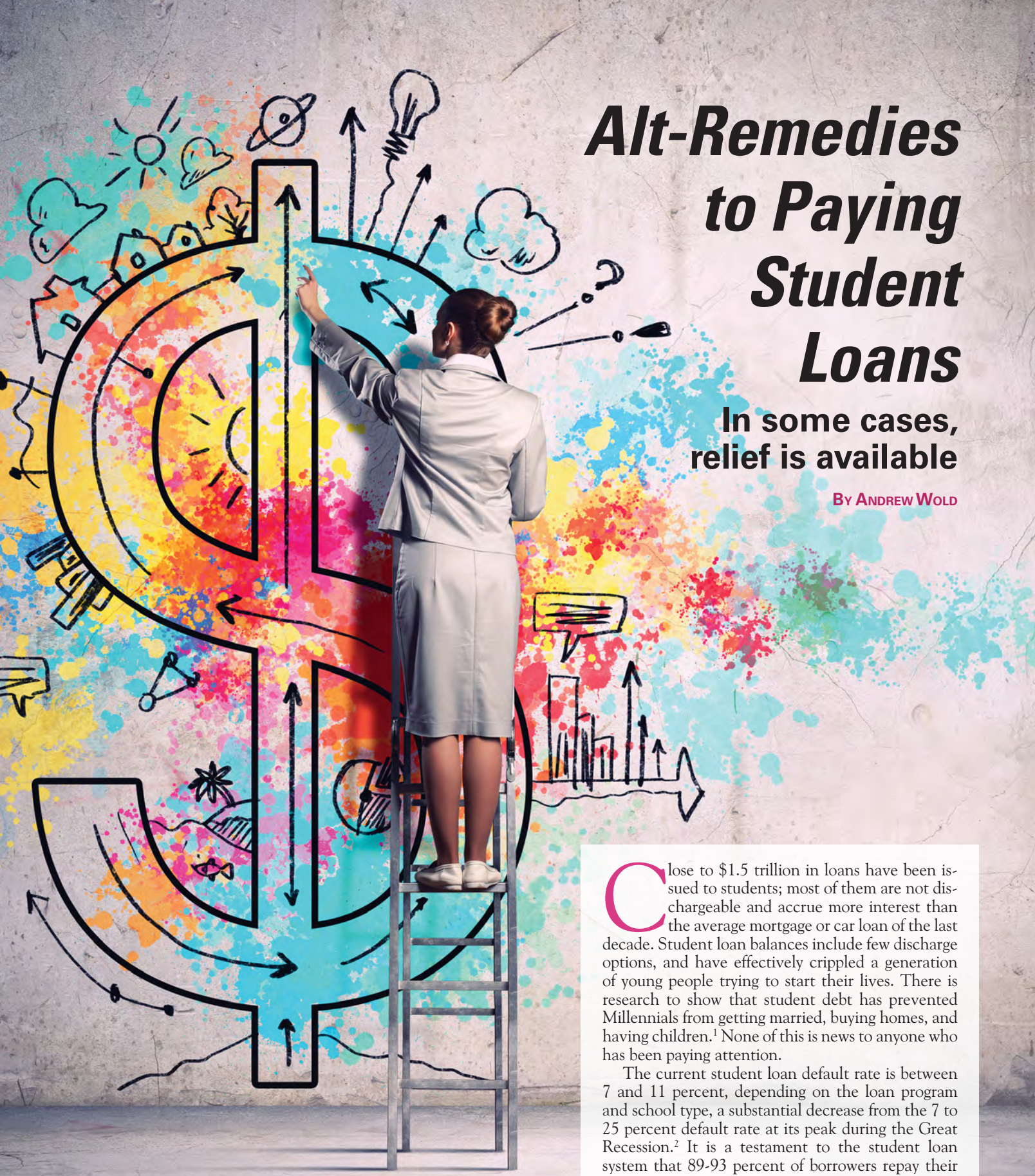

Alt-Remedies to Paying Student Loans

In some cases, relief is available

By Andrew Wold

Close to $1.5 trillion in loans have been issued to students; most of them are not dischargeable and accrue more interest than the average mortgage or car loan of the last decade. Student loan balances include few discharge options, and have effectively crippled a generation of young people trying to start their lives. There is research to show that student debt has prevented Millennials from getting married, buying homes, and having children.[1] None of this is news to anyone who has been paying attention.

The current student loan default rate is between 7 and 11 percent, depending on the loan program and school type, a substantial decrease from the 7 to 25 percent default rate at its peak during the Great Recession.[2] It is a testament to the student loan system that 89-93 percent of borrowers repay their loans, considering the exponential increases in the price of obtaining a degree and the relatively slow wage growth of the last 40 years. If you or your client are struggling to repay a student loan, there are a few options, if certain criteria are met.

Defense to repayment

"Borrower's defense to repayment" is the loan relief when your school deceived you to your detriment, and that deception is related to your student loans or the education services received from the school. For example, the U.S. Department of Education (DOE) found that the Everest Institute in Minnesota had deceived students through placement rates used in marketing materials, and impacted students were eligible for loan discharge.[3]

A documentable school deception allows an affected student to petition the DOE for forgiveness of all the federal loans the student used for the impacted education services. If a borrower is in the unfortunate circumstances of qualifying for this relief, don't expect the process to be a quick one or to offer clear guidelines. Under Secretary Betsy DeVos's leadership, the processing of these applications has been slow. As of June 30, 2018, the Department of Education reported that it had received around 166,000 discharge applications, and only about 48,000 of those had been reviewed and approved.[4] Around 9,000 claims have been denied.

The lack of clarity on this discharge and the delay in processing claims may be the result of DeVos's move to roll back Obama-era rules promulgated in 2016,[5] which were to take effect on July 1, 2017. Among their provisions, the rules would have: revised the procedures for a student to make a claim; given a student reliance-based standard to school misconduct; and shifted the burden of repayment from students to the bad-acting schools. DeVos delayed the implementation of those rules until July 1, 2018, then again until July 1, 2019.[6] Students and 18 state attorneys general sued and prevailed, obtaining a decision from federal district court that put those rules into effect in October.[7] While implementing the 2016 rules, the DOE is initiating a new rulemaking process that may make it more difficult for borrowers to file and receive a defense to repayment discharge. For example, proposed changes may require a borrower to default on a loan prior to making a discharge claim and to narrow the definition of school misconduct to only instances where the school's intent to mislead the student can be established.[8]

Unfortunately, the borrower's defense doesn't apply to private loans. There is potential that the Holder Rule[9] may apply for private loans, but the Holder Rule is a legal defense in a collection action and is more fact-specific in its application. If you have private loans—even if you've been deceived by your school—there is little recourse for discharge at this time.

Discharge in bankruptcy or death

Generally speaking, student loans are not dischargeable in bankruptcy. Lenders are not required to take action in a bankruptcy, as student loans are classified as non-dischargeable debt. If a student loan borrower is suffering an undue hardship, and cannot pay their student loans after bankruptcy, the student must bring an adversary action separate from the initial bankruptcy. After the adversary action, the bankruptcy court may find that the student loans should be discharged. In the 8th Circuit, a bankruptcy court uses a "totality of the circumstances" test to determine whether a student has an undue hardship.[10]

After little court action in undue hardship discharges, the Dodd-Frank rollbacks signed into law early 2018 provide new protections to student loan borrowers and cosigners.[11] For example, when a borrower files bankruptcy, lenders are now prevented from triggering the loan into default status. Additionally, when a student borrower dies, a cosigner to a loan is automatically discharged. This is a bittersweet change for many borrowers after the newsworthy cases of lenders taking collection actions against cosigners who have suffered the loss of a family member. New Jersey's student loan program, for example, received bad press after collecting from cosigners of deceased students. While New Jersey changed state law to prevent future collection actions, there is now a federal law to protect families impacted by the death of a student borrower.

Public service loan forgiveness

The most commonly cited loan discharge program is Public Service Loan Forgiveness (PSLF). PSLF is available to students who make 10 years of qualifying payments while employed through a qualifying employer. Obtaining this relief has been problematic, though: Only 1 percent of students who have applied for the discharge have had it granted.

To qualify for PSLF, you must have 1) a direct loan, 2) qualifying employment, 3) a qualifying repayment plan, and 4) make qualifying payments.[12] #1, #3, and #4 can be reviewed through looking at the borrower's student loan history or servicer statement. The loan needs to be a Direct Loan, including federal consolidation loans. Any payments made to other loan types (FFEL, Perkins, etc.) will not count toward forgiveness, though there is a Temporary Expanded PSLF for those whose application was denied due to some or all payments being made on a non-qualifying plan.[13] A qualifying repayment plan must be in one of the four income-driven repayment programs offered by the Department of Education. Income-driven repayment plans lower the monthly payment based on a percentage of the borrower's federal taxable income, and the plans are further defined by the number of a borrower's dependents and a spouse's federal student loan balance. A qualifying payment is the full payment of the invoiced amount under that plan, made no later than 15 days after the due date.

Finally, your servicer must determine that you have qualifying employment. While it sounds simple, you must work for 1) the government (at any level), 2) a 501(c)(3) non-profit, or 3) some other *non*-501(c)(3) non-profit, as long as the non-profit provides certain services. One of the challenges of PSLF is that it appears to be at the discretion of the servicer and whoever at that servicer is reviewing an employer for qualifying employment certification. For example, two student borrowers who had been told that their employment through the American Bar

Association (ABA) qualified later lost their eligibility for PSLF. The ABA sued, and that case is ongoing at this time.[14]

The first day that any student borrower could qualify for PSLF was October 1, 2017. As of June 30, 2018, the DOE reported that of the 33,000 applications for PSLF from 28,000 distinct borrowers, 29,000 applications have been processed.[15] This gives the appearance that the DOE has made great strides in processing this applications; however, more than 70 percent of those were denied because the applicant didn't meet the criteria and 28 percent were denied for being incomplete. Only 300 of the applications (less than 1 percent) have been approved, forgiving the loans of 96 distinct borrowers.

In addition to an exceptionally low discharge rate, PSLF is at risk of being phased out. A Republican proposal in the U.S. House would discontinue PSLF.[16] And while there is a Democratic proposal to expand PSLF in the now Democratically controlled chamber,[17] we will have to wait to see what proposal will be included in any final reauthorization of the Higher Education Act.

Finally, PSLF only applies to federal loans, so private loans must be paid through traditional means. States are starting to create initiatives to reduce the burden of student loans to residents. For example, Maine has a program that subtracts the value of student loan payments from a borrower's state tax burden.[18] If a borrower pays $1,000 toward their student loan in a given year and has state tax liability of $1,500, the net tax liability would be $500. And under certain circumstances, Maine will refund amounts that exceed the tax burden to student borrowers. This is a model that the Minnesota Legislature could consider as a tax break for students affected by student loans.

Disability loan forgiveness

There are various types of loans that offer forgiveness if you have experienced a total and permanent disability, but each type of loan has different criteria to receive forgiveness.

Federal loans have a relatively low threshold for proving that you have a disability.[19] If you are a veteran, you can show through documentation that the VA has determined you are not employable due to a service-related disability. Alternatively, you could submit proof that you receive SSDI or SSI from the Social Security Administration, or simply a letter from your doctor stating that you are totally and permanently disabled.

Private loans are dependent on the terms of the contract. For example, a Discover Bank promissory note states that "[i]n the event of Student's total and permanent disability (as reasonably determined by us) or death, the loan evidenced by this Note may be eligible for cancellation in our sole discretion."[20] It is unclear what this threshold looks like and how many of Discover Bank's loans are forgiven under the discretionary clause.

The SELF Loan, a state loan through the Minnesota Office of Higher Education (OHE), has requirements written into administrative rules that OHE will forgive the loan after it determines that the borrower has a total and permanent disability, and that the disability occurred after the final disbursement of the loan.[21] This discharge standard is higher than the threshold of the federal loans and lower than the high bar set by some private banks.

Conclusion

The moral of the story is that if you, your client, or that family member at the cocktail party can't repay a student loan, there may be some relief. You have to get into the details on what type of loan it is, and research the options available with that loan. There are alternatives to payment, if you meet the criteria. ▲

Notes

[1] *https://www.federalreserve.gov/publications/files/consumer-community-context-201901.pdf*

[2] *https://trends.collegeboard.org/student-aid/figures-tables/federal-student-loan-default-rates-sector-over-time*

[3] *https://studentaid.ed.gov/sa/about/announcements/corinthian*

[4] *https://ifap.ed.gov/eannouncements/091918FSAPostsNewReportstoFSADataCenter.html*

[5] *https://www.ed.gov/news/press-releases/us-department-education-announces-final-regulations-protect-students-and-taxpayers-predatory-institutions*

[6] *https://www.insidehighered.com/quicktakes/2017/10/23/new-delay-borrower-defense-rule*

[7] *https://www.bloomberg.com/news/articles/2018-09-12/devos-loses-states-suit-over-borrower-defense-rule-delay*

[8] *https://www.natlawreview.com/article/revised-borrower-defense-to-repayment-regulations-proposed-us-department-education*

[9] *https://www.ag.state.mn.us/Consumer/Publications/HolderRule.asp*

[10] All other circuits use a three-factor test to determine whether there is an undue hardship.

[11] *https://www.congress.gov/115/bills/s2155/BILLS-115s2155enr.xml*

[12] *https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service*

[13] *https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service/temporary-expanded-public-service-loan-forgiveness*

[14] *https://www.americanbar.org/content/dam/aba/images/abanews/PSLF_filing_122016.pdf*

[15] *https://ifap.ed.gov/eannouncements/091918FSAPostsNewReportstoFSADataCenter.html*

[16] *https://edworkforce.house.gov/prosper/*

[17] *http://democrats-edworkforce.house.gov/aim-higher*

[18] *https://www.maine.gov/revenue/faq/eotc_faq.html*

[19] *https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/disability-discharge*

[20] *https://www.discover.com/student-loans/pdf/Standard_Prom_Note.pdf*

[21] *https://www.revisor.mn.gov/rules/4850.0020/*

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JUDICIAL LAW

Minn. R. Civ. P. 6.05; affirming dismissal of late administrative appeal. Appellant contended the Worker's Compensation Court of Appeals (WCCA) erred in dismissing her appeal as untimely, arguing she was entitled to a three-day extension under Rule 6.05 when a party is served by mail. In denying the appeal, the Supreme Court held that the Rules of Civil Procedure "govern the procedure in the *district courts* of the State of Minnesota in all suits of a civil nature." Therefore, proceedings before the compensation judge and the WCCA are not district court proceedings and the three-day extension provided by Rule 6.05 does not apply. Because the Supreme Court lacked authority to extend the statutory deadlines for appeal, and the appeal was not filed within the statutory provided timeline, the appeal must be dismissed. ***Rogers v. Compass Airlines, Inc.***, A18-0319, __ N.W.2d __, 2018 WL 6519067 (Minn. 12/10/2018).

Minn. R. Civ. P. 11.02; affirming denial of motion for sanctions. *Pro se* plaintiff alleged sanctions should have been issued against two of defendants' attorneys for failure to respond to certain motions and for engaging in illegal and unethical behavior. A request for Rule 11 sanctions must: (1) be filed in a motion separate from other motions or requests; (2) contain a description of the specific conduct alleged to violate rule 11; (3) be served in compliance with rule 5; and (4) adhere to the "Safe Harbor" provisions, which state the motion cannot be filed with the court unless, within 21 days after service of the motion, the challenged document or claim is not withdrawn or appropriately corrected. Finding plaintiff's motion did not comply with the procedure of Rule 11, sanctions were not appropriate. ***Krasner v. Hoffman***, A17-1773, A18-0170, 2018 WL 6442164 (Minn. Ct. App. 12/10/2018) (unpublished).

Minn. R. Civ. P. 8.01 and 12.02; affirming general pleading standards. Plaintiff filed defamation action against individual defendant and his employer, alleging that in late September 2015, defendant, "while acting in the course and scope of his employment… made false and defamatory statements" to specific individuals. The complaint included a summary of the allegedly false and defamatory statements.

Defendants moved to dismiss the complaint under Rule 12.02 for failure to state a claim upon which relief may be granted, alleging the complaint failed to "identify (1) who heard the alleged statement; (2) when the alleged statements were made; or (3) where the alleged statements were made." Defendants also argued plaintiff failed to properly allege a defamation claim because the complaint did not contain the "precise defamatory language or even the context in which the alleged statements were made." The district court granted the Rule 12.02 motion, finding the "description of the defamation… imprecise and vague."

On review, the court of appeals confirmed that Rule 8.01 merely requires "a short and plain statement of the claim showing the pleader is entitled to relief." The court of appeals also held a claim is sufficient against a Rule 12.02 motion if "it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." The court of appeals held that the complaint sufficiently described the allegedly defamatory statements and alleged the other elements of a valid defamation claim, satisfying the requirements of Rule 8.01. Reversed and remanded. ***Swartwood v. Fodness, et al.***, A18-0649, 2018 WL 6596281 (Minn. Ct. App. 12/17/2018) (unpublished).

Minn. R. Civ. P. 60.02; affirming vacation of permanent injunction. Plaintiff is defendants' neighbor. After failing to halt construction of a home through the city, plaintiff filed suit against defendants and the city for failure to enforce zoning ordinances. The current zoning ordinance

requires lots be at least 120 feet wide, and defendants' lot was only 50 feet wide. However, the lot was a "legal nonconforming lot" because it existed before the current zoning scheme took effect.

The district court granted summary judgment for the city and dismissed it from the case. It also granted partial summary judgment to plaintiff and defendants, ruling that the reconstructed building violated the zoning codes by expanding the floor area of the building by more than 25%. After trial, the court entered a permanent injunction against building the structure in violation of this zoning ordinance.

After the injunction was issued, the city amended the zoning rules, specifically stating the city had "been made aware of a recent court ruling where the court applied [the zoning rule] in a manner that was not intended by the city." Defendants thereafter filed a Rule 60.02 motion for relief from final judgment, asking the court to vacate the permanent injunction. The court found the amendment was a mere clarification of the pre-existing rule that applied retroactively and dismissed the injunction.

On appeal, the court of appeals held that Rule 60.02 motions rest within the district court's discretion and will not be reversed absent an abuse of discretion. The court of appeals agreed with the district court that the amendment was retroactive, and vacation of the permanent injunction was appropriate. ***Ruether, et al. v. Kathleen Mimbach Living Trust, et al.***, A18-0496, 2018 WL 6595916 (Minn. Ct. App. 12/17/2018) (unpublished).

■ **Minn. R. Civ. P. 19.01 and 12.02; affirming dismissal of a necessary party when no actionable claim exists.** Plaintiff Aeshliman filed suit against his neighbor Smisek arising from water drainage issues on Aeshliman's property. Aeshliman also named Wurm, another neighbor, claiming they were an indispensable party because complete relief cannot be afforded without their presence in the case. The district court dismissed all claims against Wurm for failure to state a claim.

The court of appeals affirmed dismissal of Wurm from the action, holding that Rule 19.01 does not create a cause of action, nor does it prevent dismissal of a party from a lawsuit under Rule 12.01 when no cause of action has been alleged. Even if a party is a "necessary party" under Rule 19.01, the plaintiff must still allege a cause of action against that party or face dismissal under Rule 12.02. ***Aeshliman, et al. v. Smisek, et al.***, A18-0752, 2018 WL 6729830 (Minn. Ct. App. 12/24/2018) (unpublished).

■ **Minn. R. Civ. P. 12.02; reversing dismissal when record lacked clear and unequivocal evidence.** Plaintiff originally filed a discrimination charge against defendants with the Minnesota Department of Human Rights (MDHR). By two letters dated 9/30/2014, the MDHR updated plaintiff regarding her claims. The first letter said her charges had been referred to the Equal Employment Opportunity Commission for further processing on preemption grounds. The letter continued by saying the charges had been referred to the EEOC and all MDHR proceedings would be terminated. The second letter also discussed referral of plaintiff's charges to the EEOC because it was a companion charge. Neither letter referenced a right to bring a civil action or a 45-day limitation period for doing so.

On 7/18/2016, plaintiff received a right-to-sue letter from the EEOC. Plaintiff filed a federal suit against the defendants on 10/21/2016. The federal court dismissed plaintiff's claims for failure to comply with the 90-day statute of limitations. Plaintiff then filed suit in state court, and her claims were dismissed for failure to comply with the 45-day statute of limitations.

The court of appeals first reviewed the rules for Rule 12.02 motions. A claim is sufficient to survive a Rule 12.02 motion "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." Dismissal under Rule 12.02 is proper "only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." In making this determination, the court may only review the complaint, accepting the facts alleged therein as true and construing all reasonable inferences in favor of the nonmovant. The court may also consider documents attached to the complaint and documents referenced in the complaint.

In light of this standard, the court of appeals determined it could not conclude, on the record before it, that the statute of limitations "clearly and unequivocally" had run, because the relevant statues, administrative rules, and case law "do not suggest that the September letter provided notice that the commissioner had dismissed" plaintiff's claims. Thus, the record did not establish that the 45-day limitations period was triggered or that it had lapsed. Reversed and remanded for further proceedings. ***Brinkman v. Nasseff Mechanical Contractors, Inc.***, A18-0089, 2018 WL 6735447 (Minn. Ct. App. 12.24.2018) (unpublished).

■ **Minn. R. Civ. P. 5.04; case properly filed within one year of service.** Appellant obtained a judgment against respondent for outstanding credit card debt in 2006. In 2016, appellant moved to renew the judgment for an additional 10-year term shortly before the original judgment was set to expire. Respondent did not oppose the motion or otherwise appear in the action. Nevertheless, the district court denied appellant's motion, contending respondent's divorce decree allocated marital debt to respondent's ex-wife, making the respondent the improper party defendant. The district court thereafter dismissed the action under the principle of *nunc pro tunc* and Rule 5.04. On appeal, appellant argued that the divorce decree may have allocated responsibility for marital debt, but did not vacate the prior judgment, making its motion proper.

On appeal, the court of appeals held that appellant was not bound by the determinations of the divorce decree because appellant was not a party to that proceeding and the court in that case lacked jurisdiction over appellant to alter its judgment. The court of appeals also reversed the district court's ruling dismissing the action under Rule 5.04, which requires filing the complaint within one year of service, finding the case was filed within the one-year time period. Reversed and remanded. ***Discovery Bank v. William J. Kaufmann***, A18-0671, 2018 WL 6837470 (Minn. Ct. App. 12/31/2018) (unpublished).

■ **Minn. R. Civ. P. 12.02(e); affirming judicial interpretation of contract as part of motion to dismiss.** Plaintiff and defendant are parties to a contract governing defendant's provision of electricity to plaintiff. The contract includes an appendix that provides a rate formula that governs how defendant charges its members, including plaintiff, for power and energy. The appendix also includes procedures for amending the rate formula by obtaining approval of (i) at least 55% of defendants' members and (ii) members representing 45% of defendants' electric load.

In 2009, defendant amended the rate formula by satisfying each requirement outlined in the appendix. Plaintiff challenged application of the amended rate formula to itself because it had voted against the amendment. Plaintiff argues the contract also required approval of

the amendment by each individual member before the amended formula may be applied against that member. The district court dismissed plaintiff's breach of contract and declaratory judgment claims.

On appeal, the plaintiff argued the district court applied the wrong standard of decision under Rule 12. According to the plaintiff, the complaint alleged that the contract required approval of each individual member before an amendment could be applied against that member. Plaintiff argued the district court was required to accept that allegation as true when reviewing defendant's motion to dismiss.

The court of appeals rejected this argument. "When a complaint refers to a contract and the contract is central to the claims alleged, then a court may consider the entire written contract along with the factual allegations in the complaint." A court is not bound by the legal conclusions stated in a complaint, and when a contract is unambiguous, interpretation of that contract is a question of law that can be determined on a motion to dismiss.

The complaint referred to the contract throughout and attached the contract to the complaint. Thus, the district court properly considered the language of the contract when deciding a Rule 12 motion. Moreover, plaintiff's allegations about member approval were its interpretation of the contract, which is a legal conclusion that poses a question of law, not a question of fact that must be accepted as true. The plain language of the contract was unambiguous, the rate formula was properly applied, and the district court properly dismissed plaintiff's complaint. ***Crow Wing Cooperative Power and Light Company v. Great River Energy, et al.***, A18-0471, 2019 WL 114200 (Minn. Ct. App. 1/7/2019) (unpublished).

■ **Minn. R. Civ. P. 56.03; affirming summary judgment where plaintiff failed to support argument with admissible evidence.** District court granted summary judgment to defendant on plaintiff's claim for tortious interference with prospective economic advantage and tortious interference with contractual relations.

On appeal, plaintiff argued there was a genuine issue of material fact as to whether defendant had knowledge of the potential sale to a different buyer, satisfying the elements of his claims. The court of appeals rejected this argument as conclusory. Plaintiff failed to cite any admissible evidence in the record indicating defendant had knowledge of the potential sale. While plaintiff did cite defendant's affidavits, those affidavits explicitly denied any knowledge of the sale. As plaintiff failed to cite to admissible evidence, summary judgment was affirmed. ***Generations Law Office, Ltd. v. Lonny D. Thomas, et al.***, A18-0729, 2019 WL 114211 (Minn. Ct. App. 1/7/2019) (unpublished).

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CRIMINAL LAW

JUDICIAL LAW

■ **4th Amendment: *Terry* stop exception to warrant requirement does not apply when officer suspects person "might" commit crime.** Appellant was convicted of being a felon in possession of a firearm after police responded to a 911 call from a woman who feared for her safety and that of her infant child because an unknown intoxicated man with a gun, appellant, was in her apartment. Upon their arrival, police found appellant asleep on the couch, patted him down while he slept, and found a handgun. Police chose not to wake appellant before securing the handgun to remove the threat that he may act erratically. The officers did not suspect criminal activity or intend to arrest anyone in the apartment before patting down appellant.

Appellant argued that police unreasonably searched and seized him and also challenged the district court's denial of his motion to remove a juror for actual bias. The court of appeals found that appellant was entitled to a new trial on the juror issue, but held that the pat-frisk was reasonable under the warrant requirement exception recognized in *Terry v. Ohio*, 392 U.S. 1 (1968). The Supreme Court affirms the court of appeals, agreeing that appellant is entitled to a new trial because of the presence of an actually biased juror, but finding the pat frisk of appellant valid, instead, under the emergency aid exception to the warrant requirement.

It is well-settled that a pat-frisk for weapons is a search under the 4th Amendment. In considering whether an exception to the warrant requirement applies to the search in this case, the Supreme Court notes that the court of appeals found the *Terry* pat-frisk exception applies when an officer has reasonable

suspicion that a person "might" commit a crime. However, *Terry* is clear that the exception applies when police suspect an individual is "about to" commit a crime. Nevertheless, there was no suspicion of any crime or intent to make an arrest in this case.

The Supreme Court next distinguishes between the community caretaker exception and the emergency aid exception. The Court notes that, while some federal and other state courts have applied the community caretaker exception in a broader context, the case that first recognized the exception, *Cady v. Dombrowski*, 413 U.S. 433 (1973), addressed routine administrative searches of vehicles taken into police custody, or, in Minnesota, "inventory searches." Such searches are "totally divorced" from officers' criminal investigation and law enforcement roles. The emergency aid exception, on the other hand, involves the need to protect or preserve life or avoid serious injury. Police need reasonable grounds to believe an emergency is at hand and some reasonable basis to associate the emergency with the area or place to be searched.

Because the U.S. Supreme Court has never applied the community caretaker exception outside of the automobile context, the Court refuses to do so here. However, it does find the emergency aid exception applicable. Responding officers were objectively motivated by the need to assist the caller and prevent serious injury due to the presence of an unsecured handgun in the possession of a sleeping, intoxicated individual. Officers also had a reasonable basis to associate the emergency with the object of the search, appellant. They had no other way of addressing the exigency without risking harm to themselves or others than to act as they did—that is, to search appellant and secure the handgun before waking appellant. Thus, the pat frisk of appellant did not violate the 4th Amendment. ***Justin Stephen Ries v. State***, No. A16-0220, 920 N.W.2d 620 (Minn. 12/5/2018).

■ **Criminal procedure: Defendant does not forfeit right to challenge for-cause ruling by failing to use peremptory challenge.** The parties do not dispute that one juror at appellant's trial was biased, but the state argues that appellant should have used a peremptory challenge to remove the juror. For-cause challenges and peremptory challenges are addressed in Minn. R. Crim. P. 26.02. Nothing in this rule provides that a party forfeits the right to challenge the district court's for-cause ruling by not using an available peremptory challenge to remove the juror. The court declines to read such a requirement into the rule. The court holds that appellant did not forfeit his right to challenge the district court's denial of his motion to remove Juror 18 for cause by not using a peremptory challenge to remove the juror. As the state concedes Juror 18 was actually biased, appellant is entitled to a new trial. ***Justin Stephen Ries v. State***, No. A16-0220, 920 N.W.2d 620 (Minn. 12/5/2018).

■ **Criminal sexual conduct: Minn. Stat. §609.342, subd. 1(h), requires proof of sexual penetration.** Appellant sexually abused a 10-year-old for several months, including touching her inappropriately and engaging in genital-to-genital contact. Appellant never sexually penetrated her. Appellant was charged with and convicted of first- and second-degree criminal sexual conduct, but appellant challenges the sufficiency of the evidence to support his first-degree conviction, arguing the statute of conviction, Minn. Stat. §609.342, subd. 1(h), requires proof of sexual penetration, which the state concedes it did not prove.

The Supreme Court notes that the statute expressly uses the words "sexual penetration" in defining the crime. The statute's plain language requires that the state first prove the defendant engaged in one of the two categories of prerequisite conduct (sexual penetration or bare genital-to-genital contact with a person under 13), then prove one of the seven "following circumstances" set forth in subdivision 1(a) through 1(h) existed. The two steps are independent inquiries.

In this case specifically, the state had to prove that (1) appellant had a significant relationship to the complainant, (2) the complainant was under the age of 16 years of age *at the time of the sexual penetration*, and (3) the sexual abuse involved multiple acts committed over an extended period. The state did not prove penetration as required by the statute. ***State v. Juan Manuel Ortega-Rodriguez***, No. A17-0450, 920 N.W.2d 642 (Minn. 12/5/2018).

■ **Conditional release: Court had jurisdiction to reimpose mandatory conditional release term if authorized when imposed and defendant does not have crystallized expectation of finality in sentence lacking conditional release term.** Appellant pleaded guilty in 2009 to failing to register as a predatory offender and was sentenced to 15 months in prison. The district court failed to include the statutorily mandated conditional release term, but amended its sentencing order three months later to include the 10-year conditional release term, without a jury finding or appellant admitting his risk level status. While serving his conditional release term in 2015, appellant moved the district court to vacate the conditional release term based on *State v. Her*, 862 N.W.2d 692 (Minn. 2015) (Constitution requires that determination of status as risk-level-III offender be made by jury) and *Reynolds v. State*, 888 N.W.2d 125 (Minn. 2016) (defendant may challenge conditional release term via motion to correct sentence under Minn. R. Crim. P. 27.03, subd. 9).

At a resentencing hearing, appellant moved to terminate the proceedings and vacate the conditional release term because the original complaint did not make reference to his risk level designation. The state moved to amend the complaint, but the district court denied the motion and terminated the proceedings, finding no question for the jury to consider because the complaint did not allege appellant was a risk-level-III offender. The district court issued a second amended sentencing order stating there was no conditional release period. Based on *State v. Meger*, 901 N.W.2d 418 (Minn. 2017) (*Her* does not apply retroactively), filed subsequently, the state moved to reconsider. The district court issued a third amended sentencing order, reimposing a 10-year conditional release term.

The court of appeals reads the Supreme Court's remand instructions in *Her* and *Meger* to suggest that the district court does not lack jurisdiction to impose a lawful conditional release term even when the defendant has otherwise completed the terms of imprisonment and supervised release. It also rejects appellant's argument that the district court's jurisdiction ended when it removed the conditional release term. As *Her* is not retroactive, appellant's period of conditional release was authorized when it was first imposed. Thus, the district court had jurisdiction to reimpose the legal and mandatory conditional release term.

The court also distinguishes cases in which the defendants were not on notice that conditional release was part of the mandatory terms of their sentences. Here, the complaint referred to conditional release as a penalty, appellant's sentence was amended to include a conditional release term less than three months after the original sentencing hearing, and conditional release was lawfully imposed while appellant was still im-

prisoned. *Meger*'s ruling that *Her* did not apply retroactively and the state's motion for reconsideration challenging the order vacating conditional release prevented appellant from having "a crystallized expectation of finality in a sentence that did not include a conditional-release term." ***State v. Michael Allen Franson***, No. A18-0539, __ N.W.2d __, 2018 WL 6442707 (Minn. Ct. App. 12/10/2018).

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COMMERCIAL & CONSUMER LAW

JUDICIAL LAW

What is the right law? A recent case, *Pain Center of SE Indiana LLC v. Origin Healthcare Solutions LLC*, provides an opportunity to explore an important area of modern law. The case involved contracts between a medical practice and a computer software company pursuant to which the medical practice acquired licenses and support services for the software company's practice management and electronic medical records software. The medical practice alleged breach of contract claims, and the issue was whether these claims were barred by a statute of limitations. The medical practice asserted the 10-year statute of limitations for written contracts, but the software company asserted the four-year statute of limitations in Uniform Commercial Code §2-725. The software computer programs were pre-existing and standardized and were not custom programming. The contracts, aside from the software, provided for ongoing billing and IT support, the software being a tool that allowed the software company to perform those services; the medical practice paid monthly for the services; the software was licensed only in conjunction with those services; and the relative costs of the software and services were (1) $8,000 to license the management software and $26,294 for the services over the contract period, and (2) over $23,000 to license the medical records software but over $24,000 for services over the contract period.

The court considered the contracts "mixed," involving both the software and the services, and used the common predominant-purpose test to determine that the services predominated and thus the UCC statute of limitations did not apply, and neither did the UCC warranties of merchantability or fitness, nor the good-faith performance provision of UCC Article 1 in §1-304. This certainly is a common analysis, but it leaves questions: (1) Does the law of services apply to the asserted breach-of-contract claims? If so, since the claims were for not providing service when the medical billing software went awry, the result may be acceptable on a negligence test even though that may offer the medical practice less protection; (2) if a separate issue remains about whether the software conformed to the contract, does the determination that the contracts' predominant purpose dictates that services law (negligence) apply to that issue, which offers less protection than warranty or contract law might, or can the court now apply warranty law (which seems to contradict the predominant-purpose analysis), or can the normal rules of contract apply, which may lead to a result closer to what application of the UCC would produce? See, e.g., Farnsworth, *Contracts*, §§8.8 and 8.12 (Third Edition, Aspen Publishers 1999). Unfortunately, courts often do not focus on this question.

It also is worth consideration of what the court did focus on—that the software was a good and thus subject to UCC Article 2. UCC Article 2 in §2-102 does apply to a transaction in goods, a license could qualify as a transaction, and since goods as defined in UCC §2-105(1) includes all things which are moveable at the time of identification to the contract of *sale* (emphasis supplied), one might argue the court is right. But a license is not a sale—a sale transfers title (UCC §2-106(1)) and a license does not, and to obliterate that distinction may lead the licensor to lose control over its asset. Moreover, to treat a license as a sale involves warranties that may be inappropriate for software even if acceptable for goods (see the Uniform Computer Information Transactions Act enacted in several states). In short, shoving a transaction for which it was not designed under UCC Article 2 is a serious mistake even if in the case it may not have mattered. To avoid such a result, the contract should be able to provide for application of appropriate provisions of the uniform act, not as a choice of the law of one of the enacting states but as a matter

of freedom of contract as announced in UCC §1-302, for example. See Official Comments to UCC §1-302. This of course does not preclude a court from applying a provision from UCC Article 2 by analogy, as courts often did before UCC Article 2A on leases was enacted.

In conclusion, the Pain Center case is one that holds many lessons. ***Pain Center of SE Indiana LLC v. Origin Healthcare Solutions LLC***, 96 U.C.C. Rep. Serv. 2d 66, 2018 WL 3045278 (7th Cir. 2018).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

Disability discrimination; five claimants lose. A quintet of claimants lost their appeals before the 8th Circuit Court of Appeals recently.

An employee of a health care facility who refused to comply with a job requirement that she take a rubella screening test and pills to develop immunity to the disease due to close patient contact was properly terminated. The 8th Circuit upheld a ruling by Judge Joan Ericksen in Minnesota, who rejected the employee's claim of a failure to provide a reasonable accommodation under the Americans with Disabilities Act, although on alternate grounds. The appellate court reasoned that the health screen complied with the ADA and parallel provisions of the Minnesota Human Rights Act. ***Hustvet v. Allina Health System***, 910 F.3d 399 (8th Cir. 12/7/18).

An employee who missed work occasionally because of the need for medical treatment for an incurable disease was properly terminated. The 8th Circuit upheld a lower court dismissal of the lawsuit after the employee was fired because she failed to provide medical verification for missing work during a flare-up following receipt of a "last notice." The employer's failure to excuse the lack of medical verification, contrary to its attendance policy, did not violate the ADA. ***Lipp v. Cargill Meat Solutions Corp.,*** 2018 WL 6625770 (8th Cir. 12/19/2018) (unpublished).

A restaurant employee with a permanent medical restriction was properly fired for inability to perform essential functions of the job. The court upheld summary judgment on grounds that the facility was not obligated to provide a reasonable accommodation. ***Denson v. Steak 'N Shake, Inc.***, 910 F.3d 368 (12/3/18).

An employee's inability to perform the essential functions of her job barred her ADA claim. The court held that her inability to do so, with or without reasonable accommodations, warranted dismissal of her ADA claim. ***Blevins v. AT&T Services, Inc.,*** 2018 WL 6431544 (8th Cir. 12/6/2018) (unpublished).

Termination of total disability benefits for an employee was upheld after an independent medical examination showed that the employee was only partially disabled after gall bladder surgery (because he was able to perform daily activities) was upheld. The court held that the determination did not constitute an "abuse" of discretion under the applicable ERISA standard. ***Leirer v. Proctor & Gamble Disability Plan***, 910 F.3d 392 (12/6/18).

Age, race claims estoppel denied. A 56-year-old African American man who was laid off after returning to work following a work-related injury lost his lawsuit for age and race discrimination. The court rejected his estoppel claim that he was promised a job would be available when he healed, but the position was given to a younger, white applicant. There was no evidence that the employer took affirmative action to prevent the claimant from timely asserting her claims or requested to be rehired. ***Kirklin v. Joshen Paper & Packing of Arkansas Co.,*** 2018 WL 6625766 (8th Cir. 12/19/2018) (unpublished).

FMLA interference; untimely notice. An employee who gave untimely notice of a request for a leave of absence under the Family Medical Leave Act (FMLA) had her claim dismissed under the statute. Summary judgment was affirmed because the requirement for a leave was not communicated on a timely basis, barring the employee's interference claim. ***Stringfield v. Cosentino's Food Stores,*** 2018 WL 6629394 (8th Cir. 12/18/2018) (unpublished).

Minimum wage; travel expenses included. Travel expenses paid to truck drivers are includible in calculating whether they were paid a minimum wage. The 8th Circuit rejected a claim in a class action lawsuit that those payments should not have been used to determine whether the employees were properly paid a minimum wage amount. ***Baouch v. Werner Enterprises,*** 908 F.3d 1107 (11/14/2018).

Unemployment compensation; dishonesty bars claim. A bartender who was dishonest during an investigation of his own alleged improper transactions with customers was precluded from receiving unemployment compensation benefits. The Minnesota Court of Appeals held that making false statements in the interview constituted disqualifying misconduct. ***Nachtigall v. Marriott International, Inc.,*** 2018 WL 6442183 (12/10/2018) (unpublished).

Unemployment compensation; failure to attend hearing. An employee's failure to attend an evidentiary hearing to challenge denial of unemployment benefits barred her appeal. The appellate court held that the employee did not establish "good cause" or present newly discovered evidence to justify a new hearing and that this warranted denial of benefits. ***McCorisin v. Pizza Luce III, Inc.,*** 2018 WL 6442118 (12/10/2018) (unpublished).

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ENVIRONMENTAL LAW

JUDICIAL LAW

US Supreme Court holds no "critical habitat" under ESA unless actual species present. On 11/27/2018, the Supreme Court of the United States held that a "critical habitat" for an endangered species cannot be protected as such unless it is actually a "habitat" for the endangered species. In 2001, the U.S. Fish and Wildlife Service (FWS) listed the dusky gopher frog as an endangered species. *See* 16 U. S. C. §1533(a)(1). The listing required FWS to designate "critical habitat" for the frog, and the FWS proposed designating a 1,544-acre site in St. Tammany Parish, Louisiana. Although at one time the dusky gopher frog had lived on the site, no frogs had been spotted in many years. Nonetheless, FWS determined that because of the site's physical features, such as rare, high-quality breeding ponds, it qualified as critical habitat for the frog. The FWS estimated the loss to the landowners as a result of the designation (resulting from the additional regulatory hurdles and limitations associated with developing land designated as critical habitat) exceeded $33 million. Nonetheless, the FWS determined this cost was not disproportionate to the conservation benefits and went ahead with the listing. The district court and the 5th Circuit Court of Appeals

upheld the designation.

In vacating the 5th Circuit, the high court held that an area is eligible for designation as critical habitat only if it is habitat for the species. The Court looked to the statutory context and the plain language of §1533(a)(3)(A)(i), the only source of authority for critical habitat designation, which simply provides that once FWS determines a species in endangered or threatened, it must "designate *any habitat of such species* which is then considered to be critical habitat" (emphasis added). This language, the Court held, does not authorize the FWS to designate the area as critical habitat unless it is also an actual habitat for the species. ***Weyerhaeuser Co. v. United States Fish & Wildlife Serv.***, 139 S. Ct. 361 (2018).

ADMINISTRATIVE ACTION

■ **EPA and Corps propose rule narrowing Waters of the United States definition, Clean Water Act jurisdiction.** On 12/11/2018, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (the agencies) issued a proposed rule that would recodify the 2015 Waters of the United States (WOTUS) rule under the Clean Water Act (CWA). The agencies issued the proposed rule in response to Executive Order 13778, issued on 2/28/2017. The executive order directed the agencies to review and rescind the 2015 WOTUS rule, and to issue a new WOTUS rule "interpreting the term 'navigable waters'… in a manner consistent with" Justice Scalia's opinion in *Rapanos v. United States*. 547 U.S. 715 (2006).

The Supreme Court case attempted to define which type of wetlands and waterways could or could not be considered "waters of the United States," and thus subject to the agencies' jurisdiction under CWA. The 2015 WOTUS rule aligned with Justice Kennedy's dissent, which held that CWA jurisdiction would cover waterways with a "significant nexus" between the wetland and the other traditional navigable water. *Id*. at 780. On the other hand, Justice Scalia's plurality-opinion held that WOTUS includes only waterways that are adjacent to and have "a continuous surface connection" with other traditional navigable waters. *Id*. at 742.

The proposed rule establishes six categories of water that would be considered WOTUS. First, traditional navigable waters (TNW) such as large rivers, territorial seas, and wetlands along coastlines influenced by the tides that are used in interstate or foreign commerce. Second, tributaries that flow into TNW on a perennial or intermittent basis. Third, ditches or "artificial channel[s]" where they are used for navigation or influenced by the tides. Fourth, certain lakes and ponds where they are TNW, or where they contribute perennial or intermittent flow to TNW either directly, or through other non-jurisdictional surface waters, and where they are flooded by protected waters in a typical year. Fifth, impoundments and reservoirs connected to protected waters. And sixth, adjacent wetlands that physically touch other jurisdictional waters, wetlands with a surface connection to protected waters by flooding in a typical year, or by perennial or intermittent flow between the wetland and jurisdictional water.

The proposed rule specifically states that waters not listed above would not be considered WOTUS. Waters that are excluded in the proposed rule include, inter alia, interstate waters (no longer an independent category automatically triggering WOTUS jurisdiction), water features that flow only in response to precipitation (ephemeral streams), isolated wetlands, groundwater, artificial lakes and ponds, farm ditches, stormwater runoff features, and wastewater recycling structures.

The agencies did not provide data on how many water bodies would be excluded from the proposed rule as compared to the 2015 WOTUS rule; however, it is estimated that as much as 60% of currently protected streams and wetlands would lose WOTUS jurisdiction. If finalized, the proposed rule would apply nationwide and replace the 2015 WOTUS rule, which is currently only enforced in 22 states (including Minnesota). The agencies will take public comments on the proposed rule for 60 days after publication in the Federal Register, and have scheduled a public hearing in Kansas City, Kansas. **Docket ID: EPA-HQ-OW-2018-0149.**

■ **Gov. Walz appoints new MPCA and DNR commissioners.** Two women were appointed to top jobs in the state—one a former Best Buy executive and the other a former Minnesota city mayor. Minnesota native Laura Bishop was appointed commissioner of the MPCA, and St. Paul native Sarah Strommen was named commissioner of the DNR. Bishop spent 15 years with Best Buy Co., where she was the chief sustainability and corporate responsibility officer and a member

of the Best Buy Operating Committee. Before joining Best Buy, Bishop served as the assistant commissioner of the Minnesota Department of Administration for the Ventura administration and worked in Washington D.C at the State Department and in Switzerland with the U.S. Embassy. While at Best Buy, Bishop ushered in an e-waste recycling program and led the company's efforts to reduce its carbon footprint. She has indicated that climate change and greenhouse gas emissions are one of the governor's top five priorities for the new administration. In response to this priority, Bishop plans to appoint an assistant commissioner of air and climate change. At a recent meeting with the Minnesota Chamber of Commerce Environmental and Natural Resources Policy Committee, Bishop indicated her experience in bringing people together and finding efficiencies in programs is a strength that will help her bring the agency, the regulated community, and stakeholders together to address the state's environmental concerns.

St. Paul native Sarah Strommen is the first woman appointed to lead the DNR. Strommen most recently served as the DNR's assistant commissioner of parks and trails, fish, and wildlife. Previously, she worked as an assistant director with the Minnesota Board of Water and Soil Resources. Strommen was elected mayor of the city of Ramsey in 2012 and held that office until May 2018. She has served the nonprofit sector as the policy director for the Friends of the Boundary Waters Wilderness and as associate director of the Minnesota Land Trust. Outdoor News quoted Walz as saying, "Strommen built her career integrating science and policymaking across sectors and has a deep understanding and appreciation for our natural resources. She embraces our vision for one Minnesota and will work to build consensus among citizens and stakeholders alike." Strommen's involvement with Friends of the Boundary Waters Wilderness, an organization that opposed the PolyMet copper-nickel mining project (which has already received DNR permits), has many wondering what her agency will do with another copper-nickel mine proposed by Twin Metals. Asked about her plans, she told MPR News that the "agency's approach to regulatory process [is that] there's statutes and rules that dictate how the process goes, there's public engagement, and then there's science and data. So it will be about ensuring we have a good process."

Minnesota DNR grants permit for Fargo-Moorhead flood diversion project. The Minnesota Department of Natural Resources (DNR) announced on 12/27/2018 that it granted a dam safety and public waters work permit for a revised "Plan B" version of the Fargo-Moorhead Flood Risk Management Project. The Fargo-Moorhead project is a substantial flood diversion venture intended to redirect flood waters from the Red River of the North in the Fargo, ND and Moorhead, MN area using a series of dams, levees, and channels throughout the Fargo-Moorhead area.

The project had been originally halted in September 2017 when the Federal District Court for the District of Minnesota ordered an injunction to stop construction. The DNR had argued that the Fargo-Moorhead Flood Diversion Board of Authority was required to obtain the proper permits before any work could be undertaken. Because the diversion authority had not obtained the proper permits, the court ordered all construction work to be stopped.

Since the Court's injunction, the DNR has completed the state's required environmental review process. Through this process, the DNR determined that the Supplemental Environmental Impact Statement (SEIS) for the project was adequate, and therefore issued the permit. As approved by the DNR, the revised project will include a 30-mile long diversion channel on the North Dakota side of the Fargo-Moorhead area. It will also allow for dams and other water control features to be located on the Red River. The DNR found that the project as revised will result in reduced impacts to the health and safety of Minnesotans and their properties due to the reduced size of flood areas in the Fargo-Moorhead area.

In all, the permit contains 54 conditions that must be met, including required mitigation—which includes fish passage at Drayton Dam and acquisition of property rights for all impacted property in Minnesota. Although issuance of the permit is a key step in the process, additional permits are still required from the DNR, and approval is still required from local, state and federal agencies. *http://news.dnr.state.mn.us/*

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FAMILY LAW

JUDICIAL LAW

The parentage act allows an alleged biological father to bring an action to establish parentage notwithstanding the existence of a valid recognition of parentage identifying another man as the child's father. Mother became pregnant in 2013. Despite knowing her current partner (and later husband), J.N., was not the child's biological father, Mother and J.N. signed a recognition of parentage (ROP) under Minn. Stat. §257.75 acknowledging J.N. as the child's father. Two years passed and Mother and J.N. lived with the child as a family.

In 2016, the child's biological father, A.S., commenced a parentage action seeking genetic tests after receiving a tip through social media. Mother agreed to the testing, which confirmed A.S.'s paternity. A.S. then asked the court to adjudicate him as the child's father. Despite both procedural and substantive opposition from Mother, J.N., and a guardian ad litem appointed for the child, the court declared A.S. to be the child's father after a two-day trial. Mother and J.N. then appealed, arguing primarily that the district court should have treated the signed ROP as determinative of the child's parentage—thus depriving A.S. of standing to maintain a parentage action.

The Minnesota Court of Appeals disagreed, and affirmed the district court. While acknowledging that an ROP acts as an adjudication of a child's legal parents, the court emphasized that the statute only prohibits further litigation over parentage where "there are no competing presumptions of paternity." Here, the court reasoned, the ROP could not be treated as final because A.S.'s genetic testing gave rise to a competing presumption of parentage and A.S. was not a party to the ROP. The court of appeals further rejected Mother's argument that A.S. lacked standing to vacate the ROP, holding that "vacatur of a ROP is not a prerequisite to relief" under the parentage act. In other words, the statutory provisions for vacating a recognition do not apply to an action by a presumptive father to vacate a recognition to which he is not a party. Mother also challenged the court's decisions to adjudicate A.S. as the child's father rather than J.N. and requiring the parties to share joint legal custody. The appellate court held that the record sufficiently supported the lower court's determinations. ***In re the Welfare of C.F.N.***, No. A18-0635, __ N.W.2d __ (Minn. Ct. App. 12/31/2018).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **Threshold issues of arbitrability; "wholly groundless" exception rejected.** The Supreme Court unanimously held that where the parties have agreed that an arbitrator is to decide threshold issues of arbitrability, that agreement will be enforced even where the party opposing arbitration argues that any claim of a right to arbitration is "wholly groundless." ***Henry Schein, Inc. v. Archer & White Sales, Inc.***, ___ S. Ct. ___ (2019).

■ **Summary judgment; affidavits; statements made on personal knowledge.** Affirming summary judgment for the defendants in a Section 1983 action, the 8th Circuit rejected the plaintiff's argument that police officers' affidavits should not have been considered on summary judgment because the affidavits did not state that they were based on personal knowledge, with the 8th Circuit "declin[ing] to endorse the formalism" the plaintiff advocated, and noting that the district court had found that the affidavits were based on personal knowledge. ***Awnings v. Fullerton***, ___ F.3d ___ (8th Cir. 2019).

■ **Fed. R. Civ. P. 56(d); summary judgment; stay pending additional discovery.** Affirming an order by Judge Davis awarding the defendants summary judgment in a product liability action, the 8th Circuit found no abuse of discretion in his denial of the plaintiff's Fed. R. Civ. P. 56(d) motion to stay consideration of the summary judgment motion pending additional discovery, where the case had been pending for more than two years and the discovery the plaintiff sought was not relevant to his summary judgment arguments. ***Mancini v. Boehringer Ingelheim Pharms., Inc.***, ___ F.3d ___ (8th Cir. 2019).

■ **Pleading punitive damages; intra-district split widens.** For more than a year, this column has tracked the growing split within the District of Minnesota regarding whether motions for leave to assert claims for punitive damages are governed by Fed. R. Civ. P. 15 or Minn. Stat. §549.191.

In recent decisions:

While not reaching the issue of which standard applies, Judge Tostrud acknowledged "a recent intra-District trend" favoring the application of Fed. R. Civ. P. 15(a). ***Shank v. Carleton College***, 2019 WL 121938 (D. Minn. 1/7/2019).

Magistrate Judge Brisbois found that Minn. Stat. §549.191 applied to the plaintiffs' motion to amend their complaint to seek punitive damages. ***Rilley v. Money Mutual, LLC***, 2018 WL 6920764 (D. Minn. 12/13/2018).

In an action raising the closely related question of whether a motion to add a claim for bad faith denial of insurance benefits is governed by the Federal Rules of Civil Procedure or Minn. Stat. §604.18, Judge Schiltz found that the statute conflicted with Fed. R. Civ. P. 8 and 15, and that the motion was governed by those rules. ***Selective Ins. Co. v. Sela***, ___ F. Supp. 3d ___ (D. Minn. 2018).

■ **Early discovery; John Doe defendants.** Reversing an order by Magistrate Judge Schultz, Chief Judge Tunheim granted the plaintiff's motion for leave to serve a third-party subpoena seeking to obtain the name and address of the alleged unlawful downloader of adult motion pictures, but imposed a number of restrictions on the subpoena in order to temporarily protect the anonymity of the alleged downloader. ***Strike 3 Holdings, LLC v. Doe***, 2019 WL 79316 (D. Minn. 1/2/2019).

Magistrate Judge Leung granted the bulk of the plaintiffs' motion for leave to serve early discovery in the form of subpoenas seeking to obtain names, addresses, and other identifying information associated with the defendants in a copyright action while, like Chief Judge Tunheim, imposing strict conditions on the use of any information obtained as a result of the subpoenas. ***Paisley Park Enters., Inc. v. Ziani***, 2018 WL 6567828 (D. Minn. 12/13/2018).

■ **Fed. R. Civ. P. 4(f)(3); motions for alternative service granted.** Finding that "email service is not inconsistent with the Hague Convention or with due process," Judge Tostrud affirmed an order by Magistrate Judge Menendez that had authorized alternative service by email on an Indian defendant pursuant to Fed. R. Civ. P. 4(f)(3). ***Patrick's Restaurant, LLC v. Singh***, 2019 WL 121250 (1/7/2019).

Magistrate Judge Leung granted the plaintiffs' motion for alternative service by publication on a Canadian trucking company pursuant Fed. R. Civ. P. 4(f)(3). ***List v. Carwell***, 2018 WL 6787662 (D. Minn. 12/26/2018).

■ **Motions to seeking leave to amend denied.** Denying the plaintiff's motion to amend seeking leave to assert a Title IX claim, Judge Frank criticized the motion as a *de facto* motion for reconsideration of Magistrate Judge Noel's previous denial of a similar motion. ***Doe ex rel. Doe v. Saint Paul Conservatory for the Performing Arts***, 2018 WL 6624203 (D. Minn. 12/18/2018).

Chief Judge Tunheim affirmed Magistrate Judge Brisbois's denial of the plaintiffs' untimely motion to amend the scheduling order to allow them to seek to amend their complaint, criticizing the plaintiffs for their "minimally supported and unspecific" claims of diligence, and finding no other good cause that would offset their lack of diligence. ***Diocese of St. Cloud v. Arrowood Indem. Co.***, 2019 WL 79003 (D. Minn. 1/2/2019).

Magistrate Judge Schultz denied the plaintiff's motion for leave to file a second amended complaint on the basis of both futility and bad faith, finding that certain allegations in the proposed second amended complaint were "flatly contradict[ed]" by admissions in its

original complaint. ***ecoNugenics, Inc. v. Bioenergy Life Science, Inc.***, 2019 WL 157288 (D. Minn. 1/10/2019).

■ **General personal jurisdiction; agent for service of process.** In what is at least third decision in the district on this issue since the Supreme Court's decisions in *Goodyear* (*Goodyear Tire Ops., S.A. v. Brown*, 564 U.S. 915 (2011)) and *Daimler* (*Daimler AG v. Bauman*, 134 S. Ct. 746 (2014)), Judge Nelson held that the defendant's registration with the Minnesota Secretary of State as a foreign corporation and the corresponding presence of its registered agent for service of process within the state made it subject to general personal jurisdiction, despite "persuasive arguments" to the contrary. ***Am. Dairy Queen Corp. v. W.B. Mason Co.***, 2019 WL 135699 (D. Minn. 1/8/2019).

■ **Motion to strike jury demand granted.** Where the parties' dispute was governed by a contract that contained a waiver of the right to a jury trial, the plaintiff's 2013 complaint did not request a jury trial, the defendant demanded a jury trial in its multiple answers, and the case proceeded through discovery without either party raising the jury issue, Judge Nelson granted the plaintiff's 2018 motion to strike the defendant's jury trial demand, rejecting the defendant's argument that the motion to strike the jury demand was untimely, and that it would be prejudiced by the striking of the jury demand based on its "litigation strategy." ***In Re: RFC and ResCap Liquidating Trust Action***, 2018 WL 6696788 (D. Minn. 12/20/2018).

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IMMIGRATION LAW

JUDICIAL LAW

■ **Applying for asylum on the southern border: An update.** Following the 11/19/2018 U.S. District Court grant of the plaintiffs' request for a temporary restraining order—imposing a nationwide injunction on the government to 12/19/2018 or further court order to allow continued review of the matter until final disposition—the 9th Circuit Court of Appeals denied the government's subsequent request to stay the district court's 11/19/2018 temporary restraining order on 12/7/2018. (***East Bay Sanctuary Covenant, et al. v. Trump et al.***, No. 18-17274, 2018 WL 6428204 (9th Cir. 12/7/2018). *http://cdn.ca9.uscourts.gov/datastore/opinions/2018/12/07/18-17274.pdf*

Then, on 12/11/2018, the government filed application with the U.S. Supreme Court for a stay of the district court's 11/19/2018 temporary restraining order. On 12/19/2018, the district court issued a preliminary injunction barring the government from taking any further action to implement its rule on asylum claims along the southern border for an extended period of time. "The Court again concludes that Plaintiffs have established an overwhelming likelihood that the new rule barring asylum is invalid. Accordingly, the Court will grant Plaintiffs' request for a preliminary injunction." ***East Bay Sanctuary Covenant, et al. v. Trump et al.,*** 18-cv-06810-JST (N.D. Cal. 12/19/2018). *https://ccrjustice.org/sites/default/files/attach/2018/12/99%20Order%20Granting%20Preliminary%20Injunction%202018.12.19%20(1).pdf*

On 12/21/2018, the U.S. Supreme Court denied, in a 5-4 decision, the government's request for a stay of the plaintiffs' preliminary injunction. ***Donald J. Trump, President of the United States, et al., v. East Bay Sanctuary Covenant, et al.,*** No. 18A615, 2018 WL 6713079 (2018). *https://www.supremecourt.gov/orders/courtorders/122118zr_986b.pdf*

■ **Asylum, domestic abuse, and gang violence.** In December 2018, a federal judge permanently blocked the expedited removal of immigrants seeking asylum based on flight from domestic or gang violence without first allowing credible review of their claims as dictated by current immigration law. The judge also ordered the return to the United States of those asylum seekers denied a credible fear interview in order that they might have one. This expedited removal policy came about as a result of then-Attorney General Sessions's 6/8/2018 decision, *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), reversing a Board of Immigration Appeals finding that a Salvadoran woman fleeing domestic and sexual violence at the hands of her husband met the requirements for asylum. This decision and subsequent policy effectively eliminated consideration of either domestic abuse or gang-related violence as a basis for asylum in the credible fear context and overruled, in the process, the precedent decision, *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), which recognized domestic violence as a possible basis for an asylum claim. ***Grace, et al. v. Whitaker et al.***, No. 18-cv-01853, 2018 WL 6628081 (D.D.C. 12/19/2018). *https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv1853-106*

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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Trademark: Attorneys' fees denied where both parties prevail.** Judge Frank recently denied both sides' motions for attorneys' fees because each side partly prevailed in the case. Select Comfort sued competitors for false advertising and Lanham Act claims related to online ads and statements made about its beds. The jury determined that the defendants were not liable for any of the Lanham Act claims, but found the defendants liable for false advertising. Both parties moved for attorney's fees as prevailing parties, but the court denied the motions. Under the Lanham Act, a court may award attorney's fees to the prevailing party in "exceptional cases," which has been defined as cases in which a party's behavior went "'beyond the pale.'" However, since defendants successfully defeated Select Comfort's Lanham Act claims, and Select Comfort prevailed on its false advertising claim, the court held that each party prevailed in part and should each bear their own costs. The court also found that the case was not exceptional. ***Select Comfort Corp. v. Baxter***, Civil No. 12-2899 (DWF/SER), 2018 WL 6529493 (D. Minn. 12/12/2018).

■ **Copyright and trademark: court grants expedited discovery of defendants' information.** Magistrate Judge Leung recently granted a motion for expedited discovery needed to serve a complaint. Paisley Park filed suit against several parties for trademark and copyright infringement related to music belonging to the estate of Prince. Paisley Park sent the complaint by email, but the defendants refused to provide a physical address for formal service. To properly serve defendants, Paisley Park moved to subpoena email, internet, and social media providers for contact information related to the defendants' respective accounts. Magistrate Judge Leung analyzed several factors that weighed in favor of granting the motion. First, Paisley Park showed a high likelihood of succeeding in its infringement suit. Second, the discovery

requests were also specific and limited in scope, seeking only relevant information from known accounts that were directly related to the defendants. Finally, the defendants' expectation of privacy weighed in favor of granting early discovery because Paisley Park had alleged sufficient facts showing that defendants infringed the intellectual property, and defendants' expectation of privacy paled in comparison to Paisley Park's interest in protecting its intellectual property. The court granted the discovery motion and stipulated that the information produced from each subpoena could only be used for protecting and enforcing Paisley Park's intellectual property rights. ***Paisley Park Enters., Inc. v. Ziani***, Case No. 18-CV-2556 (DSD/TNL), 2018 WL 6567828 (D. Minn. 12/13/2018).

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PROBATE & TRUST LAW

JUDICIAL LAW

Evidence required to appoint a guardian or conservator. A friend of appellant's petitioned to have a guardian and conservator appointed after appellant was observed in local businesses with soiled pants on two separate occasions. In addition, the proposed guardian and conservator, who was also a friend of appellant's, visited appellant's home, found it to be "dilapidated" and "unlivable," and smelled fuel oil throughout the home. These observations were generally confirmed by the court appointed visitor. Finally, appellant exhibited signs of confusion, including when he claimed he had just had his furnace checked, even though it had not been checked in ten years.

The district court granted the petition and appointed a guardian and a conservator. The court of appeals reversed, holding that the district court made only "conclusory findings" that were "not substantiated with specific evidence." Specifically, the court noted that the only evidence referenced by the district court was that appellant exhibited confusion during the hearing and the "unquestionable" motives of the petitioner and the proposed guardian and conservator. The court of appeals also noted that "[t]here was no evidence presented and minimal testimony provided about the availability of alternative services that could have been provide to [appellant] to avoid the need for a guardian and conservator." Given those deficiencies, the court held that "the record evidence was insufficient to meet the clear and convincing standard of proof required to support the appointment of a guardian and conservator." ***In re the Guardianship and Conservatorship of Reinhold Struhs***, 2018 WL 6273101 (Minn. Ct. App. 12/3/2018).

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TAX LAW

JUDICIAL LAW

Charitable contribution deductions for conservation easement; tax court splits the difference. Taxpayers are permitted deductions for charitable contributions, including contributions of property other than money. When property other than money is contributed, the regulations dictate that "the amount of the contribution is the fair market value of the property at the time of the contribution." Sec. 1.170A-1(c)(1). "Fair market value," in turn, is defined as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." *Id.* subpara. (2). In this dispute, the taxpayer contributed a partial interest in property—in particular, the taxpayer contributed a perpetual conservation restriction.

Yet another regulation specifies the process for valuing such a contribution. Sec. 1.170A-14(h)(3)(i). As is frequently the case in this type of dispute, the Service challenged the taxpayer's deduction as overstating the fair market value of the conservation easement. Competing experts offered staggeringly disparate values: the taxpayer's expert valued the contribution at $9,110,000 while the Service valued the contribution at $449,000. Holding that "[n]either side's expert witness employed a method that fits within the parameters of the regulation," the court engaged in a lengthy analysis in which it parsed each sentence of the regulation to point out how each side's expert erred. Despite the experts' errors, the court reasoned that each expert's value was sufficiently helpful that the court arrived at its own valuation "by giving equal weight to the values assigned by [each

expert]." To reach this conclusion, the court discussed "(1) how both experts' opinions have aspects that are useful to the determination of the easement's value, (2) the nature of the errors made by each expert, and (3) how weighting the two experts' opinions tends to correct the errors in their respective approaches." Ultimately, the court used an equally weighted average to conclude that the value of the easement was $4,779,500, equal to 50% of the taxpayer's $9,110,000 value plus 50% of Service's $449,000 value. ***Pine Mountain Pres., LLLP v. Comm'r***, T.C.M. (RIA) 2018-214 (T.C. 2018).

■ **Personal income tax: Arbitration award ordinary income, not capital gain.** Taxpayer Robert Connell was a highly successful financial advisor who worked for many years for Smith Barney. A decision to move from Smith Barney to Merrill Lynch set in motion a series of events that led Mr. Connell and his former wife to tax court, where they disputed whether an industry arbitration award that extinguished a debt owed by Mr. Connell to Merrill Lynch represented cancellation of indebtedness (taxed as ordinary income) or a payment for taking Mr. Connell's book of business (taxed as capital gain). The saga began when Mr. Connell learned that Smith Barney was likely to be acquired; he responded by moving to Merrill Lynch, and worked to take his book of business, which represented $350 million of assets under management, with him. Merrill Lynch welcomed Mr. Connell and his book of business. In a compensation move apparently not unusual in the industry, Merrill Lynch "loaned" Mr. Connell just over $3 million, which the parties contemplated Mr. Connell would pay back out of his monthly compensation of $42,980. As the court explained, this arrangement "allowed Mr. Connell to receive the full amount of his transition compensation upfront, while recognizing income only as each monthly payment came due. No moneys changed hands with respect to each monthly 'repayment' of the loan."

The loan became immediately repayable under certain conditions, including the termination of Mr. Connell's employment with Merrill Lynch. About a year after joining Merrill Lynch, the relationship between Mr. Connell and the company collapsed. Merrill Lynch opened an investigation into whether Mr. Connell complied with industry norms and regulations, as well as his employment agreement, when he brought his clients to the company. Although Merrill Lynch's outside counsel recommended that the matter be resolved with a letter of reprimand, Merrill Lynch pursued a more aggressive track and forced Mr. Connell to resign. Upon his resignation, Merrill Lynch froze Mr. Connell's personal accounts, which the firm had required him to keep with the company, and it instituted legal action against him.

Eventually, the parties arbitrated the dispute. The arbitration resulted in Merrill Lynch's claims being denied in their entirety. Mr. Connell did not have to pay the balance owing under the promissory note and he was not obligated to pay the balance of the upfront forgivable loan to Merrill Lynch. The panel also awarded compensatory damages of $476,500, attorney's fees of $288,732, and costs of $22,734. The arbitration panel did not specify its reasoning or the basis of the award. Mr. Connell first reported the cancellation of debt as ordinary income. However, on an amended return, he "recharacterized the extinguishment of the balance of the Merrill Lynch upfront forgivable loan, $3,242,248, from ordinary income to capital gain." Since the arbitration panel did not specify the basis on which the award was granted, it was Mr. Connell's burden to prove to the court that the payment from Merrill Lynch was "in lieu of" a capital payment for his book of business.

The court looked to the pleadings to determine the character of the award that Mr. Connell sought. Although the court was persuaded that "the filings heavily emphasize Mr. Connell's argument that Merrill Lynch lured Mr. Connell to Merrill Lynch in order to acquire his book of business and that thereafter it set out to ruin his professional reputation so as to keep him from working at a competing financial services firm," that was not the only argument Mr. Connell made. Mr. Connell also argued that Merrill Lynch breached the terms of the employment contract, causing Mr. Connell to suffer damages that would be characterized as ordinary income. The court was not persuaded that petitioners met their burden to establish that the amount at issue was solely for the acquisition of Mr. Connell's book of business. The court sustained the Service's determination that the extinguishment of Mr. Connell's debt to Merrill Lynch constituted cancellation of debt income and that the amount of the extinguishment was taxable as ordinary income. ***Connell v. Comm'r***, T.C.M. (RIA) 2018-213 (T.C. 2018).

■ **No clear authority to guide taxpayer; no penalty for nonprofit health corporation for marijuana-related underpayment.** Section 280E denies to taxpayers any deduction or credit for trade or business expenses if those trade or business consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) that is prohibited by federal law. §280E. Marijuana, although legal in many states, remains a schedule I controlled substance, the trafficking of which is illegal under federal law. Taxpayer Patients Mutual Assistance Collective Corporation (d.b.a. Harborside Health Center) successfully avoided an accuracy-related substantial understatement penalty for years for which it was precluded by Code Sec. 280E from deducting ordinary and necessary expenses of its medical marijuana dispensary business.

In an opinion authored by Judge Holmes, the court held that the IRS met its burden of production on the applicability of the penalties. The taxpayer, however, also met its burden of demonstrating that it acted with reasonable cause and in good faith. Persuasive to the court were the taxpayer's arguments that there was no clear authority on which the taxpayer could rely. Also helpful to the taxpayer were its accurate books and records; its operation in accordance with state law; and its decision to begin allocating a percentage of its operating expenses to a "non-deductible" category starting the year a case with facts similar, yet not on all fours with the taxpayer's case, was released. (*Olive v. Commissioner*, 139 T.C. 19, 36-42 (2012), aff'd, 792 F.3d 1146 (9th Cir. 2015)). The court noted that Harborside began this "non-deductible" category even before *Olive* was affirmed on appeal. Furthermore, although Harborside was not primarily a caregiver like the taxpayer in another marijuana-related case, *Californians Helping to Alleviate Med. Problems, Inc. v. Commissioner (CHAMP)*, 128 T.C. 173, 181 (2007), its non-drug-trafficking activities were less negligible than those in *Olive*, putting it factually somewhere between those cases. ***Patients Mut. Assistance Collective Corp. v. Comm'r***, T.C.M. (RIA) 2018-208 (T.C. 2018).

■ **Individual income; disguised personal expenses not deductible as business expenses.** Taxpaying couple John P. Rossini and Alisa M. Rossini claimed deductions on jointly filed federal and state individual income tax returns for several tax years. The couple claimed deductions

for: (1) unreimbursed employee expenses, including expenditures for professional business attire; (2) expenses incurred in relation to several consulting activities; and (3) charitable contributions. After audit, the commissioner denied many of the claimed expenses, and reduced the permitted charitable deductions. The couple appealed administratively and the permitted charitable contribution was adjusted. The Rossinis appealed the commissioner's order to the tax court and the parties agreed to submit the matter on a stipulation of facts (with stipulated exhibits) and cross-motions for summary judgment. The court granted the commissioner's motion, denied the motion of the taxpayers, and affirmed the order of the commissioner. The tax court dispensed quickly with the taxpayer's argument that her business attire was a "uniform" and therefore deductible. The court similarly disallowed Mrs. Rossini's reported travel expenses, incurred in Washington D.C. while working in the United States House of Representatives. The tax court held that D.C. was Mrs. Rossini's tax home during that time and the claimed expenses were personal expenses. Last, the tax court disallowed the business expenses for the four purported businesses that reported losses on Schedule C. The claimed deductions were not permitted because the businesses had not yet begun to function as going concerns and had not yet performed those activities for which they were organized. Furthermore, the expenses included DirecTV and significant meals and entertainment expenses. Taxpayers are not permitted to shift their tax burden to their fellow taxpayers by disguising as business their personal consumption. The court affirmed the commissioner's order. ***Rossini v. Comm'r***, No. 9068-R (Minn. T.C. 12/28/2018).

■ **Property tax: Special agricultural homestead classification.** Mr. Luthens argued that his Hutchinson property should receive the special agricultural homestead classification, authorized under Minn. Stat. §273.124, subd. 14, and not subd. 8(a) for entity-owned property. To receive the special classification, the owner must meet five criteria: 1) the agricultural property consists of at least 40 acres; 2) the owner is actively farming the agricultural property; 3) both the owner of the agricultural property and the person who is actively farming the agricultural property are Minnesota residents; 4) neither the owner nor the spouse of the owner claims another agricultural homestead in Minnesota; 5) neither the owner nor the person actively farming the agricultural property lives farther than four cities from the agricultural property. However, Luthens did not meet the fifth criteria because the county claimed that Luthens lived at his Bearpath property. Luthens could not supply sufficient evidence to overcome the county's *prima facie* validity of his residence. The tax court held that his actions showed that he resided in the Bearpath property, regardless of whether his mail was sent to the Hutchinson property. Thus, the Minnesota Tax Court found in favor of the county. ***Luthens v. Cnty of McLeod***, No. 43-CV-15-641, et al. (Minn. T.C. 12/10/2018).

■ **Petition for return of seized property.** The Minnesota Department of Revenue (DOR) sales-and-use-tax division conducted an audit of appellants Shogun Mankato, Inc. and Shogun Burnsville, Inc. (the Shoguns), sushi restaurants. After examining their point-of-sale (POS) system data, the DOR suspected that the Shoguns were using an electronic-sales-suppression device to hide sales. The DOR seized computers, data, records, and other materials from the Shoguns. The Shoguns petitioned, under Minn. Stat. §626.04(a), seeking the return of their property without retention of copies, alleging violations of their 4th Amendment rights, which were denied in district court. The court of appeals affirmed this decision, holding that the DOR can retain the property that will be used in a future trial and the sales-suppression device is subject to forfeiture because its use is a felony. ***Shogun Mankato Inc. v. Comm'r of Rev.***, 2018 Minn. App. (unpublished) LEXIS 1103 (Minn. Ct. App. 12/31/2018).

ADMINISTRATIVE UPDATES

■ **Sales & use tax: New revenue notices.** In December, Minnesota published three sales and use tax revenue notices. The first notice revokes 96-08, which instructs contractors on how to draft purchasing agreements when they are purchasing and installing capital equipment into real property. **Rev. Not. #18-03.** The second revenue notice revokes and replaces 04-04, which provides guidance on when tangible personal property becomes an improvement or a fixture to real property for sales and use tax purposes. **Rev. Not. #18-04.** The last notice explains the sales tax treatment of a lease or rental of portable toilets when the transaction requires the lessor to service the toilet. **Rev. Not. # 18-05.**

LOOKING AHEAD

■ **Legislative tax committees.** A new group of legislators was sworn in in St. Paul, along with newly constituted tax committee in both chambers. The tax committees in the Minnesota Senate will be chaired by Sen. Roger C. Chamberlain (R-Lino Lakes). The vice-chair is Sen. David H. Senjem (R-Rochester) and the ranking minority member is Ann Rest (DFL-New Hope). The equivalent committee in the Minnesota House is chaired by Rep. Paul Marquart (DFL-Dilworth) and the vice-chair is Rep. Dave Lislegard (DFL-Aurora). The Republican lead is Rep. Greg Davids (R-Preston).

MORGAN HOLCOMB & MATTHEW WILDES
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JESSICA DAHLBERG
Grant Thornton
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Minnesota Defense Lawyers Association Wins National Diversity Award

The Minnesota Defense Lawyers Association Diversity Committee was recognized by the DRI – The Voice of the Defense Bar, a national organization of defense lawyers, for addressing issues of importance to the many segments of our society, including issues of racial/ethnic diversity, gender diversity, age, sexual orientation, disability, religious and cultural beliefs. The Diversity Committee has examined how its members' firms may achieve success in recruiting, employing and maintaining a diverse legal staff. The goals of the Committee are a work in progress, not only through meetings and publications to identify and consider issues of diversity, but most importantly through proactively seeking out members of the defense bar from diverse and minority backgrounds to join the Minnesota Defense Lawyers Association and the Committee in this cause.

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Pictured above:
(Left to right) Toyja E. Kelley, DRI President; Elizabeth Sorenson Brotten, MDLA Board Member; Jessica Schwie, Immediate Past President MDLA; John F. Kuppens, Immediate Past President DRI

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HASLERUD

Anne M. Haslerud joined Wilkerson & Hegna as an associate attorney. Prior to becoming an associate, Haslerud worked for the firm as a law clerk while earning her JD. She graduated from Mitchell Hamline School of Law.


DOLEJSI

Nick Dolejsi was elected to the partnership at Zelle LLP. Dolejsi, who joined Zelle in 2013, represents clients in litigation matters involving commercial disputes, construction and real estate disputes, insurance coverage and liability issues, class actions, and product liability.


NAGORSKI

Julie Nagorski was promoted to partner at DeWitt LLP. Nagorski has significant experience litigating disputes in numerous areas of the law, with a focus in real property and construction disputes.


BROOKS


DAVY


SCHMID


TOPKA

Dougherty, Molenda, Solfest, Hills & Bauer PA announced that Laura L. Brooks, Molly P. Davy, Lauri Ann Schmid, and William M. Topka joined the firm. Brooks is a 2015 graduate of Hamline University School of Law and practices in the area of personal and business litigation. Davy, a 2017 graduate of University of Minnesota Law School, practices in all areas of family law and municipal prosecution. Schmid practices in the areas of estate planning and corporate and consumer bankruptcy. Topka practices in the area of litigation, focusing on personal injury, commercial, and real estate law.


CHRISTIANSON

Nilan Johnson Lewis announced Heidi Christianson as its new president. Christianson succeeds Stephen Warch, who will remain as a board member, shareholder, and co-chair of the health care group. Christianson previously served as the chair of the corporate and transactional services practice group and has an extensive background in health care law and nonprofit governance. The firm also announced three new shareholders: Tyler Adams, Zach Crain, and Sarah Riskin. Adams, an MSBA Certified Real Property Law Specialist, focuses on corporate and transactional services. Crain represents businesses and nonprofits, often in the health care sector. Riskin practices within the labor and employment group.


BEAUCHAMP

Rachel B. Beauchamp has become a shareholder with Cousineau, Van Bergen, McNee & Malone, PA. Beauchamp practices in Minnesota and Wisconsin in the areas of transportation law, appellate law, insurance coverage, personal injury defense, and general liability.


KHOROOSI


BRIONES

Sam Khoroosi and Jamie Pahl Briones joined M. Sue Wilson Law Offices, a law firm dedicated exclusively to the practice of family law.

United States District Court Judge Ann D. Montgomery received the 2018 Distinguished Jurist Award from the Academy of Certified Trial Lawyers of Minnesota.

John E. Varpness joined Fisher Bren and Sheridan LLP as a partner. For more than 39 years, Varpness has represented clients in the state and federal courts, practicing in the areas of products liability, personal injury, and business, construction, and environmental litigation.


BLOOMQUIST

Mark Bloomquist has been elected to the management committee of Meagher & Geer, PLLP for a five-year term. Bloomquist, a partner at the firm, works primarily with contested matters.


PENTELOVITCH

Norman Pentelovitch has been elected a shareholder of Anthony Ostlund.

Carl Engstrom has been named partner at Nichols Kaster. Engstrom is a member of the firm's 401(k) litigation team.


PIEPER

Andrew J. Pieper, an experienced trial attorney, became a new partner at Stoel Rives LLP.

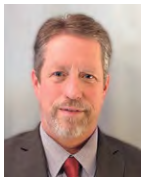
Stinson Leonard Street LLP announced the election of three new partners: Jason Engelhart, Sharon Markowitz, and Matt Tews. Engelhart represents clients in the health care industry, Markowitz focuses her practice on complex, high-exposure cases, and Tews practices in the firm's employment and labor law division.


HUYSER

Alethea M. Huyser has joined Fredrikson & Byron as an associate in the litigation, white collar & regulatory defense and energy groups. Huyser is an experienced litigator who represents clients in a wide variety of enforcement, regulatory, and civil litigation matters.

The new Minneapolis office of Spencer Fane opened in January. Jon L. Farnsworth and Randi Winter joined the firm as partners and Laurie M. Quinn and Leslie Witterschein joined as of counsel.

The Wisconsin-based law firm DeWitt Ross & Stevens SC, and its Minnesota affiliate DeWitt Mackall Crounse & Moore SC, announced they have reorganized to DeWitt LLP.


FELLMAN


HATCHER


WILLMS


HERZING


STRATTON


AANES


HALVERSON


PIETAN

Gov. Dayton appointed eight Minnesota District Court Judges: In Minnesota's 4th Judicial District TODD M. FELLMAN, MICHELLE A. HATCHER, and ANGELA J. WILLMS will be filling a new judgeship and replacing Hon. Pamela G. Alexander and Hon. Nancy E. Brasel, and will be chambered at Minneapolis in Hennepin County. In the 7th Judicial District MARK J. HERZING will be replacing Hon. Steven A. Anderson, and will be chambered at Milaca in Mille Lacs County. In the 8th Judicial District, LAURENCE J. STRATTON will be replacing Hon. Randall J. Slieter, and will be chambered at Olivia in Renville County. In the 9th Judicial District PATRICIA A. AANES and CHARLES D. HALVERSON will be replacing Hon. David J. Ten Eyck in Crow Wing County and Hon. David F. Harrington in Cass County. In the 10th Judicial District LAURA A. PIETAN will be replacing Hon. John R. McBride, and will be chambered at Stillwater in Washington County.

In Memoriam

John W. Carey passed away in 2018. He was a trial lawyer for over 48 years and, to his delight, never retired from the practice. He was a nationally recognized trial attorney at SiebenCarey, with extensive experience in the fields of medical malpractice, personal injury, and alternative dispute resolution.

Thomas W. Walsh, age 88 of Roseville, passed away on December 21, 2018. He served proudly for more than 30 years as a judge with the state of Minnesota.

Kent Charpentier, age 68, passed away on Christmas Day, 2018. He was an attorney for many years in St. Paul but always found time for family and friends.

Terence J. Hislop, age 55, died on December 26, 2018. He founded the Hislop Law Group and used his legal skills in many areas, such as personal injury, legal documentation, and as a sports agent.

Michael L. (Mickey) Robins died on September 8, 2017. He graduated from the University of Minnesota Law School in 1956. He practiced law in Minnesota and California.

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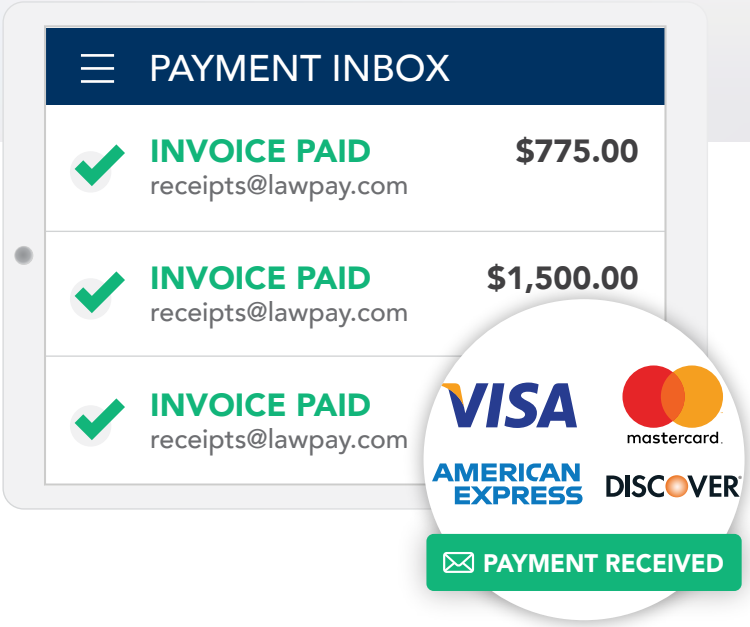

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