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OF MINNESOTA



## Competent but compromised

*Representing clients on the  
spectrum between mental  
health and mental illness*



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# Bench & Bar

## OF MINNESOTA



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# A big step for attorney wellness

I graduated from law school in 1993 and recall that the number of women and men in my graduating class was fairly equal. Interestingly, and encouragingly, there were more women justices than men on the Minnesota Supreme Court when I was sworn in.

My first job after law school was a judicial law clerkship for two district court judges in Olmsted County; one of the judges and two of the three other law clerks I worked with were women. After my clerkship, I began working at a firm that, although it had a short track record of hiring and retaining women attorneys at the time, hired four other women attorneys in relatively short order.

Over the intervening 27 years with that same firm, men continued to constitute a majority of the attorneys in the firm and the number of women attorneys fluctuated. For those women who stayed with the firm and had children, career paths varied. Some chose to work reduced schedules; some left the practice to stay home with their children; and a few—including me—returned to work full-time. I believe that each of the women attorneys felt empowered to make the choice that worked best for their personal circumstances and the firm supported their decisions. Even so, I cannot ignore the fact that having to make that decision in the first place remains a burden that is borne almost exclusively by women in the legal profession,<sup>1</sup> and one that can significantly impact the trajectory of a woman's legal career.

In 2001, the ABA Commission on Women in the Profession published "The Unfinished Agenda: Women and the Legal Profession," a report described at the time as

"the most comprehensive contemporary review of the status of women in the American legal profession and justice system."<sup>2</sup> While the report recognized the significant improvements that had been made for women in the legal profession since the commission was originally created in 1987, it also revealed that women remained underrepresented in positions of greatest status, influence, and economic reward. The report attributed the persisting disparities to a variety of factors, including unconscious gender stereotypes, inadequate support networks, inflexible workplace structures, sexual harassment, and gender bias in the justice system.

In the 20 years since that ABA study was published, tremendous strides have been made toward improving the plight of women in the legal profession. Even so, significant barriers relating to childbirth and the ensuing obligations associated with child care continue negatively affect the longevity of women in the legal profession. A 2019 ABA study authored by Roberta D. Liebenberg and Stephanie A. Scharf, "Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice,"<sup>3</sup> analyzed the persistent inequities women continue to face in private practice and found that while, year after year, women have comprised between 45 and 50 percent of entering law firm associates, they account for just 20 percent of law firm equity partners.

Not surprisingly, the 2019 study participants identified caretaking commitments as having the greatest influence on why women left their firms, with 54 percent of study participants reporting that arranging child care was their full responsibility, compared to only 1 percent of the men. Similarly stark discrepancies existed between women's and men's responses to questions about leaving work for childcare (32 percent of women, 4 percent of men), coordinating children's extracurricular activities (20 percent of women, 4 percent of men), and being responsible for evening childcare (17 percent of women, 4 percent of men) and daytime childcare (10 percent of women, 1 percent of men).

The unmistakable disparity in childcare commitments that exists between women and men in the legal profession is precisely why the work of the MSBA's Parental Leave Working Group is so vital. Over the course of the last several months, the group has been studying the intersection between workplace pressures (including rigid court deadlines) and written parental leave policies with an eye toward developing recommended changes to the Rules of General Practice, Rules of Civil Procedure, and Rules of Appellate Procedure to facilitate personal leave requests by attorneys. (The group's recommendations will be presented to the MSBA Assembly in June.)

While it remains true that women attorneys continue to bear the brunt of child caretaking obligations, the proposed changes to the rules will benefit men and women attorneys alike.<sup>4</sup> And rightfully so: As the 2017 report of the National Task Force on Lawyer Well-Being<sup>5</sup> confirmed, issues with work-life balance impact the entire profession and failure to address the problems has, at least in part, contributed to rather alarming statistics relating to attorney depression, anxiety, stress, and chemical use and abuse.

Seeking changes to the various court rules to accommodate personal leave is one small step we can take to improve well-being in our profession. I hope you will join me in supporting the recommendations of the Parental Leave Working Group. ▲

## Notes

<sup>1</sup> See, "Third child. First parental leave. What's wrong with this picture?" Michael Boulette (February 2020, Bench & Bar).

<sup>2</sup> ABA Commission on Women in the Profession, *The Unfinished Agenda: Women and the Legal Profession* (2001) [www.womenlaw.law.stanford.edu/pdf/aba\\_unfinishedagenda.pdf](http://www.womenlaw.law.stanford.edu/pdf/aba_unfinishedagenda.pdf) (last accessed on 2/28/21).

<sup>3</sup> [www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door4920053.pdf](http://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door4920053.pdf) (last accessed on 2/28/21).

<sup>4</sup> Indeed, the rule changes contemplated by Parental Leave Working Group encompass various forms of "personal leave" and are not limited exclusively to parental leave.

<sup>5</sup> ABA National Task Force on Lawyer Well-Being, *Creating a Movement to Improve Well-Being in the Legal Profession*, 8/14/2017, Bree Buchanan, Esq. (Task Force Co-Chair), James C. Coyle, Esq. (Task Force Co-Chair), <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeing-ReportRevFINAL.pdf> (last accessed on 2/28/21).



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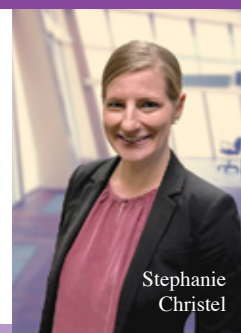


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## Notice to Greater MN Members

Call for Nominations  
2021 – 2022

We are now accepting applications for two major leadership positions at the MSBA. We will be selecting a candidate for the position of MSBA Secretary and for the Greater MN Council Representative.

**MSBA Secretary:** In the normal course of events, the MSBA Secretary will advance to the office of Treasurer, President-Elect, and President in the year 2024 – 2025. The candidate must be a member of a Greater MN District Bar Association (Districts 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 or 21).

**Greater MN Council Representative:** To be considered for this position, the candidate must be from one of the following districts (Districts 3, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, or 20). The final candidate will be expected to fulfill a three-year term on the MSBA Council beginning July 1, 2021.

Applicants for both positions should contact Ariana Guerra at [aguerra@mnbars.org](mailto:aguerra@mnbars.org) or 612-278-6313 for an application form and further information.

The deadline to apply is Sunday, May 16, 2021.

The MSBA is committed to the principles of diversity and encourages the participation and representation in its leadership of the many diverse groups that the MSBA serves.

## Required pro bono reporting to begin in 2022

The Minnesota Supreme Court has issued an order granting the MSBA's petition requesting changes to the Rules of Lawyer Registration, effective January 1 of next year. The petition asked that attorneys be required to report the number of pro bono hours they complete each year, and whether they made any financial contributions to a legal services program serving low-income people. These questions will be part of the form attorneys complete when they renew their licenses. The MSBA will work with the Lawyer Registration Office and the Court to provide more complete information to its members and the bar about the reporting obligation prior to the effective date.

The new rules do not require attorneys to do pro bono. That is an aspirational goal (spelled out in Rule 6.1 of our Rules of Professional Conduct) that attorneys undertake when they become licensed. Although the question of how many pro bono hours Minnesota attorneys contribute is frequently asked, there is currently no valid or complete answer. The MSBA's North Star Lawyer program, which recognizes MSBA members who contribute 50 hours or more of pro bono service, has seen a dwindling number of attorneys qualify over the years. Yet the need for pro bono service has not diminished. It may be greater than ever before, particularly once the eviction moratorium is lifted. Required reporting of pro bono hours will inform us how well we are living up to the commitment we made to do pro bono. Reporting will also facilitate more targeted pro bono attorney recruitment efforts.

The MSBA wishes to thank Timothy Droske of Dorsey & Whitney, who volunteered to draft the petition and speak on behalf of the MSBA at the public hearing. Thanks also to the Access to Justice Committee for their work on this issue.



**LAWYERS STEP UP  
FOR MINNESOTA**

## Lawyers urged to 'Step Up for Minnesota'

Health care and essential workers have played a critical role in getting our state through the first year of the pandemic. Now it's our turn to be heroes by helping low-income Minnesotans and their families with legal issues that affect their basic human needs.

The Minnesota Judicial Branch, Minnesota State Bar Association, and legal aid programs recently launched the one-year "Lawyers Step Up for Minnesota" campaign to help fellow Minnesotans with acute legal needs in housing, family safety, and consumer protection.

"The bench and bar have long been partners in the effort to encourage all lawyers to volunteer their legal skills. Lawyers Step Up for Minnesota is another example of our great tradition of service to those who might not otherwise have legal representation when they most need it," said Minnesota Supreme Court Justice Lorie S. Gildea. "The need for lawyers to step up during this unprecedented time is essential. The representation that lawyers provide as pro bono attorneys improves outcomes for those they represent and improves our justice system as a whole. When parties understand the legal process and have an advocate by their side, we all benefit."

By visiting the [lawyersstepupmn.org](http://lawyersstepupmn.org) website, a lawyer can fill out a brief questionnaire and be matched with a legal aid program that's a good fit based on the lawyer's interests and geographical area. The legal aid programs will work directly with lawyers to provide pro bono opportunities tailored to the volunteer's interests. Opportunities may include brief advice, helping out at a clinic, or full representation.

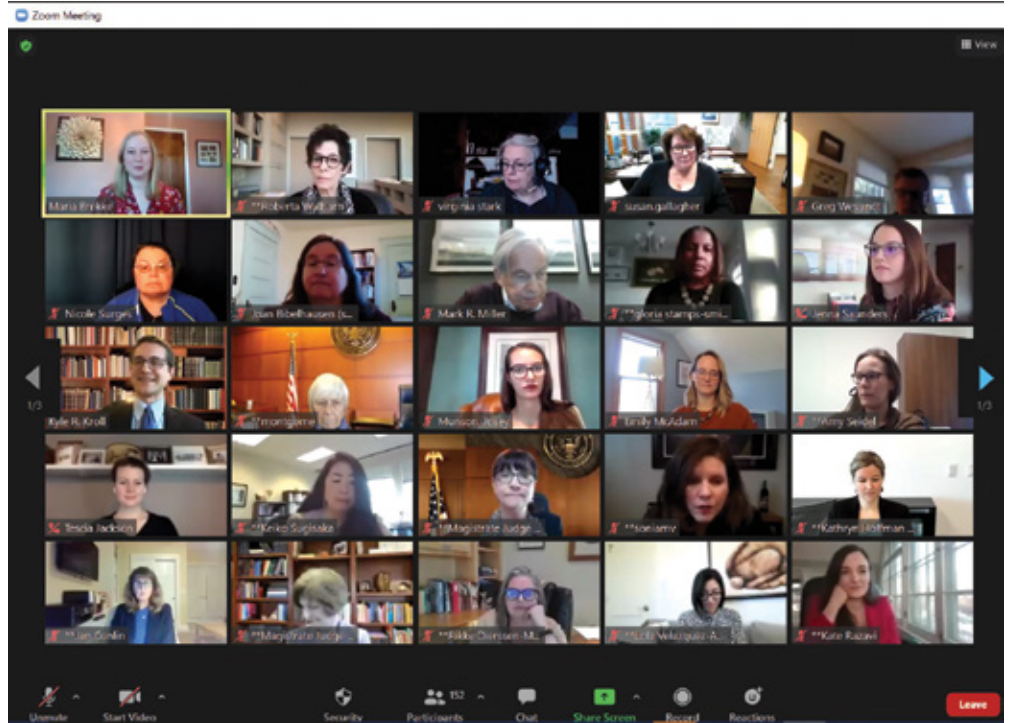
The skills that lawyers use in many types of practice are transferrable to the housing, family safety, and consumer protection arenas, such as meeting with a client, strategizing, preparing responses and forms, and negotiating. Legal aid programs provide mentorship and resources to help volunteer attorneys.

At the end of the one-year Lawyers Step Up campaign, volunteers will be recognized by the Judicial Branch for their pro bono service. Visit [lawyersstepup.org](http://lawyersstepup.org) to learn more and to volunteer.



## Celebrating Trailblazing Women Attorneys

On March 4 the MSBA New Lawyers Section—in partnership with the New Lawyers Committees and Sections of the Hennepin County Bar Association, Minnesota Chapter of the Federal Bar Association, Minnesota Women Lawyers (RISE), and Minnesota Association of Black Lawyers—hosted a “Celebrating Trailblazing Women Attorneys” online event. Over 20 trailblazers from the legal profession joined our attendees to share insights and career advice as they rotated through Zoom breakout rooms to chat with attendees. Participants heard inspiring stories, learned expert tips, re-connected with colleagues/peers, made new connections, and had fun dancing to music before the event started. Many thanks to all who participated.





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5th Judicial District  
APRIL 16

3rd Judicial District  
APRIL 30

7th Judicial District  
MAY 14

10th Judicial District  
JULY 8



# Avoiding ethics complaints

**A**nually we receive one complaint for every 25 lawyers in the state, and most complaints do not result in discipline. Those are good odds. And there is much you can do to further reduce your chance of receiving a complaint and, if you do receive a complaint, of being disciplined.

## Fundamentals matter

The most violated rules are some of the most straightforward, and in theory among the easiest to follow. Rule 1.3, Minnesota Rules of Professional Conduct (MRPC), and Rule 1.4, MRPC, are frequently violated. Do you know what they cover? Answer: diligence (Rule 1.3) and communication (Rule 1.4). Good customer service in the legal profession, as in any service industry, goes a long way, but sometimes lawyers fall short. Lawyers have a professional obligation to control their workload so that each matter can be handled diligently. No professional shortcoming is more widely resented by our clients than procrastination. It often takes a long time to get legal matters resolved, a frustrating fact for clients. Add to that timeline the non-diligence of counsel and complaints

are the natural result. Do yourself a favor and pick up that file or that matter you have been putting off, and work on it. You will feel better, and you will be reducing your exposure to a complaint.

Lawyers are known as skilled communicators, yet more lawyers than you would think struggle to communicate effectively with their clients. Too often we see lack of clarity in the scope of representation, or even

regarding who is and who is not the client. This lack of communication can continue throughout the representation. It is not enough to promptly return calls when your client reaches out to you—although that is required; your duty of communication obliges you to keep the client reasonably informed about the status of the matter: It is on you. You also must discuss the means by which the client's objectives are to be accomplished. Prompt billing and clear communication about fees and expenses as they occur are pivotal to aligning your work with

**As they say, the cover-up is often worse than the crime. You will always be better off when you choose candor and honesty, no matter how humbling or uncomfortable it may be to do so.**

the client's objectives. Periodically taking time to make sure you and your client are on the same page throughout the course of the representation is always worth the effort and goes a long way toward a satisfactory representation, no matter the end result.

Effective communication starts at the retention stage. Every engagement should have a written fee agreement, signed or acknowledged by the client, that at a minimum sets forth the scope of the representation and the basis of your fee. Some forms of engagement, such as contingency representation, require a written fee agreement signed by the client. Even when it's not required by the rules, you should prepare one for your own protection, and to limit disputes with your clients. Review your standard fee agreements frequently to confirm compliance with the ethics rules and

resist the urge to overreach!

Fee agreement errors follow close behind diligence and communication among the most frequently violated rules. If I've said it once, I've said it a thousand times—no fee is earned upon receipt and no advance fee is nonrefundable. Scrub those phrases from your vocabulary—and fee agreements—and read Rule 1.5, MRPC, in its entirety. Also, do yourself a favor and treat fee disputes with your client in a fair and equitable manner. While the Office does not investigate fee disputes only (unless an unreasonable fee is involved), fee disputes often reveal other ethics violations that may not have risen to the level of a complaint if the fee concerns had been handled promptly and equitably as a first resort. You are certainly entitled to be paid for your services, but failing to promptly address fee concerns fairly can be shortsighted.

## Candor and honesty matter

I continue to be surprised at how understanding and forgiving clients can be, and I wish that every lawyer kept this in mind. Clients understand that mistakes happen, and they appreciate your candor in addressing those mistakes. And though they might not like it initially, most come to appreciate your candid and unvarnished advice. Clients also are generally okay when you say you don't know the answer. Clients understand when you tell them something else has come up and their matter has been delayed. Clients do not like to start over with new lawyers.

It will not surprise you to learn that no client is understanding when you try to dodge responsibility or obfuscate the facts in lieu of acknowledging any of the foregoing. This is also true for the Court and communications with this Office. Some lawyers cannot resist the urge to "lawyer" or massage the facts. Partially true but misleading statements, or omissions, can be the equivalent of affirmative false statements. As they say, the cover-up is often worse than the crime. You will always be better off when you choose candor and honesty, no matter how humbling or uncomfortable it may be to do so.



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

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### You matter

It has been a rough 12 months, and although there is much hope in 2021, challenges remain. This morning I saw a press report that another Kentucky lawyer died by suicide in 2021. In January, four Kentucky lawyers died by suicide in three weeks, prompting the state bar president to issue a statement offering resources and calling upon all members of the profession to lift up others when they could.

I worry about the members of our profession a lot, and I worry about lawyers facing discipline. I also take very seriously my responsibility to enforce the ethics rules, and misconduct has consequences. I do not see these statements as contradictory. This morning I received a letter from a lawyer who was disbarred a few years ago for client theft. This lawyer wrote in order to begin to address his Client Security Board obligation. He reported that he has been sober for a few years now (we knew something was up, but he did not raise substance use in response to misconduct charges), and that he has slowly been putting his life back together. I am very glad he received help, and I'm glad the Client Security Board was there to reimburse his clients.

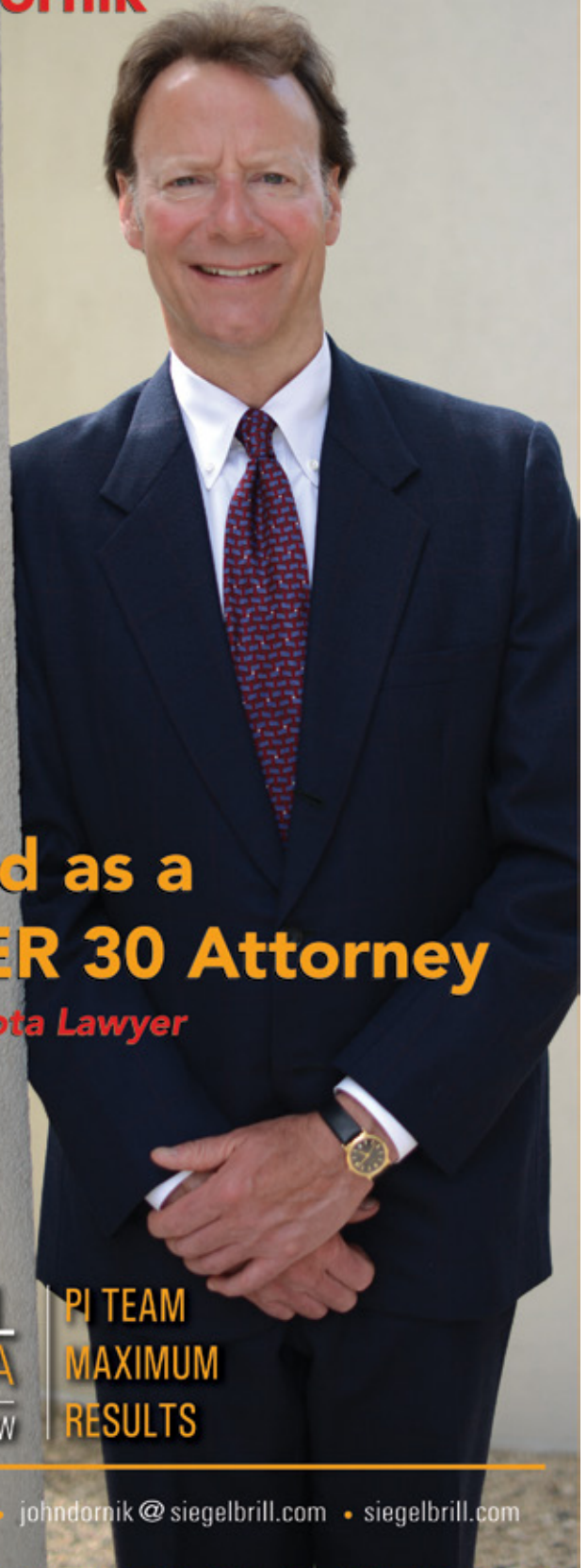
Help is available, but it can be very hard to reach for it. Make sure you check in with yourself and others. There is no doubt that we will continue to feel the effects of the last year for the foreseeable future, to say nothing of the other well-documented challenges that abound in the profession.

### Conclusion

Sometimes complaints are inevitable, but much lies within your control. Focusing on a few fundamentals goes a long way toward mitigating risk. We often give this advice to our clients, and you may be surprised to find that it holds true in your practice as well. Do everything you can to work your files and matters diligently; prioritize communications with your client; familiarize yourself with the fee agreements rules and follow them; approach everything with the utmost honesty and candor, most particularly when it is tempting not to do so; and don't forget to check in with yourself and those you work with closely. And, remember, we are available to answer your ethics questions: 651-296-3952. ▲

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# Geofence warrants

## The battle is just beginning

This past February, a TechCrunch article explained how geofence warrants were being used to identify those involved in the Minneapolis protests of last summer. With a judge's approval, geofence warrants essentially allow law enforcement to obtain information on anyone who was in a particular area at a particular time. With these general perimeters, it is more than possible that individuals who are not involved in any criminal activity will have their information requested simply for matching the search criteria. The article describes how one Minneapolis resident, Said Abdullahi, "received an email from Google stating that his account information was subject to the warrant, and would be given to the police. But Abdullahi said he had no part in the violence and was only in the area to video the protests."<sup>1</sup>

Geofence warrants mark a clear divide between those who prioritize privacy and those who want to use the long arm of surveillance technology for law enforcement. For law enforcement, geofence warrants are a powerful tool in identifying offenders; in addition to the Minneapolis protests, these warrants were widely used to locate rioters involved in the January 6 U.S. Capitol insurrection. As the Washington Post noted afterward, "The Capitol, more than most buildings, has a vast cellular and



wireless data infrastructure... Such infrastructure, such as individual cell towers, can turn any connected phone into its own tracking device."<sup>2</sup> Historically, Google cooperates with law enforcement in providing anonymized user data, following up with more specific information for potential suspects; in fact, these sorts of warrants saw a 500 percent request increase between 2018 and 2019.<sup>3</sup> While this degree of connectivity provides law enforcement with an easy tracking method, many argue that the risks and potential abuses of this capability outweigh the benefits.

By their nature, these warrants can have serious impacts upon the guilty and innocent alike. Given this impartiality, it is frequently argued that the tool facilitates unconstitutional searches and seizures. Those who are caught up in the net are often surprised to learn the extent of the geographical data that has been collected about them—and with their permission! User agreements, such as those with Google, make information sharing under certain circumstances permissible. With that in mind, it is most likely that geofence warrants and the associated concerns with their use will be addressed by the courts; the first major case to confront the potential Fourth Amendment violations of geofence warrants involves a 2019 armed robbery that occurred in Virginia.<sup>4</sup>

In Illinois, U.S. Magistrate Judge Gabriel Fuentes rejected a warrant request involving a drug theft case, stating, "if the government can identify that wrongdoer only by sifting through the identities of unknown innocent persons... a federal court in the United States of America should not permit the intrusion."<sup>5</sup> But in the meantime, these warrants will most likely continue to be used extensively by law enforcement.

In using the multitude of applications on our smart phones, we often fail to recognize the vast amounts of personal data that we allow to be collected, stored, and in some instances, shared with other parties. It is always important to be mindful of our technological footprint and the policies employed by major organizations such as Apple or Google. Since most of us tend to click "agree" without a thought, it is also wise to research and understand how your data is being used. Google now deletes location history data after 18 months, and Apple has stated with respect to providing product backdoors and broad government access, "We believe security shouldn't come at the expense of individual privacy."<sup>6</sup> But Apple also complies with legally valid requests. Unfortunately there are no perfect methods to control and monitor the huge volume of data we allow to be collected about us. ▲

### Notes

<sup>1</sup> <https://techcrunch.com/2021/02/06/minneapolis-protests-geofence-warrant/>

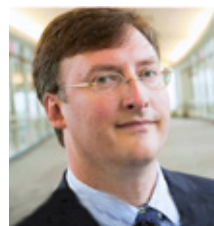
<sup>2</sup> <https://www.washingtonpost.com/technology/2021/01/08/trump-mob-tech-arrests/>

<sup>3</sup> <https://www.abajournal.com/magazine/article/law-enforcement-is-using-location-tracking-on-mobile-devices-to-identify-suspects-geofence>

<sup>4</sup> [https://www.nacdl.org/Content/United-States-v-Chatrrie,-No-3-19-cr-130-\(E-D-Va-\)](https://www.nacdl.org/Content/United-States-v-Chatrrie,-No-3-19-cr-130-(E-D-Va-))

<sup>5</sup> <https://www.abajournal.com/magazine/article/law-enforcement-is-using-location-tracking-on-mobile-devices-to-identify-suspects-geofence>

<sup>6</sup> <https://www.apple.com/privacy/government-information-requests/>



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

# NEW!

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# ‘I wanted to be a lawyer from the time I left high school’



MICHAEL FONDUNGALLAH, a native of Cameroon, received a bachelor's degree in law and a graduate degree in business law from the University of Yaounde. After migrating to the United States in the 1990s, he earned his JD from the William Mitchell College of Law in 2001. His practice is focused on immigration and employment law. ✉ MFONDUNGALLAH@FONDRLAW.COM

## When did it first occur to you that you wanted to be a lawyer?

I was born in Kumba, Cameroon to parents with very little education. While driving a dump truck, my father taught himself how to read and write and brought a newspaper home every day for me to read. This instilled in me a love for reading and writing and a desire to know everything happening around the world. I listened to the BBC and Voice of America and wrote out the news and presented it to my grade school classmates every morning.

I knew I wanted to be a lawyer from the time I left high school. So when I enrolled in the lone university we had in Cameroon at the time, the University of Yaounde, it was into the Faculty of Laws and Economic Sciences. I studied English private law and after obtaining my LLB, I did a post-graduate diploma in business law.

I joined the law chambers of Barrister Tazem in preparation for the bar as a pupil lawyer. I still loved writing and the journalist in me did not give way to the lawyer I wanted to become. So I worked for the Herald Newspaper covering sports and politics while preparing for the bar.

I did not complete my pupillage before I got an opportunity to come to the United States. When I told those who had come before me that I wanted to become a lawyer, I was told it was too difficult to become one in the United States. It was too expensive and I had no money to pay for it. While working in a Pillsbury bakery in Lewisville, Texas, I took classes in legal assistance at North Central Texas College to learn about the American legal system. Five years after my arrival to the United States, I took the law school entrance exam and was admitted to William Mitchell College of law in Saint Paul, Minnesota.

Minnesota? “It is too cold and there is snow in the winter. You cannot survive there,” I was told. I arrived in Saint Paul in the fall of 1998 vowing to complete law school and return to Texas. That vow was reinforced after my first taste of winter and its frigid cold. Twenty years after, I am still here and loving everything about this beautiful place, its people, and the law.

## Did you go into law school hoping to practice in the areas—immigration law, employment law, discrimination law—that you focus on today, or did your experience lead you to them?

No. I came into law school wanting to be an international business lawyer. Fate led me into immigration law and then employment law. After I passed the bar in 2001, a Cameroonian family I know came to my apartment and told me that their son has been arrested in Atlanta and I needed to go get him. Thanks to the Minnesota Advocates for Human Rights and various mentors, I did—and won my first immigration case. I got into employment law the same way after I was asked by a friend to help a VA police officer who was facing removal from the federal service.

## Immigration law was a difficult and rapidly changing practice area during the last presidential administration. Has the change in administrations yielded any changes that you can see in your practice so far?

A few things have changed that allow lawyers and some of their clients to sleep peacefully. Asylum seekers at the border are being allowed in to make their claims. DACA recipients are assured they will not be denied work authorizations or removed. But it is going to take time to really see the effects of the changes this administration has put in place.

## What aspect of your job do you enjoy most?

Meeting people from different countries and diverse cultures is what I enjoy most from the work I do. The ability to listen, find solutions to their problems, and use the law to make things happen is fulfilling, especially when you win. As one of my teachers said, “the law is a beautiful rose that smells bad.”

## How do you like to spend your time when you aren't working?

I like to travel, watch youth basketball and football (I have three boys). And I am learning to play the guitar. ▲



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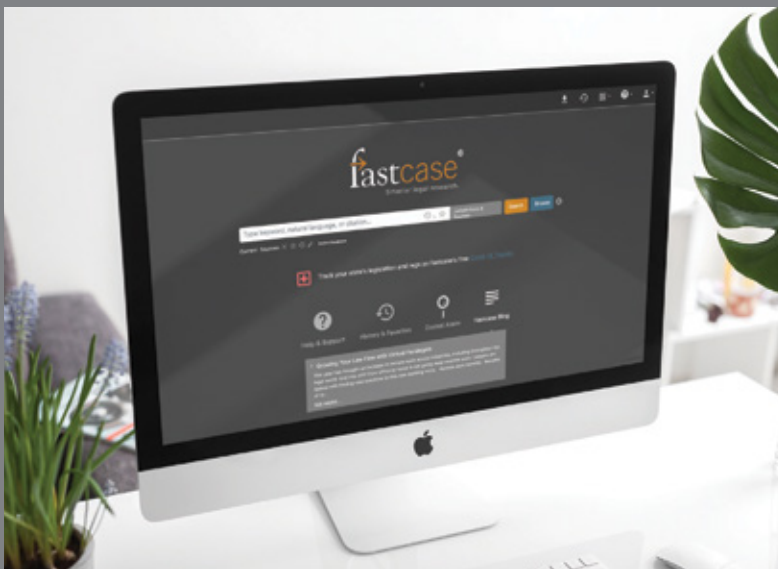
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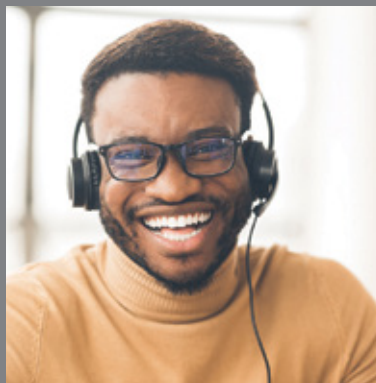


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# Three ways to improve your brief

**B**rief writing is a critical skill for lawyers. Motions are won or lost on the strength of a brief, yet many briefs miss important opportunities to persuade the court to rule favorably. While legal support and strength of analysis are the most important aspects of any brief, a close case may hinge on your ability to interest the judge in the outcome of your case. Here are three simple yet effective techniques that can substantially raise the quality and effectiveness of your brief.

## 1 Set the table

An important aspect of writing—whether fiction, academic, or legal—is connecting with your reader. In the legal context, you want to make that connection with a judicial officer (and their law clerk) early on in your brief. One way to do this is to include a brief background section about the party you represent. This is particularly useful if your client is a business or a nonprofit, rather than a person.

The simplest way to do this is to use facts about your client that are not legally significant to your case, but serve the purpose of eliciting an emotional response.<sup>1</sup> Imagine you represent a client, Bland's Men's Wear, whose doors opened in 1945. Since then, three generations of Blands (Arthur, John, and William) have run the store. Your case arises from a fire caused by faulty wiring. The background statement might look like this:

Immediately following the end of World War II, Arthur Bland realized his dream of opening his own haberdashery, Bland's Men's Wear. He sold fine men's attire at affordable prices, and prospered as a result. For the last 75 years, three generations of Blands continued the tradition of selling fine men's clothing at reasonable prices, until a fire closed their doors forever.



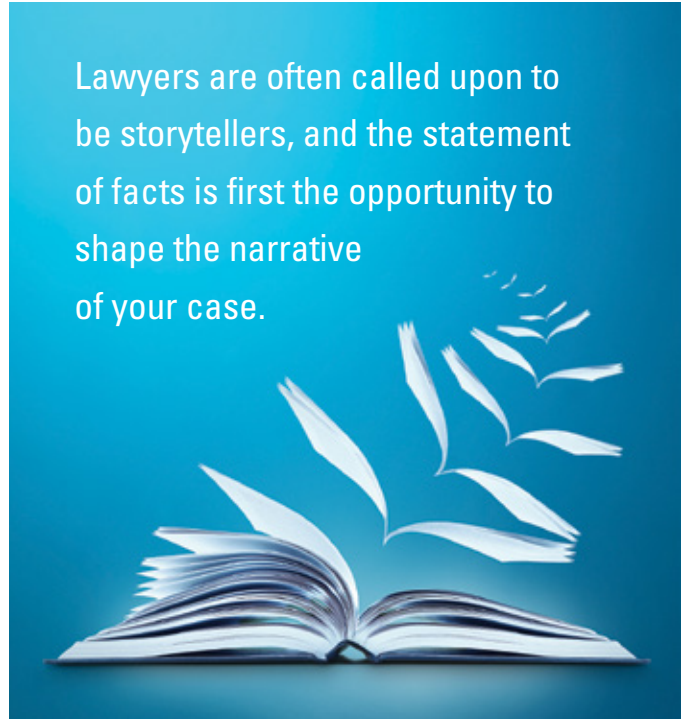
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This statement packs a punch for several reasons. First, Bland's is no longer just an anonymous business, it's an institution whose story begins with its birth and ends with its untimely death. Second, Bland's story isn't just about a fire; it's a story of pluck and perseverance, rebirth after war, and three generations of a family's work destroyed by an act of negligence. You've already generated empathy for your client's loss and haven't even reached the legally significant facts of your case.

## 2 Persuasion starts in your statement of facts

The persuasive element of your brief begins with your statement of facts, not with your analysis.

Lawyers are often called upon to be storytellers, and the statement of facts is first the opportunity to shape the narrative of your case.



Lawyers are often called upon to be storytellers, and the statement of facts is first the opportunity to shape the narrative of your case. A compelling story—one that gets the reader emotionally invested in the fate of the protagonist—is one in which the facts of the case are woven together in such a way that your desired resolution seems only natural.

Unfortunately, writers frequently fail to seize this opportunity. Often, instead of using the statement of facts to weave a story, an attorney will simply use the section as a dumping ground for all facts, relevant or not. Sometimes the facts are in chronological order, but the legally determinative facts are clustered with irrelevant material. There are few if any bridging devices. This leaves the presentation cluttered and rushed. There is no reason not to put the time and effort into crafting a statement of facts that hooks your reader.

On other occasions, writers use numbered paragraphs in the statement of facts. This often occurs in cases where multiple parties present converging fact patterns. While this approach may contain the legally determinative facts, in chronological order, and suggestive of a preferred legal outcome, it is more akin to reading a shopping list than a statement of facts. If your case (a car accident, let's say, featuring a drunk driver) has multiple parties all converging at one point, tell the story of the first party, then use a bridging phrase to show parallel timelines: "While the Smith family celebrated their daughter's engagement, the Defendant, Mr. Jones was downtown at his favorite bar." This can be used to turn multiple timelines into a compelling story that supports your client's claim.



### 3 Coordinate ideas, coordinate terms

Finally, effective sentence structure can elevate a brief. One of the most important rhetorical tools in the writer's toolkit is a technique called parallel structure. Parallel structure is the "use of words, phrases, or clauses of similar form and length."<sup>2</sup> One familiar example comes from Dr. Seuss: "I would not like them here or there. I would not like them anywhere. I do not like green eggs and ham. I do not like them, Sam-I-Am."<sup>3</sup> This earworm owes its appeal to parallel structure.

Parallel structure is particularly effective in conveying analogous reasoning. Consider the following, taken from a classroom example:

Like the appellants in *Bruce* who demonstrated the driver's obvious intoxication through circumstantial evidence such as the driver's BAC being *above the legal limit*, the driver and appellant having had *the same number of drinks*, and the driver attempting to use coins to *start her vehicle*, Ms. Delacruz can demonstrate that Grace was obviously intoxicated through circumstantial evidence such as Grace's BAC being *above the legal limit*, Ms. Delacruz and Grace having had *the same number of drinks*, and Grace having difficulty trying to *start her vehicle*.

This sentence illustrates, rather than explains, why precedent requires the court to rule in Ms. Delacruz's favor.

Parallel structure is also effective as a tool for oral argument. If you want to emphasize an important point, parallel structure is the way to go. For example:

*On three occasions*, Mr. Smith was referred to management for his behavior. *On three occasions*, Mr. Smith received formal reprimands and remedial training. And *on three occasions*, Mr. Smith refused to adjust his behavior.

Here, parallel structure effectively demonstrates Mr. Smith's repeated transgressions.

### Conclusion

Effectively implementing these suggestions requires careful thought, planning, and sufficient time. The extra effort is worth it, because a hastily written brief is often less persuasive than a carefully planned, well-written brief. Using these tools to spruce up your writing can raise your brief from "good enough" to "compelling," and a compelling argument is hard to reject. ▲

<sup>1</sup> For a good discussion of the three types of facts—legally significant, background, and emotional—see Christine Coughlin et al, *A Lawyer Writes* 246-47 (3d ed. 2018).

<sup>2</sup> Ross Guberman, *Point Made: How to Write Like the Nation's Top Advocates*, Oxford University Press (2d ed. 2014).

<sup>3</sup> Dr. Seuss, *Green Eggs and Ham* (1960).



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# *Competent but compromised*

## Representing clients on the spectrum between mental health and mental illness

By JENNIFER L. THOMPSON

The first time I tried to write this article, the deadline was March 2020. A year later, it's probably fair to say that we all have a better understanding of what it's like to feel your personal security and emotional well-being under siege on a continuing basis. In 2020 our society experienced a collective foreboding the likes of which we hadn't felt in years—generations, really. We experienced, in other words, something that people with anxiety disorders experience on a daily basis. As one writer noted in the magazine *Psychology Today*, “For billions out there now, panic is novel, new: like some strange toy as yet unfondled that spits tacks. To us, the chronically afraid, this is just one more terror, teetering contagiously atop the rest.”<sup>1</sup>

In early September 2001, I was a new sales manager at a luxury hotel in St. Louis. Working in flyover country when all flights were grounded on 9/11 meant lost business and lost jobs—including mine. I remember the crushing loss, the economic burden, and the uncertainty I felt not only personally, but as a sheltered American kid whose country had not been attacked on its own soil since 1814. That experience led to my finally being diagnosed with generalized anxiety disorder and major depression. I say “finally” because I am certain I suffered with anxiety and depression beginning in junior high, and only marginally functioned without the aid of my serotonin until I was over 30.

I tell you this not to garner sympathy or to make myself sound brave, but because I can assure you I am not the only attorney with the same or similar diagnosis. And I say with all certainty, if you haven't already, you *will* have a client similarly situated.

### *We are everywhere*

According to the National Surveys on Drug Use and Health 2014 to 2015 report, almost 19 percent of Minnesotans age 18 and over met the criteria for a mental illness in the prior year.<sup>2</sup> An estimated 17.3 million adults in the United States (about 7.1 percent) had at least one major depressive episode.<sup>3</sup> Harvard Medical School estimates that over 30 percent of U.S. adults experience an anxiety disorder at some time in their lives.<sup>4</sup> When juxtaposed with the number of Minnesotans involved in some kind of litigation (1,230,516 new cases filed in 2018),<sup>5</sup> mental illness and lawyering are bound to cross paths. And all that data is pre-pandemic.

Mental illness can be genetic, created by a chemical imbalance in the brain, or caused by environmental exposures to substances or experiences.<sup>6</sup> Trauma, quantified by the CDC in its Adverse Childhood Experiences (ACEs) study, is directly linked to not only mental disorders, but also to physical illnesses such as heart disease, diabetes, and cancer.<sup>7</sup>

This is not to say that every actionable issue has a mental health element. Sometimes a contract is just a contract.

But just as dissolution clients are screened for domestic violence, it is prudent to screen all clients for mental health issues that might go beyond personality traits or mere quirks. Knowing what to look for and how to respond can save your relationship with your client.

### *Points along a spectrum*

Mental health and mental illness are not binary states. They represent more of a continuum, a bell curve, a spectrum—and we are all on it.

At one end of that spectrum, Minn. Stat. §524.5-102, Subd. 6 defines an “incapacitated person” as one who “is impaired to the extent of lacking sufficient understanding or capacity to make or communicate responsible personal decisions, and who has demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety, even with appropriate technological assistance.” Effectively, an incapacitated person is one who requires commitment due to severe mental illness or chemical dependence, or guardianship and possibly conservatorship due to a mental or cognitive impairment.

Most attorneys understand the challenges and ethical obligations involved in representing clients with diminished capacity. Rule 1.14 of the Model and Minnesota Rules of Professional Conduct is quite clear. We are, in a nutshell, to maintain a normal relationship as far as possible; adequately act in the client's interest; take protective action;



seek appointment of a guardian *ad litem*, conservator or guardian; and protect the client's interests.

The gray area lies where a client does not meet the definition of diminished capacity, but has diagnosed or undiagnosed mental health struggles that affect their daily life and, more pertinently, their legal matters. In my own experience, representing an incapacitated person is much easier than working with a client who is capable of making their own decisions—yet whose judgment has struck me as faulty. Rule 1.14 addresses communicating ethically. Working with a competent but compromised client, on the other hand, requires communicating with empathy.

The mental health/illness spectrum includes a plethora of diagnosed and undiagnosed conditions.<sup>8</sup> Our clients may experience everything from depression and anxiety to bipolar disorder, psychoses, or sociopathic behavior. They may be on the autism spectrum, have a sensory processing disorder, or be otherwise neurodiverse. I can't help thinking of the exchange between Lucy Van Pelt and Charlie Brown

### High-incidence practice areas

Beyond civil commitment and guardianship cases, a number of other areas of law include a high incidence of clients with mental illnesses of varying severity.

■ **Criminal.** More and more, courts are recognizing mental health as a critical part of corrections.<sup>11</sup> A pre-sentencing investigation is essentially a mental health diagnostic assessment. Whether our jails and prisons should offer greater access to mental health diagnosis and treatment is a subject for a whole other article, but suffice it to say that if a person enters incarceration with no mental health issues, they likely leave with some.<sup>12</sup> Prosecutors and defense attorneys alike must be aware of a defendant's mental state—both at the time of the alleged crime and also in the years, months, days, and minutes leading up to it. While not an affirmative defense, a person's long-term mental illness can help fact-finders understand a defendant's motivations and can be used to mitigate plea bargaining, sentencing, and probation.<sup>13</sup>

mental health issue is keeping a kid from wanting to be in school, or keeping a parent from getting them there. I have seen a child as young as 11 placed in-patient due to the intensity of his trauma. I've seen a child of four diagnosed with an attachment disorder caused primarily by her mother's untreated mental health issues. You can avoid this practice area, but the kids involved may grow up to be your future clients.

■ **Family.** If any area of the law uses claims of mental illness as a weapon, it is family law. Soon-to-be-former partners and co-parents frequently accuse each other of having some sort of mental illness. Because Minnesota is a no-fault state for dissolution, it takes the wind out of some clients' sails to learn the other party's diagnosis doesn't equate to default judgment in their favor. As regards the minor children, however, domestic violence and certain criminal convictions can preclude a parent from sharing legal custody or having a parenting plan.<sup>14</sup> If a parenting consultant or guardian *ad litem* is appointed, mental health assessments will likely be ordered. Even when parents are able to mediate and use a tool such as child-inclusive mediation, the mediator who gathers the child's input may be a trained social worker or licensed therapist.

Other areas of the law may not seem as rife with the potential for mental illness, but bankruptcy, to take one example, involves ample potential for stress, shame, and broken relationships; elder law often confronts the varied symptoms that accompany the onset of dementia; military and veterans' law regularly runs up against the hard fact of PTSD; wills and trusts law frequently encounters pathological dynamics between family members.<sup>15</sup> A client's mental health can impact any kind of legal matter; learning to screen for signs of trouble—and doing so early in the client relationship—is eminently useful.

### Screening for potential mental illness

Screening for mental illness need not involve a detailed or invasive process. Paying attention to your own judgment and common sense about what is "normal" is invaluable. Generally speaking, here are some things to look for in conversations with your client or potential client.

## More and more, courts are recognizing mental health as a critical part of corrections. A pre-sentencing investigation is essentially a mental health diagnostic assessment.

when she offers up a litany of phobias, eventually "diagnosing" Charlie Brown with pantophobia—the fear of everything.

The sorts of conditions that compromise mental health but do not amount to diminished capacity can be so nebulous, the National Institute for Mental Health (NIMH) has a general web page named simply "Any Anxiety Disorder."<sup>9</sup> While it is definitely not in the scope of our professional expertise as attorneys and counselors to diagnose such conditions, identifying and accommodating a client's mental status is in our own best interest. (See the wellness sidebar for information about the impact on you.) As Vivianne Mbaku of the National Center on Law & Elder Rights has written, "Trauma-informed lawyering leads to better communication between the lawyer and client, discovery of additional legal issues, and better referrals."<sup>10</sup>

■ **Juvenile.** The juvenile statutes (Minn. Stat. §260 and its progeny) encompass child protection, delinquency, truancy, reporting of maltreatment of minors, and the lesser-known voluntary foster care for treatment. Each of these areas has a mental health component and the statutes and corresponding rules are written in such a way that social services, parent attorneys, and the courts can and frequently do recommend or order mental health and chemical use assessments. A typical CHIPS case will result in diagnostic assessments of both parents (and sometimes the children), a chemical use assessment of both parents, and potentially a domestic violence assessment or parental capacity assessment.

It has also been my experience that truancy and delinquency are rooted in mental illness. More often than not, a

# WELLNESS

## PAYING ATTENTION TO THE IMPACT ON YOU

“Do you wanna only did I not know what they were trying to have a custody hearing in spring it on me. But that made it even more important than the fact that I had one of this information taken care of and fixed but you didn’t bring it up and I tried to and was told we already close that case no you’re not gonna mention it they didn’t do or say anything to strike any of that stuff from the record what was the point you did nothing you wasted my time”

That is the actual text of an email I received recently. I was court-appointed to represent a father in a CHIPS case after two prior attorneys had already requested and been granted permission to withdraw. The social worker and guardian *ad litem* had suspended his visits out of concern for his mental health due to the verbal abuse they were receiving from my client as well as his relentless emails about what he alleged were misstatements of fact in the record.

I succeeded in getting his visits restored, e-filed a letter correcting the alleged misstatements, got the court to take judicial notice of it, got the CHIPS

dismissed, and updated him on the next hearing date in the now re-opened custody matter (in which I didn’t represent him—but I know my way around MN-CIS, so why not?). And this was the thanks I got.

I have considered changing practice areas more than once, but the fact remains that if you work with human beings, you’re going to encounter clients with mental health issues. A better approach is to care for yourself while advocating for your clients.

### **Secondary trauma**

The term secondary traumatic stress (STS) refers to “the emotional duress that results when an individual hears about the firsthand trauma experiences of another.”<sup>18</sup> Also known as vicarious trauma, the concept recognizes that the very act of listening to other people’s problems and their trauma stories day in and day out takes an emotional toll on the listener. Generally, social workers, health care, and mental health professionals are identified as experiencing compromised professional functioning and diminished quality of life due to STS. If you’re an attorney with a mentally ill

client (or several), it could affect you too.

The symptoms of STS most typically seen in the workplace are: avoidance, hypervigilance, intolerance for ambiguity, becoming argumentative, and shutting down or numbing out (including alcohol and drug use).<sup>19</sup> Symptoms in your personal life may include sleep disturbance and nightmares, headaches, stomach pain, PTSD symptoms, extreme fatigue, negative thinking, irritability, strained relationships with family and friends, compromised parenting, and doubts about whether the world is a safe place.<sup>20</sup>

If you’re experiencing any of these symptoms, I encourage you to reach out to your own physician or mental health provider. If you don’t have one, start with Lawyers Concerned for Lawyers. (Visit [www.mnlcl.org](http://www.mnlcl.org) or call 651-646-5590 for always-confidential help.) If you’re concerned that you may be headed for burnout, the Professional Quality of Life Measure is a useful, self-administered tool available at [proqol.org](http://proqol.org). You will also find a free “pocket card” that includes tips for self-care. ▲

■ **Speech or thought patterns, such as circular or tangential thought.** If a person just cannot get to the point or doesn't seem to really hear or understand what you are explaining to them, you should take note. These traits may reflect a high level of anxiety, the influence of a controlled substance, or even schizophrenia.

■ **Fixation on certain facts.** Recounting events repeatedly—especially with certainty that if the court knew the information, it would transform the case—can indicate delusions, paranoia, or phobias.

■ **Irrational fears or misperceptions.** A client may have visual or auditory hallucinations and send recordings or screenshots to you as “proof” of their delusions. They may insist an opposing party is “obsessed” with them or making “violent” statements that, when read objectively, are harmless. These traits may be further indicative of psychosis.

■ **Lack of insight into their own actions or behaviors.** A person may rationalize inappropriate responses to family or professional issues, or to current events. They may exhibit inappropriate or discordant reactions or emotions, such as hostility, anger, excitement, severe anxiety, suggestibility, belligerence, isolation, or lack of inhibition. They may be easily distracted or may substitute inappropriate words for other words. People with borderline personality disorder exhibit many of these traits.

■ **Mental or behavioral health lexicon.** A client who has been treated or hospitalized for mental illness may discuss specific medications, their case worker, treatment modalities, or other terms specific to mental health treatment.

■ **Physical symptoms.** Your client might describe physical issues that may be caused by mental illness, including insomnia, hypersomnia, headaches, or nausea. You may observe bandages or scarring from self-mutilation.

Some of these behaviors or characteristics can be the result of traumatic brain injuries, learning or developmental disabilities, side effects of certain medications, or substance abuse. Distinguishing between these other issues and mental illness is best left to medical or mental health professionals. Encouraging a client to seek out an actual diagnostic assessment may be a delicate but necessary conversation, especially if the behaviors could affect the outcome of their case.<sup>16</sup>

### ***Your role: What does it mean to be a counselor-at-law?***

In the comments to MRPC 2.1 at number 4, the rules state, “Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.” You may be one professional among many dealing with the needs of your client; yet you also may be the one professional called upon to synthesize multiple opinions into a coherent solution. As the comments on MRPC 2.1 go on to note, “...a lawyer’s advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.”

Here are five things you can do when you suspect your client is struggling with mental illness:<sup>17</sup>

**1. Recognize that intellectual or developmental disabilities are not the same as mental illness.** Though they may cause some of the same impacts on a client’s case, the statutes treat them differently and they must be handled differently. If you are communicating a legal concept or strategy and your client is struggling to understand, it may not be related to mental health. You may need to take the time to better “translate” from legalese to layperson.

**2. Check any preconceived notions at the door.** The stigma surrounding mental illness and neurodiversity contributes significantly to many people going undiagnosed and untreated. Many people have a pervasive fear that being diagnosed with a mental health disorder and taking medication will jeopardize the outcome of their legal matter. Quite the opposite. From working in high-incidence areas of law and from my own life experience, I can attest that seeking treatment and complying with a medication regimen is far healthier than denial. Encourage your client to get the help they need.

**3. Set them up for success.** In criminal and juvenile law, there is an ongoing concern about recidivism. Taking the opportunity to get a client into drug court—or treatment or counseling during probation—may be the thing that keeps them from reoffending. Civil matters have a similar revolving door. You can identify whether your client’s mental illness contributed to their legal matter or adversely affected it and help them correct their path to avoid future issues. You can also approach settlement and craft stipulations and proposed orders to ensure that





your client can follow through—that is, you may need to help them lower the bar for themselves.

**4. Remember whose side you're on.** You have an ethical and professional obligation to represent your client. That may include advising them to seek help for mental or behavioral issues. It may include bringing specific motions or approaching settlement creatively if their mental health has already adversely affected their case. Some people with mental illness are very difficult to work with and can be wearing on your patience and your own sanity. If you reach a point where you can no longer zealously advocate, you may need to withdraw.

**5. Be on the lookout for incapacity.** If your screening indicates that your client has mental health issues, be mindful that if those issues cross the line to incapacity or incompetence, you have an ethical obligation to act. Revisit Rule 1.14. Maintain a normal relationship as much as possible, but, if necessary to protect your client's interests, take protective action. It is not an easy decision to make, but you may need to request appointment of a guardian *ad litem*, conservator, or guardian for your own client.

Understanding a client's mental health is not just a tool to improve client relations or ferret out additional legal issues. We have an ethical and professional obligation to represent the whole client by "render[ing] candid advice." We are empowered to comment on "moral, economic, social, and political factors that may be relevant to the client's situation." (MRPC 2.1) We owe it to our clients to understand the totality of their circumstances, and if those circumstances include mental illness, to factor it into our counsel. ▲



## Notes

<sup>1</sup> Rufus, S. *Now the Whole World Knows How Anxiety Feels* (3/19/2020). Retrieved from [www.psychologytoday.com](http://www.psychologytoday.com): <https://www.psychologytoday.com/us/blog/stuck/202003/now-the-whole-world-knows-how-anxiety-feels>

<sup>2</sup> Blood T, W. N. *CSTE Mental Health Indicators in Minnesota-Data Brief* (June 2017). Saint Paul, MN: Minnesota Department of Health.

<sup>3</sup> National Institute of Mental Health. *Major Depression: National Institute of Mental Health* (2/20/2020). Retrieved from National Institute of Mental Health Website: <https://www.nimh.nih.gov/health/statistics/major-depression.shtml>

<sup>4</sup> National Institute of Mental Health. *Any Anxiety Disorder: National Institute of Mental Health* (2/20/2020). Retrieved from National Institute of Mental Health Website: <https://www.nimh.nih.gov/health/statistics/any-anxiety-disorder.shtml>

<sup>5</sup> Minnesota Judicial Branch. *2018 Annual Report to the Community* (Aug. 2019). Saint Paul, MN: State Court Administrator's Office.

<sup>6</sup> Mayo Clinic. *Mental Illness: Mayo Clinic* (1/30/2021). Retrieved from Mayo Clinic Website: <https://www.mayoclinic.org/diseases-conditions/mental-illness/symptoms-causes/syc-20374968>

<sup>7</sup> Centers for Disease Control and Prevention. *ACEs: Centers for Disease Control and Prevention*. Retrieved from Centers for Disease Control and Prevention Website: <https://www.cdc.gov/vitalsigns/aces/index.html>

<sup>8</sup> Education Public Awareness. (1/6/2021). Retrieved from namimn.org: <https://namimn.org/education-public-awareness/fact-sheets/>

<sup>9</sup> Supra note 4.

<sup>10</sup> Supra note 8.

<sup>11</sup> Supra note 5.

<sup>12</sup> National Research Council. (2014). *The*

*Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press.

<sup>13</sup> Supreme Court State of South Dakota, *Representing A Client with Mental Illness: A South Dakota Defense Attorney's Guide* (5/8/2018). South Dakota Unified Judicial System's State Court Administrator's Office.

<sup>14</sup> Minn. Stat. §518.1705, Subd. 6.

<sup>15</sup> Reddy, I., Ukrani, J., Indla, V., & Ukrani, V. (2018). *Creativity and Psychopathology: Two sides of the same coin?* Indian Journal of Psychiatry.

<sup>16</sup> The South Dakota Unified Judicial System's State Court Administrator's Office has published online a "handbook" for defense attorneys representing clients with mental illness. (Supra note 13.) It is designed for use in the criminal court, but is an excellent resource for all attorneys who work with humans. It includes sample interview questions to ask of clients and their family members when screening for mental illness.

<sup>17</sup> The Texas Appleseed project has provided 10 things to think about while representing a criminal client with mental illness.

<sup>18</sup> National Child Traumatic Stress Network. *Secondary Traumatic Stress* (1/30/2021). Retrieved from National Child Traumatic Stress Network Website: <https://www.nctsn.org/trauma-informed-care/secondary-traumatic-stress/>

<sup>19</sup> Rainville, C., *Understanding Secondary Trauma: A Guide for Lawyers Working with Child Victims: American Bar Association*. (9/1/2015) Retrieved from ABA website: [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-34/september-2015/understanding-secondary-trauma-a-guide-for-lawyers-working-with/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/september-2015/understanding-secondary-trauma-a-guide-for-lawyers-working-with/)

<sup>20</sup> Id.



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# Cohabitation and spousal maintenance revisited

## *Sinda v. Sinda* and the state of the law

By KATHLEEN M. NEWMAN

In 2016 Minnesota's spousal maintenance statute was changed to add cohabitation as a reason to modify spousal maintenance. In practice, did the addition of cohabitation as a basis to modify spousal maintenance change the way courts analyze a modification request based on the case law surrounding cohabitation?

All of us have encountered spousal maintenance modification motions based on a change in financial circumstances due to a reduction or increase in income or a reduction or increase in living expenses. Those motions are brought pursuant to Minn. Stat. §518.552 (2020), which we know requires a two-prong test: Has there been a substantial change in the circumstances of the parties? And does that change make the existing spousal maintenance order unreasonable or unfair? Although the statute was amended in 2016 to add cohabitation as a basis to modify spousal maintenance, it was not until August 2020 that the Minnesota Court of Appeals interpreted the cohabitation clause in the published case of *Sinda v. Sinda*. Does the analysis in *Sinda* make it easier or more difficult to obtain a modification of spousal maintenance based on cohabitation?

### Background

Prior to the late 1960s, we saw few modification motions based on cohabitation, or what was then known as a “meretricious” relationship—defined as a “stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.” Until then, openly hav-

ing a sexual relationship with someone you were not married to was taboo. With the advent of more liberal thinking about a woman's sexuality, we saw more couples living together before marriage, to the point that now, people living together prior to marriage, or living together without the intention of marrying, is entirely commonplace.

It was in the early '70s that we saw these societal changes start to affect spousal support, which was then referred to as alimony. At that point, Minnesota statutes did not address an obligee's meretricious relationship and its impact on the alimony he/she received.

One of the earliest court decisions is *Bissell v. Bissell*,<sup>1</sup> a 1971 case that addressed whether the former wife's need for alimony was reduced by her receipt over the previous two years of \$11,000 in gifts from her boyfriend. Testimony was elicited that boyfriend stayed overnight more often than not, and that boyfriend and former wife had wintered together in Florida for almost four months. In its decision, the court noted it did not decide whether the existence of the meretricious relationship, in itself, was sufficient grounds to modify alimony. However, it held that the fact of this relationship, combined with the large cash gifts, produced a substantial change in circumstances that made the existing level of support—\$500 a month—inequitable. The court reduced spousal maintenance to \$200 a month.

This analysis was restated in the 1977 case of *Sieber v. Sieber*,<sup>2</sup> the court stating that at one time post-divorce immoral conduct was viewed by some courts as an independent ground for reducing or terminating alimony. In affirming the district court, the Minnesota Supreme Court noted that "the more modern approach" to a meretricious relationship's impact on the payment of alimony was to disregard the meretricious relationship except insofar as it might improve the obligee's economic well-being. The Court also found the amount of alimony being paid was based on a stipulation, and further noted that stipulations should only be cautiously modified.

In 1979, the Supreme Court decided *Abbott v. Abbott*.<sup>3</sup> In that case, the district court had held that a meretricious relationship, standing alone, was a sufficient ground for terminating spousal maintenance, a determination directly in conflict with *Sieber*. The district court found a meretricious relationship existed but did not make an analysis of how the relationship impacted the obligee's finances. In overturning *Abbott*, the Supreme Court cited its ruling in *Sieber*, noting the Legislature had not specifically provided for spousal support termination based on post-divorce sexual activity, and observing that the parties' stipulation only included remarriage as a basis for termination. The Supreme Court cited its concern that there was no contractual obligation on the part of former wife's boyfriend to support her, and that if he left her, former wife "could, and likely would, become a public charge."

The next significant case is *Aaker v. Aaker*,<sup>4</sup> decided by the Minnesota Court of Appeals in 1989. In that case, the district court included a cohabitation clause in the judgment and decree that appeared to allow former husband to arbitrarily terminate maintenance on obligee's cohabitation. The appellate court allowed the cohabitation provision to stay in, clarifying that the cohabitation clause would not allow the former husband to make the decision to arbitrarily terminate spousal support, but rather he would have to bring a motion, and prove the cohabitation improved the obligee's economic well-being. Judge Huspeni dissented, arguing the inclusion of a cohabitation clause was not appropriate under the holding in *Sieber*.

The next several cases, *Auer v. Scott*,<sup>5</sup> *Pumper v. Pumper*,<sup>6</sup> *James v. James*,<sup>7</sup> *Spencer v. Larson*,<sup>8</sup> *Nelson v. Nelson*,<sup>9</sup> and *Hopf* v.

*Hopf*,<sup>10</sup> all follow *Sieber* in holding the analysis of a modification of spousal maintenance based on cohabitation must follow the two-pronged test of a substantial change in circumstances that makes the existing order unreasonable and unfair.

### **Litigating a changed law**

In 2016, the Legislature took up the cohabitation issue as it affects modification of spousal maintenance and passed legislation to incorporate cohabitation into the statutory framework for modification of spousal maintenance. Effective August 1, 2016, Subdivision 6 was added to Minn. Stats. Sec. 518.552. Under its terms:

- (a) Spousal maintenance may be modified pursuant to section 518A.39, subdivision 2, based on the cohabitation by the maintenance obligee with another adult following dissolution of the marriage. The modification may consist of a reduction, suspension, reservation, or termination of maintenance. In determining if maintenance should be modified due to cohabitation, the court shall consider:
  - (1) whether the obligee would marry the cohabitant but for the maintenance award;
  - (2) the economic benefit the obligee derives from the cohabitation;
  - (3) the length of the cohabitation and the likely future duration of the cohabitation; and
  - (4) the economic impact on the obligee if maintenance is modified and the cohabitation ends.
- (b) The court must not modify a maintenance award based solely on cohabitation if a marriage between the obligee and the cohabitant would be prohibited under section 517.03, subdivision 1, clause (2) or (3). A modification under this subdivision must be precluded or limited to the extent the parties have entered into a private agreement under subdivision 5.
- (c) A motion to modify a spousal maintenance award on the basis of cohabitation may not be brought within one year of the date of entry of the decree of dissolution or legal separation that orders spousal maintenance, unless the parties have agreed in writing that a motion may be brought, or the court finds that failing to allow the motion to proceed would create an extreme hardship for one of the parties.

For the practitioner looking at bringing a motion to modify spousal maintenance based on cohabitation after the enactment of the statute, this meant, first, being able to establish there is cohabitation. The statute does not define cohabitation, but it is generally defined as "the fact, state, condition, or practice of living together, esp. as partners in life, usu. with the suggestion of sexual relations."<sup>11</sup> I presume with the legalization of same-sex marriage, this would include same-sex parties cohabitating.

If you are bringing a spousal maintenance modification motion based on cohabitation, you should consider whether the cohabitation supports a termination, rather than a reduction or suspension, of the spousal maintenance obligation. As discussed later, termination is unlikely based on case law, so due consideration must be given as to what relief should be requested.

In bringing a modification motion based on cohabitation, the obligor must first prove the obligee is living with a sexual partner. In many of these cases, the cohabitant maintains some semblance of occupancy at another residence, be it a rented room, apartment, or an owned home. Thus, proving the obligee and



the cohabitant live together may be challenging. Getting mail at the obligee's address, maintaining a driver's license or passport at that address, school registration for the cohabitant or his/her children, and voter registration—all of these elements may go to prove occupancy. Serving the obligee with requests for admission pursuant to M.R.C.P 26.02 may confirm a cohabitant's residence with the obligee.

Once you have proven the obligee and cohabitant are living at the same residence, you need to prove a sexual relationship. The obligee and the cohabitant may readily admit this, or you may have to establish this by admissions or other evidence, such as the birth of a joint child.

Once you have established cohabitation, you need to address the four requirements the court must consider under Subdivision 6:

#### **(1) Whether the obligee would marry the cohabitant but for the maintenance award.**

If asked in discovery, it is unlikely an obligee in a modification motion is going to admit the only reason she will not marry the cohabitant is that she will lose spousal maintenance. Consider looking for testimony from third parties where the obligee has admitted that she is not willing to marry the person she lives with because she will lose spousal maintenance. Another consideration is if the obligee holds herself as "engaged" to the cohabitant. Sometimes there has been a "commitment ceremony," or an exchange of rings that can bolster your argument.

#### **(2) The economic benefit the obligee derives from the cohabitation.**

To prove this, you need to establish what the obligee's budget was at the time of the divorce (hopefully there is a finding of fact about budgets) and establish what the obligee's current budget is. Does the comparison show the obligee's expenses have been reduced because the cohabitant is paying certain expenses, including expenses for the home, mortgage, utilities, maintenance, food, entertainment or the like? If you can prove the obligee's living expenses have been reduced due to the cohabitant's contribution, then you have proven a substantial change of circumstances and can then look to the second prong of the test, i.e., does the economic benefit make the current support order unreasonable and unfair? Written discovery (including document production) and depositions may prove necessary to meet your burden of proof. Of course, you may have to obtain discovery from the cohabitant, and courts are often reluctant to allow too much of an invasion of that person's finances. You also need to be concerned that by involving the cohabitant in litigation, you may cause the relationship to end.

#### **(3) The length of the cohabitation and the likely future duration of the cohabitation.**

The statute provides that the motion cannot be brought within a year of the dissolution taking place, except for cases of extreme hardship. However, there is no case law or statutory guidance on how long a cohabitation should be before the court considers it impactful. Common sense dictates that the longer the cohabitation, the more likely the court is going to give weight to a request to modify spousal maintenance.

#### **(4) The economic impact on the obligee if maintenance is modified and the cohabitation ends.**

You will see comments in the older cases regarding the court's concern that terminating spousal maintenance in the case of cohabitation will place the obligee at significant financial risk if the cohabitation ends as there is no contractual obligation to support one's partner, absent a cohabitation agreement, and that may make the obligee a "public charge." This is one reason courts are so reluctant to terminate spousal support based on cohabitation.

In any motion to modify based on cohabitation, once you have established the cohabitation, which will be the substantial change in circumstances, the analysis is going to be a need-based test, and it will be your burden to show the cohabitation provides the obligee an economic benefit that makes the current spousal maintenance award unreasonable and unfair. Remember, section 518A.39 subd. 2(e)<sup>12</sup> specifies that the court, on a modification motion, is required to apply, in addition to all relevant factors, the factors for an award of maintenance under section 518.552<sup>13</sup> that exist at the time of the motion.

#### **Unpublished cases**

The first post-statute case was the unpublished decision of *Rhyan v. Rhyan*.<sup>14</sup> In affirming the district court's decision that former husband had not met his burden of proof, the appellate court first noted the alleged cohabitation was occurring at the time of the stipulated divorce decree and former husband was aware of it. The court decided the case on the basis that "the record contained no credible evidence to support a finding that wife was cohabitating with A.S...."<sup>15</sup> During the district court proceeding, the obligee claimed she had been living with A.S. prior to the divorce, that the relationship was not and had never been sexual, and she and A.S. were simply roommates; A.S. submitted a similar affidavit. In analyzing former husband's additional argument (that wife's needs had decreased from the time of the divorce because she was living with A.S.), the court noted that the judgment and decree did not clearly set forth each party's living expenses, making former husband's task of proving a change in the obligee's living expenses difficult—a reminder of the importance of clear findings of fact about budgets in the divorce decree.

In the unpublished decision of *Helms v. Helms*,<sup>16</sup> the former husband brought his motion to modify spousal maintenance, asserting that cohabitation alone warranted modification of spousal maintenance and claiming the court should "infer" that the obligee received economic benefit from cohabitation. The district court rejected that argument and denied former husband's motion to modify. The court of appeals affirmed, citing *Sieber* and *Abbott* and noting that prior to the enactment of the statute, case law required a clear showing of economic benefit from the cohabitation. The court also noted the plain language of the statute required more than cohabitation, requiring the fulfillment of "at least some" of the four factors listed in the statute.

#### **Sinda v. Sinda**

In the recent case of *Sinda v. Sinda*,<sup>17</sup> decided on August 10, 2020, the Minnesota Court of Appeals again addressed the cohabitation statute. In this published decision, the court did a detailed analysis of how cohabitation impacted a modification

motion post-statute. In *Sinda*, former husband cited several changes in circumstance in his motion to modify spousal maintenance, cohabitation being only one. In his argument that cohabitation alone entitled him to a reduction in his spousal maintenance obligation, he claimed cohabitation entitled him to a reduction regardless of whether the cohabitation constitutes a substantial change in circumstances or caused his existing obligation to be unreasonable or unfair. In analyzing the case, the appellate court noted that the sufficiency of the district court's findings on cohabitation depended on what standard is applied to a motion to modify based on cohabitation, an issue that had never been addressed.

In interpreting the cohabitation statute, the appellate court found that in determining whether to reduce spousal maintenance based on cohabitation, the district court must consider the extent to which the cohabitation improves the obligee's economic well-being, as well as considering the three other factors listed in the statute. In addressing former husband's argument that the statute did not require consideration of the two-prong test for modification—a substantial change in circumstances that makes the support order unreasonable and unfair—the court noted that in enacting the statute, the Legislature did not omit these two factors mandated by Minn. Stat. §518A.39, subd. 2(b), but expressly incorporated that test, and in addition identified four factors specific to cohabitation that district courts “should” consider, and that “may” warrant modification. The court went on to say that “far from establishing a presumption favoring modification when an obligee cohabits, this layered framework underscores the fact-specific analysis that guides the court's discretion in determining whether modification is appropriate.”

In determining that the cohabitation statute is “... an adjunct to and not a substitute for the two-part modification test,” the appellate court concluded the statute signaled that cohabitation constitutes a substantial change in circumstances that “may” afford the obligee an economic benefit. In considering the second part of the modification test, whether the existing order is unreasonable and unfair, the court must consider the four factors enumerated in the statute. The appellate court held that by listing the four factors, the Legislature established there was no presumption for modification based solely on cohabitation, but that courts must consider whether:

- the cohabitation actually reduces or eliminates the obligee's need;
- that the change in need is reasonably expected to be long term and durable; and
- that the cohabitation is not merely a means of avoiding the automatic termination of spousal maintenance that remarriage would necessitate.

Given courts' reluctance to terminate spousal maintenance based on cohabitation even if you can prove an economic benefit, it may be best to ask for a reduction or suspension of a permanent spousal maintenance award. This way, the concern that

termination would leave the obligee without any means of support (and at risk of becoming a public charge) can be alleviated.

Case law, both before and after the cohabitation statute was enacted, shows a clear reluctance to terminate spousal maintenance on cohabitation. With even moderately sophisticated cohabitants, proving the economic benefit is difficult. The cohabitant will often maintain a semblance of another residence. Detailed financial discovery of a non-party is often difficult to obtain, and cohabitating parties can take steps to muddy the waters about financial contribution from the cohabitant. This might involve using cash transfers of funds, or not requiring the cohabitant to contribute to fixed expenses, but benefiting from the cohabitation in other ways, such as paying for entertainment, dining out, or gifts of clothing, jewelry, and the like.

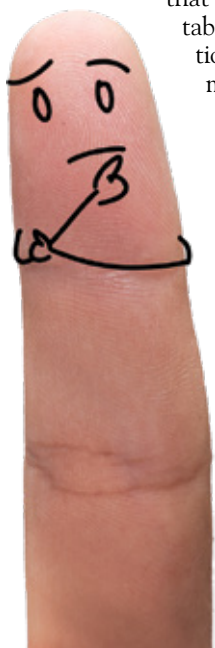
Of course, bringing the modification motion itself can cause significant stress on the cohabitating relationship, sometimes causing it to change or terminate, and the costs of the litigation incurred by the obligor will be for naught. Under most circumstances, the obligor will likely be looking at retaining a financial expert to analyze bank and credit card records, and will be engaging in extensive discovery, including depositions. Careful analysis of the case should be made before encouraging an obligor to bring a motion to modify spousal maintenance. When advising an obligee—either at the end of the divorce, or when he/she is seeking advice about the impact of cohabitation on an existing spousal maintenance award—there should be a detailed explanation of the impact of the financial contribution of a cohabitant. An obligee may wish to think long and hard about entering into a relationship that could adversely affect a hard-won permanent spousal maintenance award. ▲

## Notes

- <sup>1</sup> 191 N.W.2d 425 (Minn. 1971).
- <sup>2</sup> 258 N.W.2d 754 (Minn. 1977).
- <sup>3</sup> 282 N.W.2d 561 (Minn. 1979).
- <sup>4</sup> 447 N.W.2d 607 (Minn. Ct. App. 1989).
- <sup>5</sup> 494 N.W.2d 54 (Minn. Ct. App. 1992).
- <sup>6</sup> No. C1-00-1971, 2001 WL 826853 (Minn. Ct. App. 7/24/2001).
- <sup>7</sup> No. A05-1056, 2006 WL 463920 (Minn. Ct. App. 2/28/2006).
- <sup>8</sup> No. A07-0339, 2008 WL 227989 (Minn. Ct. App. 1/29/2008).
- <sup>9</sup> No. A07-682, 2008 WL 1748207 (Minn. Ct. App. 4/15/2008).
- <sup>10</sup> No. A08-0652, 2009 WL 910978 (Minn. Ct. App. 4/7/2009).
- <sup>11</sup> *Cohabitation*, *Black's Law Dictionary* (11th ed. 2019).
- <sup>12</sup> Minn. Stat. §518A.39 subd. 2(e) (2020).
- <sup>13</sup> *Id.* §518.552.
- <sup>14</sup> No. A17-0177, 2017 WL 3974318 (Minn. Ct. App. 9/11/2017).
- <sup>15</sup> *Id.*
- <sup>16</sup> No. A17-0854, 2017 WL 5661591 (Minn. Ct. App. 11/27/2017).
- <sup>17</sup> 949 N.W.2d 170 (Minn. Ct. App. 2020).

**With extensive experience in all aspects of marital dissolutions, KATHLEEN M. NEWMAN has handled many complex divorces, including cases with closely held business interests, professional practices, and high net worth cases. Her clients appreciate her listening skills and quick assessment of complex issues. She helps her clients organize a strategy to accomplish their goals in resolving the issues in their divorces.**

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Eagle Ridge Academy will represent Minnesota at the virtual National Mock Trial Championship in May. The team is coached by Jeffrey Magnuson, Harshita Kalidindi, Caleb Brady, Anya Magnuson, and Joe Jacobson.

## Thank you to the following for their financial support

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A special thank you to Eric Strauss, Apple Valley High School Coach, for his creation of the electronic scoresheets that were used during the virtual competitions.

# PRACTICING WITH GRACE

## Covid-19 and the coming eviction crunch

By MANAIRE T. VAUGHN



To truly understand the impact of the coronavirus pandemic, we must look at all covid-related legal issues with a systemic lens and be open to creative problem solving. It's hard to think of an area in which this is more emphatically true than with respect to the impending tsunami of eviction filings once federal and local moratoria are rescinded.

Currently, Minnesota renters are protected from being evicted for non-payment of rent according to the terms of Gov. Tim Walz's Executive Order 20-79, issued last July 14.<sup>1</sup> But landlords may still file an eviction if the tenant endangers the health and safety of others, significantly damages the unit, or if the landlord or the landlord's family member seeks to move into the unit. Tenants may also face an eviction if their actions violate specific laws involving drugs, guns, stolen property, or prostitution at the property. These exceptions have caused an uptick in eviction filings.

As a housing attorney, I have seen my share of creative eviction complaints. Minor lease infractions have become grave dangers, and many landlords have conveniently found distant relatives to move into their units. Some landlords have chosen to ignore the moratorium completely by changing the locks on units or simply refusing to make repairs.

If the current response to Executive Order 20-79 is any indication of what lies ahead, we are in trouble. In a recent study conducted by the U.S. Census Bureau, of the 54,752,332 adult tenants surveyed, 15,031,589 tenants reported no confidence or only slight confidence in their ability to make the next month's payment.<sup>2</sup> Additionally, in Minnesota, it is projected that if EO 20-79 is rescinded, there will be about 13,330 eviction filings statewide.<sup>3</sup>

Pause and try to imagine 13,330 eviction filings. Think about your favorite clerk. Imagine what the courts will look like. Standing room only at most first appearances, a massive calendar, slower Zoom hearings, an overwhelmed e-filing system, and the possibility of a super-spreader event. Scary.

Under Minn. Stat §504b.291, a landlord may bring an eviction action for non-payment of rent.<sup>4</sup> Tenants typically have two options in non-payment cases. Tenants can redeem, which requires the tenant to pay back the balance owed within a specified time, or the tenant can ask the court for seven days to move.

Although more government funding to support tenants who have struggled to pay rent is rumored, it is important to understand the often-lengthy timeline that comes with procuring funding to pay landlords. On average, a tenant receives

a letter guaranteeing agency or nonprofit payment assistance two to three weeks after submitting their application—hardly a comfort to anyone facing eviction for nonpayment in seven days. Further, not all tenants will qualify for federal or local funding, leaving a population of tenants facing homelessness.

If no assistance is available, the tenant will be forced to move. In Minnesota, once an eviction has been filed, it becomes public record. This can have a devastating impact on a person's ability to find housing. Tenant-screening agencies can report on evictions for seven years. As such, eviction filings are often seen as scarlet letters by prospective landlords, and can be used to exploit tenants. People with evictions on their record are often forced, for example, to pay double deposits, and they are more likely to be rented units with significant repair issues.

Another challenge to consider is how the covid-19 pandemic has exacerbated existing racial disparities in housing. Prior to the pandemic, Black, Indigenous, and People of Color (BIPOC) were more likely to face eviction than white renters.<sup>5</sup> Across their lifetimes, one in five Black women are evicted, compared to 1 in 15 white women.<sup>6</sup>

Pandemic fallout will likely worsen this disparity. A recent study revealed that renters of color have reported less

**“Our country has an immense responsibility, and a profound opportunity, to address the housing crisis facing so many people.”**

—Marcia Fudge, United States Secretary of Housing and Urban Development

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overall confidence in being able to pay their next month's rent and have reported not having paid the previous month's rent on time at disproportionately higher rates than their white counterparts.<sup>7</sup> Additionally, over half of Black and Latinx renter households were cost-burdened going into the pandemic, compared to 42 percent of Asian and white households.<sup>8</sup>

### **A call for grace**

The incomparable legal scholar and Howard University Law School Dean Charles Hamilton Houston once said, “A lawyer is either a social engineer or a parasite on society.” As we begin to make sense of everything that has happened during the covid-19 pandemic, it is imperative that lawyers remember the importance of being social engineers.

The need for systemic thinking in eviction cases is crucial. Before lawyers rush to file evictions once the current moratorium is rescinded, they must first examine how the tenant got behind.

Here are a few questions to ponder before filing an eviction:

- Was the tenant unemployed for a significant period?
- Did the tenant lose a loved one during the pandemic?
- Is the tenant a domestic violence survivor?
- Has the tenant made partial payments during the moratorium?
- Is the tenant from a historically marginalized community?
- Is a solution possible without filing an eviction?

I am sure some lawyers will argue that approaching eviction cases systemically creates opportunity for inequality. However, systemically approaching cases furthers equality by creating opportunities

for equity. All situations will not be the same, and thus we cannot apply a “one size fits all” approach.

We must be creative, and abandon false narratives. For example, the narrative that tenants do not want to pay rent and are simply seeking to exploit the moratorium is untrue. Most tenants want to pay, and are willing to work with landlords if afforded the opportunity to do so. Working with tenants does not mean setting unrealistic deadlines to pay balances in full. Working with tenants does not mean forgoing repair requests until past due balances are paid. Working with tenants involves assessing all factors that may have contributed to the past due balance, and figuring out the necessary steps to resolve the outstanding balance.

If a tenant is unable to pay the past due balance, enter into mutual termination agreements that are fair, and provide the tenant with a neutral reference. If an eviction has been filed, request that the case be marked confidential, and allow the tenant to get the case expunged.

Landlords need money to operate. I get it. Non-paying tenants compromise business operations and can cause significant financial burdens. But as we quest to be social engineers, we must think about the lasting impact a hastily made decision centered in profits can have. We must challenge ourselves, and ask if we are a part of the solution or the problem.

Tenants are people. They too have experienced the ongoing trauma created and exacerbated by the covid-19 pandemic. Is having an empty unrented apartment or home worth uprooting a family?

Although the future remains uncertain, we know that the moratorium will eventually be rescinded. When that awaited day comes, practice with grace. You just may change the trajectory of someone's life. ▲

### **Notes**

<sup>1</sup> <https://www.leg.mn.gov/archive/execorders/20-79.pdf>

<sup>2</sup> Table 2b: Confidence in Ability to Make Next Month's Payment for Renter Occupied Housing Units (United States Census Bureau 3/10/2021). <https://www.census.gov/data/tables/2021/demo/hhp/hhp25.html>

<sup>3</sup> Larry McDonough, *Housing Issues in the Justice Tsunami: Legal Issues Now and Eviction Estimates When Minnesota Reopens* (Poverty Law UMN Law School and UST School of Law Jan 2021).

<sup>4</sup> Minn. Stat §504b.291

<sup>5</sup> Brittany Lewis, *The Illusion of Choice: Evictions and Profit in North Minneapolis* (2019). <http://evictions.cura.umn.edu/illusion-choice-evictions-and-profit-north-minneapolis-full-report> [<https://perma.cc/X36S-FD36>] (reporting landlords disproportionately file evictions against Black women).

<sup>6</sup> Jaboa Lake, *The Pandemic Has Exacerbated Housing Instability for Renters of Color* (Center for American Progress, October 2020). <https://www.americanprogress.org/issues/poverty/reports/2020/10/30/492606/pandemic-exacerbated-housing-instability-renters-color/>

<sup>7</sup> E. Benfer et al, *The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America Are at Risk* (The Aspen Institute August 2020). <https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/>

<sup>8</sup> Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing 2020* (Harvard University November 2020). [https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard\\_JCHS\\_The\\_State\\_of\\_the\\_Nations\\_Housing\\_2020\\_Report\\_Revised\\_120720.pdf](https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2020_Report_Revised_120720.pdf)



An illustration of a woman with dark hair, wearing a yellow t-shirt and a blue skirt, pushing a large, grey, jagged rock up a steep, rocky incline. The rock has the title 'LEGAL AID IN A PANDEMIC' and the author 'BY LILO SCHLUENDER' inscribed on it in a bold, blocky font. The background is a solid teal color.

# LEGAL AID IN A PANDEMIC

BY LILO SCHLUENDER

In Minnesota,  
individual legal aid  
offices have seen  
demand increase by

**30-50%**

# NOTES FROM THE FRONT LINES

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Working in civil legal aid is challenging in good times; working as a civil legal aid attorney in a global pandemic has felt like a Sisyphean undertaking. For the past 12 months, our practice has evolved from poverty lawyers to humanitarian crisis advocates. The stories of pandemic survival have become the fabric of our practice, at times consuming it. Demand for our services has skyrocketed. In Minnesota, individual legal aid offices have seen demand increase by 30-50 percent depending on the region.

Like our private attorney colleagues, we have had to navigate the shifting sands of court mandates and government restrictions. We have learned to work from home offices, closed our public waiting rooms, and learned to interact with our clients virtually. But we don't work in isolation, and many facets of our practice have been deeply affected by a greater ecosystem of shuttered resources. Almost overnight our clients were without the holistic resources they, and we, had come to rely on—a network that includes domestic abuse advocates, self-help centers, public libraries, court records, legal clinics, county services, free meals, and safe shelters. Our offices continue to be one of the few access points for the legally vulnerable to seek assistance.

It is no secret that covid-19 has exacerbated the hardships faced by the roughly 700,000 Minnesotans living below the federal poverty guidelines. Their distress is palpable. Some of the requests for assistance we've received attest to the scale of human suffering this pandemic has caused:

- A grandparent needs to know her legal rights to her grandchildren while her daughter lies in a coma after being stabbed by her estranged husband.
- An aunt seeks emergency custody of her five-year-old niece because both parents have relapsed into addiction triggered by the closing of in-person treatment facilities.
- Mother is served with an eviction notice while hospitalized for birth complications; her family will be displaced and there is nowhere to go.
- A single parent, assessed with a \$15,000 unemployment overpayment due to a clerical error, cannot afford diapers.

These calls come from parents whispering in a closet so their children will not overhear. They come from county mental health workers and child protection workers struggling to secure safety for a family. They come from nursing homes, detention centers, prisons, and the courts themselves. Counter to what court filings seem to indicate, we in legal aid offices have seen the severity and frequency of domestic abuse cases increase. We have seen an increase in family law cases affected by parental addiction and mental health concerns. We have also seen an increase in consumer-debt concerns and public assistance cases involving agency error.

Recently, a colleague who practices in greater Minnesota disclosed to me that he has 13 open cases in which the children, subject to child protection matters, have had their access to their parents severely restricted due to the closure of county-

supervised services. Families, already displaced, are now further traumatized by pandemic-induced estrangement, another cruel reality of this crisis.

In the early months of this crisis, many of us were continuing to appear in-person to court. We took precautions, wearing masks and bathing in hand sanitizer, but the proceedings always felt risky. Sometimes the hallways were crowded, the sheriffs unmasked, or the courtroom proceedings so congested that close contact with interpreters and clients was inevitable. The very nature of our work and the high level of trauma that surrounds it required us to be physically present and engaged with our clients.

Looking back, knowing what we know now, I question why the decision was left to individual courts to protect the indigent and the lawyers who serve them. In some counties, a two-tiered judicial process began to develop: If you were represented by an attorney and had access to technology, you could avoid in-person court proceedings altogether. But often in those early months, if you were not represented, or you were represented by a legal aid attorney and the opposing party was *pro se*, you were denied a virtual appearance. Yes, the in-person civil hearings were restricted to certain critical proceedings, but they happened to be the ones legal aid attorneys most often appear in. These practices only ceased last November when the Minnesota Supreme Court issued a broader order requiring remote hearings.

## The current outlook

The access gaps, however, continue. The already burdensome process of pursuing a civil case in court has become even more difficult in a pandemic. For many of our clients, the pure act of printing a packet of pleadings, filling out the forms, making copies, and correctly filing it with a court is too difficult to accomplish alone. For clients with language or cognitive barriers, the lack of in-person assistance or translation magnifies the burden.

Many eligible legal aid clients do not have printers, copiers, or scanners in their home. Without law libraries and public offices, they (and in some areas, the courts) rely on legal aid offices to distribute *pro se* forms and provide guidance on filing. Furthermore, there seems to be a prevailing assumption that if a resource is posted online, it is accessible. For clients without internet access, or the technological literacy to make use of these resources, an online filing guide resembles hieroglyphics. These resources still require stable internet, a computer or tablet, a printer, a quiet space to complete the forms, a copier, and transportation to the courthouse.

Even in our own legal services offices, the reliance on technology has come with unintended consequences and has required constant evaluation. For example, web-based phone services do not accept collect calls. This means a prisoner or detainee trying to call an attorney in a remote legal aid office must have independent funds deposited in their account to support their call. If they do not have the funds—and many do not—they simply cannot speak to their attorney.

## HOW TO AVOID POVERTY-SHAMING IN A PANDEMIC

- Offer technology options, but do not assume access or technology literacy. Ask a client or litigant their preference: Would they rather have a phone conference or a Zoom hearing?
- Stop sharing stories of people appearing in court from cars or from their beds. Private space in a pandemic is a luxury many cannot afford.
- Stop saying “get a lawyer” to people who cannot afford one. Being poor is not a voluntary condition.
- Stay up to date on community resources for food and housing assistance and share with all. The more you share, the less you stigmatize poverty.
- Be aware of how burdensome it is to print, sign, scan, and file documents for someone without a printer or access to a copier.
- Send love to your law librarian. Law libraries and self-help centers are critical to ensuring access to justice in our state. They have been doing the heavy lifting of supporting self-represented litigants, and they will continue to do so.
- Help your neighbors! Recognize that in times of human crisis, those experiencing poverty suffer the most and for the longest. Contact your local legal aid office and lend a hand.

“I encourage all Minnesota attorneys to consider volunteering with your local legal aid office or volunteer program. You do not need specialized legal knowledge, just a desire to help your fellow Minnesotans and a belief in equal justice under the law.”

The financial stress of this pandemic manifests itself in many ways and will continue to do so for years to come. Like the countless families who have lost their incomes—with the bills piling up and rent coming due—we are anxiously awaiting the lifting of the eviction moratoriums, bracing ourselves for what will be a very dark time for families in poverty. The financial scars of this pandemic and the disruption to Minnesotan families are destined to remain long after we reach a new normal.

### *Adapting to the times*

So, how have the civil legal aid offices of Minnesota met the need in this time of crisis? To address the digital divide, the Minnesota Legal Services Coalition, with the assistance of CARES Act funds, recently installed a statewide network of 200 legal computer kiosks stationed in a variety of community locations to help Minnesotans who face barriers of technology and transportation to access legal services and appear for remote hearings. (For more information visit the Legal Kiosk Project at [legalkiosk.org](http://legalkiosk.org).)

Additionally, we use the remote resources we do have to maximize our presence in “legal desert” areas in greater Minnesota. At Legal Aid Service of Northeastern Minnesota, for example, we have instituted a virtual legal clinic model that allows us to serve our entire 11-county region with volunteers and staff attorneys who participate from all corners of the state. Remote access has allowed our private attorney involvement office to draw upon a deeper pool of volunteers willing to assist indigent clients living in rural Minnesota. As a result, a volunteer attorney in Wayzata can now represent a family law client in International Falls.

As legal aid attorneys, we are keenly aware of our responsibility in this humanitarian crisis and our obligation to help as many clients as we possibly can. I am so proud of my civil legal aid colleagues, our partners, and the collective impact we have had in working to ensure that phone calls are answered, cases are triaged, justice is pursued, and basic human needs are fought for during this extraordinary time. We have served thousands of clients, closed over 900 covid-related cases, and succeeded in securing safety and stability for thousands of families.

But we cannot do it alone. There is, and will be, far more need in Minnesota than our legal aid staff can ever meet, and a housing crisis looms in the immediate future. I encourage all Minnesota attorneys to consider volunteering with your local legal aid office or volunteer program. You do not need specialized legal knowledge, just a desire to help your fellow Minnesotans and a belief in equal justice under the law. Most programs offer thorough training, mentoring, and assistance. For a comprehensive guide to pro bono offices and opportunities, go to ProJustice Minnesota ([projusticemn.org](http://projusticemn.org)). ▲



**LILLO SCHLUNDER** is the director of private attorney involvement (pro bono) at Legal Aid Service of Northeastern Minnesota. Prior to joining LASNEM, Lilo supervised and practiced in the areas of family and poverty law at Central Minnesota Legal Services in Minneapolis.

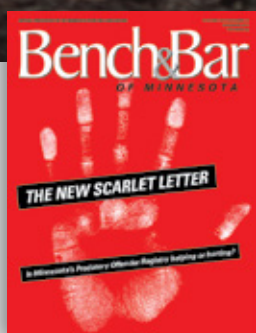
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# *Momentum builds for changes to Predatory Offender Registry*

BY STACY L. BETTISON



**December 2019:**  
***"The new scarlet letter:  
Is Minnesota's Predatory  
Offender Registry  
helping or hurting?"***

In late January, the Minnesota Legislature received the final report of the Criminal Sexual Conduct Working Group charged with recommending changes to the criminal sexual conduct statute. For over 13 months the working group—comprising victims/survivors, advocates, prosecutors, law enforcement, and criminal defense attorneys—met to consider a multitude of proposed changes to the law, designed primarily to strengthen the criminal statute. The working group membership was composed to reflect a broad spectrum of viewpoints and to be inclusive of marginalized communities.

While the working group's mandate was to consider just the criminal sexual conduct statute, it became increasingly clear (particularly to the defense bar) that any discussion about expanding criminal liability must also include a discussion of the Predatory Offender Registry—the associated database that is home to over 18,000 people and poses an annual cost of over \$1 million to Minnesota taxpayers. (I wrote about the POR at length in these pages in "The new scarlet letter: Is Minnesota's Predatory Offender Registry helping or hurting?" Dec. 2019.)



Over the course of the working group's meetings, concerns were frequently raised about the increasing number of people who will be charged with crimes under a newly strengthened statute, and the registry's increasingly disparate impact on BIPOC, the homeless, juveniles, and other vulnerable people and communities. The Outcomes Subcommittee held several meetings to consider the registry, the net it currently casts, its impact upon both victims and the accused, and how it is serving public safety.

The primary concern voiced was that the registry covers too many people while yielding public safety outcomes that are questionable at best. Concerns in particular were raised about juveniles, people who are charged with a registrable offense but never convicted of that offense, and people who are on the registry for decades due to "restart" provisions that bear no nexus to sex crime recidivism.

There was general agreement that a Predatory Offender Registry Working Group be formed to examine the registry and propose reform. In February 2021, H.F.707 was introduced and referred to the Public Safety and Criminal Justice Reform Finance and Policy Committee. That bill, which featured bipartisan authorship, included revisions to the criminal sexual conduct statute proposed in the working group's main report. It also included language that would establish a Predatory Offender Registry Working Group to convene in September 2021. (On February 25 the bill was re-referred to the Judiciary Finance and Civil Law Committee; as this article was submitted in mid-March it remained there.)

## COMMITTEE RECOMMENDATIONS

The Outcomes Subcommittee specifically focused on four principal concerns that were discussed in a supplement to the main report (Supplement 2) submitted to the Legislature. Those four concerns:

### 1. Eliminate registration requirements for juveniles.

There was broad consensus to eliminate registration requirements for adjudicated juveniles. Registration requirements would continue for Extended Juvenile Jurisdiction and juveniles tried as adults. Given the overwhelming research showing that a child's prefrontal cortex is still developing and maturing during adolescence (impacting decision making and the ability to evaluate consequences), the practice of holding children accountable to a registry for 10 years—and in many instances much longer, given the restart provisions (see below)—is contrary to the purpose of Minnesota's juvenile justice system. In fact, the participants widely concurred that requiring juveniles to register creates more harm than good.

### 2. Require registration only for convictions.

Currently, registration is required not just for those convicted of a registrable offense, but for individuals "charged with" a registrable offense and convicted of an offense "arising out of the same set of circumstances." There was broad consensus that requiring registration for offenses other than those that a person was convicted of is inappropriate. The practical impact of requiring registration on probable cause or "same set of circumstances" is that the prosecution and accused are both severely hampered by this framework. Under current law, once probable cause is determined, registration is required—regardless of a case's disposition, even if it's later dismissed or a plea agreement is reached that does not include a plea to a registrable offense.

### 3. Eliminate or modify restart provisions.

There was extensive consideration of the additional five-year registration required when a registrant is convicted for failure to register and the 10-year restart provision for conviction of a subsequent offense. The practical impact of these provisions is that once an individual is required to register, any misstep on the registrant's part results in long-term registration requirements, even where such misstep suggests no heightened risk for committing a sexual offense. While statutory language was proposed, additional discussion was needed to more fully consider the restart options and solutions.

### 4. Provide opportunities for early termination of registration requirements.

Though Minnesota has no mechanism to allow a registrant to qualify for early termination of registration requirements, there was significant discussion on the benefits of providing such an opportunity — akin to expungement. While consensus was not reached, the Outcomes Subcommittee recognized the possible benefits to a "carrot-stick" approach that creates incentive for compliance, with the goal of providing registrants an opportunity to qualify for early termination. ▲

## Proposed statutory language

The suggested statutory language for enacting the changes suggested in Supplement 2 is as follows:

243.166, subd. 1b. Registration required.

(a) A person shall register under this section if:

(1) the person was charged with or petitioned for convicted of a felony violation of or attempt to violate, or aiding, abetting, or conspiracy to commit, any of the following; and convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances:

...

(2) the person was charged with or petitioned for convicted of a violation of, or attempt to violate, or aiding, abetting, or conspiring to commit any of the following and convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances:

...

(4) the person was charged with or petitioned for, including pursuant to a court martial, convicted of violating a law of the United States, including the Uniform Code of Military Justice, similar to the offenses described in clause (1), (2), or (3), and convicted of or adjudicated delinquent for that offense. or another offense arising out of the same set of circumstances.

(b) A person also shall register under this section if:

(1) the person was charged with or petitioned for convicted of an offense in another state that would be a violation of a law described in paragraph (a) if committed in this state and convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances

Note: The working group noted that the amendments to Minn. Stat. 243.167 ("Registration under predatory offender registration law for other offenses") would also require revisions. Additionally, any revisions may need to provide that registration would still be required in extended jurisdiction juvenile (EJJ) and certified cases. Finally, there was discussion about revisions being applied prospectively only – for convictions on or after a specified date.

243.166, subd. 6. Registration period.

...

(c) If a person required to register under this section is incarcerated due to a conviction for a new offense or following a revocation of probation, supervised release, or conditional release for any offense, the person shall continue to register until ten years have elapsed since the person was last released from incarceration or until the person's probation, supervised release, current registration period, or conditional release period expires, whichever occurs later.

Subd. XX. Petition for Relief. A person who is required to register as a predatory offender under this section may commence a proceeding to terminate their registration requirements by filing a petition in the district court in the county in which the person was convicted or adjudicated of an offense that requires current registration.

(a) A petition for early termination of the registration requirement shall state the following:

1. Why early termination is consistent with public safety;

2. What steps the petitioner has taken since the time of the offense toward personal rehabilitation, including treatment, work, or other personal history that demonstrates rehabilitation.

3. Petitioner's criminal conviction record indicating all convictions for misdemeanors, gross misdemeanors, or felonies in this state, and for all comparable convictions in any other state, federal court, or foreign country, whether the convictions occurred before or after the arrest or conviction for the offense that prompted the registration requirement, including all criminal charges that have been continued for dismissal or stayed for adjudication, or have been the subject of pretrial diversion;

4. All pending criminal charges against the petitioner in this state or another jurisdiction; and

5. All prior requests for early termination made by the petitioner, whether for the present offense requiring registration or for any other offenses, in this state or any other state or federal court.

(b) The petitioner shall serve by mail the petition for early termination and a proposed early termination order on the prosecutorial office that had jurisdiction over the offense that triggered the petitioner's current registration requirement, and all other state and local government agencies and jurisdictions whose records would be affected by the proposed order.

(c) The prosecutorial office that had jurisdiction over the offense that prompted the registration requirement shall serve by mail the petition for early termination and a proposed termination order on any victims of the offense.

(d) A victim of the offense for which early termination is sought has a right to submit an oral or written statement to the court at the time of the hearing describing the harm suffered by the victim as a result of the crime and the victim's recommendation on whether early termination should be granted or denied. The judge shall consider the victim's statement when making a decision.

(e) A hearing on the petition shall be held no sooner than 60 days after service of the petition. A victim of the offense for which early termination is sought has a right to submit an oral or written statement to the court at the time of the hearing describing the harm suffered by the victim as a result of the crime and the victim's recommendation on whether early termination should be granted or denied. The judge shall consider the victim's statement when making a decision.

(f) The Court shall grant the petition following the hearing if:

a. Petitioner has completed, or has been discharged from, probation; or

b. Petitioner received an executed prison sentence, Petitioner has completed conditional and supervised release; and

c. The Court finds by clear and convincing evidence that terminating the registration requirement is consistent with public safety.



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**CRIMINAL LAW****JUDICIAL LAW**

■ **Homicide: For third-degree murder, death-causing act aimed at single person is sufficient.** Appellant, a former police officer, and his partner were on patrol at night when they responded to a call of yelling in an alley behind the victim's home. Appellant's partner drove the squad car into the dark alley with appellant in the passenger seat. They did not hear or see anything suspicious, so waited for a bicyclist to pass them before responding to another call. Before the bicyclist passed, a silhouette of a person near the driver's side window appeared and the officers heard something hit the squad. Appellant testified he saw the person, a woman, raise her arm. Appellant fired his weapon across his partner, through the driver's side door of the squad. He said he did so to protect his partner, who he noticed was unable to unholster his weapon and "feared for his life." The victim was shot in the abdomen and died. Appellant was convicted after a jury trial of third-degree murder. On appeal, he argues the evidence was insufficient to prove he acted with a depraved mind because he "directed his actions at a particular person" and "did not act with a mind bent on mischief."

Third-degree murder requires proof of an act that "(1) causes the death of another, (2) is eminently dangerous to others, and (3) evinces a depraved mind without regard for human life." Appellant argues he did not act with a depraved mind, based on the statement in *State v. Lowe*, 68 N.W. 1094, 1095 (Minn. 1896), that third-degree murder is "intended to cover cases where the reckless, mischievous, or wanton acts of the accused were committed *without special regard to their effect on any particular person or persons*, but were committed with a reckless disregard of whether they injured one person or another" (emphasis added). Appellant's act was aimed at a particular person, the person outside his squad car, so he argues he cannot be convicted of third-degree murder.

The court of appeals notes that *Lowe* goes on to say, "We do not deem it necessary that more than one person was

or might have been put in jeopardy by such act... It is, however, necessary that the act was committed without special design upon the particular person or persons with whose murder the accused is charged." *Id.* Thus, third-degree murder may occur even where the death-causing act endangers only one person.

*State v. Mytych*, 194 N.W.2d 276 (Minn. 1972), also affirmed a third-degree murder conviction based on victims known to and targeted by the defendant. In *Mytych*, the court stated that "[t]he fact that a person evinces a depraved mind by shooting and injuring one person and killing another does not necessarily mean that such killing was committed with such particularity as to exclude a conviction of third-degree murder. Each case must be determined on its own facts and issues." *Id.* at 277.

Per *State v. Hall*, 931 N.W.2d 727 (Minn. 2019), the phrase "without intent to effect the death of any person" in the third-degree murder statute does not establish a separate element, but "serves to differentiate the offense of [unintentional] third-degree murder from the more serious offense of second-degree intentional murder." *Id.* at 741 n.6. Thus, the evidence could be sufficient to sustain appellant's conviction even though he directed the death-causing act at the person outside of his squad car.

The *mens rea* required for third-degree depraved mind murder is equivalent to a reckless standard. That is, the depraved mind element "requires proof that the defendant was aware that his conduct created a substantial and unjustifiable risk of death to another person and consciously disregarded that risk." *State v. Coleman*, 944 N.W.2d 469, 479 (Minn. Ct. App. 2020). Per case law, "the reckless nature of a defendant's act alone may establish that the defendant acted with a depraved mind...", so "the evidence could be sufficient to sustain the jury's finding of guilt even if [appellant]'s act was the result of a split-second decision."

Ultimately, the court concludes the evidence was sufficient to sustain appellant's third-degree murder conviction, based on evidence that appellant fired his weapon from inside the squad across

his partner's body, without seeing the victim's hand or any weapon, without ascertaining who she was or what she was doing, whether she had a weapon, or whether she posed a threat, and moments after observing a bicyclist approaching the squad.

Judge Johnson disagrees with the majority as to the sufficiency of the evidence on the third-degree murder charge, arguing that precedent calls for a "no-particular-person" requirement. He argues appellant's act directed at a single person precludes a third-degree murder conviction and also that the evidence shows appellant did not act with a sufficiently depraved mind or without regard for human life. The Minnesota Supreme Court accepted review of this case. *State v. Noor*, A19-1089, 2021 WL 317740 (Minn. Ct. App. 2/1/2021).

■ **Procedure: Complaint may not be considered to supplement plea testimony unless defendant expressly admitted to truthfulness and accuracy of allegations.** Appellant pleaded guilty to two counts of first-degree burglary and one count of second-degree assault after he kicked open a door to the victim's father's house, assaulted the victim once inside, and threatened the victim with a knife. Appellant petitioned for postconviction relief to withdraw his guilty pleas on counts one (first-degree burglary with a dangerous weapon) and three (second-degree assault—fear), arguing there was not a sufficient factual basis for either count.

As to the first-degree burglary with a dangerous weapon charge, appellant admitted to entering the victim's father's home without consent and with a dangerous weapon and that he took and drank a beer from the fridge once inside. This admission established that appellant

committed theft after entering the victim's father's home without consent and, therefore, was a sufficient factual basis to establish appellant's guilt of first-degree burglary.

However, appellant's plea to second-degree assault with a deadly weapon was not accurate, because there was not a sufficient factual basis to establish he acted with the specific intent to cause fear in the victim. The state was required to prove appellant intended to cause the victim fear of immediate bodily harm with the knife. During the plea colloquy, appellant was not asked about whether he acted with this intent. A district court may draw inferences from the facts admitted to by the defendant, but the court finds that appellant admitted no act from which specific intent for an assault might be inferred. He admitted solely an act of the general intent crime of assault—harm.

The court rejects the state's request to consider the contents of the complaint to supplement appellant's testimony. A postconviction court is permitted to consider record evidence, but appellant did not expressly testify as to the truthfulness and accuracy of the allegations in the complaint during his plea colloquy, so they are not part of the record that may be considered in assessing the accuracy of his plea. The court reverses the district court's denial of appellant's petition to withdraw his guilty plea to second-degree assault. *State v. Rosendahl*, A20-0439, 2021 WL 416699 (Minn. Ct. App. 2/8/2021).



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## EMPLOYMENT & LABOR LAW

### JUDICIAL LAW

■ **Age discrimination dismissed; legitimate reason to terminate.** An employee who claimed that she was subject to age discrimination after she was let go due to a restructuring of her workplace lost her claim. The 8th Circuit upheld dismissal of her lawsuit on grounds that the company had legitimate basis to engage in a restructuring of the financial department where the claimant worked. *Starkey v. Amber Enterprises*, 987 F.3d 758 (8th Cir. 2/4/2021).

■ **Employee reinstatement upheld; arbitration award confirmed.** An arbitration award reinstating an employee under the Railway Labor Act was upheld on grounds that the arbitrator had authority to make the determination. The 8th Circuit rejected the employer's claim that the decision was outside the scope of the collective bargaining agreement. *Union Pacific Ry. Co. v. International Association of SMART*, 2021 WL 608938 (8th Cir. 2/17/2021) (unpublished).

■ **Discrimination claims; trio of employees lose *per curiam*.** Three employees lost their claims for racial discrimination in *per curiam* rulings of the 8th Circuit. A panel that included Judge James Loken of Minnesota upheld an adverse judgment entered after a bench trial against a pair of related *pro se* claimants, who asserted hostile work environment due to their race and ethnicity at a meat packing facility in South Dakota. *Naambwe v. John Morrell & Co.*, 2021 WL 397742 (Minn. Ct. App. 2/4/2021) *per curiam* (unpublished).

■ **Ineligibility due to misrepresentation; untimely appeal.** An employee at a bank in Iowa met the same fate in



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challenging dismissal by summary judgment in a claim for discrimination due to age. **Batcher v. Wells Fargo Bank, N.A.**, 2021 WL 485727 (Minn. Ct. App. 2/10/2021) *per curiam* (unpublished).

■ **Unemployment compensation; high schoolers eligible.** In a deviation from the state statute barring unemployment benefits for high school students, Minn. Stat. §268.085, subd. (3), the Minnesota Court of Appeals held that they may receive benefits under the federal Coronavirus Aid Relief, and Economic Security (CARES) Act. Chief Judge Susan Segal authored the opinion, concluding that students are not ineligible to receive Pandemic Unemployment Assistance (PUA) under the Act. **Matter of Muse**, 2021 WL 669865 (Minn. Ct. App. 2/22/2021) (unpublished).

■ **Unemployment compensation; quitting employee loses.** An employee who quit his job due to a claimed hostile work environment was ineligible for unemployment benefits; the court of appeals held that he did not have good reason to quit caused by the employer. **DePaul v. Dept. of Veterans Affairs**, 2021 WL 669054 (Minn. Ct. App. 2/22/2021) (unpublished).

## LOOKING AHEAD

■ **Wage case at high court.** The Minnesota Supreme Court will soon decide whether a property owner's payment to a part-time caretaker by rent credit violates the minimum wage requirements under the state Fair Labor Standards Act, Minn. Stat. §177:2-35. The court will also determine two other issues heard in early March in **Hagen v. Steven Scott Management**, No. A 19-1224: whether payment by rent credits is an impermissible wage payment under Minn. Stat. §181.79 and whether the caretaker is entitled to be paid for on-call time under §177.23.



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## ENVIRONMENTAL LAW

### JUDICIAL LAW

■ **Minnesota Supreme Court allows MERA claim against Minneapolis's 2040 Comprehensive Plan to proceed.** On 2/10/2021, the Minnesota Supreme Court issued an opinion regarding an issue of first impression involving the Minnesota Environmental Rights Act (MERA). The

case involved a challenge under MERA brought by several environmental groups (collectively, Smart Growth) to the City of Minneapolis's 2040 Comprehensive Plan. Smart Growth claimed implementation of the plan would cause increased density and related complications—including increased impervious surface and runoff, increased population and thus increased domestic wastewater and traffic, and loss of green space affecting birds and other wildlife—that are “likely to materially adversely affect the environment” under MERA.

The city, in a motion to dismiss, first argued that because comprehensive plans are exempt from environmental review under EQB rules implementing the Minnesota Environmental Policy Act (MEPA), Minn. R. 4410.4600, subp. 26, Smart Growth's MERA claim must be rejected. If the claim were allowed to proceed, the city argued, it would create inconsistency between MEPA and MERA because plaintiffs could obtain environmental review under MERA of a project intended to be exempt from environmental review under MEPA. The city also argued that Smart Growth had failed to plead a *prima facie* case under MERA, since it had not pleaded any specific facts to support allegations that the plan had caused or was likely to cause material and adverse impacts to natural resources. Minn. Stat. §116B.04(b). The district court granted the city's motion to dismiss and the court of appeals affirmed.

The Supreme Court granted Smart Growth's petition for review and reversed the lower courts. The court undertook a statutory analysis of MERA and MEPA and determined that an exemption from the broad scope of MERA should not be presumed absent express statutory language. Whereas the Legislature on other occasions has expressly exempted certain statutes from MERA, e.g., Minn. Stat. §115A.30 (exempting the Waste Management Act), the Legislature included no language in MEPA exempting it from MERA. The Court further found the two statutes did not conflict. “It is not inconsistent to recognize,” the Court wrote, “that a MERA challenge might result in environmental review that would not be required under MEPA, given that MERA is broader in scope than MEPA and applies to ‘any conduct’ of ‘any person’—including municipal governments.” Moreover, Minn. R. 4410.4600, subp. 26, the rule that exempts comprehensive plans from environmental review, by its terms only provides exemption from MEPA procedures, not MERA.

This issue of first impression involved

a procedural aspect of the city's second argument—i.e., that Smart Growth's complaint failed to set forth a legally sufficient claim for relief. The Court noted that it has “not previously had the opportunity to consider a MERA claim at the Rule 12.02(e) dismissal stage.” Specifically, the city's argument focused on causation. It claimed Smart Growth had not alleged sufficient facts showing that adoption of the 2040 plan is likely to cause the type of environmental damage that MERA aims to prevent; reliance on alleged damage from a projected buildout under the plan is too speculative to establish causation, the city asserted. The Supreme Court disagreed. Its holding rested on the procedural posture of the case as a motion to dismiss. The Court emphasized that it did not need to determine whether Smart Growth made a MERA “*prima facie* showing” with regard to causation; this would be premature at the Rule 12.02(e) stage. Rather, the issue was whether the allegations in Smart Growth's complaint, accepted as true and given all reasonable inferences, were sufficient to allege causation. The Court held that it did not appear “to a certainty” that Smart Growth would be unable to introduce facts supporting its allegations. Accordingly, the Court held that dismissal of the complaint was premature and that Smart Growth must be able to proceed with its claim. **State by Smart Growth Minneapolis v. City of Minneapolis**, 954 N.W.2d 584 (2021).

■ **MN Supreme Court holds MPCA is not obligated to consider “sham” permitting during minor air permit application process.** The Minnesota Supreme Court, on 2/24/2021, issued an opinion concerning allegations of “sham permitting” for PolyMet Mining Corp.'s copper-nickel-platinum NorthMet mining project, finding that while a permitting agency may investigate sham permitting at the synthetic minor source permit application stage, it is not required to do so.

This dispute arose in December 2018, when several environmental groups and the Fond du Lac Band of Lake Superior Chippewa raised concerns that the production capacity of the existing facilities at the PolyMet mine site were higher than the rate stipulated in the company's application for a minor air permit. The parties alleged, and the Minnesota Court of Appeals agreed, that the Minnesota Pollution Control Agency (MPCA) failed to investigate whether PolyMet intended to operate within the limits of the “synthetic” minor permit or whether it actually intended to increase its capac-



ity to major-permit levels shortly after receiving the permit. The appeals court applied the Minnesota Administrative Procedure Act in finding that the MPCA had failed to take a “hard look” into the evidence of the possible “sham” permitting. *In re Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining Inc.*, 943 N.W.2d 399, 409 (Minn. App. 2020); citing Stat. §14.69 (2020).

Under the Clean Air Act, a source must seek permitting based on its tonnage per year of pollution. A facility that emits over 250 tons per year of any regulated pollutant constitutes a major stationary source, triggering various requirements under the Clean Air Act, including the requirement to implement best available control technology measures. 40 C.F.R. §52.21(b)(12). The review process and permit requirements for major source permits are more rigorous than for minor source permits. “Sham permitting” can occur when a source obtains a minor source permit and, following construction of the facility, seeks permit modifications to become a major source, which could result in a less rigorous process and less stringent pollution control measures than would have been required if the source had initially sought a major source permit.

The allegations of sham permitting in this case focused on an investor report filed by PolyMet’s Canadian parent company with Canadian regulatory authorities 10 days after the comment period closed on the proposed NorthMet air permit. The report provided a preliminary economic analysis of scenarios where NorthMet would increase its ore-processing rates to levels that would result in major-level air emissions. This, appellants alleged, constituted evidence of sham permitting that MPCA had failed to properly consider. The court of appeals agreed.

However, the Minnesota Supreme Court did not agree and reversed. At issue was whether MPCA was required to prospectively evaluate an intent to pursue a sham permit during the permit application stage, or whether it was only required to do so once the minor source, having obtained its minor permit, subsequently in bad faith sought to exceed the minor limits and become a major source. The Court analyzed provisions in EPA minor-source permitting regulations, 40 C.F.R. §50.21, and in longstanding EPA guidance on sham permitting. Terrell E. Hunt & John S. Seitz, *Guidance on Limiting Potential to Emit in New Source Permitting*, U.S. EPA (6/13/1989). The Court concluded that these regulations and guidance, which provide EPA concurrent authority with state agencies to enforce

operational restrictions in synthetic minor permits, were solely focused on enforcement of operational limits within minor permits and punishment after the fact of sources that could be shown to have obtained a minor permit through deceit.

As a result, the Court concluded the regulations and guidance did not provide a basis for requiring MPCA to evaluate sham permitting during the application process for PolyMet’s minor air permit. And while the Court concluded certain statements in the preamble to the federal regulations indicated a state agency such as MPCA *could* look at sham permitting in the minor-source permit application stage, it is not *required* to do so. As a result, the Court concluded, MPCA did not have a legal obligation to investigate sham permitting issues as part of PolyMet’s minor-source application process; the Court thus reversed the court of appeals and remanded. *In re Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining Inc.*, Nos. A19-0115 and A19-0134, 2021 WL 710490 (Minn. 2/24/2021).

#### ADMINISTRATIVE ACTION

##### ■ President Biden signs environmental executive orders and agreement.

On 1/20/2021, hours after being inaugurated as the 46th President of the United States, Joseph R. Biden Jr. signed over a dozen executive orders (EO), presidential memoranda, determinations, and proclamations, reversing many of the former administration’s policies and guidelines. The executive actions covered topics ranging from immigration enforcement and racial equity to mask-wearing and other covid-19 priorities, as well as environmental policies and actions.

One EO issued that day was Executive Order No. 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate

Crisis. 86 Fed. Reg. 7037 (2021). The EO has many aims, including, inter alia: to ensure access to clean air and water; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; and to prioritize environmental justice in communities of color and low-income communities. In order to fulfill those aims, the EO directs all agencies to review and, when applicable, consider suspending, revising, or rescinding federal regulations and other actions of the last four years that conflict with those objectives, and to immediately commence work to confront the climate crisis.

Specifically, the EO addresses the administrator of the Environmental Protection Agency to consider proposing regulations to establish new emission guidelines and standards for methane and other compounds in the oil and gas sector, including exploration and production, transmission, processing, and storage segments.

Similarly, the EO addresses the Coastal Plain Oil and Gas Leasing Program in the Arctic National Wildlife Refuge. The EO places a temporary moratorium on all activities of the federal government for review of the program, and reinstates an Obama administration EO withdrawing certain offshore areas in Arctic waters and the Bering Sea from oil and gas drilling.

The EO explicitly states that “[i]t is essential that agencies capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account.” In doing so, the EO directs agencies to determine the damages associated with incremental increases in greenhouse gas emissions by calculating the social cost of carbon, nitrous oxide, and methane, when conducting cost-benefit analyses of regulatory actions.

To that effect, the EO revokes the

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March 2019 permit for the Keystone XL Pipeline. Citing the increase in extreme weather events, the need to create clean-energy jobs, and the undercutting of credibility and influence of the U.S. as a global leader in climate action, the EO states that leaving the Keystone XL pipeline permit in place would disserve the U.S. national interest.

On that same day, President Biden signed back on to the Paris Climate Agreement, which the U.S. officially left under the previous administration on 11/4/2020.

On January 27, during the White House "Climate Day," President Biden issued Executive Order No. 14008, Tackling the Climate Crisis at Home and Abroad. 86 Fed. Reg. 7619 (2021). With a focus on putting the climate crisis at the center of U.S. policy and government activity, this EO orders a pause on all new oil and natural gas leases on public lands or in offshore waters. And notably, the EO discusses the need to rebuild our infrastructure toward a sustainable, clean-energy economy by setting the ambitious goals of achieving a carbon pollution-free power sector by 2035 and a net-zero emission economy by 2050. **Exec. Order No. 13990**, 86 Fed. Reg. 7037 (Jan. 20, 2021); **Paris Climate Agreement**, [whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/](https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/) (1/20/2021); **Exec. Order No. 14008**, 86 Fed. Reg. 7619 (1/27/2021).



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## FAMILY LAW

### JUDICIAL LAW

■ **When a third-party custody petition is opposed, the district court should hold an evidentiary hearing before granting the petition.** This case arises from two competing third-party custody petitions. The mother of the minor child A.J. died in a car accident in 2019. The child's biological father was never identified. The child spent several years of her youth living with mother and stepfather, until they divorced in 2019. Mother's sisters filed the competing petition for third-party custody. After a non-evidentiary hearing, the district court dismissed the sisters' petition and granted the ex-stepfather's petition after determining he has

a substantial relationship with the minor child, awarding him permanent sole legal and sole physical custody. Mother's sisters appealed. The Minnesota Court of Appeals determined that after finding ex-stepfather had a substantial relationship with the minor child, the district court should have held an evidentiary hearing on the facts contained in his petition and reversed the granting of his petition and remanded for an evidentiary hearing. **Jamison John Stewart vs. John Doe; Hoda Ahmed Sulub, Malko Ibrahim, et al., third-party intervenors**, A20-0754 (Minn. Ct. App. 3/1/2021).

■ **Child's therapist may not disclose records to one joint custodian over the other's objection.** Parties are the parents of minor child B.L.F. Mother and father had been in court several times over the years. Most recently, mother moved for sole legal and sole physical custody. Father filed a responsive motion asking, among other things, that the district court terminate the minor child's relationship with their therapist since mother unilaterally signed the child up for therapy without father's input. The district court denied mother's motions, but granted father's motions regarding therapy. The court ordered that the parties terminate the child's relationship with the therapist mother selected and mutually select a new therapist; that letters from the therapist filed by mother be excluded absent a waiver from the client; and that future filings related to the child's mental health are limited.

Mother appealed. The court of appeals affirmed, stating that mother made "a substantial unilateral decision inconsistent with the parties' joint legal custody" and the ordered the parties to find a mutually agreeable therapist. The second therapy issue mother appealed was the district court's decision to exclude letters from the therapist. The court of appeals concluded that the minor child's records are privileged absent a valid waiver, pursuant to Minn. Stat. §595.02. The therapist shall not waive the client's privilege without the client's consent, and one joint custodian cannot unilaterally waive the child's privilege without the consent of the other party. Therefore, the records are inadmissible unless both parties agree. **In re the Custody of: B.L.F., Cherries Chamberlain vs. Neil Fleahman**, A20-0658 (Minn. Ct. App. 2/16/2021).



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## FEDERAL PRACTICE

### JUDICIAL LAW

■ **Article III standing; nominal damages.** Where the plaintiffs' request for injunctive relief was mooted by defendants' change in policy, the United States Supreme Court held that the case was not entirely moot because the plaintiffs had also sought an award of nominal damages, and this request satisfied the "redressability" element of Article III standing. **Uzuegbunam v. Preczewski**, \_\_\_ S. Ct. \_\_\_ (2021).

■ **Sanctions; due process.** Where the defendant sought sanctions against plaintiff's counsel for alleged discovery-related misconduct pursuant to 28 U.S.C. §1927 and the district court's inherent powers, and the court instead imposed sanctions under Fed. R. Civ. P. 37(d)(3), the 8th Circuit denied counsel's due process challenge to those sanctions, rejecting his argument that the district court's reliance on Rule 37 violated his due process rights because he should have been warned before sanctions were imposed that the court might rely on that rule. **Lopez v. Whirlpool Corp.**, \_\_\_ F.3d \_\_\_ (8th Cir. 2021).

■ **Attorney-client privilege; clawback; email attachments.** In a dispute over allegedly privileged materials that were the subject of a "clawback" request by the plaintiff months after the disputed materials were produced, Magistrate Judge Menendez found that the weight of authority and the "better course of action" prohibited the defendants' "use" of the allegedly privileged material once a privilege claim was asserted, but she declined to penalize the defendants for using their knowledge of the material in support of their motion to compel.

In addition, and after thoroughly surveying the law, Magistrate Judge Menendez found that otherwise unprivileged attachments to a privileged email do not become privileged simply because they were attached, but that they need not ordinarily be produced so long as other versions of the attachments are available. **Willis Elec. Co. v. Polygroup Trading Ltd.**, 2021 WL 568494 (D. Minn. 2/16/2021).

■ **Expedited discovery; no "good cause."** Denying the plaintiffs' motion for a preliminary injunction, Judge Tostrud also denied their request for expedited discovery, finding an absence of the required "good cause" where no preliminary injunction motion was pend-

ing, there was no articulated risk of spoliation, the plaintiffs did not argue that they were unable to proceed without the information they sought, and the plaintiffs made no attempt to limit the scope of the proposed discovery. **Let Them Play MN v. Walz**, 2021 WL 423923 (D. Minn. 2/8/2021).

■ **Arbitration; subpoena; motion to quash denied.** Magistrate Judge Menendez denied a motion to quash a deposition subpoena issued to a St. Louis resident by the arbitrator in a Minneapolis arbitration, disagreeing with decisions from other circuits finding pre-hearing subpoenas invalid, rejecting the argument that the request for a remote deposition violated the territorial limits of Fed. R. Civ. P. 45, and also rejecting relevance and burdensomeness arguments. **Int'l Seaway Trading Corp. v. Target Corp.**, 2021 WL 672990 (D. Minn. 2/22/2021).

■ **Removal; remand; burden to show the citizenship of the plaintiff.** Where the plaintiff limited partnership commenced an action in the Minnesota courts, the defendant corporation removed the action on the basis of diversity jurisdiction, and the plaintiff moved to remand, Judge Wright found that “nothing in the record” identified all of the members of the plaintiff or any of its owners’ members, meaning that the defendant was unable to meet its burden to establish that complete diversity existed. Therefore, the motion to remand was granted. **Carebourn Capital, L.P. v. Darkpulse, Inc.**, 2021 WL 614524 (D. Minn. 2/17/2021).

■ **Sealing and redaction of documents; multiple decisions.** Emphasizing the common law right of access to judicial records, Magistrate Judge Wright denied the plaintiff’s motion to redact the transcript of a hearing before Judge Schiltz on a motion for summary judgment, where there was no evidence that the plaintiff had attempted to seal the hearing from the public and the asserted property and privacy interests were “weak.” **ARP Wave, LLC v. Salpeter**, 2021 WL 406466 (D. Minn. 2/5/2021).

One month later, Magistrate Judge Wright applied the prevailing six-factor test and rejected most of defendants’ requests for continued sealing of documents that were opposed by the plaintiffs. **Wright v. Capella Educ. Co.**, 2021 WL 856912 (D. Minn. 3/8/2021).



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## INTELLECTUAL PROPERTY

### JUDICIAL LAW

■ **Copyright: Asserting copyright infringement against a licensee.** Judge Nelson recently denied Fairview Health Services’ motion to dismiss Quest Software, Inc.’s breach of contract and copyright infringement counterclaims. In 2004, Fairview purchased licenses for Quest’s Active Roles software, a program that facilitates the administration and management of a company’s information technology accounts. Fairview continued to purchase licenses until 2019, when it notified Quest that it would not renew its maintenance services for the following year.

Quest then conducted an audit of Fairview’s use and alleged that Fairview had deployed the software in excess of the licenses purchased. Quest demanded payment of over \$4 million in owed license fees. Fairview filed an action for declaratory judgment, and Quest counterclaimed for breach of contract and copyright infringement. A copyright owner who grants a nonexclusive, limited license ordinarily may not sue licensees for copyright infringement. The copyright owner, however, may recover for infringement if (1) the copying exceeds the scope of the license and (2) the copyright owner’s complaint is grounded in an exclusive right of copyright (e.g., unlawful reproduction or distribution). Fairview argued that because the license contained a true-up provision that contemplated Fairview’s right to exceed the scope of the license, subject to additional payments, Quest could not allege a nexus between the alleged breach and a violation of Quest’s copyright rights. The court disagreed. The court found Quest alleged Fairview used more copies than it had purchased and did not pay for the excess use as

provided for by the true-up provision. Consequently, Quest plausibly alleged the required nexus between the numerical limitation in the contract and Quest’s exclusive rights. The motion to dismiss was denied. **Fairview Health Servs. v. Quest Software, Inc.**, No. 20-cv-01326 (SRN/LIB), 2021 U.S. Dist. LEXIS 32382, at \*12 (D. Minn. 2/22/2021).



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## REAL PROPERTY

### JUDICIAL LAW

■ **Borrower entitled to surplus after foreclosure by action.** Defendants borrowed \$1.8 million from plaintiff and secured the loan with a mortgage on two properties. Borrowers failed to make timely payments under the loan. Creditor brought suit to obtain a judgment against the debtors for the outstanding amount. Creditor, in addition, commenced two other actions to foreclose on each property. The parties entered into stipulations for each case wherein the parties agreed that the borrowers were in default, agreed on the amount of the debts, and agreed that the court may enter judgment against the borrowers, jointly and severally. The district court thereafter entered judgment for \$1,983,815.63 in the first action, for \$1,990,012.67 in the second action regarding the TCP Property, and for \$2,005,371.35 in the third action regarding the MIG Property. The properties were sold at auction, with plaintiff submitting the highest bid on each: \$600,000 and \$1.8 million, respectively. The borrowers moved to have the surplus after the second property sale turned over, arguing that they were



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entitled to the surplus of approximately \$296,000. Lenders opposed the motion, arguing there was no surplus after the sale of the MIG Property.

Rejecting each of the lender's arguments, the court held that the stipulated judgment amount was to be substituted for the mortgage debt when determining a surplus and concluded that the borrower's mortgage debt was satisfied after the sale of the second property because the total of the two bids exceeded the amount of the judgment, a fact agreed to by the lender's counsel. The court also held that the surplus calculation was governed by Minn. Stat. §581.06, as the statute did not contradict the language of the earlier judgments, which did not specify the method for calculating any surplus. An overall focus of the court was on the lender's decision to bring three different actions on one note and alluding to the fact that the three cases should have been consolidated into one action. The appellate court concluded by affirming the district court and holding that the lender had forfeited its equitable arguments on appeal by failing to raise them at the district court. **SW Partners, LLC v. Trade Center Property, LLC**, A20-0773, 2021 WL 856071 (Minn. Ct. App. 3/8/2021) (unpublished).



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## TAX LAW

### JUDICIAL LAW

■ **Couple's \$300,000+ of rewards acquired from American Express not "income."** In a dispute "rest[ing] squarely in the legal chasm between the basic principle to broadly define income and [the IRS's own policy]" on credit card rewards programs, the tax court held that a taxpaying couple's "clever[] and relentless[] manipulation" of the AmEx Rewards Program did not result in gross income, despite the hundreds of thousands of dollars of economic benefit the couple realized. The methodology for the scheme is described in several popular press articles. In a gross simplification, the taxpayers took advantage of the 5% rewards on purchases and the lower fees on gift cards and money orders. See, e.g., Richard Rubin, *He Got \$300,000 From Credit-Card Rewards. The IRS Said It Was Taxable Income*, WALL ST. J., 4/7/2021. **Anikeev v. Comm'r**, T.C.M. (RIA) 2021-023 (T.C. 2021).

### ■ **Noncash charitable deductions denied in two cases for similar reasons.**

Veterinarian Dr. Duane Pankratz grew up on a farm in South Dakota in a home with no running water. He left South Dakota for vet school at Iowa State, and became a successful veterinary scientist. He developed a vaccine and built a vaccine company that he eventually sold for \$85 million. Following the sale, Dr. Pankratz returned to South Dakota, where he acquired and operated about a dozen business in the seemingly divergent industries of tourism and ranching.

Dr. Pankratz's commitment to South Dakota included several significant charitable donations, which form the basis of this dispute with the Service. In 2008 and 2009, he made three significant donations. First, in 2008 he donated four oil and gas projects to Missionary Church, Inc.; he valued this first donation at \$2 million, based on the purchase price and his approximation of appreciation. That same year, he donated 5.78 acres of land to Rapid City, South Dakota for road and utility improvements. (Pankratz conceded that this deduction should be disallowed.) In 2009, he donated a conference center—both the building and surrounding land—to Keystone Project, Inc., a religious charity. Dr. Pankratz worked with an appraiser to determine the conference center's value. The appraiser was not comfortable providing a qualified appraisal—the property was too large and complex for the appraiser. The appraiser did, however, explain in general terms the three methods used for professional appraisal. He also told Dr. Pankratz that the replacement method likely would be best in appraising the conference center. Dr. Pankratz took that information, totaled up the cost of the conference center and claimed that amount as a deduction.

Dr. Pankratz did not obtain qualified appraisals for any of these donations. Such a failure usually results in the denial of the claimed deduction and can also result in penalties. There was, however, one "hope for Pankratz," as the court explained—when Congress "codified many of the old substantiation regulations in section 170(f)(11), [it] added an escape hatch from non-deductibility for well-intentioned taxpayers." The Code allows the deduction despite a qualified appraisal where "it is shown that the failure to meet such requirements is due to reasonable cause and not to willful neglect."

The court here engaged in the "fact-intensive inquiry that requires a case-by-case examination of all the facts and circumstances presented" to decide if

Pankratz acted with "reasonable cause." The court explained that "reasonable cause" would be met if Pankratz exercised ordinary business care and prudence. The court concluded that he did not. A number of facts and circumstances supported the court's decision, including Pankratz's business sophistication, his reliance on individuals who were not tax professionals, and his failure to review his tax returns before they were submitted. The opinion also addresses a number of penalty issues outside this charitable contribution question. **Pankratz v. Comm'r**, T.C.M. (RIA) 2021-026 (T.C. 2021).

In the second case, a Wisconsin attorney's failure to comply with the substantiation requirements led to the denial of over \$250,000 in claimed charitable deductions. Although this taxpayer hired a qualified appraiser, he failed to report additional required information, such as the dates that he acquired the donated property, and how he determined the basis in the donated property. The petitioner "wholly failed to comply with the substantiation requirements under section 170 and its regulations" and did not act in good faith. Consequently, the deductions were denied and the imposed penalties were upheld. **Chiarelli v. Comm'r**, T.C.M. (RIA) 2021-027 (T.C. 2021).

■ **Revenue agent report was "initial determination" for penalty assessment purposes.** Taxpayers prevailed in a partial summary judgment motion in which the court held that the revenue agent's report was an "initial determination" for penalty assessment purposes. The IRS may not assess certain penalties unless the "initial determination" of the penalty assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination. The court candidly acknowledged that the statute does not set out the contours of what agency action constitutes an "initial determination," so the court turned to a "developing body" of case law. Because the agent's report in this dispute was a "communication with a high degree of concreteness and formality" and represented a "consequential moment" of IRS action, the report was an "initial determination." Since the agent did not get the supervisory approval prior to the report, the taxpayers were entitled to summary judgment on the penalty issue. **Beland v. Comm'r**, No. 30241-15, 2021 WL 777184 (T.C. 3/1/2021).

■ **Appellants fail to state a claim; court dismisses action.** Appellants Mikel and Tanya Kunza timely filed their Minne-

sota 2015 individual income tax return and property tax refund claim. On 9/11/2017, the commissioner received a report and Form CP 2000 from the IRS that adjusted appellants' federal income upward by \$15,299 for the 2015 tax year. This adjustment resulted in a corresponding adjustment to appellants' Minnesota income tax return and property tax refund claim for 2015. Appellants did not notify the commissioner of the federal adjustment.

On 9/24/2019, the commissioner issued a tax order assessing appellants \$3,394 in tax, penalty, and interest. Appellants filed an administrative appeal of the order. The commissioner subsequently abated a 10% penalty but affirmed the tax and interest. Appellants timely filed a notice of appeal with the tax court, alleging the assessment in the notice of determination on appeal was barred by a statute of limitations.

This motion was originally scheduled for 8/25/2020, but was postponed until 9/25/2020 to allow appellants the opportunity to retain an attorney. On 9/24/2020, Mr. Kunza emailed the commissioner and the court with several arguments against the motion, and also noted he would try to attend the hearing, but it would be difficult with his children home as a result of distance learning. The court subsequently postponed the hearing "to allow Mr. Kunza a final opportunity to file a response with documentation." On 10/1/2020 and 10/5/2020, the court received written submissions from Mr. Kunza and an "IRS transcript for 2015," respectively. The motion hearing was rescheduled for 11/5/2020. Appellants did not appear. The commissioner moved to dismiss the action for failure to state a claim. The commissioner argues that appellants' defense—that the commissioner's assessment is untimely—is without merit.

Commissioner orders are *prima facie* valid. Minn. Stat. §271.06, subd. 6 (2020); Minn. Stat. §270C.33, subd. 6 (2020). "Because Commissioner orders are presumptively valid, appellants bear 'the burden of going forward with the evidence to rebut or meet the presumption.'" *Congo Corp. v. Comm'r of Revenue*, 868 N.W.2d 41, 53 (Minn. 2015). Minn. R. Civ. P. 12.02(e) allows a party to "move to dismiss an action for failure to state a claim upon which relief can be granted." "If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary

judgment...." Minn. R. Civ. P. 12.02. The grant must grant summary judgment if the moving party shows that there is "no genuine issue of material fact," and the moving party is "entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01.

Minn. Stat. §289A.38 specifies the "time limitations within which the Commissioner must make assessments. Generally, 'the amount of taxes assessable must be assessed within 3-1/2 years after the date the return is filed.'" Id., subd. 1. However, relevant here, the statute of limitations is "extended by 6½ years after the due date of the return, or the date the return was filed, whichever is later, when a taxpayer omits from gross income an amount properly includable in it that is in excess of 25 percent of the amount of gross income stated in the return." Id., subd. 6(1). Additionally, "if a taxpayer fails to file amended income tax and property tax refund returns after the Internal Revenue Service changed or corrected a federal return, 'the commissioner may recompute the tax... within six years after the [amended returns] should have been filed....'" Id., subds. 7-8.

In his prehearing emails, Mr. Kunza reiterated his statute of limitations arguments, stating that his federal return was not changed until January 2020, so any amended filing would not be due until June 2020. To support his argument, Mr. Kunza attached an Internal Revenue Service Account Transcript for "tax period" 12/31/2015. The court concluded that the transcript did not support Mr. Kunza's assertions.

The court concluded that the commissioner was "within the statutory time limitation to adjust appellants' 2015 Minnesota income and to issue the contested assessment." The Internal Revenue Service's upward adjustment by \$15,299 was 49% of what appellants originally

reported. Because appellants both underreported their income by more than 25% and failed to file amended returns with the commissioner, the court ruled that appellants failed to point to any material fact that would overcome the *prima facie* validity of the notice of determination on appeal and granted the commissioner's motion for dismissal. *Kunza v. Comm'r of Revenue*, 2021 WL 161986 (Minn. Tax Court 1/8/2021).

### ■ Property tax: Court relies on traditional approaches to market values.

The court consolidated these cases for trial regarding the market value, as of 1/2/2016 and 1/2/2017, of a 321-unit self-storage facility located in Oakdale, Minnesota. The assessed values of the property as of 1/2/2016 and 1/2/2017 understated its market value.

Petitioner Chambers Self-Storage timely filed a property tax petition contesting the 1/2/2016 and 1/2/2017 assessment, claiming that both property assessments were overvalued and statutorily unequal. Prior to trial, petitioner brought several motions before the court: "(1) for withdrawal of certain deemed admissions; (2) to consolidate three petitions; (3) to compel Washington County to fully respond to petitioner's discovery; and (4) for leave to amend its petitions to include constitutional unequal assessment claims." See *Chambers Self-Storage Oakdale, LLC v. Cty. of Washington*, No. 82-CV-17-1685 et al., 2020 WL 4459046, at \*1 (Minn. T.C. 7/29/2020). Subsequently, petitioner brought a motion to continue trial pending the outcome of a petition for review to the Minnesota Supreme Court in a separate and unrelated matter. See *Chambers Self-Storage Oakdale, LLC v. Cty. of Washington*, Nos. 82-CV-17-1685 & 82-CV-18-2123, 2020 WL 5520639, at \*2 (Minn. T.C. 9/10/2020).

Trial commenced on 9/15/2020 at

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the Washington County Courthouse. At the start, petitioner noted that it attempted to subpoena Bruce Munneke, a supervisor with the Washington County Assessor's Office, but was unable to do so. Petitioner argued his testimony was necessary with respect to the office's mass appraisal process. The court treated petitioners' "subpoena issue as a motion to order service on Mr. Munneke, or a motion to order Mr. Munneke to appear at trial." The county opposed petitioners' request, arguing Mr. Munneke's testimony would not be relevant, and the court "could not compel appearance of a witness without a validly served subpoena." The court agreed and denied petitioner's motion to order service.

Although petitioner contested the assessed values on each assessment date, it did not advocate for a lower market value, stating only that the assessments were "pretty close," and that they were within range of the subject property's market value. Petitioner did not present appraisal evidence of the subject property's market value. An assessor's estimated market value is *prima facie* valid. Minn. Stat. §271.06, subd. 6(a) (2020). In this case, the county waived the *prima facie* validity of the assessment and the court determined the market value based on a preponderance of the evidence. See *Minn. Energy Res. Corp. v. Comm'r of Revenue*, 909 N.W.2d 569, 573 (Minn. 2018).

Regarding taxation, "market value" is the "usual selling price at the place where the property to which the term is applied shall be at the time of assessment; being the price which could be obtained at a private sale or an auction sale...." Minn. Stat. §272.03, subd. 8 (2020). In this case, the court considered three traditional approaches to valuation in determining market value: sales comparison, income, and cost.

The sales comparison approach assumes "that the value of property tends to be set by the cost of acquiring a substitute or alternative property of similar utility and desirability within a reasonable amount of time." Appraisal of Real Estate 352. Application of this approach requires analysis of recent sales of similar properties to compare to the subject property, and the adjustment of their sale prices as needed to account for physical characteristics, size, location, and condition to make those properties comparable to the subject property. See *id.* at 353, 362-65.

Andy Donahue, Washington County's expert, concluded to an assessment of \$2,630,000 for both the 2016 and 2017. "To get there, Mr. Donahue relied

upon seven comparable sales, located in: White Bear Township; Fargo, ND; Blaine; Inver Grove Heights; Racine, WI; Coon Rapids; and Omaha, NE." Sales outside of Minnesota were considered "due to the limited transaction volume observed," but Mr. Donahue found it reasonable to rely on these sales because "this asset type has a regional buyer base." Mr. Donahue then made several adjustments to the comparable properties' sale prices, including conditions of sale, quality, and age. Petitioner did not cross-examine, nor contest Mr. Donahue's sales comparison approach.

Under the income approach, a "suitable discount rate is used to reduce to a present value the anticipated income stream of an income-producing property." Citation omitted. The amount to be capitalized is net operating income. To determine net operation income, one must: "(1) estimate potential gross income; (2) subtract anticipated vacancy and collection losses to derive effective gross income; (3) subtract total operating expenses to derive net operating income; and (4) '[a]pply one or more of the direct or yield capitalization techniques to this data to generate an estimate of value....'" Appraisal of Real Estate 432. Mr. Donahue's income approach yielded values of \$2,770,000 for 2016, and \$2,860,000 for 2017.

"The cost approach supposes that 'an informed buyer would pay no more for the property than the cost of constructing new property having the same utility.'" This approach is used "when market or income data is unavailable." *Lowe's Home Ctrs., LLC (Plymouth) v. Cty. of Hennepin*, No. 27-CV-16-04306, 2019 WL 333004, at \*12 (Minn. T.C. 1/17/2019). This approach is best applied when "the improvements are new or suffer only minor depreciation." Citation omitted. The county concluded, given the age and difficulty of calculating depreciation, that the cost approach was less applicable to the subject property. The court agreed and did not consider the approach.

In a lengthy analysis, the court found the appraisal testimony of Mr. Donahue to be credible and accepted the conclusions of the subject property's market value for the 2016 and 2017 assessments. The court did, however, take issue with Mr. Donahue's 100% reliance on the income approach. Instead, the court placed 80% weight on Mr. Donahue's income approach, and 20% weight on his sales approach, concluding that the value of the 2016 assessment of the subject property is \$2,742,000, and \$2,814,000 for the 2017 assessment. **Chambers Self-**

**Storage Oakdale, LLC v. Washington Co.**, 2021 WL 278358 (Minn. Tax Court 1/25/2021).



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## TORTS & INSURANCE

### JUDICIAL LAW

■ **Statute of limitations; improvements to real property.** Plaintiff hired defendant to remove his broken, asbestos-insulated boiler and asbestos pipe insulation in 2013. A subsequent contractor installed a new, asbestos-free heating system. Plaintiff alleged that he witnessed defendant's workers violate safety protocols, resulting in contamination of his home. An environmental report dated 3/12/2014 confirmed that substances tracked through plaintiff's home contained asbestos, but plaintiff did not commence suit until 2018. The district court dismissed the complaint, concluding that the 2-year statute of limitations in Minn. Stat. §541.051 barred plaintiff's claims. The court of appeals affirmed the dismissal.

The Minnesota Supreme Court affirmed. The main issue before the Court was whether defendant's work constituted an "improvement to real property." Plaintiff argued that because defendant simply removed a heating system and asbestos, it performed demolition work rather than construction resulting in an improvement to real property. The Court rejected this argument, focusing on the work performed on the heating system as a whole and noting that because "the new asbestos-free boiler could not be installed until [defendant] removed the old boiler, [defendant's] work moved the project toward completion and was therefore construction on the new heating system." The Court went on to hold that the new heating system constituted an "improvement to real property" because it was a permanent addition to the home, added value, and was designed to make the home more useful and valuable than it was when it used the old heating system. **Moore v. Robinson Environmental**, A19-0668 (Minn. 2/3/2020). <https://mn.gov/law-library-stat/archive/supct/2021/OPA190668-020321.pdf>

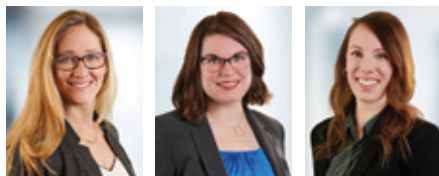


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## IN MEMORIAM



BLAZEK

RADAJ

YELLE

BRIANNA J. BLAZEK, ELISE R. RADAJ, and BRITTANY D. YELLE have joined Moss & Barnett. Blazek has a wide range of business law experience representing privately held businesses. Radaj focuses her practice on construction and commercial litigation. Yelle advises individuals, businesses, and lenders in real estate, corporate, and lending transactions.



SEYBOLT

CAMERON R. SEYBOLT has been appointed Minnesota state chair of the American College of Trust and Estate Counsel, a nonprofit association of more than 2,500 highly credentialed trust and estate lawyers. Seybolt is an attorney at Fredrikson & Byron.



CARPENTER

MARK CARPENTER has joined Monroe Moxness Berg as attorney of counsel in commercial litigation. He will also continue his solo practice with Carpenter Law Firm.

JASON E. ENKGJER has joined DeWitt LLP's Minneapolis office as a member of its transportation & logistics practice group.

BROOK MALLAK is the new ombudsperson for Asian Pacific Families with the State of Minnesota Office of Ombudsperson for Families.



MALLAK



GALLENBERG



KANNE

DEBORAH GALLENBERG and KARI KANNE have been named partners at Honsa & Mara. Both focus their practices on family law matters.

Mara. Both focus their practices on family law matters.

**Greer Edwin Lockhart**, of Minneapolis, passed away peacefully on January 29, 2021, just short of his 92nd birthday. He graduated from the University of Minnesota Law School in 1953. After a short stint in the military, Lockhart went to work for the law firm then named Richards, Montgomery, Cobb and Bassford (now known as Bassford Remele). He led the firm for many years as its president. Lockhart was recognized for his work as a trial lawyer with admission to the American College of Trial Lawyers and the American Board of Trial Advocates. He worked tirelessly to improve his profession, serving on the Minnesota Lawyers Professional Responsibility Board and serving in many roles in the Minnesota, Hennepin County, and American Bar Associations.

**Winston E. Munson**, a former resident of Bloomington, passed away at the age of 92 on January 13, 2021. He graduated from the University of Minnesota Law School and served as chairman-corporate section and senior managing partner at Mackall, Crounse & Moore.

**John C. DeMoss**, age 96, of Edina, passed away on January 14, 2021. He graduated from the University of Minnesota Law School in 1949. DeMoss began his 70-plus year general law practice in Minneapolis and was an advocate for the underprivileged, working on many cases pro bono. He was licensed to practice law in both Minnesota and California.

**Richard (Dick) Kakeldey** passed away on February 18, 2021. He earned his JD from William Mitchell College of Law in 1978 and began practicing law in Mankato. In 2016, he also started practicing law in South Dakota and split his time between his home in Pierre, South Dakota, and Mankato until his death.

**Kingsley D. Holman**, age 98, of Bloomington, passed away on February 20, 2021. Upon graduating from the University of Minnesota Law School, he opened his law practice in Bloomington. During his long career, he was most proud of representing for about 60 years the Bloomington School District, where he made numerous friends. He was also very active in Minnesota politics and served as the Minnesota DFL party treasurer for a time.

**Gilbert (Gil) Woodward Harries**, age 88, of Duluth, died January 1, 2021. Gil spent most of his 65-year legal career working in Duluth at Hanft Fride, PA, where he was a shareholder and past president. He was also a past president of the 11th District Bar Association; he served on the board of governors of the Minnesota State Bar Association; and he was a member of the American Bar Association. Gil was active in community affairs. He served as president of the City of Duluth planning commission, president of the Duluth Public Library Foundation, president of the United Way, and chairman of trustees of the Head of the Lakes United Way Trust.

**Jerome Lynch** passed away at his home in Roseville at the age of 82 on March 5, 2021. He received his law degree from the University of Wisconsin in 1973. With his background in law and ethics, he served for 20 years on the Human Subjects Committee at Gundersen Lutheran Medical Center. He was passionate about social justice, and helped people through his work as an attorney, as well as 27 years with the Lions Club, and other volunteer work.

**Lee Bearmon** died on March 14, 2021 at age 88. Upon graduating from the University of Minnesota Law School, he served three years as a first lieutenant and captain in the Judge Advocate General's Department of the United States Air Force. Bearmon was a partner in the law firm of Levitt, Palmer, Bowen, Bearmon and Rotman, which merged with Briggs and Morgan in 1983. In 1979, Lee joined Carlson Companies, Inc. where he became senior vice president, general counsel, and secretary. After retiring, he served five years as of counsel at Briggs and Morgan.



**GREEN**

Gov. Walz appointed FRANCIS GREEN as a district court judge in Minnesota's 10th Judicial District. Green, who will be replacing Hon. Mary E. Hannon, will be chambered in Stillwater in Washington County. Green currently serves as national realty specialist for the U.S. Department of Agriculture, Natural Resources Conservation Service.



**TIEN**

Gov. Walz announced that the Minnesota Tax Court unanimously voted for WENDY S. TIEN to assume responsibility as chief judge effective March 17, 2021. Judge Tien has served on the Tax Court since her appointment by Gov. Walz on November 13, 2019.



**HOFFMAN**



**NORRIE**



**LOETSCHER**

Bassford Remele announced that SARAH M. HOFFMAN has been elected to the firm's board of directors, and JONATHAN P. NORRIE and JANINE M. LOETSCHER have been elected to its compensation committee.



**KERBAUGH**

STEVEN KERBAUGH has joined Saul Ewing Arnstein & Lehr as counsel in the firm's litigation practice and the labor and employment group.

WILLIAM P. WASSWEILER was named the Minnesota Chapter of the Turnaround Management Association's 2020 Trustee Counsel of the Year. Wassweiler is a commercial litigation partner at Ballard Spahr.



**WASSWEILER**

MICHAEL MATHER has been elected the newest shareholder of HKM. Mather focuses his practice on civil litigation.



**MATHER**

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and resolution through supervision, coordination and use of internal and external staff and counsel. The successful candidate will have: Preference may be given to a professional knowledgeable of Native American culture, traditions and values. A dedication to customer service and teamwork. Shared appreciation for the department's culture which is founded on providing results for clients and department, learning and developing as individuals and as a department, and caring about our people. Strong communication and interpersonal skills. Leadership capabilities with a desire to develop that skill set further. Self-directed with ability to quickly assimilate role, responsibilities and organization culture. Able to work on multiple assignments and prioritize competing demands in a fast-paced environment, with minimal direction. Experience in computer system use and word processing capabilities. Participation in large-scale construction projects in a highly regulated environment strongly preferred. Some experience working with tribal governments, state agencies, including familiarity with litigation. Knowledge of pipeline operations, including Federal and State environmental laws and regulations affecting crude oil is preferred. Knowledge of PHMSA regulations and other Federal Laws applied to crude oil pipelines is helpful. Diversity and inclusion are important to us. Enbridge is an Equal Opportunity and Affirmative Action Employer. We are committed to providing employment opportunities to all qualified individuals, without regard to age, race, color, national or ethnic origin, religion, sex, sexual orientation, gender identity or expression, marital status, family status, veteran status, Indigenous/Native American status, or disability. Applicants with disabilities can request accessible formats, communication supports, or other accessibility assistance by contacting: [careers@enbridge.com](mailto:careers@enbridge.com). Information for applicants: Applications can be submitted via our online recruiting system only. We appreciate your interest in working with us; however, only those applicants selected for interviews will be contacted. Final candidates for this position may be required to undergo a security screening, including a criminal records check. To learn more about us and apply, visit: [www.enbridge.com](http://www.enbridge.com)



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