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RENEWING THE WELLNESS CALL TO ACTION

BY PAUL D. PETERSON

PAUL PETERSON represents families in personal injury and wrongful death cases. His office is in Woodbury and he is licensed in both Minnesota and Wisconsin. He is the proud papa of four above-average children and one outstanding dog.

On June 29 the Minnesota Supreme Court joined forces with the United States District Court for the District of Minnesota to lead a renewal of their call to action on lawyer well-being, an effort that began in 2019. The "renewal" aspect of this year's program reflects a re-examination and recommitment to wellness on the part of the profession following the impact of the pandemic and the shutdown.

Beginning last year, the two courts—led by Justice Natalie Hudson and Federal District Court Judge Donovan Frank, respectively—established a judiciary task force that led the way to this year's renewal. Much planning and effort went into the project. Representatives of the appellate and district courts, LCL, and the state and federal bar associations met to try to thoughtfully and purposefully usher in the renewal effort. Surveys were utilized to get input on the effects of the pandemic, best practices that were being developed or in use, and how best to construct a kick-off event. The gathering on June 29 was the culmination of many months of hard work. I am happy to report the program was a great success.

Chief Justice Lorie Skjerven Gildea of the Minnesota Supreme Court and Chief Judge John R. Tunheim of the United States District Court, District of Minnesota, began the program, entitled "The Judiciary: Embracing Lawyer Well-Being," by reviewing where we as a profession have been, where we hope to be going forward, and the role of the judiciary in this process. Next came keynote speaker Patrick Krill, principal and founder of Krill Strategies. He discussed where the profession currently stands on well-being as well as recently published and forthcoming research that underscores the magnitude of current challenges but also opportunities for improvement.

The presentation included three distinguished panels of speakers. The first, moderated by former Justice David Lillehaug (now senior counsel at Fredrikson & Byron, P.A.), consisted of Ivan Fong (executive vice president, general counsel, and secretary, Medtronic); Jessica Klander (shareholder, Bassford Remele); and Lowell Noteboom (partner, Stinson) sitting in for Krista Larson (director of well-being, Stinson). One overriding lesson imparted by this panel is the critical role leadership plays in successful wellness initiatives in the private law world. Another point in the discussion was the importance of the business case to be made for private law employers to act on well-being.

The next panel featured the law schools, their students, and new lawyers. This panel featured Lynn LeMoine (Mitchell Hamline dean of students), Lisa Montepetit Brabbit (St. Thomas associate dean for external relations and programs), Erin Keyes (University of Minnesota assistant dean of students; chair, Minnesota Law Diversity & Belonging Affinity Council), Racey Rodne (McEllistrem, Fargione, Rorvig, and Moe P.A.), and Chase Webber (University of Minnesota law student). The affirmative programs utilized by the law schools were discussed, as were the challenges facing law students and new lawyers. The panelists stressed the importance of peer involvement in wellness issues together with mentorship and support—either from within or outside the new lawyer's place of employment.

The final panel, a public law discussion moderated by Justice Natalie Hudson, consisted of Minnesota Federal Defender Katherian D. Roe, Attorney General Keith Ellison, and Chief Deputy Peter Ivy of the Carver County Attorney's Office. They discussed issues such as the imbalance between prosecution and public defense resources in the federal system; the pressures of practicing law in the public eye, at times prominently so; and the increasing concern over the safety of public lawyers amid growing threats of violence.

The event culminated in a very heartwarming way when The Chiefs' Award was presented by Chief Justice Gildea and Chief Judge Tunheim. I am pleased to report that Joan Bibelhausen of Minnesota Lawyers Concerned for Lawyers (LCL) was named the first-ever recipient of the award. And how well-deserved it is. As many of you know, Joan has a national reputation for outstanding work and leadership in the lawyer assistance and diversity and inclusion realms. She has served as executive director of LCL since 2005. Joan has significant additional training in the areas of counseling, mental health and addiction, diversity, employment issues, and management. She has spent more than two decades working with lawyers, judges, and law students who are at a crossroads because of concerns over mental illness, addiction, stress, and other issues of well-being. Joan is a treasure to our state and our profession, and I know I join everyone in congratulating and thanking her for her hard work and leadership. ▲

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> Monday, August 22
A Guide to Fastcase
with Sam Peacoe of Fastcase

> Tuesday, August 23
A Higher Bar: How to Exceed Client Expectations in a Virtual World
with Sarah Allen of Ruby

> Wednesday, August 24
Back to Basics: Trust (IOLTA) Accounting
with Erica Birstler of CosmoLex

> Thursday, August 25
Run Your Best Hybrid Law Firm: Get Ahead in 2022
with Jordan Turk of Smokeball

Full schedule at www.mnbar.org/cle-events

MSBA CONVENTION 2022: WELCOME BACK!

2021–22 MSBA President Jennifer Thompson kicked off the association's annual convention on June 22 in downtown Minneapolis, welcoming members back to the bar for its first in-person convention since 2019. The two-day event featured great networking and CLE presentations, including the annual State of the Judiciary address from Minnesota Supreme Court Chief Justice Lorie Skjerven Gildea. During the first day of the convention, the association's Lifetime Achievement Award was presented to George Soule for contributions to the profession and community throughout his career. And the MSBA leadership gavel was passed from Thompson to 2022-23 President Paul D. Peterson. Both big baseball fans, Thompson and Peterson donned Twins jerseys during their presentation, getting in the spirit for that evening's baseball-themed MSBA social and a Twins game at Target Field, which capped off the first evening of the convention for attendees. ▲

More awards

Other prominent annual MSBA awards were presented at the June 30 Assembly meeting, where this year's Professional Excellence Award recognized the many professional contributions of the Hon. Matthew J. Opat. The President's Award went to the development and business teams behind the Minnesota Judicial Branch's Minnesota Court Records Online (MCRO) initiative. And Senior Judge Susan R. Miles, author of "Stress is what you think: the importance of a clear mind," was named the winner of the Elmer Wiblishauser Award, presented by the Publications Committee to the author of the best article to appear in Bench & Bar in the preceding year. ▲

Emeritus rule: SEEKING INPUT

The MSBA's Access to Justice Committee is seeking input on the emeritus rule, the state's program to allow retired attorneys to continue practicing pro bono with a legal services provider while in retirement status. The committee is particularly interested in hearing from those who are retired, approaching retirement, or considering retirement. To provide input, please complete a two-minute survey at *https://www.surveymonkey.com/r/msbaemeritus*.

If you would like to learn more about the requirements for becoming an emeritus-status attorney, you can visit the Minnesota Board of Continuing Legal Education's emeritus page at *https://www.cle.mn.gov/lawyers/retired-lawyers-emeritus-2/*. ▲

PRO BONO & DONOR SPOTLIGHT: *Carole Pasternak*

Carole Pasternak is a partner at Klampe Law Firm, where she has been practicing for over 20 years. In addition to her practice, she spends her professional time volunteering for Legal Assistance of Olmsted County, where she currently holds the position of board chair, as well as logging hours with Southern Minnesota Regional Legal Services and the Volunteer Lawyers Network. Through her work with Legal Assistance of Olmsted County, she has regularly spent time representing family law clients.

With an extensive and impressive resume, it can be hard to imagine finding time to invest in pro bono work. How does Pasternak do it? "I don't make time [for pro bono]," she says. "My pro bono cases are just part of my caseload. They get the same attention as all other cases."

With this mindset, it's no wonder that she has been honored as a North Star Lawyer for the past 10 years–an honor that few attorneys have achieved. Pasternak, no doubt, invests much of her time into pro bono work, but why is it important to her? "First," she says, "attorneys have specialized knowledge about the court system and such knowledge should not be inaccessible to those who cannot pay for an attorney. Next, providing pro bono assistance is an asset to the court system as it allows the court to operate more efficiently. Third, pro bono work provides an opportunity to learn an area of law with the assistance of a mentor."

Advocacy is clearly at the core of the work that Pasternak engages in, and she urges others in the legal community to think the same. "Most of my pro bono clients truly appreciate my efforts," she reflects, "and I know that I am providing a way for my client to know their rights and allow them to be confident in their decisions on how to proceed through their case."

Pasternak also recognizes the educational benefit she's realized through pro bono work. Working with the assistance of a mentor in the past, she was able to learn new skills and insights that she could use in her law practice. Besides doing pro bono work, she also urges her colleagues to make legal aid programs part of their annual giving.

Pasternak's work reminds us to slow down, take in our surroundings and work toward giving back. "While attorneys may say they are too busy to take pro bono cases," she notes, "the recommended 50 hours per year is just one hour per week. Take advantage of the opportunity to share your knowledge, alleviate a burden on the court system, learn a new skill, and change someone's life. We all have an hour per week for that." ▲

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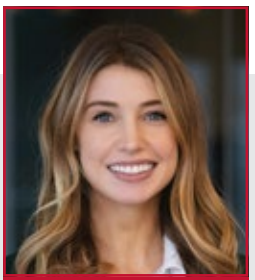

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DUE DILIGENCE *ON LAWYERS*

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

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

Each year the Office of Lawyers Professional Responsibility files with the Minnesota Supreme Court an annual report covering the operations of the discipline system. This year's report, filed on July 1, 2022, can be found on our website, along with all annual reports going back to 1999.[1] One notable aspect of the report is that it provides information about regulation-related activities undertaken by the OLPR other than investigating ethics complaints and prosecuting ethics violations. The topic of this column is one of those activities: disclosures.

Disclosures

"Disclosures" is the term we use to refer to disclosure of an attorney's disciplinary history. Obviously, all public discipline is public and is available to be viewed on our website. Using the Lawyer Search quick link on the home page of the website, you can look up a lawyer and see if they have any public discipline. Notably, our website is the only place you can find public disciplinary history (aside from whatever might pop up in a web search). When you search the Minnesota Attorney Registration System (MARS), only *current* discipline status is disclosed. Accordingly, if the lawyer has completed any public discipline, the line for "current discipline status" in MARS will show "none," notwithstanding the history of public discipline. Just below that line, however, MARS also refers the individual to our website for further information. If you are looking for a complete list of a lawyer's prior public discipline, the place to search is our website.

But what about private disciplinary history? Minnesota has a category of discipline described as private, which is reserved for ethics violations that are considered isolated and nonserious. Many states do not have private discipline, preferring to disclose even admonitions, but Minnesota does, and we issue far more private discipline each year than we do public discipline. How can someone see if a lawyer has private discipline?

Private discipline, which includes admonitions and private probations, can be disclosed by our Office upon a signed authorization of the lawyer. Each year, our Office responds in writing to hundreds of disclosure requests. The most frequent requests come from individual lawyers seeking disciplinary history as part of their application to the bar of another state. Certifying organizations also regularly seek disciplinary history, as do certain nonprofits vetting volunteer lawyers. The Governor's Office vets the disciplinary history of judicial candidate finalists. One area from which we do not receive regular requests, however, is hiring organizations. This chart lists the inquiring entities/individuals.

I've always found this information interesting. Private discipline is not in itself disqualifying because of its nature: It was issued for a rule violation that was isolated and nonserious. Further, private discipline is for most lawyers an isolated incident—most never have any contact with the

	No. of Requests	No. of Attorneys	Discipline Disclosed	Open Files
A. National Conference of Bar Examiners	239	239	14	3
B. Individual Attorneys	442	442	19	5
C. Local Referral Services				
1. RCBA	1	1	0	0
2. Hennepin County	0	0	0	0
D. Governor's Office	27	67	2	3
E. Other State Discipline Counsels/State Bars or Federal Jurisdiction	115	115	1	0
F. F.B.I.	35	36	1	0
G. MSBA: Specialist Certification Program	13	128	6	5
H. Miscellaneous Requests	17	28	2	0
TOTAL	889	1056	45	16
(2020 totals for comparison)	646	868	36	3

discipline system again. It always seemed to me, however, that the vetting organization should be in the position to make that determination for itself.

What is not disclosed

Another interesting aspect of Minnesota's attorney discipline system is the fact that we never disclose to third parties complaints that result in a determination that discipline is not warranted. We frequently advise other jurisdictions requesting complaint history that we cannot disclose this information or even verify if what a lawyer disclosed as their complaint history is accurate. Pursuant to our rules, we can disclose to an affected lawyer their own disciplinary history, including dismissed complaints, so that they can respond to inquiries accurately, but to no one else.

Further, in Minnesota, we also expunge completely any record of dismissals after three years. This is often welcome news to lawyers who receive a complaint they view as frivolous and are glad that there is no permanent record of the complaint. One tip you may wish to consider, however, is to keep a copy of any dismissal you receive. Once three years has passed, we will no longer have a record of that dismissal, and disgruntled complainants have been known to resurface again.

A cautionary tale

A recent disciplinary case prompted the idea for this column. Lawyers are expected to be trustworthy, and it should not be necessary to corroborate information provided to you by a lawyer. Unfortunately, sometimes corroboration pays off. A local law firm has as part of its hiring process receipt of law school transcripts. Lawyers are asked to provide copies of their law school transcripts as part of the application process. If the interview process continues to the point of an offer, candidates are then required to provide authorizations to verify the information provided as part of a hiring background check.

Much to the surprise of the hiring department, the law firm learned during this process that a candidate they were considering had made material changes to their transcript that included altering class rank and GPA. The transcript submitted with the application reported a class rank of 39 out of 192 and a cumulative GPA of 3.71. In truth, the candidate's class rank was 129 out of 192 and her GPA was 3.08. A subsequent investigation by our Office disclosed the lawyer had made false statements in the process of applying to and being hired at other law firms that had gone undetected.[2] While this is not a case about disciplinary history, the moral of the story remains the same: Vetting basic information about a lawyer's background through the hiring process is worth one's time. I recommend including a lawyer's disciplinary history in that process. It is a very quick process, as disciplinary history is provided within a few days of request and often can be provided the next day.

Conclusion

When someone hires a lawyer, basic vetting is a good idea, whether it is an employer or a client doing the hiring. Please encourage everyone you know who hires lawyers to use our website to confirm whether someone has public disciplinary history; if you are an organization, you may wish to include private discipline in that process. I have spoken to numerous individuals complaining about their lawyer whom I wish had looked that lawyer up on our website before hiring them. One high priority for our Office is updating our website to continue to make it more user-friendly; at present it is not very mobile-friendly. If you have questions about our disclosure process or suggestions for our website, please contact our office or send me an email. The purpose of discipline is not to punish the lawyer but to protect the public and the profession, and to deter future misconduct by the lawyer and others, and one way those purposes are satisfied is through disclosure of disciplinary history. ▲

NOTES

[1] *www.lprb.mncourts.gov/aboutus/annualreports*

[2] *In re Ballard*, A22-0698 (Order dated 6/30/2022), and Petition for Disciplinary Action found at *lprb.mncourts.gov* under Ballard, Lillian.

WHAT CRITICAL INFRASTRUCTURE EFORTS *CAN TEACH US ABOUT CYBER RESILIENCE*

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

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

Since the start of the war in Ukraine, there have been renewed concerns about attacks on critical infrastructure. In 2015, an attack on Ukraine's power grid that left thousands without power was ultimately attributed to Sandworm, a Russian hacking group. Years later, it has been revealed that a similar attack was made in the early days of the current war when "hackers targeted one of its largest energy companies, trying to shut down substations, which would have caused blackouts for two million people."[1] Fortunately, the attack was thwarted by quickly identifying the malware. And while Russia denies any direct involvement, it appears that a variation of the malware used in 2015 was discovered during the investigation.

The possibility of an attack on critical infrastructure remains a major concern, and realistically, every sector is at heightened risk. What changes should be made to cybersecurity strategies, and how can an organization improve its security posture cost effectively and quickly?

Improving cybersecurity does not necessarily require a high price point. For many organizations, the bones of a great cybersecurity posture exist in its written policies and procedures, personnel, and best intentions. While basic groundwork is often already in place, the real issue is whether it's up to date, whether anyone knows it exists, and how the procedures should actually be enacted within the organization. In 2015, clicking on an email attachment is what started the attack in Ukraine.[2] Simply dedicating time to testing out an organization's current set of policies is a cost-effective method to a) uncover obvious vulnerabilities, security gaps, and communication issues; b) improve awareness of primary threats, including social engineering; and c) identify and reinforce what's working well in the current environment.

The Cybersecurity & Infrastructure Security Agency (CISA) provides guidance on how to assess the proactive and reactive measures an organization has in place to handle and mitigate cyberattacks.[3] Basic steps include confirming the use of multi-factor authentication, keeping software up to date, conducting table-top exercises, and testing backup procedures. But CISA also stresses the need to incorporate the human element of security by encouraging organizations to include CISOs in risk-management decisions, lower reporting thresholds, and engage senior management in testing incident response procedures. CISA's list of recommendations serves as a basic checklist—a lens through which an organization can assess its cybersecurity approach. Reviewing the guidelines may help in prioritizing cybersecurity as a central aspect of business-continuity planning. This is especially important in the case of critical infrastructure. In recent years, cloud technologies and the internet of things have shaped how critical infrastructure operates. This also creates an increased number of potential vulnerabilities and the risk of operational failure should a cyberattack succeed.

This past spring, President Biden signed into law The Cyber Incident Reporting Act, which "puts in motion important new cybersecurity reporting requirements that will likely apply to businesses in almost every major sector of the economy, including health care, financial services, energy, transportation and commercial facilities."[4] While these reporting requirements will not go into effect until the rules are finalized,[5] specified entities classified as critical infrastructure will have new reporting requirements that include notifying CISA of any "covered" cyber event along with a description of the incident, its impact, and its duration. Additional requirements include alerting CISA to any ransomware payments and their amounts. This legislation is a clear acknowledgement that cyberattacks are of national concern and a recognition of the private sector's impact on federal efforts to strengthen cybersecurity.

In a recent statement by President Biden on our nation's cybersecurity, he explained that while the federal government is working toward bettering cyber defenses, "Most of America's critical infrastructure is owned and operated by the private sector and critical infrastructure owners and operators must accelerate efforts to lock their digital doors." He went on to state, "We need everyone to do their part to meet one of the defining threats of our time—your vigilance and urgency today can prevent or mitigate attacks tomorrow."[6]

This statement addresses both goals of a cybersecurity plan—prevent or mitigate. The 2022 attack on Ukraine's power grid could have been worse had it not been for the strengthened defensive measures that were implemented and the private sector's assistance in quickly identifying and mitigating the threat. And since cyberattacks may ultimately evade even our best defenses, preparation is key. Assessing written policies, conducting tabletop exercises, and practicing communication channels are easy ways that an organization can start improving its security posture today. ▲

NOTES

[1] *https://www.bbc.com/news/technology-61085480*

[2] *https://jsis.washington.edu/news/cyberattack-critical-infrastructure-russia-ukrainian-power-grid-attacks/*

[3] *https://www.cisa.gov/shields-up*

[4] *https://www.natlawreview.com/article/president-biden-signs-law-cyber-incident-reporting-act-imposing-reporting*

[5] *https://www.natlawreview.com/article/president-biden-signs-law-cyber-incident-reporting-act-imposing-reporting*

[6] *https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/21/statement-by-president-biden-on-our-nations-cybersecurity/*

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Q: Who's your favorite fictional lawyer or law firm?

Caroline Moos
cmoos@robinskaplan.com

Caroline Moos is an associate at Robins Kaplan. She is a Mitchell Hamline alumna and former judicial clerk. In her practice, she focuses on mass tort and appellate matters.

My favorite fictional lawyer would have to be Ally McBeal. I watched the show growing up and it likely had some early influence on why I wanted to become a lawyer. It is always good to see representation in media, and I think seeing a successful woman lawyer helped me be able to envision myself as one.

Looking back, some aspects of the show may not have aged very gracefully—especially the graphics—but I think there are still some solid takeaways. The situations on the show were definitely not all realistic. And I cringe remembering the depictions of the toxic law firm environment portrayed. That, too, is not super-realistic in my experience. But the lawyers were always working on interesting cases and seemed to be on the "right" side of things. The show portrayed many cases involving harassment and discrimination that could have been lifted from today's headlines. The clients were usually trying to do the right thing and had compelling stories.

I think I learned some important lessons about client counseling and navigating tough situations from the show. I can even picture many courtroom scenes in which one of the attorneys was giving an opening or closing statement, and I still remember some of their techniques. But the show is undoubtedly a professional responsibility nightmare, as there are many conflicts and inappropriate relationships. Ultimately, I'm not sure it was entirely age-appropriate for me to watch the show when I did, but I'm grateful for what I learned from *Ally McBeal*—good and bad.

Adam Spees
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Adam Spees's practice is devoted exclusively to Social Security disability law, representing clients from initial application through federal district court. Adam, a graduate of William Mitchell College of Law, lives in Northeast Minneapolis with his cat, Foxy.

I've always loved legal fiction. Whether it was book, a television show, or a movie, I always seemed to be into some new legal fiction story. The first television show I ever really became interested in was the original *Law & Order*. It was my introduction to legal fiction and I was instantly enthralled. I was just 10 and it aired late in prime time, so I would record the show on an old VCR machine. I had VHS tapes full of hours of episodes that ran back-to-back and I would watch the same episodes over and over. I just couldn't get enough. The show definitely sparked an interest in the law and lawyering that never left me, but I wanted to be a lawyer even before that time. One of my first memories is when my older sister made a video for a class she was in and I played a high-powered, five-year-old lawyer—suit, briefcase, and all. Wow, did I think I was cool!

Nowadays, my favorite fictional lawyer is Mickey Haller, better known as the Lincoln Lawyer. I first started reading the book series by Michael Connelly and really enjoyed the character. The stories are fun, exciting, and have quite a bit of courtroom drama. As a character, he is smart, smooth, and a bit cocky, but he also seems to really care about his clients and their well-being. And, of course, he always wins in the end. The movie starring Matthew McConaughey was great. The new Netflix series starring Manuel Garcia-Rulfo was also really fun to watch. They each play a unique version of the character and they both play him well.

To be sure, legal fiction has played an important role in my life. It helped foster an interest in the law and the legal profession that began at a very early age and has continued through adulthood.

Sheena Denny
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It's hard to narrow down my favorite fictional lawyer. I could easily say *Matlock*, because he was my dad's fa-

vorite, and I grew up watching all the episodes. Atticus Finch is next in mind, because at a time of conspicuous racism, he displayed morality and fought against prejudice.

But if I am being honest, Annalise Keating takes the cake. Putting aside the fact that a handful of her students are murderers, Annalise represents the lot of us. On the surface, she represents Black, queer women in the law. In a profession where Black women make up less than 10 percent of the population, and the LGBTQ population make up less than 3 percent, Annalise represents success. But she is more than that. She shines light on the fact that lawyers are significantly more prone to alcoholism than any other profession. She is not portrayed as a hero. In fact, some consider her an anti-hero. She brings reality to the forefront. An imperfect attorney, like many of us. Complicated, flawed—and wanting to make a difference.

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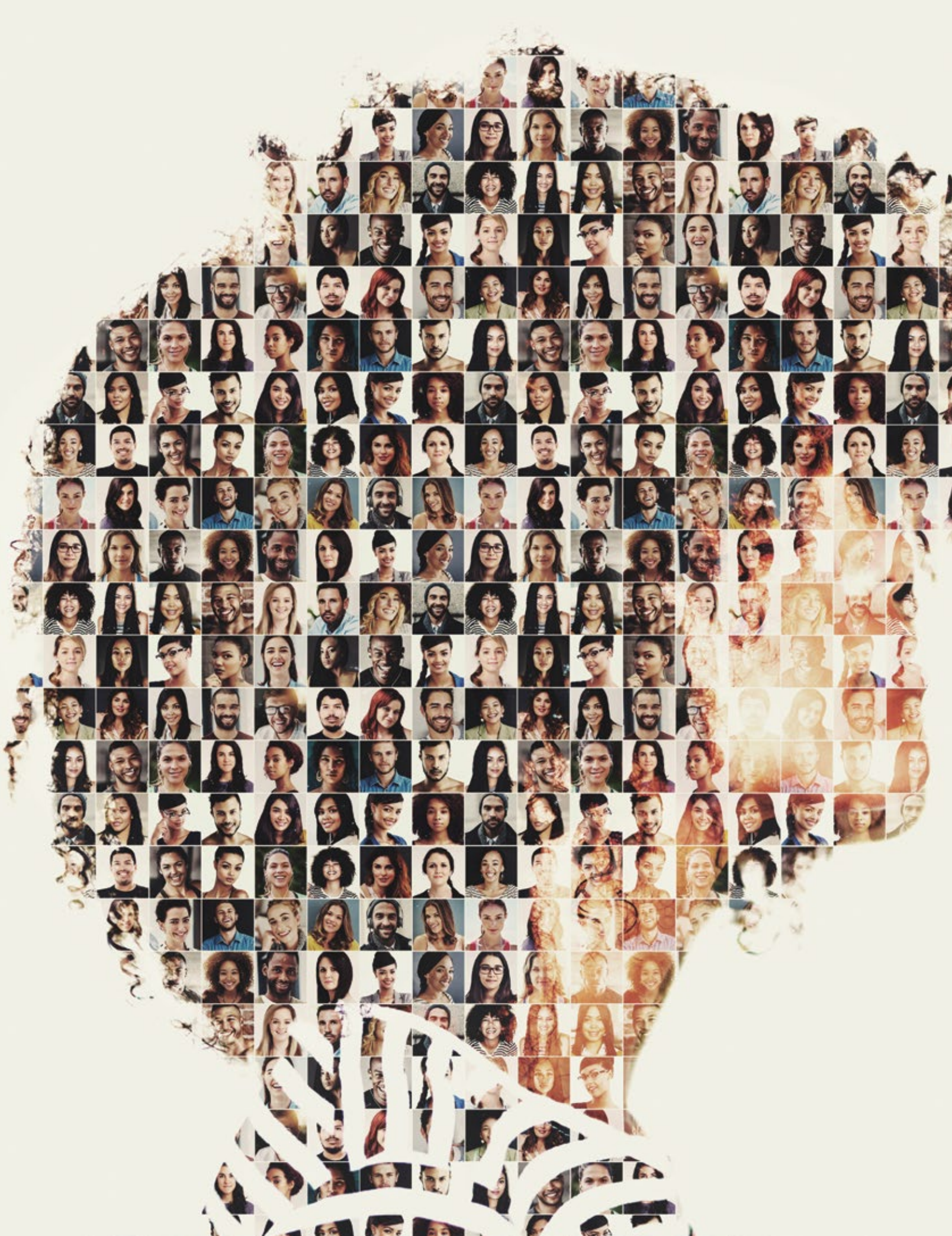
The fictional lawyer Atticus Finch is as real as they come for me. Like a lot of kids, I was forced to meet Atticus because the place where he lives, Harper Lee's novel *To Kill a Mockingbird,* was assigned reading. I was 14 at the time. Atticus was the first lawyer I recall knowing and *Mockingbird* the first novel I recall enjoying. I have never seen even a short clip of the movie because I do not want Gregory Peck's portrayal of Atticus to abrogate my own.

There are three main reasons I was drawn to Atticus and still consider him a role model. First, like a lot of smaller boys, I was bullied a bit and aided by the kids who risked their own reputations by coming to my defense. Atticus did that for his client, Tom Robinson. I liked that, and still do.

Second, less than a year after I read *Mockingbird,* my mom died. Atticus was a single dad, yet he was able to raise his kids while succeeding in a profession that seemed unattainable for me at the time. Atticus and his kids, Scout and Jem, carried on as a single-parent family. By doing so, they signaled to me that everything would be okay someday, and it was.

Third, once I began my career path as a journalist, then a civil litigator, and now a mixture of both, Atticus provided advice about writing that has proven as valuable as the tip to articulate three main points whenever possible. In the words of Scout, that advice was: "Atticus told me to delete the adjectives and I'd have the facts."



THIS IS PART 1 OF A TWO-PART SERIES ON THE BAR EXAM AND THE FUTURE OF LAWYER LICENSING IN MINNESOTA.

Building a better bar admissions process

A look at what the Minnesota State Board of Law Examiners is doing in its two-year study of the bar exam—and what other jurisdictions are considering.

BY LEANNE FUITH ✉ leanne.fuith@mitchellhamline.edu

Much has been written about the bar exam—our traditional means of measuring minimum competence or fitness to practice law. But as we emerge from the covid-19 pandemic, a period that called into question the administration of bar exams, an increasing number of jurisdictions are evaluating new ways to license lawyers, Minnesota among them. *(See "Jurisdictions outside Minnesota advance bar licensure reforms," p. 17.)*

In this process of evaluation, it is necessary to ask: What is minimum competence to practice law? And what is the best way to measure it?

THE CURRENT BAR EXAM DOES NOT EFFECTIVELY MEASURE MINIMUM COMPETENCE

Critics argue that the bar exam continues to disproportionately limit, or even exclude, the entry of the historically underrepresented and economically disadvantaged into the legal profession. It is, some assert, a test of economic resources—with the advantage going to those who can afford the cost of expensive bar exam preparation materials and tutoring or who can take a significant time away from work or caregiving responsibilities to focus solely on studying for an exam.

In addition to the concerns about its exclusionary nature, the effectiveness of the bar exam in measuring competence or fitness to practice law has been a longstanding source of concern. In daily practice, lawyers need the knowledge, skills, and ability to understand their clients' concerns, consult relevant law, and assist clients and other parties in solving problems. The bar exam does not effectively measure all of these.

Most would agree that we need some type of assessment of new lawyers to protect the public and ensure the integrity of the legal profession. In fact, the American public still overwhelmingly supports the requirement that law school graduates pass a bar examination before being allowed to practice law.[6] But the current bar exam does not fully reflect the realities of practice.

In a profession focused on becoming more diverse and inclusive and ensuring access to justice on a broad scale, these are compelling concerns. The pandemic shed a new light on questions that had been posed for decades about the efficacy of the bar exam, how it is administered, and whether it actually evaluates minimum competence to practice law. And the legal profession is responding to those questions.

MINNESOTA EMBARKS ON COMPREHENSIVE TWO-YEAR COMPETENCY STUDY

The Minnesota State Board of Law Examiners (MBLE) stepped forward to consider exactly those questions in June 2021 when it launched a comprehensive two-year study of the bar examination and pathways to evaluating minimum competence to practice law.[1] The study, which seeks broad input from the bench and bar, is expected to be completed no later than June 1, 2023 and will conclude with a report and recommendation to the Minnesota Supreme Court.[2]

The MBLE developed the following baseline evaluation criteria for the study:[3]

1. Ensure that members of the bar are worthy of public trust with regard to their professional competence.
2. Evaluate applicant's ability to satisfy the essential eligibility requirements under Rule 5A of the Rules for Admission to the Bar, including:
   - an understanding of threshold knowledge in core subjects;
   - an understanding of legal processes and sources of law;
   - the ability to reason, recall complex factual information, and integrate that information with complex legal theories;

- the ability to determine the importance of the information to the overall client matter;
- the ability to communicate with a high degree of clarity and organization;
- the ability to interact effectively with clients; and
- the ability to conduct legal research.

3. Account for diversity in the age, race, ethnicity, gender, geographic location, and practices of applicants and the clients who rely on Minnesota lawyers for their legal needs.
4. Ensure equal access to the practice of law and work to eliminate inequitable barriers to the practice of law on the basis of socio-economic status, race, gender, disability status, etc.
5. Ensure law student and lawyer well-being.
6. Evaluate feasibility in terms of scalability, flexibility, and costs and resources required for implementation: e.g., to applicants, law schools, administration, the bar, regulators, MBLE staff, etc.
7. Ability of law schools to implement, the flexibility of curriculum, and any ABA accreditation concerns.
8. Reliability of standards to determine meaningful, objective, and consistent results.
9. Available data regarding prior use of method/particular model.
10. Other considerations raised by key stakeholders.

The Minnesota State Bar Association is also actively supporting the MBLE's competency study by providing financial resources to the MBLE for process and strategic management guidance and by supporting efforts to establish a transparent process through means such as hosting CLEs and other opportunities for soliciting input from MSBA membership and Minnesota's affinity bars on the MBLE's work.

DEFINING MINIMUM COMPETENCE

The equity and efficacy of the bar exam or any system of evaluating fitness to practice law require a clear definition of what minimum competence means when it comes to the practice of law.

In October 2020, the Institute for the Advancement of the American Legal System (IAALS), in partnership with Professor Deborah Merritt at The Ohio State University Moritz College of Law and AccessLex Institute, released the results of a study outlining a set of 12 "building blocks" that define minimum competence in the practice of law.[4]

These building blocks distill insights into the knowledge, skills, and judgment minimally competent lawyers need to serve clients when they begin to practice law—as articulated by the new lawyers and their supervisors participating in the study, which included women, lawyers of color, rural lawyers, and solo practitioners.[5]

The *Building a Better Bar* study identified the following 12 interlocking components or building blocks that define minimum competence:[6]

- The ability to act professionally and in accordance with the rules of professional conduct.
- An understanding of legal processes and sources of law.
- An understanding of threshold concepts in many subjects.
- The ability to interpret legal materials.
- The ability to interact effectively with clients.
- The ability to identify legal issues.
- The ability to conduct research.
- The ability to communicate as a lawyer.
- The ability to see the "big picture" of client matters.
- The ability to manage a law-related workload responsibly.
- The ability to cope with the stresses of legal practice.
- The ability to pursue self-directed learning.

The current bar exam, although the foundation for licensing in most jurisdictions, does not assess many of these aspects of minimum competence.

The data from the *Building a Better Bar* study also revealed several key insights about appropriately and accurately assessing minimum competence. Specifically, the study showed that closed-book exams offer a poor measure of minimum competence to practice law and that the time constraints of exams similarly distort assessment of minimum competence.[7] It also confirmed that using multiple choice questions to assess minimum competence to practice law bears little relationship to the actual cognitive skills that lawyers use in practice.[8]

The current bar exam is a method of evaluation that places great weight on the ability to take a closed-book exam under significant time constraints and using, at least in part, multiple-choice questions to assess knowledge and understanding.

In contrast, the *Building a Better Bar* study showed that written performance tests are more likely to resemble many of the tasks that new lawyers perform. Further, practice-based assessments, such as ones based on clinical performance, may also offer promising possibilities for evaluating minimum competence.[9]

MBLE WORKING GROUPS EVALUATE PATHWAYS TO MEASURE MINIMUM COMPETENCE

Early in its two-year competency study, the MBLE established three working groups made up of individuals representing a broad set of interests and divergent viewpoints. The working groups were charged with reviewing three models or pathways to determining competency to practice law:[10]

- An examination at the conclusion of law school.
- A method of evaluation based on clinical or experiential programs during law school.
- A method of evaluation based on supervised practice following law school.

In developing its working group structure and pathways of evaluation, the MBLE looked to work being done in other jurisdictions to study lawyer competency, including Oregon—where, in June 2021, after months of study, the Oregon State Bar Board of Bar Examiners adopted a task force report suggesting supervised practice or law school experiential-learning programs as bar exam alternatives.[11] Similar to Minnesota, the Oregon task force focused on public protection and equity in evaluating alternatives to the bar exam and considered the results of the *Building a Better Bar* study to outline the building blocks of minimum competence.[12]

WORKING GROUPS SUBMIT RECOMMENDATIONS TO MBLE

In Spring 2022, MBLE's working groups researched and evaluated the three proposed models or pathways to determining competency, talked to experts, and discussed preliminary framework criteria. The three working groups provided re-

ports to the MBLE, and those reports are available for public review on the MBLE website (*https://www.ble.mn.gov/bar-exam/competency-study-2021-to-2023/*).

Briefly summarized, the recommendations of the working groups are as follows:[13]

Working Group 1: Examination Pathway

Working Group 1 evaluated the method of an examination at the conclusion of law school. Working Group 1 recommended that Minnesota adopt the National Conference of Bar Examiners' (NCBE) redesigned NextGen bar exam as one pathway to licensure in Minnesota, based on what is known to date about the NextGen bar exam, which is still in development by the NCBE.[14] Working Group 1 also noted in its report that while the proposed changes to the NextGen bar exam appear to be positive in testing foundational skills, the NextGen bar exam remains a standardized test and a broad spectrum of lawyering abilities are difficult to measure in a standardized test. Therefore, Working Group 1 also supports Minnesota adopting multiple pathways to licensure and not relying solely on an exam at the conclusion of

Jurisdictions outside MN advance bar licensure reforms

Minnesota is not the only place where conversations about bar licensure reform are taking place. In states around the country as well as internationally, courts, bar examiners, and members of the legal profession are considering how to more effectively train, evaluate, and license attorneys. The following is a preview of just a few.

OREGON

During the early months of the pandemic, Oregon was one of five states that adopted some form of temporary diploma privilege for examinees sitting for the bar exam.[1] Oregon eventually returned to administering the bar exam but has continued to explore the idea of long-term alternatives.

In June 2021, after months of study, the Oregon State Bar Board of Bar Examiners adopted a task force report suggesting supervised practice or law school experiential-learning programs as bar exam alternatives for attorney licensure. The board then submitted the report to the Oregon Supreme Court for consideration.[2] The task force focused on consumer protection and equity in evaluating alternative models to the bar exam and looked to a two-year study published in October 2020 by the Institute for the Advancement of the American Legal System, which outlined the building blocks of minimum competence to practice law.[3] Early indications are that the Oregon State Bar's report and recommendations were well-received.

In January 2022, the Oregon Supreme Court "approved in concept" an Oregon State Bar proposal that would allow law graduates to become licensed after working under the supervision of an experienced attorney for 1,000 to 1,500 hours (the Supervised Practice Pathway), and another proposal under which Oregon law students would spend their last two years of law school completing a body of practice-based coursework and a capstone portfolio (the Oregon Experiential Pathway).[4] These bar exam alternatives would be available to law students and lawyers within and outside the state of Oregon.[5]

There is much more work to be done before these alternative pathways are approved in Oregon and become available to applicants for attorney licensure, but Oregon's work and the comprehensiveness of its task force report have generated momentum around bar exam reform across the nation. As of their January 2022 announcement, Oregon was just the third state to propose licensing attorneys through some means outside of the bar exam.[6] Since then, the work of the Oregon State Board of Bar Examiners has generated interest from bar exam reformers nationwide and has become a model for other states considering reform, including Minnesota.

CALIFORNIA

In 2018, the California State Bar Board of Trustees created the California Attorney Practice Analysis (CAPA) Working Group to take a fresh look at the knowledge, skills, and abilities needed by entry-level attorneys in California to practice ethically and competently.[7] To evaluate the recommendations raised by the CAPA Working Group as well as additional policy questions regarding the California bar exam's format and pass score, the California Supreme Court and the Board of Trustees

established the joint Blue Ribbon Commission on the Future of the California Bar Exam.[8]

The commission is charged with considering whether a bar exam is the correct tool to determine minimum competence for the practice of law and what specifications should come with alternatives to the bar exam to ensure competency.[9] Recommendations will also address whether to make changes (and if so, what changes) to the California Bar Exam.[10] The commission consists of 19 members appointed by the Supreme Court and reflecting the state's demographic and geographic diversity and diversity in attorney practice sectors and settings.[11] The commission began its work in the second quarter of 2021 and is scheduled to present a final report on its findings and recommendations later in 2022.[12]

UTAH

In 2020, Utah was among the first jurisdictions to implement diploma privilege during the pandemic, allowing graduates to become licensed after completing law school and working a certain number of hours under a licensed attorney.[13] Since then, Utah has also returned to administering the bar exam, but has continued to evaluate longstanding questions about the bar exam and how well it measures a graduate's competency.[14]

Now, a task force of legal experts from Utah and around the country is looking at alternatives to the state's bar exam. The Utah task force is focused on identifying better ways to evaluate law student knowledge and performance, particularly with respect to the skills attorneys regularly use in day-to-day work, without imposing unnecessary barriers such as a lack of time or money to fully prepare for the bar exam—barriers that often end up serving those with more privilege.[15]

FLORIDA

In June 2022, the Florida Board of Bar Examiners (FBBE) released the results of a comprehensive, multi-year practice analysis study designed to determine the knowledge, skills, and abilities critical for newly licensed Florida attorneys to have at the time of admission to the Florida bar.[16]

FBBE's practice analysis study identified broad areas of responsibility that attorneys are expected to master across the range of settings and areas of practice, including research and analysis, oral and written communication, strategy development and implementation, practice management, professionalism and ethics, and the attorney/client relationship. It also identified a number of subject areas in which attorneys must be knowledgeable as they enter the profession. The study gives the FBBE an empirical understanding of the common activities that attorneys perform and what they must know as they practice early in their career.

With the practice analysis study concluded, the FBBE will use the study's data to analyze what content should be tested on the Florida bar examination and how that content should be tested–including what subject areas to test, the frequency of testing subject areas, whether changes to the FBBE's current test are necessary, and alternatives to the current exam's design.

CANADA

In June 2020, in the early days of the pandemic, four Canadian provinces launched an alternative to the bar exam called the Practice Readiness Education Program (PREP).[17] A nine-month program from the Canadian Centre for Professional Legal Education, PREP became available to 800 licensing candidates in Alberta, Manitoba, Nova Scotia, and Saskatchewan on June 1, 2020. PREP's online learning model uses the format of a virtual law firm and allows new lawyers to see how a law firm operates.

The PREP program, which is carried out in concert with a candidate's articling placement,[18] doesn't re-test candidates on information they have already learned in law school. It instead helps them to develop the competencies required to be admitted to the bar as an entry-level lawyer. The program includes four phases involving interactions, transactions, and simulations; it promotes competencies such as professional ethics and practice management.[19] Most complaints faced by early-career lawyers are based on practice management issues (not substantive legal issues) and the PREP program teaches candidates how to interview clients, manage files, use practice management software, and handle trust accounts, among other skills.

NOTES

[1] Sloane, Karen, *Oregon Moves Closer to a Bar Exam Alternative* (Reuters, 1/13/2022). *https://www.reuters.com/legal/litigation/oregon-moves-closer-bar-exam-alternative-2022-01-12*

[2] Oregon State Bar Board of Bar Examiners Recommendations of the Alternatives to the Bar Exam Taskforce Report (6/18/2021). *https://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf*

[3] Id.

[4] Davis, Ayumi, *Oregon Closer to Becoming Third State to Allow Would-Be Lawyers to Skip Bar Exam* (Newsweek, 1/13/2022). *https://www.newsweek.com/oregon-closer-becoming-third-state-allow-would-lawyers-skip-bar-exam-1669220*

[5] Id.

[6] Id. Only two other states, Wisconsin and New Hampshire, currently allow law school graduates to receive a license without the bar exam. Wisconsin's "diploma privilege" permits graduates from the two Wisconsin law schools to be licensed in Wisconsin without sitting for the bar exam. New Hampshire also permits a small group of law students each year who have completed a specialized two-year curriculum as part of the Daniel Webster Scholar Honors Program to become licensed in New Hampshire without sitting for the bar exam. See *Daniel Webster Scholar Honors Program at the University of New Hampshire*, *https://law.unh.edu/academics/daniel-webster-scholar-honors-program*.

[7] Blue Ribbon Commission on the Future of the Bar Exam (State Bar of California). *https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Blue-Ribbon-Commission*.

[8] Id.

[9] *California Officials Consider Bar Exam Options, Possible Changes* (Bloomberg Law, 7/7/2021). *https://news.bloomberglaw.com/us-law-week/california-officials-consider-bar-exam-options-possible-changes*

[10] Id.

[11] Blue Ribbon Commission on the Future of the Bar Exam (State Bar of California). *https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Blue-Ribbon-Commission*.

[12] Id.

[13] After Pandemic Changes, Some Re-Examining the Bar Exam (US News and World Report, 8/8/2021). *https://www.usnews.com/news/best-states/utah/articles/2021-08-08/after-pandemic-changes-some-re-examining-the-bar-exam*

[14] Id.

[15] Id.

[16] Florida Bar Board of Bar Examiners Practice Analysis Study Report (6/16/2022) (last viewed 7/12/22) https://www.floridabarexam.org/static/FBBE_Practice_Analysis_Study_Report.pdf.

[17] Balakrishnan, Anita, Alternative to Bar Exam, PREP, launches in June for Alberta, Manitoba, Nova Scotia, Saskatchewan (Law Times, May 2020). *https://www.lawtimesnews.com/resources/legal-education/alternative-to-bar-exam-prep-launches-in-june-for-alberta-manitoba-nova-scotia-saskatchewan/329710*

[18] Articling is the last step in a law student's formal legal education in most Canadian provinces and consists of working under the supervision of a qualified, licensed lawyer for a period of time after graduation from a Juris Doctor (JD) or Bachelor of Laws (LLB) program. *Regulation of the legal profession in Canada: overview* (Thomson Reuters PracticalLaw, 6/1/2021).

[19] Goodwin, Gary, *Never let a good crisis go to waste* (Canadian Lawyer, April 2020). *https://www.canadianlawyermag.com/news/opinion/never-let-a-good-crisis-go-to-waste/328524*

law school. Working Group 1 noted that a benefit of adopting the NextGen bar exam is that it will continue to allow portability into other jurisdictions.

Working Group 2: Clinical Experiential Pathway

Working Group 2 evaluated and recommended developing a curricular, experiential pathway as an additional pathway to licensing in Minnesota. A proposed curricular pathway would allow law students to meet the competency component of licensure upon graduation from law school through coursework and participation in experiential programs like clinics and externships. Working Group 2 noted that a curricular pathway would best prepare students for their first year of practice and set them on a course for success and competence in the law without creating any artificial barriers–thereby reducing inequity in bar licensure, increasing the diversity of the profession, and better maintaining the well-being of new lawyers. Working Group 2 recommended that the pathway include creating minimum competence standards to certify curricular and experiential pathways at each of the Minnesota law schools.

Working Group 3: Supervised Practice Pathway

Working Group 3 evaluated and recommended the development of the Minnesota Supervised Practice Pathway as an additional pathway for licensing in Minnesota. Under this program, applicants for licensure would complete lawyering tasks under the supervision of a licensed lawyer for a specified number of hours of practice and submit documentation of those tasks through a portfolio of work to the MBLE to demonstrate minimum competence. Working Group 3 notes that a supervised practice pathway provides the opportunity to evaluate applicants' actual performance of the skills that lawyers use in practice, much as professions such as medicine and architecture have long required demonstration of skills. Additionally, Working Group 3 suggests that a supervised practice pathway would protect consumers of legal services by ensuring that a newly licensed lawyer has gained meaningful practical experience through having a licensed, practicing lawyer supervise the applicant's work prior to their admission to the practicing bar.

MBLE TO SOLICIT PUBLIC COMMENT ON PROPOSED PATHWAYS

Over the next year, the MBLE will continue to study the minimum competencies necessary to practice law and the best models or pathways for evaluating achievement of those competencies. Using the research and recommendations of the three working groups as a foundation, the MBLE plans to develop additional questions about the three proposed pathways to licensure currently being explored in Minnesota and will make those questions available for public comment in November-December 2022.[15]

In early 2023, the MBLE will refine the recommendations based on public comment and make those refined recommendations available for additional public comment in April 2023. Final recommendations for how to measure competence to practice law in Minnesota will be submitted to the Minnesota Supreme Court for consideration and decision in June 2023.

For more information about the Minnesota State Board of Law Examiners Competency Study, including matters of process, findings, timeline, and opportunities to provide input, visit *https://www.ble.mn.gov/bar-exam/competency-study-2021-to-2023/.* ▲

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NOTES

[1] Minnesota State Board of Law Examiners Website, *https://www.ble.mn.gov/bar-exam/competency-study-2021-to-2023/*

[2] Id.

[3] Id.

[4] Cornett and Merritt, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence* (Institute for the Advancement of the American Legal System, October 2020) *https://iaals.du.edu/projects/building-better-bar-capturing-minimum-competence*

[5] *National Survey Finds Support for Bar Exam,* National Conference of Bar Examiners (9/30/2020). *https://www.ncbex.org/news/national-survey-bar-exam/* In a recent survey, 60 percent of Americans supported a supervised in-person bar exam with masks, social distancing, and compliance with all other local health guidelines during the covid-19 pandemic. When survey respondents were asked about the post-pandemic environment, support for the in-person bar exam increased to 70 percent.

[6] Cornett and Merritt, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence* (Institute for the Advancement of the American Legal System, October 2020) *https://iaals.du.edu/projects/building-better-bar-capturing-minimum-competence*

[7] Id.

[8] Id.

[9] Id.

[10] Minnesota State Board of Law Examiners Website, *https://www.ble.mn.gov/bar-exam/competency-study-2021-to-2023/*

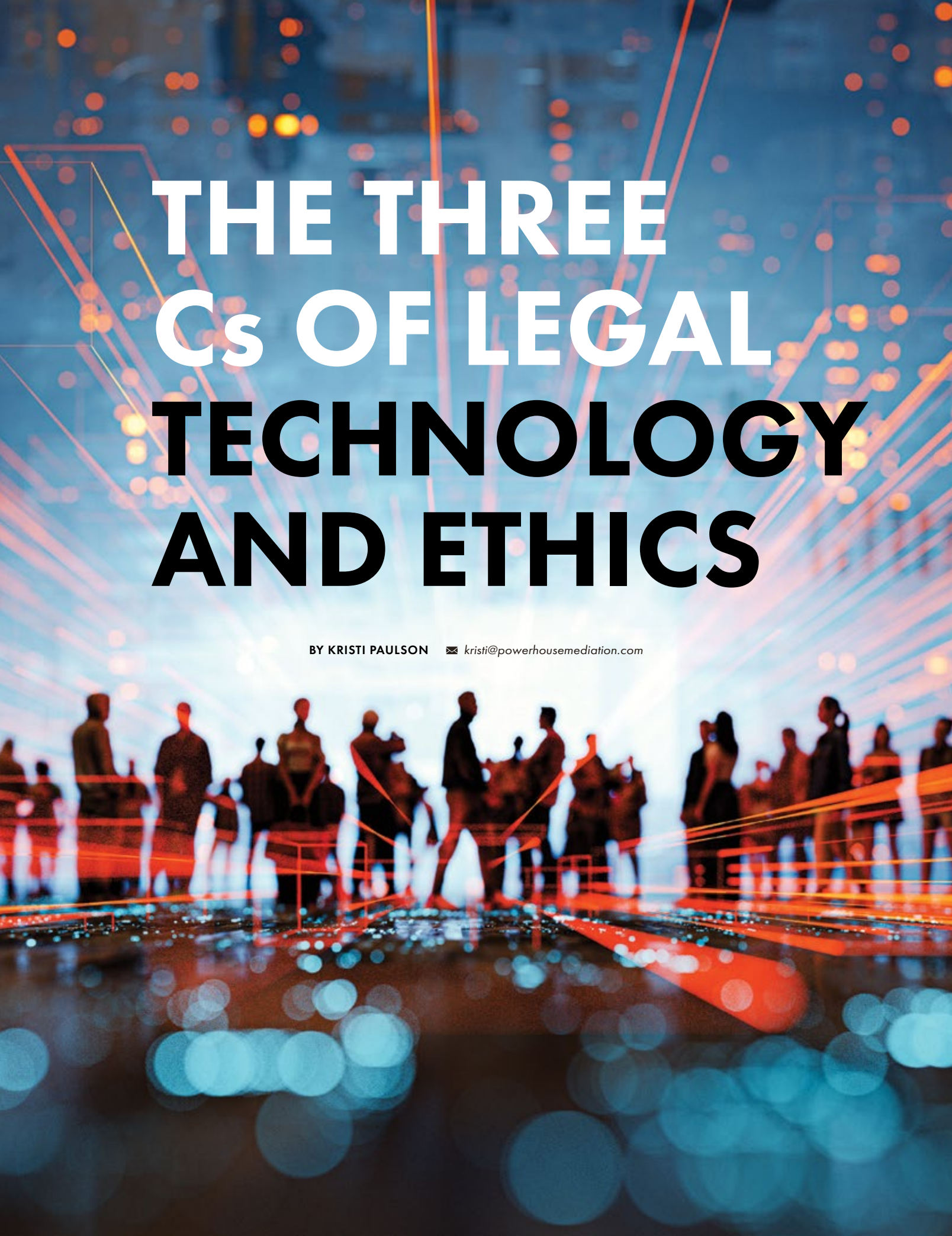
[11] Oregon State Bar Board of Bar Examiners Recommendations of the Alternatives to the Bar Exam Taskforce Report (6/18/2021), *https://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf*

[12] Id.

[13] Minnesota State Board of Law Examiners Website, https://www.ble.mn.gov/bar-exam/competency-study-2021-to-2023/

[14] The National Conference of Bar Examiners is in the process of implementing a next generation of the bar exam which was approved by NCBE's Board of Trustees at the end of January 2021. The NCBE suggests that the new NextGen bar exam will measure both knowledge and skills holistically through a refined and focused list of Foundational Concepts and Principles and Foundational Skills. The NextGen bar exam will take five years to develop and implement and is expected to be available in 2026. More information about the NextGen bar exam is available at *www.nextgenbar-exam.ncbex.org*. Working Group 1 recommends adopting the NextGen bar exam for use in Minnesota based on the information available about the Next-Gen bar exam as of the date of the working group's report. Working Group 1 further notes that much is still unknown about the NextGen bar exam and that the exam does present some concerns, so Working Group 1 supports multiple pathways to licensure in Minnesota. Minnesota State Board of Law Examiners Website, *https://www.ble.mn.gov/bar-exam/competency-study-2021-to-2023/*

[15] Minnesota State Board of Law Examiners Website, *https://www.ble.mn.gov/bar-exam/competency-study-2021-to-2023/*



THE THREE Cs OF LEGAL TECHNOLOGY AND ETHICS

BY KRISTI PAULSON ✉ *kristi@powerhousemediation.com*

As I sit at my desk writing this article, there is a computer with a hard drive directly in front of me, a scanner to my left, a router and Wi-Fi extender to my right. Immediately behind me is a teenage son with a gaming system; hanging over our heads is something called a cloud. The covid-19 pandemic ushered in many changes for all lawyers, including remote work. Kitchen tables became desks, dining rooms became conference rooms, and pajama pants became office wear as we merged our home and work lives. The same Wi-Fi connection my daughter uses to stream Netflix or Hulu may suddenly become the connection I use to appear in court and argue a motion.

The evolving technology of the modern law office is rapidly redefining how and where we work. The law office is no longer a place where we lock client files in fireproof cabinets, hit the server backup button, and know that as we lock the door and leave for the night, a security guard will remain outside protecting our confidential data.

But while the habits and habitats of contemporary law practice have changed, the Rules of Professional Conduct and our obligations as lawyers under these rules have not. As lawyers we remain bound by these rules in all aspects of our work, including our knowledge and skill in using legal technology. Now more than ever, it's important for lawyers to keep in mind the rules of ethics as they relate to legal tech. Let's take a look at the three Cs of legal technology and ethics: competence, confidentiality and communication.

THE DUTY OF COMPETENCE INCLUDES COMPETENCE IN LEGAL TECHNOLOGY

Competence is an essential rule for lawyers and that requirement includes the technology used in the practice of law. A lawyer must provide competent representation to the clients he or she represents.[1] This degree of competency requires "...the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Leaving nothing to doubt in the area of technology, the rules offer clear guidance for lawyers that the skills required to stay on top of an evolving and changing law practice include "the benefits and risks associated with relevant technology."[2]

Technology has become an essential tool in the practice of law, irrespective of setting. From the largest of firms on down to solo practices, lawyers use technology for tasks such as document management and office operations (client management systems, cloud storage, file sharing, time and billing software), communications and collaboration (Zoom and other video-conferencing software, email, messaging systems, internet phone systems), and trial advocacy and litigation practices (e-filing of cases, online legal research, e-discovery, video depositions, document storage and file preservation).

So what does technical competence mean for lawyers and what do lawyers need to do to comply with this duty? As lawyers we are obliged not only to know a few details about the systems we use, but to *understand* those systems. Staying informed about relevant risks and benefits allows us to select the best tools for the job. This can be particularly challenging owing to the speed with which technology changes and the fact that the disclosures and disclaimers we seek out are often hidden and vague. Staying up to date seems impossible at times, but the effort must be made. A lawyer needs to take any and all reasonable steps to understand the technology and to use it competently and as intended.

The obligation of competence is broader than it seems at first glance. If we expect our client to use these tools, there are times we will need to educate the client to make sure these tools are used properly. We must also know when and how to delegate and make sure that any assistants or agents we ask to use the technology understand the systems. (Keep in mind that rule about a lawyer's duty to supervise.) And, most importantly, we need to understand the technology to make sure that parties who should not be accessing our technologies are not invited or allowed into our law offices, remotely or otherwise.

The duty of competence applies to the technology we're using now, but it also applies to the changes and advances that are inevitably coming. Our ongoing obligation is to be aware of technological developments and to understand how changes impact ethical obligations.

CONFIDENTIALITY AND DATA SECURITY: LEGAL TECHNOLOGY ESSENTIALS

Keeping secrets is what lawyers do. Keeping personal and business information confidential is at the very core of the legal profession. The law practice in which pieces of paper are placed in red rope file folders and locked in fireproof file cabinets has now been replaced by systems in which we copy, transfer, access, and store confidential and sensitive client information on "cloud" platforms that are shared and thus a source of some abiding risk.

Data is valuable. Scammers, hackers, and adverse parties know that nothing is more valuable than data pre-selected by lawyers and law firms for its value. The obligation on the part of lawyers to secure and protect that data is great—and becoming even greater as technology advances. Lawyers have a duty to protect confidential and privileged information under common law. Lawyers must take reasonable steps to "...prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."[3]

Integrating technology with the practice of law creates many data security risk points that open the door to possible loss, breach, theft, and disclosure, to name just a few of the perils. These risks are especially problematic for lawyers who lack awareness of how their technology works and the steps necessary to safeguard the data.

The use of technology in legal practices is not something that was ushered in by the pandemic. Law practices have regularly shared and transported data (file sharing, email, texts, etc.) and stored that data (servers, cloud storage, shared copies of information with clients and experts). It has always been important to consider how to protect data and how to safeguard the storage systems we employ. What covid-19 ushered in was an entire frontier of new processes and technologies. Zoom and Teams have become part of our everyday vocabularies as we video conference, take online depositions, and argue motion hearings. Slack now allows us to instantly message and collaborate. Dropbox, Google Drive, and SharePoint allow us to immediately share and transfer documents.

The age of remote work has highlighted the importance of keeping data safe and secure. As we navigate online networks, it becomes important that we keep the privacy and security settings up to date in the video communication, streaming, and conferencing tools that are now part of our everyday communication and collaboration systems. The failure to do so creates vulnerabilities and exposes systems to leaks and data breaches.

While it would be nice if every law firm had an IT person or an entire IT department devoted to this process, that is not realistic. That does not mean, however, that there is nothing that lawyers can do to protect the data entrusted to them.

What are some simple steps we can do to protect the data we are expected and required to keep confidential?

- Use passwords. Protect data with passwords that are strong and unique. Do not write the password on a post-it note stuck to your laptop or in a Word document that resides on your desktop. Avoid common password "themes" (dog names, house numbers, etc.)
- Back up your data. Regularly back up all your data and make sure you store it in a secure and safe location. As part of my law practice, for example, I create regular backups that are stored on separate external drives stored in a fireproof safe.
- Be aware of scams and phishing emails.
- Use secured Wi-Fi systems and file transfer systems that are part of a network you have created. Avoid public systems and Wi-Fi networks.
- Create a separate network that is virtual and private for your work. (In other words, make sure the teenage gamer or social media butterfly in the house is not allowing uninvited guests onto the same network on which you store confidential information or conduct legal business.)
- Regularly update settings to keep security protocols in place. Don't ignore the reminders to update when they pop up—often at the most annoying moment possible. Rather, embrace them, install them, and safeguard your data.

COMMUNICATION: KEEPING CLIENTS INFORMED

Lawyers have obligations to communicate with clients and keep them informed. The tools available to do so have advanced from the days of the corded phone and the postage stamp to an endless chain of options that include email, voicemail, texts, and online portals. More and more we are using systems that embrace paperless electronic methods to keep our clients informed. Ironically, the easier it becomes to communicate, the more difficult it can be.

The Rules of Professional Conduct require that a lawyer take proactive steps to communicate with one's clients.[4] The rules won't help you select a computer, tell you whether you should email or text your clients, or provide direction on cloud storage or system providers. It is easy to get lost behind the technology that helps us process our legal work and makes our lives easier—so easy that we sometimes forget about client communication in this process. Communication with clients has never been more important.

Effective communication is an essential lawyering skill. Today's legal environment is constantly changing and with that come changes to the ways we can communicate with clients. Clients often will express strong preferences for their preferred mode of communication, be it text messages, emails, or phone calls. Many clients today are well versed in how to use tools like online portals

and video conferencing, and text messaging is increasingly one of the most popular ways for people to communicate.

Lawyers need to be prepared to communicate with clients in the manner(s) clients prefer. They also need to know and comply with all ethics rules that cover client communications. Keep in mind that not all lawyers or clients will have the same level of experience or understanding in how to use technology.

Therefore, it is important to clarify and agree on such information as:

- How do the lawyer and the client want to communicate?
- What information will the lawyer and client be exchanging using that medium?
- What are the terms and conditions of the platforms connected to such mediums? For example, what are the privacy or data-mining requirements of email servers or cellular providers?
- Who else will have access?

In communicating with clients and others, we need to be mindful of taking reasonable precautions in how information is transmitted and do our best to protect confidentiality. It is also important to remind assistants and staff about requirements and responsibilities, since the ethics rules also impose obligations on the supervising lawyer.

CONCLUSION

We have become increasingly dependent on technology tools. Clients communicate with us digitally and information is often kept and shared electronically. Technology is an inescapable part of the modern-day law practice. Lawyers should be mindful of the three Cs—competence, confidentiality, and communication—while using legal technology. Understanding the Rules of Professional Conduct can help prevent problems and keep us away from the fourth C in the lexicon of legal technology ethics: consequences. ▲

NOTES

[1] Minnesota Rules of Professional Conduct 1 and ABA Model Rules of Professional Conduct Rule 1.1.

[2] *Id.* at Comment 8.

[3] Minnesota Rules of Professional Conduct 1 and ABA Model Rules of Professional Conduct Rule 1.6.

[4] Minnesota Rules of Professional Conduct 1 and ABA Model Rules of Professional Conduct Rule 1.4.

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PAC-

THE RISE OF SPACs

and corresponding developments in securities litigation

BY KYLE WILLEMS AND BRYCE RIDDLE ✉ briddle@bassford.com ✉ kwillems@bassford.com

Special purpose acquisition companies (SPACs) are shell companies that raise capital in initial public offerings for the purpose of merging with or acquiring a privately held company. While SPACs are nothing new, they are being hailed as the next big thing in the securities industry. And with good reason: Over the past few years, the number of SPAC listings have skyrocketed in the United States. In 2019, 59 SPACs were created, with $13 billion invested; in 2020, 247 were created, with $80 billion invested; and in 2021, 613 were created, with $145 billion invested.[1]

As SPACs have gained popularity, public opinion has started to view them as a better alternative to traditional IPOs. With sponsors ranging from venture capitalists to celebrities, all signs indicate that SPAC investment will continue to rise. But, not surprisingly, SPACs' rise in popularity has coincided with an increase in SPAC-related litigation—and this trend is not expected to slow anytime soon. This article examines what SPACs are and discusses current legal trends that have arisen in the SPAC space.

HISTORY

SPACs first appeared as "blank check" corporations in the 1980s and were not well regulated. They were often associated with penny-stock fraud and cost investors more than $2 billion by the early 1990s. Congress ultimately enacted much-needed regulation, such as requiring that the proceeds of blank-check IPOs be held in regulated escrow accounts and barring their use until the mergers were complete.[2] With a new regulatory framework in place, blank-check corporations were rebranded as SPACs.

In the decades that followed, SPACs became a cottage industry for boutique law firms, auditors, and investment banks to support sponsor groups that lacked national recognition or investment training. But that changed in 2019, when investors began launching SPACs in significant numbers. Established hedge funds, private-equity and venture firms, and senior operating executives were all drawn to SPACs for various reasons, including:

- excess available cash;
- a proliferation of start-ups seeking liquidity or growth capital;
- regulatory changes that standardized SPAC products; and
- the ability to help private companies go through the IPO process on an expedited timetable and with less regulatory oversight.

Investors, too, have flocked to SPACs, enticed by the excitement of investing with a favorite brand name investor or celebrity, unique redemption rights, and the possibility of high returns.

As expected, the pros have not come without cons. Growing criticisms include:

- fee arrangements that can create competing interests between sponsors and shareholders;
- high failure rates (including the failure to merge with targets and a high overall fail rate);
- a lack of transparency;
- imbalance between the protections afforded to sponsor and shareholder rights; and
- conflicts of interest between SPAC sponsors and shareholders.

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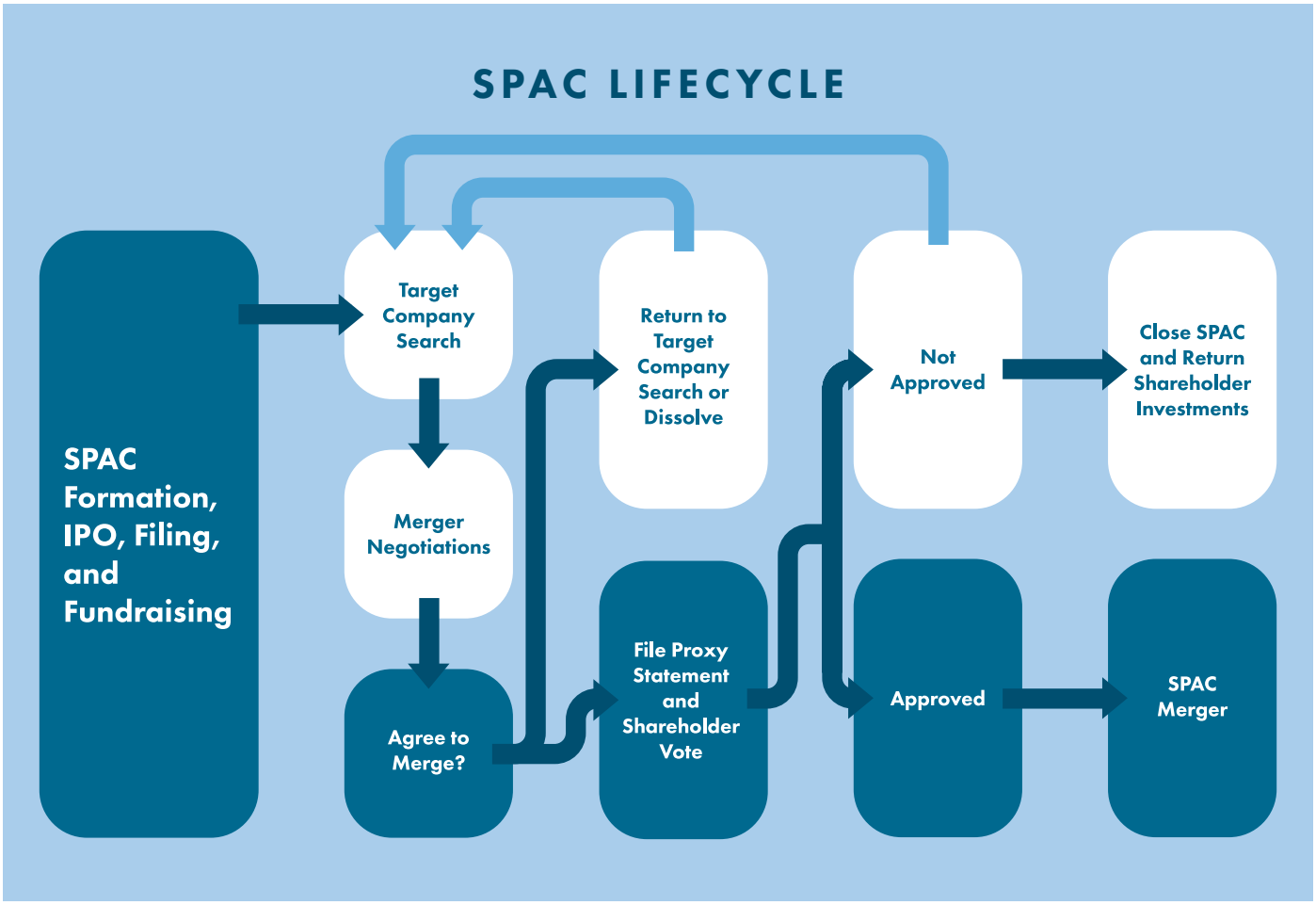

To better understand current trends in SPAC litigation, it is helpful to understand how a SPAC operates, who the interested parties are, and the goals of each party over a SPAC's lifecycle.

Sponsors, shareholders, and target companies form the core group of stakeholders in any SPAC transaction, each with distinct goals and perspectives. Sponsors initiate the SPAC process by investing risk capital in the form of nonrefundable payments to bankers, lawyers, and accountants to cover operating expenses while the SPAC searches for target companies to acquire. If the SPAC fails to effectuate a combination within a set time frame (almost always two years), the SPAC must be dissolved and the sponsors lose their risk capital.

Shareholders invest in a SPAC once it goes public, but before a target company has been identified. From there, the shareholders trust the sponsors to locate an appropriate target company. After the sponsor announces an agreement with a target company, the shareholders vote on whether to move forward with the deal or cash out a *pro rata* share of the funds that remain in the SPAC's trust account, with interest.

Target companies are typically start-up firms that have been through the venture capital process and are looking to grow. At this stage, SPACs are attractive due to their customization and time to market, assuming the target company's business and financials are in order.

SPAC LIFECYCLE

A typical SPAC has four phases in its life cycle: formation, target search, shareholder approval, and merger. Below is a timeline of a typical SPAC's life cycle.

SPAC formation

SPACs start as a concept. These concepts are brought to life by a sponsor who creates a SPAC IPO plan, invests risk capital for operating expenses, and announces a board of directors. A SPAC's IPO plan is typically based on an investment thesis focused on a sector and geography, such as the intent to acquire a media company in North America, or a sponsor's experience and background. The risk capital invested often translates to an approximate 20 percent interest in the SPAC and is commonly referred to as founder shares.

The SPAC then goes through the typical IPO process. Sponsors staff the SPAC operations team with underwriters, file an IPO registration statement with the SEC, clear SEC comments, and seek to raise capital from shareholders. Because SPACs have no historical financial results to disclose or assets to describe, SPAC financial statements in the IPO registration statement are very short and can be prepared in a matter of weeks. In essence, the IPO registration statement is mostly boilerplate language—aside from the typical practice of vaguely identifying the industry in which the target company might be operating.

Investment in SPACs during IPO phase

During the initial public offering, shareholders are sold "units" that comprise one share of common stock and, typically, a fraction of a warrant to purchase a share of common stock in the future. A full warrant, or multiple warrants per shareholder, may be issued to entice shareholders to buy into a SPAC that may be perceived as particularly risky. Nearly all SPACs sell units for $10. Following the IPO, the units become separable so that the public can trade units, shares, or whole warrants, with each security separately listed on a securities exchange.

Search for target companies begins

Following the IPO process, proceeds are placed into a trust account. At this stage, the SPAC typically has up to 24 months to identify and complete a merger, seek an extension, or return all invested funds to shareholders, at which point the sponsors typically lose their founder shares and risk capital. The SPAC management team begins discussions with privately held companies that may be suitable merger targets.

Raise additional capital, if necessary

Once a SPAC and target company reach an agreement to merge, additional funds may be required to consummate the purchase. If the situation so demands, the SPAC then attempts to validate the target company's valuation and raise additional funds in a private investment in public equity (PIPE) funding.

Finalize terms of the merger

Once all funds are secured, the SPAC and target company file a proxy that outlines the financial history of the target along with merger terms and conditions.

Hold shareholder vote on merger

Once the proxy statement is filed, the SPAC's public shareholders must then approve the transaction or elect to redeem their shares. The proxy statement will contain various matters seeking shareholder approval, including a description of the proposed merger and governance matters. It will also include financial information of the target company, such as historical financial statements, management's discussions and analysis, and *pro forma* financial statements showing the effect of the merger.

Complete the merger

If the deal is approved, the merger is completed shortly thereafter using the assets remaining after any withdrawals. The SPAC and PIPE proceeds are invested in the target company, the governance structure of the SPAC is dissolved, and the target starts trading under its own name and ticker symbol.

RECENT TRENDS IN LITIGATION

Unfortunately, not all stakeholder incentives are perfectly aligned, and litigation ensues. Data indicates that as SPAC usage increased, so too did litigation.

Year	SPACs Created[3]	SPAC-Related Federal Class Action Filings[4]
2019	59	1
2020	248	5
2021	613	32

A review of SPAC-centered lawsuits shows that most claims, whether brought by a class or not, fall into two broad categories: misrepresentations in financial documents and breach of fiduciary duties.

Misrepresentation and omission in financial documents

Common law and statutory claims for misrepresentation are the driving force for SPAC-related litigation. Typically, these claims arise out of allegations that a SPAC and/or its sponsors made material misrepresentations or omissions in the initial registration statement, the proxy statement, post-merger statements, other formal statements, Securities and Exchange Commission filings, or SPAC-related agreements.

Claims for misrepresentations and omissions are often brought under a combination of typical common law claims (including negligence, breach of contract, etc.) and various statutory claims—most notably those set forth in the Securities and Exchange Act of 1934. The tip of the spear tends to be alleged violations of Section 14(a) (a cause of action that is narrowly limited to the truthfulness and accuracy of representations that relate to proxy statements, with a requirement that the defendant acted negligently) and Section 10(b) (a cause of action that broadly relates to the truthfulness and accuracy of representations that relate to publicly traded securities, which requires both a showing of negligence and scienter).[5]

There is little litigation surrounding a SPAC's initial registration statement. This makes sense, given the fact that SPACs are "blank check" companies that are allowed to have initial registration statements that can contain nothing more than a vague statement about the SPAC's purpose. The bulk of SPAC-related litigation concerns alleged misrepresentations and omissions in the proxy statement, which is the first substantial document that shareholders rely on when voting on the merger. Claims that arise out of the proxy statement tend to fall into two camps: those that arise before the merger and those that arise after.

Claims made pre-merger are often easy to dispatch of by revising the proxy statement to correct alleged misrepresentations or omissions. This renders claims moot, and the SPAC and/or its sponsors will pay a settlement that Wall Street litigators colloquially refer to as a "mootness fee."[6]

More problematic for SPACs and their sponsors are post-merger misrepresentation and omission claims that relate to the proxy statement. These tend to relate back to alleged misrepresentations and omissions made in the proxy statement, and a common theme is that they arise when plaintiff-shareholders have buyers' remorse because they are not getting the return on investment they hoped for. Two well-known examples of this happening are *In re Heckmann Corporation Securities Litigation*[7] (commonly referred to as the "China Water" case) and *Welch v. Meaux*[8] (commonly referred to as the "Waitr" case).

In the China Water case, the plaintiffs-shareholders asserted Section 10(b) and 14(a) claims (among other claims) based on allegations that the proxy statement misstated the target's (China Water and Drinks, Inc.) operations and financial wellbeing. After three and a half years of complex and expensive litigation, the China Water case settled for $27 million.

The China Water case is a particularly important SPAC lawsuit, because it resolved well before the SPAC boom kicked off in 2019. It sent a message that SPACs would not be immune from complex, expensive litigation if proper disclosures were not made—particularly via the proxy statement.

The Waitr case came several years after the China Water case, during the current SPAC boom. In the Waitr case, plaintiffs sued under Section 10(b) (among other claims) on allegations that there were material deficiencies with the SPAC's proxy statement and the post-merger registration statement. Specifically, the plaintiffs allege that they were not properly informed of known risks and that the target company's financial valuation was inflated.[9]

The Waitr case built on the lessons learned in the China

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Water case and highlighted some additional issues that SPACs face. While SPACs may be able to dash through the IPO process with less overhead and scrutiny, the failure to perform sufficient due diligence and make proper disclosures may mean aggrieved plaintiff-shareholders will look to key representations made by sponsors, officers, directors, and the SPAC, such as those made in the proxy statement, to create an avenue to recovery if the SPAC does not make returns as expected.

Breach of fiduciary duties

SPAC-related breach-of-fiduciary-duty claims are also common, and SPAC sponsors, officers, and directors are closely tracking legal developments, because a successful breach of fiduciary duty claim means a finding of personal liability.

Typically, these claims arise out of allegations that officers and directors violated the duties of loyalty and due care (among other duties, depending on the situation) that they owe the corporation and its shareholders. Often, officers and directors respond to breach-of-fiduciary claims by citing a variety of protections, such as those afforded to them by the business judgment rule and contractual exculpatory clauses.

Given the broad protections afforded to officers and directors, breach-of-fiduciary-duty claims often take a back seat in SPAC-related litigation and there has not been a bevy of fiduciary duty lawsuits as of late.

But that may be changing. The SPAC world has been closely tracking the case of *Kwame Amo v. MultiPlan Corp, et al.*[10] In *Kwame Amo*, the plaintiff-shareholders alleged that the sponsor, officers, and directors created a compensation structure for themselves that incentivized them to get the SPAC at issue to merge—even if the resultant merger was detrimental to the plaintiffs-shareholders.[11] The plaintiff-shareholders also alleged that the sponsor, officers, and directors failed to make proper disclosures in the proxy statement.[12] And, had proper disclosures been made, the plaintiff-shareholders would have exercised their redemption rights.[13]

As expected, the sponsors, officers, and directors brought a motion to dismiss and argued that the deferential business judgment rule standard of review applied. In a recent ruling, the Court of Chancery rejected the defendants' argument and applied the more plaintiff-friendly "entire fairness" standard—which shifts the burden of proof to the defendants to show that the complained-of transaction was entirely fair to the plaintiff-shareholders.[14] The case, which is still pending, is being closely monitored.

Kwame Amo suggests that breach of fiduciary duties may play a growing role in SPAC-related litigation, and it shows that SPAC-related litigation may be a driving force for changes in fiduciary duty law.

Other claims

Numerous other legal issues have emerged around SPACs. These include claims made under the Securities Act of 1933,[15] various common law claims, and numerous SEC actions against SPACs. But we anticipate that the leading edge of SPAC litigation will be claims under the Securities and Exchange Act of 1934 and breach-of-fiduciary-duty claims.

CONCLUSION

It's hard to determine whether SPACs are a flash-in-the-pan trend on Wall Street or they are here to stay. But one thing is certain: There is a significant amount of SPAC-related litigation and more is expected to arise from current and future transactions. As such, understanding SPACs and the constant legal developments that surround them is paramount for any attorney who practices in this space. ▲

NOTES

[1] Phil Mackintosh, *A Record Pace for SPACs in 2021*, NASDAQ (3/2/2021), *https://www.nasdaq.com/articles/a-record-pace-for-spacs-in-2021* .

[2] *See* the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Public Law 101-429, available at *https://www.congress.gov/bill/101st-congress/senate-bill/647#:~:text=S.,Congress.gov%20%7C%20Library%20of%20Congress* (3/2/2022).

[3] *SPAC and US IPO Activity*, SPAC Analytics (3/2/2022), *https://www.spacanalytics.com/*.

[4] *Securities Class Action Filings—2021 Year in Review*, Cornerstone Research (3/2/2022), *https://securities.stanford.edu/research-reports/1996-2021/Securities-Class-Action-Filings-2021-Year-in-Review.pdf* at 5.

[5] *See* 15 U.S.C. §78 j and n; *see also* 17 C.F.R. 240.10b-5 and 240.14a-9 (which are the SEC equivalents to Sections 10(b) and 14(a)).

[6] *See, e.g., Wheby v. Greenland Acquisition Corp.*, No. 1:19-cv-01758-MN (D. Del.), ECF Nos. 1, 4.

[7] *See generally In re Heckmann Corp. Sec. Litig.*, No. 1:10-cv-000378 (D. Del).

[8] *See generally Welch v. Meaux*, No. CV 19-1260 (W.D. La.).

[9] *See generally id.*, ECF No. 1 (9/26/2019).

[10] *See generally*, *Kwame Amo v. MultiPlan Corp, et al.*, Consl. C.A. No. 2021-0300-LWW (Del. Ch.).

[11] *See generally*, *Id.*, (Filed 3/25/2021).

[12] *Id.*

[13] *Id.*

[14] *Id.* (Decided 1/3/2022).

[15] Codified as 15 U.S.C. §§77a-77mm (1934).

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Inclusive leaders are needed now more than ever. They can serve as lead problem solvers who address the social justice challenges facing our society. Currently, for instance, there is a call to leadership in the legal profession concerning the unmet legal needs of the poor and disenfranchised. The access to justice gap is evidenced by the fact that nearly 92 percent of the civil legal needs of low-income communities are not being met, according to the Legal Services Corporation's annual Justice Gap Report. Furthermore, the same report went on to say: "Nearly three quarters (74%) of low-income households experienced at least one civil legal problem in the previous year. A third (33%) of low-income Americans had at least one problem they attributed to the covid-19 pandemic." Moreover, there is a need for additional lawyers in many jurisdictions: As noted in the ABA Profile of the Legal Profession, "nearly 1,300 counties in the U.S. had less than one lawyer per 1,000 residents."

This is a call to inclusive leadership where lawyers make a commitment to serve and lead in their community. The ABA Model Rules of Professional Rules of Conduct offers a guide for lawyers to take action:

> *As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.*

In my latest book, *The Inclusive Leader: Taking Intentional Action for Justice and Equity*, I provide a pathway for lawyers to effect change by engaging in a process of self-reflection, grappling with unconscious biases, fostering innovation, and taking action for the betterment of society.

REDEFINING LEADERSHIP

Lawyers who embark on this leadership journey begin by redefining leadership. "Leadership" is traditionally defined according to one's position in a hierarchy of power. This conception limits leadership to being only available for a select few, like a bar leader or firm shareholder. Research demonstrates

AWYER AS
NCLUSIVE LEADER

BY DR. ARTIKA R. TYNER dr.artikatyner@gmail.com

the transformative power of defining leadership in terms that offer an invitation for everyone to have an impact within their respective spheres of influence.

Now is the time to redefine leadership by focusing on developing a collective vision of change.

A leader is a planter—a planter of ideas, seeds of change, and a vision for justice.

Inclusion emerges organically as a part of this vision. It involves a recognition that all human beings have the right to be valued, respected, and appreciated. Inclusive leadership is evidenced by leaders who embark on a lifelong learning journey to challenge their own biases, stereotypes, and prejudices. They recognize that diversity, equity, and inclusion are the foundation of business success, community engagement, and promoting the common good.

Leadership framework for action

This leaves one to ponder: How can lawyers take intentional action for justice and equity? Over the past decade, I have explored this question through my research. The culmination of my findings is encompassed in my Leadership Framework for Action.™ It provides four stages of learning.

- The *intrapersonal* level encourages engaging in self-discovery. This is where you explore your leadership story and the multifaceted dimensions of your own culture, heritage, and history.
- The *interpersonal* stage supports building authentic relationships with others. This activates inclusion in the workplace by creating a sense of belonging, honoring the dignity of each individual, and treating team members fairly.
- The *organizational* stage aids in establishing strategic outcomes and promoting equity in work environments.
- The *societal* level provides vital tools for the development of sustainable, durable solutions.

This article focuses primarily on the societal level. When engaging in societal reform, it is easy to get overwhelmed by the magnitude of the challenges. The image from the Breton fisherman's prayer comes to mind: *The sea is so wide, my boat is so small*. However, your passion for social justice coupled with your leadership capabilities and connection with a team of other committed individuals can serve as your anchor for the leadership journey ahead.

Here are a few ways you can take action:

1. ***Find your passion.*** I found my passion to become an ambassador for diversity, equity, and inclusion when I traveled to Tanzania. I traveled to Africa to teach a study-abroad class on policymaking and leadership. I learned about the transformational power of Harambee. Harambee recognizes the importance of community engagement and servant leadership. It means let's "all pull together" in Swahili.

   My passion for justice is informed by this principle of Harambee. Each day, I train, equip, and inspire students to pull together in the fight for education and criminal justice reform to better the lives of generations to come.

2. ***Redefine leadership.*** When redefining leadership, the metaphor of the drum major instinct can serve as inspiration. Dr. King characterizes this leadership role as measuring greatness by one's

HOW CAN LAWYERS TAKE INTENTIONAL ACTION FOR JUSTICE AND EQUITY? OVER THE PAST DECADE, I HAVE EXPLORED THIS QUESTION THROUGH MY RESEARCH.

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commitment to service. He stated, "[B]y giving that definition of greatness, it means that everybody can be great, because everybody can serve." There are many opportunities around us to serve and lead social change.

3. ***Find a way to get involved.*** There is no better time than the present to take action.

   You can make a difference by, for example, joining the #FREEAMERICA campaign to end mass incarceration. Your advocacy can help break down barriers experienced by individuals with a criminal record and create meaningful second chances through employment and entrepreneurship.

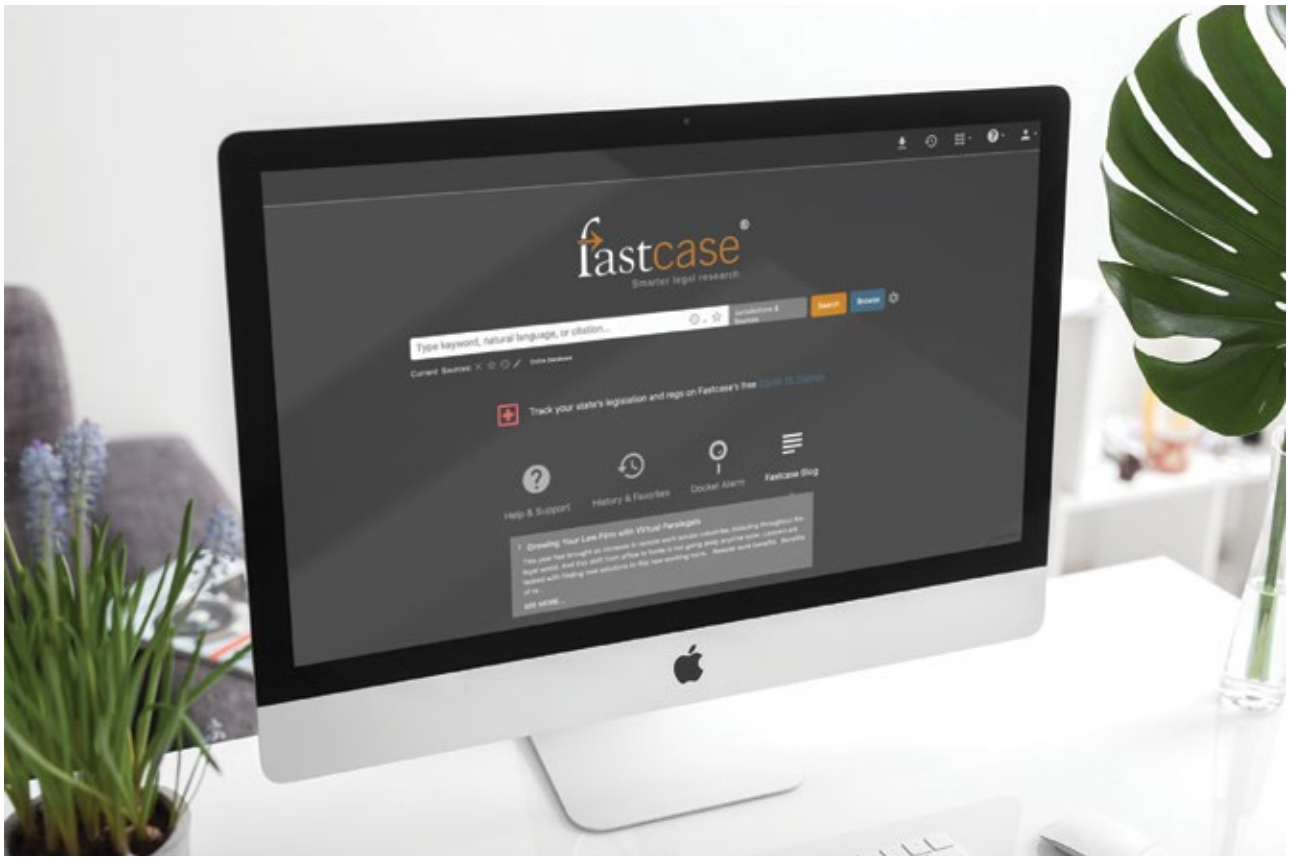
   Or you might choose to adopt a school and volunteer to support literacy. You can make a difference in the lives of our youth by promoting healthy starts. Early reading and literacy support this process. When one in four children in America has not learned how to read; students who are not proficient with reading by fourth grade are four times more likely to drop out of school; and 85 percent of children in the juvenile justice system are not literate, there is a sense of urgency related to supporting your local schools.

4. ***Connect with others who share your passion areas and commitment to making a difference.*** The journey ahead will require a team effort. A group of committed individuals must come together and work in unity. Bar associations at the state, local, and national levels can serve as key conveners of these efforts.

CONCLUSION

You can commit today to serving as an inclusive leader. Define yourself as an innovator, builder, and change agent. Remember the words of civil rights leader Bayard Rustin: "The proof one truly believes is in action." Your daily actions can aid in building a more just and inclusive society.

Download the free book discussion guide: ***https://bit.ly/InclusiveLeaderGuide*** ▲



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ROAD TO NOWHERE

2022 MINNESOTA LEGISLATIVE SESSION RECAP

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The wisdom of a balanced approach is evident in many areas of life. For example, there is a passage in the centuries-old Talmud that recommends keeping one-third of your wealth in business, one-third in land, and one-third in reserves. In its modern interpretation (maintaining equal amounts of stocks, bonds, and real estate), this ancient investing advice has been a durable and effective asset allocation strategy over long periods of time. Unfortunately, in a different context, the "a third, a third, and a third" template proved far less enduring this year at the state Capitol, where a historic budget surplus was not enough to bridge significant partisan differences.

MORE MONEY, MORE PROBLEMS

When the 2022 Minnesota legislative session began on January 31, legislators found themselves blessed with a massive budget surplus estimated at $7.7 billion, which ballooned to a whopping $9.25 billion one month later. The House and Senate typically pass budget bills in odd-numbered years, as they did in 2021. In even-numbered years they traditionally turn their attention to bonding and policy bills, but overflowing coffers diverted lawmakers' attention in 2022 and turned the session into a quasi-budgetary showdown.

Counting the cash was easy; allocating it was more challenging. The GOP-controlled Senate proposed permanent tax cuts while the DFL-majority House suggested one-time tax relief as well as new funding for, among other things, childcare and family medical leave. But despite these differences, it seemed that there were plenty of funds available to permit both sides to secure some victories and go home happy. That optimism was tempered, however, by a decade's worth of vitriolic budget battles that resulted in a string of special sessions.

After each chamber passed its respective proposals, and with one week remaining before the Legislature's constitutional adjournment deadline, House and Senate leaders joined Gov. Tim Walz in announcing a global budget deal. The framework for the agreement set aside one-third of surplus money for tax relief and one-third for new spending, while leaving the remaining third available for the FY24-25 budget negotiations that will happen during the upcoming 2023 legislative session.

Heralded as a bipartisan compromise, the budget deal nonetheless represented only a broad outline. Conference committees still needed to fill in the details, and there was sufficient time—barely—remaining in the session to do so. Ultimately, in virtually all major areas, the House and Senate were simply unable to reach agreements, leaving the tax bill and most of the supplemental budget bills unpassed when the 2022 session expired. Subsequent discussions regarding a special session have proven unproductive.

There were a handful of considerations behind the stalemate. The first and most obvious was unbridgeable differences in spending priorities. The second is election-year politics. The governor's office and every legislative seat will be on the ballot in November; in addition, a number of sitting legislators face pri-

mary challenges in August from more philosophically extreme candidates within their own parties. These dynamics naturally make elected officials more cautious. There is also the beguiling prospect of a single political party taking total control of the Capitol after the November elections and being able to dictate, rather than compromise on, surplus allocations in 2023. Finally, with an FY22-23 budget already negotiated in 2021, there was nothing that lawmakers *had* to accomplish in 2022. That may have been the most influential factor.

LOST OPPORTUNITIES

As a result of failed negotiations, significant tax relief was not passed, and new investments in a wide spectrum of areas did not happen. Among the lost opportunities was the potential for substantial—and much-needed—supplemental budget allocations for courts, public defenders, and civil legal services. These allocations were in play with the public safety conference committee but did not happen because the committee could not finalize an overall deal. Consequently, numerous other public safety-related policy proposals from the House and Senate were lost as well. In general, the Senate public safety bill focused on enhancing criminal penalties and increasing funding for police officers, while the House version concentrated on police accountability reforms and community-based crime prevention. Other limited areas of overlap were also squandered, including an MSBA-backed proposal to eliminate fees on uncertified court documents.

Other MSBA proposals were lost, too, after coming tantalizingly close to passage. A pair of Tax Law Section proposals to enhance tax fairness for single-member LLCs were adopted by the tax bill conference committee but vanished when the omnibus tax bill failed to pass. The collapse of the tax bill also doomed a Senate proposal to allow portability of a deceased spouse's unused estate tax exemption.

The failure of other major bills caused a long list of additional budget and policy casualties, some of which could receive renewed attention during a potential special session (doubtful as one is at this point) or the 2023 regular session.

NEW LAWS

Despite their headline-grabbing partisan wrangling, political posturing, and philosophical differences, the House and Senate did manage to pass nearly 70 bills that were signed by Gov. Walz. The new laws on the books include the following:

- **Ch. 37** was an MSBA proposal that modifies Torrens registration provisions to make the system less costly and more efficient and user-friendly. *(Effective 8/1/22.)*
- **Ch. 45** establishes guardianship procedures for at-risk individuals aged 18 to 21. *(Effective 8/1/22.)*
- **Ch. 46** increases penalties for trespassing while operating a snowmobile or off-road vehicle and allows conservation officers and other peace officers to issue citations for violations. *(Effective 8/1/22.)*
- **Ch. 51** prohibits sales representative contracts from including a provision for choice of venue in another state. *(Effective 8/1/22.)*
- **Ch. 59** allows law enforcement agencies to release criminal history data when conducting background checks related to local government licensing and employment. *(Effective 8/1/22.)*
- **Ch. 62** modifies structured settlement rights. *(Most provisions effective 8/1/22.)*
- **Ch. 68** clarifies indemnity application when insurance coverage exists. *(Effective 5/23/22.)*
- **Ch. 81** enacts the Uniform Registration of Canadian Money Judgments Act. *(Effective 8/1/22.)*
- **Ch. 82** allows emancipated minors to petition for harassment restraining orders on their own behalf. *(Effective 5/23/22.)*
- **Ch. 89** updates Minnesota's Code of Military Justice. *(Effective 8/1/22.)*
- **Ch. 99** enacts standards for competency to stand for trial and establishes competency restoration programs. *(Various effective dates.)*

Full text for these and other new laws is available at ***https://www.revisor.mn.gov/laws/current/*** ▲

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IMPORTANT **UPCOMING DATES**

AUGUST 9, 2022
Primary election day

NOVEMBER 8, 2022
General election day

JANUARY 3, 2023
First day of the 2023 legislative session

LANDMARKS IN THE LAW

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

Criminal Law
JUDICIAL LAW

Arson: First-degree arson does not require proof that the defendant acted "unlawfully." At his trial for first-degree arson, appellant's daughter testified she accidentally started the fire that burned down appellant's house. However, the state's expert testified the fire was intentionally set in three places. A jury convicted appellant, and he requests a new trial on appeal, arguing the state did not prove he acted "unlawfully" when he set fire to his home.

Minn. Stat. §609.561, subd. 1, states that "[w]hoever unlawfully by means of fire or explosives, intentionally destroys or damages any building that is used as a dwelling at the time the act is committed... commits arson in the first degree." Based on the statute's plain language, the court of appeals finds that "unlawfully" means "without authorization," or without the license, permit, or written permission described in Minn. Stat. 609.564, which states that a person who sets a fire with such permission from the fire department does not commit arson. This interpretation is supported by the structure of the arson statute and by the common meaning of "unlawful."

However, the court holds that the state is not required to prove a defendant acted without this authorization as a separate element of an arson offense. Instead, because acts of arson are "ordinarily dangerous to society," the court determines that "unlawfully" in the arson statute presents an exception to liability, not an element of arson. The burden of proving that exception falls on the defendant. The court concludes there is sufficient evidence to support appellant's conviction, as the state proved he intentionally burned down his home and appellant did not show that he was permitted to do so. The court of appeals also affirms the district court's decision to deny appellant's request for a durational departure and the district court's award of restitution. But the case is nonetheless remanded for resentencing, as appellant's sentence was based on an incorrectly calculated criminal history score. ***State v. Beganovic***, 947 N.W.2d 278 (Minn. Ct. App. 4/11/2022).

Trespass: Oral declaration of trespass and refused written notice do not satisfy trespass notice requirement. Police responded to a grocery store on a report of unwelcome youth refusing to leave. When police dispersed the group, an officer tried to hand appellant a written notice ordering appellant to leave and not return, but appellant refused to take the notice. Another officer told appellant, "You're officially trespassed..." Appellant left but returned to the store two months later. He was charged with criminal trespass and adjudication of his delinquency petition was stayed for 180 days following a bench trial.

Minn. Stat. §609.605, subd. 1(b)(8), makes it a misdemeanor for a person to intentionally return to a property, unless the person has a claim of right to the property or consent to be there, "within one year after being *told* to leave the property and not to return." The Minnesota Court of Appeals finds first that the officer's statement that appellant was "officially trespassed" did not satisfy the statute's notice requirement. There is no definition of "trespass" or case law that indicates "officially trespassed" means the person is ordered to leave the property and not reenter for one year. The officer's declaration was not specific enough to inform appellant of his duty to leave and not return.

The court also finds insufficient the written notice that appellant refused. The court looks to dictionary definitions of "told," holding that one cannot be found to have criminally trespassed unless he was actually informed of his obligation to leave and not return. An attempt to so inform him is not enough. The district court's finding of guilt and stay of adjudication is reversed. ***Matter of Welfare of A.A.D., Jr.***, No. A21-1264, 2022 WL 2124583 (Minn. Ct. App. 6/13/2022).

Right to unanimous verdict: Omission of one juror's jury polling response does not establish violation of right to unanimous 12-member jury. After a jury trial, Appellant was found guilty of burglary and assault. Appellant requested a poll of the jury. The transcript records the clerk questioning 11 jurors, who responded that they supported the verdicts. The court then stated, "I think that's everyone." Appellant did not object. On appeal, appellant argues his right to a unanimous 12-member jury was violated, because only 11 jurors found him guilty. The court of appeals affirmed appellant's convictions.

The 14th Amendment to the U.S. Constitution requires all

criminal jury verdicts to be unanimous, and the 6th Amendment to the Minnesota Constitution requires all felony juries to have 12 members. A defendant may request a poll of the jury after a verdict is announced. As a matter of first impression, the Supreme Court considers whether proper polling of the jury is necessary to protect a defendant's right to a unanimous verdict from a 12-member jury or if polling is simply one mechanism to ensure a defendant's rights are respected. The Court follows the majority of other courts to consider this issue and holds that "jury polling is but one mechanism to ensure a unanimous jury verdict, such that an error in polling the jury does not categorically create a violation of the constitutional right to a unanimous jury." The right to poll a jury is not included in the Constitution, as it originated in common law to protect constitutional rights. It is also optional.

Here, there was an error in the jury polling, but other safeguards were in place to protect appellant's right to a unanimous 12-person jury. The record shows 14 were originally seated and that two were dismissed during and after the trial. After the trial, the jury immediately began deliberations and returned verdicts shortly thereafter. The jurors were never sent home or had an opportunity to leave. No one present commented on any missing jurors. The jury was also twice instructed on their duty to reach a unanimous verdict. The jurors were asked as a group, prior to polling, if they agreed with the verdicts and no one objected. Thus, the record contains substantial evidence that the jury was properly constituted and acted unanimously.

The Court denies appellant any relief for the polling error, as the error was not structural and appellant did not establish a reasonable likelihood that the jury would have reached a different result had the twelfth juror been polled. ***State v. Bey***, A20-1097, 2022 WL 2137007 (Minn. Sup. Ct. 6/15/2022).

Sexually dangerous persons: Mandatory conditional release period for persons civilly committed as sexually dangerous and convicted of assaulting treatment facility employee does not violate equal protection. Appellant was previously civilly committed as a sexually dangerous person (SDP). He later pleaded guilty to fourth-degree assault for punching a security counselor in the head at the secure treatment facility. As part of appellant's sentence, the district court imposed a mandatory five-year conditional release term under Minn. Stat. §609.2231, subd. 3a(e). The district court denied appellant's petition for postconviction relief, in which he argued the conditional release period violates equal protection, because the conditional release period is imposed on persons convicted under section 609.2231, subd. 3a(b)(1) (assaulting a secure treatment facility employee while civilly committed as SDP), but not those convicted under section 609.2231, subd. 3a(c)(1) (assaulting a secure treatment facility employee while civilly committed as mentally ill and dangerous (MID)). The court of appeals affirmed, finding individuals convicted under subd. 3a(b)(1) and 3a(c)(1) are not similarly situated.

The threshold question for equal protection analysis is whether the claimant is similarly situated in all *relevant* respects to others who they claim are being treated differently. If the claimant is not treated differently from others similarly situated, there is no equal protection violation. The Supreme Court examines which similarities are relevant in this case—the penalized conduct or the broader characteristics of the two groups as a whole. The Court agrees with appellant that, notwithstanding the different statutory classifications as SDP versus MID, appellant is similarly situated to MID persons convicted under subd. 3a(c)(1), because the penalized conduct is the same under both subds. 3a(b)(1) and 3a(c)(1). The two subdivisions prohibit the same conduct in identical language, regardless of commitment status.

Next, because appellant's challenges does not implicate a fundamental right or involve a suspect class, the Court considers whether the sentencing disparity between SDP and MID patients under subds. 3a(b)(1) and 3a(c)(1) is a rational means of achieving the Legislature's policy goal. The purpose of both subdivisions is to protect treatment facility staff, a legitimate policy goal. Legislative committee discussions show legislators found the possibility of a five-year conditional release term would be more effective in deterring SDP patients, who do not necessarily suffer from disorders that prevent them from understanding the consequences of their actions, than MID patients from the same behavior. The Court finds this is an adequate justification for the disparate sentences under subds. 3a(b)(1) and 3a(c)(1). Appellant's equal protection rights were not violated. ***State v. Lee***, A20-0758, 2022 WL 2232339 (Minn. Sup. Ct. 6/22/2022).

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Employment & Labor Law

JUDICIAL LAW

Workers' compensation; exposure to noise covered. An employee whose job included monitoring workplace noise levels was entitled to workers' compensation benefits due to exposure to hazardous noise, which was deemed a "significant contributing factor" in the development of his hearing loss. The Minnesota Supreme Court, partially upholding a decision of the Workers' Compensation Court of Appeals, held that there was sufficient evidence that the employee sustained occupation disease for which compensation was required, and the court properly ordered payment of medical benefits by the employer, by whom the employee was most recently exposed to the hazard. But the Court overruled the compensation judge in determining that all issues other than medical benefits were moot and remanded for determination whether the "last-exposure employer" was entitled to reimbursement from the "last significant exposure employer" under Minn. Stat. §176.12, subd. 5 and Minn. Stat. §176.66, subd. 10. ***Sershen v. Metropolitan Council***, 2022 WL 1482048 (Minn. App. 05/11/2022) (unpublished).

Unemployment compensation; home health aide denied benefits. A home health care aide who replaced narcotics in a cabinet without recording that they had been received and on several other occasions recorded administering medication when she had not done so, was not entitled to unemployment compensation benefits. Affirming the decision of an unemployment law judge (ULJ) with the Department of Employment & Economic Developments (DEED), the court of appeals held that the employee violated the employer's policies, which constituted "disqualifying misconduct." ***Erickson v. Legacy of Delano, LLC***, 2022 WL 1210259 (Minn. Ct. App. 04/25/2022) (unpublished).

Unemployment compensation; five cases address various issues. A quintet of cases recently decided by the Minnesota Court of Appeals addressed a variety of unemployment compensation issues. As usual the employees lost most of them, but managed to prevail in one.

An employee who quit his grocery distributor job because his schedule conflicted with day care needs was denied unemployment compensation benefits. The employee failed to satisfy any

of the statutory provisions that would entitle him to unemployment benefits after quitting the job. ***Toenjes v. SpartanNash Associates, LLC***, 2022 WL 1531672 (Minn. Ct. App. 05/16/2022) (unpublished).

A supermarket employee who was fired because he made inappropriate comments to coworkers and harassed and offended customers was denied unemployment compensation benefits. The unemployment law judge (ULJ) adequately addressed all nine of the grounds raised by the employee upon a request for reconsideration after initially denying his claim. ***Kuller v. Super Valu***, 2022 WL 1533906 (Minn. Ct. App. 05/16/2022) (unpublished).

A hair stylist who quit her job was denied unemployment compensation benefits because she did not resign due to a "good" reason caused by the employer. The failure to satisfy the statutory requirements of Minn. Stat. §268.095 barred her claim. ***McDuff v. Half Moon Clippers***, 2022 WL 1531364 (Minn. Ct. App. 05/16/2022) (unpublished).

Receipt of Social Security retirement benefits was properly deducted from an employee's unemployment compensation benefits. The ULJ correctly ruled that the payment constituted a set-off from any unemployment compensation benefits under Minn. Stat. §268.085, subd. 4. ***Powers-Potter v. Data Recognition Corp.***, 2022 WL 1532131 (Minn. Ct. App. 05/16/2022) (unpublished).

An employee who filed an appeal from an initial determination of ineligibility 13 days late, nearly two weeks after the 20-day deadline, was granted leniency by the appellate court and allowed to proceed and reopen his case. The ULJ did not adequately consider whether the employee, who claimed he was late due to problems with the English language and difficulty finding a translator, satisfied the "substantial compliance" requirement establishd by *In Re Murack,* 957 N.W.2d 124 (Minn. Ct. App. 2021), which came on the heels of an executive order by Gov. Walz extending the time for unemployment compensation appeals. ***Victoria v. Long Prairie Packing***, 2022 WL 1531545 (Minn. Ct. App. 05/16/2022) (unpublished).

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Environmental Law

JUDICIAL LAW

U.S. Supreme Court limits EPA's ability to regulate power plant emissions under the Clean Air Act. On June 30, 2022, the Supreme Court of the United States issued a decision in *West Virginia v. EPA*, holding that the "major questions" doctrine limits the authority of the Environmental Protection Agency (EPA) to regulate greenhouse gas emissions under the Clean Air Act (CAA).

The case involved the EPA's 2015 Clean Power Plan (CPP) rule, which established the first-ever performance standards for carbon dioxide (CO2) emissions from existing power plants in the United States under section 111(d) of the CAA, 42 U.S.C. 7411 (d). At the time, then-President Obama described the CPP as the administration's "biggest step yet to combat climate change"; the rule aimed to reduce carbon emissions from existing power plants by over 30% compared to 2005 levels.

Under section 111 of the Act, performance standards for pollutants such as CO2 must be based upon the degree of emission limitation achievable through the application of the "best system of emission reduction" (BSER). 42 U.S.C. 7411 (a)(1). In the CPP, EPA identified four broad "building blocks" that together constitute BSER for CO2 at existing power plants: making plants more efficient, increasing the use of low-carbon power sources such as natural gas, using more low-carbon power sources (e.g., solar, wind), and increasing energy efficiency. On the basis of these BSER building blocks, the CPP established CO2 emission performance rates for two subcategories of affected electric generating units (EGUs)—fossil fuel-fired electric utility steam generating units and stationary combustion turbines. The rule then set state-specific CO2 goals, expressed as both emission rates and as mass, that reflect the subcategory-specific CO2 emission performance rates and each state's mix of affected EGUs subject to the two performance rates. States had discretion to determine the methods they would use to comply with the CO2 goals, which could include emissions credit trading between sources or even between states. Finally, the rule provided guidelines for the development, submittal, and implementation of state plans that implement the BSER emission performance rates either through emission standards for affected EGUs, or through measures that achieve the equivalent of those rates. The final rule provided up to 15 years for full implementation of all emission reduction measures. The CPP's performance rates, by EPA's own admission, were so strict that no existing coal plant would be able to comply without undertaking one of the CPP's means of "generation shifting," i.e., moving from coal to natural gas, solar, or wind. EPA projected that this would impose billions in compliance costs and require the retirement of many coal plants.

The CPP has yet to come into effect. It was immediately challenged by numerous states and private parties and eventually stayed by the Supreme Court in February 2016. Notably, as Justice Kagan explained in her dissent in the current decision, "[m]arket forces alone caused the power industry to meet the Plan's nationwide emissions target—through exactly the kinds of generation shifting the Plan contemplated." As a result, Justice Kagan continued, the CPP "had become, as a practical matter, obsolete." Nonetheless, the EPA under the Trump administration rescinded the CPP in 2019 and replaced it with the less stringent Affordable Care Energy (ACE) rule. In the ACE rule, EPA decided the BSER would be based upon building block one of the CPP, i.e., a combination of equipment upgrades and other "inside the fence-line" operating practices that would improve facilities' heat rates, and *not* upon the generation-shifting mandates of blocks 2 and 3 of the CPP.

Numerous states and private parties challenged EPA's repeal of the CPP and promulgation of the ACE rule in the D.C. Circuit court of appeals. The D.C. Circuit vacated EPA's repeal of the CPP and its promulgation of the ACE rule, holding that EPA erred by determining power generation shifting cannot constitute a "system of emission reduction" under Section 111. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 995 (D.C. Cir. 2021). Subsequently, upon an unopposed motion by the EPA under the new Biden administration, the D.C. Circuit stayed its *vacatur* of EPA's repeal of the CPP while the EPA evaluated whether to promulgate a new Section 111(d) rule. The Supreme Court then granted petitions for *certiorari* from West Virginia and several other Republican-led states. In the interim, the EPA announced that it planned to pursue different climate regulations and would not be reinstating the CPP.

Writing for a 6-3 majority of the court, Chief Justice Roberts held that EPA lacked clear congressional authority to pass the CPP. The decision first addressed the government's arguments that the petitioner states did not have standing, given that the CPP never went into effect and that EPA stated it will not enforce the CPP but will instead pursue new climate regulations. The Supreme Court was not convinced. Because the D.C. Circuit had vacated the ACE rule and the ACE's rule's repeal of the CPP, the D.C. Circuit's decision

effectively reinstated the CPP. The CPP "injures" the petitioning states, the Court held, because it requires them to regulate power plant emissions more stringently, and a "favorable ruling" from the Supreme Court would "redress" the injury. Accordingly, petitioners met the requisite standing elements. The Court posited that the government argument was in fact based on mootness, not standing. But to establish mootness, the Court held, the government bore the burden "to establish that a once-live case has become moot." Here, the EPA's statements that it did not intend to enforce the CPP were insufficient, the Court held; "voluntary cessation does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" (citations omitted).

Turning to the merits, Justice Roberts framed the issue as follows: "whether restructuring the Nation's overall mix of electricity generation, to transition from 38% to 27% coal by 2030, can be the BSER within the meaning of Section 111." The answer, the Court held, is no. The Court reached its decision largely in reliance upon the "major questions doctrine," which Justice Roberts described as follows: "[O]ur precedent teaches that there are extraordinary cases that call for a different approach—cases in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." (Citations omitted.) In such cases, the Court held, "given both separation of powers principles and a practical understanding of legislative intent, the agency must point to clear congressional authorization for the authority it claims." "Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices." (Citations omitted.) The major questions doctrine, Justice Roberts explained, addresses a recurring problem: "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."

In this case, the Court held that the vague language of CAA Section 111—authorizing EPA to determine "the degree of emission limitation achievable through the application of the *best system of emission reduction* (emphasis added)—did not provide the "clear congressional authorization" necessary to justify the "transformative expansion" of regulatory authority EPA claimed as the basis for the CPP's sweeping change in the nation's mix of methods of energy generation. The Court stated that its decision was supported by the fact that Congress had "conspicuously and repeatedly" declined to adopt the type of regulatory program established by the CPP. In addition, the Court noted that EPA's interpretation of Section 111(d) was inconsistent with the agency's prior use of the statute, which had been rare and limited to "measures that would reduce pollution by causing the regulated source to operate more cleanly." In reversing the D.C. Circuit, Justice Roberts conceded that "[c]apping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible solution to the crisis of the day." (Citations omitted.) However, he continued, "it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."

Justice Kagan, in a dissent joined by Justices Breyer and Sotomayor, sharply disagreed with the majority, criticizing the court for stripping EPA of "the power Congress gave it to respond to the most pressing environmental challenge of our time." (Citations omitted.) The regulation of climate change, Justice Kagan wrote, falls squarely within the scope of Section 111, which authorizes EPA to regulate stationary sources of any substance that "causes, or contributes significantly to, air pollution" and that "may reasonably be anticipated to endanger public health or welfare." Justice Kagan also criticized the majority's narrow reading of reading of the key language "best system of emission reduction" for power plants in section 111(a)(1). "Best system," she argued, is an intentionally broad delegation of power, designed to allow EPA to "respond, appropriately and commensurately, to new and big problems." And, she continued, "the parties do not dispute that generation shifting is indeed the 'best system'... to reduce power plants' carbon dioxide emissions." Finally, Justice Kagan called into question what may be the most consequential aspect of the majority opinion: "It announces the arrival of the 'major questions doctrine,' which replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules." The prior decisions relied upon by the majority, she argued, were decided within the context of the Court's normal approach to interpreting agency claims to statutory authority, which is often rooted in the principles of agency deference outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984), and there was no need for the Court to go beyond these principles. By doing so, Justice Kagan continued, the Court has now created a two-step inquiry: "First, a court must decide, by looking at some panoply of factors, whether agency action presents an 'extraordinary case.' If it does, the agency 'must point to clear congressional authorization for the power it claims,' someplace over and above the normal statutory basis we require." (Citations omitted.)

Exactly how this new "two-step" process will be applied by federal courts remains to be seen. However, there is little doubt that the Supreme Court's decision in this case will have ramifications far beyond limiting EPA's ability to regulate climate change under Section 111(d) of the Clean Air Act. ***West Virginia v. EPA***, ___ U.S. ___ (2022).

Minnesota Court of Appeals rules against the MPCA in favor of city wastewater treatment facility. In May the Minnesota Court of Appeals ruled in favor of the City of Osakis Wastewater Treatment Facility in its challenge to MPCA's reissuance of the facility's NPDES permit, as well as to MPCA's denial of a contested case hearing on the permit. The lower court's decision was reversed and remanded for reconsideration and for a contested case hearing.

The case involved the MPCA's lake eutrophication standards. Eutrophication is the excess nutrient loading to water bodies caused by human sources and activities. On the basis of these standards, the MPCA set a total phosphorus limit in its reissuance of an NPDES permit to the city that was lower than the limit requested by the city.

The court found that the MPCA misinterpreted the state and federal rules applicable to determining the total phosphorus limit in the permit. Despite the substantial deference and assumption of correctness given to agency decisions, the court looked only to the language of the rules because they were "clear and capable of understanding" and did not require the court to defer to the agency's interpretation.

Thus, the court found that MPCA made an error in its issuance of the NPDES permit because it relied on only one of three variables of the lake-eutrophication standards in finding a basis for its phosphorus limit. Instead, the MPCA should have also considered at least one of the other two variables. It was not enough to use phosphorus as the basis for finding that lake eutrophication standards would be exceeded—the MPCA also would have to had to find that the chlorophyll-a or Secchi disk transparency standards would be exceeded. This error meant that

the MPCA was not able to prove there was substantial evidence in the record to support its phosphorus limit.

MPCA's additional attempts to justify its phosphorus limit failed as well. The documents in the administrative records used to support the limit did not do what the MPCA contended—they did not support the conclusion that the city's wastewater treatment facility would have a reasonable potential to cause or contribute to a violation of state lake-eutrophication standards.

On the issue of the contested case hearing, the court found that because there was not substantial evidence in the record supporting the total phosphorus limit, there was not a reasonable basis for denying the request for a hearing. In addition, the MPCA's explanations were conclusory, did not discuss the evidence in detail, and did not "explain with specificity why a contested-case hearing would not be appropriate." ***In re A Contested Case Hearing Request & Reissuance of Nat'l Pollutant Discharge Elimination Sys.***, No. A21-0986, 2022 Minn. App. Unpub. LEXIS 269 (05/02/2022).


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Federal Practice
JUDICIAL LAW

Challenge to $1 attorney's fee award rejected. The 8th Circuit found no abuse of discretion in a district court's award of $1 in attorney's fees to plaintiff's counsel in a FLSA action, where the district court had found that increases in hourly rates were "entirely arbitrary and unreliable," the hours claimed were "excessive and unreliable," and the district court had calculated the lodestar as $648.10 despite counsel's request for more than $30,000 in fees. ***Skender v. Eden Isle Corp.***, 33 F.4th 515 (8th Cir. 2022).

Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 12(f); motion to strike and dismiss class action complaint denied. Judge Frank denied the majority of the defendant's motion to strike and dismiss a class action complaint, requiring additional briefing on several issues and deferring consideration of standing issues until after the class-certification stage. ***Chen v. Target Corp.***, 2022 WL 1597417 (D. Minn. 5/19/2022).

Motion for extension of time to apply for attorney's fees denied. Finding no "good cause" or "excusable neglect," Judge Wright denied defendants' motion to extend their time to move for attorney's fees, finding that defendants' "mistake of law" "cannot constitute excusable neglect." ***Core & Main, LP v. McCabe***, 2022 WL 1598230 (D. Minn. 5/20/2022).

Fed. R. Civ. P. 60(b)(1); "mistake;" error of law. The Supreme Court held that a judge's error of law constitutes a "mistake" for purposes of Fed. R. Civ. P. 60(b)(1), meaning that any "mistake"-based challenge must be brought within one year of the time the judgment becomes final. ***Kemp v. United States***, 142 S. Ct. 1856 (2022).

Arbitration; preemption of California law. The Supreme Court held that the FAA preempted a California law that invalidated contractual waivers of the right to assert "representative claims" under the California private attorney general statute. ***Viking River Cruises v. Moriana***, 142 S. Ct. 1906 (2022).

28 U.S.C. §1782(a); arbitration; "foreign tribunal;" "international tribunal." Rejecting attempts to utilize 28 U.S.C. §1782(a) to obtain discovery in aid of foreign arbitrations, the Supreme Court held that for purposes of 28 U.S.C. §1782, "foreign tribunals" and "international tribunals" necessarily exercise "government authority," meaning that "private adjudicatory bodies do not fall within §1782." ***ZF Automotive US, Inc. v. Luxshare Ltd.***, 142 S. Ct. 2078 (2022).

Arbitration; contract formation; denial of motion to compel arbitration affirmed. Finding that the issue of whether a signatory to an arbitration contract had the authority to bind a buyer was an issue of contract formation for the court rather than an issue for the arbitrator, the 8th Circuit affirmed the district court's denial of a motion to compel arbitration. ***GP3 II, LLC v. Litong Capital, LLC***, 35 F.4th 1124 (8th Cir. 2022).

Fed. R. Civ. P. 24(a)(2); denial of motion to intervene as untimely affirmed. Reviewing for abuse of discretion and affirming an order by Judge Ericksen, the 8th Circuit found that all four relevant factors weighed in favor of denying a motion to intervene. ***United Food & Comm. Workers Union, Local No. 663 v. U.S. Dept. of Ag.***, 36 F.4th 777 (8th Cir. 2022).

28 U.S.C. §1338(b); removal; remand. Where the plaintiff filed an action in the Minnesota courts alleging unlawful use of its trade name but not asserting any federal cause of action, the defendants removed pursuant to 28 U.S.C. §1338(b), Judge Menendez ordered defendants to file a memorandum supporting their claim of federal subject matter jurisdiction, and defendants attempted to rely on the artful-pleading doctrine to have the court find the presence of a Lanham Act claim and also raised several other arguments in support of federal jurisdiction, Judge Menendez rejected all of the defendants' arguments and remanded the case to the Minnesota courts. ***Horizon Roofing, Inc. v. Best & Fast Inc.***, 2022 WL 2052729 (D. Minn. 6/7/2022).

Motions to amend scheduling orders; multiple cases. Affirming an order by Magistrate Judge Schultz, Judge Wright found that some defendants' agreement to amend the scheduling order had "no bearing" on the "primary" issue of plaintiffs' diligence, agreed with the magistrate judge that plaintiffs were not diligent, and rejected plaintiffs' argument that "changed circumstances" warranted amending the scheduling order. ***Goyette v. City of Minneapolis***, 2022 WL 1963722 (D. Minn. 6/6/2022).

Finding no "good cause," a "lack" of diligence and that any motion to amend the scheduling order would be "futile," Judge Wright denied defendant's letter request for leave to file a motion to modify the scheduling order. ***Kelley v. BMO Harris Bank, N.A.***, 2022 WL 1771999 (D. Minn. 6/1/2022).

Affirming Magistrate Judge Schultz's order denying defendants' motion to amend the pretrial scheduling order on alternate grounds, Judge Wright found that defendants were not diligent and that the plaintiff would be prejudiced by any amendment. ***Fair Issac Corp. v. Fed. Ins. Co.***, 2022 WL 1537957 (D. Minn. 5/16/2022).

Finding neither "good cause" nor "extraordinary circumstances" to amend the pretrial scheduling order, Magistrate Judge Docherty denied plaintiff's request to amend multiple deadlines in the pretrial scheduling order. ***Zarling v. Abbott Labs.***, 2022 WL 1598232 (D. Minn. 5/20/2022).

Privilege; multiple cases. Denying most of the defendant's motion to compel, Magistrate Judge Docherty found that communications between counsel for multiple parties were work product protected by the "common-interest" doctrine, and also found

that billing entries describing "substantive work performed by attorneys or their mental impressions" were privileged. ***Ploen v. AIG Spec. Ins. Co.***, 2022 WL 2208328 (D. Minn. 6/21/2022).

Granting in part defendants' motion to compel, Magistrate Judge Bowbeer determined that the identities of persons who consulted with plaintiff's counsel regarding communications or payments they may have received from the defendants were privileged. ***Cohen v. Consilio LLC***, 2022 WL 2072546 (D. Minn. 6/9/2022).

Fed. R. Civ. P. 45; subpoena; burden; proportionality; cost-shifting. Granting in part plaintiffs' motion to compel compliance with a subpoena, Magistrate Judge Docherty considered "the special proportionality considerations governed by Rule 45" and ordered the plaintiffs to assume some of the costs related to the expense of producing the documents they requested. ***Rochester Drug. Co-op. v. Mylan Inc.***, 2022 WL 1598377 (D. Minn. 5/20/2022).

First-filed doctrine; second-filed action transferred. Where competing declaratory judgment actions were filed two hours apart, and the court in the first-filed action had already denied a motion to transfer that action to the District of Minnesota, Judge Menendez ordered the second-filed action transferred to the Western District of Washington, where the first-filed action was pending. ***Mass. Bay Ins. Co. v. G.M. Northrup Corp.***, 2022 WL 2236333 (D. Minn. 6/22/2022).

Fed. R. Civ. P. 4(d); request for cost of service denied. Magistrate Judge Leung denied plaintiffs' request for an award of fees and costs related to service where plaintiffs did not "provide[] any argument in support of their request" and plaintiffs did not establish that they complied with the "technical requirements" of Fed. R. Civ. P. 4(d). ***SUPERVALU Inc. v. Virgin Scent Inc.***, 2022 WL 2156233 (D. Minn. 6/15/2022).

Fed. R. Civ. P. 11; sanctions awarded. Where an attorney, acting *pro se*, had two actions dismissed for lack of personal jurisdiction over the defendants, had been sanctioned by Judge Ericksen pursuant to Rule 11 in the second of those cases, and then filed a third action raising many of the same issues, Judge Tostrud found that the plaintiff had "pretty clearly violated Rules 11(b)(1) and (2)," and granted defendants' motion for Rule 11 sanctions in an amount to be determined. ***Pederson v. Kesner***, 2022 WL 2163776 (D. Minn. 5/10/2022).

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Immigration Law

JUDICIAL LAW

Migrant protection protocols (MPP) ("Remain in Mexico"): End of the saga? On 6/30/2022, the U.S. Supreme Court ruled 5-4 in *Biden, et al. v. Texas, et al.*, that the Biden administration's recission of Remain in Mexico was a valid action.

Key aspects of the Court's decision:

1) The district court did not have jurisdiction to stop the Biden administration's recission of Remain in Mexico under the Immigration and Nationality Act, INA § 242(f)(1)/8 USC §1252(f)(1);

2) INA §235(b)(2)(C)/8 USC §1225(b)(2)(C) allows the Department of Homeland Security (DHS), in its discretion, to return noncitizens to Mexico to await their immigration proceedings, i.e., "may," not "shall;"

3) The DHS Secretary's second October 2021 Memorandum, replacing its first June 2021 Memorandum (rescinding MPP), has legal effect once the Court's decision has been certified and sent back down, usually within 28 days—at least under its analysis employing the INA.

What's next? This may not be the end of litigation since the Court directed the district court to consider the question of the validity of the October 2021 Memorandum under section 706 of the Administrative Procedure Act (APA), in the first instance. Stay tuned. ***Biden, et al. v. Texas, et al.***, 597 U.S. (2022). *https://www.supremecourt.gov/opinions/21pdf/21-954_7l48.pdf*

No jurisdiction for district courts in requests for class-wide injunctive relief. On 6/13/2022, the U.S. Supreme Court ruled 6-3 that INA §242 (f)(1)/8 USC §1252(f)(1) deprives district courts of jurisdiction to entertain respondents' requests for class-wide injunctive relief. The terms "enjoin" and "restrain" retain their ordinary meaning here. The lower courts do, however, retain the authority to "enjoin" or "restrain" the operation of the relevant statutory provisions "with respect to the application of such provisions to an individual [noncitizen] against whom proceedings under such part have been initiated." ***Garland, et al. v. Gonzalez, et al.***, 596 U.S.___ (2022). *https://www.supremecourt.gov/opinions/21pdf/20-322_m6hn.pdf*

No factual findings review by federal courts in discretionary relief proceedings. On 5/16/2022, the U.S. Supreme Court ruled 5-4 that federal courts lack jurisdiction to review facts found in discretionary relief proceedings under INA §245 and other provisions listed in INA §242(a)(2)(B)(i)/8 USC §1252(a)(2)(B)(i). ***Patel, et al. v. Garland***, 596 U.S. ____ (2022). *https://www.supremecourt.gov/opinions/21pdf/20-979_h3ci.pdf*

No due process violation here. On 6/17/2022, the 8th Circuit Court of Appeals dismissed the petitioner's claim that the immigration judge violated her due process rights. The court observed that the immigration judge advised her of her right to counsel and there was no absence of fundamental fairness. The court opined that the petitioner's admission of the charges against her and concession of removability were admissible at a later hearing before a second immigration judge assigned to her case. Nor did the agency commit procedural error when it denied the petitioner's motion to remand. It was in fact a motion to reopen, failing to comply with the substantive requirements associated with such. ***Holmes v. Garland***, No. 21-2135, *slip op.* (8th Circuit, 6/17/2022). *https://ecf.ca8.uscourts.gov/opndir/22/06/212135P.pdf*

New asylum claim not factually independent of prior one. On 5/27/2022, the 8th Circuit Court of Appeals denied the petition for review, finding the Board of Immigration Appeals did not abuse its discretion when it denied the Chinese Christian petitioner's third motion to reopen given his failure to demonstrate *prima facie* eligibility for asylum relief. The third motion reflected an effort to relitigate his prior asylum application based, in large part, on alleged mistreatment during a 2005 detention in China on account of his Christian activities. ***Li v. Garland***, No. 21-3328, *slip op.* (8th Circuit, 5/27/2022). *https://ecf.ca8.uscourts.gov/opndir/22/05/213328P.pdf*

No nexus between persecution suffered and proposed social groups. On 5/12/2022, the 8th Circuit Court of Appeals upheld the determinations made by the immigration judge and Board of Immigration Appeals that the Guatemalan petitioner failed to establish a nexus between the persecution he suffered and his proposed social groups, that is, his father's immediate family and "young, Guatemalan men who refuse to cooperate with gang members." In the former group, the court

reasoned that family membership was not a central reason for the threats but rather "incidental or tangential to the extortionists' motivation—money." As for the latter group, the court noted it is not recognized under the precedent of *Gaitan v. Holder*, 671 F.3d 678, 681 (8th Cir. 2012). The court further found that substantial evidence supported the agency's conclusion that the petitioner suffered neither past persecution ("single violent encounter with gang members [cutting Tojin's face with a knife and threatening his friend at gunpoint] does not rise to the 'extreme concept' of persecution") nor demonstrated a well-founded fear of future persecution. ***Tojin-Tiu v. Garland***, No. 21-2269, *slip op.* (8th Circuit, 5/12/2022). *https://ecf.ca8.uscourts.gov/opndir/22/05/212269P.pdf*

CAT case: BIA failed to address petitioner's likely treatment in IDP camp in Somalia. On 4/28/2022, the 8th Circuit Court of Appeals upheld the Board of Immigration Appeals' reversal of the immigration judge's grant of deferral of removal under the Convention Against Torture (CAT), finding it "squarely address[ed] the evidence on which the IJ [immigration judge] based its finding" and adequately justified why the petitioner, suffering from mental illness, was unlikely to be institutionalized in Somalia. Furthermore, the court found that the board's determination that the petitioner failed to show why he would more likely than not be forcibly evicted from an internally displaced person (IDP) camp was warranted. However, the court found the board did not address the immigration judge's findings regarding the petitioner's likely treatment in an IDP camp and what part of that experience constituted torture. Case remanded for further proceedings. ***Salat v. Garland***, No. 20-2662, *slip op.* (8th Circuit, 4/28/2022). *https://ecf.ca8.uscourts.gov/opndir/22/04/202662P.pdf*

ADMINISTRATIVE ACTION

Temporary protected status (TPS) and deferred enforced departure (DED).

Venezuela: On 7/11/2022, Secretary Alejandro Mayorkas announced his extension of the designation of Venezuela for temporary protected status for 18 months. The extension will be effective from 9/10/2022 through 3/10/2024. Only those beneficiaries under Venezuela's existing designation, and who were already residing in the United States as of 3/8/2021, are eligible to re-register for TPS under this designation. *News Release. https://www.dhs.gov/news/2022/07/11/dhs-announces-extension-temporary-protected-status-venezuela*

Liberia: On 6/27/2022, President Biden announced the extension of DED and employment authorization through 6/30/2024 for those Liberians with DED status (as of 6/30/2022) as well as expansion of DED for Liberians who have been continuously present in the United States since 5/20/2017. "Memorandum on Extending and Expanding Eligibility for Deferred Enforced Departure for Liberians." *https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/27/memorandum-on-extending-and-expanding-eligibility-for-deferred-enforced-departure-for-liberians/* **87 Fed. Reg. 38871-73** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-06-29/pdf/2022-14082.pdf*

Cameroon: On 6/7/2022, DHS announced that Secretary Alejandro Mayorkas has designated Cameroon for temporary protected status for 18 months, effective 6/7/2022. Those individuals who have continuously resided in the United States since 4/14/2022 (and continuously physically present in the United States since 6/7/2022), are eligible to apply. **87 Fed. Reg. 34706-13** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-06-07/pdf/2022-12229.pdf*

Afghanistan: On 5/20/2022, DHS announced that Secretary Alejandro Mayorkas has designated Afghanistan for Temporary Protected Status for 18 months, effective 5/20/2022. Those individuals who have continuously resided in the United States since 3/15/2022 (and continuously physically present in the United States since 5/20/2022), are eligible to apply. **87 Fed. Reg. 30976-88** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-05-20/pdf/2022-10923.pdf*

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Intellectual Property

JUDICIAL LAW

Trademark: The doctrine of laches is triggered by actionable infringement claims. The United States Court of Appeals for the 8th Circuit recently held that a district court erred by failing to consider the six likelihood-of-confusion factors when it granted summary judgment on the basis of the doctrine of laches. A.I.G. Agency, Inc. sued American International Group, Inc. for common-law trademark infringement and unfair competition related to the "AIG" trademark. Agency began using the AIG mark in Missouri in 1958 in relation to insurance broker services. The earliest possible date International first used the AIG mark was 1968. International obtained a federal trademark registration for the mark in 1981. International sent Agency letters twice, demanding that Agency cease using the AIG mark. Agency responded both times by asserting its right to use the mark in Missouri and Illinois due to its earlier first date of use in those locations. In a third letter, International stated that it would only take legal action if Agency used the mark outside of specific counties in Missouri. Starting around 2012, Agency alleged that International began a more aggressive advertising campaign that led to a notable increase in customers confusing Agency with International. Agency sued International in 2017. International asserted the doctrine of laches and moved for summary judgment. The district court found that both parties had been knowingly operating with the same mark in the same markets for decades and that Agency had knowledge of the risk of consumer confusion from the date of International's first letter.

On these findings and the basis of laches, the district court granted International's motion for summary judgment. The 8th Circuit reviewed the laches finding and focused on the doctrine of progressive encroachment in relation to inexcusable delay in asserting a claim. Under the doctrine of progressive encroachment, the period of delay relevant for laches begins when the plaintiff has an "actionable and provable" trademark infringement claim. A trademark infringement claim is "actionable and provable" where a plaintiff can demonstrate a likelihood of confusion under a six-factor analysis. A defendant must demonstrate that the plaintiff could have shown a likelihood of confusion under the six-factor analysis at a time point sufficiently far in the past to constitute inexcusable delay. The 8th Circuit noted that the district court did not conduct the six-factor analysis to determine the likelihood of confusion for the issue of progressive encroachment. Genuine disputes of material fact existed that precluded summary judgment. The case was reversed and remanded for further proceedings. ***A.I.G. Agency, Inc. v. Am. Int'l Grp., Inc.***, 33 F.4th 1031 (8th Cir. 2022).

Patents: Exclusive licensing agreements cannot bind future third parties under the theories of equitable estop-

pel or agency. Recently, the United States Court of Appeals for the 8th Circuit held that a district court did not err in finding that neither a theory of equitable estoppel nor a theory of agency supported binding a third party to a settlement agreement to which it was not a party. Cardiovascular Systems, Inc. (CSI) sued Cardio Flow, Inc. alleging breach of a prior settlement agreement that resolved a dispute of ownership in certain patents. CSI's late founder, Dr. Shturman, assigned his future patent interest to the company but then attempted to patent some of his inventions on his own, which led to litigation. He died during litigation and left any interest he had to his wife, Lela Nadirashvili.

In 2012, Nadirashvili and CSI entered into a settlement agreement that provided inverse exclusive licenses for each party to the rights of the Shturman patents owned by the opposing party. The agreement also contained a provision allowing the parties to assign their respective rights to a third party if such third party agreed to be bound to the terms of the agreement. Nadirashvili then assigned all her rights from the agreement to Cardio Flow. In district court, CSI alleged Cardio Flow was bound to the agreement through the doctrines of equitable estoppel and agency and had failed to follow its terms. The district court rejected these arguments and granted summary judgment in favor of Cardio Flow. The 8th Circuit reviewed each doctrine in turn *de novo*. As to equitable estoppel, CSI provided no evidence Cardio Flow had concealed a material fact. Instead, it asserted that concealment of a material fact is not an essential element of equitable estoppel. The court relied on Minnesota Supreme Court precedent and rejected the assertion. The court further clarified that its past decision allowing equitable estoppel upon a non-signing spouse to enforce a mortgage agreement was to be read narrowly and was not comparable to the facts of the case at hand. Within the claim of agency, the court rejected two arguments. First, it found that there was a lack of evidence to establish that Cardio Flow was a joint venture. Second, the court distinguished CSI's asserted precedent that found a debtor had acted as an agent for a creditor and bound such creditor when making agreements with third parties. The 8th Circuit affirmed the district court and dismissed CSI's claims of agreement breach. ***Cardiovascular Sys. v. Cardio Flow, Inc.***, No. 20-3478, 2022 U.S. App. LEXIS 16314 (8th Cir. 6/14/2022).

Trademark: Claims of trademark infringement do not automatically confer federal subject matter jurisdiction. Judge Menendez recently remanded a case back to state court after finding that a plaintiff's complaint asserting trademark infringement under state law did not automatically create a question of federal law giving the court subject matter jurisdiction. Plaintiff Horizon Roofing, Inc. sued Best & Fast, Inc. (B&F) in the Ramsey County District Court alleging B&F had unlawfully used Horizon's trade name within Minnesota in connection with roofing-contractor services. In its complaint, Horizon did not make a claim under federal trademark law. B&F removed the case to federal court under the pretext of federal question jurisdiction. Horizon challenged the removal. The court rejected B&F's assertion that the complaint must be evaluated under the "artful-pleading" doctrine. Second, the court rejected an argument under the commerce clause that the physical presence of a party in a state for tax purposes established jurisdiction. Third, the court rejected B&F's argument that the TRO issued by the state court against it implicated federal law because it forced B&F to change its names on the internet, thus affecting its nationwide commerce. The district court concluded that a complaint raising only state law trademark infringement claims does not necessarily implicate a federal question. ***Horizon Roofing, Inc. v. Best & Fast Inc.***, No. 22-cv-46, 2022, U.S. Dist. LEXIS 101162 (D. Minn. 6/7/2022).

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Tax Law
JUDICIAL LAW

Property tax: Assessed value exceeds market value. Along the Interstate 494 and Highway 100 interchange, about five miles west of the airport and the Mall of America, sits a massive and storied hotel property. Over its 50-year history, the property has evolved from a Radisson to a Sheraton to its current branding as a Doubletree property. This hotel was the subject property in a valuation dispute for the 2018 tax year. As of the valuation date, the property was operated by the petitioners under a franchise agreement with Hilton Franchise Holding LLC. For several years, the Doubletree had failed to meet quality assurance evaluations presumably required by the franchise agreement with Hilton. In September 2019, Hilton sent petitioners a notice of default under the franchise agreement. The notice included a final product improvement plan (PIP) from Hilton; failure to meet certain improvement goals could have resulted in a termination of the franchise. Rather than make the required improvements, petitioner negotiated the sale of the subject property to a third party, Vinakom, Inc. Vinakom tendered a $26 million purchase offer to the Doubletree in late 2019; the parties signed a purchase agreement in May 2020, and they closed the sale in July 2020. Between the initial offer and the petitioner's acceptance of the offer, the covid-19 pandemic began. The pandemic, of course, had a significant effect on the hospitality industry.

The post-valuation sale of the property, the PIP, and the pandemic contributed to a difficult valuation. The Hennepin County assessor estimated the value at $31,586,400 for the 2018 valuation date. The petitioner's appraiser valued the property at $15,000,000, while the county's expert appraiser valued the property at $26,000,000. In a lengthy opinion, the tax court considered the income and sales approaches to valuing the property. (The parties stipulated that the cost approach was not appropriate in this case.) The court gave no weight to the petitioner's expert's sales comparison approach because court disagreed with the expert's treatment of the pandemic on the valuation. Instead, the court adopted the county's expert's approach, with some modification. Similarly, disagreements with the expert's methodology led the court to give no weight to the petitioner's expert's income capitalization approach. The court again adopted the county's expert's income capitalization approach with some modification. Under the court's final reconciliation, the court held that the 2018 market value of the subject property was $25,500,000. ***Bloomington Hotel Invs., LLC v. Cnty. of Hennepin***, No. 27-CV-19-6973, 2022 WL 2347868 (Minn. T.C. 6/27/2022).

Fact issues preclude summary judgment in conservation easement dispute. In this syndicated conservation easement case, the IRS disallowed a $26 million charitable contribution deduction claimed by Morgan Run Partners, LLC and determined penalties. Morgan timely petitioned for readjustment of the partnership items, and the IRS moved for summary judgment. At issue was whether the "protected in perpetuity" requirement of a qualified conservation easement was met.

Charitable deductions for conservation easements are permitted, but to qualify, the donation of an easement must protect the conservation purpose in perpetuity. Despite this express requirement of perpetuity, even Treasury seems to acknowledge that the only

constant is change. The final rules determining whether the perpetuity requirement is met provide that "subsequent unexpected change in the conditions surrounding the [donated] property... can make impossible or impracticable the continued use of the property for conservation purposes." Nonetheless, "the conservation purpose can... be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding" and the easement deed ensures that the charitable grantee will receive a proportionate share of the proceeds and use those proceeds consistently with the conservation purposes underlying the original gift.

The IRS asserted the language of the gift instrument did not meet these rules governing the mandatory division of proceeds. Noting that "unlike most deeds the Court has examined [this deed] does not explicitly address the subject of judicial extinguishment," the court disagreed that the IRS was entitled to summary judgment. In this instance, the deed expressed the parties' intention that "no change in conditions... will at any time or in any event result in the extinguishment" of the easement. But if circumstances arose that would justify modifying certain restrictions, the deed envisioned that the Trust would have no power to agree to any amendment that would violate section 170(h) (the provision providing for deductions for qualified conservation easements). This language, the court reasoned, gives Morgan a "reasonable argument that the deed violates neither the 'judicial extinguishment' nor the 'protected in perpetuity requirement.'"

The court discussed another potential problem with the deed. In particular, the deed addressed the possibility that the restrictions might be abrogated by the exercise of eminent domain. One reading of the deed suggested that if the easement were subject to eminent domain, the proceeds to the charitable purpose would be limited. Limiting the proceeds that flow to the charitable purpose is problematic because it is at odds with the perpetuity requirement. However, at a separate point in the deed, the deed provides that in the event of eminent domain, the Trust shall be entitled to "the Trust's Proportionate share of the recovered proceeds." The term "proportionate share" seemed a term of art not defined in the deed. The meaning of the term will need to be resolved under state law principles and might require parol evidence. The term "proportionate share" could be defined so as to meet the perpetuity requirements. This created sufficient ambiguity to preclude summary judgment. ***Morgan Run Partners, LLC v. Comm'r***, T.C.M. (RIA) 2022-061 (T.C. 2022).

Individual income tax: *Pro se* taxpayer entitled to innocent spouse relief. Married taxpayers who elect to file a joint federal income tax return are each fully responsible for the accuracy of the return, regardless of which spouse (if either) prepares the return. Each spouse is also jointly and severally liable for the entire amount of tax shown on the return or found to be owing. Under certain circumstances, a spouse who has made a joint return may seek relief from joint and several liability under procedures set forth in section 6015, often referred to as "innocent spouse relief."

In this dispute, taxpayer Jan Pocock sought innocent spouse relief after her abusive spouse filed fraudulent returns for several years. Mr. Pocock fraudulently claimed large refunds on the couple's joint returns by overstating his income and federal income tax withholdings. Mr. Pocock's scheme was eventually discovered, and Mrs. Pocock timely sought relief under section 6015(f). The commissioner denied relief, and Mrs. Pocock appealed to the tax court.

The court applies a *de novo* standard and scope of review when resolving section 6015(f) cases. As the tax court explains in this opinion, the court is aided, but not bound, by revenue procedures in which the commissioner prescribes procedures to determine eligibility for equitable relief. As it relates to 6015(f), the revenue procedure directs a multistep analysis with requirements for relief categorized as threshold or mandatory requirements, streamlined elements, and equitable factors.

First, a requesting spouse must satisfy each of seven threshold requirements to be considered for relief. If the requesting spouse meets the threshold requirements, the commissioner will grant equitable relief if the requesting spouse meets each streamlined element. Otherwise, the commissioner will determine whether equitable relief is appropriate by evaluating the equitable factors.

In this dispute, the commissioner found that Mrs. Pocock did not satisfy three of the seven requirements. The requirements the commissioner found lacking included: (4) no assets were transferred between the spouses as part of a fraudulent scheme; (6) the requesting spouse did not knowingly participate in the filing of a fraudulent joint return; and (7) absent certain enumerated exceptions, the tax liability from which the requesting spouse seeks relief is attributable to an item of the nonrequesting spouse. The tax court addressed each requirement in turn and held that Mrs. Pocock met each requirement. The court characterized the commissioner's contrary findings as "fatally speculative."

The court then determined that Mrs. Pocock met the three requirements for streamlined relief: she (1) is no longer married to Mr. Pocock; (2) she would suffer economic hardship if not granted relief; and (3) she did not know or have reason to know about Mr. Pocock's scheme. ***Pocock v. Comm'r***, T.C.M. (RIA) 2022-055 (T.C. 2022).

Taxpayers who lost home in foreclosure not eligible for home mortgage interest deduction. Home mortgage interest is often deductible as qualified residence interest (QRI). In the context of foreclosures, whether a payment is one of principal (not deductible) or interest (deductible) can be tricky. The general rule is that voluntary partial payments made by a debtor to a creditor are to be applied first to interest and then to principal. Payments made in the context of foreclosure are not considered voluntary. Nonetheless, if the debtor is not insolvent, the tax court has applied the proceeds from a foreclosure sale to interest first and then to principal.

In this dispute, taxpayers who lost their Florida home to foreclosure claimed a home mortgage interest deduction of just over $100,000—the accrued interest owing at the time of the foreclosure sale. Although, as is often the case, the amount realized in the foreclosure sale did not cover the principal balance due from the taxpayer-borrowers, the taxpayers argued that the interest deduction was appropriate because the terms of the credit agreement applied payments first to interest and then to principal. The commissioner countered that since the foreclosure bid did not cover the principal balance due, no interest was paid and therefore no deduction was appropriate.

Although the court suggested that the taxpayers might have been able to establish their entitlement to the deduction, the record was silent as to how the lender applied the funds received from the foreclosure sale. Although the court could not definitively conclude that the lender received only the payment of principal, petitioners did not show, by a preponderance of the evidence, that they had paid the interest. Because the taxpayers failed to meet their burden, the court denied the deduction. The court went on to hold, however, that the taxpayers acted reasonably and in good faith and therefore were not liable for an accuracy-related penalty. ***Howland v. Comm'r***, T.C.M. (RIA) 2022-060 (T.C. 2022).

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MEMBER NEWS

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

John T. Soshnik has joined Fredrikson & Byron as an attorney in the health law group. Soshnik represents health care clients on a wide variety of transactional, regulatory, governance, and contract matters.

Blaine Balow was named a partner at Halunen Law. Balow works in retaliation, discrimination, and harassment litigation and has been recognized as a Super Lawyers Rising Star since 2019.

Jeremy Greenhouse has joined Fredrikson & Byron as a shareholder in the environment law, energy, and energy regulation and permitting groups. Greenhouse advises clients on regulatory compliance,permitting, and enforcement matters involving Minnesota and federal environmental laws.

Christina Benson has joined Eckberg Lammers as an attorney. Benson provides legal guidance to municipalities throughout Minnesota and to private and public sector organizations.

Katherine Barrett Wiik has joined Saul Ewing Arnstein & Lehr as a partner. Her experience includes disputes involving breach of contract as well as non-compete agreements and other employment issues.

Sarah Sicheneder is now a shareholder at Maser, Amundson & Boggio. Sarah joined the team in 2017. Her practice is in guardianship, conservatorship, estate planning, and long-term care planning.

Stephanie Maser has become a shareholder with Cousineau, Van Bergen, McNee & Malone, P.A. Maser practices in the areas of retail premises liability, professional liability, utilities, product liability, mortuary law, and general civil litigation.

Kyle R. Heim has become an associate of Cousineau, Van Bergen, McNee & Malone, P.A. Heim will concentrate his practice on civil litigation, specifically in construction law, general liability, motor vehicle liability, premises liability, and transportation litigation.

Tara L. Smith has launched Smith Family Law PLLC in Edina, where she continues her practice in conflict settlement and contested litigation.

Jessica Dennis has been elected to partnership at Meagher + Geer, P.L.L.P. Dennis practices in the firm's anti-fraud counseling and litigation practice group, providing litigation services related to a variety of insurance coverage and regulatory issues.

Ryan Supple has joined Tarasek Law Office and Minnesota Cannabis Law. Supple's practice is focused on construction litigation and serving the legal needs of clients in the cannabis industry.

Justine K. Wagner has joined Gregerson, Rosow, Johnson & Nilan, Ltd. as an associate. Wagner previously served as a judicial law clerk at the Chisago County district court.

In memoriam

EMMANUEL O. "MANNY" ULUBIYO
of Erskine, MN passed away unexpectedly in September 2021. Ulubiyo was 38 years old. Ulubiyo attended St. John's University and served as assistant district attorney in the Bronx District Attorney's Office in New York before moving to Erskine. Ulubiyo was employed with the Polk County Attorney's Office at the time of his passing.

KEITH F. HUGHES
passed away at the age of 85. Hughes served in the Minnesota State Senate from 1964 to 1972 and practiced at his family practice, Hughes Law Office, until his retirement at age 74.

STEVE AARON BRAND
of St. Paul died in April 2022 at age 73. Brand attended the University of Chicago Law School and practiced in the areas of probate law, estate planning, wills, and trust law.

JONATHAN FRUCHTMAN
of St. Louis Park passed away in May at age 63. Fruchtman owned Jon Fruchtman Law, where he had a long record of providing legal services for his community. He was also a volunteer with the Hennepin County Bar Foundation and the Chrysalis Center for Women.

THE HON. WILLIAM ANDREW JOHNSON
of Northfield passed away at age 76. Johnson was a chief judge of the third judicial district for two terms, retiring in 2010. As chief judge he helped guide the judiciary and served on several Minnesota Supreme Court Advisory Committees.

JOHN GREGORY HOESCHLER
of St. Paul died June 22 after a battle with prostate cancer. In 1968, Hoeschler moved to St. Paul to join Doherty Rumble and Butler, eventually leaving to start his own practice in 1982. Clients and lawyers praised his creative application of law to develop simple, elegant solutions.

First student to attend law school from prison will attend Mitchell Hamline

BY TOM WEBER

It's a moment nearly three years in the making as part of an effort by the Prison to Law Pipeline, a program of All Square and its newly formed subsidiary, the Legal Revolution. The effort aims to transform the law through initiatives that center racial equity, wellness, and the expertise of those most impacted by the law.

Onyelobi received word of her acceptance in early June from President and Dean Anthony Niedwiecki and John Goeppinger, director and co-founder of the Legal Revolution. They traveled to the state prison in Shakopee to deliver the historic news. "We have a drive and a passion to learn the law that most have never seen before because we know what it is to be in here," said Onyelobi. "We know what it's like to be on this side of the law."

The Prison to Law Pipeline is an extension of an existing partnership between Mitchell Hamline and All Square, which have collaborated to provide civil legal services to those returning home from prison since 2018.

"Mitchell Hamline has a long history of looking for ways to expand the idea of who gets to go to law school," said Dean Niedwiecki. "It's important for people who are incarcerated to better understand the criminal justice system, and this is one important way to do that. Our students will also benefit from having Maureen in class with them."

Mitchell Hamline currently runs two clinics, led by professors Brad Colbert and Jon Geffen, that work directly with those currently incarcerated and those recently released.

A series of factors made Onyelobi's acceptance to law school possible. The American Bar Association granted a variance to allow her to attend classes entirely online, which she will do from Shakopee. The variance will allow Mitchell Hamline to admit up to two incarcerated students each academic year for five years. Onyelobi's tuition will be paid through private fundraising and the same scholarship assistance available to all Mitchell Hamline students.

The Prison to Law Pipeline also has the full support of Commissioner Paul Schnell of the Minnesota Department of Corrections, who approved the J.D. program as well as the Legal Revolution's undergraduate paralegal program, which successfully launched in August 2021 in partnership with North Hennepin Community College.

"To have those who have been through the system help craft and challenge the law by accessing high-standard legal education for the betterment of themselves, and for the betterment and service to others, is a remarkable opportunity," said Schnell. "It's something I'm really proud to support."

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