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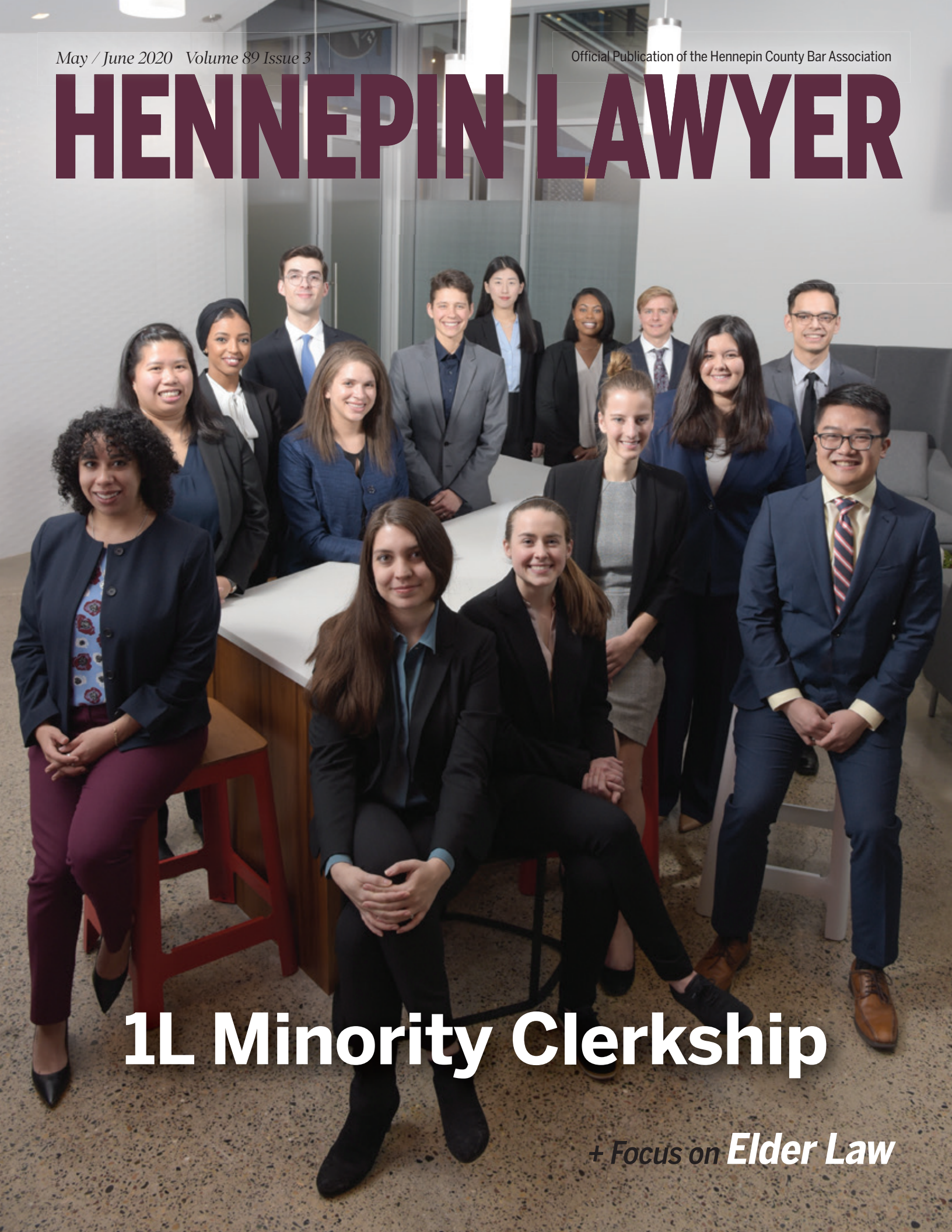
HENNEPIN LAWYER



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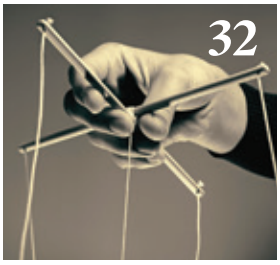

FOCUS ON ELDER LAW

Hennepin Lawyer
May/June 2020
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It's Just a Number, Right?

There is wisdom that comes from experience, and I am not going to stop learning from wise counsel.

— Congresswoman Marcia Fudge

We plan future issues of the *Hennepin Lawyer* about a year in advance, and often by looking to the past. As a committee, we consider topics we have covered in the recent past and some all-time favorites from even further back—and we anticipate what might be important in the year to come. Many times, we pick "timeless" topics appealing to a broad spectrum of our members. It is nearly impossible to be "timely" because, even if we are writing about an issue for which there is a relevant current event, by the time the issue goes to press, the timeliness of the issue could be long past.

The topic of elder law would appear to be such a timeless topic. In many ways it is. Our articles address many of the facets of elder law: practical, unique, ethical, practice-driven, and even new. You are sure to learn something and become a better lawyer, or even "just" a better citizen by reading the articles in this issue.

But, as I write this, we are into our second week of a statewide stay-at-home order. Lives are upended. Businesses are frustrated. Employees are, sadly, becoming former employees. Law firms are coping with how to practice in rapidly changing times. The courts are doing as much as possible, with 90 percent of judges and staff working from home. Remarkably, we are all still able to get a large amount of work done.

In the midst of all of this upheaval, there are ways in which "the elderly" are in the news. They are among the most vulnerable due to underlying health issues and the way many live in group-care situations. There are some who suggest "the elderly" need to be sacrificed for a less dire economic realty. Most recently, news reports are circulating about the tension between an individual's right to privacy and the public's right to know about the impact COVID-19 is having on our group-care settings. Tomorrow, there may well be yet another way "the elderly" are in the news. I can only hope it will be in a more positive light.

Our articles touch on some of the many specific legal concerns of those practicing elder law, or those who have older family members. We have practical how-to articles, an informative culture-and-the-law article, and an inspirational end-of-life article. We also address the darker side of allegations of abuse against the elderly.

In addition to our articles in this issue, I want to bridge to a recent Twitter post from the HCBA which, in turn, harkens back to the 2018 Profiles in Practice issue of the *Hennepin Lawyer* (like I said, sometimes we look back to look ahead as a publication). Back in November/December 2018, we profiled one of our members, Jules Porter, who has quite the resume—Marine Corps veteran, aeronautical engineer, seminarian, lawyer, and video game developer. Recently, Porter launched a Kickstarter campaign for her software development (and more) company, Seraph 7 Studios, as it is developing a one-of-a-kind (but, hopefully, a first-of-its-kind) video game aimed at creating "a hero for every player" in an immersive game that is fun, yet meaningful. The first game is called Ultimate Elder Battle, and it is nothing like you have ever seen. I encourage you to check it out at *www.seraph7studios.com*. It is quite compelling.

Something each of our articles addresses is the respect due to our seniors and to our future selves. How each deserves to be treated as an individual. How, too often, the grouping of individuals as some "other" group is wrong, and shortsighted. I hope you will value the insights provided by our many authors with a diverse interest in the issue of elder law, a practice area that touches each of us.

Hon. William Koch

Bill Koch has served as a judge in Hennepin County since 2007. He is proud to note many of his former and current law clerks have worked on the *Hennepin Lawyer* (because they wanted to and enjoy it, not because he used to be Chair and will not stop talking about how great an experience it is).

Looking Out For Each Other

This is one of the most difficult things I have written. I write this in mid-April, knowing that members won't read it until the beginning of May. As the coronavirus devastates our society, including the legal community, I have no idea where we will be at the time this article is published. My hope is that we will be in a better position than we are today but I admit that I have no way of knowing what the future holds.

My primary concern is for the health and safety of all of our friends, family, and colleagues. I know the lawyers in Hennepin County will comply with whatever the public officials ask us to do. I also know that lawyers are going to be needed in many different capacities as the crisis continues and we eventually begin to recover.

I worry for all the law firms in our community. I am particularly concerned for the smaller law firms and their staffs as this pandemic drags on. How long will firms be able to pay their employees with little or no revenue coming in? I wish I had an answer. I know the leadership of the HCBA will be exploring any and all ideas on how we can help.

I am also concerned about our court system as we move forward. How far behind will the court be on processing criminal cases that have priority? Will the civil calendar take a back seat and have to wait an extended period of time before those cases get back on track? What other essential court processes will need to be delayed? I do have confidence in the leaders of the court system in Hennepin County and know they will do the best they can to get the system restarted when the time is appropriate.

In the last few years we have been spending a lot of time thinking about well-being in the legal community. Now this issue will be more important than ever. If lawyers as a group were particularly susceptible to mental health issues before this crisis, focusing on this issue will only become more important in the near future. I know the stress I feel has increased exponentially as of this date. I assume others feel the same way. We all will need to look out for each other both inside and outside our firms. We need to be aware of the signs that our colleagues are suffering and need help.

I want to close with a word of support to all those in leadership roles at law firms. There is never an easy time to be in a role of leading lawyers and firms. This may be one of the more challenging times. Decisions need to be made, oftentimes quickly with a limited amount of time for consultation. You may not make all perfect decisions, but making decisions is what we have to do. Someone needs to step up and decide crucial issues that affect people's lives. That is what leaders do. Although everyone may not agree with your decisions, your role is critical for the future of your organizations. Someone has to do it. That someone is you. Knowing so many leaders in this community, I for one am confident that everyone will rise to the challenge. We will get through this. Better days lie ahead.

I know the leadership of the HCBA will be exploring any and all ideas on how we can help.

Jeff Baill
2019-2020
HCBA President

jbaill@yostbaill.com

Mr. Baill is the managing partner in the Minneapolis office of Yost & Baill where he practices in the area of Insurance Subrogation. He is the founder and past President of the National Association of Subrogation Professionals.

2020 BAR BENEFIT

Our Annual Fundraising Gala









Promoting access to justice for the people of Hennepin County is the mission of the Hennepin County Bar Foundation (HCBF). This mission is carried out by allocating grants to nonprofits who offer services to our neighbors who would not otherwise be able to afford legal representation. Every March the legal community celebrates the work we've done at our annual Bar Benefit. That's you, our colleagues, and the HCBF.

Thanks to your donations, we are able to give local nonprofits a boost in carrying out their mission—which includes projects that may not otherwise get funded. Because the HCBF cannot do this on our own, we thank you for your donations.

The Bar Benefit highlights the HCBF and the HCBA's pro-bono arm, Volunteer Lawyers Network (VLN). It's a fun night of networking, playing games, bidding on silent auction items, and celebrating the HCBF's and VLN's work. Over 300 members of the Hennepin County legal community gathered at the Lumber Exchange Event Center for this year's event. Together, we raised over $135,000 for the HCBF, with additional funds also raised for VLN.

This year, we were particularly excited to host a special pre-event reception for the 84 lawyers who have shown their commitment to our mission by joining the HCBF Fellows program and the 18 lawyers who have gone even further by becoming Founding Fellows.

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

– Mardell D. Presler
HCBF Development Committee Chair

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Responding in Times of Uncertainty

The COVID-19 pandemic has upended so many things about life in 2020. The disruption it has caused to our daily lives made us wonder what HCBA members did during other times of uncertainty. We picked selections from presidential columns that span our 100 year history showing how HCBA members responded in trying times. One constant we found throughout these messages is that lawyers have a unique duty to step up and help. During this time, we know our members will do the same.

"In times of crisis lawyers have always done their full patriotic duty."

Vocation in a Time of Crisis

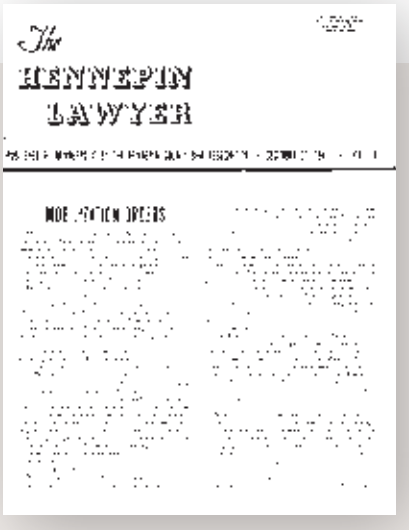
What ought to matter to us as lawyers is the same thing that has always mattered to us as moral actors: the lives that we touch, the pain that we soothe, the faces that we make smile. The law is more than a business or a profession, it is a vocation, and we who have been called must never forget that it is the people that matter.

Not too long ago, that thought closed my remarks upon being installed as your president. Now that call is being suddenly and heartbreakingly held to proof, as we lawyers face with our fellow citizens a great human tragedy and a great national crisis.

We are each in our own way processing and responding to the recent catastrophic terror that has struck our nation. But once we have processed the shock, the anger, and the grief, there are two reactions that all lawyers ought to share: First, how do I respond as a human being? How can I help?

Second, how do I respond as a lawyer? How can I use my professional skills and services in order to offer comfort and relief?

– HCBA President Brian Melendez
addressing the bar in his president's column after the 9/11 attacks.


The HENNEPIN LAWYER

Mobilization Orders

Our country is facing one of the gravest crises in its history. We are engaged in a great world war. The issue is clear. It is imperative that our nation, in conjunction with our allies, stand united against the common enemy, and that we as a people, in cold blood and with deadly determination, see to it that nothing stands in the way of ultimate victory.

In times of crisis lawyers have always done their full patriotic duty. By education and experience we are equipped to act as leaders in thought and action. We will do so now. Many of us will see active service, as we did during the last war. Those of us who by reason of age or infirmity cannot engage in active service, will find other methods of serving our country.

– HCBA President Chester L. Nichols
addressing the bar after the U.S. entered World War II.

"If not us, who, if not now, when?"

I do not know if we as a profession are best equipped to immediately consider and solve all problems, but it is worthwhile to ponder our profession's role in issues beyond the individual lawyer and to hear from members about the issues and problems they want their bar associations to tackle....

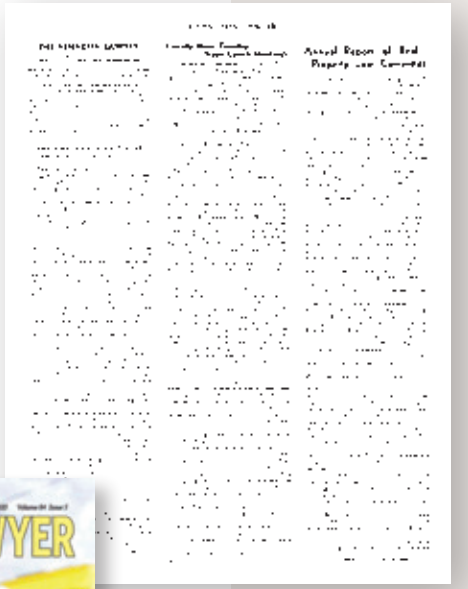
First attributed to Rabbi Hillel, the Who-When Quote read: "If I am not for myself, who will be for me? If I am not for others, what am I? And if not now, when?" Subsequently, many elected officials and political figures have borrowed and/or been attributed as the author of the Who-When Quote or some derivative thereof. For my purposes, Rabbi Hillel's original phrasing works best, but I must admit that the best illustrative use of the Who-When Quote was by President Ronald Reagan in a 1981 speech encouraging tax reform:

> "All of us came here because we knew the country couldn't go on the way it was going. So it falls to all of us to take action. We have to ask ourselves if we do nothing, where does all of this end. Can anyone here say that if we can't do it, someone down the road can do it, and if no one does it, what happens to the country? All of us know the economy would face an eventual collapse. I know it's a hell of a challenge, but ask yourselves if not us, who, if not now, when?"

Either framed in Rabbi Hillel's poetic phrasing or Ronald Reagan's familial but elegant style, the challenge of the Who-When Quote is universally useful and understood.

So we are in good (and politically agnostic) company as a profession if I borrow the Who-When Quote to ponder what we can and cannot do as a profession to solve the challenges and opportunities that face all us.

– HCBA President Kim Lowe
addressing the bar in her column in November of 2015.



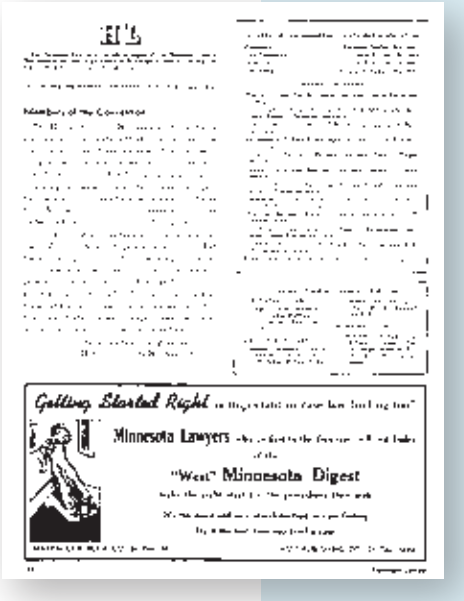
The Challenge of Today

The American bar, alert to its responsibilities, accepting them as opportunities rather than as burdens, now as always, is a profession to which you and I are proud to belong. We shall play our part in the drama of these momentous times, humbly, but we hope, to the best of our abilities.

– HCBA President L.B. Byard
addressing the members in 1933, in the midst of the Great Depression.

Let us do our part

You are assembling, while our nation is at war, with a full recognition of the duty of the Bar. You will show leadership, you will give counsel, you will take measure to protect the very institutions for which your armed forces fight. You will do your part to preserve our courts under the Constitution and you will look forward to the day when the war has been won, the day when so many of our brothers in the profession will return. Let the accounting to them at that time be a good one; let us make sure that what we do in their absence keeps pace with the best tradition of our profession, but above all, demonstrates faithfulness to duty here at home. And while, compared with their service at the front, our efforts may seem meager, indeed, let us do our part, whatever it may be, loyally and well.



– HCBA President Raymond Scallen
addressing the 1943 State Bar convention in the midst of WWII

Attorneys at Paw:

Many HCBA members, now working from home, have new co-workers to spend time with. We'd like to introduce you to a few of them.

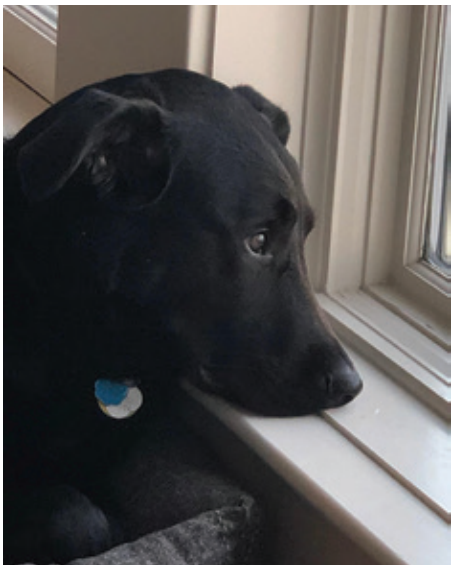
Tortfeasor the Tortoise shares a home office with Sandra and Ben Feist.

Gus works alongside *Hennepin Lawyer* vice-chair Lisa Buck

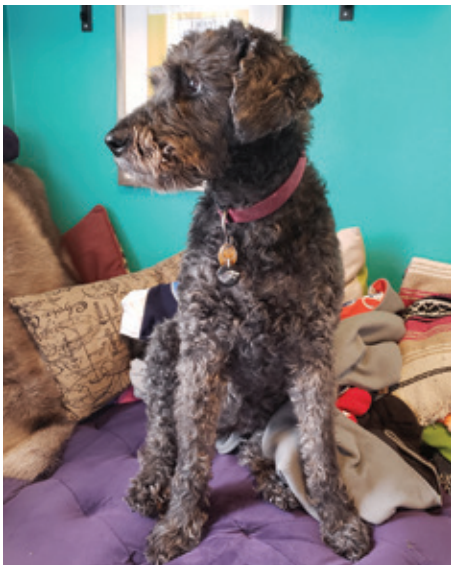
Emmett Robertson's twitter feed is often filled with pictures of Dougie.

Petunia likes to hop on to staff meetings along with HCBA Office Manager Sarah Mayer.

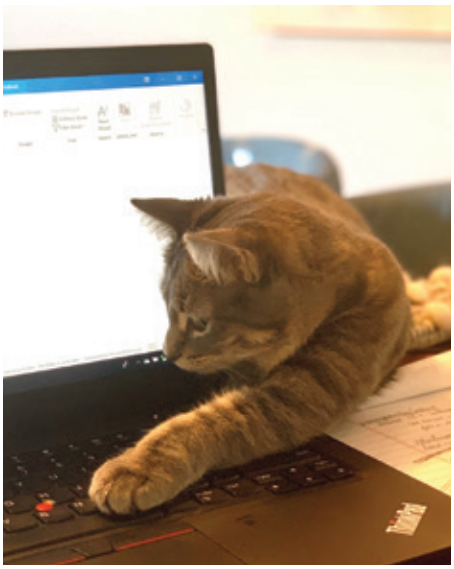
HCBA Director of Events and Partnerships Sheila Johnson has her hands full at home with Duke.



Judge Bill Koch is joined by his pup Gus.



Alissa Harrington's dog Meliora joins for her office work.



THL Committee Chair Ayah Helmy often gets interrupted by her cat Tootsie.


Lu Li
Nasriye Birmaji
Dalen Touza
Ashlyn Crawford
Christopher Hinze
Kate Whitney
Anne Bolgert
Alessandra Dantas Sabra
Martha Snipstad
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Tara Baker
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1L Minority Clerkship

The HCBA 1L Minority Clerkship Program first began in the fall of 2005. The program places first-year minority law students with Minnesota legal employers for a summer associate experience. Ultimately, the program hopes to find its participants becoming future partners and leaders in Minnesota's legal community.

The 2020 summer session is the program's 14th year, and more than 45 students applied and 15 students were placed with well-respected legal employers. The program has served hundreds of law students from underrepresented backgrounds since its inception.

Calling all employers: The Hennepin County Bar Association seeks employers to participate in the HCBA's 1L Minority Clerkship Program for the summer of 2021. Past and current employers have included large and mid-sized firms, government agencies, and the County Attorney, Public Defender's office, and the Fourth District Judicial Court.

Five Reason Your Office Should Participate in the 1L Minority Clerkship Program

1. Clerks go through a three-part interview process that is designed to offer you a highly qualified law student

2. Expand your talent pipeline by introducing diverse perspectives into your practice

3. Obtain quality assistance on legal projects for a lower cost to your clients

4. Provide professional development opportunities not only for your summer clerk, but also for your attorneys and staff who supervise the clerk

5. Invest in the legal community at large by providing opportunities for diverse students

For more information on the program, contact Athena Hollins at *ahollins@mnbars.org* or 612-271-6321.

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* Thank you to the 4th Judicial District Court for hosting three clerks.

Ageism in Our Practice

Impacts on Clients and Practitioners

by Marit Anne Peterson

A client told a poignant story: she was involved in a disagreement over a bill she received from a local service provider. Although she produced an extensive chain of correspondence corroborating her interpretation of the agreement as to service cost, the provider disagreed with her. She shared that, despite the authority of her argument and her extensive notes, she was dismissed with the age-old age-related dismissal, "You just don't remember."

What is "ageism," and why does it matter?

Ageism is the manifestation of discrimination perpetrated against a person based on age. Margaret Morganroth Gullette, a cultural critic and prize-winning writer of nonfiction, is often credited with inventing the term "ageism." She asserts ageism is an ethical issue masquerading as a health issue. It is, she believes, our society's last socially acceptable prejudice. But ageism, itself, is a complex term. The late Dr. Robert Butler helped develop the traditional boundaries of ageism with one of its first definitions: the so-called "Butler and Lewis definition":

> Ageism can be seen as a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this for skin color and gender. Old people are categorized as senile, rigid in thought and manner, old-fashioned in morality and skills [. . .] Ageism allows the younger generations to see older people as different from themselves. (Butler and Lewis, 1973).

A more modern definition recognizes ageism as impacting both young and old and focusing on any stereotype based upon age.[1] We use newer terms like micro- and macro-aggression in describing its reach. Still, it manifests most acutely and persistently with the elderly. As one colleague is fond to say, "Ageism is the only form of discrimination we practice against our future selves," which she attributes to author and ageism activist Ashton Applewhite.

And it impacts each of us in both our professional and personal lives. Ageism emerges in both explicit (direct and intentional) and implicit (unconscious) ways. The Reframing Aging Initiative—a collaboration between AARP, the American Geriatrics Society, the Frameworks Institute, and others—examines public perceptions of ageism in their summary, and rhythmically titled, report "Gauging Aging." Their findings mirror the definition of almost a half-century ago. Older adults are seen as a cohesive "other" group distinct from "the rest of us." This protects us in the face of our other pervasive public perception that "real" aging is a process of "deterioration, dependency, reduced potential, family dispersal and digital incompetence."[2] If we are not willing to admit we will one day be old, then we don't have to acknowledge the "deterioration" or "dependency" we presume will necessarily accompany aging.

How does ageism impact our clients?

Ageism impacts our clients' experience both accessing justice and within the justice system. Howard Eglit, a professor at the Chicago-Kent School of Law, has been writing on this issue for more than 15 years. In his 2004 book *Elders on Trial: Age and Ageism in the American Legal System*, several practice areas are identified in which ageist bias particularly impacts clients. These include guardianship, conservatorship, and elder abuse. His most recent book, *Age, Old Age, Language, Law*, addresses the uses and misuses of language both to create and perpetuate ageism. Words matter and language evolves, even when used to discriminate.

In addition to Professor Eglit, Professor Linda Whitton of Valparaiso School of Law has long examined the issue of ageist bias in decisions related to guardianship orders and related capacity determinations. She is a national leader with regard to surrogate decision making. Her research paper "Re-Examining Elder Law Practices" adopted a standard for assessing whether statutes or judicial opinions reflected ageist bias more than 20 years ago.[3] She urges one to consider "whether old age was used unreflectively to determine or predict characteristics of individuals, rather than merely to describe their chronological age." Thus, if you write or you read a line such as "given his old age, Mr. _____ is in need of a conservator," you can learn to immediately discount the naked assertion, regardless of any implicit acceptance of the premise. As our laws require, there must be some incapacity resulting in the need for protection or supervision.[4] Age is not an incapacity. Age-related mental health issues or physical issues may present a need for court intervention in appointing a surrogate decision maker, but age—standing alone—means nothing legally. Increasingly, there is a legal movement substituting surrogate decision making with supportive decision making in an effort to focus on "less restrictive alternatives." Our Minnesota statutes also require these alternatives be addressed prior to the imposition of a guardianship or conservatorship, for that matter.[5]

Forty years ago, the American Bar Association recognized these—and other—important concerns by establishing the Commission on Law and Aging (COLA), an interdisciplinary approach "to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons."[6] Much of COLA's current work centers on supported decision making, which includes increased attention to less restrictive alternatives to plenary guardianship or conservatorship.

What ethical considerations are necessary?

One significant consideration for those who represent older adults concerns inquiries regarding the identity of the client: if I represent a person in a discussion regarding long-term care or reimbursement planning who accesses my services as an attorney-at-law via an attorney-in-fact acting in their best interests, from whom shall I take direction? This complex question requires individualized analysis, but the Minnesota Rules of Professional Conduct provides some guidance. In her article "When Someone Else Pays Your Bill,"[7] Susan Humiston, director of the Office of Lawyers Professional Responsibility, identifies both Rule 1.8(f), regarding current conflicts of interest, and Rule 5.4(c), regarding lawyers' independent professional judgment, as applicable. These rules require informed consent by the client, independent professional judgment, and the maintenance of confidentiality in accordance with Rule 1.6.

While it may be challenging in the engagement process to structure representation in this manner, it is certainly possible so long as the lawyer communicates clearly with all parties. Informed consent as to the possibility for conflicts and the nature of representation directed by the client (vs. the payor) is critical. Humiston succinctly observes the best practice is to codify conversations as to consent in writing in an engagement letter; and to create a separate writing informing the payor of the parameters of representation. These writings document lawyers' processes in securing informed consent and remind the client and payor the attorney will represent the client, but not the third-party payor.

Relatedly, this question arises when representing clients with diminished capacity. While presuming capacity is an important initial step in responding to manifestations of ageism, it is nonetheless important to know where guidance is available should one be engaged on behalf of a client with diminished capacity. Minnesota's Rule 1.14 discusses this, directing practitioners to look to the client first, regardless of capacity. Comment [1] to that rule observes ". . . a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." This can be the case even when clients have surrogate (or substitute) decision makers.

Professor Nina Kohn explores these dynamics in her comprehensive treatment "Whom Do You Represent: The Role of Attorneys Representing Individuals with Surrogate Decision Makers."[8] Kohn makes a distinction between clients represented by an agent (or attorney-in-fact) under a power of attorney, and a client represented by a court-appointed guardian or conservator. In her nuanced analysis, Professor Kohn observes a tension in the Comments to Rule 1.14; Comment [2] instructs the attorney to afford the "represented person the status of client," while Comment [4] directs the attorney to "look to the representative for decisions on behalf of the client" if a representative has been appointed. Kohn suggests reading Comment [4] narrowly: the standard default should be to maintain normal attorney-client relationships with limited exceptions (including taking direction from someone other than the client). This recommendation is consistent with an effort to limit the impacts of ageism: centering the client in the face of other variables.

For many seasoned elder law attorneys, a fruitful attorney-client relationship comes naturally despite these complexities. But to grow the field and instill confidence in practitioners new to these and related practice areas, support in navigating these challenging questions while simultaneously avoiding manifestations of implicit bias will be necessary. Many of us have heard from our older clients about their experience being ignored in a conversation, with questions from service providers directed at younger companions. We can avoid perpetuating this iteration of ageism with thoughtful, intentional approaches in our engagements with clients. Considerations such as the length, location, and timing of meetings; availability of appropriate transit or transportation options proximate to meeting sites; and sensitive use of technology including modified or amplified audio or written materials with readable font sizes are straightforward steps practitioners can take to successfully meet client needs regardless of age.

Access to just outcomes, however defined, is also a concern in instances of potential abuse, neglect, or financial exploitation. Attorneys working with an older client may learn of the actions of others borne out of ignorance, arrogance, greed, or based on common misperceptions of an older client, that threaten the independence and rights of the older client. Although attorneys are not mandated reporters under the Minnesota Vulnerable Adults Act, the Minnesota Department of Health states "[i] f you have witnessed or know of a vulnerable adult who has been the victim of physical or mental abuse, neglect, financial exploitation or unexplained injuries act now to file a complaint or report an incident."[9] Therefore, it is important that attorneys working with vulnerable adults—which may include the elderly, but is not limited to that population of clients—be familiar with these rules. Being an attorney does not require you to report concerns, but it also does not bar you from reporting legitimate concerns.

Even when clients are able to achieve safety, their own needs and expectations may not be taken seriously by systems responding to their reports. Indeed, this dynamic contributes to reporting barriers impacting older victims so profoundly that only one in every 24 cases is reported to authorities, as demonstrated in a prevalence study conducted by the State of New York, Lifespan, and Weill Cornell Medical Center.[10] The Stanford School of Medicine describes barriers to disclosure our clients may face: incredulity; belief they will be abruptly institutionalized; or concern their decisional capabilities will be questioned or they will be deprived of their right to self-determination.[11] These real concerns of older clients point to the power of ageism to silence victims of maltreatment, or even crime.

How does ageism impact practitioners?

Within the legal profession, a consequence of ageist bias can be easily seen in the presence of mandatory retirement ages for judges. Since 1973, Minnesota requires judges to retire at the age of 70. Minn. Stat. § 490.121, subd. 21d. Although litigation has been brought by judges who have reached 70 and are fully capable of still performing judicial functions—and who even may be brought back after their 70th birthday to serve as a senior judge without an age barrier—the Minnesota Supreme Court has supported the "legitimate state interest" the Legislature "advances" through such legislation. In *Saetre v. State*, the Minnesota Supreme Court held that: "the clear intention of Minn. Const. art. 6, § 9 is to empower the legislature to develop a comprehensive plan for the retirement of judges, not strictly limited to a provision of benefits, but also to include a method and procedures designed to facilitate the orderly retirement of those individuals who have so ably served this state. A mandatory retirement provision is an appropriate component of this comprehensive plan." Our collective failure of imagination as to how we might "facilitate . . . orderly retirement" can limit our access to the most experienced practitioners, who have nuanced and empathetic reflections on the law.

The legal profession is particularly well-positioned to address ageism head-on. While we cannot stop the steady accumulation of age, we can work to end the steady drumbeat of ageism. A collective sensitivity to our clients' and our colleagues' concerns and experiences allows us to recognize when and whether the law tends to support their quality of life, or support further progress in clients' achievement of their objectives. Recognizing when the law or our approach to it fails to support older adults gives us an opportunity to speak out, participating in the cultural shift that frames aging as momentum forward.

Notes

[1] Ageism not only impacts older attorneys. Within the practice of law, age-based presumptions related to the capability of younger attorneys can impact career opportunities, professional growth, and the health and diversity of our profession. This, however, is beyond the scope of the current article.
[2] Eric Lindland et al., *Gauging Aging: Mapping the Gaps Between Expert and Public Understanding of Aging in America*, Frameworks Institute, 2015.
[3] Linda S. Whitton, "*Re-examining Elder Law Practices: Reflections on Ageism," Prob. & Prop., Jan/Feb 1998.*
[4] Minn. Stat. § 524.5-310(a)(1).
[5] Minn. Stat. § 524.5-310(a)(2).
[6] *https://www.americanbar.org/groups/law_aging/* (accessed March 8, 2020).
[7] *Bench & Bar of Minnesota*, November 2018.
[8] *Court Review: The Journal of the American Judges Association*, Vol. 53:2, 2017.
[9] *https://www.health.state.mn.us/facilities/regulation/homecare/providers/maltreatment.html* (accessed March 8, 2020).
[10] *Under the Radar: New York State Elder Abuse Prevalence Study Final Report*. 2011. *https://ocfs.ny.gov/main/reports/Under%20the%20Radar%2005%2012%20I1%20final%20report.pdf.* (accessed February 25, 2020).
[11] Elder Abuse, *Stanford Medicine. http://elderabuse.stanford.edu/screening/pt_barriers.html.* (accessed February 25, 2020).

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Issue Editor's Note: *Probate matters can be highly complex, even when you have a general familiarity with your client's culture, cultural norms, and religious practices. Our client base is increasingly diverse. Some attorneys come from those communities and help to bring a nuanced understanding to bridge the majority legal norms with the historic cultural practices. For many of us, though, this is a too-infrequent experience. Probate Referee Lori Skibbie helped us by contacting three practicing attorneys who have found success navigating those specific concerns for their clients. Here are their insights.*

Probate Issues for Cultural/Religious Communities

By Heidi Drobnick, Ahmed Bachelani, and See Lee-Sanders

(curated by Referee Lori Skibbie)

American Indian Probate

There are obstacles to overcome when serving American Indian clients. American Indians are distrustful of attorneys because of their long history of dealing with state and federal government theft and abuses. For attorneys, travel was often required over long distances to meet with clients at their home reservations. There are often cultural and traditional norms that have to be understood, such as tribal members' reluctance to talk about death because of their beliefs. Attorneys must be sensitive and able to work with this type of client. Attorneys must also be knowledgeable about each tribe's code and policies impacting personal property, home ownership, and land issues.

As with any will preparation, an attorney needs to determine the extent and quality of the client's real and personal property. When working with a tribal member, the attorney's next level of inquiry is whether or not the property is held in trust by the federal government. For property that is held in such trust, federal law applies and the tribe's code may also come into play.

It is also important that any drafting attorney understands an American Indian person's will may have to be probated in three separate courts: federal courts have exclusive jurisdiction to probate trust land ownership and trust personalty (usually a cash account held by the federal government); state courts have jurisdiction to probate off-reservation non-trust real and personal property; and most tribal courts have codes providing jurisdiction to probate on-reservation non-trust personal property, which includes houses located on trust land. In addition, some tribes have codes which have been approved by the federal government and which expand jurisdiction to determine trust issues, such as who qualifies as an heir when trust property is involved. It is not unusual for a tribe to use cultural norms to distribute certain personal property such as family heirlooms.

A properly drafted will can meet the federal, state, and tribal requirements for an American Indian client. The American Indian Probate Reform Act of 2005 (AIPRA)[1] is the most recent federal statute. AIPRA is intended to confront the problems of fractionated Indian trust land by preventing further fractionation. The Act creates a federal probate code governing the testamentary and intestate descent and distribution of trust lands, as well as creating purchase options at probate and partitioning through forced sales outside of probate. AIPRA also limits who is eligible to inherit interests in trust land. It is important for state courts and practitioners to learn about AIPRA and what constitutes property held in trust for American Indians by the federal government, in order to appropriately meet client needs. Some of the important highlights of AIPRA:

- Applies to trust land and trust personalty interests
- Encourages will writing/estate planning, as AIPRA limits who is allowed to inherit trust property without a will
- Limits heirs and devisees to "eligible heirs"
- Encourages tribes to enact Tribal Probate Codes as the American Indian Probate Reform Act leaves many land issues unresolved
- IRA (Indian Reorganization Act) lands cannot be transferred out of trust or restricted status.[2] The gift will lapse and pass pursuant to the residuary clause in the will or by intestate succession rules

The Indian Land Tenure Foundation is a good resource for information regarding American Indian land issues to be considered when estate planning for an American Indian client. Another resource is the Minnesota American Indian Bar Association (MAIBA). MAIBA has partnered with Minnesota Continuing Legal Education to provide courses on a variety of American Indian law topics, including understanding AIPRA, at its annual CLE event.

Islamic Considerations with Probate

The intent of this section is to present Islamic elder law generally, and not the different ways practicing Muslims culturally carry out elder care or estate planning. As with any religion, there are going to be cultural differences in the way elders are treated, the protections afforded to them, and what elder care means. This section breaks down Islamic elder law regarding estate planning as dictated in the Qu'ran and supported by quotations by the Prophet Muhammed (PBUH; peace be upon him). There will be differences in practice based upon marital status or family structure in passing property. There will also be differences between the guidance of religion and the laws of the secular state, some of which are mentioned here.

The Qu'ran

It is most important to understand that under Islam, money is not yours. All money afforded to you has been given to you by Allah and this makes the series of successions even more important. Islamic inheritance is known as "al-fara'id" in the Qu'ran.[3] The first verse involving inheritance in Islam, excluding caring for orphans, is "Offspring and Parents."

> Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children—you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah.[4]

It is important to understand the context behind the specifications. Under this provision, property passes along male lines because it is viewed as the males' duty to take care of their mothers, wives, sisters, nieces, etc. Under the same view, the inheritance of a spouse also varies depending upon the familial circumstances. If a male were to pass without children, the female is to take one-quarter of the inheritance and if there are children, the female is to take an eighth of the estate. If a female were to pass without children, the male inherits one-half of the estate and if there are children, the male will inherit one-quarter.[5]

This can present a challenge under Minnesota's spousal-share statute.[6] Per the statute, and depending on the length of a marriage, a surviving spouse may take up to one-half of the augmented estate. Those who practice estate planning with use of an Islamic will in the State of Minnesota can use a spousal-share waiver (waiver of right to elect and others) to bypass the requirements of the spousal-share provision.[7] This is a purely voluntary process for the parties, specifically the party who is not going to be the taker under the will, and requires the parties to enter into a contract. If the parties choose to do this prior to marriage, the waiver must be made pursuant to the legal requirements of antenuptial and postnuptial contracts.[8]

Also important is the burial of bodies as instructed in the Qu'ran. The specifics regarding burial of a body come from the story of Cain and Abel. Upon killing his brother, Cain was unsure what do with the body, "[t]hereupon Allah sent forth a raven who began to scratch the earth to show him how he might cover the corpse of his brother."[9] This is the verse relied upon by Muslims regarding the burial of a body, as opposed to cremation or other forms of funerary rights. Due to the above-referenced verse, embalming is not utilized in Islam, which can present problems as the State of Minnesota requires embalming in most circumstances. However, an exception to this rule—waiving the embalming requirement if the body is buried within 72 hours of death—allows most Muslims to avoid the embalming requirement.[10]

Not all burial rites are mentioned in the Qu'ran, however, and the exact manner of burial and the customs regarding the disposition of the body may vary by region and/or country. It is a common practice for Muslim burials to be natural or green, wherein the body is buried with nothing more than an untreated wooden board and plain sheets with a covering of soil, ensuring that all materials will decompose along with the body. Minnesota Statute § 149A.72, subd. 8 specifies that some local ordinances might require an outer burial container so that the grave will not sink. It is, therefore, recommended that a practitioner check with local ordinances when advising clients.

The Prophet Muhammed (PBUH)

The Prophet (PBUH) strongly believed inheritance and specifications of the estate planning is essential to the practice of Islam. "It is the duty of a Muslim who has anything to bequest not to let two nights pass without writing a will about it."[11] This shows the importance in not only passing the property but also in having a written instrument outlining the specifications.

As related in the above-referenced surahs (verses), the property is to be passed only after the settlement of all debts. In fact, it is so important to first settle the debts of the person who passed that the Prophet (PBUH) spoke of it quite often. "A believer's soul remains in suspense (cannot enter Paradise) until all his debts are paid off."[12] "Procrastination (delay) in repaying debts by a wealthy person is injustice."[13]

There are further requirements for Muslims after death, including specific funerary practices regarding wrapping the body, burying the body in the ground, and having the funeral rites as soon as practical. It is important for the Islamic will or estate plan to detail the wishes of the deceased when it comes to how they want their funeral conducted and to have those wishes follow the laws of Islam. Practitioners should also follow the laws of the secular state in which they are practicing. The rites of washing and then of wrapping the body in sheets are among the most important in Islam, and it is said:

> Allah's Messenger (PBUH) came to us and we were giving a bath to his (dead) daughter and said, "Wash her three, five, or more times with water and Sidr and sprinkle camphor on her at the end; and when you finish, notify me." So when we finished, we informed him and he gave us his waist-sheet and told us to shroud her in it. Aiyub said that Hafsa narrated to him a narration similar to that of Muhammad in which it was said that the bath was to be given for an odd number of times, and the numbers 3, 5, or 7 were mentioned. It was also said that they were to start with the right side and with the parts which were washed in ablution.[14]

It is important to keep in mind there are many regional and cultural differences, as well as clarifications through fatwas (religious declarations by learned clerics) and the council on Fiqh (group of clerics), which help guide Muslims in the modern world in estate planning and elder care. This article utilizes only the Qu'ran and the Hadith (quotes and stories of the Prophet (PBUH)), as they are the primary sources. The concepts presented here provide some basics for consideration when representing an Islamic elder in relation to estate planning.

The Hmong Cultural Touchpoints with Probate Issues

Estate planning for Hmong clients may be complicated by several traditional inheritance and cultural practices. Hmong practice a form of animism, which emphasizes ancestral worship and maintaining household spirits that influence everyday life. Additionally, ancestors watch over and guide their living descendants. Hmong believe wealth, health, and fame are intertwined with the spiritual world—all of which can be enhanced by burying one's parents in locations

where the Feng Shui (mem toj) flows correctly—which deemphasizes direct inheritance.

Hmong do not have a word for a "will." Hmong do not follow primogeniture; instead, the youngest son, referred to as "son to hold the spirits" (Tub Ncej dab), inherits the parents' assets (i.e., household tools, house, land, etc.) because he will care for them in their old age. All elder sons are regarded as "village sons" (Tub zej tub zos) because they must make their own way in the world. Hmong place additional value on sons because only sons carry on the family name and continue the unique religious practices of the family. Hmong have a saying—hnov dej nrov tsis tau dej haus pom taws qhuav tsis tau taws rauv, which translates, literally, as "hearing water but unable to find the source and seeing fire but unable to find a fuel source" and, figuratively, means without sons there is no one to care for one when one is old.

Hmong place less value upon daughters (ntxhais qhua) because they functionally depart the family when they marry. A daughter must adopt the traditions and practices of her husband's family. She cannot return to her parents' household, and her parents' household spirits cease to recognize her. A divorcee must not die in her parents' home. Alternately, the death of either parent in a married daughter's home would disrupt the spirits of that household, resulting in ill health and suffering for its residents.

Hmong do not adopt male children, unless the couple do not have any children of their own. Any male child, even an orphan, may be called back to his original family via a "spiritual calling" (dab tom); therefore, such an adoption would inevitably fail to preserve a family's unique practices. Therefore, male children, even the youngest from a previous marriage, do not inherit from their mother nor do they share in the funeral costs. Instead, in a blended family, the current husband's youngest son will inherit. Since girls do not carry on the family's spiritual practices, they are readily adopted. Whether accepted into a new family or accepted by a new stepfather, a girl can be welcomed into a new household by a "soul calling ceremony" (hu plig). Traditionally, Hmong adoption is the hu plig ceremony. Hmong do not have a written formal adoption process. A child is adopted by performing a hu plig.

Hmong marriages performed before emigrating are typically not legal marriages because they occurred outside the government record-keeping practices of their resident nations. Hmong marriages performed domestically may or may not conform with legal requirements. Since Minnesota does not recognize common law marriages, researching and identifying the precise nature of a Hmong client's marriage may have significant inheritance and family law ramifications. Additionally, Hmong may practice polygamy; either as a remedy where the first wife fails to birth a son or as a status symbol within the community. When a Hmong marriage occurs, the husband's family performs a soul calling ceremony. If the bride has any daughters from a previous marriage, they will also require a soul calling ceremony, which severs their relationship with the biological father. Conversely, there is no ceremony or requirement for the bride to establish a relationship with the husband's pre-existing children if any.

Traditionally, a Hmong funeral is a three-day event, preceded by several days of preparation called zov hmo. The surviving family bears the cost of housing and feeding members of the community engaged in these preparations. During the funeral, many rites are performed, and each person who performs a rite must be compensated. The final cost of a Hmong funeral may exceed $20,000. Some decedents may have enough saved for their funerals, but if not, sons—only sons—are expected to equitably offset any deficit.

Prior to the 1970s, Hmong lived in the high mountains of Laos with little access to modern technology. As the Hmong were enlisted in the Secret War (the covert war in Laos during the Vietnam War), they received a wide assortment of new technology from their allies. Some technology, such as cassette recorders, allowed elders to preserve oral traditions as never before. Additionally, elders could now record their last wishes, beginning a shift in how assets were distributed. The youngest son continued to inherit the home, but the division of remaining wealth expanded to all sons without regard for equal division.

The majority of Hmong Americans continue to practice their animism faith. However, adherence to these traditions as they impact secular life may differ depending upon the time of their emigration from Laos.

Mature adult Hmong immigrants, who arrived in their 30s and 40s, have acquired some wealth and are most likely to demonstrate a rigid adherence to tradition. Advising members of this generation may require greater research and understanding of the aforementioned traditions. Any marriage must be researched for legal sufficiency, and any assignment of the testator's funds to funeral expenses should be clear and express.

Teenaged and young adult immigrants continue to share most cultural norms and beliefs. However, they are more likely to divide wealth among all their sons, or even daughters. Their adherence to Hmong traditions may still preclude legally sufficient marriages.

Child immigrants and domestically born Hmong may continue to adhere to cultural norms and beliefs in more varying degrees. This group is highly educated, Americanized, and likely to recognize and accept standard estate strategies. Legally sufficient marriages are more common but may still warrant investigation.

Overall, Hmong inheritance practices and family relationships may appear idiosyncratic to many attorneys. These differences may require additional emphasis upon clear, precise language to eliminate ambiguities that do not arise for other clients. Because of the cultural traditions outlined above, Hmong clients are more likely to request or require exclusionary language for unrecognized descendants or specific individuals which may require additional care by attorneys. Moreover, the doctrine of equitable adoption may require further research. Ongoing concerns about legally sufficient marriages may impact homestead provisions. Finally, Hmong clients may wish to mitigate the costs of elaborate Hmong funerals; any deviation from Hmong funeral tradition should be captured in a separate writing.

For more information on Hmong traditions and cultural preferences, visit hmong18council.org

Many cultures and religious groups have immigrated to Minnesota in the past. The state's original residents and newest arrivals have rich and often unique beliefs and practices that impact how a successful attorney helps address the client's needs within the legal framework established by the state. Enhancing your awareness of these important considerations will ensure your client is properly represented and the client's wishes are empowered.

Notes

[1] 25 U.S.C. § 2201 *et seq.*
[2] 25 U.S.C. § 2206(b)(2)(B) and 25 U.S.C. § 464.
[3] The original Qu'ran was written in Arabic and translations have been the subject of much debate. Since there are variations in the translations, there is not a uniform English version.
[4] Holy Qu'ran, Chapter 4, Verse 11.
[5] Holy Qu'ran, Chapter 4, Verse 12.
[6] Minn. Stat. Ann. § 524.202 subd. (a).
[7] Minn. Stat. Ann. -§ 524.2-213.
[8] Minn. Stat. - Ann. § 519.11.
[9] Holy Qu'ran, chapter 5, verse 31.
[10] Minn. Stat. Ann. § 149A.91, subd. 3.
[11] Sahih al-Bukhari
[12] Narrated by Abu Hurairah.
[13] Sahih Al-Bukhari 3.585 Narrated by Abu Hurairah.
[14] Sahih Bukhari 1254.

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Referee Lori D. Skibbie

Fourth Judicial District

Appointed to the Probate/Mental Health Court in Hennepin County in 2018, Ref. Lori Skibbie is past chair of the Minnesota State Bar Association Elder Law Section, and past president of the Minnesota Association for Guardianship and Conservatorship. She is a frequent speaker regarding conservatorships, guardianships, long-term care planning, and estate planning and administration.

CODE GRAY:

A Litigator's Guide to Elder Abuse Investigations

by Joel Smith and Kara K. Rahimi

Hospitals and care facilities use various codes to quickly relate information in an emergency. While these differ from facility to facility, Code Blue could mean someone is in cardiac arrest, Code Red often means there is a fire, Code Pink may mean there is a pediatric crisis. Perhaps now is the time to enact a universal Code Gray for emergencies involving elderly or vulnerable patients.

Recent data indicates that some 25,000 complaints are filed with the state of Minnesota every year concerning allegations of abuse and neglect of vulnerable adults, including in nursing homes and assisted living facilities. The Minnesota Department of Health (MDH) is responsible for investigating these matters through the Office of Health Facility Complaints (OHFC). But, as the MDH acknowledges, "[i]n recent years, OHFC has not met Minnesotans' reasonable expectations for investigating maltreatment complaints."[1] This acknowledgement followed an in-depth investigation reported by the *Star Tribune* in a series of articles entitled "Left to Suffer" in November 2017. That series addressed the problem that "[e]ach year, hundreds of Minnesotans are beaten, sexually assaulted or robbed in senior care homes. Their cases are seldom investigated, leaving families in the dark."[2]

Additionally, in March 2018, the Office of the Legislative Auditor (OLA) issued a lengthy report, concluding that "OFHC has not met its responsibilities to protect vulnerable adults in Minnesota" based upon poor internal operations and the then-present complex regulatory scheme.[3] Complaints to the MDH/OHFC increased from 19,054 in 2015 to 22,581 in 2016, including reports from individuals and from providers. During FY 2017, the MDH was unable to timely process the complaints it received. Although Minnesota law states that vulnerable adult investigations "shall" be completed within 60 days (Minn. Stat. § 626.557, subd. 9c(e)), OLA found it took, on average, 140 days for OHFC to complete the investigations in 2017. Only 12 percent of complaints that year were completed within the 60-day requirement.

In late 2017, the MDH partnered with the Minnesota Department of Human Services (DHS) in an effort to address OHFC's significant performance shortfalls. On August 8, 2018, the MDH announced that it had cleared the backlog of maltreatment cases, which included 2,321 reports that had not been triaged and 826 triaged cases that had not yet been investigated.

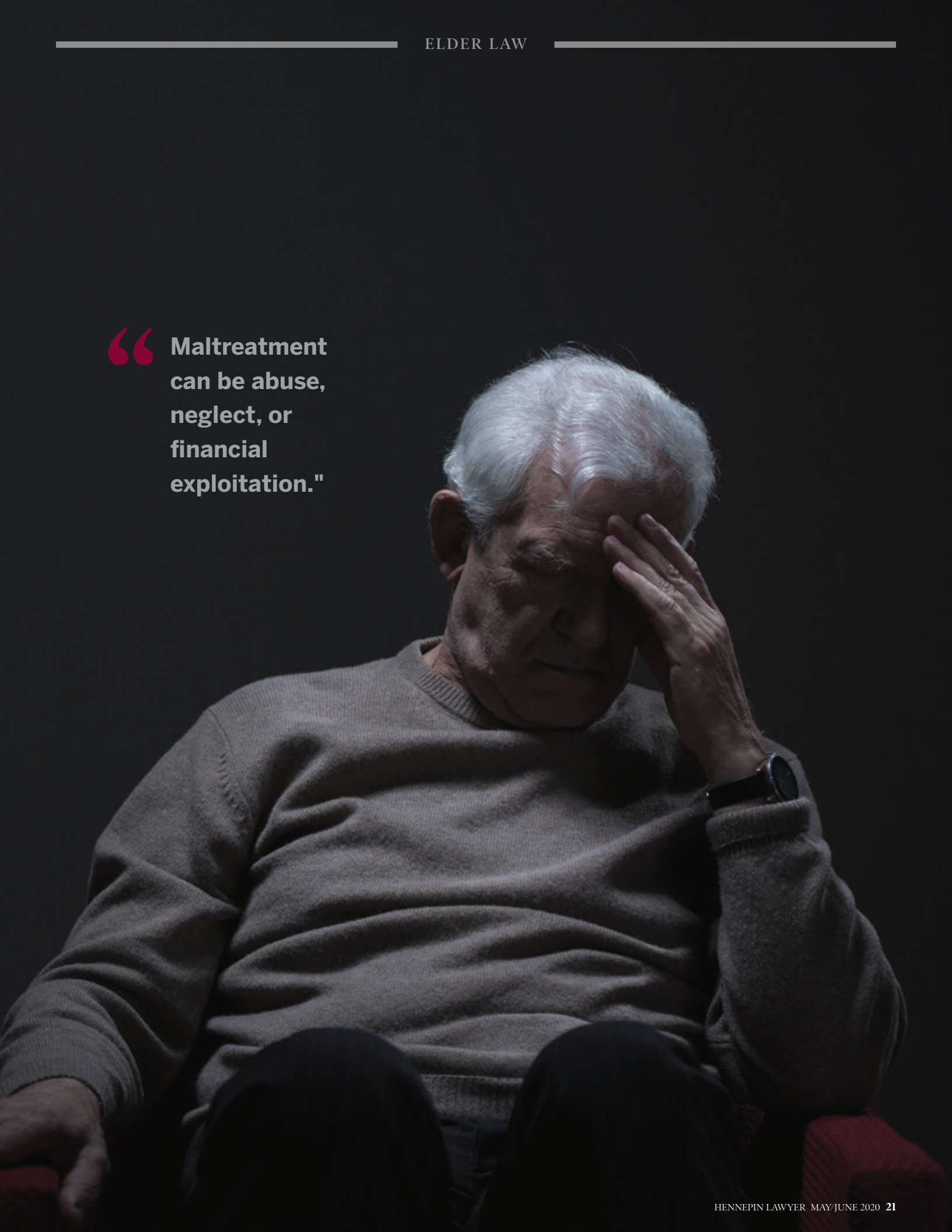
Despite claimed improvements in performance, the average time to completion of the investigation is still well beyond the statutory 60-day time period: in December 2019 average days to close was 143 and in January 2020 the average was 162 days. At the same time, the number of "substantiated" reports has increased to some 30 percent in 2018, as compared with the 16 percent in 2012. The MDH reports that in January 2020, OHFC substantiated 55 of 135 investigated complaints, with 6 investigations being inconclusive and 74 being unsubstantiated.[4]

This article addresses the importance of MDH investigations and how to use these investigations to protect your client's interests.

Who Performs Vulnerable Adult Investigations?

The MDH licenses and regulates nursing homes pursuant to Minnesota Rules, Chapter 4658. Likewise, the MDH licenses and regulates facilities commonly known as "assisted living facilities." The MDH not only licenses these facilities, it is responsible for overseeing the operation, safety, and quality of care in Minnesota's nursing homes and assisted living facilities. These responsibilities include investigating concerns about neglect and abuse of the vulnerable adults who depend on caregivers to keep them safe.

A vulnerable adult in Minnesota is generally anyone who is over the age of 18 and "possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction" impairing the person's ability to adequately provide for their own care without assistance.[5] The same MDH investigation process applies for all vulnerable adults, including those who are elderly.



> **Maltreatment can be abuse, neglect, or financial exploitation."**

The Legislature recently changed the legal structure for licensing assisted living facilities. For the first time, the MDH will issue licenses for assisted living facilities starting August 1, 2021.[6]

What Are Vulnerable Adult Investigations?

The Minnesota Vulnerable Adults Act contains explicit instructions about the investigation of complaints involving abuse, maltreatment, and financial exploitation.[7] The statute describes whether the data gathered during the investigation is to be maintained as public or private as those categories are defined in the Minnesota Government Data Practices Act ("Data Practices Act").[8]

The MDH is mandated to investigate situations involving suspected maltreatment of a vulnerable adult.[9] Maltreatment can be abuse, neglect, or financial exploitation. These words are defined by statute, but "abuse" generally involves involuntary servitude or physical, emotional, mental, or sexual abuse. "Neglect" generally involves a failure to provide for basic needs of the vulnerable adult. And "financial exploitation" can be by a person with a fiduciary or non-fiduciary relationship with the vulnerable adult.

The MDH can reach one of four conclusions when investigating a report of maltreatment: (1) substantiated, (2) inconclusive, (3) false, or (4) no determination will be made.[10] The MDH's findings and conclusions are set forth in a written Adult Maltreatment Report. The public report does not disclose the identities of the persons associated with the investigation.[11]

After the MDH releases its investigation report, an interested person or entity has only 15 days to submit a request for reconsideration in writing.[12] This small window gives a limited amount of time to address any concerns with the regulatory investigation. The regulatory action is not, necessarily, the final action taken to address the concerns resulting in the report being made. Civil litigation can follow the administrative investigation, pursuant to Minn. Stat. § 256.045, subd. 7.

What about Witness Interviews?

When the MDH investigates a nursing home, state law[13] requires it to:

> (1) interview the alleged victim;
> (2) interview the reporter and others who may have relevant information;
> (3) interview the alleged perpetrator;
> (4) examine the environment surrounding the alleged incident;
> (5) review pertinent documentation of the alleged incident; and
> (6) consult with professionals.

The MDH audio records the witness interviews when it investigates on behalf of the state. Witnesses are first provided the standard "Tennessen Warning," which is a statement required under Minnesota law[14] to advise witnesses of potential consequences of their decision to speak with the investigator. Specifically, witnesses are told:

> It is the practice of this Office to record all interviews. Information that you provide may be used in an investigative report. Some of the information may be private data and can only be made available to the Offices of Health Facility Complaints, the Commissioner of Health, and, in some cases, law enforcement, the Attorney General's office, health licensing boards and to the Nurse Aide Registry and/or to the Minnesota Department of Human Services. It is possible that your identity might be revealed to persons participating in a hearing if a determination should result in a hearing. You have the right to decline the interview.

Minnesota law requires the MDH to maintain the data it acquires in its investigations, including the witness interview recordings.[15]

These recorded interviews can be very important to any future litigation and can be requested from the MDH, with the party seeking the discovery paying for transcription by a third-party provider. Even after paying the third-party vendor to transcribe the witness statements, the MDH occasionally refuses to produce them, or may redact them to hide the identity of the witnesses and other persons associated with the investigation.

DISCOVERY AND LITIGATION FACTORS

Can Unredacted Investigation Records Be Obtained?

Although the redacted statements are helpful, they are incomplete and not the best evidence for litigation. Therefore, a subpoena on the MDH, pursuant to Rule 45 of the Minnesota Rules of Civil Procedure ("Rule ___"), to produce the unredacted records important to a client's case may be necessary. These records could include witness interview transcripts, the audio recordings of the interviews, and the Private Identifier key (which identifies the individuals referenced in the public MDH investigative report). The MDH must then either comply with the subpoena or serve objections pursuant to Rule 45.03(b)(3). If the MDH fails to respond, it would be necessary to file a motion to compel the MDH's compliance with the subpoena.

A motion to compel is pursuant to the Data Practices Act. That act sets forth a two-pronged test for courts to use when determining whether to release data. First, the court must determine if the information is otherwise "discoverable" (i.e., relevant) under the rules of evidence and of civil procedure.[16] Second, if the data is discoverable, the court "shall decide whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the entity maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy interest of an individual identified in the data."[17] To address this requirement, the court must first order the MDH to produce the documents to the court confidentially and then, following an *in camera* review, the court must order the MDH to disclose all information that meets the two-pronged requirement.[18]

Prong No. 1: Is This Evidence Discoverable?

The evidence contained in the MDH investigation file is discoverable under Rule 26.02(a), which allows parties to obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party. The information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

The requested MDH evidence is relevant when the MDH investigation materials concern the same incident forming the basis of a plaintiff's civil complaint. The requested MDH evidence is essential to the plaintiff's proper investigation, discovery efforts, and the accurate presentation of the evidence in the trial of this case. As the Hon. George F. McGunnigle found regarding a request for such information:

> Allowing the plaintiff access to the uncensored documents will: 1) avoid any unwarranted informational advantage to the defendants gained by the defendants' extensive involvement in the MDH investigation and Fair Healing; 2) allow the plaintiff a fair opportunity to evaluate potential witnesses (the documents contain the identities and knowledge of fact witnesses who can speak directly to the core issues of the present litigation; and 3) allow all parties and

> the Court to evaluate witnesses' prior statements and testimony for purposes of impeachment.[19]

Judge McGunnigle reached this conclusion after reviewing the MDH investigation file *in camera* inspection of the MDH investigation file, and he ordered production of the MDH investigation to the plaintiff in that nursing home litigation case.

In addition to the uncensored transcripts, copies of the actual audio recordings of the witness interviews may also be sought. Production of an accurate copy of the audio recordings allows all parties the ability to verify the accuracy of the transcripts and investigative report and allows jurors to listen to the primary source of evidence gathered shortly after the alleged neglect was reported to government authorities.

Prong No. 2: Are the Competing Interests Balanced?

Under the second prong of the Data Practices Act, the court must consider if the benefit to the injured vulnerable adult outweighs any harm to the confidentiality interests of the MDH or individuals identified in the report. As Judge McGunnigle found in *Kaliher*, release of nonpublic data poses no threat of complication to a prior MDH investigation since the MDH investigation is generally closed at the time of the later request. And, because a person being interviewed is given the Tennessen Warning prior to being interviewed, that person is on notice that their identity may be revealed and may be shared with the Attorney General's Office, as well as licensing boards. The disclosure of witness identities in any subsequent civil litigation is not likely to be found as chilling as the initial admonition that a witness's career could be jeopardized as a result of talking to the MDH investigator. As the Hon. John L. Holahan found:

> [P]arties involved in the [liability] incident . . . and in the events surrounding that incident were given adequate warning of possible release of their names and other identifying information through Tennessen Warnings given at the time of the investigation and no further notice is warranted.[20]

Like Judge McGunnigle, Judge Holahan also ordered the MDH to produce its investigation following an *in camera* review.

Further, even if the witnesses could be independently identified, the potential for prior inconsistent statements warrants discovery of such evidence, as the Minnesota Supreme Court long ago explained:

> Not only may impeaching testimony be the subject of impeachment itself, but in this case the information which plaintiff seeks bears on the fundamental issue of the nature and extent of the injuries which [the plaintiff] sustained in this accident. She is entitled to know what evidence defendant will produce on this issue in view of his denial that her condition is serious or is attributable to this accident.[21]

Is a Protective Order Necessary?

If the court finds any confidentiality concern associated with disclosing the requested data, the court "may fashion and issue any protective orders necessary to assure proper handling of the data by the parties."[22] The following language is typical of the protective orders in these cases: "The parties shall use the documents produced in response to this order only for purposes of the litigation that is the subject of this lawsuit. At the conclusion of the litigation, including any appeal, the parties shall destroy all documents produced in response to this order."

Are Vulnerable Investigations Admissible in a Civil Action?

When the MDH substantiates a finding of maltreatment, vulnerable investigations are admissible in a civil action. Pursuant to Minn. Stat. § 626.5573, "[a] violation of sections 626.557 to 626.5572 *shall be admissible* as evidence of negligence" in a civil negligence action. (Emphasis added.) In addition, the MDH's legally authorized investigative report may be admissible pursuant to Rule 803(8), as an exception to the hearsay rule for public records and reports, "[u]nless the sources of information or other circumstances indicate lack of trustworthiness[.]" Agency findings are admissible based on this hearsay exception.[23]

If a party opposes the admission of the MDH investigation, it has the burden to prove the report's untrustworthiness.[24]

What Effect Does Civil Litigation Have on the Facility's Ability to Appeal the Investigation Outcome?

When OHFC substantiates maltreatment against a facility or caregiver, the facility or caregiver can seek administrative reconsideration within 15 days. If dissatisfied with the MDH response to a request for reconsideration, the facility or caregiver can then continue with an appeal pursuant to Minn. Stat. § 256.045, subd. 3(a)(4). But, the facility or individual can only do so

> . . . when there is no district court action pending. If such action is filed in district court while an administrative review is pending that arises out of some or all of the events or circumstances on which the appeal is based, *the administrative review must be suspended until the judicial actions are completed.* If the district court proceedings are completed, dismissed, or overturned, the matter may be considered in an administrative hearing.[25]

What Interest Does the Federal Government Have in the State's Vulnerable Adult Investigations?

Most nursing homes participate in the Medicare/Medicaid program, which requires them to comply with federal nursing home regulations to qualify for federal reimbursement.[26] As such, the federal government may claim an interest in the state investigation. In a recent case, when the MDH was asked to produce its unredacted investigation records in accordance with the

Data Practices Act, the U. S. Department of Human Services intervened and removed the matter to federal court. The federal government argued federal law preempts disclosure under state law, claiming: (1) the state investigator was essentially a "federal" employee; (2) the witness interviews were conducted by the investigator as part of a federal investigation; (3) the state health department does not have authority to disclose evidence from a federal investigation; and, therefore, (4) the state court does not have authority to order the state health department to disclose this witness evidence. Donovan Frank, a U.S. district court judge, rejected the federal government's argument and denied its motion to quash the state subpoena against the MDH.[27] Judge Frank found:

> Because the Court finds that the subpoenaed documents are not subject to federal law, removal was improper. While DHHS [U.S. Department of Health and Human Services] contends that MDH was acting under the Secretary of DHHS pursuant to Section 1864 of the [Social Security Act] and the corresponding Agreement, this ignores the nature of the joint investigation. Although it is true that MDH was in part acting under the Secretary of DHHS with respect to determining whether [the nursing home] was in compliance with federal regulations, MDH was also acting independently pursuant to the Minnesota Vulnerable Adults Act, and its own licensing requirements . . . [T]he Court finds that [the plaintiff's] request for the Minnesota records should have been processed pursuant to the [Data Practices Act].[28]

The federal government initially appealed Judge Frank's order but then withdrew its appeal. The matter has been remanded to the Hennepin County District Court to rule on the motion to compel the MDH's compliance with the state subpoena.

Conclusion

Vulnerable adult investigations may provide critical information for cases where victims have been injured in nursing homes and assisted living facilities. Some of the investigations by the MDH are thorough and well-founded. Others may leave people wondering about the result. When the MDH substantiates neglect or abuse of a vulnerable adult, the department's investigation provides key evidence in support of the injured person's pursuit of justice in the civil courts against those who caused the harm. And, even if there is no harm found by the MDH, there may still be relief available through a civil suit.

Notes

[1] *https://www.health.state.mn.us/facilities/regulation/ohfc/docs/ohfcrfil8.pdf* (accessed March 1, 2020).
[2] *http://www.startribune.com/senior-home-residents-are-abused-and-ignored-across-minnesota/450623913/.*
[3] *https://www.auditor.leg.state.mn.us/ped/pedrep/ohfc.pdf* (accessed March 9, 2020). The OFHC investigates claims of abuse, neglect, and financial exploitation. But it is also charged with investigating licensing complaints of the various providers.
[4] According to the MDH's online "Vulnerable Adult Protection Dashboard," https://www.health.state.mn.us/facilities/regulation/dashboard.html (accessed March 12, 2020).
[5] Minn. Stat. § 626.5572, subd. 21.
[6] Minn. Stat. §§ 144G.08 – 144G.9999 (2019).
[7] Minn. Stat. § 626.557, subd. 10b.
[8] Minn. Stat. § 626.557, subd. 12b.
[9] Minn. Stat. § 626.557, subd. 9b.
[10] Minn. Stat. § 626.5572, subd. 8.
[11] Minn. Stat. § 626.557, subd. 12b(b)(2).
[12] Minn. Stat. § 626.557, subd. 9d.
[13] Minn. Stat. § 626.557, subd. 10b.
[14] Minn. Stat. § 13.04.
[15] Minn. Stat. § 626.557, subd. 12b.
[16] Minn. Stat. § 13.03, subd. 6; Northern Inns Ltd. v. County of Beltrami, 524 N.W.2d 721, 722 (Minn. 1994).
[17] Minn. Stat. § 13.03, subd. 6.
[18] State v. Renneke, 563 N.W.2d 335, 338 (Minn. Ct. App. 1997), *abrogated on other grounds by* State v. Underdahl, 767 N.W.2d 677 (Minn. 2009).
[19] Kaliher v. Augustana Chapel View Homes, Inc., et al., Order, Minnesota District Court (Hennepin County), file no. 27-CV-06-17824, filed May 1, 2007.
[20] Abrahamson v. Sholom Home West, Inc., et al., Order, at 4, Minnesota District Court (Hennepin County), file no. 27-CV-06-19305, filed 26, 2007.
[21] Boldt v. Sanders, 111 N.W.2d 225, 228 (Minn. 1961).
[22] Minn. Stat. § 13.03, subd. 6.
[23] *See, e.g.*, Chandler v. Roudbush, 425 U.S. 840, 864-64[864-?] (1976) ("Prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence of a federal-sector trial de novo."); Basset v. City of Minneapolis, 211 F.3d 1097, 1103, n. 12 (8th Cir. 2000) (the Department of Human Rights' finding of probable cause was admissible evidence regarding issues of retaliation and intentional discrimination); Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1309 (8th Cir. 1984).
[24] Kehm v. Procter & Gamble Manufacturing Co., 724 F.2d 613, 618-9 (8th Cir. 1983) *citing* Baker v. Elcona Homes Corp., 588 F.2d 551, 558 (6th Cir. 1970), *cert. denied*, 411 U.S. 933, 99 S. Ct. 2054, 60 L.Ed.2d 661 (1979). *See also* Amtrust, Inc. v. Larson, 388 F.3d 594, 599 (8th Cir. 2004) (in an action to foreclose a mortgage, the party opposing a Notice of Abandonment that had been prepared by a bankruptcy trustee in another matter had the burden of establishing the Notice as untrustworthy under Rule 803(8); the court also determined that evidence that contradicts "information contained in the Notice ... address[es] the weight to be given the Notice, rather than its admissibility.").
[25] Minn. Stat. § 256.045, subd. 3(b) *(emphasis added).*
[26] 42 C.F.R. § 483 (2017).
[27] *In re* Motion to Compel Compliance with Subpoena Directed to the Minnesota Department of Health, Pivec v. All Temporaries Midwest, Inc., et al., Memorandum Opinion and Order, Case No. 19-mc-35 (DWF/BRT), Doc. 31, filed Oct. 4, 2019.
[28] *Id.* at 18.

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This article is a compilation of information presented at Minnesota CLE on February 3, 2020, entitled "A Lawyer's Guide to Alzheimer's and Dementia."[1]

Becoming a "Dementia-Capable" Attorney

By Elissa Meyer

On February 3, 2020, Nancy Kiskis, an estate planning attorney who retired from Moss & Barnett at the end of December 2019, presented at a CLE seminar on Alzheimer's[2] and dementia. Nancy did not present on substantive law topics related to estate planning—although she worked at the firm and practiced in that area for more than 45 years. Instead, she told a compelling personal story: her family's journey following her husband Lenny's diagnosis with early onset Alzheimer's in June 2005. Nancy's talk was brave, complex, and moving, and it received a standing ovation (the first I had ever seen at a CLE). It also exemplified part of the point of what follows here: lawyers confront Alzheimer's and dementia not just in professional life, but in personal life, too. It's an obvious point, perhaps, but because of a tendency to separate work from home, it is important to reframe a holistic view of the issue, and to consider how we can all help address it and support each other, together.

One of Nancy's takeaway recommendations from her experience was that "most people don't know what Alzheimer's means—so be prepared to educate them." This short summary serves to pass on a small amount of education, outlining 10 key aspects to help inform a more "dementia-capable"[3] profession.

1 Dementia is general; Alzheimer's is a specific type.

According to the Alzheimer's Association, there are 11 different types of dementia, with Alzheimer's being the leading cause.[4] More than five million people in the United States are currently living with Alzheimer's type dementia. It is projected this number will triple by the year 2050 if no cure or other preventive treatment is introduced. Given these statistics, it is understandable that most people have heard of Alzheimer's but many likely do not know what it means. As a starting point, it is important to understand what dementia—and Alzheimer's type dementia—is (and is not), especially in comparison to the typical processes of the aging brain.

A typical aging brain shrinks, loses structure and function, and becomes more susceptible to inflammation and other disease. Normal signs of aging include impaired senses (vision, hearing, smell), impaired mobility (balance, falls, etc.), and potentially some episodic memory loss. In contrast, dementia means loss of cognitive power caused by diseases or injuries. It is a behavioral diagnosis, based on changes in cognitive behavior. Alzheimer's, a specific degenerative brain disease, is the most common cause of dementia.

2 Alzheimer's is differentiated by its impact on memory in the earliest stages.

Dementia of the Alzheimer's type (also known as DAT) is diagnosed when someone develops and displays multiple cognitive deficiencies, demonstrated by both: (a) memory impairment (amnesia) and (b) one or more of the following: loss of word-finding (aphasia), problems dressing (apraxia), inability to recognize faces (agnosia), or other disturbances in executive functioning. Different from other types of dementia, Alzheimer's hits memory first.

3 Clients may need assistance navigating bureaucracy.

Professionally, there are typical practice areas where lawyers encounter clients who may have dementia: estate planning, elder law, estate litigation, family law, social security disability law, and more. But any lawyer may be impacted by dementia professionally or personally, or may help refer friends, families, or colleagues seeking assistance. Impacted individuals or families may look for a lawyer especially when they need support finding ways to pay for care after a diagnosis. Government benefit programs paying for care and services—namely Medicare, Medicaid (Medical Assistance in Minnesota), or Social Security Disability Income—may be available. The rules, benefits, and administration of these programs are complex; the rules all have exceptions, and both the rules and the exceptions change frequently. A lawyer who first interfaces with a client around questions of benefits and paying for care is in a unique position to help connect the client, and his or her family, to other resources, services, and support.

4 Dementia can be hard to detect, and incapacity is not a singular, straightforward determination.

For attorneys who work with aging clients or aging colleagues, there are signs to look for that may indicate diminished capacity due to dementia. But the definition of diminished capacity varies, and the standards depend on the nature of the particular transaction or decision in question. For example, there are distinct standards for contractual capacity, capacity to make a will, capacity to make a gift, to marry, or to testify, etc. As an attorney starts to notice changes in client or colleague behavior, some questions to consider might be the following: How is the person expressing choices? Does the person seem to understand relevant information in context? Does the person appreciate the significance of key information? Can the person reason and logically weigh options?

These can be difficult things to assess, especially because at the onset of disease there may be significant overlap with normal age-related cognitive changes. Additionally, it is natural for each of us to try to cover up deficiencies, including memory loss—this is especially true and possible among individuals with high verbal IQ and social skills. So, where lawyers have real, founded concerns about changes in someone's cognitive function, including their own, the key points are to reach out with care and engage knowledgeable professionals to help in the assessment process. While there are resources outside the legal profession to aid in the assessment of clients, we have our own excellent resource: Lawyers Concerned for Lawyers.[5]

LCL offers free, confidential services every minute of every day for law students, attorneys, judges, and their immediate family members. Working with Sand Creek, LCL provides professional counseling. And LCL has confidential, individual or group services to help you or someone you know deal with the many stresses and demands of the legal profession.

5 Re-read the Rules of Professional Conduct.

Minnesota Rule of Professional Conduct 1.14 governs how a lawyer works with a client with diminished capacity. The comments to the rule are particularly instructive and address varying aspects of the representation. Any lawyer who has not visited the rule lately would likely benefit from a refresher.

6 Legal tools to help preserve autonomy and independence.

Many tools are available to help individuals and families impacted by dementia make decisions and meet legal needs, without necessarily having to resort to guardianship or conservatorship. Durable powers of attorney and healthcare directives are important elements to understand and put into place. In addition to a healthcare directive, a Provider Order for Life-Sustaining Treatment (POLST) may be useful. A POLST records an individual's wishes for medical treatment and is prepared and signed-off by a healthcare provider. There is also growing movement toward "supported decision making" as a less-restrictive alternative to guardianship.[6] These tools are best utilized in the early stages following diagnosis—in other words, be prepared for loss of legal capacity by understanding available options and putting a plan in place for how an individual may desire to use them.

7 Ask yourself, "Am I an Ageist?"

It is easy to want to respond quickly "no" to this question. However, give it a little more self-inquiry. Our culture has implicit biases in how we treat aging and older individuals. There can be a reversion to child-like dependence and, therefore child-like treatment. But remember the differences between an adult who is becoming more vulnerable and a child—they do not have the same lived experience. Be curious. Cultivate kindness and patience. Remember each of us is aging all the time and, if we are lucky, we will all one day be "elderly."

8 Our aging profession.

Nearly 65 percent of current equity partners in law firms will achieve "retirement age" over the next decade.[7] Because our profession is self-regulating, there is little guidance for how and when lawyers should retire; no clear rule about when to stop practicing law; no requirement for succession or continuity planning; an awkward dynamic of how lawyers should approach others with concerns; and too-often an isolation of solo attorneys. Of course, there are even more concepts inherent in the way our profession practices its craft. Senior lawyers not only have a wealth of knowledge and experience to share with younger lawyers but also an increasing risk for declining physical and mental capacity, and therefore an increasing risk for professional responsibility and ethical missteps. As a profession, it is incumbent upon each of us to participate in, guide, and support the transition of older lawyers.

9 Caregivers, grief, and stress.

The Alzheimer's Association estimates 16.1 million people in the United States provide care to someone with dementia.[8] The effects of this caregiving are significant, hitting financial, emotional, physical, and mental realms—and they are undoubtedly amplified by the grief and loss associated with having a loved-one struggling with dementia. Under this stress, caregivers are encouraged to take care and find supportive resources—a list of a few national resources includes The Alzheimer's Association, The National Institute on Aging, the National Academy of Elder Law Attorneys, AARP, CaringInfo/National Hospice and Palliative Care Organization, and AgingCare posts on www.agingcare.com. In addition, as mentioned above, LCL provides immediate and local services for attorneys and their family members.

10 Share stories and information, offer and accept help.

When a client or personal connection is first diagnosed with dementia, there will be many questions about what to do next. It can feel overwhelming, scary, and hopeless. Being more informed will help each of us to provide support for those we know in need. All lawyers can help be ambassadors of this connection—sharing knowledge and information—even if it is just a little bit. Each of us has a role in establishing a dementia-capable profession.

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Elissa Meyer currently works in professional development and marketing at Dorsey & Whitney. From late 2014 to early 2020, she was a program attorney at Minnesota Continuing Legal Education, where, among other things, she collaborated with colleagues and practicing attorneys on seminars and conferences related to estate planning and elder law, including the annual Probate and Trust Law Section Conference, annual Elder Law Institute, and most recently the program, *A Lawyer's Guide to Alzheimer's & Dementia.*

Notes

[1] *A Lawyer's Guide to Alzheimer's & Dementia* was held at the Minnesota CLE Conference Center on Feb. 3, 2020. I would like to thank the generous and talented faculty at the program for sharing their insight. Their names are listed in the program brochure available at *www.minncle.org/materials/seminars/309520.pdf*. The information shared in this article comes from the various speakers at the CLE, as well as other sources.

[2] Although many people refer to this disease by its full name "Alzheimer's Disease," the Alzheimer's Association refers to it simply as "Alzheimer's" so that is the way it will be identified in this article.

[3] "Dementia-capable" lawyers or profession is not an original term. The American Bar Association has complied an electronic library of resources and research for legal professionals, which includes reference to a training conducted by the Hawaii Bar Association in February 2015, titled *Developing Dementia Capable Legal Professionals*. It is not clear where the term originated, but it is used here to keep the concept moving forward.

[4] *https://www.alz.org/alzheimers-dementia/what-is-dementia/types-of-dementia* (accessed Mar. 10, 2020).

[5] *https://www.mnlcl.org/* (accessed Mar. 10, 2020).

[6] Proposed Minn. Stat. §524.5-102, subd. 23, outlines a definition of Supported Decision Making. It has not yet been enacted into law.

[7] This statistic was taken from the presentation on Feb. 3, 2020 by Joan Bibelhausen, of Lawyers Concerned for Lawyers, and Binh Tuong, of the Office of Lawyers Professional Responsibility, titled "The Path to Lawyer Well-Being: Supporting the Mental Health and Transition of Older Adults." "Retirement age" was not, however, defined by a specific age.

[8] This statistic was taken from the presentation on Feb. 3, 2020 by Joseph E. Gaugler, PhD, Professor and Robert L. Kane Endowed Chair in Long-Term Care and Aging and Director, Minnesota Center for Aging Research and Education at the University of Minnesota School of Public Health. His talk was titled "Working with and Supporting Families and Caregivers: Tips for Lawyers."

2019 ALZHEIMER'S DISEASE FACTS AND FIGURES

5.8 MILLION Americans are living with Alzheimer's

BY 2050, this number is projected to rise to nearly **14 MILLION**

MORE THAN 16 MILLION AMERICANS provide unpaid care for people with Alzheimer's or other dementias

These caregivers provided an estimated
18.5 BILLION HOURS
valued at nearly
$234 BILLION

IN 2019, Alzheimer's and other dementias will cost the nation
$290 BILLION

BY 2050, these costs could rise as high as
$1.1 TRILLION

BUT ONLY **16%** say they receive regular cognitive assessments

EVERY 65 SECONDS someone in the United States develops the disease

Between 2000 and 2017 deaths from heart disease have decreased **9%**

while deaths from Alzheimer's disease have increased **145%**

1 IN 3 seniors dies with Alzheimer's or another dementia

It kills more than breast cancer and prostate cancer **COMBINED**

alzheimer's association®

Funding Pooled Special Needs Trusts After Age 64

Before, During, and After *Pfoser v. Harpstead*

By Jill Sauber

Elder law attorney Laurie Hanson recalls a client she met with in 2008. He was 85 years old and virtually immobile from multiple sclerosis. The man had spent $600,000 on his long-term care and was down to his last $12,000. He had been a teacher, loved to read, and enjoyed simple life pleasures like meeting students and eating shrimp on Fridays. The man needed to apply for benefits, but he knew that once he went on assistance most of his monthly income would be mandated to go toward his care. It would be impossible for him to afford the small luxuries that boosted his quality of life. He asked Hanson to help him protect the little money he had left.

There are asset and income limits to qualify for Medicaid[1] (Medical Assistance or MA), depending on the program. With few exceptions, to be eligible for MA for Long-Term Care (MA-LTC), a single person must be blind, disabled, or age 65 or older and have assets below $3,000.[2]

Any transfer for less than fair market value made within five years of MA-LTC application (during the so-called "lookback period") is an "uncompensated transfer" resulting in a penalty (period of ineligibility for benefits) unless the applicant either (1) overcomes the presumption the transfers were made solely to divest himself or herself to qualify for benefits or (2) shows an asset-transfer exception.

In 1993, Congress enacted a law that allows a person, regardless of age, to set aside funds above the asset limit in a special-needs pooled trust for the person's sole benefit, to supplement government benefits like MA-LTC.[3] Pooled trusts are established and managed by a nonprofit association, usually a 501(c)(3) charitable entity. A separate account, known as a sub-account, is maintained for each beneficiary. But, for investment and management purposes, all accounts are pooled into a "master pooled trust," hence the name "pooled trust."

To open a sub-account and join the pooled trust, a person signs an irrevocable joinder agreement. To ensure the sub-account was not funded to protect funds for the benefit of the person's heirs, any funds left in the sub-account at the person's death must be paid back to the state as reimbursement for MA benefits paid, less than 10 percent retained by the trustee and paid to a charitable trust.[4]

Hanson's client was ineligible for MA-LTC because he was over the asset limit. Therefore, he placed his remaining $12,000 into a pooled trust sub-account so funds would be available to pay for those items that brought joy to his life, but that were not covered by MA-LTC. He applied for MA-LTC, but because he was over age 64 when he funded the sub-account, a transfer penalty was imposed. He appealed administratively, but the commissioner of the Minnesota Department of Human Services upheld the penalty. That was not, however, the end of the story.

Following an appeal and remand to Douglas County District Court, the penalty was reversed. The court held an individual cannot be penalized for transferring assets into a pooled trust sub-account solely because he was 65 or older; rather, the commissioner must show why the transfer was not for fair market value. This ruling was only at the district court level in one county. The ruling did not stop some counties from continuing to impose penalties in similar situations, while in other counties, individuals age 65 and over were able to fund pooled trust sub-accounts without penalty. There was inconsistency around the state. Additionally, the commissioner had not developed a policy concerning what constituted fair market value.

The laws related to MA eligibility prevent individuals from transferring assets out of their names for the sole purpose of qualifying for MA-LTC, but asset-transfer exceptions (such as funding a special needs pooled trust sub-account) exist for disabled people like Hanson's client. If an individual age 65 or older shows that he or she received fair market value when funding the sub-account, a penalty may not be imposed. The commissioner's own *Health Care Programs Eligibility Policy Manual* implementing federal law provides that an individual over the age of 64 who establishes a pooled trust sub-account has the right to show he or she received adequate compensation before a penalty may be imposed.[5]

Additionally, an asset-transfer penalty may not be imposed if applicants satisfactorily show they "intended to dispose of the assets either (1) at fair market value or (2) for other valuable consideration."[6]

Applicants over age 64 have been establishing pooled trust sub-accounts in other states without penalty. As mentioned above, Minnesota determinations have been inconsistent across the counties, with some counties regularly allowing such funding, while others—such as *Pfoser* in Dakota County—have been treated *per se* as uncompensated transfers. In other words, penalties are imposed based on the applicant's age without any analysis of value received.

Hanson took up the case of David Pfoser hoping to bring clarity to this area of the law. Pfoser had been diagnosed with severe Parkinson's disease that left him incapable of living independently. While he was living in a skilled nursing facility and receiving MA-LTC, his legal guardian and conservator received court approval to transfer $28,010 (proceeds from the sale of a family home owned with his siblings) into a pooled trust sub-account. Dakota County Human Services imposed a transfer penalty solely because Pfoser was age 65 at the time he established the sub-account. On administrative appeal, the commissioner affirmed, concluding it was an uncompensated transfer without analyzing the value of consideration received. Pfoser appealed. The district court reversed the commissioner's decision, and the Court of Appeals affirmed. The case, *Pfoser v. Harpstead*,[7] A19-0853 (Minn. Ct. App. Jan. 13, 2020), has received a great deal of attention since being handed down.

The appellate opinion clarifies that, although the burden is on the applicants or recipients to show fair market value or valuable consideration when placing assets into a pooled trust sub-account, the commissioner must analyze that value and cannot make an arbitrary determination based solely on the age of the applicant. "[T]he commissioner must determine, based on the evidence, whether the recipient has made a 'satisfactory showing' that the recipient 'intended to dispose of the assets either at fair market value or for other valuable consideration.'" *Pfoser* confirms the commissioner's duty to analyze the value of consideration received in exchange for assets transferred by a disabled individual (regardless of age) into a pooled trust sub-account—not just at the time when the trust is funded.

Hanson believes the Court of Appeals ruling is so important because "people who are disabled before they are 65 continue to be disabled after they are 65. If they are injured or need long-term care, and receive a personal injury settlement or an inheritance, they would have no option other than to spend down all their money to reach the $3,000 limit, and live on a stipend of $104 each month. Today's "65" is not the same as when Medicaid first passed more than 45 years ago; people are living much longer. People would have to maintain this bare existence for the next 10, 15, or more years. This ruling allows them to set aside funds for their sole benefit to provide things that bring joy to their lives—perhaps a nice wheelchair or massage therapy." In other cases, it could be the difference between living at home or in a care facility. This ruling is a very big deal. Indeed, practitioners quickly acknowledged its significance.

The commissioner has filed for Supreme Court review of *Pfoser*. In late March, the Minnesota Supreme Court accepted the case, with arguments normally taking place several months later. Now, all await a ruling from the Supreme Court.

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Jill Sauber owns Sauber Legal Services. As a former mortician, she has a unique perspective on issues related to death and dying. Sauber has a comprehensive estate and elder law practice which includes planning (disability, estate/trust, and complex long-term care planning) and related litigation.

Notes

[1] Medicaid is a joint federal-state program that funds medical care for certain low-income, elderly, and disabled people. It is often confused with Medicare, but it is not the same. Medicaid covers long-term nursing care costs that are not covered by Medicare.
[2] Minn. Stat. § 256B.055, subd. 7; 42 U.S.C. § 1381 (2018).
[3] 42 USC § 1396p(d)(4)(C).
[4] 42 USC § 1396p(d)(4)(C), Minn. Stat § 256B.056 subd. 3b(d).
[5] EPM §§ 2.4.1.3.4 and 2.4.1.3.5.
[6] 42 USC § 1396p(c)(2)(C)(i), Minn. Stat § 256B.0595, subd. 4(a)(4).
[7] Jodi Harpstead became commissioner of the Minnesota Department of Human Services in August 2019.

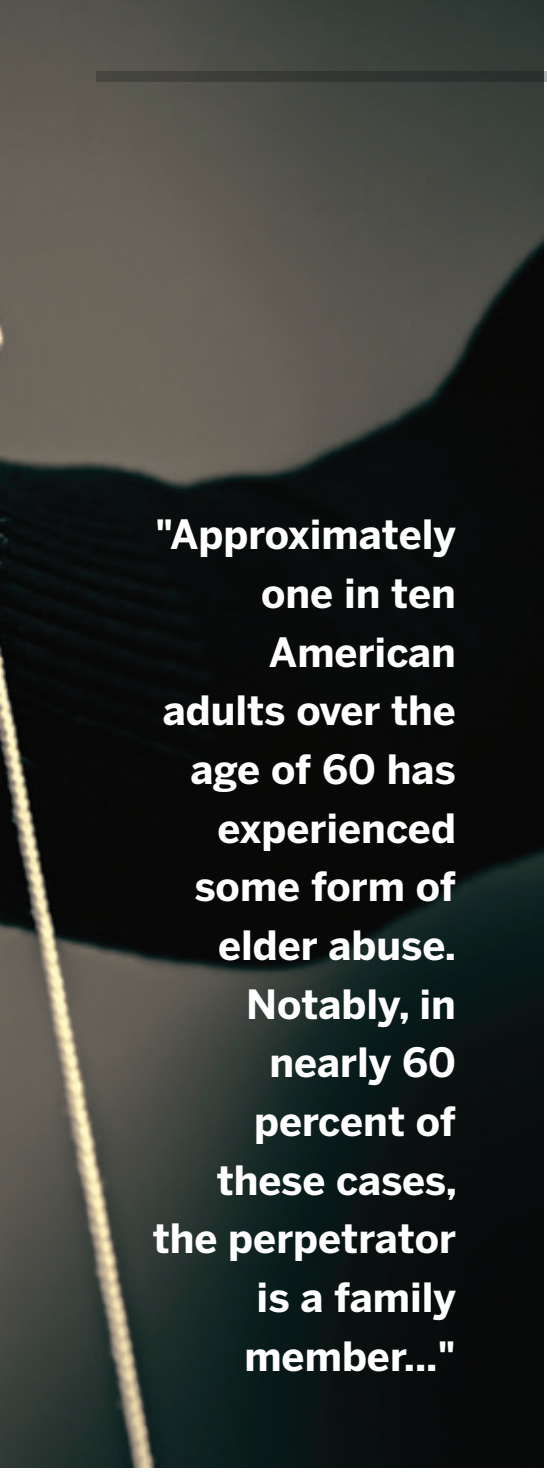
Undue Influence in Estate Planning

When Help Goes Too Far

By Amy Erickson and Beth Morrison

The growing number of aging Americans, the prevalence of diminished capacity associated with aging, and the concentration of wealth among American seniors[1] are likely to lead to an increase in will and trust contests, particularly those involving allegations of undue influence. In fact, anecdotally, Minnesota lawyers who practice in the area of trusts and estates litigation report they have seen a sharp increase in cases commenced in this area in recent years. Likewise, estate-planning attorneys, on a daily basis, face a rapidly aging population, resulting in growing concerns about their clients' diminishing or diminished capacity and susceptibility to undue influence.

The scene faced by estate planning attorneys is familiar and goes something like this: *A longtime client, Rose, who is now in her 90s, calls to schedule an appointment because she wants to change her estate plan. The following week, Rose appears at your office for her appointment, accompanied by her son, George. You are aware Rose has had some health issues in the past year, and she appears frail and withdrawn. George tells you he has been helping his mother with her finances, healthcare, and other personal matters and states his mother has decided she wants to change her estate plan. George waits in the lobby while you meet with Rose. During your meeting, Rose tells you she wants to change her estate plan to leave her entire estate to George, disinheriting*



"Approximately one in ten American adults over the age of 60 has experienced some form of elder abuse. Notably, in nearly 60 percent of these cases, the perpetrator is a family member..."

two of her other children. Up to this point, Rose's estate was to be divided equally among all of her children. When asked, Rose is not able to provide a clear rationale about why she wants to make this change to her estate plan. The next week, George calls to inquire whether you have made the updates Rose requested.

When faced with such a scenario, how do you know whether Rose is making the decision of her own volition rather than because of George's undue influence? And, if you suspect the latter is true, what steps should you take to ensure that revising your client's estate planning documents does not lead to a lawsuit upon her death?

The Rise of Diminished Capacity, Elder Abuse, and Undue Influence

Today, more than 40 million people in the United States are over the age of 65.[2] This number will more than double by 2050, reaching 89 million.[3] This increase—in large part—reflects the aging of the baby boomer generation, all of whom will reach age 65 by the year 2030.[4] With age, comes a greater likelihood of diminished capacity, including mild to severe dementia and Alzheimer's disease. In fact, studies suggest approximately 1.5 percent of American adults age 65 to 69 suffer from some form of dementia.[5] As age increases, so too does the rate (and often the severity) of the dementia. By age 90, over half of American seniors will have some form of dementia.[6]

Adults with dementia are especially susceptible to elder abuse. In fact, approximately one in ten American adults over the age of 60 has experienced some form of elder abuse.[7] Notably, in nearly 60 percent of these cases, the perpetrator is a family member—more often than not an adult child or a spouse.[8] Elder abuse can take many forms, including physical and emotional abuse, financial exploitation, and undue influence. The latter—undue influence—is especially important for attorneys who practice trust and estate law, whether they are estate planners or litigators. Specifically, it is important for practitioners to understand the law regarding undue influence and its signs so undue influence is addressed before the "help" goes too far.

The Law Regarding Undue Influence

Minnesota law defines undue influence as "influence of such a degree exerted upon the testator by another that it destroys or overcomes the testator's free agency and substitutes the will of the person exercising the influence for that of the testator."[9] In general, whether undue influence exists depends on the effect of the influence on the testator, considering the testator's physical and mental condition; the person exercising the influence; and the time, place, and surrounding circumstances.[10] The same standard applies in both will and trust contests.[11]

Undue influence is typically shown only by circumstantial evidence.[12] Further, whether undue influence exists is typically a question of fact.[13] Factors indicating the existence of undue influence in the making of a will or trust include:

1. An opportunity to exercise influence;
2. A confidential relationship between the testator and the person purportedly exercising the influence;
3. Active participation in the preparation of the will by the person purportedly exercising undue influence;
4. Disinheritance of those who would likely have been named in the will;
5. Singularity of the will or trust's provisions; and
6. The use of influence or persuasion to induce the testator to make the will or trust in question.[14]

Minnesota courts have found that an opportunity to exercise undue influence exists where there is a confidential relationship, for example, a testator and undue influencer have a close friendship, and the decedent relied on the influencer to act as an advisor, and assist in various personal and business matters.[15]

Where those who would likely have been named in the will and the singularity of the will or trust's provisions, a change from former testamentary intentions strongly supports undue influence.[16] This is especially true "where the effect of the change is to give the beneficiary charged with exercising undue influence a 'larger' share of the testator's estate than he otherwise would have received."[17]

To invalidate a will or trust on the grounds the testator was unduly influenced, however, the evidence must show the influence exerted was "so dominant and controlling of the testator's mind that, in making the will he ceased to act of his own free volition and became a mere puppet of the wielder of the influence."[18] Conjecture and suspicion are insufficient to prove undue influence.[19] Undue influence requires clear and convincing evidence.[20] With regard to the influence itself, participation of the alleged influencer in preparation of the will or trust is an important indicator of undue influence, and one that may be relatively easy to spot if an attorney is paying close attention.

"The burden of proving undue influence is on the individual or individuals contesting the will or trust at issue."

However, it is important to keep in mind undue influence is rarely committed in the open, but rather is commonly exercised behind the scenes. Thus, to prove an undue-influence claim, an attorney needs to examine carefully the facts and events leading up to the execution of the will or trust at issue.

This is often done by creating a clear timeline of the events, reviewing and analyzing communications between the testator and the alleged influencer, and interviewing independent third parties who knew both the testator and the alleged influencer. At trial, witnesses will often include family members and friends who were close to and spent time with the testator around the time of the execution of the will or trust at issue, caregivers, and anyone else who assisted the testator with other personal or financial matters. Further, and notably, the attorney who drafted the will or trust at issue is often a key witness at a trial in which undue influence is alleged.

A testator's capacity is also a factor used in proving undue influence. Along with advanced age and physical weakness, a lack of or diminished capacity may indicate a person is susceptible to undue influence.[21] Under Minnesota law, testamentary capacity exists if the testator knows the nature, situation, and extent of her property, is aware of the claims of others to her property, and can form a rational judgment concerning her property.[22] The test for capacity is whether the testator had mental capacity at the actual time of making the will or trust. As such, "[a] will [or trust] made by a person otherwise lacking testamentary capacity during a lucid interview, when he possessed such capacity, is valid."[23] Less mental capacity is required to make a will than to conduct regular business affairs.[24] In fact, even a person who is subject to a conservatorship has been found to have sufficient capacity to execute a will.[25]

Factors considered in determining whether a testator lacked capacity when making a will or trust include:

1. The reasonableness of the property disposition;
2. The testator's conduct around the time the will or trust was made;
3. Prior adjudication of the testator's capacity; and
4. Expert testimony pertaining to the mental and physical condition of the testator.[26]

Finally, the burden of proving undue influence is on the individual or individuals contesting the will or trust at issue.[27]

Recognizing Diminished Capacity and Undue Influence in Your Clients

So, how do you recognize diminished capacity and undue influence in your clients?

Examine the testator's physical and mental capacity. Look for signs of frailty, confusion, and an inability to provide a clear rationale for the requested changes to the testator's estate plan, such as those seen in Rose. This can often only be accomplished with multiple meetings. Consider meeting with the client at different times or different locations throughout the day; it is common for clients with diminished capacity to be clearer in the morning, and it may make the client more comfortable to schedule a meeting in his or her own home. Keep in mind laws regarding capacity draw distinctions between the capacity to marry, the capacity to enter into a contract, and the capacity to execute a will. As described above, the requisite capacity to execute a will is a relatively low bar. At the time of execution, testators must understand the document will control the distribution of their assets at their death, the nature and extent of their assets, and who the natural objects of their bounty are. Thus, so long as Rose grasps these three principles in a lucid moment while signing, she may still meet the capacity requirements to execute her estate plan, even if she is unable to do so moments later.

Scrutinize unexpected gifts and/or significant changes to a longstanding estate plan. Ask clients open-ended questions regarding the change to their plan. Clients with diminished capacity may answer yes to questions even if they do not fully understand. Try to get the client to explain his or her reasoning for the change and document the client's explanation. Rose's desire to deviate from her long-standing estate plan and disinherit two of her children should raise red flags. In such situations, it is especially important to ensure a clear rationale is provided as to why she wishes to deviate from her long-standing estate plan. If Rose can, in fact, provide a clear rationale as to the desired changes to her estate plan, it is less likely a court would later rule her estate plan was the product of undue influence.

Look for isolation and the opportunity to exercise influence. It may be necessary to include family members in client meetings to ease the client's anxiety but make the interview as private as possible. If the family member attends the meeting, try to find a time when you can discuss the estate plan alone with the client, even if for a short time. For an excellent resource to help explain to a family member why you must speak to the client alone, consider giving him or her a copy of the ABA Commission on Law and Aging's brochure, "Why Am I Left in the Waiting Room? Understanding the Four C's of Elder Law Ethics."[28] Further, look for signs a family member, caregiver, friend, or other individual may be putting pressure on the testator to change his or her estate plan. For instance, be wary of family members—like George—who purport to express Rose's wishes. In such a situation, it is especially important to find some time alone with Rose and ensure George's comments truly reflect her wishes.

Look to the Rules of Professional Conduct for Guidance

In Minnesota, when a client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is guided by the Minnesota Rules of Professional Conduct; specifically Rule 1.14. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, the lawyer shall—as far as reasonably possible—maintain a normal client-lawyer relationship with the client.[29]

In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: "the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision, the substantive fairness of a decision, and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician."[30]

Where a lawyer expects an estate plan may be challenged upon a client's death, it is not uncommon for an attorney to request that a physician evaluate and document the testator's capacity prior to making any changes to the will or trust. In fact, the Minnesota Rules of Professional Conduct affirmatively state a lawyer "should take steps to preserve evidence regarding the client's testamentary capacity."[31] Such documentation may later be presented in connection with litigation challenging the estate plan and can be effective evidence that the testator in fact had capacity and the will or trust at issue was not the product of undue influence.

Importantly, "the lawyer should not prepare a will for a client whom the lawyer believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline."[32]

When a client suffers from diminished capacity, a typical attorney-client relationship may not be possible. Comment [5] of Rule 1.14 expressly authorizes a lawyer to consult with a client's family to protect the client if the client is "at risk of substantial physical, financial, or other harm unless action is taken." If family members or other individuals participate in discussions with the lawyer, the lawyer must keep the client's interests foremost and, except for the protection actions authorized by the Rule, must look to the client, and not family members, to make decisions on the client's behalf.[33]

In many cases, a family member may be exploiting the client; therefore, Comment [5] permits the lawyer to take other protective measures deemed necessary. Such measures include "using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools, such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client." If left without any other viable options, the lawyer should consider whether appointment of a guardian ad litem, conservator, or guardian is necessary to protect the client's interests.[34] In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require.[35] In considering alternatives, the lawyer should be aware of any law requiring the lawyer to advocate the least restrictive action on behalf of the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.[36]

Electronic Wills and the Future of Undue-Influence Cases

The Uniform Law Commission recently passed the Uniform Electronic Wills Act which will serve as a model for states to enact similar legislation. To date, Nevada and Indiana have laws allowing electronic wills and more states are sure to follow suit. As legislation regarding electronic wills inevitably makes its way into each state, the world of undue influence cases will also become more widespread. In general, an electronic will can be executed by a testator in the "presence" of an electronic notary public and witnesses. Nevada's 2017 legislation provides a person "is deemed to be in the presence of or appearing before another person if the persons are in the same physical location, or if they are in different physical locations but can communicate with each other by means of audio-video communication, by which they are able to see, hear, and communicate with each other in real time (such as by Skype webcam connection).[37]

One factor often considered in an undue influence case is whether the influencer was present as the estate plan was signed. One can easily imagine a scenario where the webcam is focused solely on the testator as she signs her electronic will in the "presence" of an electronic notary public and witnesses, and no one would know if there was anyone else in the room. How do we guard against the fraudulent creation of these documents? How do we ensure the person executing an electronic will is not being coerced?

Preventing a Challenge to the Estate Plan

In spite of the risks of creating an estate plan for someone suffering from diminished capacity or subject to undue influence, steps can be taken to mitigate the risk of litigation in the future. First, always encourage clients to discuss their estate plan with their families—particularly in cases where a child is being favored for a logical reason (i.e., only one child wants to run the family farm). Such conversations can prevent speculation and heartache down the road. Family dynamics inevitably shift after the patriarch and matriarch of a family are gone, and a child is more likely to accept a parent's decision if a parent explains it while the parent is still alive than when a sibling does after the parent has passed. The attorney can offer to host a family meeting if the client wants assistance or support. If clients refuse to have a frank conversation with their family, encourage them to write a letter explaining their decisions. This letter can be kept in their file and may help with unanswered questions upon their death. Of course, if the letter is not accepted as intended, litigious family members can also use it as further proof of undue influence or capacity issues. Finally, as noted above, in cases in which a will or trust is likely to contested, it may be helpful to request the client's physician conduct a mini mental status examination shortly before execution of the estate plan. This exam is a simple questionnaire used extensively in clinical and research settings to measure cognitive impairment. If the results are positive, the test could be strong evidence of capacity at the time of signing.

Conclusion

In light of the increase in the number of aging Americans, the corresponding rise in diminished capacity, and the projected changes in the law regarding undue influence, it is likely that Minnesota attorneys will continue to face a growing number of cases of undue influence in the coming years. Thus, it is more important than ever that attorneys recognize the signs of diminished capacity and undue influence so they can be prepared to take the necessary steps to protect "Rose" when it appears "George's" help has gone too far and amounts to undue influence.

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Beth Morrison works with clients, individuals, and businesses alike, to implement tax-efficient estate plans. Her experience includes drafting trusts, wills, real estate documents, and other estate planning tools.

Notes

[1] Neil Howe, *The Graying of Wealth* (Mar. 16, 2018), *https://www.forbes.com/sites/neilhowe/2018/03/16/the-graying-of-wealth/#46ebffe302da.*
[2] Jacobsen et al., *America's Aging Population*, Population Reference Bureau, at 3 Fig. 1 (2011), *https://assets.prb.org/pdf11/aging-in-america.pdf.*
[3] *Id.* at 1.
[4] Jacobsen et al., *Aging in the United States*, Population Reference Bureau, at 3 (2015), *https://assets.prb.org/pdf16/aging-us-population-bulletin.pdf.*
[5] Robert B. Fleming, *Dealing with the Aging Client* (2014).
[6] *Id.*
[7] Elder Abuse Facts, National Council on Aging, *https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/#intraPageNav1.*
[8] *Id.*
[9] *In re* Wilson's Estate, 27 N.W.2d 429, 432 (Minn. 1947).
[10] *Id.*
[11] Arneson v. Arneson, 372 N.W.2d 20, 21–22 (Minn. Ct. App.1985) (construing a will and trust using same standards), *review denied* (Minn. Oct. 11, 1985).
[12] *In re* Estate of Peterson, 283 Minn. 446, 449, 168 N.W.2d 502, 504 (1969).
[13] Appeal of Borstad, 45 N.W.2d 828, 832 (Minn. 1951).
[14] Norwest Bank Minnesota North, N.A. v. Beckler, 663 N.W.2d 571 (Minn. Ct. App. 2003).
[15] Norlander v. Cronk, 221 N.W.2d 108, 111-12 (1974).
[16] *In re* Olson's Estate, 35 N.W.2d 439, 446 (Minn. 1948).
[17] *Id.* (*citing* Chamberlain v. Gordon, 151 N.W. 529, 529 (Minn. 1915).
[18] *In re* Estate of Novotny, 385 N.W.2d 841, 843 (Minn. Ct. App. 1986).
[19] *In re* Estate of Torgersen, 711 N.W.2d 545, 550-51 (Minn. Ct. App. 2006).
[20] *In re* Pundt's Estate, 157 N.W.2d 839, 841 (Minn. 1968).
[21] 79 Am. Jur. 2d, Wills § 396.
[22] *In re* Healy's Estate, 68 N.W.2d 401, 403 (Minn. 1955).
[23] *In re* Olson's Estate, 35 N.W.2d 439, 444 (Minn. 1948).
[24] *In re* Estate of Prigge, 353 N.W.2d 569, 572 (Minn. Ct. App. 1986).
[25] *See, e.g.*, Matter of Congdon's Estate, 309 N.W.2d 261, 267 (Minn. 1981).
[26] *In re Estate of Anderson*, 384 N.W.2d 518, 520 (Minn. Ct. App. 1986) (*citations omitted*).
[27] *In re* Mitchell's Estate, 44 N.W. 885, 886 (Minn. 1890).
[28] Available online at the Commission's "Publications" page at *http://www.americanbar.org/groups/law_aging/publications.html.*
[29] Minn. Rules of Prof. Cond. 1.14.
[30] Minn. Rules of Prof. Cond. 1.14 (6).
[31] *ACTEC Commentaries on the Model Rules of Professional Conduct* Rule 1.14, at 132 (4th ed. 2006).
[32] *Id.*
[33] Minn. Rules of Prof. Cond. 1.14 (3).
[34] Minn. Rules of Prof. Cond. 1.14 (7).
[35] *Id.*
[36] Minn. Rules of Prof. Cond. 1.14 (5).
[37] Bruce M. Stone, Eliam Medina, and Suzanne Brown Walsh, *Technology and Estate Planning: The Rise of the Machines*, pg. II-C-7 (2018).

Redefining How We Approach End-of-Life Planning and Care

Profile of Death Doula Jane Whitlock

by Jon Hoffman and Kathleen Hoffman

"Doula" derives from the Greek word for a female servant. In recent decades, it has been become professionalized by individuals of all genders who offer support and comfort to people during pregnancy and, more recently, to those who are dying. Doulas do not have a medical role. Instead, death doulas, sometimes called end-of-life doulas or death midwives, provide a dying person and their family with emotional, physical, and psychological support.

Jane's Path to Becoming a Death Doula

In her "first life," Jane Whitlock was a social studies teacher and athletic director. Her husband was a principal. Their whole life was school. At 47, her husband was diagnosed with kidney cancer. It was unexpected. And, four months later, he died, spending his last two months in hospice care. Although Jane's experience with hospice was overwhelmingly positive, she recalls she still felt overwhelmed by the intensity of the demands on her during this period. Jane felt ill equipped to be both a caregiver to her husband and to their young children who were about to lose their father. Jane recounts she felt like she had to be a "soldier" throughout that difficult time.

After her husband passed away, Jane's outlook on life began to change. As she processed her own grief, Jane became interested in the role of a death doula through her own self-study on issues surrounding death. As a death doula, Jane emphasizes she wants to give others permission to not have to "soldier on." She sees herself as the person "who opens the door" to help others deal with their grief and process a terminal diagnosis so they can prepare for their final moments of life.

Death Doula Jane Whitlock

While it can be difficult, Jane says her work as a doula gives her a profound gratitude and reminds her life is precious, and to be grateful for the time she has.

The Role of Death Doulas in Hospice Care

According to Jane, the average stay for a hospice patient is 11 to 17 days. Unsurprisingly, this can be an intensely emotional experience for patients and their families, and medical providers are often unable to help them process their emotions during this period. This is where doulas step in as a resource to help patients and their "tribe"—their circle of family and friends—as they navigate this difficult time. Doulas provide nonmedical support to help ease the transition for the terminally ill and their families as they prepare for and experience death. As described by Jane, a death doula's role varies greatly depending on the individual needs of the client, their anxieties, and what stage they are at in their end-of-life process. Jane might receive an initial call shortly after a terminal diagnosis or hours after a loved one's death.

One of a doula's major roles is to help patients prepare for their final moments by discussing with them how they would like to spend their last days, whether in a hospital or home setting. Doulas help clients think through who they want around them and plan out the details of their final setting, such as whether they want to hear music or be led through a mediation; whether they want to have someone hold their hand; and any rituals, either religious or secular, they want performed. As the final moment approaches, doulas help their client's navigate other difficult or unknown aspects of the end of life, such as discussing what symptoms a client might display, explaining unknown terminology used as the end of life approaches, and working towards an acceptance of death. Jane will often counsel loved ones about common stages of death; she might also sit with families during a hospice meeting and ask about what symptoms they can expect to see down the road. Jane helps

clients and loved ones redirect their focus so they can make the most of the time they have left. Jane has also been a respite resource for family members who do not want to leave their loved ones alone in hospice. She might bring a home-cooked meal or visit the ill person to allow their family to have a chance to care for themselves.

Doulas also help after their client's death. This can include, for example, assisting with funeral planning and bereavement. Doulas might support the deceased's loved ones as a "grief companion," and help them talk about and normalize their grief and come up with rituals to mark difficult anniversaries.

For Jane, she sees her most important role as being "an emotional lighthouse" for clients and their families. "There are all these issues they may or may not see coming, so to be this calm presence in the room that they can look to and just be like, we've got this, we've talked about it, we will figure it out." By providing a calm presence that people can look to, Jane helps them to be present and feel comfortable and connected to their loved ones in their final moments.

The role of death doulas is only now developing, and hospice organizations are often cautious about allowing doulas to participate in end-of-life care in their facilities. Jane acknowledges this is an understandable position, since doulas currently have no form of professional accreditation or official connection to hospice. Jane, however, has built up trust and credibility with a local hospice over many years of volunteering.

Jane says she sometimes feels she is stepping on other people's toes—be it the Chaplain or the hospice social worker—but Jane believes, "To do my job, I can't have a job to do." Nonetheless, she is very clear she does not see her role as medical or in any way at odds with hospice staff. Further, she does not believe the doula's role is to advocate for families or insert themselves into conversations with medical staff: "Bottom line, we are not medical." Instead, Jane sees her role as a doula as being someone who can reinforce hospice's messages to its clients and help client's and their family members feel comfortable during an often-traumatic period. When Jane initially meets with a client, her job is not to elicit specific information, it is to listen and to help the dying person "discern what they want and communicate that to their tribe."

Twin Cities Doula Community and Training

Jane says there are many ways to come to this work. She recommends hospice volunteering as the best entry into the field of becoming a death doula. She leads a group of mentees with whom she discusses case studies. Some local hospice facilities in the Twin Cities have begun to offer volunteer doula training programs and Jane hopes that, in the future, death doulas can continue to grow as a profession and begin to have fulltime positions in hospice programs.

Jane is a founding member of the Minnesota Death Collaborative, which strives to provide those interested in end-of-life planning with comprehensive resources and education. Local doulas regularly meet to share their experiences about the work they are doing. There are also peer support groups.

There is, as of yet, no centralized regulatory body for doulas. A number of organizations, however, offer training and certification programs. The National End of Life Doula Alliance has developed a core competency program that could become a professional standard of practice for doulas. In April 2019, the organization developed an assessment that tests a variety of practical skills. Those who pass receive a badge. Jane estimates at this point approximately 1,000 people have taken it, and her hope is that this will bring standardization and credibility to doulas who want to work with hospice.

Doulas and Elder Law Practice

Jane compared the legal work in elder care planning as similar to the palliative care she provides. Jane sees death doulas as another "portal to planning for end of life." Like elder law attorneys, doulas are often more helpful to families if they are involved well before a death occurs. Jane believes it is important for terminally ill individuals to begin thinking about the death they want to have, and how they can get there. Clients need to have plans laid out for them before they become too ill to make important decisions regarding their preferred care and end-of-life process.

A doula may also be a helpful resource for practitioners to recommend to "solos"—clients who do not have children or partners. Jane has helped these sort of clients make plans for the type of support they will need as they approach the end of their life. Often these plans involve the companionship and support of doulas, who can be a stand-in for children or other family members. Jane also sees the doula as being helpful to families who are providing care to loved ones with Alzheimer's or dementia, which can be difficult for families to navigate alone. Jane has received some recent referrals from elder law attorneys in Minnesota, particularly after speaking at the Elder Law Institute this past fall. She has also begun to collaborate with local funeral homes as an additional resource for those who are beginning to make their end-of-life plans.

Additional Resources

For those interested in learning more about death doulas and the work they do, Jane suggests getting involved with the Minnesota Death Collaborative or attending one of the monthly meetings at the Twin Cities Death Café. She also recommends the book *The Beginner's Guide to The End: Practical Advice for Living Life and Facing Death*, by Dr. BJ Miller, a palliative care specialist. And, of course, there is YouTube; you can find a funny and touching discussion by Jane about her own transformation to being a death doula. Search "What I Learned About Life from Death Jane Whitlock" on YouTube for her 2018 TEDxMinneapolis talk.

Kathleen Hoffman & Jon Hoffman

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Ms. Hoffmann has a background in civil litigation, and has also practiced in elder law and special needs planning. She formerly clerked for the Hon. Tracy Smith at the Minnesota Court of Appeals, and graduated cum laude from the University of Minnesota. Mr. Hoffmann also graduated from the University of Minnesota, and is currently a law clerk for the Hon. Hilary Lindell Caligiuri in Hennepin County District Court. Mr. and Mrs. Hoffmann met in law school and were married in 2018.

All Good Things

Planning a Graceful Exit from the Practice of Law

by Eric T. Cooperstein

"Retirement." Some lawyers see that word and sigh wistfully. Others roll their eyes and wonder what could possibly be more fulfilling than practicing law. The rest fall somewhere in between.

That said, the one common thread I see amongst older lawyers, particularly solo and small firm lawyers, is a lack of planning for retirement. Some lawyers grind along assuming they will hit a big case before they're done or that they will fund their retirement by selling their practice. Some never intend to quit but unexpectedly find their health declining or their client base shrinking. For many, retirement is not so much a strategy as a verdict.

Retirement planning is about more than identifying a colleague to sign trust account checks if you are incapacitated or understanding the technical points of selling a practice to someone else. It is about pondering your intentions, getting your house in order, and being realistic about your financial situation. Here are some factors that solo and small firm lawyers need to consider.[1]

The magic number is 62. For this discussion, assume you are in reasonably good health, enjoy the practice of law, and have been able to generate sufficient income to save a modest retirement nest egg. Let's say your magic number for planning purposes is 62, five years before you hit full retirement age for social security purposes. Social Security eligibility is a retirement benchmark for many lawyers; if your goal is to take benefits early, move your magic planning number up to 57. But even if you think you might work longer, 62 is still a good focal point for beginning the process.

At 62, you need to do several things:

1 Think hard about how much longer you intend to work.

There are basically two routes to go here, both of which still require you take the steps in sections 2 and 3.

Route A: Why in the world would I retire? Some lawyers' identities are intertwined with their law licenses. The sense of purpose, the rewards of helping people, the challenges of problem solving, and the appreciation of clients can be difficult to give up. These lawyers still need to think about what their practices will look like in five years: whether their clients themselves will retire and whether they can remain relevant in the face of changes in the profession and technology. George Dow, a coach for professionals in transition later in their careers, encourages his clients to think of the "portfolio life" they may want and what steps they need to take now to allow them to meaningfully engage in later years in nonprofit board service, pro bono work, teaching, or mentoring newer lawyers.[2]

Route B: Set a target date for your blow-out retirement party. My brother-in-law retired from the law before 62. Now, his life is filled with travel, grandchildren, baking bread, foraging for exotic mushrooms, learning a new language, and a half-dozen other activities of which I have lost track. Picking an end date may raise financial questions. Unless you have been financially successful enough to simply wrap up your cases, shut off the lights, and walk out the door, you may be looking to wring some cash out of your existing practice. Alternatively, you may want to transition your firm to a new lawyer for the benefit of your existing clients or staff (who might otherwise find themselves unemployed).

As you ponder this question, consider several cold truths about the monetary value of a law practice.

a. It's probably not worth that much. Accountants like to value businesses at two to three times annual earnings. Not so for law practices. Why? Because Rule 5.6, Minnesota Rules of Professional Conduct, prohibits noncompete agreements. As a result, the associates in your thriving practice can just form a new firm and ask the clients to follow them there, which most clients will do. Elaborate marketing systems, a well-known law firm name, a

hot website URL, an established phone number, etc., may have market value, but not being able to control who your clients hire limits the market value of your firm.

b. You likely distributed your retirement already. Some law firms have provisions in their shareholder agreements to pay out retiring lawyers over time, such as three or five years. But unlike other businesses, most law firms distribute all of their profits to the owners at the end of each year. This makes sense in the short term, to take advantage of personal income tax rates that tend to be lower than business tax rates. Down the line, when it comes time to pay out retirees, there typically is little or no equity in the firm to pay those benefits. This means the money has to come out of cash flow, i.e. out of the revenue that the remaining lawyers generate each year. So now the remaining lawyers are paying out part of their annual income to retired lawyers who are no longer producing. Once again, working lawyers have little incentive to stick around.

c. Low marketability. Although purchasing an older lawyer's practice can be a good way for a newer lawyer to get started, some older lawyers' practices are not marketable. Take a good look at your practice: are your clients mostly your vintage or is there an inter-generational mix? Perhaps more importantly, look at the age of your referral sources. Older clients and referral sources, like you, may be considering retirement, which limits the stream of future cases.

Take a look around your office. If you see only old computers running legacy software that the developer no longer supports, paper files stuffed with emails you printed out, rolodexes, and administrative staff who type up your handwritten time entries and keep trust account records on index cards, you are going to have a difficult time attracting a younger lawyer to take over your practice. It is not too late at 62 for a practice facelift, but it requires investments of time and money. At 62, it's now or never if you want to increase the likelihood that you will be able to find someone to take over your practice.

Regardless of whether you choose "work forever" or "get me out of here," it's time to address a few undesirable tasks.

2 Tackle your old files.

In a traditional, paper-based law office, managing closed files is the task always left for another day. By age 62, that day has arrived. Many lawyers have decades of files in storage facilities, empty offices, basements, and attics. Depending on how those files have been managed, it may take a long time to deal with them. If your files could contain original wills, deeds, pre-nuptial agreements, or other important original documents, you may need to fish those documents out of the files and return them to the clients. If your clients were not routinely offered copies of their files when their matters ended, you may want to contact them. Or you may want to hire a high-school student to just scan all those files and toss the paper. If you don't deal with the closed files, you may scare away prospective buyers or create a headache for your heirs. And if you decide to transition to a part-time practice, you don't want the drag of those storage costs decreasing your flexibility.

In the same vein, 62 is a good time, if you haven't done it already, to inform all your current clients that you will be destroying their files within X years of when the file is closed. "X" depends on your practice area, but for most lawyers it is somewhere between six and ten years. That way, whether you retire at 67 or not, you at least know when you are going to be able to dispose of your files. You could just give them all back to the clients as their cases end but most lawyers want a copy for themselves, in case the client raises an ethics or malpractice claim later.

3 Deal with your trust account.

Last year I advised several lawyers who were filled with anxiety because they were trying to close their practices but discovered small problems with their trust account. The accounts reconciled just fine but there were loose ends: old uncleared checks that had been tracked but never resolved; funds held for clients whose cases had ended years earlier and now could not be located to return the money. Occasionally, there are excess funds not readily attributable to any particular client. Resolving these questions may require reviewing several years of records and hunting down former clients. Take care of it now, before your long-time bookkeeper also retires and moves to Arizona.

4 Manage your leases and staff expectations.

At 62, you probably do not need to stop buying green bananas but you may not want to sign a five-year office lease. It is difficult to make that call unless you have some idea of your plan for the next five years. Share your plan with your staff; you do not want them to jump ship because they think you might retire when in fact you intend to continue practicing. Conversely, if you are planning to retire you may want to incentivize them to stick with you to the end, so you do not lose that administrative support when you really need it.

And, please, if you hire a lawyer with the expectation that you will retire in five years and the lawyer will take over the practice, stick to it. Don't be like Lucy with the football and pull it away as your retirement date gets closer. Then the associate or junior partner will leave, their clients will follow them, and you will be left without a plan.

Make a plan. Happy retirement. Or not. Your choice, as long as you make it.

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[1] Some of the ideas in this article are unquestionably the fruit of multiple conversations I had over many years with Paul Floyd and Roy S. Ginsburg, both of whom also advise lawyers on winding down and transitioning their practices.

[2] *http://georgedow.com*

Eric T. Cooperstein

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

Member News

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

Messerli Kramer is pleased to announce **Ryan Damhof** and **Daniel Dosch** have joined the firm.


Kevin M. Busch and **Timothy L. Gustin** were re-elected to three-year terms as members of the Board of Directors of the law firm of Moss & Barnett.

Arthur, Chapman, Kettering, Smetak & Pikala, P.A. is pleased to announce the addition of **Nicholas Strafaccia.**

Bassford Remele is pleased to announce that **Anu Chudasama** has joined the firm.

The Mitchell Hamline Law Review announced a new award in honor of **Minnesota Supreme Court Justice David Lillehaug**. The Justice David Lillehaug Service Award — honors Justice Lillehaug's lifelong contributions to the Minnesota legal community and support for Minnesota legal scholarship. In the future, this award will be bestowed upon recipients for significant lifetime legal achievement.

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Check out the latest CLEs and events happening at the bar associations online

www.mnbar.org/cle-events

2020 HCBA BAR MEMORIAL POSTPONED

After careful thought and consideration, the annual Minnesota Fourth Judicial District/Hennepin County Bar Association 2020 Bar Memorial that was to take place on May 1 has been postponed until a later date this year. The HCBA will provide the updated information once a new date has been confirmed. We look forward to remembering and celebrating the lives of the lawyers and judges in our legal community who passed away in 2019. To be memorialized:

Glenn Ayres
Milton H. Bix
John Philip Borger
Melvin 'Mel' Burstein
John R. 'Bud' Carroll
Mary K. Ellingen
Charles Bart Faegre
Thomas D. Feinberg
Paul Alan Fogelberg
Hon. Charles Jacob Frisch
John Michael Giblin
Raymond Alfred Haik
Joan Lawrence Heim
Patricia E. Heinzerling
Ronald Birger Hemstad
Daniel W. Homstad
David Benjamin Ketroser
John A. Kocur
D. Kenneth Lindgren
David Alan Lingbeck
Richard S. 'Rick' Little
Thomas G. Lockhart
Richard Harris Magnuson
Ronald Eugene Martell
Bert J. McKasy
Laura Haverstock Miles
Noel P. Muller
Byron Donn Olsen
Thomas Patrick O'Meara
Stewart R. Perry
Hon. Steven E. Rau
Earl D. Reiland
LeRoy Mitchell Rice
Richard B. Riley
Sherri L. (Brick) Rohlf
Robert Michael Smith
Wheeler 'Whee' Smith
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Challenge

Take the Pro Bono Challenge

In honor of the HCBA's 100th anniversary, we are encouraging members to participate in the HCBA Centennial Pro Bono Challenge during the 2019-2020 bar year.

To take part in the challenge, let the HCBA office know once you've provided 100 hours of pro bono legal services between July 1, 2019 and June 30, 2020, to low-income individuals at no fee and without expectation of a fee.

Once you've completed the challenge, or if you have any questions, please contact Dana Miner, Director of Legal Services at dminer@mnbars.org.

Members who self-report to the HCBA that they have completed the challenge will be recognized in bar communications and receive a special recognition item.

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10 QUESTIONS with RON OUSKY

Collaborative Attorney & Mediator, Ousky Law Office

1 What's your elevator speech?
I help people facing divorce achieve better outcomes by guiding them in understanding all of their options before they make important decisions. I focus on helping people identify their true interests and goals so that they can focus their attention on creating a better future for their family.

2 What is the most rewarding part of your job?
I enjoy working with people who can find a way to focus on the future and who can find a way to bring their best selves to a difficult situation. We often think of divorce bringing out the worst in people, and that can happen. However, I have often been deeply moved watching clients move past their emotional pain and work with their spouse and create a new beginning.

3 You created "Conversation Cards" for couples. What led you to do this?
As a divorce lawyer for 35 years, I have firsthand knowledge of how painful a failed relationship can be. At the same time, as someone who has been happily married for 40 years, I know relationships can work. When I listen to some of my clients tell their stories, I often wonder whether there was a time when their relationship might have retained its strength if they had found a way to talk about the things that truly mattered. The Conversation Cards were created to be a small contribution to that idea.

4 You graduated from law school in 1982. What advice would you give to a recent law school graduate?
Find something you love to do so much that you would do it for free, and then think about how to get someone to pay you to do that work. In the meantime, get a job. This is advice I stole from Richard Russo, one of my favorite authors.

5 As an attorney with a busy practice, what is your go-to for handling stress?
It varies. There are times when I handle stress by seeking solitude. Other times, I go in the opposite direction and reach out to friends and family to make deeper connections. During this COVID-19 pandemic, solitude has been easier to find and making connections has been made more difficult, but not impossible. One of the ways I have tried to increase my ability to make better connections is through my writing.

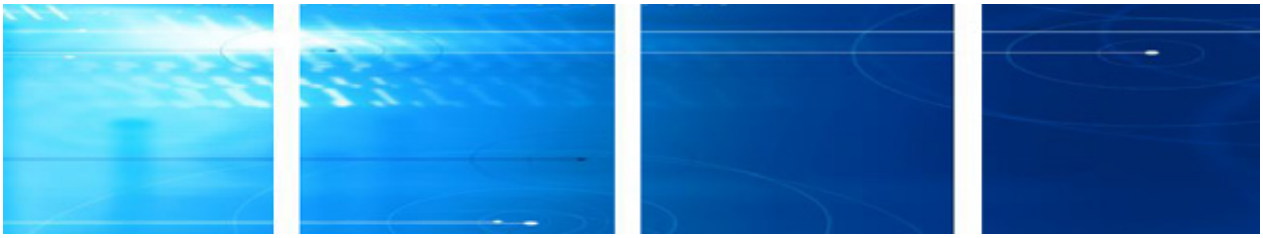
6 If you hadn't become a lawyer, what would you be?
Malcom Gladwell; or at least someone who studies human behavior and helps others think about how their behavior affects other people. I am constantly fascinated by how people behave and by the ways we can improve our behavior, and the quality of our lives, by changing how we look at the world.

7 How do you like to spend your free time?
My favorite pastime is to have interesting conversations with interesting people, usually in one-on-one conversations over a meal. Sometimes the most interesting people are the new people you meet; but I also find that the people we see every day can be quite interesting if we are willing to take some risks in our conversations.

8 What book are you reading?
I am currently reading *American Dirt,* a novel about a Mexican woman forced to emigrate from Mexico. I am also reading *How Risky is it, Really?,* a fascinating nonfiction book about how we live our lives too cautiously because we look at risk in the wrong way.

9 If you could have coffee with one person from history, who would it be and why?
Mahatma Gandhi, because he has helped inspire me to work as a conflict resolution specialist and because his story has helped me search for deeper meanings. If possible, I would leave some time for Martin Luther King, Jr. or Abraham Lincoln to join us at the end of the coffee session.

10 Finish this sentence: Everyone who knows me knows I love
Hot tubs, my grandchildren, my regular children, creativity, new ideas, relationships, visionary thinking, family time, and going against conventional thinking.



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