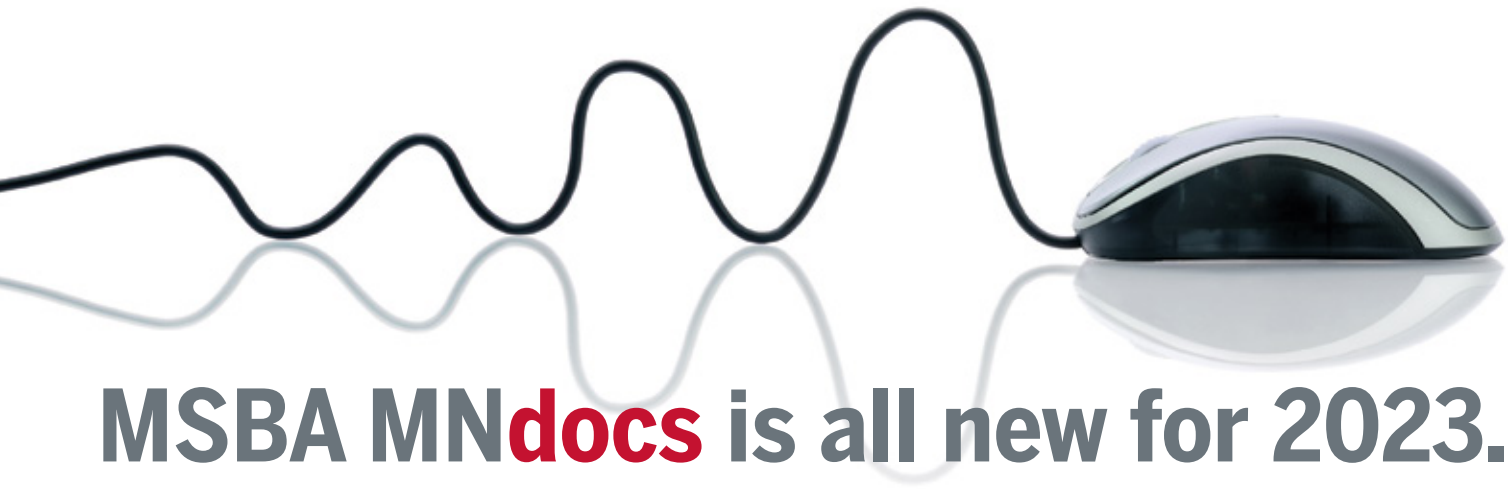
MINNESOTA STATE BAR ASSOCIATION

APRIL 2023

BENCH + BAR of Minnesota

MINNESOTA'S RACIALLY BIASED JURY POOLS AND HOW TO FIX THEM



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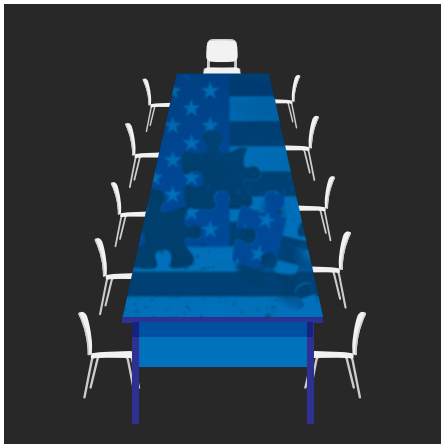

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LISTEN. LEARN. BE WELL.

BY PAUL D. PETERSON

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

This month I want to take our membership discussion in a slightly different direction and talk about the connection between loneliness, isolation, and bad mental/chemical health outcomes. Although some progress has been made, there is still a stigma around discussing and seeking help for these conditions. I asked our wonderful, internationally recognized Joan Bibelhausen, the executive director of Lawyers Concerned for Lawyers (LCL), to assist me in this effort.

Joan writes: "LCL offers free and confidential assistance to legal professionals statewide. We are honored to share this page with Paul, who has championed the importance of self-awareness and accessing support throughout his presidency.

"Are we the loneliest profession? A Harvard Business Review survey says yes, and this was before the pandemic. We strive for perfection—being able to do it all ourselves—yet perfectionism and resisting support and help from others hurts us, our clients, and those we care about. Loneliness and isolation result in far higher than average rates of mental health and substance use issues in our profession. We don't think as well, we're not as satisfied in our work, we lose a sense of meaning, we have more health challenges, and we simply don't feel we belong. The high rate of suicide in our profession is associated with a lack of belonging. Knowing someone else is paying attention and cares is a powerful antidote.

"As we seek to define our new normal (but beware: there may never be one), can we put our mental health first? What will help us to be our best selves and do our best work? At the top of the list is meaningful connection with others, giving and receiving. This is what we will remember most as we measure what is truly most important in our lives.

"Please ask for help when you need it. Well-being practices can reduce our risk, but our profession is a difficult and traumatic one. We will still have issues, and it will never be our fault for not doing well-being well enough. LCL offers free counseling to help you navigate that path to belonging and more, and LCL has resources and tools to support you. *www.mnlcl.org*, *help@mnlcl.org,* 651-646-5590."

It's no secret that studies and reports over the past decade have shown we are the unhealthiest profession out there. No one is immune from problems with wellness while doing this work, and I am no exception. If we don't talk about these issues—bring them to the forefront and work on them without attaching stigma—the troubling health and wellness news will continue.

The culture of our profession has continued to demand often brutal rites of passage—the expectation is that every lawyer must endure pain and agony and difficulty, long hours, impossible demands, and daunting expectations to call themselves members of our profession. How's that working for us? We are on the front lines facing incredible stress, incredible conflict, incredible demands on our time and our psyche.

The MSBA and its related organizations offer a helping hand professionally for all of us. We have tools to help with lawyer wellness, led by LCL. We are the place where a member can join the great work we are doing across our whole profession. One other way we achieve this is to actively pursue diversity, equity, and inclusion, and the MSBA is blessed to have Erikka Ryan (*eryan@mnbars.org*; 612-278-6321) as our DEI director. Get to know her. The work she is doing is critical to the future of our profession and the MSBA. The MSBA and our related organizations provide a sorely needed sense of belonging.

Our institutions as defined by our Constitution are under attack. We have taken an oath to support and defend those institutions. At the same time, we should always be looking to improve those institutions, to be sure our institutions represent our greater community. It is in this spirit that we are working with our justice partners to review how we license lawyers and whether (or how) we should keep using the bar exam in that process.

I am less concerned with who we are today than with who we will become tomorrow. Sometimes I feel uncomfortable when I participate in efforts to focus on DEI and wellness. What I have learned is that if I can overcome my own feelings of uncertainty and anxiety and strive to listen and learn from attorneys from diverse backgrounds trying to share their experience with me—experience that is often different from my own—I become a better ally. I also try to remember that if I feel uncomfortable, how must the people trying to share their experiences feel? Listening and learning and keeping an open mind is an important contribution that all of us can bring to wellness and DEI efforts. But it takes a conscious effort. And it's not on the people whose experience differs from my own to try to enlighten people like me. It is incumbent upon me to listen. ▲

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Holder, Klobuchar talks among highlights at Minneapolis D&I Conference

The 2023 Diversity & Inclusion Conference, held on February 21 in Minneapolis, brought together panelists from throughout the country to speak about current issues in the federal criminal justice system and propose solutions for the future.

The conference, titled "A Look at the Future of the Federal Criminal Justice System: Enhancing Public Safety and Eliminating Racial Disparities," was cosponsored by the Federal Bar Association, the Minnesota State Bar Association, the Minnesota Coalition of Bar Associations of Color, and the University of St. Thomas School of Law.

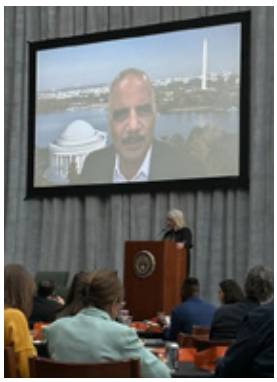
The gathering included four informative panels, a fireside chat with former United States Attorney General Eric Holder, and remarks from U.S. Sen. Amy Klobuchar. In his talk, Holder characterized diversity, equity, and inclusion as "not a zero-sum game." He continued, "We can't simply do things as we have done them in the past." Holder also reflected on his time at the Department of Justice and next steps for achievable reform.

Throughout the day, attendees heard from academics, practitioners in the field, county attorneys, prosecutors, criminal defense attorneys, federal judges, heads of U.S. probation and pretrial services departments, and individuals who have experience with the criminal justice system. Panelists agreed that systemic racial bias is a well-identified problem, and one group of panelists discussed how Black defendants in federal courts receive sentences that are approximately 20 percent longer than similarly situated white defendants, even after controlling for criminal history.

Other panel discussions highlighted efforts from around the country to reduce disparities and improve public safety through the development of alternatives to incarceration, implementation of community-based initiatives—including those funded through U.S. Department of Justice grants—and pre-trial and post-conviction specialty courts such as those currently in place in the Eastern District of New York, the Eastern District of Missouri, the Eastern District of Louisiana, and the District of Minnesota.

The conference stemmed from the work of the Minnesota State Bar Association Diversity and Inclusion Council, which strives to be a leader in the advocacy and promotion of historically marginalized and underrepresented groups within the MSBA and the legal profession. Led by current co-chairs Jerri Adams and Judge Jeffrey Bryan, the D&I Council's strategic plan includes planning and executing a biennial conference focused on DEI work. Judge Bryan worked with a team of former federal prosecutors, members of the state affinity bar organizations, officers of the Federal Bar Association, representatives of the Federal Defender's Office, and the University of St. Thomas to plan the conference.

The conference and its messages of equity, community, and allyship are part of a much larger mission of the MSBA D&I Committee and the bar association as we look to the future of reducing barriers, creating more access and opportunity, and holistically supporting our members from underrepresented communities who bring a tremendous value to the legal profession. ▲



LEGAL AID DONOR SPOTLIGHT

ANNE LOCKNER

Anne Lockner is a partner at Robins Kaplan who specializes in business litigation. When she is not practicing law, Anne serves on several boards and recently became chair of the Fund for Legal Aid.

As a law student at Georgetown University, Lockner developed an enthusiasm for public interest law that she retained upon entering private practice. When she began at Robins Kaplan, it had a strong history of philanthropy and, in particular, giving to the Fund for Legal Aid's One Hour of Sharing campaign, which asks all attorneys to donate at least their hourly billable rate to Mid-Minnesota Legal Aid. As an associate, she was among the first champions of the Fund for Legal Aid's Associates' Campaign, in which associates solicited each other to support One Hour of Sharing. The Associates' Campaign is now celebrating its 20th anniversary—a great testament to the philanthropic culture throughout the Twin Cities legal community.

Lockner believes that financially supporting legal aid is the responsibility of all attorneys. She recognizes that her pro bono work and legal aid donations are both important. While pro bono does much good, donations go further systemically. They support full-time public interest programs and personnel so that they can continue to perform their jobs and provide representation to underrepresented populations. For Lockner, it is not a matter of private versus public interest. Those in private practice can love their jobs and full-heartedly represent their clients, but must recognize a lack of protections and resources for others in the legal field.

Anne Lockner believes underfunding for civil legal services is "a real concern of our legal system" and encourages attorneys to address this need by giving generously to the Fund for Legal Aid. (Profile by Cheyenna González Pilsner, University of Minnesota Law School JD candidate, 2025.)

To see our full collection of spotlights, visit ***www.mnbar.org/acces-to-justice-spotlight.*** ▲

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Pictured are Kyle Kroll, Geri Sjoquist, and Judge Bartolomei.

Civ Lit trial skills course is back

The Civil Litigation Section has brought back the Effective Advocate Trial Skills Course (formerly an HCBA Civil Litigation Section program), which seeks to enhance the core trial advocacy skills of examining witnesses and presenting opening and closing arguments in a simulated trial setting. The course, which began on January 11, was offered free to new admittees and this year had 38 participants, many of whom have been licensed for years but hoped to sharpen their skills after the pandemic. The five-session course, which the section hopes to offer annually, ends with a mock trial session at Mitchell Hamline School of Law. Thank you to Chad Snyder for facilitating the sessions, Professor John Sonsteng for providing materials, and Judge James Moore and other judges from the Hennepin County District Court for supporting this program. ▲

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Labor and Employment Law

The MSBA Labor & Employment Certification Board is proud to welcome Andrea Ostapowich to the board. Andrea is a plaintiff's employment law attorney with Bertelson Law Offices, PA. For the past 20 years, she has practiced exclusively in employment law, representing employees in all stages of the process from advice, pre-litigation settlement, and EEOC/MDHR charges to litigation. Andrea has been a certified specialist since 2016, and we are excited to have someone with her experience and expertise on the certification board.

Interested in becoming an MSBA Labor & Employment Certified Specialist? Start your application today and take the exam virtually on October 28. **Contact Kari White (*kwhite@mnbars.org*) for more information.** ▲

PRIVATE DISCIPLINE *in 2022*

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

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

Private discipline is non-public discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are viewed as isolated and nonserious. In 2022, 80 admonitions were issued, one panel admonition was issued (in lieu of charges for public discipline), and six lawyers were placed on private probation. These numbers are generally comparable to the numbers in recent years.

The rule violations that lead to private discipline run the gamut, and a table of admonition violations by rule can be found in the annual report issued each July (available on our website). It is always true that a significant number of admonitions are due to lack of diligence (Rule 1.3) and lack of communication (Rule 1.4); hence my perennial advice that the best thing you can do to avoid complaints is to work on your files and communicate with your clients. This is of course easier said than done, as we all have those files that are challenging to work on for a variety of reasons, and once time has elapsed it is harder than ever to pick up the file. Just do it, as the saying goes. You will feel better, and you owe it to your client.

Every year a significant number of admonitions are issued for violations of Rule 1.16(d)—relating to ethical withdrawals. Last year was no exception. Fifteen admonitions were issued for failing to take reasonable steps upon withdrawal to protect the client's interest, such as providing notice, surrendering the file, and refunding unearned fees. This is also one of the most frequently asked about areas on our ethics hotline. If you have questions, just ask. I would love to see this number reduced substantially. Although compliance is pretty straightforward, it often comes when there is a breakdown in the relationship. Don't let your annoyance with the client or the souring of the relationship interfere with the discharge of your ethical duties at the time of termination.

Also remember that you have an affirmative ethical duty to refund unearned fees and expenses that have not been incurred. Don't wait for the client to complain or ask for the refund. The rule is mandatory; a lawyer "shall" refund "any advance payment of fees or expenses that has not been earned or incurred." And you must do so "promptly," upon request under Rule 1.15(c)(4). When a representation ends, prioritize settling the account with the client and make sure the client has what they need to avoid rule violations.

Let's look at a few additional rules and situations that tripped up lawyers in 2022.

Contact with a represented party

Every year lawyers are disciplined for contacting represented parties in violation of Rule 4.2, MRPC. Three lawyers were admonished for this violation in 2022; of note, two of the three lawyers admonished for this rule violation had 20-plus years of experience as lawyers and the third had more than a dozen years of experience, so an overall refresher is in order for even seasoned attorneys.

Rule 4.2 is generally referred to as the no-contact rule and states:

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

Sometimes a lawyer inadvertently contacts a represented party directly by serving documents in a case because they failed to note in the lawyer's file management system that the opposing party is represented by counsel. Mistakes happen (I've done this) and such a mistake rarely leads to discipline. In most instances, the opposing counsel calls the mistake to counsel's attention by reiterating the representation, the error is acknowledged, and the parties move forward.

In one case, a lawyer continued to directly contact a represented party by e-serving documents on that party, even though they had specifically been advised previously that the party was still represented. This is a situation that more typically gives rise to a violation; the first contact is not at issue because there was some question as to the lawyer's continuing representation. Or a mistake was made. Here, the lawyer contacted the opposing party directly after being advised of the representation on two additional occasions, because the lawyer was moving for default and wanted to make sure the client was receiving information, having heard little from opposing counsel.

While the intentions were good *(i.e.,* wanting to avoid the opposing party's default), the requirements of the rule are clear. There may be any

number of reasons why an opposing party and their counsel would choose to proceed as they are, and there is no exception to the no-contact rule to make sure that opposing counsel is effectively communicating with the opposing party. It is not our job to make sure someone else is doing their job, but it is our job to comply with the rules. This question arises fairly frequently on the ethics hotline and we advise, as the rule requires, to serve counsel and let the consequences fall where they may.

In another case, the lawyer violated Rule 4.2 when he interviewed a 12-year-old witness that he knew had been appointed counsel in a CHIPS proceeding; counsel knew the 12-year-old had counsel because he was present in court when the appointment was confirmed. Often lawyers will claim that the "matter" is not the same, attempting to draw fine distinctions to unilaterally narrow the scope of the opposing counsel's representation, an argument that is usually unpersuasive when the opposing counsel's representation arises from the same operative facts and circumstances such that the questioning infringes on the subject of the opposing counsel's representation. If you know that a party is represented by counsel, your best course of action always is to reach out to opposing counsel to understand the scope of the representation, and to proceed with caution. Opposing counsel and opposing parties take this rule seriously and direct contact often prompts ethics complaints. The Minnesota Supreme Court has a helpful opinion on Rule 4.2 that you may wish to review, *In re Panel No. 41755*, 912 N.W.2d 224 (Minn. 2018).

Business transactions with clients

Four lawyers were privately disciplined for failing to comply with Rule 1.8(a), MRPC, when entering into a business transaction with a client or acquiring an ownership interest adverse to the client. Rule 1.8(a) does not prohibit such arrangements, but rather sets forth specific compliance requirements due to the conflict of interest that the arrangements introduce into the relationship. These violations often arise when lawyers acquire a financial interest in a client's property to secure or satisfy their fee, such as acquiring title to a vehicle or other personal property that later can be sold to satisfy a fee balance. Three such admonitions arose out of criminal cases, and one from a family law case. To ethically enter into such transactions, make sure:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a document signed by the client separate from the transaction documents, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Failure to comply with all requirements will likely lead to discipline given the conjunctive nature of the requirements. Taking a moment to ensure compliance with this very straightforward rule when you enter into a business transaction or acquire a security or ownership interest adverse to your client will pay off in avoiding discipline, as this too is a frequent source of complaints by former clients.

Conclusion

Only about 20 percent of complaints to the OLPR result in any discipline, and private discipline is far more prevalent than public discipline. Most attorneys care deeply about compliance with the ethics rules, but it is important to remember that ethical conduct involves more than refraining from lying or stealing; the rules contain specific requirements. You cannot go wrong by taking a few minutes each year to re-read the Minnesota Rules of Professional Conduct. They can be found on our website and in the Minnesota Rules of Court. You will find the time well spent. And remember, we are available to answer your ethics questions: 651-296-3952. ▲

The shifting emphasis of U.S. CYBERSECURITY

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

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

On March 2, the Biden-Harris administration released its National Cybersecurity Strategy.[1] The strategy outlines key steps needed to create a more secure, resilient cyberspace, acknowledging that "cybersecurity is essential to the basic functioning of our economy, the operation of our critical infrastructure, the strength of our democracy and democratic institutions, the privacy of our data and communications, and our national defense."

Two shifts are described as necessary in reshaping and strengthening cyberspace. The first requires a rebalancing of responsibility—specifically, that those organizations in the best position to effect change in our digital landscape are called upon to do so, rather than individuals or small businesses. The strategy lays out the role of regulation in balancing innovation with liability and articulates a movement away from placing the brunt on consumers.

Cybersecurity and Infrastructure Security Agency Director Jen Easterly recently urged businesses to prioritize consumer security, suggesting legislation be created to "prevent technology manufacturers from disclaiming liability by contract, establishing higher standards of care for software in specific critical infrastructure entities, and driving the development of a safe harbor framework to shield from liability companies that securely develop and maintain their software products and services."[2] Our digital age could be generally described as a kind of Wild West, with heavy reliance upon technology with relatively few safeguards. There seems always to be a temptation to view the dangers associated with our digital world as hypothetical and somehow separate from our "real lives." As we are now seeing, this characterization is becoming increasingly unacceptable; businesses are being held accountable for their products and consumers are no longer expected to accept the same degree of risk. Jen Easterly pointed to Apple's security policies as a strong example for other technology companies to follow, including its widescale use of multi-factor authentication. These sorts of measures are moving from "preferred" to "mandatory," much as the installation of seat belts did in the years after their introduction.

> "CYBERSECURITY IS ESSENTIAL TO THE BASIC FUNCTIONING OF OUR ECONOMY, THE OPERATION OF OUR CRITICAL INFRASTRUCTURE, THE STRENGTH OF OUR DEMOCRACY AND DEMOCRATIC INSTITUTIONS, THE PRIVACY OF OUR DATA AND COMMUNICATIONS, AND OUR NATIONAL DEFENSE."

In addition to building cybersecurity into products and software, "The Administration supports legislative efforts to impose robust, clear limits on the ability to collect, use, transfer, and maintain personal data and provide strong protections for sensitive data."[3] Unlike previous approaches, this strategy points to mandatory standards as a way to establish consistent improvement, especially in upholding consumer protections. Underscoring these efforts is a need for private and public sector cooperation, information sharing, and shared responsibility.

Similarly, the second shift highlights the need to incentivize and balance long-term cyber goals with short-term, necessary improvements to existing technology. Proactive cybersecurity systems and policies, education, research programs, and the establishment of a diverse cyber workforce are all components of how the U.S. government plans to make itself an example of cybersecurity investment and modernization. This will be especially evident as it works to better secure critical sectors; consider, for instance, the government's proactive investment in a new energy infrastructure. In addition to adopting a zero-trust architecture (involving the implementation of multi-factor authentication, encryption, and more stringent access controls, among other advancements), the strategy also describes the federal government's need to "replace or update IT and OT systems that are not defensible against sophisticated cyber threats."

One such threat described in the report is ransomware. It would have been discussed in the report in any case, but as it happened, this strategy was released in the wake of a ransomware attack on the U.S. Marshals Service. In February the Service revealed that it had been the victim of "a ransomware and data exfiltration event"[4] in which sensitive data had been compromised. A huge concern was that this hack would have breached information related to the Federal

Witness Security Program, but thankfully, it seems that this information has been kept secure.[5] While many details have not been reported, it might be that the attackers were not financially motivated. As noted in an NPR report, "If no ransom was demanded, that could speak to the potential hidden motivation. Nation-state adversaries including Iran and Russia have launched destructive attacks designed to look like ransomware in an effort to cover up efforts to steal intelligence or cause disruption in the past."[6] Though much about the attack remains unclear (or undisclosed), the elements laid out in the National Cyber Strategy to combat ransomware should be considered in preventing or mitigating future attacks:

1. leveraging international cooperation to disrupt the ransomware ecosystem and isolate those countries that provide safe havens for criminals;
2. investigating ransomware crimes and using law enforcement and other authorities to disrupt ransomware infrastructure and actors;
3. bolstering critical infrastructure resilience to withstand ransomware attacks; and
4. addressing the abuse of virtual currency to launder ransom payments.

These components work together in making ransomware a less profitable venture for cybercriminals, combined with a general prohibition against paying ransoms when they are requested.

The next steps for the strategy will be published in a subsequent implementation plan. The effectiveness of the action items and national progress toward long-term improvement will be assessed, and lessons learned from cyber incidents will continue to be incorporated. It is encouraged that big-picture security reviews—for example, those created by the Cyber Safety Review Board[1]—are also utilized by private companies. ▲

NOTES

[1] *https://www.whitehouse.gov/wp-content/uploads/2023/03/National-Cybersecurity-Strategy-2023.pdf*

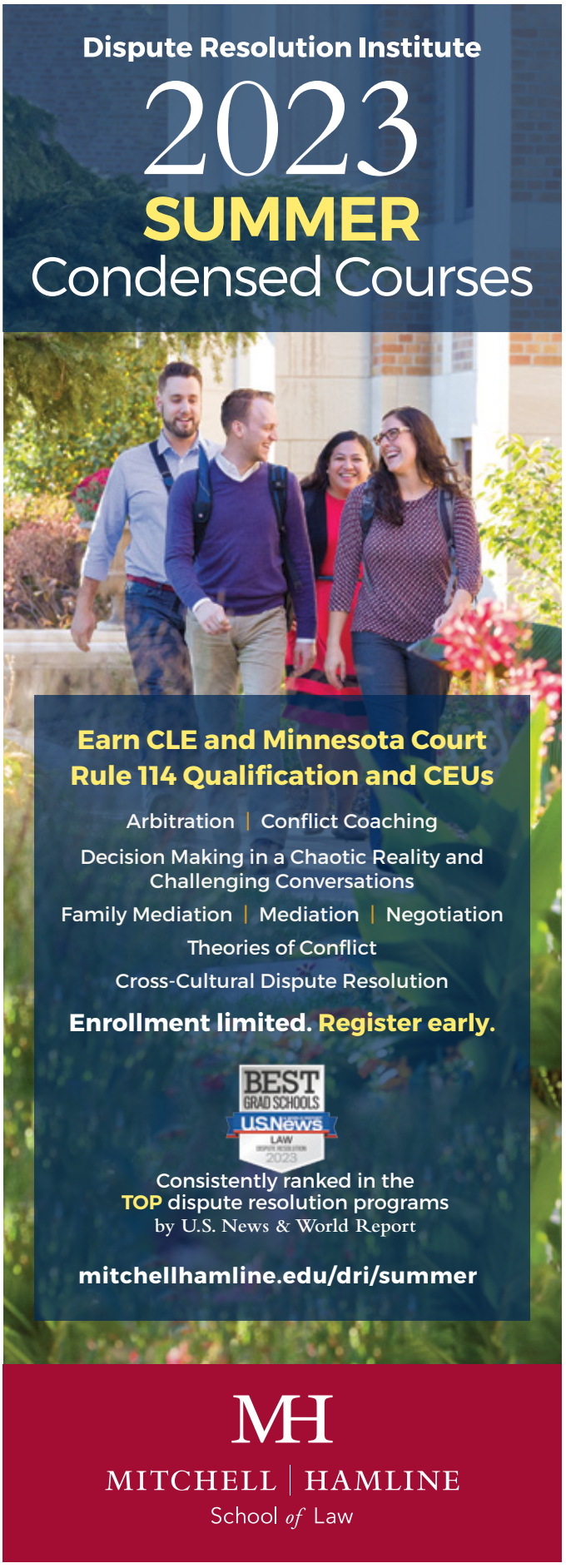
[2] *https://www.cnbc.com/2023/02/27/cisa-director-praises-apple-security-suggests-microsoft-twitter-need-to-improve.html*

[3] *https://www.whitehouse.gov/wp-content/uploads/2023/03/National-Cybersecurity-Strategy-2023.pdf*

[4] *https://www.nbcnews.com/politics/politics-news/major-us-marshals-service-hack-compromises-sensitive-info-rcna72581*

[5] *https://www.npr.org/2023/02/28/1160112051/hackers-steal-sensitive-law-enforcement-data-in-a-breach-of-the-u-s-marshals-ser*

[6] *https://www.npr.org/2023/02/28/1160112051/hackers-steal-sensitive-law-enforcement-data-in-a-breach-of-the-u-s-marshals-ser*



THE HARDEST PART OF BEING A LAWYER? *Email*

BY CRESSTON D. GACKLE ✉ *cdg@cresstonlaw.com*

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The first thing I do when I wake up in the morning is check my email. The last thing I do every day is check my email. Somewhere between the third and fourth sentence anyone speaks to me, I check my email. I probably check my email in my sleep.

Email can be addictive. It's a one-stop shop of notifications of new information on all my court cases as well as an interactive to-do list. Email also makes me feel needed; responding to email makes me feel useful. But because I have no boundaries around it, it intrudes upon my work, my life, and my relationships.

While email is essential to modern legal practice, it remains one of my most inefficient tools. I too often see (and use) email as a punting mechanism to kick projects between people until someone finally takes the next substantive step forward. Projects frequently stall out on receipt of a particularly long or next-steps-laden email that demands the receiver perform several tasks before responding—followed by an email that asks for clarification or updates. Email threads are a Gordian knot of information that saps everyone's memory and accountability. Email is like a coping mechanism for anxiety about task completion: As long as something resides on someone else's to-do list, it's not on our own.

Email is also highly disruptive to completing other tasks. The escalating red number on my email app and the Pavlovian ping on my electronic devices signal yet another task that demands priority. The receipt of a particularly lengthy, obtuse, or disconcerting email can throw off a whole day's plan for court hearings, preparation, or other tasks. Emails tacitly demand an answer before it's reasonable to expect one both during and after working hours. Coupled with institutional demands of legal practice, email systems mean 1) work piles up while we're away, building the dread of an inevitable return to a mountain of unread emails; and 2) everyone thinks their email is the one that should be answered first or within a set timeframe. Email persistently demands that we fail to keep work in its place: at work and during those working hours when we are not in the middle of completing other tasks.

Additionally, I've found email to be the worst kind of to-do list. Because it's organized only by the time of sending and receipt, there's no concept of priority in emails. Of course, we've all received

"high priority" or "urgent" emails which in themselves are another grave misuse of email. Email is not designed for emergencies. It's like putting a post-it note on someone's desk saying there's a fire on the floor below.

Finally, email usually fails to convey tone and nuance. It's not a very humane form of communication. I don't know whether your ellipses convey impatience with me or the fact you've chosen to pause in your thought process as you composed your email. Nor is it helpful to receive a seemingly sharp email without being able to sense the sender's body language and facial expressions.

In short, email has deeply impacted my well-being as a lawyer. I have developed an unhealthy reliance upon a tool of communication never meant to be much more than a means of greeting someone and asking to set up a meeting. It is also the part of my work I take home, intruding upon my morning and nightly routines, my spare time, and the time I spend with friends and family. It breaks down the boundaries I place around my attempts at work-life balance, inevitably spilling into the time I devote to *not* working.

Email is a daily tax on my well-being. I'm a zero-unread-emails kind of person. I can't stand leaving emails unanswered because ultimately I can't find rest outside work unless the oppressive to-do list that is my inbox has been dealt with. And so I strive constantly for the ephemeral goal of an empty inbox.

In view of my poor relationship with email, in early September 2022, I added the following to my firm and public defender email signatures:

> **EMAIL RESPONSE POLICY NOTICE:**
> Thank you for sending me your message.
> I appreciate your taking the time to do so.
> To reduce interruptions to my work flow and to my life outside of work, I will be reviewing email for one hour per business day. I will not be reviewing email on Saturdays, Sundays, legal holidays, sick days, or vacation days. I will respond to your message in due time and I appreciate your patience in allowing me due time to respond.

At the time, I was checking my work email incessantly. As my partner and friends could attest, I had no boundaries around checking my email. It would be the first and last thing I did every day and the thing I'd do in every in-between moment.

So far, this experiment has been a partial success. I still check my email constantly both at and outside of my work. I haven't been consistent with holding off on checking email until I've completed my morning routine. I have succeeded in responding to email very little if at all on weekends and holidays, even if the email seems to demand a more immediate response. My email response notice has become more of a mantra than a practice, something I strive to hold to but fall short of each day. I do think it helps remind me, and others who choose to read the small print at the bottom of my emails, that email should not be used for emergencies and that work is not my top priority in non-working hours.

I believe the way I use email must fundamentally change or else it will contribute to my exit from the profession. I should of course send less email and I should also respond to email more slowly. I should internalize that email is never for emergencies nor for the most important communications we have with each other. It has been and always will be a slow, shallow, and soporific puzzle of an activity, not a meaningful place to engage with others in problem-solving, discussion, or connection.

Rather than fighting through the slog of shallow and vague emails, I can envision a legal practice where communication only involves speaking directly to people, the kind of communication centered on collaborative interaction that is more human, more direct, and more connected. Perhaps someday I will simply delete my email address and tell people they can mail me everything they need to send me and meet with me to tell me everything they need to tell me. I believe that could be a healthier—and more efficient—practice than continuing with the way our profession currently uses email. ▲

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SCOTUS:

Bankruptcy doesn't erase debts incurred by the fraud of another

BY GEORGE H. SINGER ghsinger@hollandhart.com

The United States Supreme Court recently answered the question of whether a debtor in bankruptcy can discharge a debt resulting from another person's fraud, even if the debtor is not aware of the fraud. On February 22, 2023, the high court decided *Bartenwerfer v. Buckley*,[1] ruling unanimously that a debtor could not use the protection of bankruptcy to avoid paying a debt that resulted from the fraud of a partner. The debt is nondischargeable in bankruptcy even though the debtor had no culpability—she did not know and could not have known about the fraud.

A cornerstone of modern bankruptcy law is the discharge. The discharge is the statutory forgiveness of liability for debts not otherwise addressed in a bankruptcy case. It facilitates the "fresh start" policy of the bankruptcy laws by freeing the honest, but unfortunate, debtor from the financial burdens of debt. Bankruptcy, however, strikes a balance between the interests of debtors and creditors. Congress enacted §523 of the Bankruptcy Code to reflect a policy that certain debts should be excepted from the discharge when the creditor's interest in recovering a particular debt outweighs the debtor's interest in a fresh start. One such exception is set forth in §523(a)(2)(A), which precludes a debtor from discharging any debt for money to the extent "obtained by... fraud."

Factual background

Kieran Buckley sued Kate and David Bartenwerfer after discovering defects in a San Francisco house that he purchased from the couple in 2007. The Bartenwerfers remodeled the home after purchasing it to resell it at a profit. They subsequently sold the property for more than $2 million to Buckley, a real estate developer. The couple made disclosures in connection with the sale and attested that they had disclosed all material facts relating to the property. Buckley later discovered several undisclosed defects with the home.

Buckley sued the Bartenwerfers in state court for misrepresentation, arguing that the couple were partners in the remodeling project and sale transaction. He secured a judgment against both Kate and David Bartenwerfer as partners of more than $200,000 for breach of contract, negligence, and nondisclosure of material facts.[2]

The Bartenwerfers filed for protection under Chapter 7 of the Bankruptcy Code. Buckley commenced an adversary proceeding seeking to have the amount awarded declared nondischargeable under the fraud exception set forth in 11 U.S.C. §523(a)(2)(A)—which excepts from the bankruptcy discharge "any debt... for money... to the extent obtained by... false pretenses, a false representation, or actual fraud."

Lower courts reach opposite conclusions

The bankruptcy court found that David committed fraud and imputed his fraudulent intent to Kate. The court reasoned that the two had effectively formed a legal partnership to renovate and sell the property. The bankruptcy court therefore found the debt to be nondischargeable.

Kate appealed to the bankruptcy appellate panel, which found that §523(a)(2)(A) barred her from discharging the debt only if

she knew or had reason to know of David's fraud. On remand, the bankruptcy court determined that Kate lacked such knowledge and permitted the discharge of the debt. The Ninth Circuit Court of Appeals reversed on further appeal, finding that a debtor who is liable for the fraud of a partner is not able to discharge that debt in bankruptcy, regardless of the individual's own culpability.

The Supreme Court's decision

The Supreme Court affirmed the decision of the Ninth Circuit, resolving a circuit split over the dischargeability of such debts in bankruptcy.[3] In an opinion authored by Justice Barrett, the Court found that the Bankruptcy Code, "[b]y its terms" precludes the discharge of the debt. The Court rejected the debtor's argument that an ordinary English speaker would understand that "money obtained by fraud" as used in §523(a)(2)(A) of the Bankruptcy Code means money obtained by the *individual debtor's* fraud.[4] The Court found that the text of the statute is written in a passive voice and does not specify a fraudulent actor. The Court disagreed with the contention that the passive voice "hides the relevant actor in plain sight."[5] Rather, the passive voice used by Congress "pulls the actor off the stage."[6]

Section 523(a)(2)(A) is framed by Congress to be agnostic with respect to who committed the fraud. What is important is not the identity of the actor, but the event that occurred. The intent or culpability of the actor is, unlike neighboring provisions of §523(a)(2)(B) and (a)(2)(C) of the Bankruptcy Code, not a focus. The Court pointed out that in the relevant context of common law fraud, fraud liability is not confined to the wrongdoer. Courts, for example, have long held principals liable for the fraud of their agents[7] and held partners jointly liable.[8]

The Court also considered its textual analysis of the fraud exception to discharge in the context of the statute's history. Congress reenacted the statute when it overhauled the Bankruptcy Code in 1978 and deleted "of the bankrupt" from the exception for fraud that was in place under the predecessor statute. By doing so, Congress excised the actor from the statute. In addition, the Court underscored a Supreme Court decision from 1885 which found that two partners were liable for a debt attributable to the claims of a third partner even though they were not "guilty of wrong."[9]

The debtor invoked the "fresh start" policy of modern bankruptcy law to support the argument that precluding faultless debtors from discharging debts for frauds they did not commit is inconsistent with that policy. The Court emphasized that §523's aim of barring certain debts from discharge is a reflection of countervailing policies distinct from wiping the slate clean. In any event, the discharge exception embodied in §523(a)(2)(A) addresses the debt as it is. It does not define the scope of a debtor's liability for the fraud of another—that is the function of underlying nonbankruptcy law.[10]

The statute turns on how the money subject to the debt was obtained, not on who committed the fraud to obtain it or any actor's intent or culpability. The Court adopted a nationwide rule in favor of victims of fraud to seek compensation for losses by precluding those who are liable, even if not culpable, from discharging that debt in bankruptcy. Congress has concluded that a creditor's interest in recovery of full payment of debts resulting from fraud outweighs a debtor's interest in a complete fresh start.[11]

The concern over the consequences of the Supreme Court's decision in *Bartenwerfer v. Buckley* will be with respect to the imputation of liability. As the debtor argued in her petition for *certiorari,* an adverse ruling on the issue "potentially impacts every joint transaction or endeavor that may be construed as a partnership, including transactions involving married persons and couples, even the sale of a family home." The Court, however, pointed out that the law of fraud does not impose liability "willy-nilly on hapless bystanders" and an ordinarily faultless individual is responsible for another's debt only when there is a special relationship between the parties. ▲

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NOTES

[1] __ U.S. __, No. 21-908, 2023 U.S. LEXIS 943 (2/22/2023).

[2] The debt has, as a function of interest and time, ballooned to over $1 million.

[3] *Compare In re M.M. Winkler & Assoc.*, 239 F.3d 746, 749 (5th Cir. 2001) (finding that any debts that arise from fraud are nondischargeable) *with In re Walker*, 726 F.2d 452, 454 (8th Cir. 1984) (finding a debt to be nondischargeable only if the debtor knew or should have known of the fraud).

[4] As positioned by the debtor, any other interpretation would bar the liability perpetrated by another from the discharge in bankruptcy without any act, omission, intent, or knowledge on the part of the debtor.

[5] *Bartenwerfer v. Buckley,* __ U.S. __, 2023 U.S. LEXIS 943 *10 (2/22/2023).

[6] *Id.*

[7] *Id.* at *11 (citing *McCord v. Western Union Telegraph Co.*, 39 N.W. 315, 317 (Minn. 1888).

[8] *Id.* at *12 (citing *Tucker v. Cole,* 11 N.W. 703, 703-04 (Wis. 1882)). "Understanding 523(a)(2)(A) to reflect the passive voice's 'antagonism' is this consistent with the age-old rule that individual debtors can be liable for fraudulent schemes they did not devise." *Id.*

[9] *See Strang v. Bradner*, 114 U.S. 555 (1885) (rejecting the contention that a lack of knowledge or intent serves as a basis to discharge a debt incurred by a partner under predecessor statute).

[10] *Buckley,* __ U.S. __, 2023 U.S. LEXIS 943 *19.

[11] *Id.* at *20. Justices Sotomayor, with whom Justice Jackson joined, authored a concurrence and indicated that §523(a)(2)(A) incorporates the common-law principles of fraud and bars debts obtained by fraud of a debtor's agent or partner. Justice Sotomayor found noteworthy that the Court was not confronting a situation involving a fraud by a person bearing no agency or partner relationship to the debtor. *Id.* at *22. It involved two people who acted together in a partnership. *Id.*

MINNESOTA'S RACIALLY BIASED JURY POOLS AND HOW TO FIX THEM

BY BETHANY O'NEILL, CRESSTON GACKLE, AND DAVID SCHULTZ

Individuals accused of crimes are entitled to a trial before an impartial jury of their peers.[1] This is a bedrock principle of American law, with origins that date to medieval England. The idea is embodied in the Sixth Amendment, which requires the pool from which a jury is drawn to reflect a representative cross-section of the community.[2] Yet what if the jury pool is not racially diverse enough to be representative of the community? This is the problem across Minnesota. Changing racial demographics in the state, coupled with the practices currently used to determine jury pools, are empaneling juries that are not racially representative. The result is that trials often fail to produce justice and perhaps even violate the Sixth Amendment.

Minnesota has a race problem. The murder of George Floyd brought to the fore of the public conversation again the racial disparities in education, income, and health care that plague Minnesota.[3] There are also racial disparities in the criminal legal system, among them incarceration rates and police stops.[4] Disparities also extend to the racial composition of juries.

At one time in American history, people of color were simply barred from serving on juries. This resulted in all-white juries convicting Black defendants of crimes.

Traditionally the focus on race and juries has come at the *voir dire* stage, where peremptory challenges were historically used to exclude prospective jurors on the basis of race. The U.S. Supreme Court ruled in *Batson v. Kentucky*[5] that such practices violate the Constitution. Yet despite this ruling, studies point to continued racial discrimination and underrepresentation in juries across the nation.[6] This problem extends too to Minnesota.

JURIES IN MINNESOTA UNDERREPRESENT PEOPLE OF COLOR

Nearly 30 years ago, the Minnesota Supreme Court's Task Force on Racial Bias in the Judicial System wrote that "[t]he ethnic, racial and sexual makeup of a jury affects the outcome of cases" and that "grand and petit juries need people of color to truly reflect the whole community if the jury's verdict is to reflect the community's judgment."[7] At that time, the task force concluded:

> "People of color are overrepresented in the number of individuals arrested and prosecuted and imprisoned, as well as in the number of individuals who are victims.... People of color waiting for justice or judgment abound. Yet somehow, people of color on the *other* side of the courtroom—in the jury box—are very hard to find. In fact, jury pools rarely are representative of the racial composition of our communities."[8]

Over 25 years ago, Justice Alan Page recognized the systemic exclusion of Black people from juries in Minnesota. In a special concurrence in *Hennepin County v. Perry*, Justice Page outlined the county's racially discriminatory practices and identified corrective actions that could be taken to combat the systematic, harmful, and dangerous exclusion of people of color from jury service. He wrote:

> "While, on its face, the process used by Hennepin County to select grand jurors appears to be race-neutral, it has, for some time, disproportionately excluded people of color from participating in one of the most important and fundamental activities of our representative government. At some point, a purportedly race-neutral process that perpetuates and reinforces inequality of opportunity... is no different than a race-based process intended to produce the same result...."[9]

In the most recent assessment of jury diversity and representativeness in Minnesota, the Minnesota Supreme Court's Committee for Equality and Justice studied data from jury trials in 2018 and 2019 and found that white, non-Hispanic Minnesotans are represented at a higher rate in jury pools than most other racial groups.[10] Black and African-American Minnesotans made up 5.5 percent of the adult population yet only 3.3 percent of jury pools statewide, a comparative disparity of about 40 percent. Nearly half of all juries statewide in 2018 and 2019 were all-white.[11] In Hennepin and Ramsey Counties—the busiest in the state in terms of filings and trials—the situation is similarly poor.[12] Nationally, a 2018 national assessment of jury pool data in the federal courts determined that "underrepresentation of the Latin and African American population is ubiquitous."[13]

HOW JURIES ARE SELECTED IN MINNESOTA

Title IX of the Minnesota General Rules of Practice governs the jury-selection process in Minnesota. The jury commissioner of each county, ordinarily the judicial district court administrator or their designee, is responsible for compiling and maintaining a list of prospective jurors called the "source list."[14] The Minnesota Statewide Jury Management Rules require each jury commissioner to create the source list for each county from two major databases: (1) the Department of Public Safety's database of licensed drivers and Minnesota State ID card holders and (2) the Secretary of State's database of registered voters.[15]

While, historically, jury source lists based on licensed drivers and registered voters may have been representative of the state's population when it was 90 to 95 percent white Caucasian, it no longer is. People of color are underrepresented in jury pools because they are often underrepresented in the voter registration databases used to create the pools. Socioeconomic, historical, and geographic obstacles to voter registration mean that many racial and ethnic groups are not fully represented on voter registration lists.[16] While Minnesota does not have statistics regarding the racial composition of those who hold driver's licenses or who are registered to vote, there is evidence that people of color are underrepresented in both.

According to 2020 US Census data, 83.7 percent of white non-Hispanics were registered to vote in Minnesota. This compares to 53.5 percent of Black persons, 51.2 percent of Asian persons, and 55.8 percent of Hispanic persons.[17] These differences in registration patterns reveal clear racial disparities in voter registration. If jury pool selection is based simply on voter registration, it will likely fail to produce a jury pool that is racially representative of the adult Minnesota population.

There are also racial disparities in who holds driver's licenses. Because of privacy laws, independent academic research regarding race and possession of a driver's license is difficult. Moreover, Minnesota does not maintain, or at least does not publicly release, data regarding race and the possession of a driver's license. However, several studies have found racial disparities nationally and in other states, and there is reason to believe that Minnesota may reflect similar trends.

A 2012 Survey of the Performance of American Elections (SPAE) found that while 93 percent of white Caucasians nationally possessed a driver's license, only 79 percent of Blacks and 90 percent of Hispanics possessed a driver's license. A 2012 American National Election Service (ANES) study done by Vanessa Perez found that 95 percent of white Caucasians possessed a valid government identification, whereas only 87 percent of Blacks and 90 percent of Hispanics did.

An Employment Training Institute (ETI) study from 2017, Research on Disparate Racial Impacts of Using Driver's Licenses for Voter IDs, documented the racial disparities in race and possession of a driver's license. The report noted federal judge Lynn Adelman's decision in May 2014 finding Wisconsin's state photo ID law unconstitutional due to its adverse impact on many Wisconsin citizens. In his 90-page decision, Judge Adelman cited the ETI research indicating that only 47 percent of Black adults and 43 percent of Hispanic adults (compared to 73 percent of white adults) in Milwaukee County held valid driver's licenses, as did 85 percent of white adults in the rest of Wisconsin, compared to 53 percent of Black adults and 52 percent of Hispanic adults. While the studies cited above were not of Minnesota, there is no reason to think Minnesota is exempt from the same or similar racial disparities.

Overall, there is compelling evidence that there are racial disparities in who has driver's licenses and registers to vote in Minnesota. If so, then relying upon these methods to select jury pools will consistently under-represent racial minorities.

WHY DIVERSE JURIES MATTER

Racially diverse juries are better and more deliberative than non-diverse juries. "Compared to all-White juries, racially mixed juries tended to deliberate longer, discuss more case facts, and bring up more questions about what was missing from the trial."[18] Racially diverse juries "were also more likely to discuss racial issues such as racial profiling during deliberations."[19]

Social science also reveals that a racially mixed jury, regardless of whether it produces an acquittal or a conviction, leads observers to believe that the outcome is fairer.[20] When the jury is all white, convictions are seen as less fair. This is hardly surprising, since 87 percent of Blacks and 61 percent of whites believe that Blacks are treated less fairly than whites by the criminal justice system.[21]

Diverse juries also produce less biased verdicts.[22] In a study of 785 felony trials occurring over a 10-year period, "researchers compared conviction results when there was at least one African-American in the jury pool[] with the results when there were no African-Americans in the jury pool."[23] The all-white pool convicted Black defendants 81 percent of the time and white defendants 66 percent of the time.[24] When the pool included at least one Black person, 71 percent of Black defendants were convicted compared to 73 percent of white defendants. Just one diverse juror can and does make a huge difference.

THE SOLUTION

Minnesota can produce more racially representative juries. The jury that convicted officer Derek Chauvin of the murder of George Floyd was half-composed of people of color in a county where approximately 83 percent of the population was white Caucasian.

The simple solution is to change the way jury pools are created. California recently added its state tax filing list as another source from which to draw juror names. Minnesota could do the same, either by way of a state legislative mandate or by court action.

The Minnesota General Rules of Practice allow the source list to be supplemented "with names from other lists specified in the jury administration plan."[25] And if the chief judge, or designee, determines that improvement is needed in either the inclusiveness of the jury source list or the representativeness of the jury pool, he or she must order corrective action.[26] Nevertheless, no such order requiring supplementation of the source list has ever been issued in Minnesota.

But the mere fact that it has not been done does not mean that it can't be done. The state may argue that this would create a logistical hardship for court administration. However, logistical problems for court administration or overburdened judicial systems do not trump a defendant's constitutional rights.[27]

There is movement by some to change how we select juries. In the state's Third Judicial District,[28] for example, the local Committee for Equity and Justice (CEJ)[29] has taken concerted action aimed at eliminating long-standing racial disparities on juries. (See sidebar, p.19.) The counties of the Third District are rapidly diversifying[30] by race, yet people identifying as Asian, Black, Hispanic, and multiracial or other are all underrepresented at the reporting, *voir dire*, and sworn stages of the juror selection process, with comparative disparities frequently exceeding 40 percent in individual counties.[31]

The Third District CEJ, noting the specific problems that exist in the district with county and district-specific data in hand, wrote a letter asking Third District Chief Judge Joseph A. Bueltel to

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A THIRD JUDICIAL DISTRICT UPDATE

After the state-level Committee for Equality and Justice issued its report, the Third District CEJ analyzed the comparative disparities and inclusivity rates of jury pools in Third District counties. Based on that review, the Third District CEJ sent a letter to Chief Judge Bueltel recommending corrective action, specifically:

- sending jury qualification questionnaires and summonses to non-responding persons at least twice;
- requiring redrawing of the venire for *voir dire* if the proportion of people of color is underrepresented until the proportion of people of color is adequately or overrepresented and requiring draws from the master source list to overdraw from communities, neighborhoods, and/or zip codes where people of color are overrepresented;[1]
- ordering that jury questionnaires and summonses be sent in multiple languages, including Spanish and Somali, and plainly indicate that English proficiency is not a requirement of jury service. Order that English-as-a-second-language speakers be provided an appropriate interpreter for simultaneous interpretation of all proceedings, including sworn jury service, if requested.[2]

On July 18, 2022, Chief Judge Bueltel ordered:

- the Third District's chief court administrator and jury commissioner to work with the statewide Consolidated Jury Unit to translate the jury summons and questionnaire form into Spanish, Somali, Hmong, and Karen languages and to make these available online, at courthouses, and whenever requested;
- amendment of both documents (as well as the failure-to-respond notice) to notify recipients that translated versions of those documents are available online, at courthouses, and by mail;
- translation of the online jury summons questionnaire to allow answers in Spanish, Somali, Hmong, and Karen;
- amendment of Question 4 of the jury summons and questionnaire form to substantively convey that "[w]hile no exact level of English language skill or proficiency is required, you should be able to understand the evidence, the lawyers' arguments, and the court's instructions, and be able to discuss the case with other jurors in English. If you are unsure or concerned about your ability to communicate in English, you should come to court and tell the judge about your concerns, and the judge will decide if you are able to serve."

The court denied the committee's remaining recommendations.[3]

In September 2022, the Judicial Council authorized a pilot project in the Third District to implement most of the court-ordered changes. On January 20, 2023, Chief Judge Bueltel confirmed by email to justice partners that as of April 1, 2023, judges would be performing English proficiency screenings in the *voir dire* process if deemed necessary. The Judicial Council will review the pilot project in one year to consider expansion of the project to other districts.

Additionally, the Minnesota Supreme Court asked the Rules of General Practice Advisory Committee to review the jury management rules in September 2022. In late December 2022, that committee recommended wholesale changes to the jury management rules that would, if adopted, remove the authority of any chief judge to order corrective action in their districts to address inclusivity and representativeness issues in jury selection, including amendment of the source lists. The Minnesota State Bar Association's appointed rules advisory committee members voted to endorse these changes with an exception, specifically to modify the proposed amendments so that a chief judge may still identify an issue with the jury selection process and raise it with the Judicial Council for discussion. ▲

take "corrective action" to reduce racial disparities on juries. The Third District CEJ recommended, among other things, requiring the jury commissioner of each county to update the master jury source list every six months and requiring the integration of public assistance and unemployment compensation source lists.

On July 18, 2022, Chief Judge Bueltel issued several orders regarding translation of summons and other documents, but he rejected the demand to incorporate additional source lists.

Two recent developments may affect jury pool composition in the future. In February 2023 the Minnesota Legislature voted to restore ex-felon voting rights upon completion of their incarceration, and Gov. Tim Walz subsequently signed the measure into law. Two, on January 18, 2023, Hennepin County Judge John L. Lucas issued an order raising questions regarding the racial representation of juries in the Fourth Judicial District and indicating that some changes are needed. Both events could potentially address the problem of racial disparities in juries across the state.

CONCLUSION

For 30 years, the problem of racially disproportionate juries has been identified and analyzed by the judicial branch in Minnesota. Our jury system has perpetuated the creation of jury pools and sworn juries that are substantially racially unrepresentative of their communities. It is reasonable, both as a philosophical matter and as shown by data, that many people of color would have no confidence in a jury to reach fair decisions unless they believe those serving have some of the same experiences they do. In our deeply flawed society, many experiences are defined by race. By allowing our jury system to continue operating without proper corrective action, we endorse a system that consistently generates racially disproportionate juries. As Justice Page observed in 1997, there is scant if any difference to a person of color facing a jury trial between a "selection system that produces a disproportionate number of single-race juries" and one that intentionally excludes people of color.[32] Reform of our juror selection system is long overdue. ▲

NOTES

[1] U.S. Const. amend. VI; Minn. Const. art. I, §6.

[2] *Taylor v. Louisiana*, 419 U.S. 522, 527-28 (1975); *see also* Minn. Stat. §593.31 ("It is the policy of this state that all persons selected for jury service be selected at random from the broadest feasible cross section of the population of the area served by the court...").

[3] David Schultz, "How We Got Here: Race, Police Use of Force, and the Road to George Floyd," INEQ. INQUIRY (Apr. 2021), *available at*: *https://lawandinequality.org/?s=how+we+got+here [perma.cc/76CV-EFPN].*

[4] Andy Mannix, *Black drivers make up majority of Minneapolis police searches during routine traffic stops*, Star Tribune, 8/7/2020, *available at*: h*ttps://www.startribune.com/black-drivers-make-up-majority-of-minneapolis-police-searches-during-routine-traffic-stops/572029792/*; Andy Mannix, *Minnesota sends minorities to prison at far higher rates than whites*, Star Tribune, 4/14/2016, *available at*: *https://www.house.leg.state.mn.us/comm/docs/b930ba62-979e-4714-9c4d-d9c708dddcf7.pdf*

[5] 476 U.S. 79 (1986).

[6] Equal Justice Initiative, Race and the Jury: Illegal Discrimination in Jury Selection (2021); *see also Flowers v. Mississippi*, 139 S.Ct. 2228 (2019).

[7] Minnesota Supreme Court Task Force On Racial Bias in the Judicial System, Final Report, p. 36 (May 1993) ("1993 Racial Bias Task Force Report"), *available at: https://www.mncourts.gov/mncourtsgov/media/scao_library/CEJ/1993-Minnesota-Supreme-Court-Task-Force-on-Racial-Bias-in-the-Judicial-System-Final-Report.pdf* (citing Kenneth C. Vert, *A Grand Jury of Someone Elses Peers: The Unconstitutionality of the Key-Man Selection System*, 57 UMKC L.R. 505 (1989); Note, *The Case for Black Juries*, 79 Yale L.J. 531, 532 (1970)).

[8] 1993 Racial Bias Task Force Report at 32.

[9] *Hennepin Cty. v. Perry*, 561 N.W.2d at 897-901 (Minn. 1997) (Page, J., concurring) (internal citations and quotation omitted).

[10] *See* 2020-2021 Committee for Equality and Justice Study on Jury Race Data and Recommendations (2020-21 CEJ Report). This report was drafted by the Access and Fairness Committee, a subcommittee of the state-level CEJ.

[11] *Id.* at 7.

[12] *Id.* at 33, 36.

[13] Mary R. Rose, Raul S. Casarez, & Carmen M. Gutierrez, *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts*, 15 J. OF EMPIRICAL LEGAL STUDIES 378, 379, 396 (June 2018) (finding 40% of African-Americans and 30% of Latinx people are not part of their community's jury pools).

[14] Minn. Gen. R. Prac. 806(a).

[15] Minn. Gen. R. Prac. 806(b). In practice, the State Court Administrator's Office compiles the list. *See* 2020-2021 Committee for Equality and Justice Study on Jury Race Data and Recommendations at p. 4.

[16] Equal Justice Initiative, A History of Discrimination in Jury Selection, *available at*: *https://eji.org/report/race-and-the-jury/a-history-of-discrimination-in-jury-selection/*

[17] 2020 U.S. Census Data, U.S. Census Bureau, a*vailable at*: *https://www.census.gov/library/stories/state-by-state/minnesota-population-change-between-census-decade.html*.

[18] Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1028 (2003); *see also* Amanda Nicholson Bergold, *What Psychology Says About Jury Diversity, Judges' J., Spring 2022, at 6, 8–9 (2022).*

[19] *Id.* (researchers found that "more often than not, Whites on these heterogeneous juries were the jurors who raised [racial] issues").

[20] Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033, 1048-49 (2003); *see* Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 Washburn L.J. 103, 159 (2019).

[21] John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, Pew Rsch. Ctr. (5/21/2019).

[22] *See* Amanda Nicholson Bergold, *What Psychology Says About Jury Diversity*, Judges' J., Spring 2022, at 6, 8 (2022).

[23] Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 Iowa L. Rev. 1719, 1744 (2016) (citing Shamean Anwar, Patrick Bayer, Randi Hjalmarsoon, *The Impact of Race in Criminal Trials,* 127 The Quarterly Journal of Economics 1017 (2012)).

[24] *Id.* at 1745.

[25] Minn. Gen R. Prac. 806(b); 2020-21 CEJ Report at 3-4.

[26] Minn. Gen. R. Prac. 806(f) ("if the chief judge, or designee, determines that improvement is needed in either the inclusiveness of the jury source list or the representativeness of the jury pool, appropriate corrective action *shall* be ordered" (emphasis added)); 2020-21 CEJ Report at 4.

[27] *See generally*, *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986) ("[t]he delay... appears to be the result of our overburdened judicial system...[,] [t]he reason for this delay must weigh against the state. The responsibility for an overburdened judicial system cannot, after all, rest with the defendant"); *Strunk v. United States*, 412 U.S. 434, 436 (1973) (systemic issues like overcrowded dockets are delays caused by the government); *Barker*, 407 U.S. at 531 ("the ultimate responsibility for such circumstances [as negligence or overcrowded courts] must rest with the government rather than with the defendant.")

[28] The Third Judicial District is a set of 11 counties in the southeastern corner of Minnesota with 25 judicial officers. Minnesota Judicial Branch Website, Third Judicial District, a*vailable at*: *https://www.mncourts.gov/Find-Courts/Third-Judicial-District*

[29] The Third District Committee for Equity and Justice (CEJ) is a district chapter organization of the statewide CEJ, which reports to the Minnesota Judicial Council.

[30] 2020 U.S. Census Data, a*vailable at*: *https://www.census.gov/library/stories/state-by-state/minnesota-population-change-between-census-decade.html*. Third District counties have grown relatively slowly (1.8% compared to 7.6% statewide from the 2010 census to 2020 census), but have outpaced the state as a whole in the percentage population growth of those identifying as Hispanic or Latino (6.3% growth in the Third District counties versus 6.1% growth statewide), Black (63% versus 47.7%), Native American (212.5% versus 54.7%), Asian (66.1% versus 44.7%), and two or more races (242.3% versus 176.3%).

[31] Third District Committee for Equity and Justice letter to the Honorable Joseph A. Bueltel dated 3/25/2022, at pp. 3-4. *See also* Molly Castle Work, *How all-white juries taint confidence in Rochester and Minnesota's courts*, Post Bulletin, 5/26/2022. Analysis of comparative disparities on a state-wide basis tends to mask the far larger disparities occurring at the county level.

[32] *See Perry*, 561 N.W.2d at 897 (J. Page, concurring).

SIDEBAR NOTES

[1] The Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, in its Final Report on pages S-14 to S-15, recommended amending the Jury Management Rules to allow Hennepin and Ramsey County District Courts to adopt new jury selection procedures that would guarantee minority representation on grand juries, requiring redraws of the venire until proportionality consistent with the census data was reached. Subsequent reports by the Judicial Branch seem to suggest that this change occurred without addressing that it appears the pilot project was never implemented by the Hennepin or Ramsey County District Courts. *See* Minnesota Judicial Branch Action Following the 1993 Minnesota Supreme Court Task Force on Racial Bias in the Judicial System and Recommendations for Minnesota Judicial Branch Action in FY20-21 at pp. 9-10. Meanwhile, scholars outside the state seem to believe that this system was actually implemented when it was not. *See e.g.*, Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury De Medietate Linguae*, 4 Va. J. Soc. Pol'y & L. 645, 658 (1997); Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U.L. Rev. 707, 726 (1993).

[2] New Mexico has already implemented a jury system that accommodates non-English speakers. Chief Justice Edward L. Chávez, *New Mexico's Success with Non-English Speaking Jurors*, 1:2 Journal of Court Innovation 303 (2008), *available at: https://www.courts.wa.gov/subsite/mjc/docs/2017/New%20Mexico%27s %20Success%20with%20Non-English%20Speaking%20Jurors.pdf.*

[3] *See* Third District Order Regarding Corrective Action to Improve Jury Pool Inclusiveness dated 7/18/2022, at p. 2. *See also* Molly Castle Work, *Rochester district judge issues 'corrective action' to improve jury pool formation*, Post Bulletin, 7/24/2022.

Caregiver BEWARE

Spotting scams that target seniors and other vulnerable adults

BY NOAH LEWELLEN *noah.lewellen@ag.state.mn.us*

"Mary," a senior living alone in Minnesota, received a Facebook message out of the blue from "Aaron," a 50-something living in Montreal, Canada.[2] Aaron was moving to Minnesota soon, he said, and wanted to make friends before he got there. Mary was happy to walk Aaron around her town virtually, trading photos of herself and the local scenery, receiving in return pictures of a dapper man who appeared to enjoy sailing, wine tasting, and travel. One day, Aaron reported some bad news—he needed shoulder surgery, and he simply wasn't able to come up with enough money to pay for the $17,625.38 procedure. Mary graciously volunteered to lend Aaron money via gift cards and wire transfers to help him out of his bind.

Over the next six months, Aaron reported a string of astonishingly bad luck, from additional trauma requiring medical intervention to issues with Customs' refusal to allow him to cross into the United States with some gold bars he had acquired in his travels. By the time Mary realized that she would never meet Aaron or be repaid any of the money she had lent him, she had lost tens of thousands of dollars, paid by gift card or wire transfer.

Scams targeting senior citizens and other vulnerable adults are all too common. They typically focus on emotional pressure points: asking people to make snap decisions, ostensibly to help loved ones; preying on social isolation; and taking advantage of lack of familiarity with technology or changing methods of communication.

Digital and telephone impersonation scams pose unique problems for private, and even state, enforcement. First, many scams originate in other countries. Second, by the time a scam has been reported, the victim has frequently already sent funds in ways that are difficult or impossible to trace or recoup, such as through gift cards or wire transfers to perpetrators using falsified identification. And third, victims are generally contacted through spoofed numbers or disposable email or social media accounts.

The best way to combat these scams is to identify them and take proactive steps to deal with them before they can cause any harm. While scammers are constantly evolving new ways to part people from their money, many of the most common reports received by the AGO of impersonation scams targeting seniors and other vulnerable adults involve variations on grandparent scams, romance scams, and government-impersonation phishing.

Grandparent scams

In a typical grandparent scam, a con artist calls or emails posing as a relative in distress or as someone claiming to represent the relative, such as a doctor, lawyer, or law enforcement agent. The scammer may frantically yell or talk over artificially induced white noise, making it difficult to identify the voice of the caller, with an opening like "grandma, it's me." This is often followed by a short description of an acute problem that, coincidentally, may be quickly solved by your sending of hundreds or thousands of dollars for bail money, lawyer fees, hospital bills, or other expenses.

This type of scam preys on seniors' empathy with their grandchildren, poor audio quality, declining hearing, and/or lack of knowledge of grandchildren's email accounts. These scams are "hard sells," demanding fast "emergency" action and thus targeting seniors' declining ability to make smart decisions quickly.[3]

Often, slowing down to think about verifying the situation, or asking follow-up questions, can help prevent financial losses.[4] Grandparents faced with these situations are encouraged to simply hang up and call or text the grandchild's known cell phone number to verify the original caller's identity.

Romance scams

Social isolation has long been recognized as a significant factor in mental and physical decline in older adults.[5] Researchers have also found that social isolation is a significant predictor of vulnerability to financial exploitation in older adults.[6] Con artists take advantage of social isolation in so-called "romance scams" by engaging seniors and vulnerable adults in frequent and personal conversations, usually over social media. These longer-term scams can escalate into an expensive venture—like an overseas vacation or a visit to the victim—or culminate in an ask for cash to deal with some alleged emergency, as in the grandparent scam.

Unlike grandparent scammers, however, romance scammers use the fabricated interpersonal relationship the victim feels they have with the scammer to repeatedly obtain access to the victim's money or accounts. While termed a "romance scam," after the most common variant involving a scammer professing to be falling in love with the victim, many such scams simply prey upon the victim's desire for interpersonal, platonic relationships.

When adults have frequent social interactions with people they care about, and with whom they discuss things occurring in their lives—like new, mysterious overseas love interests—romance scammers have less fertile ground for their scams. Friends, children, and caretakers should be on the lookout for sudden, intense relationships that blossom seemingly out of nowhere, especially when the first contact occurred online or by phone.

Government-impersonation phishing/vishing

Phishing, once novel, is a ubiquitous threat found in nearly every organizational and individual email inbox in the country. In a government-impersonation phishing (or vishing, if done by phone) scam, the con artist impersonates an attorney or other government official purportedly contacting you from a trusted governmental agency like the Social Security Administration, or a trustworthy-sounding fictional governmental agency like the Government Grant Center. The scammer is here to deliver wonderful news—that you have been determined to be eligible for a higher level of benefits, or some grant for which you were previously ineligible. This scam may culminate in one of several ways, including asking for "verifying" information like a Social Security number or bank account number, or asking the victim to pay for an "administrative processing fee" via gift card, wire, or even cryptocurrency.

This scam preys on individuals' financial insecurity, their trust in government institutions, and their lack of ready access to information. The scammer's request for private information or payment is the biggest sign of the scam—government institutions will never request your full Social Security number or bank account information by phone, email, or social media. Generally, the websites, emails, and names the scammers use may initially seem plausible, but don't pass muster upon closer inspection. For example, an internet search for "Government Grant Center" directs you to numerous scam alerts. Additionally, emails from government actors don't come from, say, Hotmail accounts—even ones that start with "socialsecurityadministration."

As with grandparent scams and romance scams, the best practice is slowing down, asking questions, and talking to friends or family about what is happening, which will generally help prevent financial loss.

Impersonation scam hallmarks

The impersonation scams described above can take many forms, but potential victims and their friends and advocates should be aware of these common red flags:

- **Payment by wire transfer, gift card, or cryptocurrency.** All three pose difficulties for law enforcement in tracking the ultimate recipient or user of the funds, and requests for payment by these means should be considered suspect.
- **Time-sensitive requests for significant amounts of money.** It is rare that an urgent request for money cannot wait at least 30 minutes for additional investigation about the request. Reaching out to family and friends to get a second opinion may be invaluable in gaining perspective about the request before getting scammed.
- **Sudden and unusual outreach from a stranger or supposed friend or family member.** Because scammers frequently pose as a trusted person, or prey on social isolation, friends and family should keep in touch with their loved ones to serve as a sounding board for unusual contacts.

AGO and private actions to reduce financial impact of scams

The Minnesota Attorney General's Office (AGO), in conjunction with other state and federal partners, has investigated scam conduct being enabled by money transmittal companies like Western Union and MoneyGram, both of which were required to institute anti-fraud programs, provide anti-fraud training to their employees, and take steps to terminate agents who failed to rigorously enforce the companies' anti-fraud measures. The Federal Trade Commission, along with local law enforcement, has worked with private businesses to train employees and provide signage warning of gift card fraud.

The AGO has written and published, and routinely updates, publications on various scams and scam methods. The office's publications, sorted by topic, can be accessed at *www.ag.state.mn.us/Office/Publications.asp*. The AGO encourages the public to download, print, and distribute the publications freely to better inform Minnesotans about scams, and thus defend against vulnerable adult exploitation.

If you, a client, or anyone you know has been harmed by an impersonation scam, you are encouraged to report the scam to both the Office of the Attorney General and the Federal Trade Commission. Government agencies may not be able to address every individual scam, but attorneys collecting these reports are better able to stay abreast of emerging scams in the marketplace that may be addressed by litigation or legislation. ▲

NOTES

[1] Mary and Aaron are fictional, but the story told here is a patchwork of actual complaints received by the Minnesota Attorney General's Office.

[3] Mischa von Krause *et al.*, *Mental Speed is High Until Age 60 as Revealed by Analysis of Over a Million Participants*, 6 Nature Hum. Behavior 700 (May 2022).

[4] Some research suggests that seniors actually process and analyze information better than younger adults, demonstrating a more fine-grained interpretation of incoming data, but that additional time is required for an aging brain to do so. Michael Ramscar *et al.*, *The Myth of Cognitive Decline: Non-Linear Dynamics of Lifelong Learning*, 6 Topics in Cognitive Science 5 (Jan. 2014).

[5] Omolola Adepojou *et al.*, *Correlates of Social Isolation Among Community-Dwelling Older Adults During the COVID-19 Pandemic*, 9 Front Pub. Health 702965 (2021) (collecting sources, noting significant increases in dementia and premature death in socially isolated older adults).

[6] Aaron C. Lim *et al.*, *Interpersonal Dysfunction Predicts Subsequent Financial Exploitation Vulnerability in a Sample of Adults Over 50: A Prospective Observational Study*, Aging & Mental Health (May 2022).

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Congratulations to the 2023 State Champions Nova Classical Academy

Nova Classical Academy will represent Minnesota at the National High School Mock Trial Championship (NHSMTC) in May. This is their sixth State Championship. The team is coached by Jennifer Mullin, Logan Juran, Jeff Magnuson, Israel Wilson, and Damon Fraser, Esq.

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A special thank you to the United States District Court, Chief Judge Patrick Schiltz, Judge Kate Menendez, Judge Donovan Frank, Judge Paul Magnuson, US District Magistrate Judge Elizabeth Wright, US District Bankruptcy Court Judge William Fisher, Clerk of US District Court Kate Fogerty, and Eighth Circuit Deputy Clerk in Charge Maureen Gornik, for hosting the 2023 State Tournament. Mitchell Hamline School of Law for donating gift bags to the State Tournament participants.

WHAT THE RESPECT FOR MARRIAGE ACT DOES AND DOESN'T MEAN

BY CONNOR BURTON AND MATT YOST matt@messicklaw.com connor@messicklaw.com

On December 13, 2022, President Joe Biden signed the Respect for Marriage Act[1] into law in a public ceremony held on the White House lawn featuring performances by the Gay Men's Chorus of Washington, D.C, Sam Smith, and Cyndi Lauper.

This new law supersedes in part the 1996 Defense of Marriage Act (DOMA). That measure, signed into law by President Bill Clinton, held that a same-sex marriage solemnized under the laws of one U.S. state, territory, possession, or tribe did not require recognition in any other U.S. state, territory, possession, or tribe; and further defined the word "marriage" as a legal union between one man and one woman as husband and wife, and the word "spouse" as referring only to a person of the opposite sex who is a husband or a wife on a federal level.[2]

On June 26, 2015, the United States Supreme Court issued its decision in *Obergefell v. Hodges*,[3] holding that the Fourteenth Amendment's due process and equal protection clauses required all states to recognize marriage equality for LGBTQ+ people. National marriage equality had been the culmination of over fifty years of evolution in constitutional law, the collective understanding of family, and religious teaching. The *Obergefell* decision superseded the second section of DOMA, leaving it unenforceable. However, even after *Obergefell*, LGBTQ+ persons have faced obstacles to equal treatment and uncertainty remained regarding the permanence of a judicially crafted right.

Many observers have heralded the Respect for Marriage Act as enshrining the right to same-sex marriage in federal law. But a review of the text of the Respect for Marriage Act and the legal precedent that it is built upon reveals its limitations.

The codification of *Windsor* and *Loving* at a federal level

In *Loving v. Virginia*,[4] decided in 1967, the U.S. Supreme Court ruled that laws banning interracial marriage violate the equal protection and due process clauses of the 14th Amendment to the U.S. Constitution. In the unanimous decision, Chief Justice Earl Warren opined that "[m]arriage is one of the basic civil rights of man, fundamental to our very existence and survival."[5] The Court held that states could not deny such a "fundamental freedom on so unsupportable a basis as the racial classifications embodied" in these anti-miscegenation laws.[6] Such racial classifications were "directly subversive of the principle of equality at the heart of the Fourteenth Amendment[.]"[7] Depriving interracial couples of the fundamental right to marry was "surely to deprive all the State's citizens of liberty without due process of law."[8]

The decision in *Loving* explicitly overturned the previous Supreme Court precedent of *Pace v. Alabama*,[9] an 1883 decision that found Alabama's miscegenation statute constitutional because it applied equally to both "whites" and "non-whites" alike, since the punishment for violating the statute was the same regardless of the offender's race.[10] The Court in *Loving* rejected this "equal application" argument and held miscegenation laws to be unconstitutional.[11]

In 2013, in *United States v. Windsor*,[12] the U.S. Supreme Court held section three of DOMA to be unconstitutional under similar principles. In a 5-4 decision, Justice Anthony Kennedy, writing for the majority, cited the propositions of state autonomy, equal protection, and liberty, holding:

> "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities."[13]

While the *Windsor* decision determined that the federal definition of marriage as between one man and one woman was unconstitutional, the second section of the DOMA remained in full force and effect until 2015.

The Respect for Marriage Act does not codify *Obergefell*

In holding that state same-sex marriage bans violated the due process and equal protection clauses, the majority in *Obergefell* cited *Loving* and *Windsor* as precedents regarding the fundamental right to marry.[14] The *Obergefell* decision made the second section of DOMA unconstitutional, rendering DOMA a dead act.

The Respect for Marriage Act picked up where *Obergefell* left off. By its text, the Respect for Marriage Act forbids the denial of full faith and credit to a marriage between two parties "on the basis of sex, race, ethnicity, or national origin[.]"[15] Additionally, it establishes a presumption that an otherwise legal marriage between two individuals is considered valid under federal law, rule, or regulation. The Act, therefore, legislatively recognizes the judicial precedents laid down in *Loving* and *Windsor*.

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Essentially, the Respect for Marriage Act codifies much of the current legal landscape surrounding marriage created by the Supreme Court in *Loving*, *Windsor*, and *Obergefell*. A risk remains that the Supreme Court may overturn *Obergefell*, at which time individual states could once again return to refusing to perform same-sex marriages (since the federal government cannot force states to codify same-sex marriage). However, because of the Respect of Marriage Act, individual states cannot deny benefits or recognition to parties who are or were otherwise legally married in states that have separately codified same-sex marriage.

The Respect for Marriage Act in Minnesota

In 2011, the Minnesota Legislature passed identical bills placing a proposed constitutional amendment banning same-sex marriage on the 2012 general election ballot.[16] On November 6, 2012, voters rejected the proposed amendment, with 47.44 percent voting in favor.[17]

In the next legislative session, the issue was taken up again, but this time with legislation focused on legalizing same-sex marriage. A bill legalizing same-sex marriage passed both chambers of the Legislature,[18] and on May 14, 2013, Gov. Mark Dayton signed the bill into law.[19] Same-sex marriage has been legal statewide in Minnesota since August 1, 2013, with civil marriage defined as "a civil contract between two persons, to which the consent of the parties, capable in law of contracting, is essential."[20]

Because same-sex marriage is codified clearly and separately under state law, and because Minnesota has never banned interracial marriage, the Respect for Marriage Act exists as a secondary, rather than primary, legal protection for same-sex and interracial couples. A hypothetical overturning of *Obergefell* (or even *Windsor* or *Loving*) would not invalidate or erode the existing marital contract between same-sex couples in Minnesota.

Conclusion

At the time *Loving* was decided, 16 states still codified laws forbidding interracial marriage.[21] The last of these laws was not repealed until 2000.[22]

While same-sex Minnesotans' marital rights have enjoyed a codified certainty for almost 10 years, laws banning same-sex marriage and refusing to recognize foreign same-sex marriages exist in all four of Minnesota's neighboring states.[23] Should *Obergefell* ever be overturned, same-sex couples in these and other states may rely on Minnesota's laws to legally validate their marriages. Per the Respect for Marriage Act, a state with a same-sex marriage ban could not refuse to recognize a legal same-sex marriage performed in a state like Minnesota, providing a layer of certainty, security, and consistency for couples, regardless of where they live.

For states like Minnesota, the benefit of the Respect for Marriage Act is largely symbolic. Symbolism, however, cannot be discounted. To many contemporary observers, decisions such as *Loving* and *Windsor* and *Obergefell* were fantastical and unfathomable. Even years and decades removed, the tenuousness of judge-made law still leaves these decisions feeling delicate and illusory. In that reality, a strong nationwide statement of values, such as the Respect for Marriage Act, serves as a clear and unifying force against bigoted rhetoric, providing concrete stopgaps to families across the country and bending the moral arc of what is possible and achievable toward greater equity. ▲

NOTES

[1] Respect for Marriage Act, Pub. L. No. 117-228.
[2] 1 U.S.C. §7.
[3] 576 U.S. 644 (2015).
[4] 388 U.S. 1 (1967).
[5] *Id.* at 13 (citations omitted).
[6] *Id.*
[7] *Id.*
[8] *Id.* at 12 (citations omitted).
[9] 106 U.S. 583 (1883).
[10] *Id.* at 585.
[11] *Loving*, 388 U.S. at 10 (citations omitted).
[12] 570 U.S. 744 (2013).
[13] *Id.* at 772.
[14] *Obergefell*, 576 U.S. at 644; *id.* at 666.
[15] Respect for Marriage Act, Pub. L. No. 117-228.
[16] Laws of Minnesota, Chapter 88, S.F. No. 1308.
[17] Minnesota Secretary of State. *Results for Constitutional Amendments*, Minnesota Secretary of State (https://electionresults.sos.state.mn.us/Results/AmendmentResultsStatewide?ersElectionId=1&scenario=state) (accessed 12/19/2022).
[18] Laws of Minnesota 2013, Chapter 74, H.F. 1054.
[19] *Id.*
[20] Minn. Stat. §517.01.
[21] Srikanth, Anagha (6/12/2020). "The origins of Loving Day explained". *The Hill* (*https://thehill.com/changing-america/respect/diversity-inclusion/502540-the-origins-of-loving-day-explained/*) (accessed 12/20/2022).
[22] *Id.*
[23] N.D. Const. art. XI, §28; S.D. Const. art. XXI, §9; S.D. Codified Laws §§25-1-1, 25-1-38; Iowa Code §§595.2, 595.20; Wis. Const. art. XIII, §13.

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LANDMARKS IN THE LAW

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

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JUDICIAL LAW

Confrontation clause: Confrontation rights not violated by allowing a witness to testify via Zoom during covid pandemic. During appellant's jury trial for third-degree sale of a controlled substance, held during the second wave of high covid infection rates, the lead investigator was permitted to testify via Zoom after the witness was forced to quarantine following a covid exposure. Appellant was convicted and argues on appeal her right to confrontation was violated when Zoom testimony was permitted. The court of appeals affirmed the district court's decision to allow the testimony.

The Supreme Court holds that the proper test here for whether a confrontation clause violation has occurred is that set forth in *Maryland v. Craig*, 497 U.S. 836 (1990). In *Craig*, the issue was whether a statute allowing a child abuse victim to testify via one-way, closed-circuit television violated the defendant's confrontation rights. The U.S. Supreme Court found a defendant's right to confront witnesses may be satisfied without "a physical, face-to-face confrontation only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850.

Here, a valid public policy interest was furthered by using remote technology for this one witness, given the "extraordinary context of courts trying to administer justice safely" during a pandemic. This was the only way to allow the trial to proceed while protecting the health and safety of those in the courtroom. This remote testimony was also reliable, because the witness was under oath and subject to cross-examination, and the jury was able to observe the witness's demeanor during the testimony by watching the testimony on a large screen TV. Under the *Craig* test, appellant's right to confrontation was not violated by allowing the lead investigator to testify via Zoom. Appellant's conviction is affirmed. ***State v. Tate***, 985 N.W.2d 291 (Minn. 2/8/2023).

Probation violation: District court must issue order revoking stay of execution and issue a warrant or summons for the defendant to initiate probation revocation proceedings. Appellant was on probation after receiving stayed sentences for fifth-degree controlled substance convictions. During the stays, several probation violation reports were filed, and the district court issued warrants for appellant's arrest. Before being arrested, appellant's stays expired. More than six months later, appellant's probation was revoked after a hearing. The Minnesota Court of Appeals holds the district court did not have authority to revoke appellant's probation, because the court did not initiate revocation proceedings within six months after the stays expired.

Under Minn. Stat. §609.14, subd. 1, the district court may revoke a stayed sentence if probation conditions are violated. If the stay has expired since the time of the alleged violation, subdivision 1(b) provides that the district court must initiate probation revocation proceedings within six months after the expiration of the stay. Subdivision 1(a) provides how the court is to initiate the proceedings–the court must issue an order revoking the stay and direct that the defendant be taken into custody. Here, the district court issued warrants within six months of the expiration of appellant's stayed sentence, but it did not issue a revocation order during the required time period. The district court's probation revocation order is reversed. ***State v. Redford***, A22-0696, 2023 WL 1948645 (Minn. Ct. App. 2/13/2023).

Privilege: Protected medical information may not be disclosed for *in camera* review without the patient's consent. Respondent was accused of criminal sexual conduct against a teenage boy. The district court granted respondent's motion for an *in camera* review of the victim's medical and mental health records. The state seeks a writ of prohibition to prohibit enforcement of the subpoena to obtain the records, which the state argues are privileged.

The court of appeals holds that the district court should have quashed the subpoena, as the records are statutorily privileged and may not be disclosed even for *in camera*

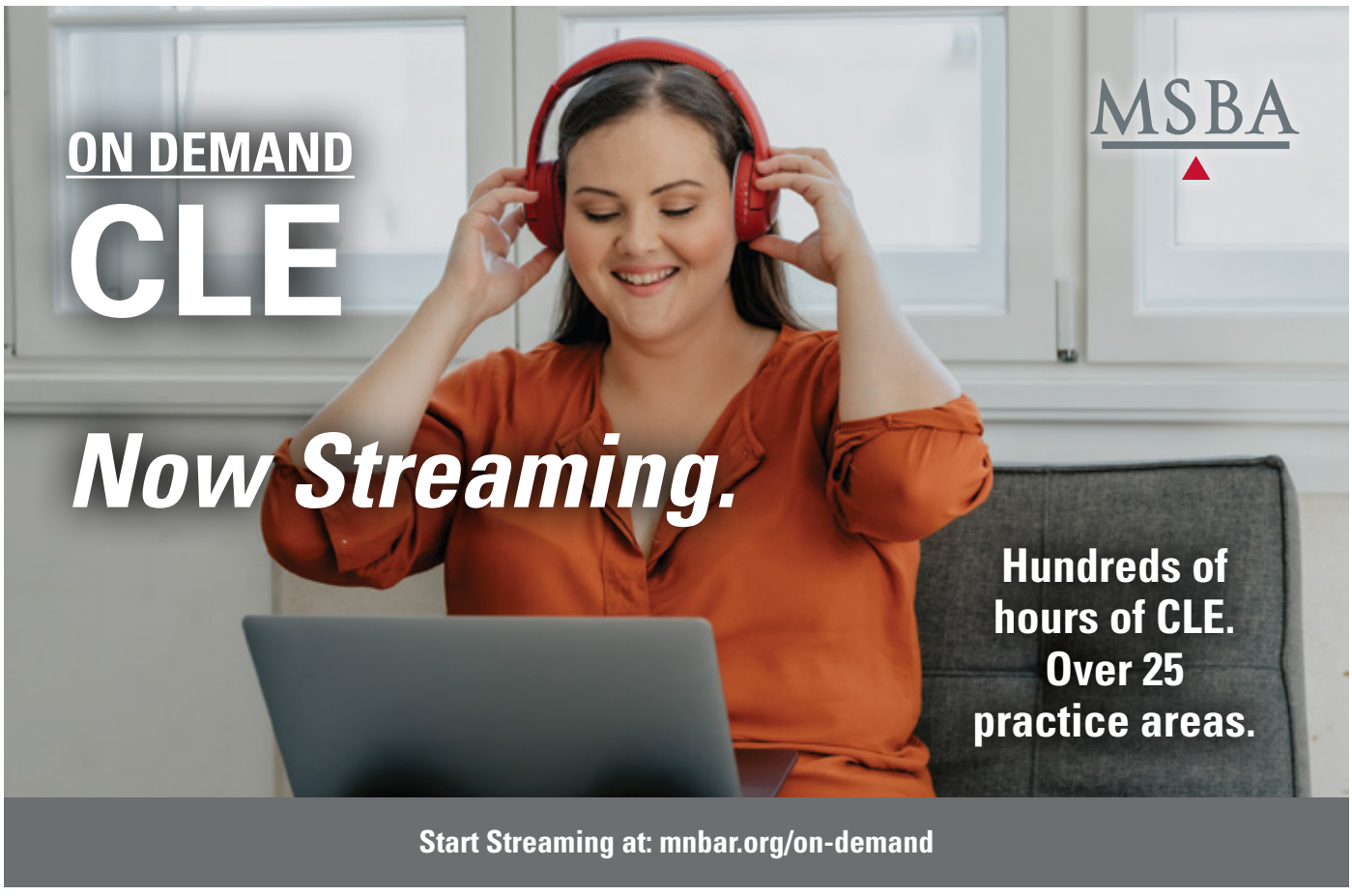
review. A writ of prohibition may be issued where a district court "has ordered production of information clearly not discoverable and there is no adequate remedy at law." *In re Paul W. Abbott Co.*, 767 N.W.2d 14, 17 (Minn. 2009). The subpoenaed medical and mental health records in this case are protected by Minn. Stat. §595.02, subd. 1(d) and (g), which provides that medical and mental health records may not be disclosed without the patient's consent.

In *In re Hope Coalition*, 977 N.W.2d 651 (Minn. 2022), the Supreme Court considered a similar privilege for sexual assault counselor records (Minn. Stat. §595.02, subd. 1(k)) and held that the statute plainly prohibits any disclosure of such records without the patient's consent. While *Hope Coalition* interpreted only paragraph (k), the court of appeals applies the same analysis to paragraphs (d) and (g), because the privileges were designed in a substantively similar manner. Thus, because the victim here did not consent to disclosure of his medical or mental health records, the district court did not have authority to compel disclosure of the records.

These privileges do not violate the defendant's rights to confrontation and due process. The court finds that these rights are outweighed by the state's compelling interest in protecting patient privacy and preserving patient-provider relationships. Lack of access to these records also does not prevent respondent from confronting and cross-examining witnesses against him; the records are maintained by a private nonparty, and the records are protected by a statutory privilege subject only to narrow exceptions not relevant in this case. ***In re State***, A22-1490, 2023 WL 1945629 (Minn. Ct. App. 2/13/2023).

■ **Sentencing: One custody status point to defendant who committed present offense while on probation after pleading guilty to another felony charge that resulted in a stay of adjudication.** Appellant was found guilty by a jury of first-degree and third-degree criminal sexual conduct. The state argued the defendant should receive one custody status point in his criminal history score because he committed the criminal sexual conduct offenses while on probation after he pleaded guilty to a felony theft charge. Appellant argued he should not receive the custody status point, because the felony theft plea resulted in a stay of adjudication. The district court agreed with the state and imposed an executed 156-month sentence on the first-degree conviction.

In relevant portion, the sentencing guidelines direct the court to assign one custody status point if, at the time the current offense was committed, the offender was on probation after pleading guilty to a felony offense. Minn. Sent. Guidelines 2.B.2.a. Here, appellant was on probation for a felony offense to which he pleaded guilty when he committed the criminal sexual conduct offenses. An actual conviction for that prior felony offense is not required under the guidelines. The conditions for the application for one custody status point are satisfied even if the prior guilty plea resulted in a stay of adjudication. The district court's sentence is affirmed. ***State v. Woolridge***



Carter, A22-0164, 2023 WL 1945674 (Minn. Ct. App. 2/13/2023).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Employment & Labor Law

JUDICIAL LAW

Sexual assault; outside FTCA scope. An alleged sexual assault by a patient at a Veteran's Administration Hospital against a nurse practitioner was properly dismissed under the Federal Tort Claims Act (FTCA). The 8th Circuit affirmed dismissal on grounds that the alleged perpetrator was pursuing "a personal desire," outside the scope of his duties. ***Doe v. United States***, 58 F.4th 955 (8th Cir. 1/24/2023).

Hostile workplace; discrimination claim rejected. In an important ruling clarifying the "hostile work environment" doctrine for harassment and discrimination issues, the Minnesota Supreme Court rejected a pair of claims by a technician with the St. Paul School District who alleged wage-based discrimination after quitting her job. The Court held that the "hostile" claim failed due to a lack of sufficient evidence of "severe or pervasive" behavior by the employer or of "adverse employment action" to support a constructive discharge calm. But there was sufficient evidence of age discrimination to warrant trial on the issue upon remand. ***Henry v. Independent School District #625***, ___ N.W.2d ____ 2023 WL 1807744 (Minn. 2/8/2022) (unpublished).

Unemployment compensation; covid policy violations. An employee who did not abide by their employer's covid vaccination or testing policy was denied unemployment compensation benefits. Confirming its practice, the court of appeals affirmed an administrative denial of benefits for covid policy noncompliance, holding that the employee lacked a sincerely held religious belief to satisfy noncompliance. ***Carson v. Minnesota State College System, Winona***, 2023 WL 193984 (Minn. 1/17/2022) (unpublished).

LEGISLATIVE ACTION

Noncompete agreements. A pair of companion bills to restrict use of noncompete contracts by employers are progressing through the Minnesota Legislature. The measures, H.F. 295 and S.F. 405, would limit their imposition to higher-than-average wage earners and require payment of one-half of the former wages while the noncompete is in effect.

The legislation, if enacted, would complement, or supplement, a prospective prohibition at the federal level by the Federal Trade Commission of most noncompete arrangements, fulfilling a 2020 campaign promise of President Biden.


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Environmental Law
JUDICIAL LAW

Minnesota Court of Appeals rejects no-EIS decision for Cohasset engineered wood facility. On 2/6/2023, the Minnesota Court of Appeals, in an opinion written by Judge Jesson, reversed the City of Cohasset's determination that an environmental impact statement (EIS) was not required for Huber Engineered Woods LLC's proposed oriented-strand-board manufacturing facility, to be built west of Cohasset.

Various environmental impacts were associated with construction of the proposed project, including the filling or excavating of 26 wetlands (two or which were "public water wetlands," Minn. Stat. §103G.005, subd. 15a), stormwater impacts from increased impervious surfaces, timber harvesting, and the emission of nitrogen oxides and sulfur dioxide among other air pollutants. After preparing an environmental assessment worksheet (EAW), the city—the "responsible governmental unit" under the Minnesota Environmental Policy Act (MEPA), Minn. Stat. ch. 116D— determined that the proposed project did not require preparation of an EIS for two reasons: (1) it did not fall into one of MEPA's mandatory EIS categories, and (2) it did not have the potential to cause significant environmental effects. The Leech Lake Band of Ojibwe appealed the city's decision to the Minnesota Court of Appeals.

1. Mandatory EIS categories. Under Minn. R. 4410.4400, subp. 20, preparation of an EIS is mandatory when a project "will eliminate a public water or public waters wetland." "Public waters wetlands" are defined as "all types 3, 4, and 5 wetlands... not included within the definition of public waters, that are ten or more acres in size in unincorporated areas or 2-1/2 or more acres in incorporated areas." Minn. Stat. §103G.005, subd. 15a. The proposed project did not trigger a mandatory EIS under subpart 20, the city determined, because although the project would permanently fill part of each impacted public waters wetland, neither wetland would be completely filled and thus not "eliminated."

The court rejected the city's interpretation of "eliminated" in subpart 20 as referring to the complete filling or excavating of a public waters wetland. Rather, the court held, even when a public waters wetland is not completely filled or excavated, it still is "eliminated" if the remaining portion of the wetland no longer possesses either of its two qualifying characteristics under section 103G.005, subd. 15a—that is, if it no longer qualifies as a type 3, 4, or 5 wetland, or it no longer encompasses more than 10 acres in an unincorporated area or 2-1/2 acres in an incorporated area. The city argued the record showed the remaining parts of the two public waters wetlands would still meet these qualifications and thus not be "eliminated" under the court's interpretation. However, the court agreed with the Band that the administrative record contained nothing more than conclusory statements that the wetlands would be unaffected, which fell short of the substantial-evidence standard. Accordingly, the court reversed the city's decision not to require an EIS and remanded the case to the city to revisit its EIS decision consistently with the court's holding.

2. Potential for significant environmental effects. The court also evaluated the Band's alternative argument that even if the proposed project did not fall into a mandatory EIS category under MEPA, an EIS was still required because the project had "the potential for significant environmental effects." 116.04, subd. 2a. The court first held the administrative record lacked substantial evidence supporting the city's position that the proposed project would not cause significant environmental effects through wetlands removal. For example, the court held the city failed to properly investigate potential stormwater impacts from the proposed project on the nearby Blackwater wild-rice bed—concerns that were raised not only by the Band but also by the Minnesota Pollution Control Agency (MPCA) and the Minnesota Department of Natural Resources (DNR). This provided an additional basis, the court determined, for remanding the matter to the city for a revised decision on the need for an EIS.

The court did determine that substantial record evidence supported the city's determination the proposed project did not have the potential for significant environmental effects from air emissions and timber harvesting. For example, air emissions from the project would be mitigated by the ongoing regulatory authority of the MPCA's Clean Air Act permitting programs, Minn. R. 4410.1700, subp. 7(C). And the court cited record evidence that sufficient policies and practices were in place to address the potential effects that timber harvesting could have on other resources, such as wildlife habitat; water quality; aesthetics; soil erosion; historic/cultural resources; and rare, endangered, or threatened species. Judge Kevin Johnson concurred in part and dissented in part. ***In re City of Cohasset's Decision on Need for an Env't Impact Statement for Proposed Frontier Project***, 985 N.W.2d 370 (Minn. Ct. App. 2023).

Minnesota Court of Appeals finds Minnesota's clean car rule valid. The court of appeals recently issued an opinion upholding the MPCA's adoption of new vehicle emission standards across the state. The federal Clean Air Act (CAA) generally gives power to the federal government to establish and regulate standards for emission from new motor vehicles. The CAA also includes a carve-out that allows states to instead implement California's standards, which are generally more stringent than those established by the U.S. EPA.

In 2019, the MPCA commenced rulemaking proceedings to adopt the more stringent California emission standards, and in 2021 adopted the clean car rule (CCR) implementing these standards. The CCR applies to new motor vehicles beginning with the 2025 model year. New motor vehicles sold in Minnesota will need to comply with California's air pollutant emission standards and meet requirements for zero-emission vehicles. The CCR also allows for the amendment of Minnesota standards as they may be amended in California.

In June 2022, the Minnesota Automobile Dealers Association (MADA) challenged the CCR. MADA claimed (1) the CCR constituted an unconstitutional delegation of rulemaking; (2) MPCA did not have the authority to adopt emission standards on a statewide basis; and (3) Minnesota was ineligible to adopt California's emission standards under the CAA.

The court found MADA's first theory unavailing. The court reasoned that MPCA has broad authority to prevent pollution and manage Minnesota's air quality. MPCA has authority to adopt air

quality standards, "including maximum allowable standards of emission of air contaminants from motor vehicles," as well as to adopt rules and standards to prevent, abate, or control air pollution. MPCA was "well within its authority when it incorporated by reference existing California regulations into the [CCR]."

The court also found MPCA was statutorily authorized to adopt statewide emission standards. In performing its statutory analysis, the court found that Minn. Stat. §116.07 allows MPCA to establish air quality standards having a statewide effect. Specifically, subd. 4 provides, "Any such rule or standard may be of general application throughout the state." The plain language of this statute, the court reasoned, allowed MPCA to implement statewide vehicle emission standards.

Finally, the court rejected MADA's third claim that Minnesota could not opt into the California standards. The court reasoned that Minnesota met Part D of the CAA, requiring plans for "nonattainment areas," and that MADA's argument was beyond the scope of review of MPCA's rulemaking. After rejecting all three arguments from MADA, the court concluded that the CCR is valid in Minnesota. ***Minnesota Auto. Dealers Ass'n v. Minnesota Pollution Control Agency***, No. A22-0796, 2023 WL 1094143 (Minn. Ct. App. 1/30/2023).

Minnesota district court approves consent decree to restrict trapping in threatened lynx habitat. In February the U.S. District Court of Minnesota approved a consent decree between the Minnesota Department of Natural Resources (DNR) and the Center for Biological Diversity (CBD) to impose additional restrictions on fur-trapping activities in the Lynx management zone in northeastern Minnesota.

The Canada lynx has been listed as a "threatened" species under the Endangered Species Act (ESA) since 2000. 16 U.S.C. §1531 et seq. Northeastern Minnesota contains federally designated critical habitat that is essential to the conservation of the species, where approximately 50 to 200 lynxes are currently living.

Over the past several years, at least nine and perhaps as many as 16 lynxes have been captured or harmed in snares set by fur-trappers targeting bobcats, fishers, and other wildlife. It is illegal to harass, harm, trap, capture, or kill a species listed under the ESA, even if doing so happens unintentionally, like the instances mentioned above. In 2008, the district court ordered the DNR to apply for an incidental take permit from the Fish and Wildlife Service to cover the incidental captures of the threatened Canada lynx, but the state never obtained an incidental take permit.

Because of this, in 2020, the CBD filed suit against the DNR for violating the ESA. Over the next several months, however, both parties began working together on a framework for settlement. On 6/1/2022, both parties filed a joint motion for entry and approval of a consent decree, but not before three fur-trapper associations moved to intervene as a defendant in disapproval of the DNR's actions.

The consent decree requires the DNR to add more trapping rules to further protect the Canada lynx in the lynx management zone. The additional restrictions ban the use of snares that cinch down tighter than a diameter of three-and-one-quarter inches, prohibit attachment of snares to fences or trees, restrict snares longer than seven feet

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in length, and ban the placement of foothold traps with a jaw-opening greater than six-and-one-half inches.

The trappers requested that the consent decree be denied. Among other arguments advanced, the trappers argued that the proposed regulations in the consent decree would not prevent further lynx mortality. The court rejected this argument by stating that consent decrees must be found to be fair, reasonable, and faithful to the law, and not "the best possible settlement that could have been obtained."

The trappers also argued that the regulations setting specific snare measurements and placement regulations were unreasonable because the measurement specifications were obtained during studies on non-lynx species, like wolves and coyotes, and that the additional regulations would be burdensome to the trapper and make trapping practically ineffective in the lynx management zone.

The court also was not persuaded by these arguments, noting that nearly one third of states include specific snare measurement requirements, that the types of injuries resulting from wolf and coyote studies "would be true for any species" caught in a snare trap, and that additional placement regulations may be challenging to trappers, but those challenges can be addressed and overcome, and therefore are not over-burdensome or unreasonable enough to reject the consent decree.

In summary, the court granted the consent decree between the DNR and CBD. The DNR is now required to educate the public and trappers on the new restrictions and must publish the additional trapping restrictions within 40 days. ***Ctr. for Biological Diversity v. Strommen***, No. 20-CV-2554, 2023 WL 2136650 (D. Minn. 2/21/2023).

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Federal Practice
JUDICIAL LAW

Removal and remand; second removal; no "two bites at the apple." Where defendants removed an action on the basis of diversity jurisdiction and CAFA, the action was remanded, the state court denied the plaintiff's motion to dismiss, and defendants again removed, citing 28 U.S.C. §1446(b)(3) and asserting that the state court's order constituted a "new paper," the 8th Circuit rejected defendants' "creative" argument, finding among other things that a second removal requires a "different factual basis" for removal. ***City of Creve Couer v. DirecTV LLC***, 58 F.4th 1013 (8th Cir. 2023).

Award of attorney's fees reduced; multiple trials; plaintiff's legal error. Affirming in part and reversing in part a district court's award of attorney's fees to a prevailing plaintiff in a FRSA action, the 8th Circuit found that the plaintiff was not entitled to attorney's fees related to the first of several trials where the need for a second trial was the result of the district court's adoption of the plaintiff's proposed jury instruction, which misstated the law. ***Blackorby v. BNSF Rwy. Co.***, ___ F.4th ___ (8th Cir. 2023).

Standing; no concrete injury in fact. The 8th Circuit reversed a district court's grant of judgment as a matter of law to a plaintiff class on FDCPA and related state law claims, finding that a debt collection letter did not cause any concrete injury in fact to the plaintiff where she had waived any claim for individual damages, meaning that she lacked Article III standing. ***Bassett v. Credit Bureau Servs., Inc.***, ___ F.4th ___ (8th Cir. 2023).

Fed. R. Civ. P. 12(b)(6); matters embraced by the pleadings; audio recordings. Where a plaintiff alleged in his complaint that certain of his telephone calls with one of the defendants had been recorded, Judge Tunheim refused to consider recordings of those calls submitted in support of defendants' Rule 12(b)(6) motion, finding that the recordings were "outside the pleadings." ***Glover v. Am. Credit Acceptance***, 2023 WL 158198 (D. Minn. 1/11/2023).

Motion to remand granted; failure to obtain all defendants' consent to removal. Rejecting the removing defendant's argument that the "defunct" defendant that had not consented to removal was a "nominal defendant," Judge Wright instead found that the non-consenting defendant was the "principal alleged wrongdoer," meaning that the failure to secure its consent to removal was a "defect" warranting remand. ***MOAC Mall Holdings LLC v. Walking Co.***, 2023 WL 166917 (D. Minn. 1/12/2023).

Fed. R. Civ. P. 15(a); Minn. Stat. §549.191; punitive damages; Erie. Magistrate Judge Foster recently followed "nearly every" recent decision in the district in holding that Fed. R. Civ. P. 15(a) and not Minn. Stat. §549.191 governs motions for leave to amend to assert claims for punitive damages. ***McNamara v. Kuehne***, 2023 WL 2189980 (D. Minn. 2/6/2023), *report and recommendation adopted*, 2023 WL 2189055 (D. Minn. 2/23/2023).

28 U.S.C. 1404(a); motions to transfer; multiple cases. Judge Wright denied the defendant's motion to transfer an action to the Eastern District of Texas, assuming without deciding that the proposed venue was proper, but finding that the defendant could not meet its "heavy burden" to establish that transfer was warranted where "most" of the relevant factors weighed against transfer or were neutral. ***LG2, LLC v. Am. Dairy Queen Corp.***, 2023 WL 171792 (D. Minn. 1/12/2023).

Finding that the majority of the relevant factors were "neutral," Judge Davis denied a motion to transfer the action to the Northern District of Iowa. ***Anderson Trucking Servs., Inc. v. Hadland***, 2023 WL 1477635 (D. Minn. 2/2/2023).

Personal jurisdiction; multiple cases. Judge Menendez granted defendants' motion to dismiss for lack of personal jurisdiction in part, finding that one defendant's relationship of "nearly two decades" with the plaintiff, its CEO's travel to Minnesota, the purchase over $20 million in products, and a Minnesota forum selection clause all weighed in favor of jurisdiction.

However, Judge Menendez granted two other defendants' motions to dismiss for lack of personal jurisdiction, finding no facts "suggesting that either directed any activities at Minnesota sufficient to support the exercise of personal jurisdiction." ***Cortect Corp. v. Corpac GmbH & Co.***, 2023 WL 171791 (D. Minn. 1/12/2023).

Determining that the defendant had "fair warning of being sued in Minnesota," Judge Tunheim denied its motion to dismiss for lack of

personal jurisdiction, finding that its negotiations with the Minnesota plaintiff, the parties' "multi-year contractual relationship," the "quantity of contracts," and the purchase of more than $5 million in product all weighed in favor of personal jurisdiction. ***Cambria Co. v. Disney Worldwide Servs., Inc.***, 2023 WL 203973 (D. Minn. 1/17/2023).

Motion to stay granted; "considerations of comity." Citing the prevailing three-part test, as well as "considerations of comity," Judge Wright granted the defendant's motion to stay the action pending a decision in a related action by the 10th Circuit. ***Ceska zbrojovka Defence SE v. Vista Outdoor, Inc.***, 2023 WL 171886 (D. Minn. 1/12/2023).

Removal; federal question jurisdiction; no express federal claim. Where the plaintiffs alleged violations of unspecified "Debt Collection Practices Law" and referenced "factual allegations and terminology... somewhat unique to FDCPA cases," and the defendants removed on the basis of federal question jurisdiction, Judge Tostrud found that the plaintiffs had done "enough to assert an FDCPA claim," meaning that removal was proper. ***Wilkening v. Santander Consumer USA***, 2023 WL 1785626 (D. Minn. 2/6/2023).

Arbitration; preliminary injunction; absence of "qualifying contractual language." Despite the absence of "qualifying contractual language" in an arbitration clause, Judge Frank relied on Minn. Stat. §572B.08(a) in entering a preliminary injunction requiring the plaintiffs to preserve evidence pending the arbitration. ***Computer Forensic Servs., Inc. v. BraunHagey & Borden LLC***, 2023 WL 1767304 (D. Minn. 2/3/2023).

Fed. R. Civ. P. 37(c)(1); motion to strike amended initial disclosures granted. Finding that the plaintiff's disclosure of a new witness more than six years after the action was filed was not substantially justified or harmless, and that it prejudiced the defendant, Magistrate Judge Wright relied on Fed. R. Civ. P. 37(c)(1) in barring the newly disclosed witness from testifying. ***Watkins Inc. v. McCormick & Co.***, 2023 WL 1777474 (D. Minn. 2/6/2023).

Fed. R. Civ. P. 30(b)(6); deposition notice seeking "discovery on discovery" rejected. Granting in part and denying in part the plaintiff's motion to compel, Magistrate Judge Docherty found that the plaintiff's attempt to take the Fed. R. Civ. P. 30(b)(6) deposition of one defendant on its document collection efforts was "improper" because the party's document retention and discovery practices were "not at issue in the lawsuit." ***Berry v. Hennepin Cnty.***, 2023 WL 1777467 (D. Minn. 2/6/2023).

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Intellectual Property
JUDICIAL LAW

Patent: Fees for Rule 11 violation reduced as excessive. Judge Wright recently assessed attorneys' fees against defendants but reduced the award because the total number of hours worked by plaintiffs' attorneys was unreasonable. Plaintiff Iceotope Group Limited sued LiquidCool Solutions, Inc. seeking a correction of inventorship for LiquidCool's family of patents directed to liquid-cooling technology. The court previously granted LiquidCool's motion to

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dismiss, finding that Iceotope had not plausibly alleged the facts to support its complete substitution of inventorship or joint inventorship claims. The court also found Iceotope knew or should have known that its joint inventorship claim was not warranted by law and lacked any evidentiary support. Therefore, the court awarded sanctions to LiquidCool in the form of its reasonable attorneys' fees incurred by defending the joint inventorship claim.

Courts determine reasonable attorney fees by multiplying the number of hours reasonably expended by a reasonable hourly rate (known as the lodestar method). First, the court noted that there was no dispute that the rates charged by the lawyers in the case were reasonable. Next, to determine the number of hours reasonably expended on the joint inventorship claim, the court considered the proportion of the total case attributable to the joint inventorship claim. Accepting LiquidCool's argument that work on the joint inventorship claim was implicated in a variety of general litigation tasks, the court determined that LiquidCool could recover 20% of its total attorneys' fees in the litigation. However, the court then considered the total number of hours billed in the litigation, determining that this number was excessively high. The court found that the nearly 800 hours of attorney time was excessive for the six-month long case that was resolved on an early motion to dismiss. Thus, the court reduced the award by an additional 50%, awarding a total of $44,226.20. ***Iceotope Grp. Ltd. v. LiquidCool Sols., Inc.***, No. 20-cv-2644 (WMW/JFD), 2023 U.S. Dist. LEXIS 25364 (D. Minn. 2/15/2023).

Trade secret: Speculative technical expert opinions inadmissible. Judge Tostrud recently granted summary judgment for defendants, based in part on finding that plaintiff's technical expert opinions were inadmissible. Plaintiff Syngenta Seeds, LLC sued former employee Joshua Sleper and its competitor, Farmer's Business Network (FBN), alleging that Sleper shared Syngenta's trade secret information on plant seed production with FBN. Syngenta brought claims under the Defend Trade Secrets Act, which defines a "trade secret" as "information" that (1) is the subject of "reasonable efforts" to maintain its secrecy and (2) derives "independent" economic value from not being "generally known or readily ascertainable." Syngenta relied on expert testimony from its technical expert, Dr. J. Stephen Smith, to demonstrate that the information shared by Sleper with FBN was a trade secret. Smith opined on a document disclosed by Sleper that included a list of 84 publicly available seed lines Sleper recommended for FBN. Of these 84 lines, eight were Syngenta lines. According to Dr. Smith, Sleper used Syngenta's trade secrets to prepare the list. In support of this theory, Syngenta alleged that five of the eight Syngenta lines were listed in Syngenta's confidential "best lines list." The court found that while Sleper may have relied on the "best lines list," as Dr. Smith contended, Sleper also could have merely selected these five lines based on chance, skill, or public information. Thus, the court found that Dr. Smith's opinion was speculative and inadmissible. ***Syngenta Seeds, LLC v. Warner***, No. 20-cv-1428 (ECT/DTS), 2023 U.S. Dist. LEXIS 32492 (D. Minn. 2/8/2023).

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Probate & Trust Law
JUDICIAL LAW

Personal representative removal. A will named four children as equal heirs to their mother's estate. Two of the children were generally aligned against the other two children, so the district court appointed a neutral third-party as personal representative. One of the children moved to remove the neutral, arguing, among other things, that the neutral did not address allegations of fraud committed by two of his siblings when they acted as power of attorney for their mother. The district court rejected this argument and specifically noted that the allegedly fraudulent conduct took place well before the neutral had been appointed.

Moreover, the district court noted that an audit had previously been conducted by a neutral party who found that every part of the estate was accounted for. The district court also noted that some of the property the siblings were accused of stealing was returned to the estate. The court of appeals agreed with the district court that removal was not necessary when the fraud occurred prior to the appointment of the neutral, the allegations were previously addressed, and certain of the property was included in the estate. On appeal, the neutral asked the court of appeals to exercise its discretion to award it damages and costs. The court of appeals declined, noting that while the objector's conduct had impacted the estate and prolonged litigation, there was some merit to his claims of improper conduct. Therefore, an award of costs was not appropriate. ***In re Estate of Bicanich***, A22-0624, 2023 WL 1956501 (Minn. Ct. App. 2/13/2023).

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Tax Law
JUDICIAL LAW

Diabetes and early withdrawal from qualified tax retirement plans. The taxpayer in this case began withdrawing from his 401(k) retirement plan before the age of 59 and a half. Barring any exceptions, 401(k) distributions withdrawn before 59 and a half are subject to a 10 percent additional tax. The taxpayer contends that his diabetes qualified him for an exception to these additional taxes, but the exceptions require the taxpayer to be unable to engage in activity comparable to that which was engaged before the disability began. I.R.C. §72(m)(7). The taxpayer's continued employment at the time of the withdrawals shows no indication of a reduced ability to engage in comparable activity and therefore did not "constitute a disability within the meaning of section 72(m)(7)." ***Lucas v. Comm'r of Internal Revenue***, T.C.M (RIA) 2023-009 (T.C. 2023).

Certification and liabilities under Section 7345. Sec. 7345 provides that if a taxpayer is seriously delinquent on their tax debt, their passports can be denied, revoked, or limited pursuant to the FAST Act. I.R.C §7345. In this case, the *pro se* taxpayer held a "seriously delinquent tax debt" as defined under §7345 and petitioned the court to redetermine the liabilities underlying the certification. Arguments raised by the taxpayer asked the court the same questions that had been raised in *Ruesch*, which was vacated for mootness on a jurisdictional question. *Ruesch v. Comm'r of Internal Revenue*, 154 T.C. 289, 297 (2020), aff'd in part, vacated in part, remanded, 25 F.4th 67, 71-72 (2d Cir. 2022). While *Ruesch* was vacated and is no longer precedential, the court viewed

its reasoning as persuasive and readopted the holding, in which the court recognizes it lacks jurisdiction "to review liabilities underlying the certification of a seriously delinquent tax debt."

The tax court's ruling that it lacks jurisdiction to review liabilities underlying §7345 certifications has been cited in subsequent §7345 cases. ***Adams v. Comm'r of Internal Revenue***, No. 1527-21P, 2023 WL 368464 (T.C. 1/24/2023).

Individual income tax: "Additional newly discovered or previously unavailable evidence" as a matter of first impression in spousal relief determinations. In a case where a taxpayer petitioned for relief from unpaid joint and several tax liability, the court held the definition of "additionally newly discovered or previously unavailable evidence" as "recently obtained sight or knowledge of for the first time."

When married couples elect to file joint federal income tax returns, their liability for any tax due is joint and several. In cases where the IRS finds it would be inequitable to hold one spouse liable for unpaid taxes, section 6015(f) permits the IRS to relieve the spouse. I.R.C. §6015(f). In 2019 Congress amended the statute to include a standard and scope of review that govern the IRS's determination to relieve a spouse. I.R.C. §6015(e). This amendment included that such determinations "shall be based upon—*any additional newly discovered or previously unavailable evidence*." I.R.C. §6015(e)(7).

With the addition of new evidence, the amendments were relevant, and the court had to determine the meaning of this amendment. In this case, after the death of her husband, the taxpayer asked for relief from unpaid joint and several liabilities. The IRS denied the request, and pursuant to section 6015(e), the taxpayer petitioned to determine appropriate relief under 6015(f). At trial, the commissioner proposed exhibits from the taxpayer's blog that included information of the petitioner's assets, lifestyle, and business that had not been a part of the administrative record. The taxpayer moved to strike those exhibits under her interpretation of "additional newly discovered... evidence."

The taxpayer argued that while the evidence was newly introduced into the case, it was not evidence that had been previously unavailable, but rather it was readily available with a simple search of the petitioner's name. The taxpayer argued that an interpretation like FRCP 60(b)(2) "provides an administrable standard for admitting newly discovered evidence, by requiring a showing that the party seeking admission has exercised reasonable diligence." Fed. R. Civ. P. 60(b)(2). The court, however, found that the commissioner's arguments were more favorable. The commissioner argued for an ordinary meaning interpretation of the statute and that the standard from FRCP 60(b)(2) was not appropriate because at the drafting of the 6015 amendments, Rule 60 was widely known, and Congress could have chosen a diligence standard from within Rule 60 but instead chose to not include such a standard.

The court concluded that the ordinary meaning

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of "newly discovered" was "recently obtained sight or knowledge of for the first time," therefore, the proposed exhibits were "newly discovered... evidence" within the meaning of section 6015(e)(7)(B) and admissible into the record. ***Thomas v. Comm'r of Internal Revenue***, No. 12982-20, 2023 WL 2127690, (T.C. 2/13/2023).

Individual income tax: Racing costs as "ordinary and necessary expenses" for solo practitioners? Petitioner operated a "solo practice" as an attorney and became interested in cars and racing. He thought racing might be a way to meet potential clients. As his interest in the field grew, he began a one-man racing team of which his solo legal practice was the only sponsor. Petitioner deducted the sponsorship as advertising expenses under Section 162—deductions for ordinary and necessary business expenses. The commissioner challenged the deductions.

In determining whether the racing-related costs were deductible, the court focused on whether the costs were "ordinary and necessary expense[s] of the particular business in which [petitioner] was engaged." *Commissioner v. Lincoln Sav. & Loan Ass'n*, 403 U.S. 345, 352 (1971). With an ordinary expense being one that is "of common or frequent occurrence in the [petitioner's] type of business" and a necessary expense being "'appropriate and helpful' in carrying out the taxpayer's profit-seeking activity," the court found the racing-related costs were not ordinary and necessary. *Deputy v. du Pont*, 308 U.S. 488, 495 (1940); *Welch v. Helvering*, 290 U.S. 111, 113–14 (1933). As a result, the court found the petition failed the burden of proving the incurred sponsorship costs were deductible advertising expenses. ***Avery v. Comm'r of Internal Revenue***, T.C.M. (RIA) 2023-018, (T.C. 2/21/2023).

Property tax: Questions of material fact prevent summary judgment in rental income dispute. Minnesota residents Angeline and Frank Brozovich own a single-family home on Bainbridge Island in the state of Washington. The couple claimed to use the property as a rental property during two tax years at issue, and the couple deducted expenses associated with the property. The commissioner challenged those deductions. The Brozoviches moved for summary judgment, asking the court to determine that—as a matter of law—they correctly deducted losses associated with their rental property.

Numerous questions of material fact prevented the court from granting summary judgment. First, the court noted the couple's inconsistent evidence around whether the couple qualified for the "nonpassive activity loss" deduction. The court further discussed that issues of material fact were presented as to whether the couple charged their adult child market rent when the adult child rented the property for a month. Finally, disputes around timing of certain payments and deductibility of credit card interest prevented the court from deciding the case at the summary judgment stage. ***Brozovich v. Commr. of Revenue***, 9545-R, 2023 WL 379700 (Minn. Tax Ct. 1/24/2023).

Property tax: No "prevailing party" in settlement. A taxpayer challenged the assessed value of property located in Nicollet County. After negotiating a settlement with the county to decrease the assessed value of the subject property from $3,913,000 to $3,688,000, the taxpayer filed a Notice of Application for Taxation of Costs and Disbursements, requesting a total of $1,108.70. At the district court's suggestion, the taxpayer moved for an award of costs and disbursements. The county objected.

The taxpayer argued that "it [was] entitled to costs and disbursements as a prevailing party under Minnesota Statutes sections 549.02, subdivision 1 and 549.04.23 *See* Minn. Stat. §§549.02, subd. 1 (2022) (pertaining to "actions commenced in the district court"); 549.04 (2022) (providing for reasonable disbursements "[i]n every action in a district court").

The court explained that because "the parties agreed voluntarily to reduce the valuation of the subject property by way of stipulated settlement" the taxpayer is not a prevailing party and as such, denied the taxpayer's motion for costs and disbursements. ***St. Peter Hosp., LLC v. County of Nicollet***, 52-CV-21-16, 2023 WL 2028201 (Minn. Tax 2/15/2023).

Property tax: Failure to respond and failure to serve will lead to dismissal. A taxpayer challenged a special assessment for taxes payable in 2020 but failed to identify which property was the subject of the petition and failed to serve the petition. The county moved to dismiss for failure to file timely.

While Minn. Stat. §278 (2022) establishes how a taxpayer may challenge an assessment, it "expressly excludes claims to contest the validity or amount of any special assessment made pursuant to chapters 429, 430, any special law or city charter." Minn. Stat. §278.01, subd. 3 (providing that the procedures in section 278.01 are "not available" for special assessment disputes); Minn. Stat. §429.081 (2022) (providing that procedure for appeal to district court "provides the exclusive method of appeal from a special assessment levied pursuant to this chapter"); *Sievert v. City of Lakefield*, 319 N.W.2d 43, 44 (Minn. 1982) (observing that amendment to section 429.081 in 1978 "clarified legislative intent that there be no other avenue of contesting special assessments").

The taxpayer filed a petition on 3/26/2022. The county informed the taxpayer that she failed to sign the petition and did not show that she had served the county. The notice went on to instruct the taxpayer how she could rectify the issues, but the county received no response. The county again notified the taxpayer of the petition's deficiencies and directed her to speak with the county's housing navigators for further guidance.

The taxpayer failed to respond to the county's communications and motion and failed to appear for the hearing. The court, therefore, granted the motion and dismissed the case. ***Ahmed v. Hennepin County***, 27-CV-22-4159, 2023 WL 2091002 (Minn. Tax 2/16/2023).

Property tax: Failure to file timely will lead to dismissal. A taxpayer challenged the commissioner's Notice of Determination on Appeal regarding tax and interest changes. The commissioner, in turn, filed a motion to dismiss for failure to appeal within the statutory deadline.

Taxpayers are allowed to challenge an appeal regarding "any tax, fee, or assessment... including the imposition of interest...." Minn. Stat. §271.06, subd. 1 (2022). "[W]ithin 60 days after the notice date of an order of the commissioner of revenue, the appellant... shall serve a notice of appeal upon the commissioner and file the original, with proof

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of such service, with the Tax Court administrator....” Minn. Stat. §271.06, subd. 2.

The commissioner’s Notice of Determination on Appeal was noticed on 8/30/2022. Any appeal was required to be filed by 10/31/2022. The taxpayer filed an appeal on 12/5/2022. The taxpayer argued that his failure to file was a direct result of his repeated failed attempts to contact the tax court and the tax court’s failure to guide or assist him with filing via by mail or in person. The court reasoned that Tax Court Form 1 gives explicit instructions on how to file an appeal via mail or in person and determined that the court could not “conclude that communication problems prevented timely filing” and dismissed the case. ***Beavers v. Comm’r of Revenue***, 9563-R, 2023 WL 2147293 (Minn. Tax 2/21/2023).

Property tax: Failure to serve will lead to dismissal. Taxpayers filed a petition challenging the assessed value of property located in Minneapolis but failed to serve the petition on the county. The county, in turn, filed a motion to dismiss for failure of service.

Taxpayers are allowed to challenge real property assessments. Minn. Stat. §278.01, subd. 1 (2022). However, the “petition must be served on the county’s auditor, treasurer, attorney, and assessor.” *Kmart Corp. v. Cnty. of Clay*, 711 N.W.2d 485, 490 (Minn. 2006) (citing Minn. Stat. §278.01, subd. 1(a)).

The taxpayer filed the petition in person with the district court administration and alleges that a staff member told her, “She did not need ‘backup paperwork’ to file the petition” and to “wait ‘for someone to call you to set up a court date’.” The taxpayer contacted the government center several times, receiving the same response, and the taxpayer even communicated with the assessor, who advised her that “the case had been filed... but there was an administrative hold he could not explain.” Eventually, the taxpayer communicated with county attorneys who informed her of their intention to file a motion to dismiss due to her failure to file a second copy. Taxpayers argue that they “tried to complete the steps necessary to correctly file the petition but was stymied by incorrect instructions provided to her.”

The county presented evidence of email correspondence where it informed the taxpayers that their petition was filed “without the requisite proof of service” and advised how service could be completed prior to the deadline. The notice went on to advise the consequences that would result if the taxpayers failed to correct the issue. The county argued that due to failure to serve the petition, taxpayers “failed to invoke the court’s jurisdiction” and therefore the case should be dismissed.

Taxpayers used Minnesota Tax Court Form 7, which explicitly instructs “you must file the original petition with any attachments, *proof of service*... and filing fee... on or before April 30th of the year the tax becomes payable.” Because taxpayers failed to present evidence of service, the court dismissed the case for lack of jurisdiction. ***Zwicky v. County of Hennepin***, 27-CV-20-15145, 2023 WL 2146468 (Minn. Tax 2/21/2023).

Property tax: All *North Star* factors must be satisfied to qualify for an exemption. A single-member limited liability taxpayer (whose sole member was a Minnesota nonprofit corporation) challenged the accuracy of a property’s assessed commercial classification and property tax. On 6/24/2019, the taxpayer purchased a small box building located on a parcel in Woodbury. The taxpayer specifically purchased the property to take advantage of Minnesota Statute §272.02, subd. 38(a)-(b), which allowed for an entire tax year of exempt status if purchase was made before July 1 of the tax year. Though the taxpayer did not begin its nonprofit services until December 2019, it did begin converting the space into a layout that would meet its service needs.

To successfully challenge an assessment and seek an exemption, a taxpayer must first overcome the presumption that “the assessor’s classification of real property is *prima facie* valid. Minn. Stat. §271.06, subd. 6(a) (2022),” then it must show “concurrent ownership and use of the subject property toward the charitable purpose. *Living Word Bible Camp v. Cnty. of Itasca*, 829 N.W.2d 404, 412-13 (Minn. 2013) (citing *Christian Bus. Men’s Comm. of Minneapolis*, 38 N.W.2d at 808).”

The taxpayer successfully overcame the *prima facie* validity by introducing exhibits and presenting testimony. But a dispute remained regarding whether the property qualified for a property tax exemption. The nonprofit was a company that provided free development services and job training to underprivileged individuals—services that otherwise would be borne by the government. While there was no dispute that the nonprofit owned or used the property, the county argued that the nonprofit “fail[ed] to satisfy two of the six statutorily required *North Star* factors, Minn. Stat. 272.02, subd. 7(a); *North Star Research Inst. v. Cnty. of Hennepin*, 306 Minn. 1, 6, 236 N.W.2d 754, 757 (Minn. 1975)” in its efforts to demonstrate that the nonprofit “uses the subject property for a charitable purpose.”

The two requirements that were allegedly unmet consisted of “(3) establishing that a material number of the recipients receive benefits at reduced or no cost, or whether the organization alleviates a government burden, and (5) whether the beneficiaries are restricted or unrestricted, and if restricted, if the class of persons to whom the charity is made available is reasonably related to the charitable objectives. Minn. Stat. §272.02, subd. 7(a)(3), (5).”

On 1/2/2019 and 1/2/2020, the nonprofit corporation occupied the property while providing free development services and job training to youth, adults, and members of the public, which satisfied the exemption requirements under Minn. Stat. §272.02, subd. 7(a)(3) (2022). Further, due to the services being provided to a “restricted class of persons,” and the objective to “promote environmental sustainability,” the nonprofit also satisfied the exemption requirements under Minn. Stat. §272.02, subd. 7(a)(5).

The court therefore classified the property as “exempt as an institution of purely public charity” for both 2019 and 2020 and ordered a refund of any real estate taxes paid. ***GW Rest. Holdings LLC, Petr., v. County of Washington, Respt.***, 82-CV-20-1872, 2023 WL 2317604 (Minn. Tax 3/1/2023).

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PEOPLE + PRACTICE

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

Honsa & Mara is now Honsa Mara & Kanne. **Kari Kanne**, a partner in the firm, is now a named shareholder. Kanne has been with the firm for over 10 years and focuses her practice on complex divorce and family law matters.

Matthew De Jong has joined Bird, Stevens & Borgen, PC. His practice includes civil litigation and criminal defense.

Jesse A. Flynn has joined Woods, Fuller, Shultz & Smith in the firm's new Worthington, MN branch office. Flynn handles real estate and business matters.

Steve Schleicher, a litigation partner at Maslon LLP, has become a fellow of the American College of Trial Lawyers. Schleicher's induction ceremony took place February 25 during the spring meeting of the college in Key Biscayne, Florida.

Arianna D. Chapman and **Inayah J. Smith-Marsette** have joined Arthur, Chapman, Kettering, Smetak & Pikala, PA. Chapman's practice focuses on automobile law, commercial transportation, and general liability. Smith-Marsette focuses her practice on workers' compensation law.

Heather J. Kliebenstein was named managing director of Merchant & Gould's seven offices. Kliebenstein is a Minneapolis shareholder who joined in 2004.

Moss & Barnett made several announcements: **Michael T. Etmund, Chelsy M. Jantsch, Mary Frances Price,** and **Jeffrey A. Wielan** have become shareholders in the firm; **Timothy L. Gustin** and **Christopher D. Stall** have been elected to the firm's board of directors; and **Debra M. Bulluck** and **Madeline E. Davis** have joined the firm.

Toni Ojoyeyi joined Spencer Fane LLP as an associate in the labor and employment practice group.

Ken Engel of Engel Professional Association was selected to join *The Real Estate Lawyers* guide as the recommended attorney and exclusive advisor for the state of Minnesota.

Best & Flanagan welcomed **Josh Hillger, Barbara Kristiansson,** and **Megan Kunze** as additions to the firm's private wealth planning and employment law practice groups.

Jenni Ives has joined Ann Viitala and Mary Pat Byrn at Viitala Byrn & Ives Law Office. Ives focuses her practice on employment law.

In memoriam

HERMAN L. (HERM) TALLE of Anoka died on March 2, 2023. He was 91. Talle graduated from University of Minnesota Law School in 1958 and practiced for 64 years. He served as a first lieutenant in the United States Marine Corps, 1st Marine Division, during the Korean War. Talle was a well-known Anoka County-area attorney and joined Barna, Guzy & Steffen, Ltd. as part of a merger in 1991. At the time he intended to wind down his practice but instead practiced another 32 years, retiring in January 2023.

THOMAS M. (TOM) REGAN of Prior Lake, 66, died peacefully at his Prior Lake home on February 23. After earning his JD at Creighton University in 1981, the Mankato native practiced at two Minneapolis law firms prior to opening his own firm in 1987. He had a lifelong passion for waterskiing. Among his many professional accolades was being named Minnesota Small Business Advocate of the Year by the Small Business Administration.

SALLY TARNOWSKI, a St. Louis County District judge, was fatally struck by a driver while on vacation in Florida on March 8. She was 63 years old. The Duluth native was a graduate of William Mitchell College of Law and was known as a leading advocate for mental health needs in northern Minnesota. She was appointed as a judge in 2007 by Gov. Tim Pawlenty.

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Justice Esther M. Tomljanovich 21st Annual Celebration of Women in Law CLE and Tea

Tuesday, April 11, 2023, on campus

CLE: 3:30–5 pm,
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Scan to register for tea

50th Anniversary Clinic Symposium and Celebration

Friday, May 5, 2023, on campus

Symposium: 10:30 am-4:30 pm,
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Celebration: 5-7 pm,
Scan to register
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Alumni Golf Tournament

Monday, Aug. 7, 2023

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Cutler Law Firm, LLP, an AV-rated firm located in Sioux Falls, SD, is seeking an associate attorney to join its business section. Business associates have the opportunity to work on a broad range of business transaction, contract and real estate matters. Our clients include large and small companies in manufacturing, telecommunications, logistics, financial services, real estate development, and others. Preferred candidates will have: Strong oral and written communication skills. Capable of high-level analytical and critical thinking and problem solving. Top academic credentials. Excellent interpersonal skills and the ability to work well as part of a team. JD from an ABA-accredited law school or in the final year of study and on track to graduat. Practicing attorneys must have a license and be in good standing to practice in South Dakota or willing to obtain a license in South Dakota. Cutler Law Firm, LLP offers competitive salary and a full benefit package. If interested, please send a cover letter, resume and references to: Cutler Law Firm, LLP, Attn: Shawn Noem, Business Manager, 140 N Phillips Ave, Fourth Floor, Sioux Falls, SD 57104. Or email to: shawnn@cutlerlawfirm.com. For more information about Cutler Law Firm, LLP, visit www.cutlerlawfirm.com.

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Meagher + Geer has an immediate opening in the Minneapolis office for a litigation Associate Attorney with one to three years of experience. Applicants should have excellent academic credentials, strong writing skills, persuasive speaking and analytical skills, and be admitted to the Minnesota bar. Litigation experience, court of appeals or judicial clerkship experience preferred. Applicants are asked to submit a cover letter, resume, law school transcript and two writing samples to: recruitment@meagher.com. We are committed to diversity within the legal profession and strongly encourage diverse applicants to apply for positions. Visit our website for more information about Meagher + Geer, one of the leading civil litigation and insurance coverage firms in the country.

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Tired of Downtown? Or are you in a small office looking for a team? Henningson & Snoxell is looking for an experienced full-time business law attorney with five plus years of experience. We are expanding and seeking an attorney, licensed in the state of Minnesota, who is passionate about providing advice and counsel to clients on business and corporate matters. Join our experienced team of dedicated attorneys, educating and guiding businesses, business owners, and families in all aspects of business Law, including startups, contracts, and business succession. High interest in employment law issues, as well as nonprofit law issues, is desired. A book of business and a referral network are required. Founded on the principles of honesty and integrity, Henningson & Snoxell, Ltd. attorneys are dedicated to understanding the needs of our clients, protecting their rights, and working with them to grow and expand their businesses. Submit your cover letter, resume, transcript, and references to: officemanager@hennsnoxlaw.com.

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ing sample to: Human Resources, Rajkowski Hansmeier Ltd., 4140 Thielman Lane, Suite 110, PO Box 7456, Saint Cloud, MN 56302-7456. 320-251-1055. humanresources@rajhan.com. EOE.

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