OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVII NUMBER 1
JANUARY 2020
www.mnbar.org

Bench&Bar OF MINNESOTA

THE TROUBLE WITH EYEWITNESS TESTIMONY

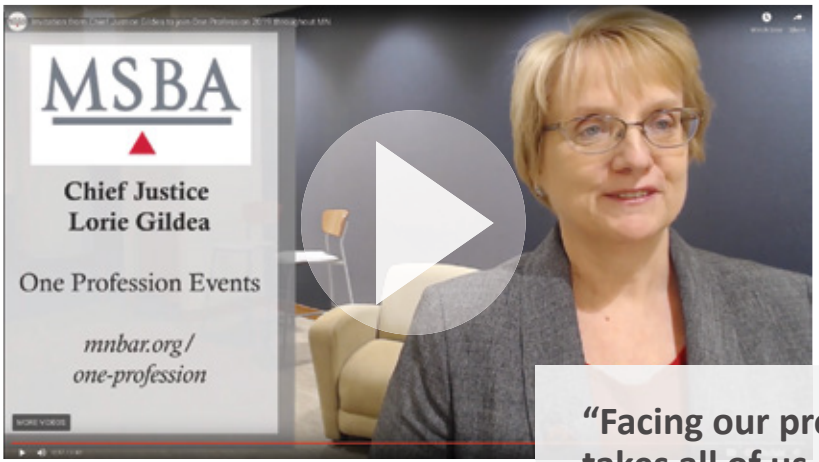
TOWARD A MODEL JURY INSTRUCTION ON WITNESS ACCOUNTS

ONE Profession

One Profession.
One Day.
Coming Your Way.

The MSBA's One Profession events bring together judges and lawyers for one day each year to discuss the issues and opportunities facing the legal profession around Minnesota. These programs are open to all lawyers—MSBA members and non-members alike.

Join your colleagues for presentations, panel discussions, and conversations with attorney thought leaders. Each One Profession event is unique—tailored to reflect the interests and concerns of its regional constituents.



Watch Chief Justice Gildea's video at www.mnbar.org/one-profession

MSBA Minnesota State Bar Association

Upcoming 2020 One Profession Events

DULUTH 6TH JUDICIAL DISTRICT
January 23, 2020

ROCHESTER 3RD JUDICIAL DISTRICT
January 31, 2020

WILLMAR 8TH JUDICIAL DISTRICT
March 13, 2020

BEMIDJI 9TH JUDICIAL DISTRICT
March 27, 2020

WADENA 7TH JUDICIAL DISTRICT
May 8, 2020

COON RAPIDS 10TH JUDICIAL DISTRICT
July 9, 2020

MANKATO 5TH JUDICIAL DISTRICT
September 24, 2020

LAKEVILLE 1ST JUDICIAL DISTRICT
October 30, 2020

CLE credits are available.
For more information visit:
www.mnbar.org/one-profession

"Facing our profession's toughest challenges takes all of us, no matter what part of Minnesota you call home."

– Chief Justice Lorie Skjerven Gildea, MN Supreme Court

OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVII NUMBER 1
JANUARY 2020
www.mnbar.org

Bench&Bar OF MINNESOTA

2 ***President's Page***
20/20 Foresight
By Tom Nelson

4 ***MSBA in Action***
North Star Lawyers

6 ***Professional Responsibility***
Ethical fee agreements
By Susan Humiston

8 ***Law & Technology***
Beyond compliance: Effective security training
By Mark Lanterman

10 ***Colleague Corner***
'There is incredible value in membership'
Meet Sarah Soucie Eyberg

12 ***Bonus! 2020 Buyers' Guide***
Products & Services for Lawyers

33 ***Notes & Trends***
Landmarks in the law

47 ***People & Practice***
Member announcements

48 ***Opportunity Market***
Classified ads

ON THE COVER

16 **THE TROUBLE WITH EYEWITNESS TESTIMONY**
Toward a model jury instruction on witness accounts
By Julie Jonas, Jevon Bindman, and David Herr

20 **HEALTHY LAWYERS ARE PRODUCTIVE LAWYERS**
The business case for promoting lawyer well-being
Lawyers who are impaired—whether because of substance use, diagnosed mental health issues, or simply garden-variety stress—are more likely to commit legal malpractice or violate ethical rules.
By Patty Beck and Alice M. Sherren

27 **WORKERS' COMPENSATION FOR MEDICAL MARIJUANA?**
Not So Fast.
Think the Minnesota Department of Labor and Industry has settled the issue? Think again.
By Sue Conley and Jeff Markowitz

20/20 Foresight

You're right, of course, those numbers (20/20) often accompany the term "hindsight." So here's a brief look back, and a longer look forward.

OK, Cheryl Dalby, you've been CEO of our combined bar associations for a year now. You're on:

"Thanks, Tom. During 2019 we created new ways for the bars to collaborate and become more efficient. We've combined staff and our physical offices; we've integrated our databases, phone systems, accounting systems, and personnel policies and benefits packages. We're looking at new ways the bars can collaborate even more on programming, while maintaining the distinct identity of each organization."

Dyan Ebert, you'll be taking up the presidential baton next June. What think ye?

"We will continue to reach out to the legal profession in Greater Minnesota, to better understand and assist with their strengths and struggles. We will also address the declining number of attorneys practicing outside of the wider Twin Cities area. We will mark and celebrate the 100th anniversary of the ratification of the 19th amendment, which guaranteed women the right to vote. I look forward to continuing and strengthening our work on access to justice, lawyer well-being, and member support, engagement, and retention."

Great. Two terrific leaders. Looking forward to Jennifer Thompson's and Paul Peterson's continuing and emerging leadership, as well. So here's s'more about what's on our minds.

Twenty topics for 2020

(1) "One Profession." All-day gatherings in each of our districts— CLE credits; with the district court judges, private practitioners, and public service lawyers alike.

(2) Commemoration of the Duluth Lynchings. In June it'll be 100 years since the murders of Elias Clayton, Elmer Jackson, and Isaac McGhie. Remembrances on June 15 in Duluth, and June 16 at the Minneapolis Hilton. Guest speaker: Bryan Stevenson of the Equal Justice Initiative, author of *Just Mercy*, and much more. Stay tuned and please plan on attending.

(3) Minnesota Supreme Court Paraprofessional Pilot Implementation Committee: We have to figure out how to serve the tsunami of *pro se* litigants coming to our courts. Our current reality is not sustainable, either from an access to justice or a court capacity perspective. Chief Justice Gildea has confirmed that we can no longer just "admire the problem." I agree.

TOM NELSON is a partner at Stinson LLP (formerly Leonard, Street and Deinard). He is a past president of the Hennepin County Bar Association.

(4) Mandatory reporting of *pro bono publico* hours and financial contributions? Has the time come? Add your voice and views. FYI: I said "yes" in my December column.

(5) Access to justice: Continuing collaboration with the Minnesota Supreme Court and the Judicial Branch on LawHelpMN and a potential coalition or "commission."

(6) Lawyer health and wellness: January 13 conference, and a spring summit. Be there and be well. "It's safe to seek help to get well."

(7) Health insurance: We're developing an association-based and affordable health insurance program for solo or small multi-employee law firms. Hopefully, a June 2020 launch.

(8) On-demand CLE: Coming to a screen near you? It's already at 15 hours of the required 45 hours over three years. A pending petition to the Supreme Court would allow for all 45 hours to be "on demand."

(9) 2020/2021: Legislative and budget sessions and ABA priorities: Civil Legal Aid funding and attorney salaries. Student loan forgiveness initiative. Housing and evictions. "Civil Gideon," anyone?

(10) Hate crimes: Legislation? Attorney General initiative? First Amendment?

(11) Uninsured attorneys representing clients? Professional responsibility and ethics issues, and potential rules? Insurance availability? Disclosure to clients or the Court?

(12) Diversity and inclusion: A professional obligation. New strategic plan for MSBA Diversity and Inclusion Council. Continuing support for marvelous and important affinity bar associations.

(13) Potential MSBA amicus positions: Transgender rights. Family law and custody matters.

(14) What to do with dues? Simplify? Lower?

(15) Specialists: Certification? Advertising restrictions? First Amendment.

(16) Solo/small/suburban/Greater Minnesota: Great recent edition of *Bench & Bar*. Practice management and legal research tools. Substantive sections. Duluth MN/CLE solo/small summit.

(17) New and "vintage" lawyers: New and creative ways to collaborate across generations.

(18) Large, national and international law firms coming to Minnesota. Invasions or evolutions? Non-lawyer ownership of law firms?

(19) Courthouse security: Lawyer access and parity.

(20) And more: Immigration; Native American law and life; Mock Trial.

All of which reflects our continuing view that our bar association is A Great Idea and A Good Deal. It's a good deal in light of the benefits and all of the "free stuff" that comes with membership. A good investment—from robust practice tools to a constant stream of substantive resources and timely programs. And it's a great idea because of our unique opportunity to lead, speak for, support, connect—and protect—our profession. Whether in Minnesota or U.S. legislative hallways, or in our Supreme Court and District Court conference rooms and social gatherings.

Put another way, there is value that you "get" and there are values that you support—like excellence and ethics even in the course of zealous representation; dignity and decency; professionalism and civility; diversity and inclusion. There will no doubt be new and maybe even surprising issues that come our way in 2020. As Yogi Berra explained: "It's difficult to predict things, especially about the future." But this is our 20/20 vision: optimistic; leaning and looking forward; trying to see and seize the bright side of our future together. Happy New Year, and welcome to 2020. ▲

Bench&Bar OF MINNESOTA

Official publication of the
Minnesota State Bar Association
www.mnbar.org | (800) 882-6722

Editor
Steve Perry
sperry@mnbars.org

Design & Production
Jennifer Wallace

Advertising Sales
Pierre Production & Promotions, Inc.
(763) 497-1778

MSBA

Bench & Bar of Minnesota (ISSN 02761505) is published Monthly, except Bi-Monthly May/June by the Minnesota State Bar Association, 600 Nicollet Mall STE 380, Minneapolis, MN 55402-1641. Periodicals postage paid at St Paul, MN and additional mailing offices. **Postmaster:** Send address changes to Bench & Bar of Minnesota, 600 Nicollet Mall STE 380, Minneapolis, MN 55402-1641. Subscription price: $25.00 for members which is included in dues. Nonmembers $35.00 per year. Some back issues available at $5.00 each. Editorial Policy: The opinions expressed in *Bench & Bar* are those of the authors and do not necessarily reflect association policy or editorial concurrence. Publication of advertisements does not constitute an endorsement. The editors reserve the right to accept or reject prospective advertisements in accordance with their editorial judgment.

WE'D LIKE TO HEAR FROM YOU: To query potential articles for Bench & Bar, or to pass along your comments on matters related to the profession, the MSBA, or this magazine, write to editor Steve Perry at sperry@mnbar.org or at the postal address above.

Keeping the Fire Going

MSBA North Star Lawyers talk about pro bono service, commitment, and practice

The Minnesota State Bar Association launched North Star Lawyers, its first individual recognition program for members who provided 50 or more hours of pro bono service, in 2012. Since that time, the program has provided an opportunity for MSBA to recognize the many members who have been meeting the aspirational standards set in Minnesota Rules of Professional Conduct Rule 6.1.

Last year the MSBA recognized 934 members who certified they met the program requirements. These members provided over 110,500 hours of total service, with an estimated value of $27.6 million. I recently contacted a few of those 2018 North Star Lawyers in order to find out a little more about their pro bono work as well as their tips for incorporating pro bono into one's practice.

They included the following individuals:

Carole Pasternak, Klampe Law Firm, Rochester

Pasternak has been a licensed attorney since 1999. About 80 percent of her work is in family law, 20 percent in family immigration. She has been a partner since 2008 and serves on the board of Legal Assistance of Olmsted County.

Chris Pham, Fredrikson & Byron, PA, Minneapolis

Pham is a shareholder who works in his firm's business litigation department and also co-chairs the firm's sports & entertainment practice group.

Lauren Pockl, Briggs and Morgan, Minneapolis

Pockl is an associate in her firm's energy group, where she focuses primarily on regulatory matters, as well as environmental and natural resource issues.

Tracy Podpeskar, Trenti Law Firm, Virginia

Podpeskar is a partner in her firm, where she focuses exclusively on family law and serves on the board of the Legal Aid Society of Northeastern Minnesota.

Allison Woodbury, Stinson, LLP, Minneapolis

Woodbury has been a partner in her firm's income tax practice since 2012 and does almost exclusively transactional practice, providing support to the firm's corporate lawyers.

Why is pro bono service important to you?

Woodbury: "The number of unrepresented clients demonstrates that the answers are beyond the resources of non-profit organizations and government to fill."

Podpeskar: "The need for representation can be seen in legal clinics where folks present a range of family law issues clearly beyond their capacity to address on their own in court. Even half an hour of service can make a difference in the success of a case."

Pasternak: "Pro bono work is important because access to justice cannot be solely based upon one's income. While one would be appointed a criminal defense attorney if one could not afford a private attorney, there are many other areas of law that impact a person's life as dramatically as a criminal action."

Pham: "Doing pro bono service is important to me because I believe in personal community responsibility, which I view as similar to corporate social responsibility. I grew up in a low-income, single-parent household in north Minneapolis, so I can relate to many of the obstacles and adversities that underrepresented individuals face on a regular basis."

Pockl: "As a lawyer, I believe I have a professional responsibility to provide legal services to those that are unable to pay for those services, thereby providing services for the greater public good."

How do you connect with pro bono opportunities?

Woodbury: "I want to take cases where the client has the greatest need. My firm's Deinard Legal Clinic provides some of my case referrals, in addition to Southern Minnesota Regional Legal Services (SMRLS) and the Minnesota Volunteer Lawyers for the Arts. I have worked on cases that are outside of my tax practice, in areas such as Social Security disability, consumer credit, and criminal expungements."

Pham: "Given my upbringing, I have a soft spot for working with inner-city youth, so much of my pro bono work relates to serving that group, which includes, among other things, a pro bono class action lawsuit against St. Paul Public Schools; representing children in need of protective services through the Children's Law Center of Minnesota; and volunteering at the YouthLink Legal Clinic."

Pasternak: "Most of my pro bono work is through legal services groups—LAOC, SMRLS, and most recently, an asylum case I obtained through The Advocates for Human Rights."

Podpeskar: "I only take referrals from my local provider—currently LASNEM, formerly the Volunteer Attorney Program—as I do not want to pick and choose between clients that come to me through my regular practice. I meet clients at a sponsored legal aid clinic for brief half-hour service and take some of them on as extended representation cases."

Pockl: "I seek opportunities that align with the interests that I am not able to live out through my everyday professional work, like criminal matters, courtroom appearances, and various other areas and aspects of the law that interest me."

How do you incorporate pro bono representation into your practice?

Pockl: "I make time to ensure that I am able to fully engage in the pro bono work that I perform as much as I make time to ensure that I fully engage with my day-to-day legal work. The relationships that I have built, the skills that I

have harnessed, and the wide variety of legal areas that I have covered as a result of my pro bono work have all contributed to me being a better corporate attorney and firm employee."

Pasternak: "I always have at least one full representation pro bono case on my active case list. I also provide short consultations for LAOC's Family Law Clinics and Father's Project—each is a 30-45-minute consultation. I believe that the clinic is not income based, just a signup. I serve on the LAOC board as the vice chair, and help with fundraising efforts to keep LAOC in the black."

Podpeskar: "I treat every pro bono advice client like any other client. The local provider staff knows my limits and spreads out referrals. I have never felt burdened by referrals from legal aid and, occasionally, I will say no if I can't handle the matter."

Woodbury: "Consistency is the key. I always have something active in my pro bono caseload. It is a practice management skill to manage my workload. If I waited for the 'right' time to take a case, it would never happen and that time would be eaten up by other matters."

Pham: "Two things: experience and networking. By doing pro bono work, I've gained significant experience in the courtroom and in front of certain judges/magistrates. And networking goes hand-in-hand with that experience—additional opportunities to meet lawyers, judges, and other professionals."

What advice do you have for lawyers interested in, but not currently doing, pro bono service?

Pockl: "For those who are interested but concerned about time management, I would advise simply picking up a pro bono file in an area of law that is of interest to you. It does not need to be anything complex or time-consuming, but something that is meaningful. Experiencing firsthand that pro bono service can be performed alongside the daily demands of an attorney's practice is important when deciding if or how much pro bono work to take on."

Podpeskar: "Pro bono is a good opportunity for new lawyers starting out to get their feet wet and find out what they are interested in. Volunteer attorney programs can connect new lawyers to volunteer opportunities and provide support by connecting them to more experienced mentors. In greater Minnesota, relationships matter a lot and it's hard to say no to someone you know in your community."

Pasternak: "For those who may not be sure about pro bono, I would say take one case and see what a difference it makes. Most cases are not terribly time-consuming. And reaching the 50 hour pro bono annual hours is likely only 2-3 cases per year."

Woodbury: "Find a lawyer you know who is active as a volunteer. Ask him or her how they choose activities, balance responsibilities in practice and got started. There are varying levels of commitment. The point is to get started and not put it off."

Pham: "Just jump in! I know a lot of lawyers may be hesitant because the legal area may be unfamiliar, or if they're transactional lawyers, then the hesitancy is because they've never been to court, have no experience 'litigating,' etc. But so much is learned through hands-on experience in any event, so jump in and keep in mind that although you may be inexperienced, nervous, and/or uncomfortable, imagine how the pro bono clients feel." ▲

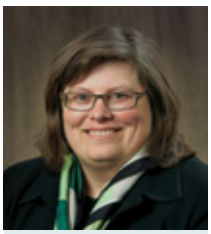
Ethical fee agreements

The start of a new year is a good time to dust off your standard fee agreement to ensure it complies with the ethics rules. Every year attorneys receive discipline for noncompliant fee agreements. Let's make sure it doesn't happen to you in 2020.

The basics

The ethics rules require you to have a written fee or retainer agreement signed by the client in three situations: contingency fee cases, flat fee cases in which you place the advance fee in your business account rather than your trust account, and cases in which you charge an availability fee.[1] In all other cases, written fee agreements are strongly encouraged but not expressly required by the ethics rules.

If you do not have a written fee agreement, you still must communicate to your client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible.[2] Under the rules, the client must sign the agreement in the cases where written fee agreements are required—not a family member or friend, but the client. And a "signed" writing can "include[] an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing."[3]



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.

SUSAN.HUMISTON@COURTS.STATE.MN.US

The content

The rules also establish content requirements and prohibitions. Of course, fees must be reasonable.[4] And this rule is expansive—it prohibits making an agreement for, charging, or collecting an unreasonable fee. The agreement for an unreasonable fee can itself be an ethics violation, even if it's unpaid.

Describing any fee as nonrefundable or earned upon receipt is expressly prohibited by the ethics rules.[5] This rule has been in place since 2011, yet every year discipline is imposed for flouting it. Please help us spread the word. If you see anyone with such agreements, remind them of the rules. You do not need to report them to this Office; just help out your fellow bar member. It would be deeply gratifying if 2020 was the year that no one received discipline for violating this rule.

FLAT FEE HINT!

Watch your language: Telling a client they "might" receive a refund if all of the work is not performed is inconsistent with the required notification that the client "will" receive a refund if all of the work is not performed.

In the case of a flat fee, you may ethically describe the advance fee payment as the lawyer's property subject to refund, but it cannot be earned upon receipt, unless the client is actually paying after all work has been completed. Ordinarily, all fees paid in advance of legal services being performed must be placed in trust, and only withdrawn as earned with notice to the client.[6] In order to treat a flat fee paid in advance as the lawyer's property subject to refund (and thus eligible to be placed in a business account and spent rather than placed in a trust account until work is complete), Minnesota's ethics rules require that the written fee agreement signed by the client notify the client of five specific things.[7] The required notifications are set forth in the rule, and you must include all five. Please review the text of the rule to ensure your flat fee agreement is compliant. And—hint!—watch your language: Telling a client they "might" receive a refund if all of the work is not performed is inconsistent with the required notification that the client "will" receive a refund if all of the work is not performed. Please do not try to mislead your clients by needlessly wordsmithing the notifications required by the rule.

If you wish to charge an availability fee, please consult the rule,[8] and do yourself the favor of consulting experienced ethics counsel. I have yet to see a compliant availability fee agreement that someone is willing to pay; too often they are just impermissible attempts to designate a portion of a flat fee as nonrefundable. Remember, if you agree to represent someone on a particular matter that is pending, you are already agreeing to be available for representation. Availability fees are separate and apart from any compensation for legal services to be performed, which is why they are rarely valuable to a client.

If you use a contingency fee agreement, make sure to specify the kinds of expenses that will be deducted from any recovery, and whether the expenses will be deducted before or after the contingent fee is calculated.[9] Most contingency fee agreements we see have the first requirement covered, but attorneys sometimes omit the second. I'm sure it will not surprise you that clients expect you to deduct expenses from the award, and then calculate your percentage recovery on the lower remaining sum, but that is rarely how you plan to do the math. The rule requires you to be specific.

If you plan to charge clients for the cost of copying or retrieving their files, remember that a client must agree to that in writing prior to termination, so your fee agreement is a good place to secure your client's agreement to this expense.[10] You also cannot ask your client to prospectively limit liability for your malpractice unless the client is independently represented.[11]

(The rule does not say you should tell your client to consult another lawyer; it expressly requires that the client be represented by someone else in order to make a prospective agreement of this kind.)

You should also take care if you plan to insert an arbitration provision in your fee agreement. In 2002, the ABA opined that it is permissible to require a client to arbitrate fee disputes or malpractice claims, but to be ethical, such a provision should apprise the client of the advantages and disadvantages of arbitration to ensure informed consent.[12] Whether an arbitration provision that does not do so is rendered unenforceable or preempted by the Federal Arbitration Act, if applicable, is a subject for another day, but I do recommend that you familiarize yourself with the law and ethics opinions in this area if you wish to include an enforceable and ethical arbitration clause in your fee agreement.

Also take care in attempting to obtain security for payment of fees in your fee agreement (or otherwise). The conflict rules have specific requirements for the manner in which you can acquire a security interest adverse to your client.[13] You should follow those rules to avoid an unethical business transaction with your client. Nor can you acquire a proprietary interest in the cause of action or subject matter of the litigation, except for an attorney's lien authorized by the law or a reasonable contingent fee.[14]

Finally, double-check if you plan to charge interest on your accounts receivable. You must comply with state usury and lending laws regarding the interest you charge, because an illegal fee is an unreasonable fee.[15]

Conclusion

Fee agreements are central to the attorney-client relationship. Done well, they provide great clarity to clients and counsel alike. The ethics rules include a lot of information on how you may, or in some cases must, structure your fee agreement. Do not be so focused on contract law that you forget the ethical rules that also apply. Happy 2020, and as always, please call our advisory opinion service at 651-296-3952 if you need ethics advice. ▲

Notes

[1] Rule 1.6(c), Minnesota Rules of Professional Conduct (MRPC) ("A contingent fee agreement shall be in a writing signed by the client...."); Rule 1.5(b)(1), MRPC ("If agreed to in advance in a written fee agreement signed by the client, a flat fee shall be considered to be the lawyer's property upon payment of the fee, subject to refund as described in Rule 1.5(b)(3)."); Rule 1.5(b)(2), MRPC ("Such an availability fee shall be reasonable in amount and communicated in a writing signed by the client.").

[2] Rule 1.5(b), MRPC.

[3] Rule 1.0(o), MRPC.

[4] Rule 1.5(a), MRPC; *see also* ABA Formal Opinion 93-379 providing guidance on ethically reasonable fees and expenses.

[5] Rule 1.5(b)(3), MRPC.

[6] Rule 1.15(c)(5), MRPC ("except as specified in Rule 1.5(b)(1) and (2), deposit all fees received in advance of the legal services being performed into a trust account and withdraw the fees as earned"); Rule 1.15(b), MRPC (requiring withdrawal of earned fees within a reasonable time of being earned as well as written notice of the withdrawal from trust).

[7] Rule 1.5(b)(1), MRPC.

[8] Rule 1.5(b)(2), MRPC.

[9] Rule 1.5(c), MRPC.

[10] Rule 1.16(f), MRPC.

[11] Rule 1.8(h), MRPC.

[12] ABA Formal Opinion 02-425 (2/20/2002) ("It is permissible under the Model Rules to include in a retainer agreement with a client a provision that requires the binding arbitration of disputes concerning fees and malpractice claims, provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement.")

[13] Rule 1.8(a), MRPC; *see also* Rule 1.8(a), Cmt. [4] ("a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with a client.")

[14] Rule 1.8(i), MRPC.

[15] *See* Patrick R. Burns, *Interest on Legal Fees: Usury is Illegal, Unreasonable, and Just Plain Bad*, Minn. Lawyer, 8/27/2001, available at *http://lprb.mncourts.gov/articles/Articles*.

Beyond compliance:
Effective security training

The importance of education and training in striving for the best possible cybersecurity outcomes can't be overestimated. Within organizations, management looks to these initiatives as a way to inform employees about an ever-evolving cyberthreat landscape replete with risks and the potential for losses. Regularly scheduled training also provides a method for documenting employee compliance and a "checked box" for security efforts.

But staying compliant with regulations, laws, and internal policies is not a guarantee of perfect security. I often think that we'd all like to believe that completing that 15-minute module three weeks ago on how to spot an email scam (the one that really only took five minutes to finish) is enough to ensure our organization's security. Everyone who was assigned the training has completed it—that's enough, right? This false sense of security frequently weakens the culture of security that training and education are supposed to support.

In 2013, Target fell victim to a massive breach that left millions of customers' data vulnerable to hackers. The attack continues to cost Target even now, as the organization has decided to pursue legal action against its insurer for $74 million, alleging that it was not reimbursed for issuing new payment cards to customers.[1] Substantial reputational and financial damages ensued as a result of the breach, and clearly, Target is not completely out of the woods. The scary thing? As a recent journal article pointed out, "In 2013, Target was certified PCI DSS compliant weeks before hackers installed malware on the retailer's network."[2]

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.

Compliance with Payment Card Industry (PCI) standards would have had upper management feeling pretty good about their security. While the Payment Card Industry Security Standards Council has set forth these standards as a minimum baseline by which an organization should abide, I think it's fair to say that a large majority of PCI-compliant organizations take a passing audit as an A+ for security, "set it and forget it" until the next audit, and pat themselves on the back when they pass again. The fact is, Target's compliance meant little in providing an overall view of its security posture; PCI compliance could not predict that when technical controls alerted Target to an intrusion, they would be ignored.

Compliance with technical control standards can never override the human element of security. In Target's case, compliance with PCI standards did not have any impact on day-to-day security practices. Organizations can support security, budget appropriately, pursue compliance, assure customers and clients of their attention to latest requirements and best practices—and still be insecure. Accounting for the human element requires interactive, regular training that considers each employee's unique role in contributing to an organization's security culture. While every employee is responsible for security, different roles and responsibilities require personalized education. Additionally, training for new technologies—as well as an organization's incorporation of the Internet of Things—should always be provided across departments.

Attorneys are held to an especially high standard when it comes to the information they protect. According to the American Bar Association's Formal Opinion 477R, "a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security."[3] The reasonable efforts required by the legal community to prevent data breaches necessitate thorough education that takes the firm's specific needs, and types of data, into account. Compliance with policy is only worthwhile when upheld by a culture of security that acknowledges the unpredictability of a changing threat landscape. ▲

Notes

[1] *http://www.startribune.com/target-sues-insurer-for-at-least-74-million-in-2013-data-breach-costs/565169292/*

[2] *https://www.csiac.org/journal-article/compliant-but-not-secure-why-pci-certified-companies-are-being-breached/*

[3] *https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_477.authcheckdam.pdf*

60% of adults in the U.S. don't have a will or living trust.

For Millennials that figure jumps to 78% without an estate plan.
93% of American households have a net worth of less than $1 million.

To help our members better serve this segment of the market, the MSBA recently added basic estate planning to its document assembly product, mndocs.

Estate Planning Starter Kit

This Starter Kit is intended to let users try mndocs document assembly for some simple estate planning forms, including a Power of Attorney and Health Care Directive.

Try it for only $5 a month
try.mndocs.com

Reduce errors in and time spent drafting legal documents with mndocs. With 550 forms in a dozen practice areas, mndocs can help you serve your clients more efficiently and effectively. Full subscriptions are available for $25 per month or $249.95 per year.

Learn more about document assembly at: mndocs.com

MSBA

hotdocs MARKET | mndocs

THE cloud-based, ecommerce marketplace for automated legal document creation

'There is incredible value in membership'

SARAH SOUCIE EYBERG is a 2011 graduate of William Mitchell College of Law. The winner of the MSBA New Lawyers Section 2018-19 Outstanding New Lawyer of the Year Award, Sarah practices Social Security disability law as a solo practitioner. As a member of the MSBA since she was a law student, Sarah has held leadership roles in numerous sections, including New Lawyers, Practice Management and Marketing, and Social Security Disability Law. She served as chair of the New Lawyers Early Bar Exam Committee, and saw that special project through approval by the NLS Council and the MSBA Assembly and a petition to the Minnesota Supreme Court. She now serves on the Board of Law Examiners Early Bar Exam Committee, representing the MSBA. Sarah is also the chair of the MSBA Assembly General Policy Committee and was recently re-elected to another term on the MSBA Council. She lives in Coon Rapids with her husband and four wonderful children.

SOUCIEEYBERGLAW@GMAIL.COM

Why did you go to law school?

When I was growing up, I had the great fortune to watch my father practice law. And from a very young age I wanted to be a lawyer. I also wanted to be a rock star and a ballerina and a cowgirl. But I stuck with being a lawyer. Definitely not because I wasn't extremely talented in all those other areas.

How did you come to focus your practice on Social Security disability work?

I came up on Social Security disability work because that was the type of law practiced in the first law firm that hired me. I had no prior experience in Social Security disability, nor did I ever take any administrative law classes in law school. When I was in law school I thought I might be a legal aid attorney and help people with their family law issues. After doing some work like that, I realized quickly that was not the place for me.

What I like about Social Security disability is that I am helping people with really serious physical or mental health problems navigate a complex system. My clients are often unsophisticated, or otherwise vulnerable, most often because of the impact of their health conditions on their functioning.

You've done an extraordinary amount of volunteer work for the bar, including service as chair of the MSBA General Policy Committee and as a member of the MSBA Assembly and MSBA Council. What led you to get so involved?

I have been an MSBA member since law school. To me, it is a no-brainer. There is incredible value in membership. I care passionately about the organization and its mission, and I have a hard time not volunteering when there is work to be done.

What have you gained professionally from your bar volunteer service?

I think the number one value that I get from bar volunteer service is the sense of giving back to the greater good, or having an impact on the legal profession greater than the service I can provide to my clients. A lot of the work we do at the bar has a direct impact on practitioners' practices, well-being, and success. I love being a part of that.

What do you like to do when you're not working?

When I am not working, I am likely shuffling between MSBA meetings, Girl Scouts, Boy Scouts, and wrestling/gymnastics/softball practices. We also love spending time at the cabin as a family. I like to run, and knit, though usually not at the same time. And occasionally I get to spend time with my handsome (and equally busy) husband. ▲

BLENDED LEARNING AT MITCHELL HAMLINE SCHOOL OF LAW

THE FIRST. THE BEST.

515
blended-learning students have enrolled since 2015

153
blended-learning students have graduated

93.6%
employment rate for blended-learning graduates in the class of 2018

In 2015, Mitchell Hamline became the first ABA-approved law school in the nation to offer a law degree through a blend of online and on-campus instruction.

Learn more about the evolution of blended learning at Mitchell Hamline at mitchellhamline.edu/bbdec.

MH MITCHELL | HAMLINE School of Law

MITCHELLHAMLINE.EDU ST. PAUL, MINN.

Bench&Bar OF MINNESOTA

Buyers' Guide 2020

Please consider these companies / organizations when searching for a product or service.

Borene Law Firm – U.S. & Global Immigration

Borene Law Firm is a global and national leader in immigration law. 35 years experience helping clients obtain work visas and green cards. Listed in Best Lawyers in America.
www.borene.com

Contact: Scott Borene
T: 612-321-0082 **F:** 612_332-8368
✉ sborene@borene.com
3950 IDS Center
80 S 8th Street
Minneapolis, MN 55402

PAGE 39

CPEC1031 – Commercial Partners Exchange Company, LLC

1031 qualified intermediary for: forward exchanges, reverse exchanges, and build-to-suit construction exchanges.
www.CPEC1031.com

Contact: Jeffrey R. Peterson, JD
T: (612) 643-1031 or 1 (877) 373-1031
F: (612) 395-5475
✉ jeffp@CPEC1031.com
200 S Sixth St #1300
Minneapolis, MN 55402

PAGE 43

Encompass, Inc.

Encompass is a structural and mechanical consulting engineering firm established in 1979. Encompass specializes in forensic analysis of both residential and commercial construction and provides Expert Witness services.
www.encompassinc.com

Contact: Rob Giesen
T: (952) 854-4511
✉ rob@encompassinc.com
5435 Feltl Rd
Minnetonka, MN 55343

PAGE 44

Children's Law Center of Minnesota

Children's Law Center of Minnesota: "Because the smallest voice in the courtroom should be the loudest". Give a child a voice. Show your support at **www.clcmn.org**

Contact: Lilia Panteleeva
T: (651) 644-4438
✉ info@clcmn.org
450 N Syndicate Street #315
St. Paul, MN 55104

PAGE 39

Computer Forensic Services

Computer Forensic Services specializes in cybersecurity and the analysis of digital evidence in data breaches, as well as civil and criminal investigation.
www.compforensics.com

Contact: Kyle Loven, National Director
T: (952) 924-9920 **F:** (952) 924-9921
✉ kloven@computerforensics.com
The Pence Building
800 Hennepin Ave, 5th Floor
Minneapolis, MN 55403

PAGE 35

Engel Metallurgical

Engel Metallurgical specializes in product failure analysis, materials evaluations, and materials engineering consulting. Our customers include industrial clients, insurance companies, and attorneys.
(ISO 17025 accredited)
www.engelmet.com

Contact: Lester Engel
T: (320) 253-7968 **F:** (320) 253-7917
✉ les@engelmet.com
925 Industrial Dr S
Sauk Rapids, MN 56379

PAGE 47

Erickson, Bell, Beckman & Quinn

Mr. Erickson has completed hundreds of successful mediations, arbitrations and mediation/arbitration resolutions in personal injury, residential and commercial property damage, product liability and subrogation.
www.ebbqlaw.com

Contact: James C. Erickson Sr.
T: (651) 223-4999 **F:** (651) 223-4987
✉ jerickson@ebbqlaw.com
1700 W Highway 36 #110
Roseville, MN 55113

PAGE 7

Government Liaison Services, Inc.

Since 1957, we have specialized in trademark, patent and copyright searches and due diligence. Our expertise can be invaluable in the subjective world of intellectual property research.
www.trademarkinfo.com

Contact: Robert Forbes
T: (703) 524-8200 **F:** (703) 525-8451
✉ gls@trademarkinfo.com
200 N Glebe Rd #321
Arlington, VA 22203

PAGE 7

MSBA-ENDORSED

LawPay

Law Pay, credit card processing for attorneys, helps you win new business, improve cash flow and reduce collections. Call 866-376-0950 or visit: **www.lawpay.com/mnbar**

T: (866) 376-0950
✉ info@LawPay.com
3700 N Capital of Texas Hwy #300
Austin, TX 78746

INSIDE BACK COVER

MSBA-ENDORSED

Fastcase

Premier online legal research service. Members have unlimited access to one of the largest law libraries in the world, training webinars and tutorials, and live customer support.
www.mnbar.org/guide-fastcase

Contact: Michael Carlson
T: (612) 278-6336
✉ mcarlson@mnbars.org
600 Nicollet Mall #380
Minneapolis, MN 55402

BACK COVER

Hannover, Ltd.

Expert witness services in financial matters, including defaulted financings, due-diligence, disclosure, damages calculations, M&A, investor dispute, and investment banking; over 35 years experience.
www.hannoverconsulting.com

Contact: Don Keysser, DBA, CM&AA
T: (612) 710-0995
✉ don@hannoverconsulting.com
8276 Kingslee Rd #101
Bloomington, MN 55438

PAGE 43

Livgard & Lloyd PLLP

Since 1993, Paul Livgard has successfully pursued Social Security disability benefits for those who can't work. He represents claimants compassionately and zealously to get their benefits.
www.livgard.com

Contact: Paul Livgard
T: (612) 825-7777 **F:** (612) 825-3977
✉ paul@livgard.com
2520 University Ave SE #202
Minneapolis, MN 55414

PAGE 47

GBR Interpreting & Translation Services

GBR offers interpreting and translation services for approximately 150 languages. We can provide face-to-face or telephonic interpreting, transcription of recorded audio, and translation of written documents.
www.gbrinterpreting.com

Contact: Gennady Bronshteyn
T: (763) 241-0002 **F:** (763) 445-2088
✉ scheduling@gbrinterpreting.com
9201 Quaday Ave NE #207
Otsego, MN 55330

PAGE 47

Landex Research Inc.

Landex Research, Inc. specializes in locating missing and unknown heirs anywhere in the world. Research services are provided for courts, lawyers, trust officers, executors and estate administrators.
www.landexresearch.com

Contact: Laura Harris
T: (847) 519-3600 **F:** (847) 519-3636
✉ lharris@landexresearch.com
1345 Wiley Rd #121
Schaumburg, IL 60173

PAGE 43

Lutheran Social Service of Minnesota

LSSMN offers Pooled Trusts for individuals with disabilities and Health Care Agent, Power of Attorney, Personal Representative of the Estate, Guardianship and Conservator Services.
lssmn.org/protectyourassets

Contact: Larry Piumbroeck
T: (888) 806-6844
✉ protectyourassests@lssmn.org
1605 Eustis St
St. Paul, MN 55108

PAGE 37

MSBA-ENDORSED

Mercer Health & Benefits Administration LLC – MSBAINSURE

Mercer continues to partner with the MSBA with member voluntary benefit insurance offerings like; 10 / 20 Year Level Term Life, AD&D, Disability Income, Long Term Care, Auto/Home, Cyber Liability, General Liability & Workers Compensation and Health Insurance Solutions.
www.msbainsure.com

Contact: John T. Collentine
T: (612) 642-8642 / (800) 328-4671 **F:** (866) 715-0997
✉ john.collentine@mercer.com
333 S Seventh St #1400
Minneapolis, MN 55402

PAGE 35

Mitchell Hamline School of Law

Mitchell Hamline has been educating lawyers for more than 100 years but still innovates to respond to the changing legal world.
www.mitchellhamline.edu

Contact: Dan Cheng, Director of Admissions
T: (651) 290-6478
✉ admissions@mitchellhamline.edu
875 Summit Ave
St. Paul, MN 55105

PAGE 11

Nolan, Thompson, Leighton & Tataryn, PLC

Nolan, Thompson, Leighton & Tataryn, PLC. is a civil litigation law firm with a dedicated focus on private disability claims and federal ERISA law.
www.nmtlaw.com

Contact: Rob Leighton
T: (952) 405-7177 **F:** (952) 224-0647
✉ rleighton@nmtlaw.com
595 Southgate Office Plaza
5001 American Boulevard W
Bloomington, MN 55437

PAGE 43

MSBA-ENDORSED

Minnesota Lawyers Mutual Insurance Company

Founded in 1982, MLM provides risk management services for the legal community including lawyers' professional liability insurance, exemplified by an AM Best rating of A- (excellent.)
www.mlmins.com

Contact: Chad Mitchell-Peterson
T: (612) 373-9681 **F:** (800) 305-1510
✉ chad@mlmins.com
333 S Seventh St #2200
Minneapolis, MN 55402

PAGE 26

National Dizzy & Balance Center

NDBC combines Physicians, Audiologists, Physical Therapists, and Occupational Therapists within the same facility to offer a true multidisciplinary approach to dizziness, balance disorders, and concussions.
www.nationaldizzyandbalancecenter.com

Contact: Teresa Standafer
T: 952-800-8951 **F:** 952-345-6789
✉ teresas@stopdizziness.com
6700 France Ave, Suite 300
Edina, MN 55435

PAGE 26

Patrick J. Thomas Agency

The Patrick J. Thomas Agency: Offers Surety Bonds and Commercial Insurance; for over 40 years specialized in these industries and focused on how to better serve the Minnesota legal community.
www.pjtagency.com

Contact: Jon Davies
T: (612) 339-5522 **F:** (612) 349-3657
✉ email@pjtagency.com
121 S Eighth St #980
Minneapolis, MN 55402

PAGE 37

Minnesota Lawyer Referral and Information Service (MNLRIS)

Could your practice use additional clients? Are your marketing costs getting out of hand? Are you looking for a steady source of client referrals? Join MNLRIS, a program of the Hennepin and Ramsey county bar associations.
mnlawyerreferral.org

Contact: Dana Miner
Attorneys: (612) 752-6660
Clients: (612) 752-6699
✉ dminer@mnbars.org

PAGE 5

MSBA-ENDORSED

mndocs

Fully automated, Minnesota-specific legal forms with cloud-based document assembly. Over 550 forms in a dozen practice areas. Reduce time drafting legal documents by up to 95%.
www.mndocs.com

Contact: Michael Carlson
T: (612) 278-6336
✉ mcarlson@mnbars.org
600 Nicollet Mall #380
Minneapolis, MN 55402

PAGE 9 & 41

Siegel Brill PA – John M. Dornik

John's practice areas include: personal injury, motor vehicle accidents, wrongful death, aviation and medical malpractice. Awards include Minnesota Lawyer of the Year and Super Lawyer.
www.siegelbrill.com

Contact: John M. Dornik
T: (612) 337-6145 **F:** (612) 339-6591
✉ JohnDornik@siegelbrill.com
100 Washington Ave S, Suite 1300
Minneapolis, MN 55401

PAGE 3

CATEGORICAL LISTINGS OF ADVERTISERS

** Vendor of MSBA-endorsed products and services*

1031 Reverse Exchanges
CPEC1031 – Commercial Partners Exchange Company, LLC

Alternative Dispute Resolution
Erickson, Bell, Beckman & Quinn

Charitable Giving
Children's Law Center of Minnesota

Computer Forensics
Computer Forensic Services, Inc.

Concussion/TBI Care Management
National Dizzy & Balance Center

Continuing Legal Education
Mitchell Hamline School of Law

Credit Card Processing
LawPay Merchant Account (Affinipay)*

Disabilities Consulting
Livgard & Lloyd, PLLP
Nolan, Thompson, Leighton & Tataryn, PLC

Document Assembly
mndocs*

Due Diligence
Government Liaison Services
Hannover, Ltd.

Economic Damage Analysis
Hannover, Ltd.

Engineering Consultants
Engel Metallurgical

Estate Planning
Lutheran Social Services of MN
mndocs*

Expert Witness
Computer Forensic Services, Inc.
Encompass, Inc.
Engel Metallurgical
GBR Interpreting & Translation Services

Financial Services/Consultants
Mercer Health & Benefits Administration*
Hannover, Ltd.

Financial Technology
LawPay Merchant Account (Affinipay)*

Forensic Engineering
Encompass, Inc.

Forms
mndocs*

Human Issues
Children's Law Center of Minnesota

Immigration Law
Borene Law Firm, PA

Insurance
Mercer Health & Benefits Administration*
Minnesota Lawyers Mutual Insurance Company*
Patrick J. Thomas Agency

Interpretation/Translation
GBR Interpreting & Translation Services

Investigations
Landex Research Inc.

Law Firms
Nolan, Thompson, Leighton & Tataryn, PLC

Law Firms – St. Paul
Erickson, Bell, Beckman & Quinn, PA

Law Firms – Minneapolis
Siegel Brill, PA

Law Library
Fastcase*

Law School
Mitchell Hamline School of Law

Legal Research
Fastcase*

Mergers & Acquisitions
Hannover, Ltd.

Personal Injury
Siegel Brill, PA

Probate Research
Landex Research Inc.

Professional Liability Insurance
Minnesota Lawyers Mutual Insurance Company*

Rehabilitation Consultants & Services
National Dizzy & Balance Center

Referral Service
Minnesota Lawyer Referral and Information Service (MNLRIS)

Social Security Law
Livgard & Lloyd, PLLP

Surety Bonds
Patrick J. Thomas Agency

Tax Attorney
CPEC1031 – Commercial Partners Exchange Company, LLC

Tax Deferred Exchanges (1031)
CPEC1031 – Commercial Partners Exchange Company, LLC

Title Insurance Company
CPEC1031 – Commercial Partners Exchange Company, LLC

Trademark & Copyright Services
Government Liaison Services

Trust Services
Lutheran Social Services of MN

Work Visas
Borene Law Firm, PA

THE TROUBLE WITH EYEWITNESS TESTIMONY

TOWARD A MODEL JURY INSTRUCTION ON WITNESS ACCOUNTS

By Julie Jonas, Jevon Bindman, and David Herr

One of the most gripping moments in any trial occurs when an eyewitness identifies the defendant as the perpetrator of a crime in open court. But what the jury doesn't know is this is primarily for show; the "real" identification occurred months earlier in a police lineup, photo array, or other identification procedure. Dozens of factors affect what the eyewitness observed, the witness's ability later to recall that information to make the identification, and the witness's confidence in the identification. And even the best-intentioned law enforcement officer or investigator can unintentionally bring bias to the procedure.

Recent scientific advances have led to a greater understanding of how the circumstances under which witnesses observe something affect their ability to recall that information later. Events that occur between the initial observation and the identification can also affect a witness's memory. As a result, researchers have advanced numerous recommendations to educate all stakeholders on methods to ensure greater certainty in eyewitness identifications and greater understanding of their sometimes-counterintuitive limitations.

These recommendations are essential to the justice system's efforts to ensure that the correct person is held responsible for the wrong committed. But the justice system has been slow to incorporate these recommendations, and jurors are often uninformed about critical factors that affect the reliability of eyewitness identification. It is important to understand that these issues do not arise only on "one side of the v" in criminal cases—nor, for that matter, only in criminal cases. Any party proffering or challenging eyewitness (or "earwitness") testimony may need to have the testimony put in proper perspective so that the factfinder can assess it fairly.

One solution, consistent with how we handle other matters of guidance to juries, is a more detailed jury instruction that provides useful information regarding the science behind identification and recall. A well-crafted jury instruction is a cost-effective way to educate jurors about best practices for obtaining a credible identification, particularly since the pertinent research is so broadly accepted.

This article describes the current jury instruction used in Minnesota, its origins, and recent attempts by Minnesota courts to address this issue. It identifies factors not included in Minnesota's jury instruction that may be helpful in weighing the credibility of a testifying eyewitness, and offers a sample jury instruction that addresses those factors.

Brathwaite: The unintended jury instruction

Like most states, Minnesota follows the constitutional standard for admission of eyewitness testimony set by the U.S. Supreme Court in *Manson v. Brathwaite*.[1] Under that standard, if an identification procedure is unnecessarily suggestive, the evidence should be excluded unless the prosecutor can show through the totality of the circumstances that the identification is still reliable. In determining whether the evidence is admissible, a court may consider the opportunity of the witness to view the perpetrator, the witness's degree of attention, the accuracy of the witness's description, the witness's degree of certainty, and the time elapsed between the crime and the identification. In the decades since 1977, the Supreme Court has provided little additional guidance regarding factors that make a lineup unnecessarily suggestive.

Brathwaite provides a standard for judges to exclude unreliable eyewitness

identification evidence. But it does not inform jurors how to weigh such evidence when it is admitted, and was never intended to do so. Nevertheless, Minnesota and many other states use *Brathwaite* as the foundation for their standard criminal jury instruction on eyewitness testimony. For example, Minnesota's instruction (CRIMJIG 3.19) states:

> Testimony has been introduced tending to identify the defendant as the person observed at the time of the alleged offense. You should carefully evaluate this testimony. In doing so, you should consider such factors as the opportunity of the witness to see the person at the time of the alleged offense, the length of time the person was in the witness's view, the circumstances of that view, including light conditions and the distance involved, the stress the witness was under at the time, and the lapse of time between the alleged offense and the identification. (If the witness has seen and identified the person before trial and after the alleged offense, you should also consider the circumstances of that earlier identification, and you should consider whether in this trial the witness's memory is affected by that earlier identification.)[2]

The jury instruction identifies some of the factors considered under the *Brathwaite* test, such as the witness's stress level, opportunity to observe, and lapse in time, but not others. And even for those factors that are mentioned, CRIMJIG 3.19 does not explain *how* those factors affect the reliability of a witness's identification. For example, a juror might plausibly believe that increased stress sharpens a witness's ability to form a clear memory, when in fact the opposite is true.

More concerning, CRIMJIG 3.19 ignores many additional factors not included in *Brathwaite* that we now know affect a witness's ability to make a reliable identification, including the following:

1 **Weapons focus:** The presence of a weapon during the event may focus the witness's attention toward the weapon and away from the actor's face. This may make the witness prone to a false identification or more susceptible to suggestion from other witnesses or interested parties.

2 **Cross-racial effect:** Differences in race or ethnicity between the witness and the person being identified affect the reliability of an identification. People are worse at identifying individuals with an ethnic or racial background different from their own.

3 **Intoxication:** Intoxication can inhibit a witness's ability to focus on an event as it occurs. It can also prevent the formation of a clear and detailed memory.

4 **Complexity:** The presence of multiple actors can limit the witness's ability to focus on specific people.

5 **Confidence statements**: A confidence statement made at the time of the initial identification is more reliable than one made at a subsequent identification or at trial. Additionally, the very act of telling a witness that the suspect they chose was the "correct" one can make the witness feel more certain about the identification even when it is incorrect.

6 **Exposure to extraneous information:** Opinions, descriptions, or other identifications provided to a witness may affect the independence of the witness's identification or the witness's confidence in the identification.

7 **Procedure for out-of-court identification:** The procedure for the out-of-court identification also may affect the witness's memory of the encounter. Factors include (1) whether the lineup "fillers" match the description of the suspect; (2) whether the lineup is "double blind" (i.e., did the administrator know which person in the line-up was the suspect and thereby intentionally or unintentionally bias the procedure?); (3) the quality and specificity of instructions given to the witness, including whether the witness is told that the suspect may be absent from the lineup; (4) whether the witness sees the suspect in more than one identification procedure; and (5) whether the lineup administrator gives confirmatory or post-identification feedback, which may afford the witness a false sense of confidence in the identification.

Like the factors discussed in *Brathwaite*, some of these additional considerations are easy to understand given the expected knowledge of most jurors, whereas others are either unfamiliar or maybe even counterintuitive. For example, most jurors will appreciate that a witness who is intoxicated will be less able to make a reliable identification. But the witness's memory may also be affected by the actor's race or ethnicity, the presence of a weapon, or multiple perpetrators, all of which tend to call into question the identification rather than bolster it. Other factors, such as degree of certainty, may correlate with reliability—but that depends on whether the witness was exposed to other opinions or identification results that artificially bolstered his or her confidence.

Educating the jury regarding these factors is obviously of paramount importance to criminal defendants, but prosecutors may also need to explain factors that affect witness memory when confronting a defendant's alibi witness. These issues may likewise be implicated in civil cases, such as products liability (what product did the witness use and when?) and personal injury (who was at fault for the automobile accident?), or any situation where a party must prove a specific person is responsible for an action that gives rise to damages. Proper instruction on eyewitness testimony is therefore a problem that involves both the criminal and civil bars.

Moving beyond *Brathwaite*

In its 2014 report on the problems with eyewitness identification, the National Academy of Sciences recommended that courts give specific jury instructions that go beyond *Brathwaite*:

> Jury instructions should explain, in clear language, the relevant principles [of assessing eyewitness identification].... [T]he instructions should allow judges to focus on factors relevant to the specific case, since not all cases implicate the same factors.... [J]ury instructions have tended to address only certain subjects, or to repeat the problematic *Manson v. Brathwaite* language, which was not intended as instructions for jurors.[3]

Although other states have adopted more extensive jury instructions based on this recommendation, Minnesota courts have continued to grapple with how better to educate juries on issues surrounding eyewitness identification. In one recent case, the district court was asked to provide a more detailed jury instruction on eyewitness identification that included additional factors shown to affect reliability. The lower court, holding that expert testimony was required before it would give an instruction in those areas, denied the instruction. The Minnesota Court of Appeals affirmed this result.[4] Several months later, another district court denied a defense request for an expert to testify about the eyewitness identification issues that were present in that case. Again, the court of appeals affirmed, citing earlier Minnesota Supreme Court decisions that give district courts wide discretion in determining the admissibility of expert testimony.[5] The Minnesota Supreme Court denied review of both cases.

In 2019, another eyewitness identification case came before the court of appeals on the issue of jury instructions. The defense requested the standard jury instruction with additional cautionary language on the procedures used by the police in obtaining the identification, cross-racial identification, and weapons-focus distraction. The district court denied the instruction, the court of appeals affirmed, and the Supreme Court denied review.[6]

These decisions illustrate a perplexing Catch-22 for litigants. A district court decision to disallow expert testimony on eyewitness identification will not be overturned on appeal absent abuse of discretion, and a district court decision to deny a more case-specific jury instruction may be affirmed because an expert is required to support such an instruction.

In 2017, the Minnesota Supreme Court issued an order that recognized the unique challenges presented by eyewitness identification evidence. The Court asked its Rules of Evidence Advisory Committee to review studies and literature in the area of eyewitness identification and to recommend potential reforms. The committee published its report on October 1, 2018, and made recommendations related to police practices in identification procedures, admissibility standards for identification evidence, the use of eyewitness identification experts, jury instructions, and appellate standards of review.[7] The Supreme Court distributed the report to criminal justice professionals throughout the state and directed additional training for judges, but neither the Supreme Court nor the District Court Judges Association, which promulgates standard jury instructions, has adopted any of the specific recommendations.

In its report, the committee agreed that CRIMJIG 3.19 is inadequate and should be "updated and modernized," but could not reach consensus on the details of an appropriate jury instruction.[8] Some members preferred to simply add a list of criteria to the current rule, which would provide a measure of brevity, but would not explain the counterintuitive nature of certain factors. Others preferred an approach that would explain the prevailing science regarding the factors. This approach would provide the jury with more useful information, but it is longer and some of the factors may be better dealt with by expert testimony than jury instructions.

Example jury instruction[9]

The example jury instruction appended to this article attempts to address the primary issues surrounding eyewitness identification while acknowledging that a very detailed instruction runs the risk of losing jurors' attention and being rendered ineffective. The content is highly dependent on the facts of the particular case, and it would be a rare case that would present all the issues covered by the instruction. Accordingly, the instruction would be tailored to include only the factors that are potentially implicated in each identification. We hesitate to claim that it is a model instruction, but there is no reason it, or a comparable counterpart, should not be regularly available for trial where eyewitness testimony is received. Other states have also adopted more extensive instructions that may provide useful language in appropriate Minnesota cases.[10]

We hope this example instruction provides a starting point for practitioners and judges to open a dialogue and to craft an instruction that provides jurors with useful information, yet does not confuse or overwhelm them. Jurors need this information in order to understand the complex factors that affect identification and memory. A jury instruction is the simplest and most economical way to impart this information. Ultimately, this is an issue that the judiciary should address to ensure that juries uniformly have the tools to evaluate eyewitness identifications and to minimize the risk of incorrect identifications. ▲

***JULIE JONAS** is the legal director for the Innocence Project of Minnesota. She also teaches classes on wrongful convictions and supervises clinical students working on innocence cases at the University of Minnesota Law School and Mitchell Hamline School of Law.*
JJONAS@IPMN.ORG

***JEVON BINDMAN** is an attorney at Maslon LLP and focuses his practice on construction and appellate litigation. He is a member of the Minnesota Supreme Court Rules of Evidence Advisory Committee and a contributor to Minnesota CLE's Minnesota Courtroom Evidence Deskbook.*
JEVON.BINDMAN@MASLON.COM

***DAVID HERR** is an attorney at Maslon LLP and is an experienced appellate lawyer. He is co-author of Minnesota Handbook of Courtroom Evidence and Minnesota Trial Objections, both published by West/Thomson Reuters.*
DAVID.HERR@MASLON.COM

Notes

[1] *Manson v. Brathwaite*, 432 U.S. 98 (1977).

[2] *Minn. Practice Series*, *Jury Instruction Guide—Criminal* 3.19.

[3] Nat'l Acad. of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* 112 (2014).

[4] *State v. Thomas*, 890 N.W.2d 413 (Minn. Ct. App. 2017), *rev. denied* (Minn. 3/28/2017).

[5] *State v. Anderson*, No. A16-0565, 2017 WL 1157882 (Minn. Ct. App. 3/27/2017), *rev. denied* (Minn. 6/20/2017).

[6] *State v. Davis*, No. A18-0758, 2019 WL 2262225 (Minn. Ct. App. 5/28/2019), *rev. denied* (Minn. 8/20/2019).

[7] Report of the Minnesota Supreme Court Rules of Evidence Advisory Committee (10/1/2018), *available at http://www.mncourts.gov/mncourtsgov/media/PublicationReports/Publications-Reports-Rules-of-Evidence-Advisory-Committee-Summary-Report.pdf.*

[8] *Id.* at 29.

[9] The example jury instruction was drafted by Connie Iversen, a managing attorney in the Second Judicial District Public Defender's Office. It has been modified slightly by the authors.

[10] *See, e.g.*, Mass. Model Eyewitness Identification Instruction (11/16/2015), *available at https://www.mass.gov/files/documents/2016/11/sk/model-jury-instructions-on-eyewitness-identification-november-2015.pdf*; N.J. Model Criminal Jury Charges (rev. 7/192012), *available at https://www.innocenceproject.org/wp-content/uploads/2017/06/NJ-Jury-Instruction.pdf*.

Instruction on Eyewitness Identification Testimony

APPENDIX

Defendant requests the following special instruction in lieu of CRIMJIG 3.19 —Identification Testimony. Defendant requests a cautionary instruction before testimony by eyewitness(es) and at the close of the case.

The burden is on the state to prove beyond a reasonable doubt each and every element of the crime charged. This burden includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who [insert activity observed].

Identification testimony is an expression of belief or impression by an eyewitness. The value of identification testimony regarding the defendant depends on the opportunity the eyewitness had to observe whether or not the defendant was in fact the person who [insert activity observed] and to make a reliable identification of the defendant on a later occasion.

In appraising the identification testimony of an eyewitness you may consider the following:

1 The level of stress the eyewitness was under at the time the eyewitness viewed the person. High levels of stress can diminish an eyewitness's ability to recall and make an accurate identification.

2 Whether a weapon was present during the commission of the offense. When a visible weapon is used during a crime, it can distract an eyewitness and draw their attention away from the perpetrator. "Weapon focus" can impair an eyewitness's ability to make a reliable identification and to describe what the perpetrator looks like if the crime is of a short duration.

3 The amount of time the eyewitness had to observe the event may affect the reliability of an identification. A brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure.

4 The circumstances of the event, including the distance between the perpetrator and the eyewitness and the lighting conditions. Greater distance between an eyewitness and the perpetrator and/or poor lighting conditions can diminish the reliability of an identification by the eyewitness.

5 Any intoxication impairing the eyewitness's ability to later recall persons and events.

6 The lapse of time between the alleged offense and the identification. Delay between the commission of the crime and the time an identification is made by an eyewitness can affect the reliability of the identification.

7 The ability of the eyewitness from one ethnic/cultural group to effectively recognize distinguishing features of a person of a different ethnic/cultural group.

8 The accuracy of the eyewitness's prior description of the perpetrator.

9 Whether the eyewitness was exposed to opinions, descriptions, or identifications given by other witnesses or any other information or influence that may have affected the independence of the identification. Eyewitness memories can be altered when other eyewitnesses share information about what they observed. Statements and/or conduct of another witness can also affect the eyewitness's confidence in their identification.

10 Whether or not "unconscious transference" affected the eyewitness's identification. "Unconscious transference" occurs when an eyewitness unconsciously identifies a person as a perpetrator because they may have seen the person in another situation or context.

11 The circumstances of the out-of-court identification by the eyewitness to law enforcement, including:

a. whether the identification was administered in a double-blind or blind fashion. Double-blind administrators do not know who the actual suspect is. Blind administrators are aware of who the suspect is but shield themselves from knowing where the suspect is located in the lineup or photo array;

b. the quality and specificity of the instructions given to the eyewitness before viewing the photo lineup;

c. whether law enforcement gave confirmatory or post-identification feedback to the eyewitness. Confirmation can reduce doubt and engender a false sense of confidence in an eyewitness, and feedback can falsely enhance an eyewitness's recollection of the quality of his or her view of an event;

d. the composition of the photo lineup shown to the eyewitness, including whether the defendant stood out from other members of the lineup or photo array;

e. whether the lineup was properly administered by law enforcement to the eyewitness; and

f. any statements or conduct by law enforcement after the identification was made that may have influenced the identification or the eyewitness's confidence in the identification.

12 Any other factors given to you to assess the credibility of a witness.

HEALTHY LAWYERS ARE PRODUCTIVE LAWYERS

By Patty Beck and Alice M. Sherren

The business case for promoting lawyer well-being

Lawyers who are impaired—whether because of substance use, diagnosed mental health issues, or simply garden-variety stress—are more likely to commit legal malpractice or violate ethical rules.

When considering malpractice and ethics risks, lawyers tend to focus on complying with ethical rules, meeting deadlines, maintaining attorney-client relationships, and monitoring client trust accounts. But many overlook the most impactful factor in risk management for lawyers: personal well-being.

Movies and books have glamorized the caricature of the overworked lawyer billing around the clock with little time for anything outside the office. The problem is that this narrative has been internalized by too many lawyers and has led some to believe the only way to be successful is to prioritize work above all else. As a result, many lawyers worry that taking time away from their work for family or personal interests—or even for their physical or mental health—will jeopardize their financial and professional goals.

Lawyers who assume (correctly or not) that their firms demand such devotion from them may neglect their individual well-being. This is dangerous for the lawyer personally and professionally, but also costly for their law firm. Impaired lawyers and their law firm face an increased risk of ethical and malpractice claims.[1]

The financial and reputational consequences to a law firm when its lawyers neglect their personal well-being can include negative publicity when a lawyer is disciplined or disbarred, lost clients, costly lawyer and staff turnover, and adverse verdicts or settlements that can cripple a law firm's viability.

It may seem counter-intuitive to those who want to maximize firm profits, but it's a business necessity for law firms to make the personal well-being of their lawyers and staff a priority.

Although managing and reducing lawyers' workloads may have an acute negative impact on firm revenue, it will likely save money in the long run by avoiding turnover caused by burnout and reducing stress-induced errors… Importantly, addressing lawyer well-being also reduces the financial and reputational costs of malpractice and ethics violations.

What's the big deal?

Statistics paint a bleak picture of lawyer well-being. The American Bar Association (ABA) Hazelden Betty Ford Foundation Study released in 2016 showed that nearly one in three of the lawyers who responded struggle with depression, about one in five struggle with anxiety, and just over one in five identify as problem drinkers.[2] As acknowledged in the study, even more lawyers grapple with such issues and either did not respond to the study or did not want to admit their struggles. While some lawyers have diagnosed chronic mental health issues such as bipolar disorder or clinical depression, others struggle with situational depression or anxiety. Similarly, lawyers who don't identify as struggling with alcoholism or substance use may have unhealthy relationships with mind-altering substances.

But it is not just substance use or mental health struggles that can negatively affect a lawyer's ability to function at his or her best. The sedentary nature of the profession can exacerbate health hazards in ways akin to the effects of obesity or smoking. Many lawyers neglect their physical well-being with irregular mealtimes due to long hours in the office, an overabundance of caffeine and junk food to get them through the day, and little regard for proper nutrition. For some, physical activity is limited to the steps they take walking between their cars and their office chairs. Many lawyers struggle to find the time to tend to their physical well-being, which can further compound the challenges otherwise inherent in the profession.

The practice of law is by nature stressful. Lawyers routinely face demands from clients and colleagues, and there is a perception that we should be available at all times—even when we are not in the office. The adversarial nature of resolving disputes or negotiating contracts can make "professional courtesy" seem like a fantasy. And of course, many of the people drawn to the practice of law are perfectionists who hold themselves—and others—to sometimes unreasonably high standards, terrified of falling short.

It is easy for lawyers to get caught up in competing with other firms or even other lawyers within their firm to work the most hours, charge the highest billable rate, and attract the most sophisticated clients. Lawyers often feel guilty when they take time for family, friends, or hobbies because they believe they will be perceived as uncommitted to the firm or their work. Scheduling a vacation can seem impossible when a simple work-free weekend is rare. Many lawyers become disillusioned that the actual practice of law differs so radically from what they imagined when they decided to go to law school. But they often see no way to change their status quo, which can compound already existing stress.

And while the threats to lawyer well-being might change in the course of a career, they do not seem to ebb with years in practice. Young lawyers may experience stress and anxiety because they are afraid to make a mistake, but also afraid to admit they do not know something. Lawyers seeking partnership may struggle with developing a book of business when they have no experience doing so and feel a lack of support from their firms. Lawyers taking on supervisory or managerial roles may fear taking on seemingly overwhelming responsibility for the livelihoods of their partners, employees, and clients. Lawyers nearing retirement may be anxious about losing their identities when they are no longer spending the majority of their days in the office.

Regardless of the particular circumstances causing lawyer stress, ignoring mental and physical health can lead to devastation of personal and professional lives.

Why should we care?

Lawyers struggling with impairments face a conundrum. If we ask for help, will we be perceived as weak? Will we be risking our professional reputation?

Ironically, if we *don't* ask for help, we are actually far more likely to put our law firms, clients, and law licenses at risk. Lawyers who are impaired—whether it's because of substance use, diagnosed mental health issues, or simply garden-variety stress—are more likely to commit legal malpractice or violate ethical rules. Furthermore, in a society that seems to demand excellent results in the cheapest and shortest amount of time, clients can be very unforgiving of errors and delays caused by lawyers who are not taking care of themselves, which can have costly impacts to law firms by way of negative online reviews, non-repeat business, and costly malpractice lawsuits.

Minnesota Rules of Professional Conduct Rule 1.3 requires lawyers to act with reasonable diligence and promptness in representing a client, and Rule 1.4 requires lawyers to communicate promptly and effectively with their clients. Rules 3.3, 3.4(b), and 4.1 prohibit lawyers from lying to anyone involved in the legal process. Impaired lawyers are far more likely to fail to meet these basic ethical obligations than lawyers who make well-being a priority.

And it's not just the impaired lawyers whose behaviors implicate professional rule violations. Rule 5.1 imposes responsibilities on partners and lawyers in supervisory roles to ensure that other lawyers in their firm are meeting their ethical obligations to their clients and the legal profession. Rule 5.3 addresses responsibilities relating to non-lawyers. Ignoring the well-being of those around us can put our firm's reputation and our own law licenses on the line.

The potential for malpractice and ethics violations skyrockets when lawyers endure work-related stress in addition to regular personal stress. A lawyer working 50-60 hours per week for months on end is likely to burn out, even if everything else in his or her life is going well. The mental exhaustion associated with practicing law is difficult to manage without taking adequate time for the brain to rest, and the chance of making a mistake due to fatigue increases. If that same lawyer also faces personal relationship or money problems, or is struggling with substance use or depression, his or her malpractice and ethics risk can careen into the danger zone. It can be extremely difficult for even a highly skilled lawyer to thoroughly analyze a complex legal matter for a client when their brain is fraught with thoughts of a recent argument with their spouse, or the devastating news that they or a loved one has been diagnosed with a terminal illness, or worry about their aging parents or troubled children.

Lawyers concerned about money for whatever reason may overbill or churn files to increase their revenue. Some lawyers might deal with their personal stress by focusing solely on work, and others by not being productive at all. Some lawyers feel so overwhelmed by stress that they lie to their clients, opposing counsel, and the court in an attempt to cover up their mistakes or inaction in handling a matter.

Failing to appropriately identify and address impairments like substance use, anxiety, or even general stressors can negatively affect a lawyer facing a disciplinary matter. Of course, each disciplinary matter is handled on a case-by-case basis, but the core factors that guide the imposition of discipline are the nature of misconduct, cumulative weight of disciplinary violations, harm to the public, and harm to the profession.[3] The goal of attorney discipline is not to punish the attorney, but to protect the public and the judicial system, and to deter future misconduct by the disciplined attorney and others.[4]

Lawyers who acknowledge their problems and are proactive in addressing them (and, in appropriate cases, seeking treatment) are better able to regain personal and professional well-being. While it is important to note that the mere existence of, for example, overwhelming stress, or a substance use problem, is not itself an excuse or defense to professional misconduct, a willingness to admit and address such issues may be considered a mitigating factor in the imposition of discipline.[5] Lawyers are held to the same ethical standards regardless of their personal struggles, but those who actively address their situation head-on may have a better chance of returning to the practice of law after a disciplinary matter than lawyers who are uncooperative and refuse to acknowledge or take responsibility for their actions.

Research indicates that those who address their problems are at a significantly reduced risk of ethical and malpractice claims. In 2001, the Oregon Attorney Assistance Program conducted a study involving 55 lawyers in private practice who sought treatment for alcohol use and measured the malpractice and ethics complaints reported against these lawyers during the five-year periods before and after seeking treatment. The study revealed a 30 percent annual malpractice rate during the five years prior to seeking treatment, and only an 8 percent rate after seeking treatment.

Unfortunately, many lawyers feel paralyzed with respect to their personal well-being due to general stigma and the fear of losing the esteem of their clients and colleagues if their struggles become known. Others may struggle with understanding the type of help they need, or fear what will happen if seeking help does not resolve the issue. While these are valid concerns, it is far better to take action toward regaining well-being than simply to allow one's personal and professional life to deteriorate.

What can we do?

When lawyers are unsure how to address a complicated legal issue, it is common sense to research applicable case law and talk with other lawyers or experts with experience in the practice area. We should feel empowered to do the same when we face uncertainty about the stress in our professional and personal lives. Thus, best business practices include reducing the stigma of admitting personal and professional stressors, and increasing awareness of and access to tools for lawyers to improve their overall well-being. For legal employers, we recommend consulting the *Well-Being Toolkit for Lawyers and Legal Employers*, a resource created last year by Anne M. Brafford for use by the American Bar Association.

The first step in managing our personal well-being is to do a self-evaluation to determine the sources of our discomfort. One way to do this is to write out a list of everything in your current job or career path that causes you stress and then look for common themes for guidance on change. Is it a specific case—or working with certain clients/colleagues—that causes you stress? Is it the pressure of making a final recommendation to a client? Are you frustrated at the lack of control over your schedule or your level of passion for your work?[6]

Once these stressors are identified, we can make necessary changes. For some, a frank discussion with firm partnership could alleviate anxiety about performance issues. Others may benefit from moving out of highly stressful areas of practice, such as criminal law, family law, or child protection. Some may decide that the culture or expectations at a different firm or company are a better fit for them. Still others might decide to leave the practice of law altogether to pursue an in-house, teaching, or other non-practicing role. Some lawyers may come to the realization that they need treatment for alcohol or substance use, medication for mental health issues, or counseling to work through personal problems.

Unfortunately, many lawyers suffer in silence because they hope things will get better on their own. They won't. The decision to seek help can be scary for lawyers who believe they are supposed to be tough and able to handle everything on their own. This thinking is wrong.

Notes

[1] See G. M. Filisko, *Disbarred Lawyers Who Seek Reinstatement Have a Rough Road to Redemption*, ABA J., Aug. 2013 (citing Sarah Krauss, then-chair of the ABA Commission on Lawyer Assistance Programs, who said in 2013 that mental health or substance abuse issues may be a factor in more than half of lawyer discipline cases), *available at http://www.abajournal.com/magazine/article/disbarred_lawyers_who_seek_reinstatement_have_a_rough_road_to_redemption*.

[2] Krill, Patrick, Ryan Johnson, and Linda Albert, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys." *Journal of Addiction Medicine* 10, no. 1 (January/February 2016): 46-52.

[3] *In re Nett*, 839 N.W.2d 716, 721 (Minn. 2013).

[4] *In re Koss*, 611 N.W.2d 14, 16 (Minn. 2000).

[5] *See generally*, *In re Bosman*, 876 N.W.2d 308, 309 (Minn. 2016).

[6] On the flip side, make a list of everything in life both personally and professionally that makes you happy. Circle everything that your current lifestyle allows you to experience, at a minimum, on a bi-weekly basis. If over half the list is not circled, something needs to change. Also, mark the top 10 things most important to your happiness, and if those are not already circled, that is an even bigger indicator that change is needed. There is no reason why you should not be able to experience the things in life that bring you the most joy at least twice per month!

[7] For information published by the ABA Working Group to Advance Well-Being in the Legal Profession, please visit the following website: *https://www.americanbar.org/groups/lawyer_assistance/working-group_to_advance_well-being_in_legal_profession/*.

[8] Please visit the following website to learn more about the National Task Force on Lawyer Well Being: *https://www.americanbar.org/groups/professional_responsibility/task_force_lawyer_wellbeing/*

[9] Please visit the following website to learn more about the MSBA Well-Being Committee: *https://www.mnbar.org/about-msba/leadership/msba-committees/life-the-law*.

Everyone needs assistance at some point, and it takes a tremendous amount of courage to make the decision to seek help.

For work-related concerns, this might be as simple as talking with a mentor or another lawyer. Other times, and especially when personal stress, anxiety, substance use, or serious mental health issues are in play, it can be more difficult to talk with people we know. Lawyers might be concerned that their confidences will be breached, or that their jobs might be in jeopardy, based on something they share with their firm. Lawyers with such concerns are encouraged to seek help from a mental health professional. Whether this is a therapist, a psychiatrist, or a similar specialist, many lawyers are relieved to share their struggles with someone who is not a colleague, spouse, family member, or friend, and who is there to help rather than judge. Certain mental health professionals believe the hardest part is getting lawyers through the front door, but once they're in, they tend to stick with it because it is in their nature to want to succeed at everything they do.

Many lawyers will wish to privately consult with a specialist or group of their choice. Another fantastic option is Lawyers Concerned for Lawyers (LCL), which provides free, confidential support and services to Minnesota lawyers, judges, law students, and their immediate family members on any issue that causes stress or distress. (You can contact LCL through its website—www.mnlcl.org—or by phone: 651-646-5590 in the metro area and 866-525-6466 for greater Minnesota callers.)

Being engaged with others through professional organizations and events also promotes lawyer well-being. Getting to know other lawyers on a personal level can alleviate a sense of isolation. The realization that other people experience self-doubt and stress in their personal and professional lives might be what a person who is struggling needs to enable tangible steps to improve their situation.

Firm management may understandably be reluctant to take steps that shift focus away from firm revenue, since all law firms are at their core businesses. But from a business perspective, such reluctance could hurt the firm's bottom line far more than, for example, billing fewer hours. Lawyers and firms who prioritize well-being are likely to be rewarded with happier and healthier work environments and better results for clients. Although managing and reducing lawyers' workloads may have an acute negative impact on firm revenue, it will likely save money in the long run by avoiding turnover caused by burnout and reducing stress-induced errors. Firms that encourage lawyers to take time off to recharge create positive morale that permeates the entire practice; lawyers who are rested and focused are generally better able to provide clients with excellent representation. Finally, addressing lawyer well-being also reduces the financial and reputational costs of malpractice and ethics violations.

Conclusion

A focus on lawyer well-being can help reduce malpractice and ethics violations, can prevent turnover, and can make the practice of law more rewarding for lawyers and their clients. Prioritizing lawyer well-being is necessary for the betterment of the profession, and can have long-range positive impact on the financial health of the firm. For additional ideas about how to promote well-being at your firm, consult the materials published by the ABA Working Group to Advance Well-Being in the Legal Profession,[7] the report published by the ABA National Task Force on Lawyer Well Being entitled *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*,[8] and information available on the MSBA Well-Being Committee website.[9]

You can also contact your malpractice carrier for guidance. Be well! ▲

***ALICE M. SHERREN** is a claim attorney with Minnesota Lawyers Mutual Insurance Company where she directs the defense of legal malpractice claims and advises attorneys facing ethical or disciplinary complaints. Alice frequently develops and presents continuing legal education presentations and writes articles for various publications on risk management and ethics matters.*

ASHERREN@MLMINS.COM

***PATTY BECK** is a claim attorney with Minnesota Lawyers Mutual Insurance Company where she manages litigation involving legal malpractice claims, advises attorneys facing ethical dilemmas, and resolves complex pre-suit malpractice claims on behalf of MLM insureds. She is co-chair of the MSBA Well-Being Committee.*

PBECK@MLMINS.COM

Minnesota Continuing Legal Education

JANUARY 16 & 17, 2020

Attend As Much As Your Schedule Allows

The 2020

New Lawyer Experience

Real-World Practice Tips for New Lawyers

FREE FOR 2017, 2018, 2019 ADMITTEES

12.5 CREDITS | MINNESOTA CLE CONFERENCE CENTER | MINNEAPOLIS

For more information and to register visit minncle.org or call 651-227-8266 or 800-759-8840

Workers' Compensation for Medical Marijuana? Not So Fast.

Think MDOLI has settled the issue? Think again.

By Sue Conley and Jeff Markowitz

There are times in the law when everyone thinks you're wrong but you just can't shake the feeling that you're right. It is a bit jarring, and it can make you (quite reasonably) second-guess yourself. But you double- and triple-check your facts and the law, take a deep breath, and conclude, yes, I got this right.

We respectfully suggest that we are in that situation when it comes to whether, through the 2015 promulgated opioid rules, the Minnesota Department of Labor and Industry (MDOLI)—by defining medical marijuana that is used consistent with Minnesota law as not an "illegal substance"—made such medical marijuana reimbursable through Minnesota workers' compensation.

Many attorneys in the workers' compensation claimant bar, and some workers' compensation judges, have concluded that MDOLI's 2015 opioid rules authorized workers' compensation reimbursement for medical marijuana.[1] They point solely to Minnesota Rule 5221.6040, subpart 7a, which defines "illegal substance" as "a drug or other substance that is illegal under state or federal controlled substances law," but excludes from that definition's scope "a patient's use of medical cannabis permitted under Minnesota Statutes, sections 152.22 to 152.37." They conclude that, in so defining "illegal substance," MDOLI was approving of courts *requiring* employers and their insurers to pay workers' compensation benefits to cover such medical marijuana.

That conclusion is incorrect. The term "illegal substance" that Minn. R. 5221.6040, subp. 7a defines exists nowhere in the Minnesota Workers' Compensation Act (WCA).[2] It exists in only three places in the workers' compensation treatment parameters, all of which appear in one rule—Minn. R. 5221.6110—that governs long-term use of opioids. The gist of "illegal substance" as defined in that context means that use of medical marijuana consistent with Minnesota law

will not disqualify someone from receiving workers' compensation benefits for opioids—an exception to the general disqualifying effect of using illegal substances while taking opioids.

Even if MDOLI had intended by that rule to authorize reimbursement for medical marijuana under workers' compensation—it did not—such a rule would nonetheless be invalid. It would be beyond MDOLI's rulemaking authority, given that possession of medical marijuana generally remains a federal crime under the Controlled Substances Act (CSA),[3] and because the Minnesota Legislature—which gave MDOLI its rulemaking authority—cannot require others to aid, abet, or conspire in criminal violations of the CSA.

In this article, we will first address the federal landscape, under which marijuana—even medical marijuana—is illegal for any purpose except for federal government-approved research. Second, we will discuss the impact of Minnesota's 2014 medical marijuana amendment. Third, we will explain why MDOLI did not intend to—and did not actually—make medical marijuana reimbursable through the WCA.

Federal background

Congress enacted the CSA in 1970 "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances."[4] The CSA does so by imposing harsh criminal penalties.[5] It punishes even first-time possession done "knowingly or intentionally," with a potential prison term of one year minus one day; a fine of at least $1,000; or both.[6]

Of particular concern to employers and workers' compensation insurers, those penalties are not reserved for principal actors. The CSA extends "the same penalties as those prescribed for the offense" to any person who "conspires to commit" the offense, when the offense was the conspiracy's "object."[7] The CSA is also subject to the general aiding-and-abetting statute, under which, whoever "aids, abets, counsels, commands, induces or procures [an offense's] commission, is punishable as a principal."[8]

"In enacting the CSA, Congress classified marijuana as a Schedule I drug."[9] Marijuana has remained on Schedule I, notwithstanding seven petitions to the Drug Enforcement Agency (DEA)[10] to reschedule it to a less restrictive schedule.[11] The DEA most recently denied such a petition on August 12, 2016.[12] The only qualifier to marijuana's Schedule I placement came on December 20, 2018, when Congress added the hemp exception through the Agriculture Improvement Act of 2018 (a.k.a. the 2018 Farm Bill).[13] As amended, CSA Schedule I substances include "[t]etrahydrocannabinols, except for tetrahydrocannabinols in hemp (as defined under section 1639o of title 7)."[14]

"By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study."[15] In other words, "there is but one express exception, and it is available only for Government-approved research projects."[16]

Federal law prohibits doctors from prescribing medical marijuana.[17]

For all substances on Schedule I of the CSA, Congress expressly found three things: (1) "[t]he drug or other substance has no currently accepted medical use in treatment in the United States"; (2) "[t]he drug or other substance has a high potential for abuse"; and (3) "[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision."[18] In the DEA's most recent denial of a petition to reschedule marijuana—the August 12, 2016 denial—the DEA expressly found that marijuana "continues to meet the criteria for schedule I control under the CSA."[19]

The United States Supreme Court, in *Oakland Cannabis* and *Raich*, has made clear that marijuana's Schedule I placement leaves no wiggle room for medical marijuana. In *Oakland Cannabis* (2001), a cooperative of medical-marijuana dispensaries opened up shop to sell medical marijuana, consistent with a California medical-marijuana statute that "create[d] an exception to California laws prohibiting the possession and cultivation of marijuana."[20]

The district court issued an injunction that enjoined the dispensaries from distributing medical marijuana, even for medical marijuana that was, according to the cooperative, "medically necessary."[21] "Marijuana is the only drug, according to the Cooperative, that can alleviate the severe pain and other debilitating symptoms of the Cooperative's patients."[22]

The district court concluded that "[a]lthough recognizing that 'human suffering' could result,... a court's 'equitable powers [do] not permit it to ignore federal law.'"[23] Disagreeing, the Ninth Circuit reversed, concluding that the cooperative had a legally cognizable medical-necessity defense that permitted it to distribute medical marijuana.[24]

The Supreme Court reversed. The Court concluded that "a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act."[25] The cooperative argued that "use of schedule I drugs generally—whether placed in schedule I by Congress or the Attorney General—can be medically necessary, notwithstanding that they have 'no currently accepted medical use.'"[26] The Court "decline[d] to parse the statute in this manner."[27] "It is clear from the text of the Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception."[28] "[W]e have no doubt that the Controlled Substances Act cannot bear a medical necessity defense to distributions of marijuana."[29] The Court concluded likewise as to "the other prohibitions in the Controlled Substances Act."[30]

Raich (2005) further closed the door on medical marijuana under federal law in the context of California's medical-marijuana law, but this time dealing with (seriously ill) users rather than dispensaries.[31]

Two Californians (Raich and Monson) suffered from "a variety of serious medical conditions," and used medical marijuana, consistent with California law.[32] Their licensed, board-certified medical providers concluded that "marijuana is the only drug available that provides effective treatment."[33] "Raich's physician believe[d] that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal."[34]

Raich and Monson moved for a preliminary injunction to enjoin enforcement of the CSA against them.[35] The district court denied the motion; the Ninth Circuit reversed and ordered the district court to enter the injunction.[36] The Ninth Circuit concluded that the CSA, as applied to Raich and Monson, was "an unconstitutional exercise of Congress's Commerce Clause authority."[37] It reasoned that "intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law" is beyond the CSA's scope.[38]

The Supreme Court reversed, concluding that "[t]he CSA is a valid exercise of federal power, even as applied to the troubling facts of this case."[39] "[W]e have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."[40] "[T]he mere fact that marijuana—like virtually every other controlled substance regulated by the CSA—is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA."[41] "[L]imiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach."[42]

Moreover, at least two out-of-state courts have concluded that federal aiding-and-abetting liability may arise even from an employer's or insurer's payment of workers' compensation benefits for medical marijuana authorized by state medical marijuana law, in Maine (*Bourgoin*) and Massachusetts (*Wright*).[43] No federal courts or Minnesota appellate courts have squarely addressed the issue.

On November 13, 2019, a Minnesota workers' compensation judge rejected (we believe erroneously) the criminal-liability concerns of an employer and insurer in *Musta*.[44] She appeared to rely solely on a temporary budgetary rider (known as the Rohrabacher-Farr/Rohrabacher-Blumenauer amendment). At the moment, the rider (as interpreted by some courts) prohibits the United States Department of Justice (DOJ) from using Congressional funds made available by the most recent appropriations act to prosecute manufacturers, dispensers, or users of medical marijuana, if compliant with state law.[45] The currently applicable rider was scheduled to expire on September 30, 2019, but Congress passed stop-gap continuing resolutions to extend it and other appropriations provisions through November 21, 2019,[46]and then again through December 20, 2019.[47]

Such temporary riders—although they generally have been added to appropriations bills since December 2014[48]—do "not provide immunity from prosecution for federal marijuana offenses."[49] "The federal government can prosecute such offenses for up to five years after they occur."[50] As the Ninth Circuit pointedly observed in *McIntosh*, "Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding."[51] "The Rohrabacher–Farr Amendment... did not repeal federal laws criminalizing the possession of marijuana, 21 U.S.C. §844."[52] Congress appeared likely to include such a rider in the appropriations bill for 2020, when the authors of this article finalized it on December 17, 2019.

Minnesota background

The THC Therapeutic Research Act (THC Act)[53] was enacted in 1980.[54] When originally enacted, the THC Act did not authorize the use of medical marijuana. Rather, the Minnesota Legislature authorized that use by amendment in 2014. Through the 2014 amendment, the Legislature created a patient registry program, through which qualifying patients could apply to the Minnesota Commissioner of the Department of Health for authorization to buy medical marijuana,[55] from one of two registered manufacturers in Minnesota, LeafLine Labs or Minnesota Medical Solutions.[56]

A central requirement for a successful medical-marijuana application is that the patient provide a "certification" from his health-care provider, stating she has been "diagnosed with a qualifying medical condition."[57] The 2014 amendment codified nine qualifying conditions: (1) glaucoma; (2) HIV and AIDS; (3) Tourette's syndrome; (4) amyotrophic lateral sclerosis; (5) seizures, including those characteristic of epilepsy; (6) severe and persistent muscle spasms, including those characteristic of multiple sclerosis; (7) inflammatory bowel disease, including Crohn's disease; and, with some qualifiers that require additional symptoms, (8) cancer and (9) terminal illnesses with a probable life expectancy of less than one year.[58] The amendment also gave the Commissioner authority to add qualifying conditions.[59] The Commissioner has added seven: (1) intractable pain; (2) post-traumatic stress disorder; (3) autism; (4) obstructive sleep apnea; (5) Alzheimer's Disease;[60] and, most recently—announced on December 2, 2019, effective August 2020—(6) chronic pain and (7) age-related macular degeneration.[61]

Worth noting is the way in which the 2014 amendment "legalized" medical marijuana. It *did not* remove marijuana from Schedule I of Minnesota's own controlled-substance statutes and rules—marijuana remains there today.[62] Nor did the amendment permit doctors to prescribe marijuana; Minnesota doctors still cannot legally do so under state law.[63] Notably, shortly after the amendment's approval, the Minnesota Court of Appeals concluded in *Thiel* that "a defense of medical necessity is [still] not available in Minnesota for a defendant charged with a controlled-substance crime."[64] The court cited with approval its *Hanson* opinion (1991), in which it concluded, by placing marijuana on Minnesota's own Schedule I, the Legislature "implie[d] a determination that marijuana has 'no currently accepted medical use in the United States.'"[65]

Rather, the Minnesota Legislature "legalized" medical marijuana by codifying various back-end protections.[66] For example, the Legislature made "use or possession of medical cannabis or medical cannabis products by a patient enrolled in the registry program" "not [a] violation[] under" Minnesota's controlled-substances statutes in Minnesota Statutes Chapter 152.[67] In a similar vein, the Legislature essentially immunized State of Minnesota personnel from civil and criminal liability for their roles in the program, and it protected "health care practitioner[s]" and Minnesota Department of Health personnel from civil or disciplinary penalties based solely on their program participation.[68] In related fashion, the Legislature guaranteed that nothing in "sections 152.22 to 152.37" of the THC Act would "require medical assistance and MinnesotaCare to reimburse an enrollee or a provider for costs associated with the medical use of cannabis."[69]

The 2014 amendment included no such protection for employers or their workers' compensation insurers. Nor, however, did it purport to require employers or their insurers to reimburse employees for medical marijuana, through workers' compensation or otherwise.

The amendment was silent on the issue.

That brings us to the heart of this article: Minn. R. 5221.6040, subp. 7a.

The Minnesota WCA; the 2015 opioid rules; and the definition of "illegal substance" in MDOLI's rule

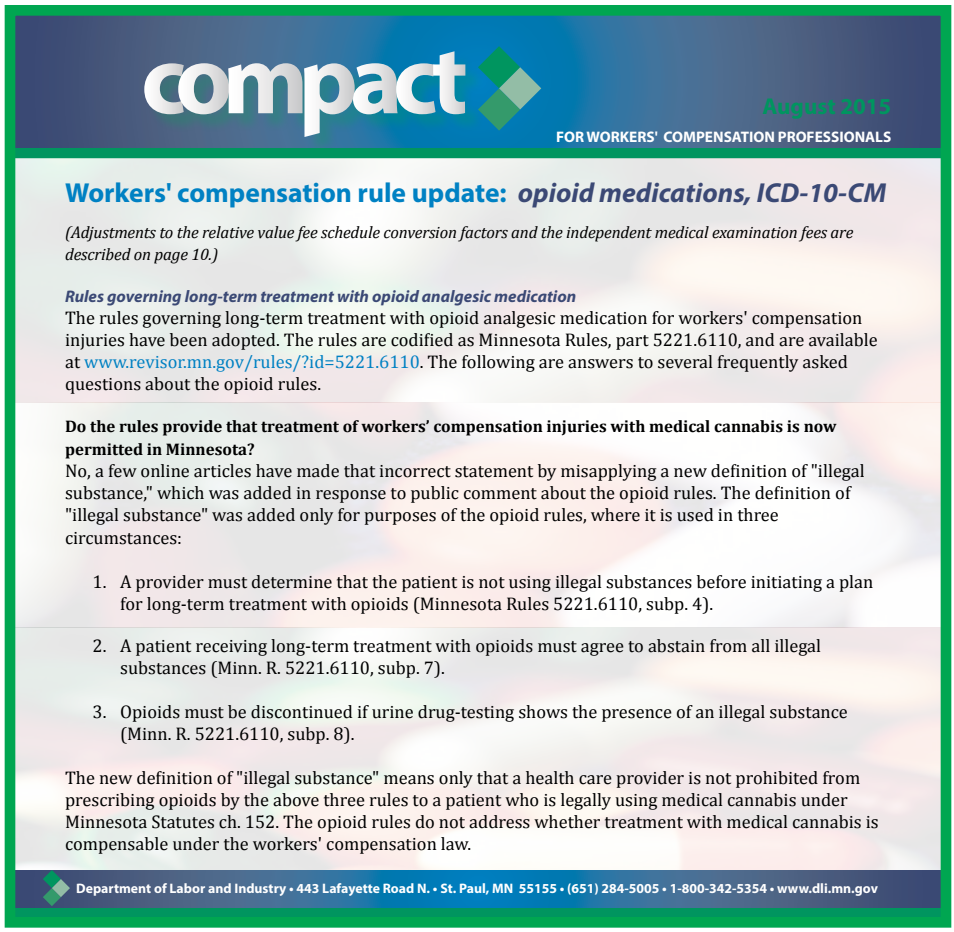
A question that Minnesota workers' compensation lawyers and judges have been struggling with (in recent and active litigation) is whether the general duty to pay workers' compensation benefits imposed by the WCA[70] extends to require employers and their workers' compensation insurers to reimburse an employee for medical marijuana that she buys and uses in a manner compliant with Minnesota law (even though it is otherwise federally illegal). Nowhere in the WCA does the Legislature mention medical marijuana or the THC Act's 2014 amendment that permitted medical marijuana for qualifying conditions.

However, MDOLI mentioned both when it promulgated the 2015 opioid rules. That caught the attention of a number of Minnesota workers' compensation lawyers—and at least a few judges. MDOLI did so in the newly added definition of "illegal substance." That definition led some legal observers to (mistakenly) conclude that this was MDOLI approving of employers and insurers reimbursing an employee for her purchase of medical marijuana, as long as the employee's use complied with the THC Act's 2014 amendment.[71]

In our view, this popularized view cannot be sustained by the plain text and context of Minn. R. 5221.6040, subp. 7a. Further, MDOLI itself refuted this view in August 2015, shortly after promulgating Minn. R. 5221.6040, subp. 7a, effective on July 13, 2015.

Minnesota Rule 5221.6040, subpart 7a, simply defines "illegal substance." Definitions do nothing, apart from the terms that they define, when used. The rule defines "illegal substance" as "a drug or other substance that is illegal under state or federal controlled substances law," but excludes from that definition's scope "a patient's use of medical cannabis permitted under Minnesota Statutes, sections 152.22 to 152.37." But the term "illegal substance" appears nowhere in the WCA. Moreover, Subpart 1 of that same Rule 5221.6040 (Scope) states that the definitions set forth in Rule 5221.6040 serve to define "[t]he terms used in parts 5221.6010 to 5221.6600."

The term "illegal substance" appears in only one of those rules: Minn. R. 5221.6110—the *opioid* rule—which "govern[s] long-term opioid medication."[72] Rule 5221.6110 provides "detailed substantive and procedural requirements that physicians must follow in treating workers' compensation patients with opioid pain medications."[73]



compact

August 2015

FOR WORKERS' COMPENSATION PROFESSIONALS

Workers' compensation rule update: *opioid medications, ICD-10-CM*

(Adjustments to the relative value fee schedule conversion factors and the independent medical examination fees are described on page 10.)

Rules governing long-term treatment with opioid analgesic medication

The rules governing long-term treatment with opioid analgesic medication for workers' compensation injuries have been adopted. The rules are codified as Minnesota Rules, part 5221.6110, and are available at www.revisor.mn.gov/rules/?id=5221.6110. The following are answers to several frequently asked questions about the opioid rules.

Do the rules provide that treatment of workers' compensation injuries with medical cannabis is now permitted in Minnesota?

No, a few online articles have made that incorrect statement by misapplying a new definition of "illegal substance," which was added in response to public comment about the opioid rules. The definition of "illegal substance" was added only for purposes of the opioid rules, where it is used in three circumstances:

1. A provider must determine that the patient is not using illegal substances before initiating a plan for long-term treatment with opioids (Minnesota Rules 5221.6110, subp. 4).
2. A patient receiving long-term treatment with opioids must agree to abstain from all illegal substances (Minn. R. 5221.6110, subp. 7).
3. Opioids must be discontinued if urine drug-testing shows the presence of an illegal substance (Minn. R. 5221.6110, subp. 8).

The new definition of "illegal substance" means only that a health care provider is not prohibited from prescribing opioids by the above three rules to a patient who is legally using medical cannabis under Minnesota Statutes ch. 152. The opioid rules do not address whether treatment with medical cannabis is compensable under the workers' compensation law.

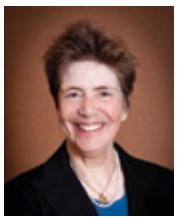
Department of Labor and Industry • 443 Lafayette Road N. • St. Paul, MN 55155 • (651) 284-5005 • 1-800-342-5354 • www.dli.mn.gov

In the opioid rule, "illegal substance" appears three times: in Rule 5221.6110, Subparts 4(F), 7(I)(2), and 8(F)(1). The gist is that, generally, use of illegal substances will disqualify a patient from opioids, *except if the illegal substance is medical marijuana*.[74]

MDOLI explained the matter fully in its August 2015 issue of COMPACT, in which it refuted the view that the definition of "illegal substance" in Minn. R. 5221.6040, subp. 7a, and the opioid rules made medical marijuana reimbursable through Minnesota workers' compensation.[75] No pre-2016 issue of COMPACT is available through MDOLI's online archives.[76] Thus we include a screen shot from the August 2015 issue, which refuted the erroneous view that the July 2015 opioid rules made medical marijuana reimbursable.

In short, contrary to seemingly popular belief, the opioid rules are just about opioids. They did not, nor did MDOLI intend them to, address whether employers and insurers must reimburse a Minnesota-law-compliant employee for medical marijuana, where such reimbursement (at least arguably) compels the employer and insurer to commit federal crimes by aiding, abetting, and conspiring to further possession of marijuana.

Whether the WCA compels such reimbursement is, at least, an open question.[77] ▲



Working alongside insurers, employers, and self-insured entities, SUE CONLEY works to resolve workers' compensation and general liability cases, and has done so for more than 25 years. She has a special interest in complex issues involving medical marijuana, occupational exposure, traumatic brain injury, and complex medical claims.

SKCONLEY@ARTHURCHAPMAN.COM

JEFF MARKOWITZ has a special interest in helping clients navigate tough issues, including those implicated by medical marijuana. He focuses his practice primarily on business and employment law, as well as a busy appellate practice. He clerked for the Minnesota Court of Appeals, and enjoys guest judging mock arguments.

JMMARKOWITZ@ARTHURCHAPMAN.COM

Notes

[1] *See, e.g.*, Jirak, Laurie, "DLI NOT BLOWING SMOKE: MEDICAL MARIJUANA VALID WORKERS' COMP EXPENSE," 25 No. 7 Minn. Emp. L. Letter 1 (Sept. 2015) ("Medical marijuana is now a permissible and reimbursable treatment for workplace injuries, according to the Minnesota Department of Labor and Industry (DLI)."); Farrish Johnson Law Office, "Medical Marijuana in a Workers' Compensation Case," *https://www.farrishlaw.com/medical-marijuana-in-a-workers-compensation-case/*, *last visited* 12/3/2019; Puechner, Nic., Larkin Hoffman, "Minnesota Worker's Compensation Claims Involving Medical Marijuana *https://www.employmentandlaborlawblog.com/2019/02/minnesota-workers-compensation-claims-involving-medical-marijuana/*, *last visited* 12/3/2019.

[2] Minn. Stat. §§176.001-.862.

[3] 21 U.S.C. §§801-904.

[4] *Gonzales v. Raich*, 545 U.S. 1, 12 (2005).

[5] 21 U.S.C §841(b) (potential sentences of 10 to 20 years and stiff fines).

[6] 21 U.S.C. §844(a).

[7] 21 U.S.C. §846.

[8] 18 U.S.C. §2(a).

[9] *Raich*, 545 U.S. at 14.

[10] The CSA gave authority to reschedule drugs to the U.S. Attorney General, and the Attorney General delegated that authority to the head of the DEA. *Washington v. Barr*, 925 F.3d 109, 115 n.3 (2d Cir. 2019) (citing 21 U.S.C. §811(a); 28 C.F.R. §0.100(b)).

[11] *Washington v. Sessions*, No. 17 CIV. 5625 (AKH), 2018 WL 1114758, at *2 (S.D.N.Y. 2/26/2018) (quoting *Raich*, 545 U.S. at 15), *appeal held in abeyance sub nom. Washington v. Barr*, 925 F.3d 109 (2d Cir. 2019).

[12] *Denial of Petition To Initiate Proceedings To Reschedule Marijuana*, 81 FR 53767-01, 2016 WL 4240243 (F.R. 8/12/2016).

[13] AGRICULTURE IMPROVEMENT ACT OF 2018, PL 115-334, 12/20/2018, 132 Stat 4490, §12619(b).

[14] 21 U.S.C. §812, Schedule I(c)(17).

[15] *Raich*, 545 U.S. at 14 (citing 21 U.S.C. §§823(f), 841(a)(1), 844(a); *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 490 (2001)).

[16] *Oakland Cannabis*, 532 U.S. at 490.

[17] *Oakland Cannabis*, 532 U.S. at 491; *United States v. Evans*, 892 F.3d 692, 699 (5th Cir. 2018) ("Schedule I drugs... are deemed to have no medical use and thus cannot be legally prescribed under federal law."); 21 U.S.C. 829 ("Prescriptions," listing Scheduling II, III, IV, and V substances, but not Schedule I substances).

[18] 21 U.S.C. §812(b)(1).

[19] *Denial of Petition*, 81 FR 53767-01, at *53767.

[20] *Oakland Cannabis*, 532 U.S. at 486.

[21] *Id.* at 488.

[22] *Id.* at 487.

[23] *Oakland Cannabis*, 532 U.S. at 487-88.

[24] *Id.*

[25] *Id.* at 491.

[26] *Id.* at 493.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 494.

[30] *Id.* at 495 n.7.

[31] *Raich*, 545 U.S. at 5.

[32] *Id.* at 6-7.

[33] *Id.* at 7.

[34] *Id.*

[35] *Id.* at 7-8.

[36] *Id.* at 8 & n.8.

[37] *Id.* at 8 (quotation omitted).

[38] *Id.* (quotation omitted).

[39] *Id.* at 9.

[40] *Id.* at 22.

[41] *Id.* at 28.

[42] *Id.* at 29.

[43] *See Bourgoin v. Twin Rivers Paper Co., LLC*, 187 A.3d 10 (Maine 2018); *Daniel Wright, Employee Pioneer Valley, Employer Cent. Mut. Ins. Co., Insurer*, No. 04387-15, 2019 WL 3323160 (Mass. Dept. Ind. Acc. 2/14/2019). *But see Appeal of Panaggio*, 205 A.3d 1099 (N.H. 2019); *Lewis v. American General Media*, 355 P.3d 850 (N.M. Ct. App. 2015); *Vialpando v. Ben's Auto. Servs.*, 331 P.3d 975 (N.M. Ct. App. 2014).

[44] *Susan K. Musta, Employee v. Mendota Heights Dental Center and Harford Insurance Group, Employer/Insurer*, OAH Case No. 7750318-MR-2327 (11/13/2019) (J. Kirsten Tate).

[45] PL 116-6, H.J.Res.31, 133 Stat 13, Consolidated Appropriations Act, 2019, Div. C, Title II, §537. *https://www.congress.gov/bill/116th-congress/house-joint-resolution/31/text?q=%7B%22search%22%3A%5B%22H.J.Res.31%22%5D%7D&r=1&s=1*, *last visited* 12/3/2019; *see United States v. McIntosh*, 833 F.3d 1163, 1169 (9th Cir. 2016) (rider barred prosecutions of medical-marijuana users); *Marin All. for Med. Marijuana*, 139 F. Supp. 3d 1039, 1044-45 (N.D. Cal. 2015) (rider barred prosecutions of dispensaries); *see also United States v. Jackson*, 388 F. Supp. 3d 505, 510-14 (E.D. Pa. 2019) (rider barred DOJ involvement in prosecuting criminal defendant for violating terms of supervised release).

[46] H.R.4378 Continuing Appropriations Act, 2020, *https://www.congress.gov/bill/116th-congress/house-bill/4378/text?q=%7B%22search%22%3A%5B%22H.R.+4378%22%5D%7D&r=1&s=10*, *last visited* 12/3/2019.

[47] H.R.3055, Further Continuing Appropriations Act, 2020, *https://www.congress.gov/bill/116th-congress/house-bill/3055/text?r=25&s=3*, *last visited* 12/3/2019.

[48] *McIntosh*, 833 F.3d at 1169.

[49] *Id.* at 1179 n.5.

[50] *Id.* (citing 18 U.S.C. §3282).

[51] *Id.*

[52] *United States v. Tote*, No. 1:14-MJ-00212-SAB, 2015 WL 3732010, at *2 (E.D. Cal. 6/12/2015); *see Coats v. Dish Network, LLC*, 350 P.3d 849, 853 n.2 (Co. 2015) (Rohrabacher-Farr rider did not change fact that "medical marijuana use remains prohibited under the CSA").

[53] Minn. Stat. §§152.21-.37.

[54] *See* Minn. Stat. §152.21, subd. 7; 1980 Minn. Laws, ch. 614, §93.

[55] Minn. Stat. §152.27.

[56] Minnesota Department of Health, "Medical Cannabis Manufacturers/Laboratories," *https://www.health.state.mn.us/people/cannabis/manufacture/index.html*, *last visited* 12/3/2019; *see* Minn. Stat. §§152.25, subd. 1(a), 152.30(c).

[57] Minn. Stat. §152.27, subd. 3(4).

[58] Minn. Stat. §152.22, subd. 14(1)-(9).

[59] Minn. Stat. §152.22, subd. 14(10).

[60] Minnesota Department of Health, "Medical Cannabis Qualifying Conditions," *https://www.health.state.mn.us/people/cannabis/patients/conditions.html*, *last visited* 12/3/2019.

[61] Minnesota Department of Health, News Release (12/2/2019), *https://www.health.state.mn.us/news/pressrel/2019/cannabis120219.html*, *last visited* 12/3/2019.

[62] Minn. Stat. §152.02, Schedule I(h); Minn. R. 6800.4210, Schedule I(C)(17), (C)(25); *State v. Thiel*, 846 N.W.2d 605, 613 n.2 (Minn. App. 2014), *review denied* (Minn. 8/5/2014).

[63] Minn. Stat. §§152.11-.12 (not authorizing Schedule I prescriptions); *Thiel*, 846 N.W.2d at 613 n.2 ("Even under the legislation recently approved by the state legislature, medical cannabis is not prescribed by health care practitioners.").

[64] *Thiel*, 846 N.W.2d at 613 n.2, 615 (citing *State v. Hanson*, 468 N.W.2d 77, 78-79 (Minn. App. 1991), *review denied* (Minn. 6/3/1991)).

[65] *Hanson*, 468 N.W.2d at 78 (quoting Minn. Stat. §152.02, subd. 7(1)).

[66] Minn. Stat. §152.32, subd. 2.

[67] Minn. Stat. §152.32, subd. 2(a)(1).

[68] Minn. Stat. §152.32, subd. 2(c)-(d).

[69] Minn. Stat. §152.23(b).

[70] *Johnson v. Darchuks Fabrication, Inc.*, 926 N.W.2d 414, 420 (Minn. 2019) (quoting Minn. Stat. §176.021, subd. 1); *Gamble v. Twin Cities Concrete Prod.*, 852 N.W.2d 245, 248 (Minn. 2014) (quoting Minn. Stat. §176.135, subds. 1a, 6).

[71] *Supra*, note 1.

[72] *Tina Castro, Employee/respondent*, No. WC16-5958, 2017 WL 357246, at *4 (Minn. Work. Comp. Ct. App. 1/9/2017).

[73] *Johnson*, 926 N.W.2d at 418.

[74] *See* Minn. R. 5221.6110, subps 4.F. (requiring prescribing health-care provider to ensure that a qualitative urine drug test confirms that the opioid patient is "not using any illegal substances"), 7(I)(2) (opioid patients must enter into a written treatment contract in which they agree to "abstain from all illegal substances"); 8(F)(1) (opioid patient fails urine drug testing "if it shows the presence of an illegal substance").

[75] COMPACT is a quarterly publication for workers' compensation professionals, published by MDOLI's Workers' Compensation Division. *https://www.dli.mn.gov/business/workers-compensation/work-comp-compact-newsletter-archive*, *last visited* 12/3/2019.

[76] *See id.*

[77] So too is the closely related question of whether the federal CSA and aiding-and-abetting laws would preempt—and thereby supersede and displace—any state law that purported to require employers and insurers to pay workers' compensation benefits to reimburse an employee for medical marijuana. That would be the case, in our opinion, as we have written on previously. Conley, Susan K.H., and Markowitz, Jeffrey M., "Pot for Pain: A Courtroom Conundrum in Workers' Compensation," *For the Defense*, DRI (Oct. 2019), *https://www.arthurchapman.com/files/original/2019-10%20A%20Courtroom%20Conundrum%20in%20Workers'%20Compensation%20Article%20FTD-1910-Conley-Markowitz.pdf*, *last visited* 12/3/2019. If the Legislature lacks the authority to compel others to aid, abet, and conspire to further federal crimes through statutes, so does MDOLI through its rules, which have no more authority than that which the Legislature delegated to it.


MSBA
Our duty to
Diversity & Inclusion
is not satisfied by
aspirations alone;
it is a duty of
action and results.
A Business Case for Diversity & Inclusion
www.mnbar.org/diversity

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.

33
ADMINISTRATIVE LAW
by Mehmet K. Konar-Steenberg

33
CRIMINAL LAW
by Samantha Foertsch & Stephen Foertsch

34
EMPLOYMENT & LABOR LAW
by Marshall H. Tanick

36
ENVIRONMENTAL LAW
by Jeremy P. Greenhouse, Jake Beckstrom, Erik Ordahl & Audrey Meyer

38
FEDERAL PRACTICE
by Josh Jacobson

38
IMMIGRATION LAW
by R. Mark Frey

40
PROBATE & TRUST LAW
by Casey D. Marshall

42
TAX LAW
by Morgan Holcomb & Sheena Denny

44
TORTS & INSURANCE
by Jeff Mulder

ADMINISTRATIVE LAW

JUDICIAL LAW

Rules and "litigation positions." The Minnesota Supreme Court has held that an agency is not required to go through rulemaking in order to take a position on a question of statutory or regulatory interpretation in an enforcement proceeding, but that such "litigation positions" are not entitled to the judicial deference normally accorded to rules.

The issue arose in the context of an enforcement action against a home health care provider for failure to pay overtime as required under Minnesota Statutes section 177.25 and related regulations. The commissioner of Labor and Industry took the position that the statute and regulations required overtime payments for all hours worked by an employee after the first 48 hours in a given workweek. The provider disagreed with this interpretation and argued that the agency's interpretation should be disregarded because it was not the product of rulemaking under the Minnesota Administrative Procedure Act (MAPA). However, the Court held that an agency's interpretation of a statute outside of MAPA rulemaking does not preclude the agency from asserting the interpretation as a litigation position.

The Court stated, "Like any other party, the Department may argue that its regulations should be interpreted in a particular way; that the agency did not choose to proceed with further rule-making under the Minnesota Administrative Procedure Act means only that we interpret the regulation de novo, without deference to the agency's interpretation." In this case, the Court reviewed the statute and regulations de novo and agreed with the commissioner's interpretations.

Justice Anderson, joined by Chief Justice Gildea and Justice Thissen, dissented. The dissenters argued that the majority's approach encouraged rulemaking-by-adjudication and could deprive regulated parties of adequate notice of an agency's views on enforcement. *In re Minnesota Living Assistance, Inc.*, No. A17-1821 (9/18/2019).

MEHMET K. KONAR-STEENBERG
Mitchell Hamline School of Law
mehmet.konarsteenber@mitchellhamline.edu

CRIMINAL LAW

JUDICIAL LAW

Manslaughter: First-degree manslaughter predicated on fifth-degree assault does not require proof that death or great bodily harm was reasonably foreseeable. Appellant was convicted of first-degree manslaughter predicated on an underlying fifth-degree assault after he was involved in an altercation outside of a bar. Appellant acted aggressively toward the victim's friend, after which the victim came out of the bar and began poking, pushing, and yelling at appellant. Appellant then punched the victim once in the face, and the victim fell to the ground, hit his head, and became unresponsive. The victim later died at the hospital as a result of blunt force head trauma and his elevated blood alcohol concentration. At trial, the district court denied appellant's request to instruct the jury that first-degree manslaughter predicated on a fifth-degree assault requires that death or great bodily harm be reasonably foreseeable. Minn. Stat. §609.20(2) identifies two ways that first-degree manslaughter may be committed: a person "violates section 609.224 [fifth-degree assault] and causes the death of another or causes the death of another in committing or attempting to commit a misdemeanor or gross misdemeanor offense *with such force and violence that death of or great bodily harm to any person was reasonably foreseeable*…" The court of appeals held that the "reasonably foreseeable" modifier (italicized above) applies to only the misdemeanor-offense clause.

The Supreme Court agrees with the district court and court of appeals. The plain language of section 609.20(2) makes clear that the modifier does not

apply to the fifth-degree assault clause. The statute lists two predicate offenses, and the Legislature repeats the harm language ("causes the death of another") for each, clearly articulating two separate forms of first-degree manslaughter. The reasonably foreseeable modifier comes after only the misdemeanor-offense clause. If that language applied to both forms of manslaughter, the Court reasons, the Legislature would not have included the harm language twice in the statute. This conclusion is further supported by the last-antecedent rule of grammar, which states that "a limiting phrase ordinarily modifies only the noun or phrase that it immediately follows."

Thus, the Court holds that when fifth-degree assault is the crime underlying a first-degree manslaughter charge, section 609.22(2) does not require the state to prove that death or great bodily harm was a reasonably foreseeable result of the defendant's conduct. Appellant's conviction is affirmed. ***State v. Stay***, 935 N.W.2d 428 (Minn. 11/13/2019).

■ **4th Amendment: Reasonable suspicion for stop when officer observes driver not wearing seat belt.** Appellant was charged with DWI and violating a driver's license restriction after being pulled over for a cracked windshield and not wearing a seat belt. Before trial, he moved to suppress evidence, arguing there was no reasonable suspicion for the stop of his vehicle. The district court addressed only the cracked windshield, finding it provided the officer with a sufficient basis to stop appellant. After a stipulated facts trial, appellant was convicted of both offenses. The Minnesota Court of Appeals found the officer was not justified in stopping appellant for his cracked windshield, but concluded that the officer had sufficient reasonable suspicion that appellant was not wearing his seat belt.

Driving without a seat belt is a crime, but the officer must be able to articulate facts that support the conclusion that the officer observed the driver not wearing a seat belt. The Supreme Court finds that the officer here articulated sufficient facts showing he observed appellant not wearing a seatbelt: he told appellant more than once he was stopped for the cracked windshield and not wearing a seat belt, his incident report indicated the reason for the stop was appellant's failure to wear a seat belt, and he testified that he pulled appellant over for not wearing a seat belt.

After appellant was pulled over, the officer observed appellant actually wearing a seat belt. However, the officer testified that he believed appellant's seat belt was off while he was driving and that, when he approached the vehicle, he observed a vehicle part hanging down, which could have led the officer to believe appellant's seat belt was unfastened. Thus, even if the officer's observation that the seat belt was off was mistaken, the mistake was objectively reasonable under the totality of the circumstance. Appellant's convictions are affirmed. ***State v. Poehler***, No. A18-0353, 2019 WL 6334370 (Minn. 11/27/2019).

SAMANTHA FOERTSCH
Bruno Law PLLC
samantha@brunolaw.com

STEPHEN FOERTSCH
Bruno Law PLLC
stephen@brunolaw.com

EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Dismissal reversed; discovery sanction improper.** The dismissal of an employee's discrimination claim as a discovery sanction was overturned. The 8th Circuit Court of Appeals held that the dismissal by the trial court with prejudice was improper because the claimant did not wrongfully depart from his deposition before it was completed. ***Akins v. Southern Glazers Wine & Spirits of Arkansas***, 2019 WL 4071876 (8th Cir. 8/29/2019) (unpublished).

■ **Whistleblowing; DNR claim rejected.** A whistleblower claim by a seasonal employee of the Minnesota Department of Natural Resources (DNR) was rejected because the concern he expressed about conversion of his job from a temporary seasonal to a pair of emergency appointments did not "implicate" a violation of law. The Minnesota Court of Appeals affirmed a ruling of the Lake County District Court that neither Minn. Stat. §43A.15, subd. 2 or an accompanying rule requires explicit approval of the appointments by the DNR commissioner. ***Steffens v. State DNR***, 2019 WL 5884570 (Minn. Ct. App. 11/12/2019) (unpublished).

■ **Accrued PTO; city need not pay.** The City of Plainview is not obligated for accrued but unpaid paid-time-off (PTO) following termination of an employee's job. The court of appeals held that the provision in the municipal handbook calling for payment contained a disclaimer, and there was no other contractual basis under Minn. Stat. §181.13, the prompt payment law, in "the absence of an independent substitute legal right." ***Hall v. City of Plainview***, 2019 WL 6695142 (8th Cir. 12/9/2019) (unpublished).

■ **Final wages; timely payment made.** An employee's claim of late payment of final wages under Minn. Stat. §181.14, subd. 4, was denied. The court of appeals held that the dismissal of the case by the Hennepin County District Court was proper because the final payment complied with the 10-day post-termination grace period for the claimant, whose job involved collection, disbursement, and handling of money or property. ***Ka v. Lonvigson's Service Center, Inc.***, 2019 WL 5691820 (Minn. Ct. App. 11/4/2019) (unpublished).

■ **FELA claim reversed, causation issue remanded.** An employee's negligence claim under the Federal Employers Liability Act (FELA) was revived. The court of appeals reversed and remanded dismissal by the St. Louis County District Court in order to determine whether the employer's negligence may have been a "contributing" cause of the injury, which also was attributable, in part, to the employee's own negligence. ***Wallace v. BNSF Railway Company***, 2019 WL 6112446 (Minn. Ct. App. 11/18/2019) (unpublished).

■ **Retaliatory discharge; no requirement to alter job.** An employee who claimed retaliatory discharge following her termination two years after suffering a workplace injury lost her case. The appellate court affirmed a ruling of the Brown County District Court that the employer was not required to alter her job or create a new one to accommodate her physical inabilities due to the injury. ***Conn v. Bic Graphic USA Manufacturing Co., Inc.***, 2019 WL 4694673 (Minn. Ct. App. 9/23/2019) (unpublished).

■ **Police officer reinstatement; arbitration award upheld.** A Duluth police officer discharged for excessive use of force was entitled to reinstatement due to an arbitration award overturning the discharge. The court of appeals held that, even though the officer's use of force was contrary to "public policy," the St. Louis County District Court did not err in confirming an arbitrator's ruling reinstating the officer without back pay. ***City of Duluth v. Duluth Police Officer's Union***, 2019 WL 4165031 (Minn. Ct. App. 9/3/2019) (unpublished).

■ **Unemployment compensation; improper use of force bars claim.** A prison guard who was terminated for excessive use of force on an inmate was denied unemployment benefits. The court of appeals, affirming a ULJ decision, ruled that the officer's behavior constituted disqualifying misconduct. ***Casey v. Minnesota Department of Corrections***, 2019 WL 6112713 (Minn. Ct. App. 11/18/2019) (unpublished).

■ **Unemployment compensation; quit due to failure to show up.** An employee who failed to report to work or notify his employer of his absence was denied unemployment compensation benefits. The appellate court upheld a determination by an unemployment law judge (ULJ) with the Department of Employment and Economic Development (DEED) of disqualifying misconduct. ***Mitzuk v. Davlyn, Inc.***, 2019 WL 4164896 (Minn. Ct. App. 9/3/2019) (unpublished).
w

■ **Unemployment compensation; misconduct due to improper remarks.** An employee who made inappropriate remarks to employees and guests at a hospitality site was properly denied unemployment compensation benefits. The appellate court upheld a determination by a ULJ that the employee's behavior constituted disqualifying misconduct. ***Singh v. Grand Casino Hinckley***, 2019 WL 5885074 (Minn. Ct. App. 11/12/2019) (unpublished).

LOOKING AHEAD

■ **SCOTUS and LGBTQ.** A ruling is expected soon by the U.S. Supreme Court on a trio of consolidated cases concerning LGBTQ discrimination. The high court heard them on the second day of its term in October and will decide early this year if the prohibition on sex discrimination by employers in Title VII of the Federal Civil Rights Act extends to LGBTQ employees, which is not explicitly addressed in the statute. ***Bostock v. Clayton County***, No. 16-1628; ***Altitude Express, Inc. v. Zarda***, No. 17-1623, ***Harris Funeral Homes v. EEOC***, No. 18-107. Minnesota is one of about two dozen jurisdictions that bar such discrimination under state or local laws (see Minn. Stat. §363A.03, subd. 44), but periodic efforts to amend the federal statute have failed dating back nearly three decades.

MARSHALL H. TANICK
Meyer, Njus & Tanick
mtanick@meyernjus.com

ENVIRONMENTAL LAW

JUDICIAL LAW

Minnesota Court of Appeals decides two water law issues of first impression. The Minnesota Court of Appeals issued a published decision reversing and remanding a National Pollutant Discharge Elimination System (NPDES)/State Discharge System (SDS) permit that the Minnesota Pollution Control Agency (MPCA) reissued to U. S. Steel Corporation on 11/30/2018 for U. S. Steel's Minntac taconite tailings basin facility in Mountain Iron, Minnesota.

The court's decision addressed two water-law issues of first impression. The first issue involved the regulation of seepage discharges from the tailings basin to groundwater that is hydrologically connected to, and transports pollutants to, certain surrounding surface waters. Specifically at issue was whether these groundwater-to-surface-water discharges (GSWDs) constitute discharges to "waters of the United States" under the Clean Water Act (CWA) and are thus subject to NPDES permitting requirements such as the requirement to meet surface water quality standards—or, as MPCA and U. S. Steel contended, GWSDs are properly regulated under state law only (i.e., MPCA's SDS permitting program). This issue has been the subject of numerous conflicting federal appellate court opinions, one of which, *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), is currently being reviewed by the Supreme Court of the United States. However, no Minnesota state or federal court had yet ruled on the issue. The court of appeals applied the analytical framework established by *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for Discharge of Treated Wastewater* for determining when to show deference to a state agency's interpretation of a statute it is charged with administering. 731 N.W.2d 502, 516 (Minn. 2007). Here, the court sided with MPCA and U. S. Steel, holding that the relevant language in the CWA was ambiguous regarding GWSDs and that MPCA's interpretation of that language as *not* bringing GWSDs within the scope of the CWA—"regardless of any hydrological connection to surface waters"—was reasonable.

The second issue of first impression was whether groundwater is subject to MPCA's Class 1 water quality standards in part 7050.0221, which incorporate by reference EPA's drinking water standards. Based on its position that groundwater is subject to the Class 1 standards, MPCA included numerous conditions in the permit requiring Minntac to comply with the Class 1 standard for sulfate in groundwater. U. S. Steel argued, and the court concurred, that chapters 7050 and 7060 unambiguously do not classify groundwater as Class 1 waters and that therefore MPCA erroneously imposed permit conditions requiring compliance with the Class 1 sulfate standard in groundwater.

In addition to these issues of first impression, the court also concluded that MPCA had not identified substantial evidence supporting its decision that there were no discharges to surface water from the tailings basin, and only seepage discharges to groundwater. Minntac has constructed systems around the tailings basin to intercept aboveground discharges from the basin before they reach surface waters and pump the water back to the basin pond. Based on these systems, MPCA determined there were no surface water discharges from the basin and thus did not impose permit limits based upon surface water quality standards. However, the court held that MPCA failed to base this decision upon substantial evidence.

Finally, the court mostly side-stepped arguments regarding the applicability of the "wild rice rule," a Class 4 water quality standard for sulfate related to surface waters used for wild rice production. Environmental and tribal appellants argued that MPCA wrongly failed to include permit conditions based upon the wild rice rule. However, because the court remanded the permit to MPCA to make further factual findings on the presence of surface water discharges, the court held it would be premature to rule on the applicability of the wild rice rule. The court did clarify, however, that with regard to the SDS portion of the permit, the wild rice rule "cannot, under current law, be the basis for conditions requiring the expenditure of funds." The court thus reversed MPCA's decision reissuing the permit and remanded the permit for further proceedings consistent with its decision. ***Matter of NPDES/SDS***, A18-2094, 2019 WL 6691515 (Minn. Ct. App. 12/9/2019).

District court defers to EPA, rules groundwater discharge does not violate Clean Water Act. On 11/26/2019, the U.S. District Court for the District of Massachusetts held that discharges of pollutants into groundwater that subsequently reach surface waters are not subject to liability under the Clean Water Act (CWA). The court deferred to the EPA's recent interpretation of the CWA under the Chevron deference test.

The CWA prohibits the discharge of a pollutant from any point source into navigable waters without a permit. 33 U.S.C §§1251, et seq. In this case, the defendant, the Wychmere Beach Club Hotel, is located on the Wychmere Harbor estuary that connects to the ocean at Nantucket Sound. The Beach Club treats its sewage and wastewater on the property and stores the treated sewage in 22 concrete leaching pits meant to convey the treated sewage from the treatment facility into the ground. Plaintiff filed suit claiming that the resulting discharge of nitrogen into the groundwater subsequently reached the navigable water of Wychmere Harbor estuary, and that the Beach Club failed to obtain a National Pollutant Discharge Elimination System (NPDES) permit under CWA prior to the discharge. However, the Beach Club has an Individual Groundwater Discharge Permit issued by the Massachusetts Department of Environmental Protection. Defendant argued that it is not liable under the CWA because it discharges the nitrogen into groundwater, rather than directly into the harbor.

The court held that the 22 leach pits were in fact point sources within the meaning of the CWA. However, in April 2019, after full notice and comment procedures, EPA published an Interpretive Statement concluding that discharges of pollutants from point sources to groundwater are categorically excluded from liability under CWA's NPDES permit program. 84 Fed. Reg. 16810 (4/23/2019). Thus, the court followed the Chevron deference test to determine that EPA's interpretation of CWA was not unreasonable to exclude discharges through groundwater from the NPDES program. In making this determination, the court recognized that Congress deliberately opted to leave groundwater protection to the states under the CWA.

Similar cases from the 4th, 6th, and 9th Circuits were decided prior to the April 2019 EPA Interpretive Statement, leading to a split in the circuits. *Sierra Club v. Virginia Elec. & Power Co*, No. 17-1895, (4th Cir. 2018); *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637 (4th Cir. 2018); *Kentucky Waterways All. v. Kentucky Utilities Co*., No. 18-5115, (6th Cir. 2018); *Tennessee Clean Water Network v. Tennessee Valley Auth*., No. 17-6155, (6th Cir. 2018); *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018).

On 11/6/2019, the U.S. Supreme Court heard oral argument on the same question in the 9th Circuit case *Hawai'i Wildlife Fund v. County of Maui*. No. 18-260. Until the Supreme Court issues

a decision in *Hawai'i Wildlife Fund*, it is most likely other courts will withhold judgment on similar cases. *See also* the Minnesota Court of Appeals' decision on this issue in the Minntac NPDES/SDS permit decision outlined above. ***Conservation Law Foundation Inc. v. Longwood Venues and Destinations Inc. et al.***, No. 18-11821-WGY; 2019 WL 6318530 (D. Mass. 2019).

ADMINISTRATIVE ACTION

EPA releases final guidance on "adjacency" for new source review permitting. The Environmental Protection Agency (EPA) issued guidance on 11/26/2019 to clarify use of adjacency as a factor in determining whether stationary sources in close proximity may be combined under Clean Air Act "major source" permits in nonattainment areas. The agency's New Source Review (NSR) program regulates new sources of air emissions in geographic areas that do not attain EPA's National Ambient Air Quality Standards (NAAQS). Major sources—stationary source(s) located within a contiguous area under common control that emit ten tons per year of any one hazardous air pollutant, or 25 tons per year of a combination of pollutants—trigger the requirement for an NSR permit. 42 U.S.C. §7412(a)(1).

In order to reach the "major source" level and trigger NSR permitting requirements, multiple sources within close proximity may be aggregated. But sources may be aggregated only when they (1) are under common control, (2) fall under the same major standard industrial classification (SIC) code, and (3) exist on contiguous or adjacent properties. 40 C.F.R. §70.2. The meaning of "adjacent" has been debated among federal appellate courts. *See e.g. Summit Petroleum Corp. v. United States EPA*, 690 F.3d 733 (5th Cir. 2012). EPA's new guidance clarifies that physical proximity is the sole determinative factor of adjacency. If the properties do not share a common border or are not physically touching, EPA concluded, they will be deemed "adjacent" only if "the properties are nevertheless nearby, side-by-side, or neighboring." EPA's position terminates the agency's former practice of grouping more widely spaced related industrial sources into a single "major" facility.

JEREMY P. GREENHOUSE
The Environmental Law Group, Ltd.
jgreenhouse@envirolawgroup.com
JAKE BECKSTROM *Vermont Law School, 2015*
ERIK ORDAHL *Flaherty & Hood, P.A.*
AUDREY MEYER *University of St. Thomas School of Law, J.D. candidate 2020*

FEDERAL PRACTICE

JUDICIAL LAW

■ **Appellate jurisdiction; appeal from denial of motion for temporary restraining order.** Rejecting defendants' argument that it lacked jurisdiction over one plaintiff's appeal from the denial of the plaintiffs' motion for a temporary restraining order, the 8th Circuit found that the district court's order "had the practical effect of denying a preliminary injunction." ***Wise v. Dept. of Transportation***, ___ F.3d ___ (8th Cir. 2019).

■ **Sanctions order vacated pending reconsideration.** Last month this column noted the imposition of sanctions against a *qui tam* defendant by Magistrate Judge Rau. The defendant appealed the order, and Judge Ericksen subsequently vacated the order and sent the dispute to Magistrate Judge Leung, with instructions to reconsider the motion for sanctions "in light of Defendant's objections and with the benefit of oral argument." ***United States ex rel. Higgins v. Boston Scientific Corp.***, 2019 WL 6328135 (D. Minn. 11/25/2019).

■ **Sanctions; informal collection of documents after discovery deadline.** Where the plaintiffs obtained releases from members of the plaintiff class, sought documents from third parties "long after" the close of fact discovery and the filing of dispositive motions, and then produced 10,000 documents to the defendant, Magistrate Judge Thorson rejected plaintiffs' arguments that they had merely supplemented their document production as Fed. R. Civ. P. 26(e) requires and that their "informal" document collection was not governed by deadlines in the scheduling order. Instead, the magistrate judge determined that "[f]act discovery is fact discovery," found that sanctions were warranted, and prohibited all parties from utilizing the documents in the litigation. ***Murphy ex rel. Murphy v. Harpstead***, 2019 WL 6650510 (D. Minn. 12/6/2019).

■ **Motion to amend to add additional parties; standing to oppose.** Where the plaintiffs sough to amend their complaint to add additional parties, Magistrate Judge Menendez found that the existing defendant had standing to oppose the motion on the basis of futility, where it was "virtually certain" that the same argument would be raised by the prospective defendants if the amendment was allowed. ***Brewster v. United States***, 2019 WL 6318613 (D. Minn. 11/26/2019).

■ **Duplicative counterclaim dismissed.** Where a law firm that represented the plaintiff in a personal injury action sought a *quantum meruit* recovery, Judge Montgomery denied that request, the law firm's appeal was pending in the 8th Circuit, the law firm was sued for malpractice in a separate action by the same plaintiff, and the law firm asserted a counterclaim seeking a *quantum meruit* recovery, Judge Montgomery granted the plaintiff's motion to dismiss the counterclaim, finding that the counterclaim was "duplicative" of the law firm's claim in the first litigation. Judge Montgomery also rejected the law firm's request that she stay—rather than dismiss—the counterclaim. ***Trice v. Napoli Shkolnik PLLC***, 2019 WL 6324867 (D. Minn. 11/26/2019).

■ **Fed. R. Civ. P. 45(f); "exceptional circumstances;" motion to quash subpoena transferred.** Magistrate Judge Menendez transferred a motion to quash a subpoena to the district where the underlying action is pending pursuant to Fed. R. Civ. P. 45(f), noting that a number of other subpoena-related disputes had already been transferred, and finding "a significant risk of inconsistent decisions" if the motion was not transferred. ***Pete v. Big Picture Loans, LLC***, 2019 WL 6250715 (D. Minn. 11/22/2019).

■ **Fed. R. Civ. P. 30(b)(6); irrelevant topics.** Reversing an order by Magistrate Judge Rau, Judge Brasel granted a defendant's motion for a protective order, finding that three topics listed in the plaintiff's Fed. R. Civ. P. 30(b)(6) deposition notice were not relevant to the plaintiff's claims. ***Kroening v. Del Monte Fresh Produce N.A., Inc.***, 2019 WL 6524893 (D. Minn. 12/4/2019).

■ **Attempt to amend allegations in opposition to summary judgment motion rejected.** Granting defendants' motions for summary judgment, Judge Magnuson rejected the plaintiff's attempt to raise new allegations in her opposition to the motions, finding that "[a] plaintiff may not amend a complaint in briefs or in oral argument, but must file an amended complaint." ***Uradnik v. Inter Faculty Association***, 2019 WL 6608784 (D. Minn. 12/5/2019).

■ **Multiple decisions relating to costs.** Where the parties discussed the formats in which ESI would be produced, but did not reduce an agreement to writing or include any agreement in their Rule 26(f) report, Judge Tostrud held that defendant was nevertheless entitled to recover more than $3,300 for the costs of producing ESI as single-page TIFFs with OCR under 28 U.S.C. §1920(4). ***Wing Enterprises, Inc. v. Tricam Indus., Inc.***, 2019 WL 5783485 (D. Minn. 11/6/2019).

Rejecting the plaintiff's argument that the cost of a hearing transcript ordered by the defendants in conjunction with his appeal was not taxable because "no evidence was presented at the hearing," Judge Nelson affirmed the clerk's taxation of costs for the transcript. ***Kushner v. Buhta***, 2019 WL 5677869 (D. Minn. 11/1/2019).

Judge Nelson found that an award of costs to the defendants in an ADA action was "inappropriate" where the action was dismissed for lack of jurisdiction and no judgment was entered in favor of the defendants, meaning that the defendants were not the "prevailing party." ***Dalton v. Simonson Station Stores, Inc.***, 2019 WL 5566712 (D. Minn. 10/29/2019).

In contrast, Judge Tostrud found that ADA defendants were prevailing parties where the action was dismissed for lack of subject matter jurisdiction and judgment was entered, and also rejected the plaintiff's argument that the clerk's cost judgment should be vacated based on his inability to pay. ***Smith v. Bradley Pizza, Inc.***, 2019 WL 6650475 (D. Minn. 12/6/2019).

JOSH JACOBSON
Law Office of Josh Jacobson
joshjacobsonlaw@gmail.com

IMMIGRATION LAW

JUDICIAL LAW

■ **Applications for asylum by those who travel through a third county without first seeking relief there.** As previously noted in the November 2019 edition of *Bench & Bar*, the U.S. Supreme Court issued an order on 9/11/2019 staying the U.S. District Court's injunction (enjoining the government from implementing its 7/16/2019 rule barring asylum eligibility for individuals entering or attempting to enter the United States through

the southern border while traveling through a third country without first seeking relief in that country) during the pendency of the court litigation on the mandatory bar to asylum eligibility. ***Barr, el al. v. East Bay Sanctuary Covenant, et al.,*** 588 U.S. ____ (2019). *https://www.supremecourt.gov/opinions/18pdf/19a230_k53l.pdf*

Since then, the U.S. District Court for the Southern District of California has granted plaintiffs' motions for provisional class certification and a preliminary injunction enjoining the government from relying on the 7/16/2019 rule to deny asylum eligibility to those non-Mexican asylum seekers who were "metered" at the United States-Mexico border *before* the ban went into effect. "Metering" is a procedure employed by the U.S. Department of Homeland Security restricting the number of asylum seekers accepted for inspection and processing at U.S. ports of entry—leaving them to thus wait and stay in Mexico. "[A]lthough the regulation clearly states that it applies only to aliens who entered, attempted to enter, or arrived on or after July 16, 2019, the Government is now attempting to apply the Asylum Ban beyond its unambiguous constraints to capture the subclass of Plaintiffs who are, by definition, not subject to this rule. The Government's position that the Asylum Ban applies to those who attempted to enter or arrived at the southern border seeking asylum before July 16, 2019 contradicts the plain text of their own regulation." ***Al Otro Lado, Inc., et al. v. McAleenan, et al.***, No. 3:17-cv-02366-BAS-KSC (S.D. Cal. 11/19/2019). *https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/litigation_aol_order_granting_plantiffs_motion_for_professional_class_certification.pdf*

■ **Willful injury causing bodily harm is a "crime of violence" and hence an aggravated felony.** The 8th Circuit Court of Appeals held that the petitioner's conviction for willful injury causing bodily harm in violation of Iowa Code §708.4(2) was indeed a "crime of violence" under 18 USC §16(a) and thus qualified as an aggravated felony under INA §101(a)(43)(F), rendering the petitioner ineligible for asylum and withholding of removal. It further held the Board of Immigration Appeals' grant of the Department of Homeland Security's appeal of the immigration judge's grant of deferral of removal under the Con-

vention Against Torture was warranted. ***Jima v. Barr***, No. 19-1104, *slip op.* (8th Cir. 11/8/2019). *https://ecf.ca8.uscourts.gov/opndir/19/11/191104P.pdf*

■ **Immigrants and proof of health coverage.** On 10/4/2019, the president issued Proclamation No. 9945, suspending the entry of immigrants who "will financially burden the United States healthcare system," effective 11/3/2019 at 12:01 a.m. (EDT). That means any individual applying for an immigrant visa after that date and time must (with certain limited exceptions) provide evidence to the consular officer at the visa interview that (s)he will be covered by approved health insurance within 30 days of U.S. entry or has financial resources to pay for "reasonable foreseeable medical costs." Otherwise, the visa application will be denied. **84 *Fed. Reg.*, 53991-94** (10/9/2019). *https://www.govinfo.gov/content/pkg/FR-2019-10-09/pdf/2019-22225.pdf*

On 10/30/2019, a complaint was filed contending, among other things, that the proclamation seeks to rewrite our nation's immigration laws by creating a new ground of inadmissibility rejected by Congress while imposing requirements that are extremely difficult, if not impossible, to meet. In short, "the Proclamation contravenes well-established and duly enacted immigration and healthcare laws, exceeds the scope of the President's statutory authority, and violates Constitutional separation of powers and equal protection principles." ***Doe, et al.* v. *Trump, et al.***, No. 3:19-cv-01743-SB (D. Or. 10/30/2019). *https://www.courtlistener.com/recap/gov.uscourts.ord.148990/gov.uscourts.ord.148990.1.0_2.pdf*

On 11/26/2019, in response to the plaintiffs' motion, the U.S. District Court for the District of Oregon, Portland Division, issued a preliminary injunction enjoining the defendants from taking any action to implement or enforce Presidential Proclamation No. 9945 until the court resolves the case on the merits or until such time as the parties agree to amend, supersede, or terminate the preliminary injunction. ***Doe, et al.* v. *Trump, et al.***, No. 3:19-cv-01743-SI (D. Or. 11/26/2019). *https://www.courtlistener.com/recap/gov.uscourts.ord.148990/gov.uscourts.ord.148990.95.0.pdf*

ADMINISTRATIVE ACTION

■ **USCIS announces utilization of H-1B electronic registration process for upcoming 2021 cap season.** On 12/6/2019, USCIS announced the implementation of a registration process for the upcoming H-1B lottery. Employers intending to file H-1B cap-subject petitions for the upcoming 2021 cap season, including those petitions eligible for the advanced degree exemption, will be required to first electronically register and pay a $10 H-1B registration fee. The initial registration period for employers (or their authorized representatives) to register with basic information about the employer and each sponsored worker will run from 3/1/2020 through 3/20/2020. The H-1B random selection process will be applied to the registrations with those selected then eligible to file H-1B cap-subject petitions. *https://www.uscis.gov/news/news-releases/uscis-announces-implementation-h-1b-electronic-registration-process-fiscal-year-2021-cap-season*

■ **Poland designated a Visa Waiver Program country.** On 11/8/2019, the acting secretary of the Department of Homeland Security, Kevin McAleenan, published notice that Poland had been designated for inclusion in the Visa Waiver Program, effective 11/11/2019. Eligible citizens, nationals, and passport holders from designated Visa Waiver Programs may apply for admission to the United States at U.S. ports of entry for a period of 90 days or less for business or pleasure without first obtaining a nonimmigrant visa, provided they are otherwise eligible for admission. Other countries included in the Visa Waiver Program are: Andorra, Australia, Austria, Belgium, Brunei, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, Republic of Korea, San Marino, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, and the United Kingdom (i.e., British citizens who have the unrestricted right of permanent abode in the United Kingdom, consisting of England, Scotland, Wales, Northern Ireland, the Channel Islands, and the Isle of Man). **84 *Fed. Register*, 60316-18** (11/8/2019). *https://www.govinfo.gov/content/pkg/FR-2019-11-08/pdf/2019-24328.pdf*

■ **Continued retention of Temporary Protected Status for beneficiaries from El Salvador, Honduras, Nepal, Nicaragua, Sudan, and Haiti.** On 11/4/2019, the U.S. Department of Homeland Security announced that in order to continue its compliance with the preliminary injunction orders of the U.S. District Court for the Northern District of California in *Ramos, et al. v. Nielsen, et al.*, No. 18-cv-01554 (N.D. Cal. 10/3/2018) and the U.S. District Court for the Eastern District of New York in *Saget, et al. v. Trump, et al.*, No. 18-cv-1599 (E.D.N.Y. 4/11/2019), and with the order of the U.S. District Court for the Northern District Court of California to stay proceedings in *Bhattarai v. Nielsen*, No. 19-cv-00731 (N.D. Cal. 3/12/2019), beneficiaries of Temporary Protected Status (TPS) designations for El Salvador, Honduras, Nepal, Nicaragua, and Sudan will continue to retain their TPS status while the preliminary injunction under *Ramos* remains in effect. Beneficiaries of TPS designation for Haiti will retain their TPS status while either of the preliminary injunctions under *Ramos* or *Saget* remain in effect. As a result, TPS designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan will continue through 1/4/2021. **84 *Fed. Register*, 59403-10** (11/4/2019). *https://www.govinfo.gov/content/pkg/FR-2019-11-04/pdf/2019-24047.pdf*

R. MARK FREY
Frey Law Office
rmfrey@cs.com

PROBATE & TRUST LAW

JUDICIAL LAW

■ **Minn. Stat. §524.3-721: Compensation paid by an estate.** The estate of Prince Rogers Nelson hired appellants NorthStar Enterprises Worldwide Inc. and CAK Entertainment Inc. to act as entertainment advisors to monetize the estate's intellectual property. Appellants entered into an agreement with the estate whereby they would receive a 10% commission on all money paid to the estate pursuant to agreements entered into as a result of services provided by appellants. Appellants were to receive the commission "simultaneously with the payment to" the estate of any amounts due under such agreements. The estate entered into a contract with Jobu Presents LLC to organize and promote a tribute concert and a contract with Universal Music Group for the distribution and marketing of certain of Prince's recordings. Jobu and Universal made initial payments totaling over $33 million and appellants collectively received over $3 million in commissions. The agreements with Jobu and Universal ultimately fell apart and the estate refunded the entire amount received.

A special administrator for the estate brought a motion under Minn. Stat. §524.3-721 seeking an order requiring appellants to refund the commissions. The district court entered a "temporary" order requiring appellants to refund the commissions, which were to be held in escrow by the estate until the court could decide the merits of the estate's claim. Appellants appealed arguing, among other things, that the court lacked authority under Minn. Stat. §524.3-721 and that it had erred by granting what was in reality a temporary injunction without considering the *Dahlberg* factors. The Minnesota Court of Appeals determined that the district court's order had the characteristics of a temporary injunction and accepted the appeal for immediate review.

On appeal, appellants first argued the district court lack authority to proceed by motion, under Section 524.3-721, without filing a formal lawsuit and serving them with process because that statute is generally used for review of accountants' and attorneys' fees, which doesn't require testimony or submission of substantial evidence. Section 524.3-721 allows an interested person to file a motion challenging the reasonableness of compensation paid by an estate to any person employed by a personal representative, "including any attorney, auditor, investment advisor or other specialized agent." The court of appeals found that Section 524.3-721 applied because appellants were "specialized agent[s]." Appellants next argued that, given the complexity of the issues, the special administrator's challenge to their commissions must be brought in a plenary action under the rules of civil procedure rather than on an administrative motion under Section 524.3-721. The court of appeals found that Section 524.3-721 expressly allows an interested person to move the district court to review "the reasonableness of the compensation" and to order "appropriate refunds" where compensation was excessive. Finally, appellants argued that their compensation was controlled by an agreement with the personal representative and that the agreement had been approved by the court. The court drew a distinction between the reasonableness of the rate agreed to and the reasonableness of the actual compensation paid given the services provided, and held that it had authority to review the latter pursuant to Section 524.3-721.

Appellants next challenged the order on the basis that it was basically a temporary injunction and the court had not considered the *Dahlberg* factors. Since the court of appeals accepted jurisdiction over the appeal on the basis that the order had the characteristics of a temporary injunction, it held that the district court erred by not considering the *Dahlberg* factors that must be analyzed before a temporary injunction can be granted. The court of appeals therefore remanded for consideration of the *Dahlberg* factors and ultimate determination of the reasonableness of appellants' commissions. ***In re Estate of Nelson***, No. A19-0503, 2019 WL 6258679 (Minn. Ct. App. 11/25/2019).

CASEY D. MARSHALL
Bassford Remele
cmarshall@bassford.com

TAX LAW

JUDICIAL LAW

Tolls are not taxes; 1st Circuit instructs district court it has jurisdiction, and remands for resolution of Rhode Island dispute. The Tax Injunction Act (TIA) provides that federal "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341. Principles of comity—and the practical realities of state budgets—animate the TIA. As the 1st Circuit noted in this dispute between members of the trucking industry and the state of Rhode Island, "[a] principal purpose of the TIA was to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances." (internal citations omitted).

The TIA applies by its terms only to taxes. If the sums the state seeks to collect are not taxes, but some other payment or fee, the TIA does not apply. The sum Rhode Island sought to collect in this dispute (and continues to seek to collect) was defined as a "toll" in the statutory language. In particular, the state authorized the Department of Transportation to collect tolls exclusively from large commercial trucks in an effort to address a problem with the state's bridges (23% of large Rhode Island bridges had been deemed structurally deficient). The Legislature found that large commercial trucks, like those owned and operated by the plaintiffs in this case, cause over 70% of the damage to Rhode Island roads and bridges but contribute less than 20% of the revenue to fund transportation infrastructure under then existing sources. The tolls at issue were designed to eliminate that funding disparity.

The plaintiffs, however, argued that the tolls violate the dormant Commerce Clause and sued the state and the state's transportation department in federal district court. The lower court called it a "close call" but determined that the TIA barred the lower court from hearing the case. The 1st Circuit disagreed, holding that the word "tax" in 1937 (the year the TIA was passed) did not include "toll." The court looked to plain language, case law, and Thomas Cooley's treatise *The Law of Taxation* to reach its conclusion. All of these sources pointed the 1st Circuit to the conclusion that "tolls" are not "taxes" for TIA. Further, the broad purposes of comity and federalism did not compel the federal court to refrain from exercising jurisdiction. The case was reversed and remanded to the district court. ***Am. Trucking Associations, Inc. v. Alviti***, No. 19-1316, 2019 WL 6606088 (1st Cir. 12/5/2019).

Tax shelters; partnership tax. Opening its opinion with the direct statement, "Andrew Beer was in the tax shelter business," the DC Circuit affirmed the tax court's decision that certain at-issue transactions entered into by the defendant partnership "were shams designed to look like real world trades without any of the risk or concomitant opportunity for profit." Since the transactions lacked economic substance, the $144 million in losses generated could not be used to offset the partner's gain. As the court explained, sham transactions are those that do not possess "(1) any objectively reasonable potential for profit nor (2) any other legitimate nontax business purposes." (The transactions at issue occurred prior to Congress's 2010 establishment of its own test, which applies only prospectively.) The opinion describes clearly the transactions at issue, and a concurring opinion provides even more clarity on the sham nature of the deals. ***Endeavor Partners Fund, LLC v. Comm'r***, No. 18-1275, 2019 WL 6314276 (D.C. Cir. 11/26/2019).

Nonresident corporation subject to Minnesota income tax. The Minnesota Tax Court revisited a dispute centered on whether gains realized by a nonresident taxpayer are subject to Minnesota corporate income tax. In a previous order, disputed issues of material fact prevented the court from ruling on the parties' cross motions for summary judgment. In this opinion and order, the court found no such obstacle and ordered summary judgment to the commissioner. The previous order is reported at *YAM Special Holdings, Inc. v. Comm'r*, Docket No. 9122-R, 2019 WL 2519414 (Minn. T.C. 6/12/2019).

YAM Special Holdings, Inc. (YAM), a nonresident corporation, realized and reported gains on the 2011 sale of a majority interest in the operations of its Go Daddy business. YAM's sole shareholder, Robert Parsons, received $1.168 billion of the transaction proceeds and although the sale was reported on YAM's 2011 Minnesota income tax return, it was reported as a transaction not subject to Minnesota tax. The commissioner determined that a portion of YAM's gain on the sale was subject to Minnesota tax and assessed YAM. The taxpayer appealed the determination and the parties moved for summary judgment. The court concluded that the gains realized by YAM are subject to Minnesota tax. The court therefore denied YAM's motion for summary judgment and granted the commissioner's motion for summary judgment.

In a comprehensive opinion, the court first explained the parameters of Minnesota's taxation of nonresident corporations; such corporations are subject to taxation if the corporation engages in Minnesota contacts with the state and those contacts produce gross income attributable to sources within this state. Minnesota taxes nonresident corporations when that income is "derived from the conduct of a trade or business." Minn. Stat. §290.17, subd. 2. "All income of a trade or business is subject to apportionment [between Minnesota and other states] except nonbusiness income." *Id.*, subd. 3. Nonbusiness income is assigned depending on the nature of the income.

Of particular import for this dispute, the statute also provides that "Gain on the sale of an interest in a single member limited liability company that is disregarded for federal income tax purposes is allocable to this state as if the single member limited liability company did not exist and the assets of the limited liability company are personally owned by the sole member…. Gain on the sale of goodwill or income from a covenant not to compete that is connected with a business operating all or partially in Minnesota is allocated to this state to the extent that the income from the business in the year preceding the year of sale was allocable to Minnesota under [Minn. Stat. § 290.17] subdivision 3." Minn. Stat. §290.17, subd. 2(c).

After setting out these statutory parameters, the court explained the definition of nonbusiness income and discussed constitutional principles governing apportionment of income to a taxing state. Applying these principles, the court concluded that "the December 2011 sale resulted in gains apportionable to Minnesota" and therefore summary judgment for the commissioner was appropriate. ***YAM Special Holdings, Inc. v. Comm'r of Revenue***, No. 9122-R, 2019 WL 6213168 (Minn. Tax 11/12/2019).

■ **Penalty imposed for continued frivolous position.** The taxpayer, an attorney, failed to file federal income tax returns for several years. The taxpayer raised several justifications for this failure, including the frivolous arguments that "there is no constitutional basis for federal taxes on the ordinary labor of a working American," and that the Service failed to account for the basis value of a person's labor which "would be valued at near or the same as the value of the gross receipts which that same labor generated." In previous interactions with the Service, the tax court did not impose penalties but admonished the taxpayer that continued assertion of vexatious arguments would result in sanctions. The court is authorized to impose a penalty of up to $25,000 if the taxpayer's position in the proceedings is frivolous or groundless. IRC 6673(a)(1). "A taxpayer's position is frivolous if it is contrary to established law and unsupported by a reasoned, colorable argument for change in the law." *Worsham v. Comm'r*, T.C.M. (RIA) 2019-155 (T.C. 2019) (citing *Rader v. Comm'r*, 143 T.C. 376, 392 (2014) (additional internal citation omitted)). Because the taxpayer continued to make arguments previous rejected by the tax court (and other courts) as frivolous, the court in this case made short work of its opinion: "As we have previously told petitioner: 'We perceive no need to refute … [frivolous] arguments with somber reasoning and copious citation of precedent.' Because petitioner continues to make frivolous arguments despite numerous warnings, we will require him to pay to the United States a penalty of $3,000 under section 6673." ***Worsham v. Comm'r***, T.C.M. (RIA) 2019-155 (T.C. 2019) (internal citations omitted).

MORGAN HOLCOMB
Mitchell Hamline School of Law
morgan.holcomb@mitchellhamline.edu
SHEENA DENNY, *Mitchell Hamline School of Law*

TORTS & INSURANCE

JUDICIAL LAW

Joint and several liability; liability not reduced by employer's fault. Plaintiff suffered injuries during a workplace accident. After plaintiff and his employer settled his workers' compensation claim, he then brought a common-law negligence claim against defendant, alleging that its employee was at fault for his injuries. In response, defendant brought a third-party contribution claim against plaintiff's employer. Defendant and plaintiff's employer settled the contribution claim and the employer's possible subrogation claim. Plaintiff's lawsuit against defendant then proceeded to trial. The jury found that the injury was caused by plaintiff, his employer, and defendant, and allocated fault 5 percent to plaintiff, 75 percent to the employer, and 20 percent to defendant. Post-trial, defendant, citing Minn. Stat. §604.02, subd. 1, argued that its liability should be proportionate to its 20 percent fault. Plaintiff countered that, by its plain language, section 604.02 did not apply because defendant and his employer were not both "severally liable." The district court agreed with defendant and applied section 604.02 to reduce the net damage award by an amount proportionate to the employer's fault. The court of appeals reversed, concluding that it was error to apply section 604.02 in these circumstances, and remanded to the district court for recalculation of the judgment.

The Minnesota Supreme Court affirmed the decision of the court of appeals. The Court began by noting that Minn. Stat. §604.02, subd. 1 requires apportionment of liability according to fault "only when 'two or more persons are severally liable.'" The Court then rejected defendant's argument that "both [defendant] and the employer were liable at the moment the tort occurred in this case—in other words, when [plaintiff] was injured," reasoning that "employers liable in workers' compensation and third parties liable in tort are not commonly liable, either jointly or severally, because the employer is shielded from tort liability." Further, the Court noted that if the phrase "severally liable" included employers, then "a severally liable employer would become a person 'jointly and severally liable for the whole award' in tort if its fault were greater than 50 percent." Because the Legislature could not have intended such a result, the Court declined to reduce the judgment by the amount of the employer's fault. ***Fish v. Ramler Trucking, Inc.***, No. A18-0143 (Minn. 11/27/2019). *https://mn.gov/law-library-stat/archive/supct/2019/OPA180143-112719.pdf*

Defamation; personal liability of corporate officer. Plaintiff is a former director of a company where defendant serves as chief executive officer. In 2015, plaintiff was accused of sharing defendant's confidential information with a third party. Plaintiff later resigned as director, and the company commenced suit against him alleging breach of fiduciary duties. Later, the company issued a press release accusing plaintiff of breaching his fiduciary duties and stating that he resigned as a result of his conduct. Plaintiff subsequently sued defendant for defamation. While defendant did not author the press release, plaintiff alleged that it was issued at defendant's direction and with his approval, and subsequently re-published to the Securities and Exchange Commission at his direction. The district court granted defendant's motion to dismiss, holding that the complaint failed to state a claim because plaintiff did not allege that defendant authored the press release. The court of appeals affirmed.

The Minnesota Supreme Court reversed and remanded the case for further proceedings. The Court noted that while a "corporate officer cannot be held personally liable for a company's defamatory acts by virtue of job title alone," "[I]t is the universal rule that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor." Because plaintiff alleged that defendant "personally took part in the commission of a tort by directing, authorizing, and approving a defamatory press release," the district court erred in granting defendant's motion to dismiss. ***DeRosa v. McKenzie***, No. A18-1171 (Minn. 12/11/2019). *http://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Standard%20Opinions/OPA181171-121119.pdf*

JEFF MULDER
Bassford Remele
jmulder@bassford.com

MSBA

Find the Right Practice Management Fit for Your Firm

Law firms that use legal case management software can experience a $22,000 increase in yearly revenue per attorney.*

Not all firms are the same, so why should they use the same practice management system?

With this in mind, MSBAdvantage brings you discounts from six practice management partners, each with a different set of practice tools and resources.

Whether it's Clio, AbacusLaw, AmicusAttorney, CosmoLex, PracticePanther, or TimeSolv, find the option that's the best fit for your firm...and SAVE!

Learn more at: www.mnbar.org/Advantage

ABACUSLAW

AMICUS ATTORNEY

Clio®

CosmoLex

PRACTICEPANTHER

TIMESOLV

* Based on median hourly rate; Blue Hill Research study "Building a Case for Law Practice Management"

THE MINNESOTA JUSTICE FOUNDATION THANKS THE SPONSORS OF OUR 2019 ANNUAL AWARDS CELEBRATION

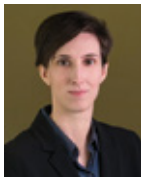
Gold Sponsors
Robins Kaplan, LLP
Stinson LLP

Silver Sponsors
Ballard Spahr LLP
Briggs and Morgan, PA
Dorsey & Whitney, LLP
Faegre Baker Daniels, LLP
Felhaber Larson
Fredrikson & Byron, PA
Maslon LLP
Schwegman Lundberg Woessner

Bronze Sponsors
Best & Flanagan, LLP
Collins Buckley Sauntry and Haugh, PLLP
Fox Rothschild, LLP
Tim and Susanne Goodman
Gray Plant Mooty
Mitchell Hamline School of Law
Monroe Moxness Berg PA
Nichols Kaster, PLLP
University of Minnesota Law School
University of St. Thomas School of Law

Pro Bono Supporters
Greene Espel, PLLP
Lockridge Grindal Nauen PLLP (in memory of Rick Plunkett)
Lommen Abdo


BASSETT


MUELLER


HERMAN

HEIDI BASSETT, ALEX MUELLER, and KATHERINE HERMAN have joined Hellmuth & Johnson. Bassett specializes in banking, business, real estate, and construction. Mueller concentrates on copyright, trademark, and media law. Herman represents clients in a range of litigated disputes and advising matters.


SURESH

ANJU SURESH has joined Hinshaw & Culbertson LLP as an associate in the Minneapolis office. Suresh represents clients in a wide variety of business disputes and transactions.

NATHAN J. NELSON and ALEX W. JOHNSON joined DeWitt LLP in the business and estate planning practice areas. Nelson joins the firm as a partner and Johnson joins the firm as an associate.

SCOTT ANDREW FULKS joined Deckert & Van Loh, PA as an associate attorney. Fulks received his JD in May 2019 from the University of St. Thomas School of Law. He will be practicing in the area of immigration.


COLEMAN

AL COLEMAN, a corporate partner of Saul Ewing Arnstein & Lehr, has been named chair of the firm's new Sports and Entertainment Practice.

Thomas M. Sweeney, attorney in St. Paul, age 80, resident of White Bear Township, formerly of St. Paul, passed away on November 25, 2019.

Richard "Dick" Pemberton Sr, 87, of Fergus Falls, died December 1, 2019. Pemberton joined the firm that now bears his name in 1960. He was a fellow of the American Board of Trial Advocates and the American College of Trial Lawyers; the 1986-87 president of the Minnesota State Bar Association; and awarded the MSBA Professional Excellence Award in recognition of career achievements.

ATTORNEY WANTED

ASSOCIATE ATTORNEY — Litigation. Conmy Feste Ltd. is a seven-attorney general practice law firm in Fargo, North Dakota. The firm is seeking an attorney to work in general litigation, including commercial, personal injury and family law. The firm prefers a recent graduate who is interested in developing a practice with a well-established law firm but will consider an attorney with up to three years of experience desiring to make a lateral move. Please email Wendy Ritchison with a cover letter and resume at: writchison@conmylaw.com

▲▲▲▲▲

ASSOCIATE ATTORNEY — Litigation and Family Law/Employment Law. Farrish Johnson Law Office is a seven-attorney law firm in Mankato, Minnesota with a collaborative culture and experienced support staff. We are seeking two associate attorneys licensed in Minnesota with one or more years of work experience; one with an interest in litigation and one with an interest in family law and employment law. We are looking for attorneys with a solid work ethic to deliver exceptional service to clients and positively influence our shared goals. You should be personable and confident, comfortable in the courtroom, be prepared to manage your own cases while working with an experienced team and be committed to establishing and maintaining your legal practice. Salary commensurate with experience and qualifications. Please send a resume, cover letter, and copy of law school transcript via email to: skelly@farrishlaw.com. All applications will be held in confidence.

▲▲▲▲▲

FARGO LAW FIRM seeks attorney with six plus years of experience in commercial law and civil litigation. The work would vary, but primarily representation of creditors, with much less time with debtors and others. All aspects and areas of debtor/creditor relations and disputes. Salary commensurate with experience and qualifications. Please send notice of your interest to Kaler Doeling, PLLP, attention: Jan, 3429 Interstate Blvd., PO Box 9231, Fargo, ND 58106-9231, (701) 232-8757, jan@kaler-doeling.com.

WENDLAND UTZ, an established law firm in Rochester, MN, seeks associate attorney for general business and commercial law practice, including litigation. Strong academic credentials and excellent writing skills are required. Experience preferred. Candidates should be self-motivated, eager to develop client relationships, and able to manage a diverse caseload. Please submit resume, transcript and writing sample to: HR@wendlaw.com.

OFFICE SPACE

BRAINERD OFFICE sharing arrangement with three other attorneys in historic downtown building serving clients since 1978. Near Courthouse and Judicial Center. Private office and secretarial workstation. Rent $600 per month plus share of overhead. 510 Maple Street. Call Glen or Jim at: (218) 829-1719.

▲▲▲▲▲

ENJOY WORKING again! You're a business/construction attorney with experience in real estate and development, entrepreneurial, prefer jeans over suits, and a little irreverent. After three to five years of big law experience, you're thinking about leaving but aren't sure you want to practice alone. You love legal work, not so much firm management. We're a fast-growing boutique firm with clients who are owner-operated commercial and residential contractors. We have separate office space for the person wanting his/her own gig and room for the right person to join the firm, if and when the time is right. If this sounds like you, let's talk: (651) 484-4412 or bill@mncls.com.

▲▲▲▲▲

LOOKING FOR a great community to have your solo or small firm in? Looking for a beautiful, well-appointed office? Looking for virtual services so you can work from home or on the go? Look no further — MoreLaw Minneapolis has all that and more. Call Sara at: (612) 206-3700 to schedule a tour.

▲▲▲▲▲

OFFICE SPACE in ideal Roseville location for one attorney plus assistant in professionally appointed offices at Lexington Avenue & Highway 36. Includes reception area, spacious conference room, kitchenette and patio with ample FREE parking. Wifi, color printer, copier and phones available. Call John or Brian at: (651) 636-2600.

PROFESSIONAL SERVICES

VALUESOLVE ADR Efficient. Effective. Affordable. Experienced mediators and arbitrators working with you to fit the procedure to the problem — flat fee mediation to full arbitration hearings. (612) 877-6400 www.ValueSolveADR.org

▲▲▲▲▲

EXPERT WITNESS Real Estate. Agent standards of care, fiduciary duties, disclosure, damages / lost profit analysis, forensic case analysis, and zoning/land-use issues. Analysis and distillation of complex real estate matters. Excellent credentials and experience. drtommusil@gmail.com (612) 207-7895

▲▲▲▲▲

ATTORNEY COACH / consultant Roy S. Ginsburg provides marketing, practice management and strategic / succession planning services to individual lawyers and firms. www.royginsburg.com, roy@royginsburg.com, (612) 812-4500.

▲▲▲▲▲

MEDIATION TRAINING: Qualify for the Supreme Court Roster. Earn 30 or 40 CLE's. Highly rated course. St. Paul (612) 824-8988 transformativemediation.com

▲▲▲▲▲

MEDIATIONS, ARBITRATIONS, special master. Serving the metro area at reasonable rates. Gary Larson: (612) 709-2098 or glarsonmediator@gmail.com

▲▲▲▲▲

PARLIAMENTARIAN, meeting facilitator. "We go where angels fear to tread.™" Thomas Gmeinder, PRP, CPP-T: (651) 291-2685. THOM@gmeinder.name

Paper checks are notoriously unreliable. They get lost in the mail, they get tossed in the laundry, and they carry a lot of sensitive information around with them wherever they go.

LawPay changes all of that. Give your clients the flexibility to pay you from anywhere, anytime. Most importantly, we ensure you stay in compliance with ABA and IOLTA guidelines.

MSBA

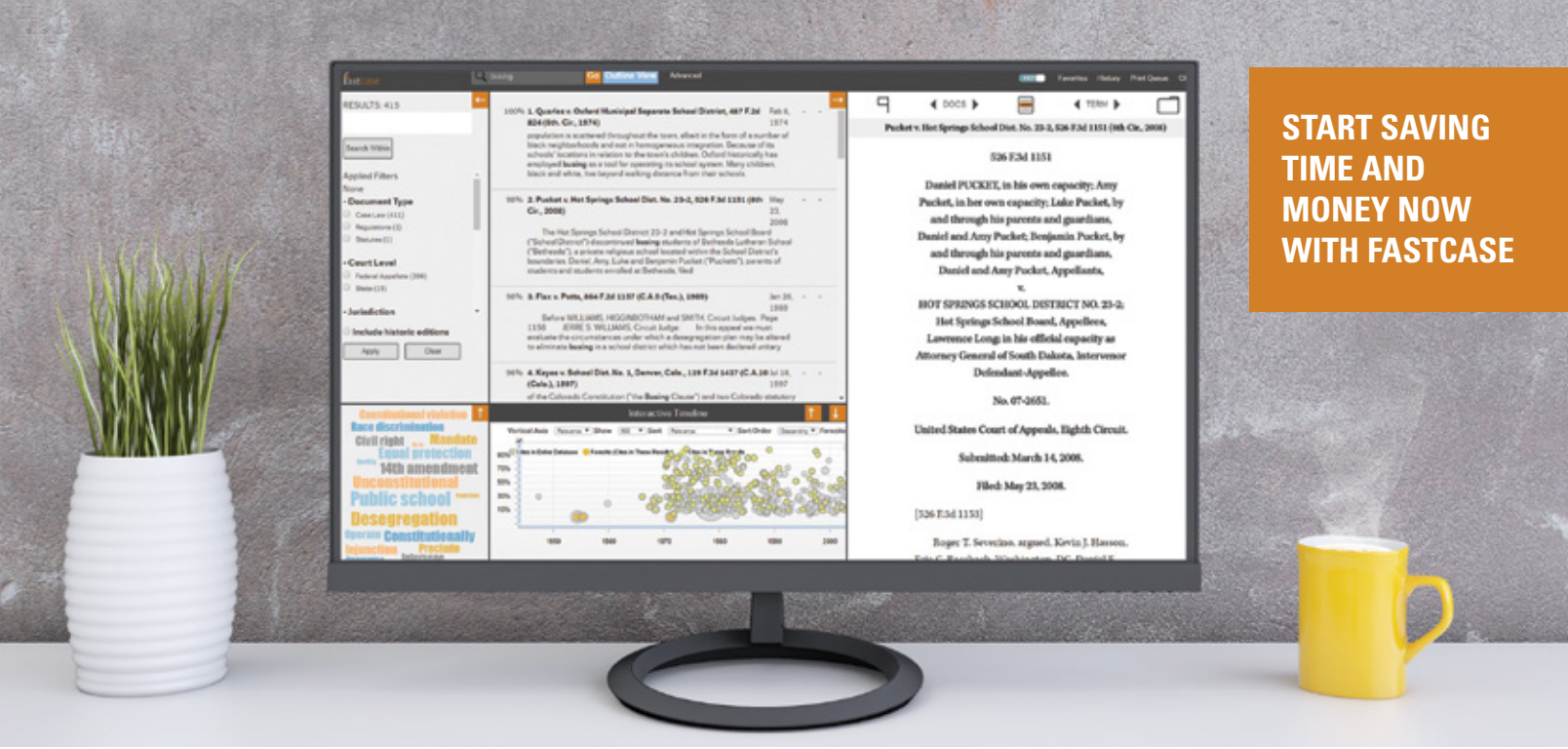
Proud Member
Benefit Provider

It's easy to get started

888-515-9108 or visit **lawpay.com/mnbar**

LAWPAY®

AN AFFINIPAY SOLUTION



Smarter Legal Research.
Free for MSBA Members.

Fastcase is the leading next-generation legal research service that puts a comprehensive national law library and powerful searching, sorting, and data visualization tools at your fingertips.

As a member of the MSBA
you have free access to fastcase.
Login at: www.mnbar.org/fastcase

fastcase®
Smarter legal research.

Find What You Need, Fast.

LEARN MORE ABOUT FASTCASE

- **Live Webinars – Thursdays, Noon - 1:00 PM**
  fastcase.com/webinars
- **On-Demand CLE**
  mnbar.org/fastcase/on-demand-cle
- **practicelaw videos**
  mnbar.org/practicelaw/fastcaseVSgoogle
  mnbar.org/practicelaw/fastcaseLegalResearch

MSBA

Questions? Contact Mike Carlson at the MSBA at 612-278-6336 or mcarlson@mnbar.org