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Hail the departing chief
A review of cases from Chief Justice Lorie S. Gildea's tenure at the Minnesota Supreme Court.
By Cathy E. Gorlin and Marshall H. Tanick

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MSBA 2023-24

New leadership, new horizons

MSBA Board of Governors

BY PAUL FLOYD

PAUL FLOYD is one of the founding partners of Wallen-Friedman & Floyd, PA, a business and litigation boutique law firm located in Minneapolis. Paul has been the president of the HCBA, HCBF, and the Minnesota Chapter of the Federal Bar Association. He lives with his wife, Donna, in Roseville, along with their two cats.

Change is inevitable, and as we embark on a new bar year, the MSBA Board of Governors has undergone a transformation, introducing seven new persons and perspectives to its leadership. Let's take a closer look at the dynamic professionals who are driving the MSBA's mission forward and shaping the legal landscape of Minnesota.

As president of the MSBA, I envision myself as a bridge builder, connecting the wisdom and experience of the Baby Boomer generation with the innovative ideas and values of the next generation within the bar association. My mission is to guide us from the confines of the past and steer toward a future for the bar that is vibrant, forward-thinking, and relevant to the ever-changing legal landscape. By fostering collaboration, embracing change, and championing our core values, this year's MSBA officers and the chair of the MSBA New Lawyers Section form a dedicated executive team, ready to take on the challenges and opportunities that lie ahead.

Sam Edmunds, our president-elect, brings a wealth of bar and legal experience and vision to the role. Joining him are Tom Pack, treasurer, and Kenya Bodden, secretary, both of whom embody the mission of the MSBA of championing justice, equality, and professionalism, as well as having a wealth of bar association experience. Finally, Colin Hargreaves, chair of the New Lawyers Section, rounds out the leadership team that will guide the Board of Governors and the Assembly toward the bar association's next generation.

An inclusive Board of Governors

Following the recent December 2022 MSBA Bylaw amendments, the Board of Governors has expanded to accommodate a broader range of voices and perspectives, growing from 16 to 20 members. The board now includes an additional representative from the New Lawyers Section, two more members from under-represented communities, and two additional at-large members. This evolution reflects the MSBA's commitment to inclusivity and diverse representation.

This year's Board of Governors is an exceptional blend of legal professionals and community leaders. They hail from various backgrounds and practice areas, enriching the board's collective expertise.

- **Private practice leaders**: Your board features legal minds practicing across the spectrum, from solo practitioners and small law firms to national law firms, offering a wide range of experience and insight into the legal profession locally, regionally, and nationally.
- **Experienced professionals**: The practice areas represented on the board run the gamut from family law, criminal law, personal injury, Social Security disability, workers compensation, corporate and business, nonprofit, employment, antitrust, construction, products liability, complex

commercial litigation, mediation and arbitration, and general practice to a claims attorney with a national legal malpractice carrier to an assistant public defender in Hennepin County.

- **Champions of justice**: Many of the members are actively involved in public service, serving in local government and nonprofit organizations, as well as being North Star Lawyers—who provide at least 50 hours of annual pro bono legal representation to persons of limited means.
- **Bar association advocates**: Many board members extend their influence beyond the MSBA as officers and leaders past and present in local district bars (Aitkin/Crow Wing County, Anoka County, Dakota County, HCBA, RCBA, 1st Judicial District, 7th Judicial District, and Stearns/Benton Bar) and in national bar associations (the ABA, National LGBTQ+ Bar, the National Native American Bar, Association of Professional Responsibility Lawyers, National Employment Lawyers Association; American Board of Trial Advocates [ABOTA]).
- **Community engagers**: Beyond the legal realm, our board members actively engage with their communities, participating in a variety of charities and organizations that make a positive impact, including the American Red Cross, Habitat for Humanity, Children's Hospital Association, Shepherd's Foundation US/Ukraine, and Bridge for Youth, just to name a few.
- **Exceptional educators:** A number of the board members share their knowledge and experience as full and part-time professors at each of the local law schools and as CLE educators, enriching the legal education landscape in Minnesota.
- **Recognized leaders**: The board boasts numerous accolades and awards, including Super Lawyers, Rising Stars, Best Lawyers in America, and honors from prestigious legal associations: Twin Cities Diversity in Practice; Volunteer Lawyers Association; American Civil Liberties Union; and the Warren E. Burger Inn of Court.

MSBA Officers

A bridge to a brighter future

As we look ahead, the MSBA's officers and Board of Governors are committed to serving the needs of its members and the broader legal community. With their extensive experience, diverse backgrounds, and dedication to justice, equity and professionalism, they are well-prepared to navigate the challenges and opportunities that lie ahead for Minnesota lawyers. I encourage you to connect with your officers, board members, and the MSBA staff to explore ways to become more involved. Attend meetings, join one of our 40 sections or an MSBA committee, and engage in discussions and take action to contribute to the ongoing growth and success of the MSBA. ▲

SAVE THE DATE

NEW LAWYERS LEADERSHIP CONFERENCE!

The New Lawyers Section is looking forward to another bar year of developing, supporting, and engaging new lawyers and law students as the next generation of leaders in the profession and the community. The section is excited to host its 9th Annual New Lawyers Leadership Conference, which will be taking place on Friday, November 3 at Watson Block in Minneapolis. This conference for up-and-coming legal professionals looking to advance their careers will bring together fresh perspectives in CLE sessions on law, leadership, diversity, and service; the goal is to inspire and empower new lawyers and law students in their early years of practice. The New Lawyers Leadership Conference also offers the chance to network with MSBA leadership and build valuable connections with peers who are on similar professional journeys. Visit ***www.mnbar.org/cle-events*** for the complete schedule and registration details.

FRIDAY, NOVEMBER 3

PRO BONO WEEK
OCTOBER 23-27

Pro Bono Week is upon us again. The MSBA and our community partners have many opportunities to engage in training to get you back up to speed in a pro bono area of need or to celebrate the great work done throughout the year. The MSBA is hosting a remote kickoff event, "Feeling Good by Doing Good," on Monday, October 23. The event will feature a panel of inspiring pro bono attorneys discussing how pro bono work actually improves their sense of wellness and fulfillment. On Tuesday, join us in Minneapolis for our first Pro Bono Expo and Social. This event includes training options with community partners Tubman, SMRLS, and VLN, followed by a social hour from 4:00 – 5:00 pm with special guest Justice Paul Thissen. If you already have a strong practice, we encourage you to come to the social hour to celebrate the great work being done in our community. You can learn more about all these events (and register) at **www.projusticeMN.org.**

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Unlock the future of legal technology during October by joining us for a cutting-edge six-session online CLE series brought to you by the MSBA and its Advantage partners. Explore revenue-generating strategies in "Your Lead Gen Playbook;" discover how to turn a hybrid work environment into a competitive advantage; or dive into other exciting topics, such as the latest e-lawyering techniques, a review of Clio's Legal Trends Report, and a session on selecting case management software that's right for you. Whether you're an MSBA member taking these sessions for free or a non-member at $45 per session, this is your chance to learn about new tools that will keep you ahead in the legal tech game. Most sessions begin at noon. Visit ***www.mnbar.org/cle-events*** for the complete schedule and registration details.

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Court issues order on ABA discipline system recommendations

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

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

In August, the Minnesota Supreme Court issued its order regarding the recommendations it received from the American Bar Association's Standing Committee on Professional Regulation.[1] In past columns I've discussed the lengthy report prepared by the ABA at the Court's request, as well as some of the report's 25 recommendations.[2] Following a comment period and public hearing, the Court's order reflects careful and thoughtful consideration of the various recommendations. We are fortunate in Minnesota to have an active and engaged Court willing to commit significant time to attorney discipline matters. The order is lengthy, so I think an overview of the Court's decisions and next steps is in order.

Recommendations adopted

The order begins by acknowledging a core strength of Minnesota's discipline system: the many talented volunteers and other participants who are "engaged, committed, and take their responsibilities and work seriously."[3] I could not agree more. Thank you to everyone who cares about and contributes to this important work. We all share the belief that because lawyers hold an important role in society, the legal profession is diminished when lawyers fall short of the applicable ethical standards. To that end, a well-functioning discipline system helps to protect the public and to maintain confidence in the profession.

The order adopts a number of changes that in turn necessitate procedural rule changes to the Rules on Lawyers Professional Responsibility (RLPR). To assist, the Court is appointing a 10-person Advisory Committee, chaired by Judge Lucinda Jesson of the Minnesota Court of Appeals, to make recommendations on particular rule amendments by June 30, 2024.[4]

One recommendation that the Court has adopted—and perhaps the most impactful—is the decision to implement a diversion program. In Minnesota, we issue a lot of private discipline, which is generally reserved for conduct deemed isolated and non-serious. The Office spends a lot of time on those private admonitions. And, as the Office indicated in its public comments, there is more recidivism than one would like to see. Roughly one in three Minnesota lawyers who has received an admonition has received more than one. Perhaps something different is necessary to help the lawyer modify their conduct such that misconduct is unlikely to happen in the future? This is where diversion can fit in—the hope is that education or other programming will have a more significant impact on the lawyer's practice than a private discipline decision. Most states have some form of diversion program. I'm excited to explore with the Advisory Committee what a diversion program should look like in Minnesota.

One key thing to keep in mind is that educational programs will need to be created for diversion to be effective, and I hope stakeholders currently engaged in educational programming for lawyers answer the call to develop effective and targeted law office management programming to which lawyers can be diverted.

Another consequential recommendation adopted by the Court is to change the presumptive suspension period from 91 days to six months for cases in which a reinstatement hearing is required. The Court adopted other recommendations to streamline and make transparent the requirements and timing of reinstatement proceedings. In doing so, the Court articulated a new and important rule—lawyers who have previously been suspended for any period and engage in conduct that warrants another suspension will be required to petition for reinstatement and will not be reinstated by affidavit, no matter the length of the subsequent suspension.

The Court adopted other changes, such as the recommendation to define "probable cause" as that term is used to determine whether public discipline is warranted for misconduct. The Court changed this term to "reasonable cause" and directed the Advisory Committee to make recommendations for defining this standard and streamlining reasonable-cause proceedings. The Court adopted the ABA recommendations to make changes to several specific procedural rules.

The Court also referred several recommendations to the State Court Administrator, Board, and Director for consideration; most of them involved recommendations that had budgetary impact.

As I have discussed previously in this space, the portion of annual attorney registration dollars allocated to the discipline system compares quite favorably to the amounts allocated in other jurisdictions. We do a lot in Minnesota for the dollars allocated. And even lawyers are often surprised, since we are part of the taxpayer-funded judiciary, that no taxpayer dollars are used to cover attorney-regulation activities. As a consequence, we are constantly weighing and balancing competing priorities, and because annual registration fees have remained quite steady for long periods of time, we are currently stretched for resources, as the ABA report recognized.

Recommendations rejected

The Court rejected several recommendations. A few are notable. The Court rejected the ABA recommendation to create a separate Administrative Oversight Committee. In doing so, the Court noted its recent (2021) changes to Rules 4 and 5, RLPR, relating to the division of responsibilities between the Board and Office and decided a longer period of adjustment was appropriate. The Court asked the Advisory Committee to consider whether some clarifying amendments to Rules 4 and 5 may be appropriate.

The Court also rejected the recommendation to transfer Rule 18, RLPR (reinstatement hearings), to referees versus a panel of the Board, preserving public member participation in this important process. The Court further rejected the recommendation that the Office relinquish to some other entity the advisory opinion service currently operated by the Office. While the Court noted this service is time-consuming, the benefits to the practicing bar outweighed the issues raised in the Court's estimation. The Court likewise rejected the recommendation to appoint the Director as trustee less often when a lawyer dies, is disabled, or abandons their practice, but recommended the Director work with the state bar on resources for succession planning. I'm pleased to report that this effort is already underway; a subcommittee of the MSBA's Professional Regulation Committee—of which I am the chair—is currently working on succession planning resources. Finally, the Court rejected the ABA's recommendations to provide for discretionary review of referee reports and to eliminate the ability of Board panels to issue admonitions.

Conclusion

This short article is a selective summary of the Court's decisions, just as prior articles were not able to discuss all the many ABA recommendations. As one can surmise from the length of each of the referenced documents—the ABA report is 88 pages; the Court's order is 36 pages, plus a concurrence/dissent from Justice Thissen and a summary attachment—there is a lot more to the recommendations and the Court's decision.

What I hope is clear, however, is that a lot of very engaged stakeholders have given careful consideration to a lot of ideas and recommendations, and in doing so, have demonstrated a deep commitment to the quality of Minnesota's discipline system. A periodic system review process has been a hallmark of Minnesota's discipline system since its creation in 1970. Thanks to the ABA Standing Committee on Professional Regulation, the Lawyers Professional Responsibility Board, OLPR personnel, members of the MSBA Professional Regulation Committee, district ethics committee (DEC) members, and the Court for the time and continuing attention given to this important subject. As always, feel free to contact me if you have recommendations or concerns. I welcome your input as we strive to operate the best system possible. ▲

NOTES

[1] Order Regarding the Report and Recommendation of the American Bar Association Standing Committee on Professional Regulation on the Minnesota Discipline System dated 8/23/2023, located in Supreme Court File No. ADM10-8042.

[2] *See* Susan Humiston, "ABA Issues Consultation Report on Minnesota's Discipline System," Bench & Bar (November 2022); Susan Humiston, "More on the ABA Consultation Report," Bench & Bar (December 2022), both available at *lprb.mncourts.gov/articles*.

[3] Order dated 8/23/2023, at 2.

[4] The Court established a 9/15/2023 deadline to apply to be a member of the Advisory Committee; a date that will have passed before this article is published. In addition to the chair, Lawyers Board Chair Ben Butler or his designee will be on the Advisory Committee, as will I or my designee.

Deepfakes, AI, and digital evidence

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

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

With the ever-expanding prevalence of artificial intelligence, I'm sure that most of us have seen at least a few types of "deepfakes." Elvis Presley singing the latest top hits. Albert Einstein answering viewers' questions about life. Living portraits of old photographs. Or some more problematic examples, such as a menacing speech by Mark Zuckerberg or a video of a politician created to spread disinformation. Some may have even seen a video appearing to depict their company's CEO requesting an immediate wire transfer, as cybercriminals continue to use AI to bolster social engineering campaigns. It seems that just about everybody now has the ability to alter digital media, with varying degrees of believability.

Deepfakes, or digitally altered media that convincingly make one individual appear as another, have also had an impact on the courtroom. According to the Department of Homeland Security's paper, "Increasing Threat of Deepfake Identities," "Deepfakes... utilize a form of artificial intelligence/machine learning (AI/ML) to create believable, realistic videos, pictures, audio, and text of events which never happened. Many applications of synthetic media represent innocent forms of entertainment, but others carry risk."[1] While there have been cases of litigants attempting to enter a deepfake into evidence, the problem has also been reversed–litigants claiming that real evidence has been manipulated or fabricated.

Digitally stored information has repeatedly proved itself to be a pivotal source of evidence, often serving as a critical, unbiased witness. Nearly every case today involves ESI to some extent. When presented with this kind of strong, perhaps damning, evidence, people now have the ability to throw a new defense at the wall and see if it sticks: "It's not real." While a judge may reject the attempt,[2] the "deepfake defense" will still have consequences. As an NPR report about the phenomenon noted, "If accusations that evidence is deepfaked become more common, juries may come to expect even more proof that evidence is real."[3] Though the technology is relatively new, courts already have processes in place to handle fake evidence and can apply these same procedures to managing deepfakes.[4] But courts are less prepared to deal with proving that real evidence is, in fact, real. Furthermore, the better the evidence, the more likely that juries will feel required to verify its legitimacy. With the rise of common applications of artificial intelligence, the pressure is on to verify digital evidence as efficiently as possible.

Deepfakes present a host of legal concerns. From actors losing the rights to their own identities to reputational damage to manufactured evidence affecting the outcomes of custody disputes, we are just beginning to learn how to grapple with deepfakes and artificial intelligence. In the courtroom, well-communicated guidelines, strong authentication standards, and extensive training can address some of the risks. Expectations for juries surrounding the requirements for evidence verification should be well-established, and court-appointed digital forensic experts can manage and analyze digital evidence for both sides, helping to create an even playing field and manage costs.

Emerging laws and regulations will hopefully begin to help the legal community navigate new problems posed by these technologies. But developing tried-and-true methods to identify deepfakes reliably will undoubtedly remain a work in progress. Given how difficult it can be to spot a deepfake, the New York Times wrote recently, "Initiatives from companies such as Microsoft and Adobe now try to authenticate media and train moderation technology to recognize the inconsistencies that mark synthetic content. But they are in a constant struggle to outpace deepfake creators who often discover new ways to fix defects, remove watermarks and alter metadata to cover their tracks."[5]

In the meantime, members of the legal community should be on high alert for the possibility of altered digital media, from opposing parties and their own clients. Attorneys should strive to be especially vigilant in abiding by digital-evidence best practices throughout the entirety of a case. In the event that third-party verification is ultimately required, organizing original source material and making it readily available is essential. ▲

NOTES

1 *https://www.dhs.gov/sites/default/files/publications/increasing_threats_of_deepfake_identities_0.pdf*

2 *https://www.npr.org/2023/05/08/1174132413/people-are-trying-to-claim-real-videos-are-deepfakes-the-courts-are-not-amused*

3 *Id.*

4 *Id.*

5 *https://www.nytimes.com/2023/01/22/business/media/deepfake-regulation-difficulty.html*

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From the Lone Star State to the North Star State: ABDM is excited to announce the opening of its new offices in the Twin Cities!

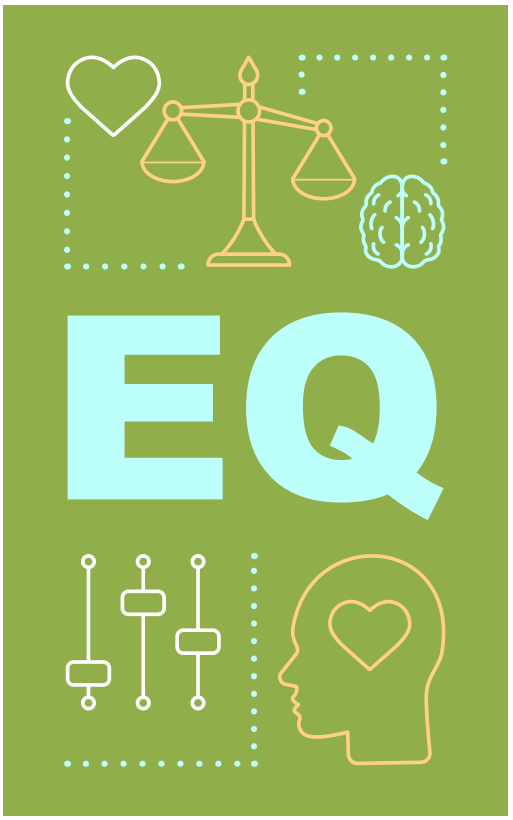
Well-being and emotional intelligence are business development tools

BY KENDRA BRODIN kendra@esquirewell.com

As a lawyer, it can be easy to see your legal practice as a place to escape feelings. Many of us fail to understand that human emotion is a huge part of the work itself; we did not learn much about emotional intelligence and well-being in law school.

If you want to build a successful and sustainable practice, you need a strategy for business development that factors your well-being into the big picture. Without a plan to maintain and nourish your well-being, growing your business can bring quick burnout.

Let's take a deep dive into how well-being, emotional intelligence, and business development can work together, why the combination is so critical for success, and how to use these insights to elevate your day-to-day practice.



What is well-being?

Many of us are quick to focus solely on growing our business, assuming we will have time to think about our well-being after we have "made it." But we should view the concepts of well-being and business development as co-counsels working toward the same goal.

Well-being can feel like a fuzzy concept at first, so let's make it more concrete. In its 2017 report, "The Path to Lawyer Well-Being," the National Taskforce on Lawyer Well-Being defined well-being "as a continual process in which lawyers strive for thriving" in each of the following areas: emotional; occupational; creative or intellectual; spiritual; physical; and social.

Well-being doesn't just impact how you feel about your job; it also impacts how effectively you do the work. As "The Path to Lawyer Well-Being" reminded us, "Lawyer well-being is part of a lawyer's ethical duty of competence." Without an ongoing dedication to well-being, you not only risk your quality of life, but you jeopardize your ability to make sound decisions on behalf of your clients.

Despite our "all business, all the time" culture, the best business development strategies incorporate well-being. There are several ways that well-being can foster career advancement and business growth.

Why well-being matters for business growth

Many of my clients are nervous about business development because they think it feels "sales-y." But that's not the case at all. Done well, connecting with potential and current clients can feel genuine, warm, and natural, and that's exactly what makes it so effective.

When you prioritize your well-being, you empower yourself to be more adept at:

- **Making connections.** Networking is an essential part of your job. It can help you discover new opportunities and attract new clients to your practice. When you prioritize your well-being, you give yourself the necessary physical and mental bandwidth to forge genuine connections with new and existing clients.
- **Introducing yourself.** When you're "making the ask" for business, you'll want to sound spontaneous and authentic while you convey the specific ways you can help. When you feel confident in your career and your abilities, offering your skills and services becomes a natural next step in any business relationship.
- **Feeling fulfilled.** Clients are not the only ones who deserve a sense of satisfaction and fulfillment. Lawyers do, too. When you are passionate about and engaged in your work, it shows, and clients are drawn to your passion for what you do.
- **Overcoming challenges.** Will rejection sometimes sting? Of course, even when we tell ourselves "it's just business." Strengthening your self-confidence and interpersonal skills helps you avoid interpreting rejection as a ruling on your self-worth.

> THE LEGAL PROFESSION REQUIRES YOU TO MANAGE YOUR OWN EMOTIONS WHILE YOU COUNSEL PEOPLE WITH INTENSE POSITIONS, FEELINGS, AND OPINIONS. UNDERSTANDING AND RESPONDING TO YOUR FEELINGS AND THE FEELINGS OF OTHERS WITH EMPATHY AND SELF-AWARENESS IS WHAT EQ IS ALL ABOUT.

KENDRA BRODIN is founder and CEO of EsquireWell, a lawyer well-being and professional development company that provides speaking, coaching, consulting, and on-demand learning to help lawyers be happier, healthier, and more successful.

Emotional intelligence is rocket fuel for well-being

One of the most important tools you need to build business while maintaining and protecting your well-being is emotional intelligence (EQ).

Yes, building a sustainable practice requires a high IQ (odds are that your IQ is above average by nature of the fact that you are an attorney—it takes a certain IQ level to get into and through law school and the bar exam). But EQ is the type of intellect that will empower you to grow without sacrificing your well-being. EQ is IQ's more likable sibling. It's your ability to recognize and navigate emotions. People gravitate toward lawyers with high EQ even when they are not quite sure why.

The legal profession requires you to manage your own emotions while you counsel people with intense positions, feelings, and opinions. Understanding and responding to your feelings and the feelings of others with empathy and self-awareness is what EQ is all about.

You have probably met a few attorneys who seem like they were born with magnetic people skills and emotional intelligence. The good news is that EQ is not only learnable, it's a lifelong practice at which you can become excellent.

How to put emotional intelligence into action

Here are four specific EQ strategies to use daily to build business and preserve your well-being, both in and out of the office:

- **Listen and ask questions.** Active listening can't be interrupted by the ding or buzz of a smartphone. It will help you better understand your client's needs and, therefore, better perform your job. But don't just listen. Ask relevant follow-up questions. This can help you get to the heart of an issue while finding out if there are other ways to expand your (or your firm's) work with a particular client.
- **Look up.** While listening, don't look down at a phone, your notes, or anything else. Instead, make eye contact. Read the person's body language and facial expressions to understand how they really feel. Your eye contact shows you are actively engaged and focused on what the other person is saying.
- **Take a breath.** Our work as lawyers often includes conflict and combative situations. Expect it, but do not let yourself be triggered by it. A well-timed pause can be powerful. Use it to take a few deep, slow breaths to calm your nervous system and your mind so you can do your best thinking. Even Navy Seals use deep breathing techniques to help regulate the body's fight-or-flight response.
- **Find your community.** Participate in associations, organizations, and events not only because they are excellent opportunities for networking, personal and business growth, and simply connecting with interesting new people, but also because they give you a chance to put empathy into practice. Focus on listening, asking questions, and reading body language. Empathy is a muscle, and we need reps to build it.

Bringing it all together

The importance of fostering and protecting your well-being goes beyond taking care of yourself. It is a savvy business move. Business growth can be a natural outgrowth of greater well-being. You don't have to sacrifice one for the other; you can pursue both simultaneously and with purpose. Prioritizing your well-being increases your chances of professional success because it empowers you to build more genuine connections, cultivate stronger client relationships, serve your existing clients better, feel more fulfilled, and exercise resilience in the face of setbacks.

One of the most effective ways to build a sustainable and well-being-focused business is to enhance your emotional intelligence. By improving your ability to exercise self-awareness and empathize with others, you'll improve your own practice. And you'll play a role in humanizing and elevating our entire profession. ▲

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READING THE FINE PRINT

The extensive changes to Minnesota landlord-tenant law in 2023 mostly codify best practices

BY TIMOTHY A. BALAND

The 2023 Minnesota legislative session saw what have been heralded as unprecedented changes to landlord-tenant law in Minnesota. Unless otherwise noted, the statutes discussed in this article become effective on January 1, 2024. For the most part, the changes reflect best practices for landlords—things that landlords already are or should be doing.

This article will attempt to summarize and comment on those changes. For the sake of clarity, I'm going to divide these new laws into three categories: laws that directly affect landlords, laws that directly affect leases, and laws that directly affect evictions.

In fact, all the new laws affect all three categories, but there are so many changes that some sort of systematic organization has to be imposed. The summary of the new law is printed in *italics*, and my reaction or recommendation is printed in regular type.

EVICTIONS

504B.268: Right to Counsel in Public Housing Breach of Lease Eviction Actions. *On the first page of an eviction complaint in public housing cases, the landlord must include the following notice in bold 12-point type: "If financially unable to obtain counsel, the defendant has the right to court-appointed attorney."*

This statute applies only to public housing cases. Before omitting the requisite language, the landlord should make sure that the case does not involve public housing. For my part, I'm going to recite the language from the statute in my standard eviction complaint. Most counties are providing some sort of court or volunteer attorney for tenants anyway, so I don't think that this change will be a big deal.

The effective date of this statute is somewhat confusing. This session law states that "this section is effective August 1, 2023." However, another part of the statute says that it is effective January 1, 2024. Smart landlords who rent public housing units would go with the August 1, 2023 date. I certainly am.

504B.285, subd. 5: Combining Allegations: *Tenants are no longer required to pay rent, interest, and costs in order to get a trial.*

This statute conflicts with another statute that says tenants are required to pay back rent, interest, and cost in order to get a trial if the trial is scheduled more than 10 days out. Tenants often ask for trials, even if such a request is frivolous, as a way of getting additional time to move out. Instead, I would respectfully suggest that tenants simply ask their landlords. They may be surprised at the answer.

504B.291, subd. 1, Action to Recover: *If the landlord brings an eviction based on nonpayment of rent, tenants have the right to redeem the property by providing a written agency guarantee.*

Most landlords that I know would agree to this anyway, almost as a matter of course.

What follows are in my opinion the most substantial changes to landlord tenant law. There is a lot to unpack here.

504B.321: Complaint and Summons. *Notice requirement: Before bringing an eviction action alleging nonpayment of rent, a landlord must provide a notice to the tenant specifying:*

(1) the total amount due;

(2) a specific accounting of the amount of the total due from unpaid rent, late fees, and other charges under the lease;

(3) the name and address of the person authorized to receive rent and fees on behalf of the landlord;

(4) the following statement: "You have the right to seek legal help. If you can't afford a lawyer, free legal help may be available. Contact Legal Aid or visit www.LawHelpMN.org to know your rights and find your local Legal Aid office.";

(5) the following statement: "To apply for financial help, contact your local county or Tribal social services office, apply online at MNBenefits.mn.gov or call the United Way toll-free information line by dialing 2-1-1 or 800-543-7709"; and

(6) the following statement: "Your landlord can file an eviction case if you do not pay the total amount due or move out within 14 days from the date of this notice. Some local governments may have an eviction notice period longer than 14 days. The notice must be given at least 14 days prior to filing an eviction based on nonpayment. Local municipalities may require longer than 14 days advance notice.

IF A TENANT REQUESTS A TRIAL, THE COURT MAY NOT REQUIRE THE TENANT TO POST BOND OR OTHER SECURITY UNLESS THE DATE OF THE TRIAL IS MORE THAN 10 DAYS AWAY.

As a general rule, landlords should have month-to-month leases, and only evict based on notice and holding over. But if the landlord decides to bring an eviction based on nonpayment of rent, the landlord should provide the requisite notice and attach that notice to the complaint. Most landlords that I represent would send such a notice anyway before bringing an eviction based on nonpayment.

Emergency assistance

Receipt of the notice is sufficient evidence of an emergency to qualify the tenant for emergency assistance from the county or another government authority. Further, the notice must be attached to the complaint.

This is actually good news for landlords, because sending a notice of nonpayment will help the tenant qualify for emergency assistance, assuming that they are otherwise eligible. If the landlord is more concerned about the money that the tenant owes and does not want to get rid of the tenant, then I would send the notice of nonpayment. However, if the landlord prefers to have the tenant leave, then I think I would give the requisite notice required under the lease.

Expedited evictions

To qualify for an expedited eviction, the tenant must engage in behavior that seriously endangers the safety of other residents or intentionally and seriously damages the property of the landlord or another tenant. Expedited hearings are limited only to those claims and cannot be combined with any additional claims, such as breach of lease, nonpayment of rent, or holding over.

If I were a landlord, I would not waste my time bringing an expedited eviction. The benefit that you get—a hearing within five to seven days—is far outweighed by the limitations, both in terms of the reasons you can bring an expedited eviction and the fact that you only get one shot at service. I have brought countless evictions and can remember only one time when the facts warranted bringing an expedited eviction—and we brought that eviction only because the city asked us to. And we got really lucky on service.

Required attachments to eviction complaint

An eviction complaint must: include a copy of the current written lease and any relevant lease addenda; include an accounting or statement listing the amounts of unpaid rent (if the eviction is based on unpaid rent); identify the specific clauses in the lease that have been violated (if the complaint alleges breach of lease); identify the conduct in question that constitutes a violation of 504B.171; attach a copy of the notice to vacate or notice to quit if alleging holding over; state in the complaint whether the tenancy is affected by a federal or state housing subsidy program through Sec. 8, the low income housing tax credit program, or any other similar program; and, if so, include the name of the agency that administers the housing subsidy program.

I can't speak for other attorneys who represent landlords, but I tend to do this anyway.

Dismissal and expungement of nonconforming complaint

If landlord files a complaint that does not comply, the court must dismiss and expunge the eviction from the tenant's record. However, if the complaint complies, the court administrator will issue a summons that contains additional resources for tenants.

Landlords who are *pro se*, and attorneys who represent landlords, should make sure to attach the required addenda to the eviction complaint, or the complaint will be dismissed and expunged. But even if the landlord files a nonconforming eviction complaint, I tend to think it still affords opportunities for settlement discussions with the tenant.

Additional requirements for affidavit of plaintiff

If filing an affidavit of plaintiff, the landlord must include that the landlord has communicated to the defendant that an eviction hearing has been sched-

uled, including the date, time, and place of the hearing specified in the summons, by a form of written communication that the plaintiff regularly uses to communicate with the defendant that includes a time and date stamp.

I don't understand the necessity of this statute, because the court administrator is already required to issue a summons with exactly the same information. If a landlord files an affidavit of plaintiff, the landlord should include the requisite language. If the landlord communicates what is required to the tenant by letter, I would put it in big, bold, all-capital letters "**DATE AND TIME STAMP**." And I would file that letter with the court to show compliance with the statute.

Tenant not required to post bond or other security to get a trial unless trial is more than 10 days away

If a tenant requests a trial, the court may not require the tenant to post bond or other security, unless the date of the trial is more than 10 days away. In that case, the court may order security in an amount deemed appropriate by the court. Further, when scheduling a trial, the court must select a date that allows for a fair, thorough, and timely adjudication of the merits of the case, including the complexity of the matter, the need for the parties to obtain discovery, the need for the parties to ensure the presence of witnesses, the opportunity for the defendant to seek legal counsel and raise affirmative defenses, and any extenuating factors enumerated under section 504B.171.

Some tenants request a trial thinking that it will get them more time. Tenants who have decided that they need more time to move out should simply ask the landlord—they may be very surprised by the results. From the landlord's perspective, I would request that trial be scheduled more than 10 days in advance so that the landlord (or landlord's attorney) can ask the court under the statute to require that the tenant post the requisite security.

Stay of writ of recovery

The court can stay the writ of recovery for up to seven days, unless the eviction is brought for nonpayment, illegal activity, serious endangerment, or intentional and serious property damage.

Currently, the writ of recovery can be stayed for up to seven days, regardless of why the eviction is brought. Under this statute, however, the writ cannot be stayed for evictions based on nonpayment, illegal activity, serious endangerment, or intentional and serious property damage.

As such, this is a boon to landlords—and attorneys representing landlords—who bring evictions for the reasons outlined in the statute. This statute will provide leverage to landlords to use in negotiating settlement agreements.

Appeals

If the defendant appeals, courts may order the defendant to pay a bond but cannot include back rent, late fees, disputed charges, or any other amount in excess of regular rent as it accrues each month.

This statute limits the authority of the court to require a tenant to pay a bond for more than the amount of monthly rent as it accrues if the tenant appeals. The law will have the effect of encouraging tenants to appeal as a way of getting more time. I suspect that attorneys who represent tenants will threaten appeals as a way of forcing a landlord to agree to a settlement agreement that the landlord might not otherwise agree to.

484.014: Expungement. *The court may order expungement if the interests of justice are not outweighed by the public's right to know about the eviction. A court will, without motion of either party, order expungement for the following additional reasons:*

(2) if the defendant prevailed on the merits;
(3) if the court dismissed the plaintiff's complaint for any reason;
(4) if the parties to the action have agreed to an expungement;
(5) three years after the eviction was ordered; or
(6) upon motion of a defendant, if the case is settled and the defendant fulfills the terms of the settlement.

An eviction filing is not accessible to the public until the court enters a final judgment on the matter.

(In an order dated August 8, 2023 [ADM 10 – 8050], however, the Minnesota Supreme Court abrogated the portion of the statute relating to eviction filings being nonpublic, presumably on separation of powers grounds, saying that "[e]viction records are public except as authorized by court rules or court order.")

This statute is both positive and negative for landlords. As a general rule, I do not encourage landlords to oppose expungement except in extraordinary circumstances. But both parties have to agree to expunge an eviction, and this may encourage more settlement discussions.

LEASES

504B.114: Pet Declawing and Vocalization Prohibited. *Landlords cannot refuse to rent to or require that a tenant have a pet declawed or devocalized. Landlords who do so will face a civil penalty of $1,000.*

My recommendation is that landlords should not allow pets, and if they do, they should comply thoroughly with this law. Where this will get really interesting is in the case of service or companion animals. Although a thorough discussion of service or companion animals is beyond the scope of this article, landlords are required to make a reasonable accommodation upon a showing by a tenant that the animal in question qualifies as a service or companion animal. If a tenant makes such a showing, the landlord should comply fully with this law.

504B.120: Prohibited Fees. *Landlords must disclose all non-optional fees on the first page of the lease agreement. Landlords must also disclose in the lease agreement whether utilities are or are not included in the rent. Landlords who fail to make those disclosures are liable to tenants for triple damages and reasonable attorney fees.*

Landlords should simply incorporate all fees into the amount of monthly rent, but make sure to thoroughly and accurately disclose what is included in the amount of monthly rent. If the landlord decides to charge non-optional fees to a tenant, I would comply thoroughly with this law, and disclose all non-optional fees on the first page of the lease.

504B.182: Initial and Final Inspections Required. *The landlord must notify the tenant of the right to request a move-in and move-out inspection. The move-in inspection must occur within 14 days, and the move-out inspection must not occur earlier than five days before the termination of the tenancy. However, with the agreement of the tenant, a landlord may provide photos or videos of a rental unit in lieu of the move-in inspection. If the tenant does not request*

a move-out inspection, the obligations of the landlord in that regard are discharged. The landlord and tenant may waive these inspection requirements only in accordance with the statute, but not in the lease. In other words, a provision in the lease that says the tenant waives the right to inspection is void.

The easiest way for a landlord to comply with this law is to disclose these inspection rights in the lease and have the tenant initial that paragraph. If the tenant waives either of these rights to a move-in or move-out inspection, that waiver should be in a writing that is separate from the lease.

Landlords should be aware that a malicious tenant could take advantage of the move-out inspection. More specifically, a unit might be in pristine condition when a landlord inspects before the tenant moves out, but after the landlord leaves and before the tenant moves out, the tenant can trash the place. In the old days, tenants used to do relatively benign things like cutting the copper piping out of the walls and selling it for scrap. However, these days, tenants who want to get back at their landlords sometimes pour concrete mix down the drains, let it dry, and then leave the water running when they vacate. This creates a huge mess for the landlord.

LANDLORDS CAN STILL ENTER RENTAL PREMISES WITHOUT NOTICE IN THE EVENT OF AN EMERGENCY—BUT SHOULD AVOID DOING SO IF POSSIBLE, AND ALWAYS MAKE AN EFFORT TO NOTIFY THE TENANT OF ENTRY IN WRITING.

504B.211: Right to Privacy. *The landlord must provide a residential tenant with 24 hours advance notice before entering the property and may only enter between the hours of 8:00 am and 8:00 pm. The landlord must provide the tenant with an anticipated time or window of time of entry. Although a tenant may agree to allow the landlord to enter sooner than 24 hours, the tenant cannot waive this right as a condition of entering into or maintaining the lease. The penalty is increased to $500 for each violation and reasonable attorney fees.*

Smart landlords should provide a tenant with a 24-hour notice of intent to enter, only enter for a reasonable business purpose, and provide a window of time for entry. This is the best business practice for landlords anyway, so the change should not be a big deal. Landlords can still enter without notice in the event of an emergency—but should avoid doing so if possible, and always make an effort to notify the tenant of entry in writing.

LANDLORDS

504B.161: Implied Covenant of Habitability (Temperature). *The landlord is required to supply or furnish heat at a minimum temperature of 68°F from October 1 through April 30. Like all covenants of habitability, this requirement cannot be waived by the tenant.*

Landlords should make sure to supply heat at a minimum temperature of 68°F from October 1 through April 30. Landlords, providing appropriate notice, should test the heating system in September and throughout the heating months to make sure that the requisite temperature is met.

504B.375: Unlawful Exclusion or Removal; 504B.381, subds. 1 and 5: *Tenants can seek emergency relief for the following items:*

(i) a serious infestation;
(ii) the loss of running water;
(iii) the loss of hot water;
(iv) the loss of heat;
(v) the loss of electricity;
(vi) the loss of sanitary facilities;
(vii) a nonfunctioning refrigerator;
(viii) if included in the lease, a nonfunctioning air conditioner;
(ix) if included in the lease, no functioning elevator;
(x) any conditions, services, or facilities that pose a serious and negative impact on health or safety; or
(xi) other essential services or facilities.

Tenants do not have to provide any particular proof that they have provided notice of necessary repairs to the landlord, and the filing fee is reduced to the amount required for a conciliation court complaint.

Landlords are required to provide most of these services anyway, but I would recommend making it clear in the lease what services the landlord is responsible for providing and maintaining. For example, I once helped a client who had in his lease that the rental premises currently had central air conditioning, but that the landlord was not responsible for repairing or maintaining that service.

It troubles me that tenants do not have to provide any particular proof that they provided notice to the landlord, because it raises the risk of rent escrow case filings that claim notice was given when in fact notice was never given. The reduced filing fee means that tenants have less skin in the game. Tenants would be wise to communicate with their landlords about repair issues and include the notice in their petition. If tenants notify the landlord about repair issues before filing a petition, they might actually get those issues resolved without having to go to court.

504B.135: Terminating Tenancy at Will. *When a tenant neglects or refuses to pay rent, the section authorizing the landlord to provide 14 days advance notice to quit is deleted.*

Landlords should only enter into month-to-month leases with tenants, unless there is a good reason for doing otherwise.

504B.144: Early Renewal of Lease. *If the lease is for a period of time longer than 10 months, a landlord must wait until at least six months from the expiration of the current lease before requiring a tenant to renew. The statute says that nothing prevents the landlord from waiting until closer to the date of expiration, but any attempt to waive this provision is contrary to public policy and void.*

Landlords should do the math, follow the statute, and not attempt to waive its provisions.

504B.171: Limitation on a Crime Free Drug Free Lease Provisions. *Conduct of a tenant, household member of the tenant, or a guest of the tenant that occurs off the premises or curtilage of the premises is not grounds for eviction unless (1) the conduct would constitute a crime of violence against another tenant, the tenant's guest, the landlord, or the landlord's employees, regardless of whether a charge was brought or condition contained or (2) the conduct results in a conviction of a crime of violence against a person unrelated to the premises.*

Criminal conduct away from the rental premises that does not harm another tenant, that tenant's guest, the landlord, or the landlord's property is not grounds for eviction. Landlords should evict based only on notice, and be extremely careful before bringing an eviction based on conduct constituting a crime of violence. Landlords would be wise to seek the advice of competent legal counsel before bringing an eviction on the grounds referenced in this statute.

New subsection(c) for cannabis. *Landlords can only prohibit consumption of cannabis products by smoking or vaping. The statute specifically says that landlords can prohibit tenants from consuming cannabis products "by combustion or vaporization of the product and inhalation of smoke, aerosol, or vapor from the product." Landlords cannot prohibit tenants from legally possessing cannabis but can be held liable for failing to enforce a lease that prohibits smoking and vaping cannabis.*

This puts landlords in a awkward position because, on the one hand, landlords have to prohibit the smoking or vaping of cannabis, but on the other hand can be held liable for failing to enforce a lease that prohibits such smoking and vaping. In other words, a tenant "who is injuriously affected or whose personal enjoyment is lessened by a nuisance" by the actions of a different tenant who is smoking or vaping cannabis can sue the landlord for "injunctive relief and the greater of the person's actual damages or a civil penalty of $500." The text in quotations is from Minn. Stat. §342.82.

Unscrupulous tenants may well take advantage of the language in the statute to sue landlords when what those tenants should do is call the police to report the nuisance and then notify the landlord. Again, communication is key—and tenants will be much better served by reporting a nuisance and suspected drug use to the proper authorities than by suing a landlord civilly. Even though the statute authorizes the affected tenant to obtain injunctive relief, I bet that the landlord will have difficulties proving the landlord's case.

504B.172: Recovery of Attorney Fees. *If the lease says that the prevailing party gets attorney fees and court costs under 549.02, the tenant does too if the tenant prevails.*

Under the legal principle that what is good for the goose is good for the gander, this makes a lot of sense. Tenants have been able to get attorney fees and court costs for a long time under a lease provision that gives the landlord the right to collect them, so I don't really see the purpose of this change.

504B.266: Termination of Lease upon Infirmity of Tenant. *If certain conditions are met, a tenant or "authorized" representative may terminate the lease by providing at least two months' written notice. This requirement cannot be waived.*

The tenant is responsible for paying rent and any damages that have occurred to the rental premises beyond ordinary wear and tear that might occur during the notice. Landlords should take note of this, and make sure that any notice received is written. I would recommend that, for purposes of this statute, landlords have the tenant appoint an agent in the lease to take charge of the tenant's personal property.

This statute is fairly similar to the termination of the lease upon the death of a tenant and will not come as a surprise to many landlords.

CONCLUSION

The key takeaways here are that landlords should only enter into month-to-month leases and evict based only on notice. Minnesota is a very tenant-friendly state these days, and the social climate in Minnesota definitely favors tenants.

What bothers me most about these changes is that they were enacted without consulting with a very important group of stakeholders: namely, property owners and landlords. Had that group been consulted, I think that the changes would have been a lot better, both for landlords and tenants.

I believe the effect of these changes will be to push smaller landlords—who might overlook a recent eviction, a felony criminal conviction, or other detrimental information—out of the rental market. I would challenge attorneys who represent tenants to answer the question: Do you want to deal with huge, behemoth, corporate landlords who will not overlook deficiencies in the application, and will not give a prospective tenant who has negative information on the rental application a chance?

As an attorney who represents landlords, I would much rather settle a case than litigate it to death. But that is where we are headed—and these laws are going to move us further in that direction.

Big, corporate landlords will have the resources to fight and will be less likely to settle an eviction case on terms that are objectively favorable to the defendant. Is that really what attorneys who represent tenants want? ▲

TIM BALAND is an attorney who represents landlords and also handles real estate and bankruptcy issues. Tim is a Rule 114 Qualified Neutral. When he is not practicing law, he enjoys gardening, nonmotorized water sports, and spending time with his wife and son.

THE LAWYER AS PRIVATE INVESTIGATOR

Parsing new ABA Model Rule 1.16(a)– Inquiring Into and Assessing Representations

BY WILLIAM J. WERNZ ✉ *wernz.william@dorseyalumni.com*

In August 2023, the ABA adopted a new first sentence for Rule 1.16(a) of the Model Rules of Professional Conduct, requiring lawyers to "inquire into and assess the facts and circumstances of each representation [of a client] to determine whether the lawyer may accept or continue the representation." The amendment's proponents stated, "This Resolution also will demonstrate to the U.S. Government... and the public that the profession takes seriously its obligations to avoid becoming involved in a client's criminal and fraudulent conduct, including money laundering, terrorist financing, human trafficking and human rights violations, tax related crimes, sanctions evasion, and other illicit activity."

The ABA also adopted amendments to two Comments to Model Rule 1.16. Comment [1] provides guidance regarding Rule 1.16(a). Comment [2] identifies factors for assessing "the risk that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud." The ABA adopted the amendments to Rule 1.16 and its Comments to preempt possible federal legislation that might well burden lawyers heavily.

The ABA Standing Committee on Ethics and Professional Responsibility, which proposed the amendments, stated, "These are not new obligations. Lawyers already perform these inquiries and assessments every day to meet their ethical requirements."[1]

This article will examine evidence that supports and weighs against this statement. This article will also examine hypotheticals in several areas of the practice of law, to show how the amendments could create new obligations and important uncertainties.

ABA Model Rules are not the law until they are adopted in a governing jurisdiction. However, the Model Rules provide the basic template for ethics rules in all U.S. jurisdictions. In Minnesota, the MSBA, the Lawyers Board, and the Office of Lawyers Professional Responsibility will consider whether to recommend that the Minnesota Supreme Court add Model Rule 1.16(a) to the Minnesota Rules of Professional Conduct.[2] Minnesota typically adopts Model Rules amendments unless it finds a strong reason for not doing so. However, the Minnesota authorities have occasionally not submitted any recommendation to the Court, because they regarded a Model Rule amendment as addressing a situation that did not exist in Minnesota to any significant degree.

Will the ABA's action preempt federal legislation?

About 20 years ago, after the frauds and implosions of prominent entities like Enron and Arthur Andersen, courts and commentators asked, "Where were the lawyers?" To prevent future frauds, the Congress enacted the Sarbanes-Oxley Act. The Securities & Exchange Commission adopted rules requiring reporting by lawyers for public companies of certain insider misconduct. The ABA amended Model Rules 1.6 (Confidentiality) and 1.13 (Organization as Client) to permit and in some instances require lawyers to report fraud and other misconduct by clients and their representatives. With several variations, in 2005 Minnesota followed the ABA's lead. On the whole, these ethics rules amendments served their purposes of preventing more onerous federal lawmaking and enhancing lawyers' duties and permissions to deal more effectively with insider corporate misconduct.

How likely is it that, with or without the Model Rule amendments, the U.S. Congress would enact legislation burdening American lawyers with responsibilities to prevent money laundering, terrorist financing, etc.? The ABA Report supporting the proposed amendments contended that, without the amendments, there was a substantial likelihood of legislation. If this contention is persuasive, how likely is it that the amendments will persuade the Congress that legislation is no longer needed?

If the amendments did not add any "new obligations," why would federal legislators desist from imposing genuinely new obligations on lawyers? If money laundering through lawyers is a serious problem, how would mere codification of existing obligations affect the perceived need for legislation?

Do the amendments create new obligations? Reasons for answering "no."

Twenty-some years ago, a leading legal ethics expert, Peter Jarvis, testified that "because of the duty of loyalty, lawyers 'tend to very strongly believe [their] clients' and, at least in the civil bar, lawyers 'tend not, by and large, to be immediately suspicious of [clients] if they ask us to do things.'" The opposing expert agreed that lawyers could give clients the benefit of the doubt regarding veracity of client statements.[3] In the last few decades, however, lawyers' due diligence duties regarding their clients have increased, as three examples will illustrate.

First, Rule 11, R. Civ. Proc., has long required civil litigators to certify, after a reasonable inquiry, that filings have a reasonable basis in fact and law. Rule 3.3, R. Prof. Conduct is a partially parallel ethics rule. These rules apply, however, only to litigation; and money laundering, crime, and fraud are more likely to occur in transactional matters.

Second, malpractice insurers have counseled their insureds to scrutinize clients, because "unworthy clients" are arguably the greatest cause of claims and losses. Enforcement of Rule 5.1, R. Prof. Conduct, covering partners' supervisory responsibilities, has also increased in recent years. Many law firms have new business committees to screen new clients and new matters. The committees often do background checks on new clients. The committees often reject proposed clients who give evidence of being dishonest, disorganized, litigious, pugnacious, or lacking experience for the underlying matter. Internet scammers deserve special scrutiny. The committees also check conflicts of interest. But they generally focus on new clients rather than ongoing representations, and on risks to law firms rather than to the public. In addition, a law firm's failure to prudently screen new client matters does not, by itself, create a basis for attorney discipline unless the failure relates to a matter covered by the MRPC, such as conflicts of interest.

Third, the duty of competence has expanded. Rule 1.1, Comment 5 states, "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem...." However, this Comment focuses on problem-solving, not on the bona fides of the client and, in Minnesota, Comments are not adopted by the Court.

Do the amendments create new obligations? Reasons for answering "yes."

Words matter. The Terminology section of the rules provides three strong indicators that Model Rule 1.16(a) would transform the rules. The duty to "inquire" appears only twice in the current rules, and not as a general duty; a synonym, "ascertain," appears more frequently, but not as a general duty. Many duties under the rules depend on whether a lawyer "knows" relevant facts, but the rules do not generally require a lawyer to make inquiries to gain actual knowledge. Indeed both the rules and the common law require lawyers to resolve doubts in the client's favor. The most frequent characterization in the rules is that a lawyer must act "reasonably," but the amendments do not require only *reasonable* inquiry and assessment.

First, "reasonably should know" denotes when "a lawyer of reasonable prudence and competence would ascertain the matter in question." The meaning of "ascertain" is very similar to the operative phrase of new Model Rule 1.16(a), "inquire into and assess." The phrase "reasonably should know" appears only 18 times in the MRPC and Comments. None of these usages creates any general obligation to "ascertain." Almost all usages of "reasonably should know" relate to duties to non-clients—such as whether a non-client understands the lawyer's role, whether documents were inadvertently transmitted, and whether an employee is a disbarred or suspended lawyer. In short, current rules only infrequently and in limited circumstances expressly require a lawyer to "ascertain"—that is, to "inquire into and assess."

Synonyms for "ascertain" are rarely found in the rules. "Investigate" does not appear at all. The word "inquiry" does not appear as a lawyer's duty. "Inquiry" appears as a lawyer's duty just twice, both times in comments: (1) Rule 1.1 cmt. 5, noted above; and (2) Rule 3.3 cmt. 3, stating that a lawyer should not make a representation to a tribunal as of the lawyer's own knowledge without actual knowledge or a belief based on diligent inquiry.

Second, the Terminology section defines "knows" (and related words) as denoting "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Rule 1.0(g). "Know," "knows," "knowledge," and "knowingly" appear 174 times in the rules. Many of the rules' obligations and prohibitions require that the attorney "know" the fact in question. An attorney cannot turn a "blind eye" to avoid knowledge, but a blind-eye prohibition is readily distinguishable from an obligation to "inquire into and assess." The amendments' broad requirement that lawyers gain knowledge on subjects relating to the MRPC before and during every representation represents a substantial addition beyond current requirements that lawyers act on what they know or what is so obvious they may be deemed to know it.

Regarding a lawyer's knowledge, it is also important that the rules and Minnesota common law recognize that lawyers have a duty to resolve doubts in favor of clients. "A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact.... [A]lthough a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood." Rule 3.3 cmt. 8. In a leading case, a non-client plaintiff claimed a lawyer had a legal duty to independently investigate the assertions of his clients, to determine whether those assertions were true, and to communicate that information to the adversary. The Court firmly rejected that idea: "We cannot recognize such a duty. It would undermine the attorney's duty to zealously represent the client and resolve all doubts in favor of the client. It would also undermine the trust between the attorney and client, which is an essential element of the relationship."[4] How does a lawyer whose duty is to "resolve all doubts in favor of the client" also independently and objectively "inquire into" and "assess" the facts of the matter?

Third, the word "reasonable" does not qualify the new duties to inquire into and assess. This omission is intrinsically important and belies the claim the amendments did not create new obligations. The most common standard in the rules is that lawyers must adhere to what is "reasonable." "Reasonable" and "reasonably" denote "the conduct of a reasonably prudent and competent lawyer." Rule 1.0(i). These words appear hundreds of times in the rules. Good, experienced lawyers can proceed with some confidence by doing what their counterparts customarily do. The dominance of the standard of reasonableness in the rules is also conservative, because lawyers' habits change only gradually. If the drafters wanted to avoid creating new obligations, they should have followed the standard vocabulary of the rules and tied the obligation to inquire and assess to the prevailing practices of reasonably prudent and competent lawyers.

What would be the impact of a duty to "inquire into and assess" client representations?

Amended Comment 1 to Rule 1.16 provides an example of a trigger for the duty to inquire and assess: "during the course of a representation, a new party is named or a new entity becomes involved." This example, and the broad language of Rule 1.16(a), show that the rule is not restricted to money-laundering situations, nor to fraud prevention. Rather, the obligation to inquire and assess applies to all sorts of ethics obligations, such as potential conflicts of interest arising when a new party becomes involved in a representation.

Other hypotheticals may be analyzed to try to understand how the amendments might apply. Here it bears repeating that, because the duties to inquire and assess are not qualified by "reasonable" or "reasonably," the hypotheticals cannot be answered by citing the prevailing practices of good lawyers as benchmarks.

A typical tax preparer, whether a lawyer or accountant, asks a taxpayer to acknowledge that the preparer is relying entirely on the taxpayer for the accuracy of relevant information. Under Rule 1.16(a), however, a lawyer-preparer has duties to "inquire into and assess the facts and circumstances" of each tax representation, and to continue to perform those duties throughout the representation. What, exactly, would these new duties require of the lawyer-preparer? If more is required of a lawyer than of another preparer—and of the lawyer's client in responding to and paying for the lawyer's inquiries and assessments—will the lawyer be at a competitive disadvantage?

A criminal defense attorney in some cases deliberately does not ask a client questions about certain important matters. The attorney intends not to know too much, in some cases to avoid adducing perjured testimony. How would a new duty to inquire and assess affect the attorney's customary mode of practice?

■ Cassie, a plaintiff's personal injury lawyer, obtains a doctor's permanent injury rating for a client, Harmon. Two months later, while Cassie is negotiating a settlement with the insurer, Harmon makes a total recovery but does not inform Cassie. Cassie does not inquire about Harmon's condition. A large settlement is obtained. The insurer learns of Harmon's recovery and

files a complaint with OLPR, alleging that Cassie violated Rule 1.16(a). The insurer also sues Cassie for abetting a fraud. Citing Rule 1.16(a) as "some evidence" of a lawyer's duty, the insurer's expert opines that Cassie should have inquired whether Harmon had a recovery and then disclosed it.

■ Anu, a business lawyer, represents several members of the Owen family, in the dissolution of Owen, Inc. Initially, it appears that the Owens have harmonious interests. Due to family developments unknown to Anu, these interests come to diverge and conflict, but the Owens do not inform Anu. After the matter is concluded, one of the Owens files an ethics complaint against Anu, alleging that Anu did not periodically inquire into and assess whether conflicts had arisen. Did Anu violate amended Rule 1.16(a)?

■ Fred was retained to appeal a civil judgment. Fred relied entirely on the trial record and the law. After the briefs were filed, but before oral argument, a development occurred that, if disclosed, would affect the remedies available to the appellate court. The appellant knew of the development and would have disclosed it to Fred if Fred had asked, but Fred did not. Did Fred violate Rule 1.16(a)?

■ Nancy, a family lawyer representing H, received from H an appraisal of a business operated by H. The appraisal appeared to have been prepared by XYZ Appraisals, a reputable firm. In fact, H altered the XYZ appraisal. Nancy did not verify the authenticity of the appraisal by contacting XYZ. Nancy presented the appraisal to H's spouse and later filed it with the court in support of a marital termination agreement. Did Nancy violate Rule 1.16(a) by not inquiring into and assessing the appraisal?

How will these questions be answered? The author has rendered ethics opinions for 42 years but cannot confidently opine on how OLPR or courts would answer the questions above. Are the customs and practices of good lawyers irrelevant? Many new rules initially have some measure of uncertainty, but the broad duty to "inquire and assess"—especially without any qualification of reasonableness—creates extraordinary uncertainty.

Whither Minnesota?

Should Minnesota adopt a rule whose purpose is to thwart money laundering but whose application extends far beyond that purpose? Minnesota has less than a handful of reported cases of lawyers involved in money laundering. It seems unlikely that the Congress would legislate or not based on whether certain states where lawyer involvement in money laundering is negligible adopt Rule 1.16(a).

Putting money-laundering concerns aside, should Minnesota adopt Rule 1.16(a) based on the assertion that the new rule and its Comments make explicit obligations that are already found under existing rules?

Consideration of amended Rule 1.16(a) and its Comments should also cause consideration of Rule 1.16(b)(2) and Rule 1.2 cmt. 13. Rule 1.16(b)(2) provides, "[A] lawyer may withdraw from representing a client if:... (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."[5] The ABA rejected a proposal to make the withdrawal duty mandatory in these circumstances. In the author's opinion, rejecting this proposal was a clear mistake. "May withdraw" implies "may continue." It is difficult to conjure circumstances in which it would be prudent or ethical to continue providing services to a willful client in what very likely is a criminal or fraudulent enterprise.

Comment 13 to Rule 1.2 has an error that should be corrected whenever the next petition to amend the MRPC is filed. The error is attempting to add an obligation via a comment, when a basic principle is that "Comments do not add obligations to Rules...." SCOPE [14]. Rule 1.2(d) forbids a lawyer to assist a client when the lawyer "knows" the client's conduct is criminal or fraudulent. Comment 13 interprets Rule 1.2 to apply when a lawyer "knows *or reasonably should know*" that the lawyer's assistance is improper. The italicized words represent an attempt to use a comment to add an obligation to a rule.

Conclusion

In recent decades the traditional principle that lawyer may rely on clients for the facts of a matter has become subject to a growing number of qualifications. The pace of this evolution has been slow and gradual. Those considering the present amendments should ask several questions. Do the amendments involve a substantial leap rather than step-by-step evolution? Is omission of the frequent qualifier "reasonable" prudent? Does the rationale of preempting federal legislation apply in Minnesota? And if not, are there good reasons for adopting the amendments? Would adoption of the amendments create fundamental uncertainties for practicing lawyers? ▲

NOTES

[1] *Revised Report to the House of Delegates* (Aug. 2023) at 6.

[2] The Court declines to adopt Comments but gives permission for the Comments to be published with the rules.

[3] *United States v. Kellington,* 217 F.3d 1084, 1190 (9th Cir. 2000). *See also United States v. Wuliger,* 981 F.2d 1497, 1505 (6th Cir. 1992), cert. denied, 510 U.S. 1191 (1994) ("Although an attorney must not turn a blind eye to the obvious, he should be able to give his clients the benefit of the doubt.").

[4] *L & H Airco, Inc. v. Rapistan Corp.,* 446 N.W.2d 372, 379 (Minn. 1989).

[5] Rule 1.2(d) *requires* withdrawal if the lawyer "knows" the client's conduct is criminal or fraudulent. The difference between "reasonably believes" and "knows" can be very slender in real-world settings.

WILLIAM J. WERNZ is the author of the online legal treatise Minnesota Legal Ethics. He has been a member of the Board on Judicial Standards and has also served as Dorsey & Whitney's ethics counsel and as director of the Office of Lawyers Professional Responsibility.

THE CHANGING WORKPLACE

New and revised 2023 laws affecting employers and employees

BY BETH L. LACANNE AND SHANNON E. ECKMAN

blacanne@bassford.com seckman@bassford.com

The 2023 Minnesota legislative session was a pivotal one for laws impacting Minnesota's workplaces. In particular, the session saw a wave of laws affecting employees' rights and well-being. At the close of the session, Minnesota chose to join the ranks of other states with paid medical leave and sick and safe time requirements. Existing protections for pregnant and lactating employees were expanded. And while the law related to protections for pregnant and lactating mothers is not new, the paid medical leave law and sick and safe time law have thrust many employers into uncharted waters.

Employers, including law firms, must apprise themselves of the 2023 legislative changes. Those who do not adjust existing policies and procedures may be caught up in a net of administrative enforcement and litigation. This article provides a high-level summary of the three most impactful 2023 legislative changes affecting employee well-being in the workplace.[1]

EXPANDED PROTECTIONS FOR LACTATING AND PREGNANT EMPLOYEES

When Minn. Stat. §181.939 was promulgated in 1998, it provided limited protections to lactating mothers and did not contemplate protections for pregnant employees.[2] The statute remained largely unchanged until 2021, when the Legislature added a provision requiring accommodations for pregnant employees.[3] This year, additional substantive changes were made. The amendments went into effect on July 1, 2023.

LACTATING EMPLOYEES

The 2023 amendments to section 181.939 retained the requirement that every employer, even those with only one employee, provide reasonable break times and a private space for lactating employees to express breast milk. The space must be shielded from view and free from intrusions but cannot be a bathroom or toilet stall. Employers may be relieved of their obligations to provide a space so long as they have made a reasonable effort to provide a private room or location.

One of the most significant changes to section 181.939 is the expansion of to whom the statute applies, and for how long. Specifically, every employee expressing breast milk must be given breaks, regardless of whether they are expressing breast milk for their own child or another. Additionally, the employee can continue to do so beyond the first year of a child's life. Equally significant is the deletion of language that previously exempted an employer from providing break time if it unduly disrupted business operations. Now breaks must be granted even if they might unduly disrupt business operations.

PREGNANT EMPLOYEES

As of January 1, 2022, section 181.939 required reasonable accommodations for health conditions related to pregnancy or childbirth. When it was first effective, the pregnancy-related accommodations requirement only applied to employers with 15 or more employees. The 2023 amendment to section 181.939 expands the requirement to all employers with one or more employees—in other words, to nearly every employer.

Because the pregnancy-related accommodations provision is relatively new, it is worth recapping. When an employee makes a pregnancy-related accommodation request, the employer and employee must engage in an interactive process akin to the one required for disability-related accommodation requests. Generally, accommodations should be made unless an accommodation would create an undue hardship. However, a claim of undue hardship is not permitted if an accommodation request is for "(1) more frequent or longer restroom, food, and water breaks; (2) seating; and (3) limits on lifting over 20 pounds."[4] Importantly, an employee may not be entitled to the accommodation of their choosing. Notably, the law does not require an employer to create a position for the requesting employee or promote the requesting employee. Additionally, an employer is not required to discharge or transfer another employee in order to place the requesting employee in their preferred accommodation.

NOTICE AND ANTI-RETALIATION

An entirely new subdivision added to section 181.939 requires employers to provide employees notice of their rights related to expressing breast milk and pregnancy accommodations.[5] Notice must be provided when an employee is hired and anytime an employee asks about or requests parental leave. The notice must be provided in English and the language the employee identifies as their primary language. Additionally, if an employer provides employee handbooks to its employees, the handbook must include information regarding the rights and remedies provided under section 181.939.

The amendment to section 181.939 also expanded the anti-retaliation provision to include a prohibition on discharging, disciplining, penalizing, interfering with, threatening, coercing, or discriminating against employees invoking their rights under section 181.939.

PARALLEL FEDERAL STATUTES

Another important consideration for employers is recent federal legislation that closely parallels section 181.939. The Providing Urgent Maternal Protections for Lactating Mothers (PUMP) Act has been in effect since December 2022, but enforcement was stayed until April 28, 2023.[6] The PUMP Act expanded existing requirements to provide time and space for lactating mothers to include all employees covered by the Fair Labor Standards Act (FLSA).[7] As a result, nearly all employers, even those with fewer than 50 employees, must provide break time and space. The PUMP Act also added a monetary remedy for violations.

Although the PUMP Act and section 181.939 are very similar, there are some important differences. For example, while both apply to essentially all employers, under the PUMP Act, employers with fewer than 50 employees may be exempted from providing break time and space if doing so would result in an undue hardship. As noted above, the 2023 amendment to section 181.939 deleted similar exempting language in relation to the break-time requirement. Additionally, the PUMP Act limits the time and space requirement to one year after giving birth, whereas section 181.939 no longer has a time limit.

The Pregnant Workers Fairness Act (PWFA) went into effect on June 27, 2023.[8] Like section 181.939, the PWFA requires employers to provide reasonable accommodations to a worker's known limitations related to pregnancy, childbirth, or related medical conditions. The PWFA, like section 181.939, does not require an accommodation if it creates an undue hardship. Unlike section 181.939, which applies to all employees working in Minnesota, the PWFA only applies to employers with 15 or more employees.

Regardless of differences across these laws, employers must comply with the most stringent requirements of all statutes to ensure compliance with all.

CHARTING A COURSE FOR THE EARNED SICK AND SAFE LEAVE LAW

Minnesota's Earned Sick and Safe Leave (ESSL) law goes into effect on January 1, 2024.[9] As of that date, nearly every employer is required to provide paid sick and safe time to most full- and part-time employees, including temporary employees, who work at least 80 hours a year in Minnesota. The ESSL does not apply to independent contractors and most airline flight decks and cabin crews.

The ESSL permits an employee to use accrued sick and safe time as soon as it is earned for themselves or for a "family member," the definition of which is expansive, including more than just parents and children.[10] Grandparents, nieces, nephews, aunts, and uncles fall within the definition of "family member;" even individuals who have no genetic relationship to the employee may qualify as family members. Additionally, an employee may designate one individual each year to be a family member.

The permitted uses of sick and safe time fall into three general categories: mental or physical health, safety, and weather or other public emergencies.[11] In the mental and physical health category, it may be used for the employee's or a family member's mental, physical, or other health condition; the care, diagnosis, or treatment of a mental, physical, or other health condition; or preventative care.

In the safety category, sick and safe time may be used for absences related to the potential transmission of communicable diseases (such as covid) or where the employee or employee's family members have been the victim of domestic violence, sexual assault, or stalking. In cases involving victims, sick and safe time may be used to seek medical or psychological care, to obtain services from a victim services organization, to relocate/move, or to seek legal advice or take legal action.

In the final category, sick and safe time may be used due to closures caused by weather or other public emergencies, including the employee's place of business or the employee's family member's school or place of care.

While sick and safe time is being used, the employer must maintain the employee's insurance coverage, and the employee must pay any portion they normally pay. An employee who has used sick and safe time must be paid the same pay, including any pay changes, upon their return and must retain their pre-leave benefits and seniority.

SAFEGUARDS FROM ABUSE

The ESSL provides some safeguards to mitigate the potential for misuse of the new law or disruption to an employer's operations. First, an employer may require advance notice of an employee's intent to use sick and safe time.[12] However, an employer may only require advance notice if it has a written policy setting forth the procedure for providing notice and a written copy of the policy has been provided to its employees. If the need is foreseeable (a scheduled appointment or surgery, for example), an employer may require up to seven days' notice. If the need is unforeseeable, notice must be given as soon as practicable.

Second, in cases where an employee has used sick and safe time for more than three consecutive days, an employer may re-

quire reasonable documentation to establish that the absence is for a qualifying purpose.[13] What constitutes "reasonable documentation" depends on why sick and safe time has been used. Where the purpose is related to mental or physical conditions or the transmission of communicable diseases, reasonable documentation includes a signed statement by a health care professional stating the need for the employee's or employee's family member's use of sick and safe time. A written statement by the employee is sufficient if a health care professional was not seen, or if the employee cannot get a written statement from a health care professional in a timely manner or without added expense.

If the employee uses sick and safe time due to domestic violence, sexual assault, or stalking, "a court record or documentation signed by a volunteer or employee of a victims services organization, an attorney, a police officer, or an antiviolence counselor" is reasonable documentation.[14]

An employer's right to documentation is not unlimited. Specifically, the employer cannot require information regarding the details of the medical condition or the domestic abuse, sexual assault, or stalking that gave rise to the need to use sick and safe time. Finally, an employee's written statement may be in the employee's first language and does not need to be notarized.

ACCRUAL

Accrual begins as soon as employment starts. For every 30 hours worked, an employee is entitled to accrue a minimum of one hour of sick and safe time. An employee can accrue no more than 48 hours per year unless their employer agrees to a higher amount. Employees must be allowed to carry over unused time into the following year, but they cannot exceed 80 hours at any point unless their employer agrees to a higher amount.

In lieu of carrying over unused sick and safe time, an employer may front-load all of an employee's allotment at the start of the year. It can be front-loaded in two ways. If the employer pays out unused sick and safe time at the end of the year, the employer must front-load at least 48 hours of sick and safe time at the beginning of the next year. If the employer does not pay out unused time, then the employer must front-load 80 hours.

Employees exempt from overtime under the FLSA[15] are deemed to work 40 hours per week for purposes of accruing sick and safe time unless they normally work less than 40 hours. In that case, accrual is calculated based on their normal number of hours.

REQUIRED NOTICE AND EARNING STATEMENTS

Employers are required to notify their employees that they are entitled to sick and safe time.[16] The notice must detail the amount of sick and safe time, the accrual year, the terms of the ESSL, and the form the employees must provide to give notice of their intent to use the benefit. Additionally, the notice must explain that retaliation is prohibited and that an employee can file a complaint or bring a lawsuit if sick and safe time is denied or if the employee is retaliated against for using or requesting it.

The ESSL serves as a good reminder to employers regarding the requirements for earning statements and employee notices found in Minn. Stat. §181.032, which was amended contemporaneously with the promulgation of the ESSL. In addition to the previously required information, earning statements must now also include the total number of sick and safe time hours accrued and available, as well as the hours used during the pay period. The ESSL will also require adjustments to the written employment notice for employers who did not previously provide paid sick and safe time. Since mid-2019, section 181.032 has required employers to provide new employees with a written notice containing specific information and obtain the employee's signature on the notice. The required information on the written notice includes sick and safe time, its accrual, and terms of its use.

SEPARATION FROM EMPLOYMENT, PREEMPTION, AND ANTI-RETALIATION

An employee is not entitled to payment of unused sick and safe time when they separate from employment, but if the employee is rehired within 180 days, their accrued sick and safe time balance must be reinstated. Accruals also remain unaffected when there is a sale or transfer of the business and the employee remains employed or is rehired within 30 days by the successor employer.

If an employer already provides the equivalent of paid sick and safe time under an existing policy, the employer does not need to provide additional time, so long as the policy meets or exceeds the minimum standards and requirements under the ESSL and does not conflict with the ESSL.[17] Additionally, the ESSL does not preempt, limit, or otherwise affect other laws, regulations, policies, or standards that exceed the minimum standards and requirements under the ESSL.[18]

The ESSL prohibits employers from retaliating against employees who use or request to use their sick and safe time. This anti-retaliation provision includes a prohibition on the use of absence policies to count sick and safe time as an absence that may result in retaliation or adverse employment action. Additionally, employers cannot retaliate against employees who inform other employees of their ESSL rights, who file a complaint or lawsuit related to sick and safe time, or who participate in an investigation, proceeding, or hearing.

MINNESOTA'S PAID FAMILY MEDICAL LEAVE ACT

The paid family medical leave adopted by the 2023 Legislature is the most expansive change to Minnesota employment law in recent years. Though eligible employees in Minnesota cannot take leave until January 1, 2026, here are some key details to know and plan for.[19]

QUALIFICATIONS FOR LEAVE

Paid family medical leave can be used for serious medical conditions. A serious medical condition is defined as "physical or mental illness, injury, impairment, condition or substance use disorder" that "involves inpatient or outpatient care or continuing treatment or supervision by a health care provider involving various types of incapacity for a specified period of time." This definition is similar to the one contained in the federal Family Medical Leave Act, but encompasses more circumstances, such as caring for a family member, bonding leave, safety leave, and qualifying exigency leave (military).

The most common type of leave is surrounding the time of a child's birth, adoption, or foster care. This bonding leave must be used within the first 12 months of that event. Another example is caregiving for a family member's serious physical or mental illness.

ELIGIBILITY AND LEAVE BENEFITS

For employers, the new law applies to all regardless of size or number of employees located within the state. An employee is eligible for this leave if:

(1) the requested leave time is in the employee's benefit year;
(2) the employee is unable to perform work due to the type of leave (serious health condition, bonding, caregiving, safety, qualifying exigency leave);
(3) the employee has earned at least 5.3 percent of the state's average annual wage; and
(4) the employee is able to fulfill the certification requirements.

The paid family and medical leave program provides partial wage replacement for eligible employees for 12 weeks of paid leave for their own serious health conditions and up to 12 weeks paid leave for bonding, caregiving, safety, or qualifying exigency (military) leave. Any single event is capped at 12 weeks of leave, and there is a cap per employee of 20 weeks in aggregate during a 52-week period. However, leave does not have to be taken consecutively. For example, if an eligible employee needs to be away for regular health treatments (such as chemotherapy treatment), leave can be taken intermittently within a 12-month period, but it is still limited in total to 480 hours (the equivalent of 12 weeks).

To receive paid leave, employees will apply to the state and process their claim up to 60 days before leave. The Department of Employment and Economic Development (DEED) is charged with administering the program through its new Family and Medical Insurance Division.

COMPENSATION

Compensation of eligible employees is based on both the employee's wage and the state average weekly wage. Eligible employees making less than 50 percent of the state's average wage will receive 90 percent of their regular pay while on leave. Those who earn more than the state average will receive 55 percent of their regular pay while on leave. Employees who earn more than half of the state average weekly pay but less than the average will receive 66 percent of their regular pay. Employers can "top off" or "round up" wages, but this is not required.

FUNDING THE PROGRAM

The benefits for eligible employees are funded by the state surplus ($670 million) and then the state family and medical benefit insurance fund. The state and employers will share costs. Employers pay quarterly premiums based on the taxable wages paid by the employer to eligible employees. This premium is a payroll tax, beginning at 0.7 percent and capped at 1.2 percent. For companies with fewer than 30 workers, costs are lowered. Of course, any employer could opt out of the program if it offers paid leave benefits that meet or exceed the state program standards. Those who are self-employed or independent contractors can buy into the program.

NEXT STEPS

The infrastructure for this benefits program will ramp up to the effective date of January 1, 2026, when employers begin paying and employees can begin taking paid leave under this statute. Until then, employers can use this time to understand the new requirements, make any needed policy adjustments, and arrange for the implementation of this program. Importantly, the statute provides a private right of action for employees to enforce compliance with the law in either federal or state court. The statute also has an attorneys'-fees-and-costs hook. Violations are subject to a penalty of $1,000 to $10,000 per violation, paid to the employee. Considering these enforcement mechanisms, employers are bracing for the changes now.

Conclusion

Although employers may encounter some rough waters as the recent legislative changes are effectuated and implemented, properly preparing for the changes and adjusting existing policies and procedures will help them steer clear of hazards. Likewise, employees will be navigating their new rights and protections. Employers' and employees' awareness and understanding of the legislative changes are important to the well-being of Minnesota's workforce, and ultimately the retention of healthier, more productive employees. ▲

BETH L. LACANNE is an attorney at Bassford Remele, where she advises clients regarding employment matters, including litigation and investigations, professional liability, and general liability. Beth is licensed in Minnesota and Wisconsin.

SHANNON E. ECKMAN is a litigator at Bassford Remele, focusing her practice in the areas of employment litigation/advice, professional liability, and general liability.

NOTES

[1] Nothing in this article should be relied upon as legal advice from Bassford Remele, P.A. In addition, nothing herein creates an attorney-client relationship between Bassford Remele, P.A. and any reader of these materials.
[2] Minn. Stat. §181.939 (1998).
[3] Minn. Stat. §181.939, subd. 2 (2022).
[4] *Id.*
[5] Minn. Stat. §181.939, subd. 3.
[6] 28 U.S.C. §218d
[7] The FLSA regulates minimum wage, overtime pay, hours worked, recordkeeping, and child labor. *See generally*, 29 U.S.C. 201, *et seq.*
[8] 42 U.S.C. Ch. 21G
[9] Minn. Stat. §181.9445, *et seq.*
[10] Minn. Stat. §181.9445, subd. 7.
[11] Minn. Stat. §181.9447, subd. 1.
[12] Minn. Stat. §181.9447, subd. 2.
[13] Minn. Stat. §181.9447, subd. 3.
[14] Minn. Stat. §181.9447, subd. 3.
[15] Within the FLSA, there are exemptions related to minimum wage and overtime pay for certain types of employees, such as executive, administrative, professional, and outside sales employees. *See generally*, 29 U.S.C. 201, *et seq.* Whether an employee is exempt is beyond the scope of this article.
[16] Minn. Stat. §181.9447, subd. 2.
[17] Minn. Stat. §181.9448, subd 1.
[18] Employers with employees who work in Minneapolis, St. Paul, Bloomington, or Duluth should be aware that each city has its own paid sick and safe time ordinance. However, a comparison of the ordinances to the ESSL is beyond the scope of this article.
[19] Minn. Stat. §268B.01, *et seq.*

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Construction law: updated indemnification and wage theft rule

BY JEVON BINDMAN, ANNA BARTON, AND CARLY JOHNSON

jevon.bindman@maslon.com anna.barton@maslon.com carly.johnson@maslon.com

The 2023 legislative session spelled many changes for the construction industry, from deeming indemnification agreements in connection with public improvements unenforceable to creating upstream liability for contractors and potentially owners when subcontractors engage in wage theft.

Indemnification agreements in public contracts; subcontractor protections

As of May 25, 2023, indemnification agreements are unenforceable when contained in, or executed in connection with, a public improvement contract unless an exception applies. Indemnification agreements are agreements to "indemnify, defend, or hold harmless" another party against liability when someone is hurt or property is damaged.[1]

Indemnification agreements in public construction contracts are now unenforceable unless (1) the underlying injury or damage was caused by negligence or a wrongful act or omission, including breach of contract by the promisor or their independent contractors, agents, employees, or delegatees; or (2) an owner, responsible party, or government entity "agrees to indemnify a contractor directly or through another contractor with respect to strict liability under environmental laws."[2] This new statutory language for public projects parallels already-existing laws governing construction contracts in general.

The updated law also prohibits public building or construction contracts from requiring a party to provide insurance coverage to another party for their own negligence, intentional acts, or omissions.[3] This does not prohibit a party from requiring workers' compensation insurance, performance or payment bonds, builder's risk policies, or insurance for the other party's vicarious liability or negligent acts or omissions (including that of their independent contractors, agents, employees, and delegatees).[4]

Another significant change in this law is an amendment of the definition of "indemnification agreement" to include an agreement to "defend" another party.[5] This amendment applies to all construction contracts, not just public improvements. In effect, this means subcontractors are only responsible for defense costs to the extent of their wrongful acts or omissions. It is likely that this will cause headaches in the construction industry because

the defense obligation is triggered at the beginning of a dispute (i.e., *before* a determination is made as to liability). In practice, one of the parties (or their insurers) will need to pay the defense costs upfront and seek reimbursement once liability is determined. Another potential solution is for the parties to engage in expedited dispute resolution at the outset to determine proportionate liability solely to establish a party's share of the defense cost until there is a final adjudication, at which point the defense costs could be readjusted.

To comply with the new law, construction contractors for public or private projects seeking to be indemnified by their subcontractors should ensure that any indemnification obligation is limited to the extent of the injury or damage caused by the subcontractor's negligent or otherwise wrongful act or omission, including breach of contract. Parties should also ensure they have sufficient and proper insurance coverage per their contractual obligations.

Construction Worker Wage Protection Act

Lawmakers also made changes regarding wage theft in the construction industry with the Construction Worker Wage Protection Act (CWWPA).[6]

As of Aug. 1, 2023, a contractor entering into, renewing, modifying, or amending a construction contract or agreement assumes unpaid wages, benefits, and damages owed to employees of a subcontractor of any tier.[7]

This law builds on Minnesota's wage theft protections, providing employees the right to sue contractors directly, making contractors jointly and severally liable for judgments against subcontractors for unpaid wages, establishing benefits and penalties under the law. Where an employee has a successful claim, a contractor may also be liable for the employee's attorneys' fees and costs.[8]

A contractor broadly includes any person, firm, partnership, corporation, association, company, organization, or other entity (including a construction manager, general or prime contractor, joint venture, or any combination thereof, along with their successors, heirs, and assigns), that enters into a construction contract with an owner.[9] An owner is also considered a contractor where the owner enters into a construction contract with more than one contractor or subcontractor on any construction site.[10]

Where a contractor pays claims for unpaid wages by employees of a subcontractor, the contractor has a right to sue for actual and liquidated damages against the subcontractor.[11]

Along with the obligation to remedy wage theft complaints, the CWWPA gives contractors the right to demand payroll records and data from subcontractors to ensure they are complying with the law. Within 15 days of such a request, a subcontractor must produce records containing all lawfully required information for workers on the project and enough information to apprise the contractor or subcontractor of such subcontractor's payment of wages and fringe benefit contributions to a third party on the workers' behalf. The records must also include the following information:

- the names of all employees and independent contractors of the subcontractor on the project, and, when applicable, the name of the contractor's subcontractor with whom the subcontractor is under contract;
- the anticipated contract start date;
- the scheduled duration of work;
- when applicable, local unions with which such subcontractor is a signatory contractor; and
- the name and telephone number of a contact for the subcontractor.

Redactions of the records are permissible for the sole purpose of preventing Social Security number disclosure.

The law contains an exemption for contractors or subcontractors who are signatories to a collective bargaining agreement with a building and construction trade labor union when that agreement:

- contains a grievance procedure that can be used by workers to recover unpaid wages; and
- provides for the collection of unpaid contributions to fringe benefit trust funds.[12]

Stakeholders in the construction industry are encouraged to review the changes to the indemnification and wage theft statutes closely and consider new practices to ensure compliance. ▲

NOTES

[1] Laws of Minnesota 2023, Reg. Sess. chapter 53, article 7, section 1, subd. 1a-3, 2023 Minn. Laws ch. 53, at 50.

[2] *Id.*, subd. 3.

[3] *Id.*, subd. 3(b)

[4] *Id.*, subd. 3(c).

[5] *Id.*, subd. 1a; *see also* Laws of Minnesota 2023, chapter 53, article 7, section 4, 2023 Minn. Laws ch. 53, at 51 (codified at Minn. Stat. §337.01, subd. 3).

[6] Laws of Minnesota 2023, chapter 53, article 10, sections 1-8, 2023 Minn. Laws ch. 53 at 56-59.

[7] *Id.* at section 6, subd. 2(a) (codified at Minn. Stat. §181.165, subd. 2(a)); section 8.

[8] Laws of Minnesota 2023, chapter 53, article 10, section 6, subd. 3(b) (codified at Minn. Stat. §181.165, subd. 3(b)); sections 2-5 (modifying Minn. Stat. §177.27, subds. 4, 8-10).

[9] *Id.* at section 6, subd. 1(e) (codified at Minn. Stat. §181.165, subd. 1(e)).

[10] *Id.* at subd. 1(f) (codified at Minn. Stat. §181.165, subd. 1(f)).

[11] *Id.* at subd. 2(b) (codified at Minn. Stat. §181.165, subd. 2(b)).

[12] *Id.* at subd. 6 (codified at Minn. Stat. §181.165, subd. 6).

JEVON BINDMAN, a partner at Maslon LLP, is an experienced trial lawyer who focuses on construction, insurance coverage, and appellate litigation as well as general commercial matters. He has significant experience with contract disputes, policyholder insurance coverage claims, and construction defect and mechanic's lien claims.

ANNA BARTON of Maslon LLP advises clients on general commercial litigation matters, focusing her practice on a wide variety of business disputes involving employment, construction, and insurance coverage cases for individual and business policyholders.

CARLY JOHNSON of Maslon LLP assists clients in commercial litigation cases ranging from construction disputes to real estate, contract, and employment matters.

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LANDMARKS IN THE LAW

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

Criminal Law

JUDICIAL LAW

Juveniles: District court lacks jurisdiction over EJJ case for a felony before the defendant turned 14 years old. Appellant was convicted as an adult of second-degree criminal sexual conduct for an offense committed when he was 12 or 13 years old but for which he was not charged until he was 21 years old. By statute, the juvenile court has jurisdiction over proceedings concerning any child alleged to be delinquent, and that jurisdiction can continue until the child turns 19, or, if the child is convicted as an extended jurisdiction juvenile (EJJ), until the child turns 21. However, a proceeding involving a child alleged to have committed a felony may only be designated an EJJ prosecution if the child was 14 to 17 years old at the time of the offense. The juvenile court can certify a proceeding for adult prosecution, but only if the alleged offense would be a felony if committed by an adult and was allegedly committed by the child after turning 14 years old. The criminal code further provides that children under the age of 14 are incapable of committing crime.

The Minnesota Court of Appeals finds that these statutory provisions "demonstrate a clear legislative intent to limit district court criminal jurisdiction over a felony-level offense committed by a child to those cases in which the child is allege to have committed the offense after becoming 14 years of age." This purpose is undermined by Minn. Stat. §260B.193, subd. 5(d), which provides that "[t]he district court has original and exclusive jurisdiction over a proceeding (1) that involves an adult who is alleged to have committed an offense before the adult's 18th birthday, and (2) in which a criminal complaint is filed before expiration of the time for filing under section 628.26 and after the adult's 21st birthday." To resolve this conflict, the court gives effect to the legislative intent reflected in the minimum age requirement for adult certification and EJJ jurisdiction, and specifically holds "that the grant of district court jurisdiction in Minn. Stat. §260B.193, subd. 5(d), does not apply if the alleged offense occurred before the offender became 14 years of age."

Because the offense here occurred before appellant turned 14, the district court lacked jurisdiction and is reversed. ***State v. Thompson***, A22-1669, 2023 WL 5339997 (Minn. Ct. App. 8/21/2023).

6th Amendment: Defendant must waive right to counsel before proceeding *pro se* at a felony sentencing hearing. Appellant entered into a plea agreement under which he agreed to plead guilty to first-degree sale of a controlled substance and possession of ammunition by an ineligible person in exchange for a specified sentence. Under the agreement, however, the state reserved the right to seek a longer sentence if appellant failed to appear for sentencing. After he was apprehended for failing to appear at two sentencing hearings, appellant informed the district court he wished to discharge his attorney. At the sentencing hearing, appellant's attorney moved to withdraw, appellant again expressed his desire to discharge his attorney, and the district court ultimately discharged the attorney. The district court then denied appellant's motion to withdraw his plea and sentenced him to longer than was originally contemplated in the plea agreement.

The court of appeals agrees with appellant that he did not validly waive his right to counsel. The right to counsel is protected by the 6th Amendment and, to waive the right, the Minnesota Rules of Criminal Procedure require a "voluntary and intelligent written waiver" of the right be entered on the record. Minn. R. Crim. P. 5.04, subd. 1(4). Absent a written waiver, the district court must make a record of the defendant's waiver, which must include an advisory to the defendant of the nature of the charges, all offenses included within the charges, the range of allowable punishments, the fact that there may be defenses and mitigating circumstances may exist, and "all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel." *Id.* at 1(4)(a)-(f).

Here, the district court did not obtain a written waiver of appellant's right to counsel,

did not make a record of his waiver, and did not advise appellant as required by Minn. R. Crim. P. 5.04. While, despite these waiver requirements, the circumstances of a case may demonstrate a defendant knowingly, voluntarily, and intelligently waived his right to counsel, that is not the case here. Appellant's sentence is reversed and the district court is directed to conduct a new sentencing hearing. ***State v. Gant***, A22-1333, 2023 WL 5340023 (Minn. Ct. App. 8/21/2023).

■ **Self-defense: "Offense against the person" refers to offenses threatening bodily harm.** At appellant's trial for felony domestic assault, the court instructed the jury on self-defense, specifically, that appellant could use reasonable force to resist an "assault against the person." Appellant argues the court should have informed the jury he could use reasonable force to resist "any offense against the person." The jury found him guilty. While the court of appeals held the district court's instruction was erroneous, it found the error was not plain and that the evidence was sufficient to support appellant's conviction.

The Supreme Court agrees the evidence is sufficient to support appellant's conviction but, unlike the Court of Appeals, finds the district court's self-defense instruction was not error. The Court finds that Minn. Stat. §609.06, subd. 1(3), permits the use of self-defense to resist an offense carrying a threat of bodily harm. Section 609.06 codifies the common law self-defense doctrine, which required, as a trigger for a claim of self-defense, force carrying the threat of bodily harm. Prior cases have reinforced the threat-of-bodily-harm requirement.

Here, under the facts of the case, the only "offense against the person" carrying the threat of bodily harm that appellant arguably acted to resist was assault. Thus, the district court's instruction was merely a tailoring of the self-defense instruction to the facts of the case, which is proper. Appellant's conviction is affirmed. ***State v. Lampkin***, A20-0361, 2023 WL 5419184 (Minn. 8/23/2023).

■ **Restitution: Life insurance proceeds paid to victim's family should not be considered in determining amount of economic loss sustained.** Appellant appealed the district court's restitution order following his second-degree intentional murder conviction. First, the court of appeals finds that, although appellant failed to file his restitution challenge within the required time and failed to file the required affidavit before the restitution hearing, the district court still had jurisdiction over appellant's restitution challenge. The court finds the procedural and timing requirements of section 611A.045, subd. 3, are claim-processing rules, not subject matter jurisdiction rules. As such, even when untimely, the district court had subject matter jurisdiction over appellant's restitution challenge.

Second, the court holds that life insurance proceeds are not an economic benefit conferred by appellant on the victim's mother and, thus, it was proper for the district court to refuse to consider the proceeds in determining the amount of the victim's mother's economic loss. A restitution award must account for any benefits received by a victim from the defendant or his offense in determining the aggregate economic loss. Life insurance proceeds are benefits conferred by the payor of the insurance premiums, not the defendant who murdered the insured.

Finally, the court holds that the district court did not abuse its discretion by awarding restitution to the victim's mother for expenses that post-dated the victim's funeral, as the district court was well within its discretion to find those expenses were directly related to the victim's death. ***State v. White***, A23-0126, 2023 WL 5519379 (Minn. Ct. App. 8/28/2023).

■ **Distracted driving: Picking up a cell phone to view caller ID information is not reading an electronic message or engaging in a phone call.** Appellant veered off the road and tipped his semitruck after picking up his ringing cellphone to check the caller identification, which showed he was receiving a spam call. He was convicted of driving with a suspended license and operating a motor vehicle while using a cellular device. The court of appeals agrees with appellant that his conduct does not satisfy the requirements of Minn. Stat. §169.475, subd. 2 (operating a motor vehicle while using a cellular device).

While appellant was charged with violating section 169.475, subd. 2(a)(1) (prohibiting the use of a cell phone to compose, read, send, etc. an electronic message while driving), the jury was instructed on the subd. 2(a)(2) (prohibiting making a call while driving). However, the evidence is insufficient to support a conviction under either subdivision. Section 169.475, subd. 1(b), includes a definition of "electronic message" that specifically excludes "data transmitted automatically without direct initiation by a person." The caller ID information that appeared on appellant's phone falls within this exception. The evidence also does not indicate appellant initiated a call, talked or listened on a call, or participated in a video call. By glancing at the caller ID information, he also did not "engage" in a phone call, but was merely acting to determine whether to engage in the call. Thus, appellant neither sent or received an electronic message or engaged in a phone call while driving, and his conviction under section 169.475, subd. 2, is reversed. ***State v. Gutzke***, A22-1444, 2023 WL 5519380 (Minn. Ct. App. 8/28/2023)."

■ **Ineffective assistance of counsel: Attorney's failure to challenge a defendant's competence is deficient representation if a reasonably skilled attorney would have doubted the defendant's competence.** Appellant entered a guilty plea to a charge of violating a DANCO and was sentenced. He argues his plea was invalid, his attorney should have challenged his competency to proceed, and the district court should have *sua sponte* ordered a competency evaluation.

The Minnesota Court of Appeals finds support in the record for the district court's decision not to order a competency evaluation. Appellant admitted his guilt, confirmed he understood the plea agreement and his rights, and responded appropriately to all questions asked of him. His responses and comments showed he had consulted with an attorney and understood the proceedings. While he had been found incompetent in the past, this information was not available to the sentencing court. Even if it had been, the most recent competency evaluation in 2015 had deemed appellant competent, and his attorney, his probation officer, and the prosecutor all expressed not having any concerns about his competence.

The 6th Amendment entitles criminal defendants to the assistance of counsel. This right is violated if ineffective assistance is provided. Minn.

R. Crim. P. 20.01, subd. 3, requires a defense attorney to challenge a defendant's competence if the attorney doubts the defendant's competence. Failure to follow this rule is ineffective assistance. That is, "a defendant's attorney's failure to challenge a defendant's competence to proceed is deficient representation if a reasonably skilled attorney would have doubted the defendant's competence under the circumstances." Under these facts, however, appellant's attorney did not render deficient representation. ***State v. Epps***, A21-0938, 2023 WL 5519405 (Minn. Ct. App. 8/28/2023).

Samantha Foertsch
Bruno Law PLLC
samantha@brunolaw.com

Stephen Foertsch
Bruno Law PLLC
stephen@brunolaw.com

Enviromental Law
JUDICIAL LAW

Youth-led climate litigation victorious in Montana; application elsewhere uncertain. In August a Montana state court issued a ruling in favor of 16 youth plaintiffs, declaring that the state of Montana violated the youth's constitutional rights to a clean and healthful environment. The plaintiffs in *Held v. Montana* were represented by attorneys with Our Children's Trust (OCT), an Oregon-based nonprofit organization representing youth plaintiffs in similar constitutional climate legal actions against state and federal government agencies.

The plaintiffs, ranging in age from two to 18 when the complaint was filed, challenged provisions of Montana's state energy policy, which explicitly promotes the use of fossil fuels, and an amendment to the Montana Environmental Policy Act, which forbids the state and its agents from considering the impacts of greenhouse gas (GHG) emissions or climate change when permitting large energy projects that require environmental reviews, including coal mines and power plants. The plaintiffs alleged that the state's fossil fuel-based state energy system causes and contributes to climate change in violation of their constitutional rights as guaranteed under the Montana Constitution and the public-trust doctrine.

The Montana Constitution includes unique environmental protection provisions. Article IX, Section 1 of the Montana Constitution provides that "the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Article IX, Section 3 of the Montana Constitution guarantees "the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways." The public-trust doctrine is a long-standing legal principle that establishes certain natural resources as common property which the government must preserve and maintain for public use, and is codified in Article IX, Section 3 of the Montana Constitution.

In the ruling, the court affirmed the plaintiffs' claim that a stable climate is includ-

ed in the right to a "clean and healthful environment" guaranteed in Montana's constitution. The court also found unconstitutional the provision in Montana's Environmental Policy Act prohibiting the state from considering climate impacts when permitting energy projects.

Although the ruling in *Held* is narrowly focused on provisions of Montana's state energy policy, the decision illustrates how state constitutional law may provide a foundation for climate legal actions and provides a framework for overcoming procedural hurdles such as standing, causation, and redress.

Since 2011, OCT has filed actions against the federal governments and all 50 states, alleging that these governmental entities violated the common law public-trust doctrine by failing to limit GHG emissions that contribute to climate change. OCT's claims are rooted in the public-trust doctrine, which was first formally recognized by the United States Supreme Court in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387, 435 (1892). The doctrine has historically been applied to protect the public's right to use navigable waterways for fishing, commerce, and navigation. A minority of states have expanded their public-trust doctrines to protect public lands, parks, shoreland and beaches, the atmosphere, animals, and plant species.

Some state legislatures have enacted laws reflecting common law public-trust doctrine principles. In 1971, the Minnesota Legislature enacted the Minnesota Environmental Rights Act (MERA). MERA grants any private party, state, or local government the right to sue for declaratory or equitable relief to protect "the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction." (Minn. Stat. §116B.03, subd. 1).

In 2011, OCT sued the state of Minnesota, Gov. Mark Dayton, and the Minnesota Pollution Control Agency (collectively, the state), on behalf of Reed Aronow, a 25-year-old Minnesota resident. Aronow alleged that the state failed to carry out its duties under the public-trust doctrine and MERA to adequately reduce Minnesota's GHG output and thus preserve the atmosphere for the benefit and protection of present and future generations of Minnesotans. Aronow requested a declaratory judgment confirming that the atmosphere is protected by the public-trust doctrine and that the state violated the public-trust doctrine by failing to preserve and protect the atmosphere for the use of present and future generations.

The trial court granted the state's motion to dismiss for failure to state a claim upon which relief can be granted. The trial court held that the public-trust doctrine applies only to navigable waters, and that Aronow failed to plead a viable claim under MERA. Aronow appealed the trial court's ruling and requested that the Minnesota Court of Appeals expand the common law public-trust doctrine to include the atmosphere. In an unpublished opinion, the Minnesota Court of Appeals affirmed the trial court's order and held that held as an intermediate appellate court, it was an error-correcting court and thus without authority to change the law. *Aronow v. State*, No. A12-0585, 2012 WL 4476642 (Minn. Ct. App. 10/1/2012). Accordingly, at least for the time being, Minnesota's common law public-trust doctrine applies only to navigable waters and not to the climate.

OCT is aggressively litigating a series of lawsuits invoking the public-trust doctrine against state governments for failure to implement policies that adequately address climate change. In addition to bringing legal actions on behalf of children, OCT has petitioned nearly every state environmental agency to enact rules that would reduce statewide GHG emissions to a level consistent with scientific projections for the global emissions reductions needed to achieve climate stability. *Held v. Montana* made history when it became the first-ever constitutional climate case to go to trial. As noted, however, *Held* involves a narrow holding under a state-specific constitutional provision, so its application in other jurisdictions may be limited. Nonetheless, the case provides a striking example of the public-trust doctrine being used to support existing environmental protection statutes and regulations in climate litigation. ***Held v. Montana***, No. CDV-2020-307 (1st Dist. Ct. Mont., 8/14/2023).

8th Circuit affirms dismissal of farmer's wetland certification claims. The 8th Circuit Court of Appeals recently affirmed a South Dakota District Court's grant of summary judgment that dismissed a farmer's claims against the United States Department of Agricultural (USDA) and Natural Resources Conservation Service (NRCS). Foster, the farmer, sought to set aside NRCS wetland certification of his land and alleged violations of the Swampbuster Act, Congressional Review Act, and the Administrative Procedure Act.

The Swampbuster Act permits the Secretary of Agriculture to "delineate, determine, and certify all wetlands." Relevant here, the act precludes farmers who convert wetlands or produce crops on converted wetlands from receiving certain farm-related benefits. Foster's land was certified as a wetland in 2004. Foster requested review of the NRCS's determination in 2011, and then again in 2017 and 2020. The NRCS recertified the land following the 2011 request, but did not conduct additional reviews in 2017 or 2020, reasoning that Foster did not provide new information the NRCS had not previously considered. Foster then commenced action in district court, arguing that the NRCS improperly refused to consider new information, and that his land was outside the scope of the Swampbuster Act.

The 8th Circuit affirmed the district court's dismissal of Foster's claims. As it related to the Swampbuster Act claim, Foster argued that when a farmer requested review of prior wetland certifications, any such certifications were void until the NRCS issued a new certification. The court recognized that this interpretation of the Act would lead to farmers' ability to "unilaterally nullify wetland certifications" by "filing vague and facially-meritless review requests."

Foster next argued that the district court erred in finding the Congressional Review Act was not reviewable through litigation. The 8th Circuit examined the language of the Congressional Review Act and affirmed the district court's finding based on "broad and unambiguous" language of the Act that precludes "judicial review of all omissions under the [Congressional Review Act], including those of agencies such as the USDA," and therefore Foster's CRA claim could not be reviewed.

Finally, Foster argued the NRCS's decisions to deny his 2017 and 2020 review requests were arbitrary and

capricious, in violation of the Administrative Procedure Act. The 8th Circuit affirmed the dismissal of this claim as well. Foster did not provide evidence that a natural event altered the wetland or that an error existed in the NRCS's current wetland certification of his land. Nothing in the record indicated that the NRCS acted arbitrarily or capriciously in violation of the APA. ***Foster v. United States Department of Agriculture***, 68 F.4th 372 (2023).

ADMINISTRATIVE ACTION

EPA amends WOTUS rule to conform with Supreme Court *Sackett* decision. On 8/29/2023, the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers issued a final rule amending the definition of "waters of the United States" (WOTUS), prescribed under the Clean Water Act (CWA), in response to the U.S. Supreme Court decision issued in *Sackett v. EPA*, 598 U.S. __ (2023). Prior to this conformance, the latest definition of WOTUS (the January 2023 rule) was published on 1/18/2023, as the "Revised Definition of 'Waters of the United States'." 88 Fed. Reg. 3004 (2023).

The January 2023 rule codified aspects of both Justice Scalia's and Justice Kennedy's jurisdictional tests for WOTUS from the Supreme Court decision in *Rapanos v. United States*. 547 U.S. 715 (2006). In *Rapanos*, Justice Scalia set forth, in a plurality opinion, that WOTUS includes only waters that are "relatively permanent, standing or continuously flowing" or to wetlands that are immediately adjacent to such waters. And Justice Kennedy, in a partially concurring opinion, established that federal "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." Keeping this portion of text focused on wetlands, the January 2023 rule defined WOTUS to include: wetlands adjacent to traditional navigable waters, interstate waters, and the territorial seas; wetlands adjacent to and with a continuous surface connection to relatively permanent impoundments and tributaries that meet either the relatively permanent standard or the significant nexus standard; and interstate wetlands that meet either the relatively permanent standard or the significant nexus standard.

But on 5/25/2023, the Supreme Court issued the *Sackett* decision, significantly curtailing the jurisdictional reach of the CWA over wetlands. Notably, the Court unanimously rejected the "significant nexus" test as a basis for CWA jurisdiction. And the majority held that "waters of the United States" refers only to (i) "geographical features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes'" and (ii) adjacent wetlands that are "indistinguishable from those bodies of water due to a continuous surface connection." Furthermore, the Court stated that to prove jurisdiction over an "adjacent" wetland under the CWA, the party must show that the adjacent body of water constitutes WOTUS (*i.e.*, is a "relatively permanent body of water connected to interstate navigable waters"); and that the wetland has a "continuous surface connection with that water, making it difficult to determine where the water ends in the wetland begins."

The *Sackett* decision only invalidated certain portions of the January 2023 rule, and kept intact others, so the amendments (the conforming rule) only revised the portions

of the January 2023 rule that were deemed invalid under the *Sackett* decision. Specifically, the conforming rule removes altogether the "significant nexus" standard, removes "interstate wetlands" from the text of the interstate waters provision, removes wetlands and streams from the list of additional interstate waters, and amends the definition of "adjacent" for wetlands.

No longer will "adjacent" wetlands be considered WOTUS solely because they are "bordering, contiguous, or neighboring... [or] separated from other 'waters of the United States' by man-made dikes or barriers, natural river berms, beach dunes and the like." Under the conforming rule, "adjacent" wetlands will only be considered WOTUS if they have a "continuous surface connection" to jurisdictional waters.

Notably, the conforming rule definition only includes a portion—i.e., "having a continuous surface connection"—of the *Sackett* decision's test for adjacent wetlands, which, condensed here, requires adjacent wetlands to be "indistinguishable" from jurisdictional waters due to a continuous surface connection that makes it difficult to determine where the water ends and the wetland begins.

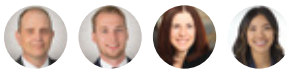
The conforming rule became effective on 9/8/2023, when it was published in the Federal Register. **Revised Definition of "Waters of the United States"; Conforming, 88 FR 61964** (9/8/2023).

EPA TSCA framework for new PFAS and PFAS uses. In June 2023, the United States Environmental Protection Agency (EPA) announced a framework for evaluating new per- and poly-fluoroalkyl substances (PFAS) and new uses of existing PFAS. Currently, new PFAS or new uses require notice to the EPA under the Toxic Substances Control Act (TSCA) Section 5. EPA then has 90 days to conduct an evaluation to determine if the new PFAS or new use presents an unreasonable risk of injury to health or the environment. If the EPA finds such risk, it will issue a Section 5(e) order prohibiting or limiting the manufacture, processing, distribution in commerce, use, or disposal to the extent necessary.

This process under TSCA will now be conducted according to EPA's planned approach as described in the new framework. This will involve an extensive evaluation EPA has deemed necessary because of the challenge new PFAS and new uses present when there is often insufficient information to quantify the risk. The process will normally include testing requirements for any PFAS that are likely to be persistent, bioaccumulative, and toxic (PBT) chemicals. If test results indicate potential risks, EPA will require additional testing and risk mitigation. If additional testing and risk mitigation fail to address the concern, EPA would prohibit the manufacture or new use. **EPA, Framework for TSCA New Chemicals Review of PFAS Premanufacture Notices (PMNs) and Significant New Use Notices (SNUNs)** (6/28/2023).

MN PFAS remediation guidance. Minnesota also acted recently to address PFAS. The Minnesota Pollution Control Agency (MPCA) released a draft PFAS remediation guidance for public review and comment. The guidance outlines the approach MPCA will take to identify, investigate, evaluate, and remediate PFAS contamination at sites in the MPCA remediation program. The remediation program includes Superfund sites (sites remediated under the Minnesota Environmental Response and Liability Act at the state level and under the Comprehensive Environmental Response, Compensation, and Liability Act at the federal level) and Brownfield sites (sites remediated under the voluntary investigation and cleanup (VIC) program). The guidance includes direction to assess these sites for current and historical use of PFAS and proximity to potential PFAS sources to determine whether PFAS sampling is necessary. For Brownfield sites, additional consideration is given to whether the site activities will create an exposure pathway relative to potential PFAS contamination and whether the VIC applicant wants PFAS to be included in the assurance letter.

The PFAS remediation guidance also includes a summary of risk-based values (RBVs) currently available in Minnesota for assessing risks to human and ecological health. The guidance states that the RBVs should not be interpreted as default cleanup factors and additional lines of evidence should be considered. Public comment on the PFAS remediation guidance will be accepted until 10/5/2023. **MPCA Remediation Division PFAS Guidance (draft)** (August 2023).



Jeremy P. Greenhouse, Cody Bauer Vanessa Johnson, and Molly Leisen Fredrikson & Byron P.A.

Jake Beckstrom Vermont Law School, 2015

Federal Practice
JUDICIAL LAW

No standing; future harm not "real and immediate;" no reputational harm. Where the plaintiff challenged the NTSB's brief suspension of her pilot's license, the 8th Circuit, distinguishing "standing" from "mootness," found that her claim that the suspension would harm her prospects for future employment was not "real and immediate," and further found that she lacked standing to challenge the expired suspension absent a claim of a future injury "with a high degree of immediacy." Accordingly, the 8th Circuit panel also rejected the plaintiff's claims of reputational harm. ***McNaught v Nolen***, ___ F.4th ___ (8th Cir. 2023).

Fed. R. Civ. P. 24(a)(2); denial of motion to intervene affirmed. The 8th Circuit affirmed a district court's denial of a motion to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2), relying on the "presumption" that the proposed intervenor's interests were adequately represented by the government defendant, and finding that the proposed intervenor had not made a "strong showing" to the contrary. ***Entergy Ark., LLC v. Thomas***, ___ F.4th ___ (8th Cir. 2023).

Daubert*; district court's exclusion of expert witness affirmed.** Reviewing for abuse of discretion, the 8th Circuit affirmed a district court's exclusion of the plaintiff's expert and its award of summary judgment to the defendants in a FELA action, finding that the expert's opinion was "speculative at most" and therefore "unreliable." ***Lancaster v. BNSF Rwy. Co., 75 F.4th 967 (8th Cir. 2023).

Fed. R. Civ. P. 37(c)(1); no abuse of discretion in excluding expert's supplemental opinion. Where the plaintiff's expert's causation analysis was all of three sentences, defendants moved to strike the opinion, and the plaintiff opposed the motion and submitted a "lengthy specific causation analysis" from the expert seven months after the deadline for expert

disclosures, the 8th Circuit found no abuse of discretion in Judge Wright's refusal to consider the expert's declaration and the following award of summary judgment to the defendants, finding that Fed. R. Civ. P. 37(c)(1) did not require that Judge Wright consider a lesser sanction where the plaintiff never proposed any alternative sanction. ***Cantrell v. Coloplast Corp.***, ___ F.4th ___ (8th Cir. 2023).

■ **No waiver of right to arbitration despite delay.** Affirming in part and reversing in part, the 8th Circuit agreed with Judge Ericksen that the defendant had not waived its right to compel arbitration despite failing to assert arbitration as an affirmative defense in its answer and waiting more than two years after the action was filed before it brought its motion to compel, where it brought its motion promptly after plaintiffs' motion for class certification was granted and none of the named plaintiffs were subject to arbitration agreements. ***H&T Fair Hills, Ltd. v. Alliance Pipeline, L.P.***, ___ F.4th ___ (8th Cir. 2023).

■ **Fed. R. Civ. P. 44.1; foreign law; timing.** The 8th Circuit found that a district court did not abuse its discretion when it granted the defendant's request to apply foreign law to the plaintiff's claim, finding that the defendant's request was timely when it was made after the close of discovery, but nine months prior to the trial date. ***Rey v. General Motors, LLC***, ___ F.4th ___ (8th Cir. 2023).

■ **No abuse of discretion in district court denying leave for sur-reply brief.** The 8th Circuit found that a district court's refusal to allow the plaintiff to file a sur-reply brief in opposition to the defendants' motion for summary judgment was "harmless error," particularly where the plaintiff did not file a motion to reconsider in the district court. ***Cornice & Rose Int'l, LLC v. Four Keys, LLC***, ___ F.4th ___ (8th Cir. 2023).

■ **Federal question; removal; remand; voluntary amendment of complaint; remand.** Where a putative class action alleging only state law claims was removed and was then dismissed by the district court for lack of jurisdiction; the dismissal was reversed and remanded by the 8th Circuit, which found that the plaintiff's state law claims would require "explication of federal law," and after remand the plaintiff amended her complaint and eliminated every reference to federal law; the plaintiff's motion to remand was denied; and the defendants' Rule 12(b)(6) motion was granted, the plaintiff appealed, and the 8th Circuit requested supplemental briefing regarding its subject matter jurisdiction; the 8th Circuit ultimately held that the voluntarily amended complaint "superseded" the original complaint and divested the federal courts of jurisdiction over the action, rejecting concerns that this rule could lead to "forum manipulation." ***Wullschleger v. Royal Canin U.S.A., Inc.***, 75 F.4th 918 (8th Cir. 2023).

■ **Application to vacate arbitration award; no subject matter jurisdiction.** Where an application to vacate arbitration awards failed to plead the parties' citizenship and the underlying dispute did not involve a federal question, the 8th Circuit vacated the district court's order vacating the awards and remanded the action with instructions to dismiss for lack of jurisdiction. ***Prospect Funding Holdings (NY), LLC v. Ronald J. Palagi, P.C.***, ___ F.4th ___ (8th Cir. 2023).

Removal; refusal to identify members of limited liability company; remand. Where the defendant removed the action on the basis of diversity jurisdiction, failed to identify its members or the members of the plaintiff limited liability company, and declined to comply with Magistrate Judge Micko's order that it identify the citizenship of both parties, Judge Schiltz accepted the defendant's "stipulation" and remanded the action to Ramsey County. ***BevSource, LLC v. Innovation Ventures, LLC***, 2023 WL 5000262 (D. Minn. 8/4/2023).

Attorney-client privilege; ERISA fiduciary exception. Finding that the ERISA fiduciary exception applied, Magistrate Judge Docherty granted the plaintiff's motion to compel the production of documents listed on the defendant's privilege log where the defendant was unable to establish that an "adversarial relationship" existed at the time the documents were created. ***Hardy v. Unum Life Ins. Co. of Am.***, 2023 WL 4841952 (D. Minn. 7/28/2023).

Fed. R. Civ. P. 34(b)(2); defendants required to disclose whether they are withholding documents. Where defendants asserted objections to multiple document requests but were "postponing" disclosing whether they were withholding documents based on those objections, Magistrate Judge Docherty cited Fed. R. Civ. P. 34(b)(2) and ordered defendants to supplement their responses to comply with the rule. ***Smartmatic USA Corp. v. Lindell***, 2023 WL 4882865 (D. Minn. 8/1/2023).

28 U.S.C. §1292(b); several requests for interlocutory appeals denied. Determining that the plaintiff had not met its "heavy burden" to establish any of the three elements required to justify an interlocutory appeal, Judge Wright denied its requests to have an issue certified for appeal pursuant to 28 U.S.C. §1292(b). ***Berkley Regional Ins. Co. v. John Doe Battery Manuf.***, 2023 WL 4864277 (D. Minn. 7/31/2023).

Judge Tunheim also denied a request to certify a ruling for interlocutory appeal, finding, among other things, that a single intra-district split did not "rise to the level of substantial disagreement" regarding a controlling question of law. ***Varela v. State Farm Mut. Auto. Ins. Co.***, 2023 WL 5021182 (D. Minn. 8/7/2023).

Ex parte* motions to serve third-party subpoenas granted with conditions.** Magistrate Judge Foster again granted the plaintiff's motion for leave to serve subpoenas prior to a Rule 24(f) conference after applying the so-called *Arista Records* test and finding "good cause," but also imposed a "limited protective order" intended to protect the rights of the John Doe defendants. ***Strike 3 Holdings, LLC v. Doe, 2023 WL 4864279 (D. Minn. 7/31/2023).

ADMINISTRATIVE ACTION

Proposed federal rules amendments. Proposed amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure are currently wending their way through the system.

Of particular interest to federal practitioners are proposed amendments to Fed. R. Civ. P. 16 and 26, which would require the parties to address procedures relating to privilege logs in their Rule 26(f) report, and would similarly require the court to address privilege log procedures in the pretrial scheduling order.

Written comments on these proposed amendments are due no later than 2/16/2024.

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

Immigration Law

JUDICIAL LAW

Completed Hobbs Act robbery is a "crime of violence" Under INA §101(a)(43)(F). In August the 8th Circuit Court of Appeals held that the petitioner, who pled guilty to one count of Hobbs Act robbery and spent five years in prison, was removable because a completed Hobbs Act robbery is a "crime of violence." The court noted, "Any [foreign national] 'convicted of an aggravated felony is removable from the United States.' *Id.*; *see* 8 U.S.C. §1227(a)(2)(A)(iii). The list of qualifying aggravated felonies includes 'crime[s] of violence'—offenses that have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.' 18 U.S.C. §16(a); *see* 8 U.S.C. §1101(a)(43)(F)." ***Green v. Garland***, No. 22-2335, *slip op.* (8th Circuit, 8/16/2023). *https://ecf.ca8.uscourts.gov/opndir/23/08/222335P.pdf*

Motion for reconsideration automatically terminated voluntary departure grant from previous removal proceeding. In July the 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) did not abuse its discretion when it denied the Mongolian petitioners' motion for reconsideration. According to the court, the filing of their motion to reconsider, prior to the end of their voluntary departure period, automatically terminated the grant of voluntary departure issued in their previous removal proceeding. 8 C.F.R. §1240.26(e)(1). ***Bekhbat v. Garland***, No. 22-2379, *slip op.* (8th Circuit, 7/27/2023). *http://media.ca8.uscourts.gov/opndir/23/07/222379P.pdf*

Nebraska convictions for shoplifting not aggravated felonies. On 7/13/2023, the 8th Circuit Court of Appeals held the Board of Immigration Appeals (BIA) committed error when it found the South Sudanese petitioner was removable for committing a theft offense—constituting an aggravated felony—based upon his Nebraska shoplifting convictions. According to the court, the Nebraska statute of conviction was broader than the generic federal offense and thus rendered the BIA's decision erroneous. "Because an offender can be convicted under Nebraska's shoplifting statute when he acts with an intent not encompassed by a generic theft offense, we hold that the statute sweeps more broadly than the generic federal offense." ***Thok v. Garland***, No. 22-2508, *slip op.* (8th Circuit, 7/13/2023). *https://ecf.ca8.uscourts.gov/opndir/23/07/222508P.pdf*

No actual prejudice shown in motion for reconsideration based on a due process claim. On 7/13/2023, the 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) did not abuse its discretion when it denied the Mexican petitioner's motion for reconsideration based on a due process claim, given his failure to show actual prejudice. It further found the Board's application of the wrong legal standard to the petitioner's motion to reopen was immaterial since it applied a less-stringent standard. ***Arroyo-Sosa v. Garland***, Nos. 22-1334, 22-2593, *slip op.* (8th Circuit, 7/13/2023).

https://ecf.ca8.uscourts.gov/opndir/23/07/221334P.pdf

Failure to show membership in any of proposed social groups. On 7/6/2023, the 8th Circuit Court of Appeals upheld the denial of asylum and related relief to the Mexican petitioner, finding that the Board of Immigration Appeals (BIA) did not commit error when it concluded none of the petitioner's 12 proposed particular social groups (PSGs) was cognizable for asylum purposes: (1) cattle ranchers and farmers in Mexico; (2) landowners in Mexico; (3) business owners in Mexico; (4) family of cattle ranchers and farmers in Mexico; (5) family of landowners in Mexico; (6) family of business owners in Mexico; (7) the Uriostegui family; (8) the Uriostegui-Teran family; (9) family of Juan Uriostegui Jimenez; (10) family of gang kidnapping victims; (11) family of gang extortion victims; and (12) deported Americanized Mexicans/ponchos. ***Uriostegui-Teran v. Garland***, No. 22-2472, *slip op*. (8th Circuit, 7/6/2023). *https://ecf.ca8.uscourts.gov/opndir/23/07/222472P.pdf*

ADMINISTRATIVE ACTION

DHS notices extending and redesignating TPS.

South Sudan: On 8/21/2023, the U.S. Department of Homeland Security (DHS) announced the extension of the designation of South Sudan for temporary protected status (TPS) for 18 months, from 11/4/2023 through 5/3/2025. Those wishing to extend their TPS must re-register during the 60-day period running from 9/6/2023 through 11/6/2023. The secretary also redesignated South Sudan for TPS, allowing additional South Sudanese to apply who have continuously resided in the United States since 9/4/2023 and have been continuously physically present in the United States since 11/4/2023. The registration period for these new applicants runs from 9/6/2023 through 5/3/2025. **88 Fed. Reg. 60971-79** (2023*). https://www.govinfo.gov/content/pkg/FR-2023-09-06/pdf/2023-19312.pdf*

Ukraine: On 8/21/2023, the U.S. Department of Homeland Security (DHS) announced the extension of the designation of Ukraine for temporary protected status (TPS) for 18 months, from 10/20/2023 through 4/19/2025. Those wishing to extend their TPS must re-register during the 60-day period running from 8/21/2023 through 10/20/2023. The secretary also redesignated Ukraine for TPS, allowing additional Ukrainians to apply who have continuously resided in the United States since 8/16/2023 and have been continuously physically present in the United States since 10/20/2023. The registration period for these new applicants runs from 8/21/2023 through 4/19/2025. **88 Fed. Reg. 56872-80** (2023*). https://www.govinfo.gov/content/pkg/FR-2023-08-21/pdf/2023-17875.pdf*

Sudan: On 8/21/2023, the U.S. Department of Homeland Security (DHS) announced the extension of the designation of Sudan for temporary protected status (TPS) for 18 months, from 10/20/2023 through 4/19/2025. Those wishing to extend their TPS must re-register during the 60-day period running from 8/21/2023 through 10/20/2023. The secretary also redesignated Sudan for TPS, allowing additional Sudanese to apply who have continuously resided in the United States since 8/16/2023 and have been continuously physically present in the United States since 10/20/2023. The registration period for these new applicants runs from 8/21/2023 through 4/19/2025. **88 Fed. Reg. 56864-72** (2023*). https://www.govinfo.gov/content/pkg/FR-2023-08-21/pdf/2023-17877.pdf*

DHS issues fact sheet: Family reunification parole processes for El Salvador, Guatemala, Honduras, Colombia, Cuba, and Haiti. On 8/7/2023, the Department of Homeland Security (DHS) issued a fact sheet on the new family reunification parole (FRP) processes for El Salvador, Guatemala, Honduras, and Colombia, and the updated family reunification parole processes for Cuba and Haiti. This process makes it easier for eligible individuals to reunite with family in the United States, "the latest example of the U.S. effort to expand lawful pathways and offer alternatives to dangerous and irregular migration." Key features of this process include the following:

1) Certain nationals of those countries who are beneficiaries of an approved relative petition may be eligible for parole into the United States, provided they are outside the United States, meet all requirements (including screening, vetting, and medical requirements), and not already issued an immigrant visa.
2) They may be considered on a case-by-case basis for a period of up to three years while applying to become a lawful permanent resident on the basis of their approved relative petition.
3) The U.S. government will deliver timely and efficient authorization for those approved and vetted to travel with those paroled into the United States eligible to apply for employment authorization.
4) The process commences with the Department of State issuing an invitation to the U.S. citizen or lawful permanent resident whose relative petition has been approved for a beneficiary (i.e., a family member from Colombia, El Salvador, Guatemala, or Honduras).
5) Only an invited U.S. citizen or lawful permanent resident petitioner may initiate the process by filing a request on behalf of the beneficiary and their eligible family members to be considered for advance travel authorization and parole.
6) Once the beneficiary's priority date becomes current (i.e., an immigrant visa becomes available), the beneficiary may apply for permanent residence through adjustment of status while in the United States.
7) Noncitizens who fail to use this process or another lawful, safe, and orderly pathway by attempting to enter the United States unlawfully will be subject to severe consequences, including, for example, removal, a minimum five-year bar on admission, and potential criminal prosecution for unlawful reentry.

USCIS announces new version of Form I-9. On 7/25/2023, U.S. Citizenship and Immigration Services (USCIS) announced the introduction of a new version of Form I-9, Employment Eligibility Verification. Several changes were made to the form, including a checkbox indicating an employee's Form I-9 documentation was examined using a DHS-authorized alternative procedure. The new version of Form I-9 was made available for use on 8/1/2023. The previous version of Form I-9 (version date: 10/21/2019) will continue to be allowed for use through 10/31/2023. **88 Fed. Reg. 47891-92** (2023).

For more on the optional alternatives to the in-person physical document examination method for Form I-9, *see* **88 Fed. Reg. 47749-54** (2023) and **88 Fed. Reg. 47990-48022** (2023).

R. Mark Frey
Frey Law Office
rmfrey@cs.com

Indian Law
JUDICIAL LAW

The Parental Kidnapping Prevention Act does not apply to Indian tribes. Following a North Dakota state-court decision granting parents interim shared custody of a child enrolled in the Cheyenne River Sioux Tribe, the tribal-member mother brought the child from North Dakota to the Cheyenne River Indian Reservation in South Dakota without court approval or notification to the non-Indian father. Following the mother's arrest and detention for parental kidnapping and custody-order violations, the tribal court assumed jurisdiction and placed the child with another relative. The father appealed that decision, arguing that the Parental Kidnapping Prevention Act required the tribal court to recognize the first-in-time North Dakota state custody orders. After a string of remands, appeals, and proceedings in tribal, state, and federal courts, the 8th Circuit reviewed the language of the Act and held, in a matter of first impression in the Circuit, that the Act does not apply to Indian tribes (and thus the tribal court did not need to follow its terms) because it does not specifically reference Indian tribes in the full-faith-and-credit provisions. ***Nygaard v. Taylor***, __ F.4th __, 2023 WL 5211646 (8th Cir. 2023).

Leah K. Jurss
Hogen Adams PLLC
ljurss@hogenadams.com

Tax Law
JUDICIAL LAW

Hospitalization did not excuse untimely disclosure; experts excluded. The defendant in this property tax dispute failed to disclose several experts by the scheduling order deadline. He claimed an unexpected hospitalization caused the delay and asked the court to serve the experts out of time. The court refused, explaining that under the six criteria laid out in *Dennie,* the circumstances still warranted suppressing the expert testimony. *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986). Notable factors included that defendant did not disclose one expert's retention until 129 days after the last permissible date for disclosure, and the counsel for the defendant had had their expert witnesses excluded before by this very court, so was already "on notice at the time concerning the importance of timely expert witness disclosures." ***Bradley v. Cnty. of Hennepin***, No. 27-CV-21-5224, 2023 WL 5340024 (Minn. Tax 8/18/2023).

Counsel's unreasonable and vexatious actions justified sanctions. In *LakePoint Land II, LLC v. Comm'r of Internal Revenue*, both parties submitted motions for reconsideration on the tax court's previous partial summary judgment order as well as a motion to impose sanctions submitted by the petitioner.

In the previous order, the court granted partial summary judgment in favor of the respondent. Respondent had sought favorable adjudication on compliance with §6751(b)(1), written supervisory approval requirements, for penalties asserted under §6662(a). Section 6751(b)(1) states that "[n]o penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor." U.S.C.A. §6751(b)(1). "Furthermore, section 6751(b)(1) does not require approval to be indicated by a wet signature, nor any particular form of signature; rather, respondent need only show written evidence that timely supervisory approval was obtained."

The petitioner's motion for reconsideration was granted, the respondent's denied, and the previous order was vacated upon review of previously unavailable evidence. The previous order relied in part upon a penalty consideration lead sheet filed in July 2016. The July lead sheet contained all the penalties eventually used in petitioner's final partnership administrative adjustment. After the order was granted, it was established by the petitioner, and then agreed to by both parties, that the July lead sheet had been backdated. Given that the July lead sheet had demonstrated the requisite supervisory approval, the court concluded it had made its decision on erroneous evidence.

The petitioner had additionally filed a motion to impose sanctions requesting (1) the court award reasonable expenses incurred as a result of the respondent's misconduct and (2) for the court to decide adversely against the respondent's section 6751(b) written supervisory approval of penalties issue. Upon further review of the newly developed record, the court determined that respondent's counsel was told regarding the July lead sheet that "I am not sure that the typed in date... was accurate." Upon this development, the court determined that respondent's counsel knew or should have known his representation lacked candor and previous declarations by the respondent to the court were false. The court stated the respondent's counsel failed to meet his ongoing obligations to correct misrepresentations under ABA Model Rule 3.3.

Holding the determination of fees and costs until after trial, the court granted in part the petitioner's motion to impose sanctions. The court concluded that the respondent's counsel's actions unreasonably and vexatiously multiplied the proceedings in the case and the respondent would be liable for the multiplication. The court, however, found that granting the adverse ruling on written supervisory approval penalties requested by the petitioner would be inappropriate in the case. ***LakePoint Land II, LLC v. Comm'r of Internal Revenue,*** T.C.M. (RIA) 2023-111 (T.C. 2023).

Court "unimpressed" with "common practices" arising from covid administrative constraints. A single issue was before the court in *Channels, Inc. v. Comm'r of Internal Revenue*: "whether the Court should strike the parties' revised Proposed Stipulated Decision" after the court found discrepancies between the taxpayer's answer notice and status report notice. Upon an order to explain the discrepancies, the taxpayer's counselors explained that as a result of the constraints imposed by covid, the counselors did not possess the physical administrative files of the case. They attempted to reconstruct a complete and accurate copy of their client's notice of deficiency. A counselor used the first page of an incomplete copy of the notice of deficiency, which was stamped as "ORIGINAL," and a draft version of the notice to create their answer. Counselors contended that "it became a 'common practice to reconstruct the SNOD [statutory notice of deficiency]'" because of the covid-19 pandemic. The court

was altogether unimpressed given the criticality of SNODs in both adjudication and settlement proceedings.

The court found the "common practices" disconcerting and stated that the "conduct falls woefully short of [its] expectations for practitioners who regularly appear before it." The taxpayer's counselors submitted a document labeled as "ORIGINAL" that was purported to be a "complete copy" but was in fact, a byproduct of undisclosed reconstruction. When their first status report failed to inform of the discrepancies, a counselor merely stated, "I was simply hoping that just by attaching a complete copy back with the Status Report it would at least put the correct notice on record."

Because the "slipshod-cut-and-paste Status Report Notice presented to the Court created doubt as to... the accuracy-related penalty in the notice of deficiency sent to petitioner," the court concluded that striking the proposed stipulated decision was warranted and ordered the parties to file revised decision options. ***Channels, Inc. v. Comm'r of Internal Revenue***, T.C.M. (RIA) 2023-109 (T.C. 2023).

Tax court lacks jurisdiction to provide refund. Here, the commissioner prepared a substitute for return (SFR) for the taxpayer after the taxpayer failed to file a timely federal income tax return for 2015. Following the SFR, the commissioner also issued a notice of deficiency that included additions authorized by §6651. The taxpayer then filed a return. After examination, the commission deemed that the taxpayer was not liable for deficiency or additions in the tax year, and in fact that the taxpayer had overpaid his taxes for the year at issue. The commissioner, however, "contend[ed] that any refund of overpaid tax is barred by statute." Both parties then filed cross-motions for summary judgment to determine if the taxpayer was entitled to a refund for his overpayment.

The court's jurisdiction to order refunds for overpayment is limited to when either taxes are paid, or when the taxpayer filed their returns. 26 U.S.C.A. §6512 (b)(2)(B). Here, because the taxpayer failed to file a return before a notice of deficiency was issued, the court's jurisdiction is limited to only a two-year look-back period. 26 U.S.C.A. §6512 (b)(3) (West). The court determined the taxpayer's payment did not occur within the two-year look-back period because the notice of deficiency was issued in 2021 and the taxpayer's employment withholdings had applied as payment in 2016.

While the court was sympathetic to the taxpayer's situation, "[t]he Supreme Court has made clear that the limitations on refunds of overpayments prescribed... shall be given effect... regardless of any perceived harshness to the taxpayer." ***Golden v. Comm'r of Internal Revenue***, T.C.M. (RIA) 2023-103, at 2 (T.C. 2023).


Morgan Holcomb
Adam Trebesch
Mitchell Hamline School of Law

PEOPLE + PRACTICE

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


Alex Galle-From and **Elaine Mikel** joined Best & Flanagan as associate attorneys in the private wealth planning and corporate law practice groups.


Charles A. Horowitz and **Christopher T. Porter** joined the business law firm of Trepanier MacGillis Battina PA.

Alexa Thomas joined the Minneapolis office of DeWitt LLP with the business practice group.

Taylor Kerkela joined Eckberg Lammers practicing in the municipal law group, with a strong focus on criminal prosecution.

Robins Kaplan LLP partner **Brendan Johnson** was named chair of the firm's national business litigation group, which includes more than 100 attorneys across all seven of the firm's offices.

Ike Messmore joined Soule & Stull as a partner. Messmore has over 11 years of experience as a litigator and trial lawyer in product liability, class action, and commercial cases.

Carlo Faccini joined Heimerl & Lammers, LLC in the firm's growing family law practice.



Matthew Frerichs and **Sarah Khoury** joined Maslon LLP as partners in the estate planning group. **Jeffrey Koerselman** joined the firm as a partner in the real estate group.

In memoriam

ADAM ROSS WICKENS, age 40, passed away December 26, 2022 in Lewistown, Montana. Wickens graduated from the University of St. Thomas and enjoyed a career as a mergers and acquisitions lawyer for Dorsey & Whitney.

FREDERICK EARL "FRED" FINCH, age 79, died on August 6, 2023. His legal practice began at Fredrikson & Byron in 1973. In 1990 he joined Bassford Remele, where he was quickly recognized as a one-stop encyclopedia for case law, citations, interpretations, and a general source of overall knowledge on all legal issues. Over the years he served as the president of the Hennepin County Bar Association, sat on many committees for the Minnesota State Bar Association, and was the Minnesota state representative for the American Bar Association. He was honored with the MSBA Lifetime Achievement award in 2018.

ROBERT J. ALFTON passed away on September 2, 2023 at the age of 84. He joined the Minneapolis City Attorney's Office in 1967 and was appointed Minneapolis city attorney in 1978, a position he held for 16 years. He was also an administrative law judge for the State of Minnesota. Later in private practice, he focused on labor and employment matters. He served as president of the International Municipal Lawyers Association and the Minnesota Municipal Lawyers Association.

MARK H.B. WILLIAMSON, age 63, died on September 13, 2023. He attended Columbia Law School in New York City. He moved back home to Minneapolis in 1987 to join Oppenheimer Wolff & Donnelly. A series of jobs followed until Williamson founded his own law firm. He practiced solo as Mark Williamson, PLC, until his passing.

Jim Hilbert named interim president and dean at Mitchell Hamline

BY TOM WEBER

Jim Hilbert is pretty sure his first time on the Mitchell Hamline campus was to use the library.

That was 25 or more years ago, when he was in private practice. Since that time, he gradually increased his relationship with the law school. He was a guest speaker, then an adjunct professor, full-time faculty member, and tenured professor before becoming vice dean in December 2020.

In August, Hilbert became interim president and dean, scheduled to lead the school until a new president and dean takes over in July 2024. He says he's grateful to be leading the school, even on a temporary basis, at a time when transformation abounds.

"Years of law school and a law degree don't just transform an individual student's life," said Hilbert. "That combination of expertise with the important credential of a J.D. can often greatly impact the student's community, as well.

"We can make that happen because we have been transforming legal education all along—whether it is a focus on practical skills, the use of technology, or providing the right mix of support so our students can thrive. I'm ready to do my part to make sure those things continue."

Born and raised in St. Paul, Hilbert graduated from Carleton College and soon focused on service and advocacy. He worked directly with adults with severe and intellectual and developmental disabilities while also serving as an organizer for several political candidates. It was during those few years that Hilbert decided to go to law school. "For me, it helped me realize my goal was to be a civil rights attorney," he said.

As a law student at the University of Minnesota Law School, one of Hilbert's first assignments as a clerk for the Minneapolis NAACP was to research and draft a certiorari petition, which had the unique distinction of eventually being granted by the U.S. Supreme Court. It was part of a years-long desegregation case in the 1990s.

Hilbert later joined the Shulman Law Firm, where he continued his work on the desegregation case in addition to other plaintiffs' civil rights cases. He was also during those years invited to speak at William Mitchell on his civil rights work. He was soon approached about teaching as an adjunct. "I realized speaking to those classes that I loved teaching, particularly about skills and techniques I had learned in practice," said Hilbert.

At the law school, Hilbert was one of the early architects of what is now the blended-learning enrollment option, which allows students to have a more flexible and partially online schedule. In 2022, he became vice dean under Anthony Niedwiecki.

"Jim is a perfect leader for this transition," said Niedwiecki, who announced in March he would step down and return as a faculty member during the 2024-25 school year. "Mitchell Hamline will be well-served by his enthusiasm for our law school and for legal education."

The search for a new president and dean is well underway; Hilbert does not plan to seek the permanent post. But in the time he has at the helm, Hilbert plans to focus on making sure people remember that "this is a special place, and our students are remarkable."

"What we're doing is different than other law schools," he said. "We're trying to reach students whose incredible potential is often overlooked by other schools or provide opportunities to students who could not go to law school if not for us. We're increasing access to law school. And we're trying to break down traditional barriers that have long existed in legal education.

"I'm excited to be part of that work."

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ATTORNEY/SENIOR ATTORNEY

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ASSOCIATE ATTORNEY

Join our team at the Swenson Lervick Law Firm! We are currently looking for an Associate Attorney to build our growing practice. As the City Attorneys for several surrounding municipalities, our Associate Attorney will have the opportunity to hone their courtroom skills while prosecuting crimes for the City of Alexandria, as well as establish a private law practice. We are currently looking to build on our thriving family law practice but welcome this attorney to expand on their particular areas of interest. Ranked as one the top micropolitans in the U.S. and as the #1 micropolitan in Minnesota, Alexandria is surrounded by great lakes for year-round fun and even greater people! We are conveniently located between Fargo and Minneapolis and offer a large client base and a collegial local bar association without the hustle and bustle of the big city. Our team offers opportunities for personal and professional growth and values community involvement. Alexandria is known to be an excellent place to live, work, and raise a family. For more information about our team and practice, please visit our website at www.alexandriamnlaw.com. Interested applicants should send a cover letter and resume to Beth at: bak@alexandriamnlaw.com.

LATERAL LITIGATION ATTORNEY

Maslon LLP is seeking an attorney with five plus years of litigation experience to work in its Construction Litigation practice group. A successful candidate will be a highly motivated self-starter who is able to work well in a fast-paced environment, who has an in-depth knowledge of the law, industry experience, and strong advocacy skills. Litigation experience is required; prior first-chair experience with construction law and/or insurance coverage law is strongly preferred. The firm is willing to consider senior associates and/or partners with previous trial experience whether or not the candidate has a portable book of business. For more information, visit us at www.maslon.com. To apply, please submit a resume and cover letter to Angie Roell, Legal Talent Manager, at: angie.roell@maslon.com.

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Central Minnesota Legal Services seeks full-time housing supervising or staff attorney for its Minneapolis office. Licensed in MN preferred. Post-law school pov. law experience, housing law, or clinical experience preferred. Spanish or Somali language a plus. Staff Attorney Range: $70,001 - $76,365 DOE. Supervising Attorney Range: $76,494 - $94,381 DOE. Excellent benefits. Hybrid work policy. Resume, cvr letter, references and writing sample to Hiring Committee: info@centralmnlegal.org. EOE.

BOARD SEEKS EXECUTIVE SECRETARY

The Minnesota Board on Judicial Standards seeks applicants for the position of executive secretary following the announcement of the pending retirement of current Executive Secretary Thomas M. Sipkins. Applications and related materials are due by October 21, 2023. By law, the executive secretary must be licensed to practice law in Minnesota and have at least fifteen years of experience in the practice of law, including any service as a judge. The current salary is $152,547 plus state employee benefits. The position is full-time. It is expected that the executive secretary will work on an in-person basis, which may involve some travel in the discharge of responsibilities. Links to the position description, application forms, and releases of information are available at: http://www.bjs.state.mn.us/board-news/board-seeks-executive-secretary. Completed applications and signed releases may be submitted to Board Search Committee Chair Tim O'Brien by email at: timothy.obrien@faegredrinker.com or by mail to: Tim O'Brien at 90 South Seventh Street, Suite 2200, Minneapolis, MN 55402. Questions, call: 612-987-2215.

PERSONAL INJURY ATTORNEY

Wanted – Personal Injury Attorney for Bolt Law Firm. We are a growing, entrepreneurial law firm looking for another experienced Personal Injury Attorney to support and expand that practice. The candidate would be involved significantly with our nation-wide railroad litigation practice, which includes FELA claims, as well as injury/wrongful death claims associated with crossings, pedestrians, and rail passengers. Candidate will assist with the partners' cases as well as maintain their own caseload. For more information about the firm see our website: www.boltlawfirm.com. Benefits package includes salary, performance incentives, employee health, dental, vision and disability insurance, paid parking, as well as a 401k/profit sharing plan. Requirements and Qualifications: The candidate must: Be highly motivated to learn our railroad litigation and personal injury practice, and eventually develop new business opportunities. One to three years prior experi-

ence as an attorney, or a judicial clerkship is preferred. Be able to demonstrate good writing skills. Have good verbal communication skills. Please send your cover letter, resume and salary expectation to: eric.wiederhold@boltlawfirm.com.

LITIGATION ATTORNEY

We are seeking an experienced highly service-oriented Litigation Attorney, who has strong experience working in Minnesota and Wisconsin, for our dynamic and growing firm. This role will have a focus on litigation in the areas of personal injury, employment law and civil cases. Essential duties and responsibilities: Process and manage a litigation case from preliminary investigation through all phases of pleadings, written discovery, depositions, motion practice, and trial. Professionalism and prioritization of client customer service and representation. Strategize on how to resolve the client's cases in a favorable manner. Provide proficient communications, consultation, and sound advice to clients. Requirements Include: Must be admitted to practice in Minnesota and/or Wisconsin and in good standing. Three to ten years of litigation experience; minimum of three years personal injury litigation experience. Strong knowledge and understanding of civil procedural rules and practices. Strong knowledge and understanding of administrative rules and practices. Strong writing and research skills For more information about Eckberg Lammers, and to apply online, visit our website: www.eckberglammers.com. You may also send your cover letter, salary requirements and resume to Molly Bergren at: HR@eckberglammers.com. Eckberg Lammers is an EOE. All qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran.

DUAL GOVERNMENT / PRIVATE PRACTICE ATTORNEY

Full-time attorney position with the Pipestone County Attorney's Office and O'Neill, O'Neill & Barduson law firm. This is a dual government-private practice position; the attorney will be employed by both the Pipestone County Attorney's Office and O'Neill, O'Neill & Barduson. As Assistant Pipestone County Attorney, duties will include prosecution of adult criminal cases and juvenile delinquency cases, handling child protection cases, civil commitments, and child support matters. As an associate attorney with the law firm, the attorney will be practicing in the areas of estate planning and real estate, with potential to expand to other non-litigation civil practice. This is a unique opportunity to gain government courtroom experience while simultaneously gaining valuable private practice experience with potential rapid advancement. County benefits include health, dental, and vision coverage, Public Employee Retirement (PERA), life insurance, elective long-term and short-term care, and Health Savings Account Contribution. O'Neill, O'Neill & Barduson benefits include sick leave, paid time off, and enrollment in a profit-sharing program. This position is eligible for Public Service Loan Forgiveness. Minimum beginning annual salary of $75,000 or more depending on experience. We are looking for someone who wants to live in Southwest Minnesota, just 50 miles from Sioux Falls, SD. Email resume and references to: office@ooblawfirm.com.

EXPERIENCED CIVIL LITIGATION ATTORNEY WANTED

River Valley Law, PA, is a civil litigation firm focused on employment, business, and real estate matters. We seek an attorney with at least five years of experience to join the firm as an associate, staff attorney, or possibly as a partner. We serve a variety of clients with matters in Minnesota state courts, Minnesota appellate courts, and in the U.S. District Court, District of Minnesota. We are hard-working and dedicated professionals, who are compassionate toward our clients and to our team. We value and respect our staff as an integral part of what we do. As a team, we celebrate our teams' success and support each other in defeat. We are looking for an attorney who shares these values. This position will be based in our offices with remote work options available. A valid Minnesota law license is required. An additional North Dakota law license is preferred but is not required. Competitive salary and benefits provided, such as medical, dental, HSA, 401(k), and more. Contact: info@rivervalleylaw.com.

TRANSACTIONAL ATTORNEY

Associate General Counsel/Senior Associate General Counsel. The University of Minnesota is seeking a skilled, client-focused and experienced lawyer to advise and represent academic departments and business units in complex business transactions. For a full job description and to apply, please see the website: https://humanresources.umn.edu/jobs for job ID 357565.

ENTREPRENEURIAL BUSINESS ATTORNEY

Gurstel Law Firm, PC ("Gurstel") is looking for entrepreneurial business attorneys looking for an alternative to a solo or big firm practice. Are you tired of administrative hassles, internal politics, absurd and stale billable hourly requirement expectations, and/or lack of collaboration? If so, Gurstel is the home for you. We value creative thinkers, offer a generous draw and revenue split on originations, subsidized benefits including a 401k match, business development assistance, sharing of firm clients and opportunities, and office space (or support for your remote work needs – should the beach be your preferred office setting). Portable book of business required. Please contact Creig Andreasen at: Hourly@Gurstel.com for more information.

ASSOCIATE ATTORNEY

Jovanovich, Dege & Athmann, a St. Cloud general practice firm, is seeking a full-time associate attorney with three to five years' experience. We offer a collaborative work environment, seasoned attorneys and highly qualified staff to assist you working with our clients or growing a practice area of your interest. Great benefits and a salary commensurate with experience. Applicants must be motivated and demonstrate experience handling client files. Interest in general litigation is desired. Send resume to: susan.dege@jdalaw.net.

CORPORATE & SECURITIES ASSOCIATE

Maslon LLP is seeking attorney candidates with at least two years of experience to join the firm as associates in our Corporate & Securities Practice Group. Associates in this group practice primarily in the areas of mergers and acquisitions, private and public securities offerings and compliance, entity formation and governance, commercial contracting, drafting technology agreements and general business counseling. Candidates must be highly motivated and mature with a minimum of two years of relevant law firm experience, a commitment to transactional practice, proven superior academic performance, and excellent communication skills. For more information, visit us at www.maslon.com. To apply, please submit a resume and cover letter to Angie Roell, Legal Talent Manager, at angie.roell@maslon.com. EOE.

ASSOCIATE ATTORNEY

Flaherty & Hood, PA, St. Paul, Minnesota, is seeking an associate attorney with zero to five years of experience to join its growing practice representing and advising Minnesota cities and other local government units in the areas of general municipal law, land use and development, real estate transactions, and contracts. Education and a demonstrated interest in public sector law as well as some administrative hearings and/or litigation experience is preferred.

Flaherty & Hood, PA provides competitive salaries and benefits, such as medical, dental, long-term disability, and life insurance; 401(k) plan; health club and data plan reimbursement; and paid holidays and paid time off. Please submit your cover letter and resume by email to Chris Hood, Shareholder Attorney, at: cmhood@flaherty-hood.com. More information about the firm is available at: http://www.flaherty-hood.com.

ASSOCIATE ATTORNEY

Hvistendahl Moersch Dorsey & Hahn, PA, in historic Northfield, Minnesota is expanding! We are seeking applications for an experienced associate attorney to practice primarily in family law. Approximately two years of experience or more is preferred. Send resumes and cover letters to: lawinfo@hvmd.com.

LITIGATION ATTORNEY

Small, growing litigation firm with national personal injury defense practice seeking a lawyer with five to fifteen years' experience in personal injury and/or trial work. Strong writing, researching and interpersonal skills are necessary. Licensure in other states is a plus. Please send resume and/or direct inquires to: eholmen@donnalaw.com.

ASSOCIATE ATTORNEY

Franz Hultgren Evenson, PA, a full-service civil law firm located in St. Cloud, Minnesota, seeks an associate attorney with three or more years of legal practice experience. The attorney will have the opportunity to work in civil areas including business, litigation, and real property; however, we are open to any practice area as long as you are a good fit with our current team. This position involves immediate and extensive client representation. We pride ourselves in our firm work environment and providing a great team of staff and attorneys who truly care for each other and all get along great. We are especially looking for applicants who want to live and work in Central Minnesota with the entrepreneurial drive to develop client relationships and ultimately become a partner in the firm. Interested attorneys should provide a resume and cover letter to: adecker@fhelawyers.com. Please visit our website at: www.FHElawyers.com. No telephone inquiries. Salary range: Dependent upon qualifications.

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