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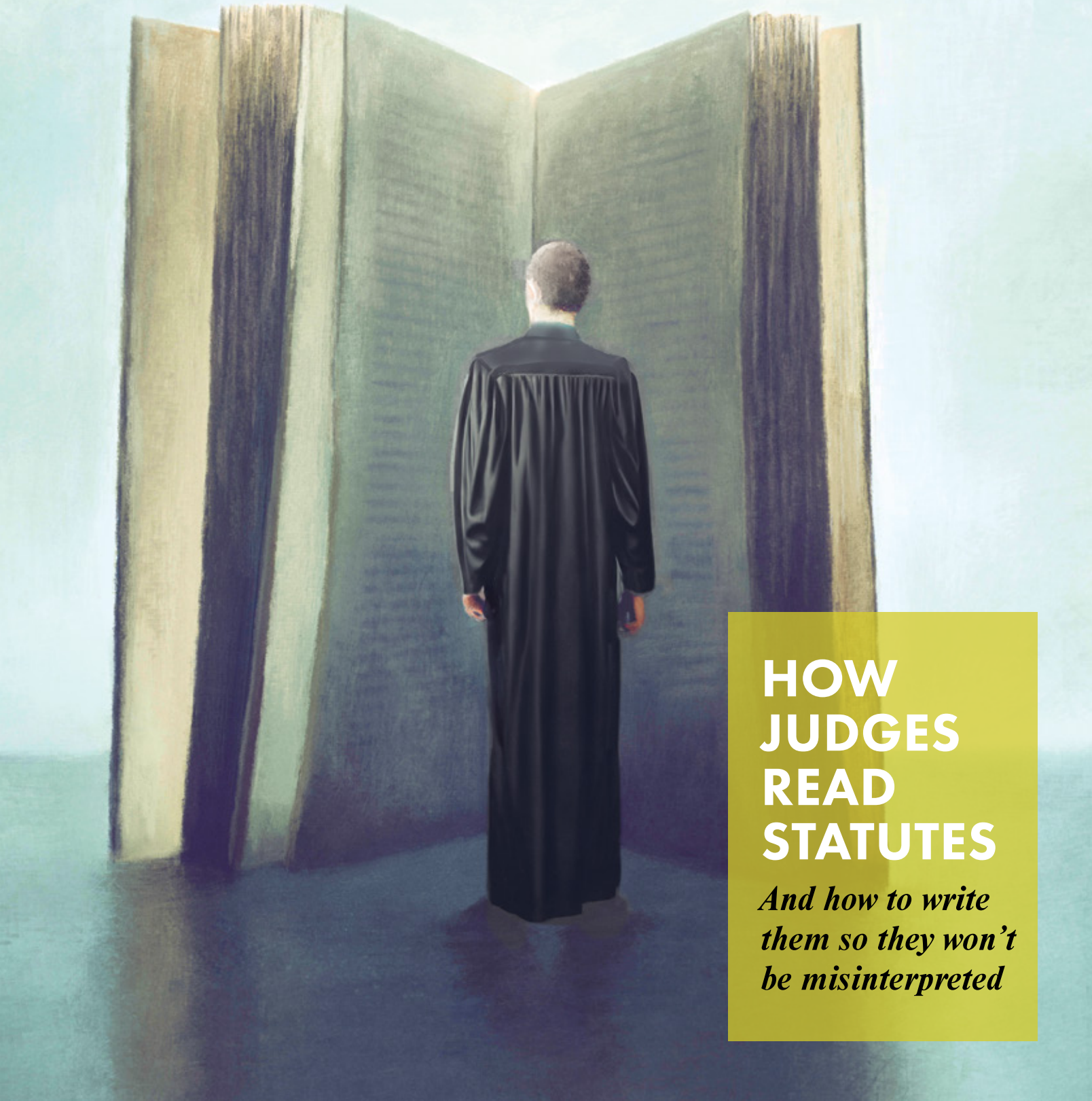

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PAUL M. FLOYD is one of the founding partners of Wallen-Friedman & Floyd, PA, a business and litigation boutique law firm located in Minneapolis. Paul has been the president of the HCBA, HCBF, and the Minnesota Chapter of the Federal Bar Association.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

Finding a personal style of lawyering that's effective over time can be difficult for lawyers of all ages. In a world where TV and movies often glorify uncivil, hard-nosed, ruthless lawyers (*a la* Saul Goodman, fka Jimmy McGill, from *Better Call Saul* and *Breaking Bad*) as the epitome of success, it can be tempting to emulate these portrayals. In the popular imagination, the lawyer who is kind, forgiving, and empathetic when dealing with opposing counsel does not produce the same drama or pizzazz that the nasty lawyer does.

In reality, there are numerous advantages to being known as "the nice lawyer." This approach to practicing law leads to better health and well-being, fosters deeper and more lasting friendships, and ultimately results in greater financial success over the long term. And, good news, there are proven strategies from the field of game theory we can employ to be nicer lawyers.

Better lawyering

If you ask for deposition advice from a seasoned lawyer, they will often tell you to "be nice." If you want to elicit information from someone, the best strategy is to make them feel comfortable and think of you favorably. People who feel attacked will tense up and close down, becoming unwilling to share information with you unless you drag it out of them. The same can be said for interviewing witnesses, getting favorable treatment from court clerks, and working with experts.

Financial success

Nasty lawyers get a reputation from their negative relational style that is hard to break even if they later want to. This is because they are repeatedly hired as the "gunslinger" to be aggressive and mean-spirited (unkind, malicious, or lacking in compassion and empathy) and their reputation is set. In contrast, the "nice lawyer" can achieve success by focusing on collaboration and problem-solving. Just as importantly, the nice lawyer will connect with opposing counsel, mediators, and others, which leads to more referrals, and repeat business, leading to greater financial success in the legal profession.[1] My experience has been that lawyers uniformly want to work for and collaborate with the nice lawyer and not the nasty one. As team collaboration becomes more the norm, having the reputation of being the nice lawyer on the team can be critical to being a successful lawyer in the 21st Century.

Better health and well-being

While the aggressive, confrontational approach of the "nasty lawyer" may yield short-term victories, it often leads to isolation and a cycle of conflict and alienation that can be detrimental to the attorney's well-being and health. Aggressive lawyers often use their behavior to mask their own anxieties and, perhaps ironically, their own lack of self-esteem. Lawyers who maintain a respectful and considerate demeanor experience lower stress levels, reduced burnout, and a higher overall quality of life.[2] This healthier approach to the legal profession ensures longevity and resilience in a demanding career.

Deeper, longer-lasting friendships

Building meaningful relationships with colleagues, clients, and even opposing counsel is a hallmark of the "nice lawyer." By being gracious to opposing counsel, lawyers can foster trust and build enduring relationships within the practice, sometimes resulting in lasting friendships.

Proven tactics for becoming nicer

If you are considering how you might become known as a nice lawyer, there are a number of proven tactics that you might adopt.

One approach is to adopt reciprocal altruism, a relational style that you can employ to build your reputation as a nice lawyer. When you are tempted to respond tit-for-tat ("an eye for an eye"), consider the strategy of tit-for-two-tats. When your opposing counsel's behavior is unprofessional, consider responding, if possible, with a kind gesture or word and wait and see how counsel responds. Individuals often adapt their behaviors to mirror those of their peers, and your kind reply may well prompt your opponent to respond in kind.

If the approach of reciprocal altruism (tit-for-two-tat) does not work, it might be better to stick to writing letters instead of making phone calls. Taking a break before sending a quick, heated response can help you cool off. It's also a good idea to have someone else read your letters to ensure they're professional and on point, without getting sidetracked or diverted by red herrings. Sometimes it's best to just ignore the other lawyer's tricks and focus on preparing your case, using your effort in a positive way to be a better lawyer.

Nice lawyers finish first

So the next time you have the urge to be uncivil to opposing counsel, remember the benefits of being a nice lawyer and the lesson drawn from the game-theory tactic known as tit-for-two-tat.

Instead of immediately reciprocating unkindness or meanness from your opponent, opt for forgiveness and graciousness as your initial response. This approach may lead to a positive response in kind from the other lawyer (tit for tat), and, at the very least, it will further establish your reputation as one of the nice lawyers who finish first. ▲

NOTES

[1] *See* Heidi K. Gardner, *The Collaboration Imperative for Today's Law Firms: Leading High-Performance Teamwork for Maximum Benefit,* published in *Managing Talent for Success: Talent Development in Law Firms.* Edited by R. Normand-Hochman. London, UK: Globe Business Publishing Ltd, 2013.

[2] Ethically Speaking: Linking Civility and Well-Being (12/13/2022), available at: *https://www.lawsociety.ab.ca/ethically-speaking-linking-civility-and-well-being/* (last visited 11/17/2023).

Photos from 2023 Judges Dinner

2024 Judges Dinner
Thursday, March 7

The Judges of Ramsey County showcase their dramatic talents in a variety show and dinner.

Midland Hills Country Club
Roseville, MN
5:00 p.m. Social
6:30 p.m. Dinner

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North Star is about the many generous lawyers who walk alongside clients, meeting them in their time of need. Whether that was in a clinic, by helping with paperwork, mentoring a new pro bono attorney, or through litigation, everyone has important skills to offer. We celebrate MSBA members who commit to pro bono—because even though it isn't always glamorous or easy, it's always important.

To certify as a North Star Lawyer, visit our website at *www.mnbar.org/NorthStar* or check with your firm about sending in all your colleagues' contributions. If you didn't hit the 50-hour mark in 2023, now is a great time to start for 2024. Visit *www.projustice.org* for a full listing of pro bono organizations or reach out to Access to Justice Director Katy Drahos (kdrahos@mnbars.org) for personal recommendations and connections. ▲

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Do you know a nonprofit legal services staff member or law student who deserves to be recognized for their outstanding work with low-income Minnesotans? If so, nominations are open for the 2024 Bernard P. Becker awards! Through four awards—for legacy of excellence, emerging leader, advocate, and law student—we honor those who are on the front lines of fighting injustice for low-income Minnesotans. Anyone may submit a nomination by visiting ***www.mnbar.org/becker-awards.***

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Third Judicial District
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Consider a firm operations self-assessment

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.

Last month's column walked readers through a sample self-assessment of their trust account management practices. This month's column expands the approach to other areas of your legal practice. A few states have created practice self-assessments to help lawyers proactively create policies and procedures that enhance their ability to consistently meet their ethical obligations. Colorado has such a self-assessment, which is generously made available to the public.[1] We have permission to borrowed from it to help lawyers in Minnesota who participate in our probation program to create enhanced office procedures. For this self-assessment, let's focus on a couple of areas of legal practice that give rise to ethics complaints.

Avoiding conflicts of interest

We see a lot of complaints involving conflicts of interest. When we dig into those complaints, we often find inadequate conflict management systems in place. There are several questions you can ask yourself to determine whether you have adequate conflict screening processes in place.

- Have you clearly identified who is, and who is not, the client? This sounds simple but is often the source of issues, particularly if your client is a business entity. Do you include names of related parties and witnesses in your conflict management system? Do you include prospective clients whose representation was declined? Do you keep track of the type and scope of matters for which representation was undertaken? All this information is necessary to make screening effective.
- Do you periodically rescreen when new parties, witnesses, or individuals are added to a matter?
- Do you have a documented process (attorney-led, preferably by an attorney other than the originating lawyer) to review and sign off on matters that are flagged as potential conflicts?
- Do you use engagement, declination, and closing letters regularly? Engagement letters can clarify the scope of representation and help you analyze conflicts. Closing letters help clarify if you are analyzing conflicts under Rule 1.7, Minnesota Rules of Professional Conduct (MRPC) (concurrent conflicts) or Rule 1.9, MRPC (former client conflicts).
- Do you represent multiple clients in a single matter? Have you worked through potential joint representation issues?
- Does your system capture personnel matters that might give rise to potential conflicts of interest, such as business transactions with clients, or community or volunteer activities?
- If a conflict is identified, what is the process to determine if consent can be obtained? Do you understand what informed consent is? Hint: Consult Rule 1.0(f), Minnesota Rules of Professional Conduct (MRPC). Sometimes your confidentiality obligation to a current or former client makes it difficult to provide sufficient information to obtain consent. Do you have a process that is sensitive to ongoing confidentiality obligations?
- How do you ensure that informed consent is obtained in writing and copies retained in every matter where it is applicable?
- How do you capture changed circumstances in a matter to ensure any potential new conflicts are addressed?
- If a conflict arises, do you have withdrawal procedures to ensure compliance with Rule 1.16, MRPC?

Ethical disengagement

Withdrawing ethically is a frequent area of inquiry on our ethics hotline as well as one of the areas where we see more discipline than we would like. Have you asked yourself the following lately:

- Before you take on a matter, have you thought carefully about whether this is a good matter for you to undertake? This includes considering any potential red flags related to the client, your competency (and interest) in the matter under consideration, your current availability and capacity, and the ability of the client to pay for the representation.
- Is withdrawal consistent with the ethics rules, if available or required?[2]
- Do you have a standard procedure to address return of the client file (or file closing) and return of any unearned fees with the client upon withdrawal (or termination of the representation)? Recently we have had law firms state that they do not address unearned fees on flat fee engagements unless the client requests some form of refund. If you did not complete the flat fee representation, you need to make a refund of unearned fees and should have a process in place to do so automatically upon disengagement.
- Do you have a procedure for collecting accounts receivable? Lawyers have been disciplined

for suing current clients as well as for disclosing confidential information related to the representation that is not necessary to collect the debt. Having a good policy and pre-approval process before becoming adverse to a former client can prevent self-inflicted errors en route to collecting your fee.

Charging appropriate fees

Fee agreement issues make up a good percentage of discipline. Some things to consider:

- Do you have a written fee agreement for every matter? If not, is there a good reason for this? Can you still demonstrate that you have clearly explained the scope of the representation and the basis for your fee?
- Are you providing limited scope representation? Remember, you are ethically obligated to get the client's informed consent to a limited scope representation, and the limitation must be reasonable. You cannot just tell the client what you are willing to do. *See* Rule 1.2(c), MRPC.
- If the matter is a flat fee engagement, have you complied with Rule 1.5(b)(1), MRPC?
- For contingency engagements, have you complied with Rule 1.5(c), MRPC?
- If the matter is litigated, do you have a process where you explain that courts can assess costs and disbursements against your client in certain circumstances?
- Do your clients understand what expenses they will be responsible to pay? How do you know this?
- Do you have policies in place to address how best to work on a file with lawyers who practice outside of your firm? This might include fee-sharing (*see* Rule 1.5(e), MRPC). Also, remember, you cannot fee-share with non-lawyers, nor can you pay finder's fees. *See* Rule 5.4, MRPC; Rule 7.2, MRPC.
- Do you have a process in place to alert clients to changes in key fee terms, such as annual rate increases? And are you billing your client regularly? I believe strongly that our communication obligations under Rule 1.4, MRPC, require us to communicate rate and accounts receivable balances proactively and promptly as part of the client's ability to make informed decisions about the representation. Getting paid is important to you; ensuring your client understands what you are doing and what that is costing them is important to them. Remember that the ethics rules are client-centered and your customer service practices should be client-centered as well to ensure good risk management.

Other areas that can benefit from a self-assessment include ensuring competency in client matters; communicating in an effective, timely, and professional manner; ensuring diligent representation; protecting client confidences; law firm organization and personnel supervision; file management, retention, and security; and trust accounts and fiscal practices.

Resources

The above questions are just a few from Colorado's self-assessment, which cites to Colorado's ethics rules. Minnesota's ethics rules are similar in many respects to Colorado's rules since both are based upon the American Bar Association's model rules. If you are reviewing Colorado's self-assessment and have questions on application in Minnesota, review Minnesota's comparable ethics rule, and if you still have questions, give us a call. We are available every day to answer your ethics questions at 651-296-3952. I know there is never enough time in the day to do everything that needs to get done, but I hope that this column inspires you to invest some time to ensure you have in place good policies and procedures that support your ethical obligations. The time spent will pay dividends by elevating your professional development. ▲

NOTES

[1] Colorado Consolidated Lawyer Self-Assessment, *https://www.coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp*.

[2] *See* Susan Humiston, *Withdrawing as counsel (ethically)*, Bench & Bar of MN (Nov. 2019).

A new year's review: Cyber considerations for 2024

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.

In December 2023, the U.S. Securities and Exchange Commission (SEC) put into effect its new rules for cyber disclosures. In a statement, the purpose of the rules was described:

"In July of this year, the Commission adopted final rules that will require public companies to disclose both material cybersecurity incidents they experience and, on an annual basis, material information regarding their cybersecurity risk management, strategy, and governance. These rules will provide investors with timely, consistent, and comparable information about an important set of risks that can cause significant losses to public companies and their investors."[1]

Since the rules were announced, many organizations have been working to understand the new compliance requirements, especially in determining what types of events warrant disclosure. Even in the midst of actively responding to a cyberattack, upper management will now have to carefully consider when an event necessitates quick disclosure. The SEC has stated that no specific cybersecurity measures are mandatory, and organizations have the responsibility to determine for themselves how to best counteract risks. However, disclosure about individual, material incidents (as well as a yearly accounting of cyber risk and how it is being actively managed) is necessary.

Heading into 2024, it is wise for organizations to take stock of their security postures and set goals for the coming year. Whether it's prompted by recently enacted requirements, or the knowledge of an ever-evolving threat landscape, a comprehensive cybersecurity review can help address gaps and inform subsequent assessments. The surge of artificial intelligence applications in 2023 (as both a tool and a new threat) has also led many organizations to review their existing policies and practices. From ensuring the appropriate use of ChatGPT by employees to being on alert for increasingly sophisticated spear-phishing campaigns, AI has tested cybersecurity postures.

This effect could soon extend to cyber insurance policies, as AI may begin to feature more prominently in risk profiles and underwriting. As I discussed in my previous article, "Social engineering or computer fraud? In cyber insurance, the difference matters" (October 2022), reviewing term definitions and asking the right questions ahead of time can be critical in understanding coverage. "To date, exclusions specific to AI have not yet been identified in the insurance market," Reuters reported recently. "Nonetheless, in the event such exclusions or other coverage limitations begin to appear during placements and renewals—for example, exclusions for claims, losses, or damages that 'arise out of' or are 'related to' AI—such changes should be vigorously resisted by insureds."[2] The ubiquity of AI has increased both the sophistication and proliferation of cyber threats, including automation and advanced spear-phishing attacks.[3] It is yet to be seen how AI will impact future cyber insurance policies, from the application process to claims.

Changing threats, increasing risks, and new requirements render a New Year cyber review smart, if not necessary. Move beyond your written policies; try to determine how practices on paper are being implemented on an everyday basis. One frequently forgotten area: data retention policies. An organization may have a well-written and detailed policy that specifies timelines, notification procedures, and destruction methods for different types of data. However, as is often the case with written cybersecurity policies, it comes to be more or less forgotten. As with any security measure, it is only useful when it's actually enacted.

Or sometimes written data retention policies may be too vague to be actionable and might require reworking to fit current needs. Encryption policies, VPN usage, remote work environments, tabletop exercises for incident response activities, access control management, and third-party vendor relationships are all aspects of a cybersecurity posture that should be considered during an assessment. Training programs also need to be updated and assessed for efficacy, as many organizations have a "check-the-box" approach to education, with no retention testing or documentation of completion. Simple cybersecurity goals can make all the difference in 2024. ▲

NOTES

[1] *https://www.sec.gov/news/statement/gerding-cybersecurity-disclosure-20231214*

[2] *https://www.reuters.com/legal/legalindustry/lets-chat-about-ai-insurance-2023-10-24/*

[3] *https://www.cnbc.com/2023/11/28/ai-like-chatgpt-is-creating-huge-increase-in-malicious-phishing-email.html*

After career in Army, Mitchell Hamline student excited for second career in the law

Clockwise from upper left: Karen Hanson; with son Nicholas Shears; son, Chad Lewis; with husband Tom

BY TOM WEBER

During her 30 years in the Army, Karen Hanson often looked for online law school programs but never could find any. When she retired in 2020, she was accepted into an Executive Leadership Ph.D. program and discovered law schools were now offering online options. Then, she found Mitchell Hamline—the first law school to offer an ABA-approved partially-online option.

She'd fallen in love with the law while taking a course on business law while getting her accounting degree more than 20 years ago. Last month, she completed her studies and graduated law school.

Hanson lived in Missouri during her first two years of law school and now lives in Hawaii—taking advantage of Mitchell Hamline's mantra: "Earn a J.D. from anywhere in the world." Hanson's is a military family. Her sons both achieved milestones during their mother's second year of law school: Nicholas was promoted to Sergeant First Class and Chad graduated from Drill Sergeant Academy. Hanson's husband, Tom, teaches at Army University after his own career in the Army—nearly 30 years—where he retired as an infantry colonel.

Hanson was drawn to Mitchell Hamline because of its national reputation for work in dispute resolution and mediation, which she had experience with as an Army officer. But along the way during her time in law school, Hanson found she was also drawn to estate planning. She now hopes to work in both mediation and estate planning, which she says "will allow me to help families in greatest need for these services."

Not that it was easy. Hanson absolutely had moments when it was difficult and even considered quitting during her first semester but was convinced to stick it out. "After that, when people asked me why I was in law school, I told them 'because the people who love me the most didn't stop me,'" she said.

"Now I've graduated and am very glad no one stopped me."

Learn more about Mitchell Hamline's work as a Yellow Ribbon school, offering financial assistance to active duty, veteran, and military-connected students.

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ADHD in the legal profession

The quiet struggle

BY HANNAH SCHEIDECKER ✉ *hannah@fremstadlaw.com*

HANNAH SCHEIDECKER is an attorney at Fremstad Law, where she practices probate, estate planning, and guardianship and conservatorship.

Last year I attended an event featuring the renowned author and motivational speaker Mel Robbins. Little did I know that attending this event would serve as a catalyst. As Robbins candidly shared her own journey, and her back-door discovery of her attention deficit hyperactivity disorder (ADHD), I found myself connecting the dots in my own life. The echoes of her experiences resonated deeply within me, leading me down a path of self-discovery that ultimately resulted in my own diagnosis of ADHD.

I had more questions than answers, so I began reading and reviewing everything I could find about ADHD. This unexpected revelation marked the beginning of a new chapter, challenging my preconceptions and unlocking a newfound understanding of myself. It has been a bittersweet journey toward self-acceptance.

I am part of the lost generation of women discovering ADHD in adulthood. There is a complex blend of relief and grief as the diagnosis weaves a clearer understanding of my past struggles. Relief for finally understanding the intricacies of my mind; grief for the years spent grappling with a silent and unrecognized battle. It involves a mix of gratitude for newfound clarity and a mourning for the time lost in the shadows of misunderstood challenges.

What is ADHD?

ADHD is a complex brain disorder that affects approximately 4.4 percent of adults.[1] ADHD is not a behavior disorder, a mental illness, or a specific learning disability. Instead, it is a developmental impairment of the brain's ability to manage itself. ADHD presents in three different ways: inattentive type, hyperactive type, or combined type. For people with ADHD, these symptoms are chronic, pervasive, neurologically based, and highly disruptive of their everyday lives.

The signs of inattentive type ADHD include difficulty sustaining attention, difficulty with organization, avoidance of tasks requiring sustained mental effort, losing things, being easily distracted, making careless mistakes, appearing not to listen, struggling to follow instructions, and proving forgetful in daily activities.

Signs of hyperactive/impulsive ADHD include extreme restlessness, fidgeting with or tapping hands or feet, being unable to engage quietly in leisure activities, talking excessively, answering questions before they're asked completely, having difficulty waiting one's turn, and interrupting others.[2] Combined type ADHD includes symptoms from both these lists.

What does ADHD have to do with lawyering?

Lawyers report being diagnosed with ADHD at a rate of 12.5 percent, a figure two and a half times greater than the general adult population.[3] High achievers with ADHD are drawn to the legal profession because we thrive under pressure. This isn't anything new; we have had to perform well in high-pressure scenarios such as law school, the bar exam, and juggling 10 roles at once for most of our lives. In the realm of lawyering, ADHD can present both challenges and unique strengths.

Lawyers with ADHD bring a unique set of strengths to the legal profession that can contribute to their success. Their heightened creativity and innovative thinking allow them to approach legal challenges with fresh perspectives, fostering novel solutions. The periods of hyperfocus associated with ADHD become valuable assets in tasks such as legal research, complex case analysis, and thorough preparation. Quick thinking and adaptability, inherent to ADHD individuals, prove advantageous in navigating the fast-paced and unpredictable nature of legal practice.

Moreover, the passion and tenacity often characteristic of individuals with ADHD can fuel a deep commitment to advocacy and justice, making them formidable advocates in legal proceedings. The ability to multitask effectively, a skill heightened by ADHD, aligns well with the demands placed on lawyers, who frequently handle diverse responsibilities simultaneously. Finally, the high energy levels of individuals with ADHD can empower them to meet demanding work schedules and handle the intense workload often associated with legal practice. Recognizing and harnessing these unique strengths—coupled with tailored coping strategies and accommodations—allows lawyers with ADHD to navigate their professional roles successfully.

Amid the intricacies of legal work, lawyers contending with ADHD often find themselves grappling with a range of issues that extend far beyond the stereotypical notions associated with the disorder. One significant challenge lies in maintaining focus, a cornerstone of effective legal practice.

Lengthy research sessions, intricate document reviews, and complex legal analyses demand sustained attention—precisely the cognitive function that individuals with ADHD find elusive. The struggle to concentrate becomes a silent undercurrent in the legal professional's journey, impacting the quality and efficiency of their work.

Strategies for success

In the face of these challenges, lawyers contending with ADHD can employ strategic approaches not merely to cope but to thrive. Leveraging effective time management tools is a critical factor in mitigating the impact of attention-related difficulties, ensuring tasks are organized and deadlines are met. Stress-reduction techniques can further equip individuals to navigate high-pressure legal work. And seeking accommodations that create a supportive work environment, such as flexible schedules or assistive technologies, can enhance productivity and well-being.

In addition, lawyers with ADHD may wish to consider the benefits of occupational therapy or an ADHD coach. These specialized resources can provide personalized strategies, skill development, and ongoing support, offering tailored approaches to address specific challenges and foster sustained success in the legal profession.[4]

Providing better support to lawyers with ADHD

To enhance support for lawyers with ADHD, the legal profession should cultivate an atmosphere of inclusivity and understanding. Educational programs to promote awareness and dispel misconceptions surrounding ADHD help to foster a more empathetic workplace culture. (If you're interested in exploring an ADHD support group for lawyers, check out the one sponsored by Minnesota Lawyers Concerned for Lawyers at *https://mnlcl.org/support-groups/#adhd_support*.) Other measures to improve workplace culture include:

- implementing flexible work arrangements, such as providing quiet workspaces or allowing for alternative schedules;
- encouraging open discussions about mental health within law firms and organizations to help lawyers feel comfortable disclosing their ADHD and seeking necessary accommodations;
- creating easily accessible resources within law firms to facilitate a voluntary and confidential process for lawyers to address their needs;
- offering training for supervisors and colleagues to recognize and support individuals with ADHD;
- advocating for mental health support programs and clear accommodation procedures; and
- integrating technology and organizational tools tailored to enhance time management.

Ultimately, the goal is to cultivate a workplace culture that values self-awareness, open communication, and the voluntary pursuit of necessary support for lawyers dealing with ADHD-related challenges. Our profession should be a space where neurodiversity is not merely acknowledged, but integrated into the fabric of everyday practice. By fostering an awareness of the challenges posed by ADHD, legal workplaces can begin to dismantle the stigma surrounding the condition and pave the way for a culture that encourages open dialogue, understanding, and targeted support. ▲

NOTES

[1] Kessler, R. C., Adler, L., Barkley, R., Biederman, J., Conners, C. K., Demler, O., Faraone, S. V., Greenhill, L. L., Howes, M. J., Secnik, K., Spencer, T., Ustun, T. B., Walters, E. E., & Zaslavsky, A. M. (2006). The prevalence and correlates of adult ADHD in the United States: results from the National Comorbidity Survey Replication. *The American journal of psychiatry*, *163*(4), 716–723. *https://doi.org/10.1176/ajp.2006.163.4.716*

[2] Barkley, R.A. (2014). *Attention-deficit hyperactivity disorder, fourth edition: A handbook for diagnosis and treatment.* New York, NY: Guilford Press.

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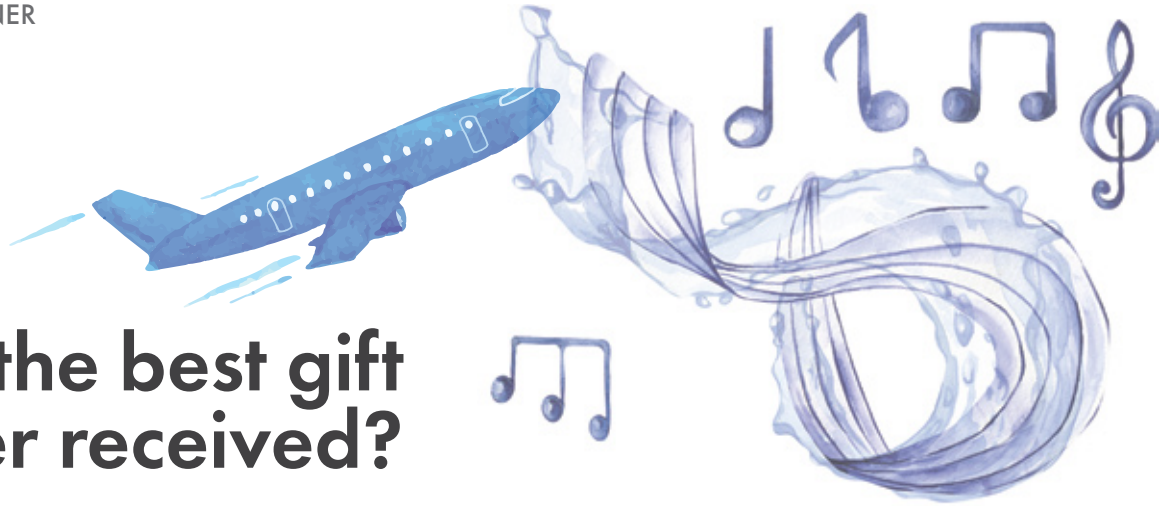

Q: What's the best gift you ever received?

Gloria Stamps-Smith

Gloria Stamps-Smith is a senior attorney in the Hennepin County Attorney's office, juvenile unit. She has previously worked in the adult services (mental health) section of the office. Prior to joining Hennepin County, she was a disciplinary counsel for the Supreme Court of Tennessee.

gloria.stamps-smith@hennepin.us

I was asked this question and thought it would be easy. Well, this was not an easy question. I found it to be quite difficult.

I thought about the first doll I received who had brown eyes and brown hair like mine. My first Easy Bake oven, which was all the rage at the time and oddly enough is now a very hot commodity again. I thought of some precious jewelry I have received over the years—diamonds and other gemstones. I thought of the birth of my children, who have brought me unspeakable joy and are obviously a gift I will forever cherish.

In the spring of 2022, I went home for Mother's Day, which is something I had tried to do for several years as my mother grew older. That year, I was able to spend time with my mother and sisters. We had a great time just being together, sharing meals and laughter. I convinced myself my mother was fine because that is what I needed at the time. When I returned home to Minnesota, my daughters asked candidly how she was doing and I said she was fine. While they did not disbelieve me, they felt in their souls they needed to visit her for themselves. I made a turn-around time with them and returned to Mississippi two weeks later with my daughters and grandson. While my mother appeared physically strong and healthy, it was obvious she was not as sharp as she had been. She spent time with my daughters and grandson laughing, taking pictures, and recounting tales of her childhood—including time she spent with her grandparents, how she met my father, and historical information about her family. Many of these stories I had never heard before. I am forever grateful that they insisted on this visit.

Three months later there was a tragic loss in my husband's family that required another unexpected trip home. During that trip we were able to make a brief stops on the front and back ends of the trip to visit my mother. She was engaging, supportive, and so gracious to my children in their time of need. She provided them with words of encouragement and wisdom to get them through the loss of a relative who was their contemporary. She was a rock.

That was the last time my children or I saw my mother alive, and we are forever grateful for the gift of grace that provided this opportunity to spend time and say goodbye in an environment that was full of hope. This was my greatest gift and one I will forever cherish.

Mike Mather

Mike Mather is general counsel for HealthEZ, a national health benefits innovator for self-funded health plans. Before moving in-house, Mike was a shareholder at a law firm in St. Paul, focusing his practice on commercial litigation.

mike.mather@healthez.com

When I was a kid, I was absolutely fascinated with flying. Books, toys, video games, and—like most kids my age—*Top Gun*. Even today, now that I generally understand the science behind the mystery, there is still something amazing about the idea of a 130,000-pound machine calmly climbing into the sky. So when I found out my parents had gifted me a short "introduction to flying" trip at the local airport for my eighth birthday, I was absolutely giddy.

After a quick introduction with the pilot, my dad and grandfather piled into the backseat of the single-engine plane, while I took the front next to the pilot. For the next hour we toured the skies, flying over downtown Milwaukee, Lake Michigan, and old Milwaukee County Stadium (RIP). I was in heaven.

Looking back on that day so many years later, it's amazing how many things I can remember. The drive to the airport. Talking on the radio. Looking down on the city below. The mixture of joy and sadness when it was over. Little did my parents know that one simple gift would grow a joy of flight that still exists to this day.

Heidi Torvik

Heidi M. Torvik received her undergraduate, masters, and post-graduate degrees at The Juilliard School in New York City; and her JD from the University of Minnesota Law School. She is licensed in Minnesota, North Dakota, Wisconsin, and the United States Court of Federal Claims.

htorvik@lommen.com

The best gift I have ever received is my education and, specifically, my early musical education in the Montevideo Public School System. My sixth-grade band director noticed I made my way through the beginner flute book in one day, which was unusual. Sensing my aptitude for the instrument, he spent countless hours with me after school to provide extra lessons. Under his guidance, I began learning the great flute repertoire but, more importantly, I began to learn how to practice efficiently, the need for patience, the merits of short- and long-term goal setting, and, of course, the value of good old-fashioned hard work.

He eventually sensed I needed more advanced training and connected me with a flutist in the Minnesota Orchestra. My parents were generous enough to drive five hours each weekend for lessons. The instruction of these two fine teachers ultimately helped me gain admittance to The Juilliard School in New York.

My time at Juilliard was transformative and a dream come true. My teachers and fellow students were from every corner of the world, and living in New York City as a performing artist was extraordinary. While a member of the Juilliard Orchestra, I went on to tour with the ensemble both nationally and internationally. I had a fulfilling life as a professional musician in New York for 16 years—performing and teaching at major concert halls in New York and across the country. It was a wonderful life.

The rigors of performing at a high level have assisted me in my career as a litigator and, in particular, as a trial lawyer. My time on tour taught me a great deal about working with a diverse group of colleagues under very stressful circumstances. Moreover, understanding how to break down complex music theory and harmonic analysis has assisted in structuring legal arguments. I often like to tell my colleagues that once you have had a German conductor single you out for a mistake in front of a full orchestra, opening statements in a jury trial are not so bad!

At the end of the day, I was fortunate to learn so much from my sixth-grade band director. The lessons he taught me have carried me though my time in New York and applied to my career in the law. I am continually grateful for the time he so generously gave me those many years ago.

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WHAT HAPPENS WHEN AI FINALLY DOES LEARN TO WRITE LEGAL BRIEFS?

A future imagined.

BY VADIM TRIFEL

"I did not comprehend that ChatGPT could fabricate cases," the attorney rationalized his decision-making, before being reprimanded.[1] As every lawyer knows, citing a case without, at a minimum, a cursory review is sacrilege. But that's old news. We know the lesson: We can't trust AI to do our legal work for us.

Still, the threat looms. Hollywood writers were on strike until recently, in large part due to the fear that AI will, one day, take over their jobs and write the new hit dystopian series about grownups playing children's games with life-and-death stakes, or the next generation of legal dramas.[2] After all, if there's one thing that AI excels at, it is fabrication.

Then, a few weeks ago, I received an email about a job offer. It was an invitation to train a legal AI. The email did not go into detail. I assumed I would be involved in some type of machine learning. I would sit behind a computer and correct the program's mistakes, give it a human touch. And perhaps, unwittingly, I would teach it enough of what I have spent over a decade learning for it to take over my job one day in the not-too-distant future.

In exchange, I would receive $40 an hour. I didn't respond. No doubt others have and will. And, eventually, lawyers will not be reprimanded, but rewarded, for using their AI friends.

Flash forward 20 or so years.

Big Law Firm (BLF) just upgraded to the latest version of the AI legal assistant, N.O. Mercy 5.0. This AI can review the entire file and compile a summary judgment brief in just a few minutes. But that's not all. N.O. Mercy is the legal equivalent of Rosey the Robot. It does document review, legal research, and deposition prep—all for the very low price of $30,000 per month. What role is there for associates? Well, there really isn't one anymore. BLF fired all its associates many years ago. It's actually cheaper this way.

Judy Bloom, a partner at BLF, looks out of the window of her downtown office at the small dots below. They're still out there, the protesting law students. They demand employment. She takes a drag from her e-cigarette—which is just as unhealthy as it was two decades ago.

Judy walks over to her desk. N.O. Mercy has finished its latest summary judgment memorandum. She prints out the brief. It is a thick stack of paper. There used to be a day, many years ago, when she would read the entire memorandum. She briefly recalls the time that an attorney was sanctioned for neglecting to doublecheck the work of an AI. It seems like an eternity has passed since then.

In the hundreds of memoranda that she's read, she hasn't encountered a single mistake. Not one incorrect citation, nor an inapposite case, nor a misstated fact, nothing. She skims it. It is better than anything a human lawyer could compile, the equivalent of months of work—really, a masterpiece.

But she really should read it over, shouldn't she? Judy thinks it over. There's simply no point. And with AI doing so much of the legal drudgery, BLF has done away with hourly fees (you cannot bill for three minutes of work; you'd go out of business). Flat and contingency fees have become a lot more lucrative. So it would actually be more cost-effective not to read it.

Down the street is the Little Law Firm. Sue Little is a talented trial lawyer, but could hardly afford the monthly price tag (even with the small firm discount) for using N.O. Mercy. She doesn't want to anyway. It's cheating, she thinks. Plus there's no joy in it. Sue wants to do it the old-fashioned way: By herself. Create a case from scratch. She relishes the mental challenge.

The case, *Ma and Pop v. XYZ Corp*., is venued in Hennepin County District Court. N.O Mercy has followed the Rules of General Practice to a T.

Rule 115.05 provides, in part:

> No memorandum of law submitted in connection with either a dispositive or nondispositive motion shall exceed 35 pages, exclusive of the recital of facts required by Minn. Gen. R. Prac. 115.03(d)(3), except with permission of the court.

XYZ Corp.'s summary judgment memorandum is exactly 35 pages long, exclusive of the recital of facts. But, in total, the brief is nearly 200 pages.

How could a simple breach of contract case be so fact-intensive? But the fact section is mesmerizing, written in the style of Virginia Woolf, one of the judge's favorite authors. And the argument cites nearly 70 cases, including some of the judge's own opinions. It even appears to imitate the judge's reasoning. Someone who didn't know any better would be certain that the argument portion of the memorandum was written by the judge, with literary flair.

Sue knows that she has a good case. But XYZ's fact section is too elaborate—and, she has to admit, too compelling. She has trouble developing a counter-statement of facts. She begins to doubt her own case. And then there's the argument. It is well-reasoned and includes every conceivable affirmative defense: unclean hands, estoppel, waiver, laches, etc. Sure, plead them (if you can), but you don't include them all in the argument. But the thing is, somehow, they all appear to have merit.

She spends her nights and weekends researching and writing—80, 90, 100 hours just to respond to this treatise couched as a memorandum of law. Ma and Pop are not happy having spent tens of thousands of dollars. Sue takes a look at Rule 115 again. There's only so much time: Just two weeks. She doesn't even have time to answer the phone. It takes all of her energy, but she finally does it. Her brief is finished.

The judge thoroughly reviews both briefs. At the end, he does not know if N.O. Mercy is wrong. No one does. XYZ's argument is just so convincing that there is no disputing it. Moreover, the judge can no longer handle the caseload, especially in situations when both parties use AI to write their memoranda. And, frankly, he no longer finds passion in his work. What else is there to do after justice has been "perfected"?

Worse yet, there is a new judge running against him in the election. The creators of N.O. Mercy's slightly modified invention is the new A.I. judge, Judge E. Mental. The voters have spoken: Human error is what creates injustice. They're convinced that Judge E. Mental will be much more fair and impartial than any human being. ▲

VADIM TRIFEL is a solo practitioner and civil litigator. ✉ *vadim@trifel.law*

NOTES

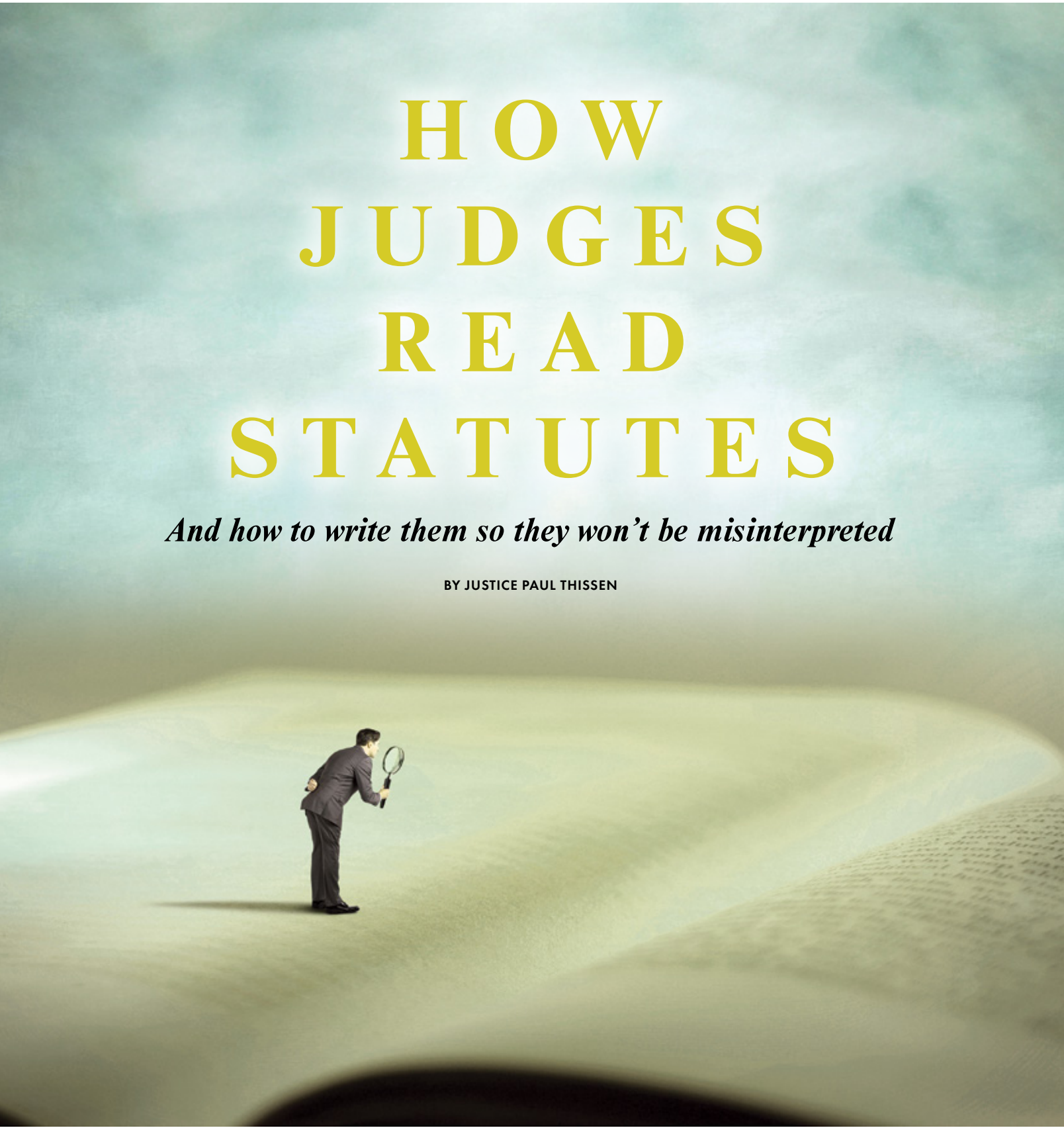
[1] *https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html*

[2] *https://www.pbs.org/newshour/show/why-artificial-intelligence-is-a-central-dispute-in-the-hollywood-strikes*

HOW JUDGES READ STATUTES

And how to write them so they won't be misinterpreted

BY JUSTICE PAUL THISSEN



Statutes have many audiences. They communicate legislators' values to their constituents or to more narrow interest groups. They communicate obligations and limitations imposed upon the people and private institutions who are the subject of the legislation, instructing them on what they can and cannot do. Statutes communicate directions—sometimes broad and sometimes detailed—to the executive branch of government on how to carry out various tasks of governing.

But one critically important audience for legislators and others involved in crafting statutes is judges. When people get into a dispute about what a statute means—about the scope and application of the obligations and limitations a statute imposes—it is judges who interpret it. And, of course, the best way to write for a particular audience is to put yourself in the shoes and the mind of that audience.

Keeping the judicial audience in mind is important because judges have, over centuries, built up a superstructure of rules for interpreting statutes. These rules are essentially assumptions about how legislators think when they are drafting, debating, and voting on statutes. Based on my experience as a member of the Minnesota Legislature for 16 years and as a judge for nearly six years, judges' perceptions about how the Legislature operates differ in fundamental ways from how the Legislature operates in real life.

Said more plainly, people involved in crafting statutes presumably want the statute to be applied in the way they intended. And so it is in a legislator's self-interest to anticipate, when writing a statute, how a judge will understand what the legislator was trying to accomplish. That way the legislator can minimize the risk of a judge interpreting the statute in a different and unexpected way. In this article, I hope to provide practical tips for people involved in the process of drafting statutes so they can maximize the odds that judges will interpret and apply statutes as their drafters intended.

I want to be clear that this is not a one-way street. Judges and lawyers also have an obligation to learn more about how the legislative process actually works. Indeed, I teach an entire law school class with that goal in mind. But that is a subject for a different article.

Thinking like a lawyer

Different professions are taught to look at the world and approach problems in different ways. Our perspectives and analytic methods can become so ingrained over time that it is difficult to approach a problem using a different lens. Indeed, one forgets that different lenses even exist. That is as true for judges as for any profession.

To anticipate how judges will interpret a statute, consider the way lawyers think. Lawyers are taught to systematize and categorize—to create hierarchies of ideas and principles. Moreover, lawyers hate to leave stray things lying about. They like to fit concepts, words, ideas, types of conduct, and more into boxes and they like to have a box where everything can be placed.

A simple example of this is the New York Times Connections game. In Connections, a player is given 16 words and the goal is to fit groups of four words into four categories that have a common theme or characteristic. For example:

CREATE FOUR GROUPS OF FOUR!

EXTRA	BALL	WON	MUG
PIN	COPY	TOO	TEE
ATE	SPARE	PEN	LANE
ALLEY	TOTE	FOR	BACKUP

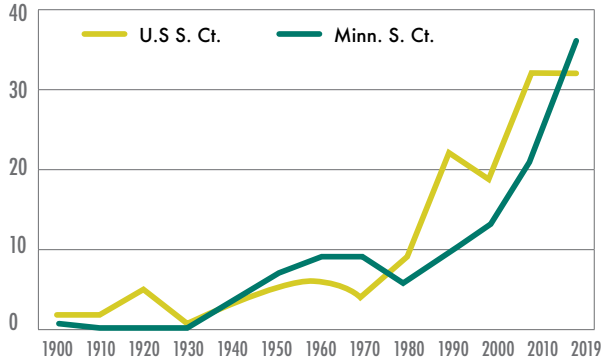
Let's start with the word "tee." Does that word fit with the words ball, pin, and won (things related to the game of golf) or with mug, tote, and pen (things given as merch at a bar association conference, i.e., a tee shirt). This is a perfect game for lawyers because it requires the player to figure out the theme or characteristic that connects words, to fit each word into the correct category, and to leave no word without a category.

This closely resembles the thought process a judge goes through—guided by the canons of construction—when interpreting a statute. Reading the statutes you are drafting, debating, and voting on from this perspective may open your eyes to ways that a statute could prove ambiguous to a judge. Is a tee the thing you drive a golf ball from or a thing you wear?

Define your terms

Judges love to look at dictionaries to help them understand what words in a statute mean. I have over a dozen different dictionaries sitting on my shelf within easy reach as I write this, and, more importantly, as I write my opinions. And I am not even that big a fan of dictionaries. Here is a chart that former Justice David Lillehaug put together a few years ago:

NUMBER OF OPINIONS CITING A DICTIONARY



For reference, the Minnesota Supreme Court, like the U.S. Supreme Court, typically writes fewer than 100 opinions per year. Judges on these courts, in other words, cite dictionaries in roughly a third of their opinions, and that percentage is rising. In contrast, I never saw a legislator in committee or on the floor consulting a dictionary when trying to understand what a statute means or deciding how to vote on a bill or amendment.

The reality is that dictionaries themselves are often sources of ambiguity and contradiction, both within a single dictionary and between different dictionaries. Sometimes a single dictionary will include a dozen or more inconsistent definitions for the same word.[1] Thus, a judge will often have considerable discretion in choosing which of several dictionary meanings to adopt when interpreting the meaning of the statute. For legislators who want to keep some control over the application of the laws they passed, that is a problem.

For example, the Minnesota Supreme Court was once asked to interpret Minn. Stat. §609.375 (2012), which provided: "Whoever is legally obligated to provide *care and support* to a spouse or child... and knowingly omits and fails to do so is guilty of a misdemeanor...."[2] A father convicted under the statute for not paying child support appealed, arguing that "care" and "support" were two separate obligations.[3] Because he provided "care" (defined in dictionaries as "watchful oversight, charge or supervision") to his children, he claimed that he had not violated the statute—even though he admitted he had not provided monetary "support" to his children.[4] Although one justice reasoned that "care and support" was a single concept that required payment of financial support,[5] the Court agreed with the father and reversed his conviction.[6] The majority reasoned that the Legislature must have intended to give "care" a meaning distinct from "support," because otherwise it would not have used both terms.

There is an interesting postscript to this decision. Within a year of the decision, the Legislature changed the phrase "care and support" to "court-ordered support."[7]

But there is good news for legislators who want to avoid confusion like this in future cases. Judges adhere to a simple rule that says if the Legislature defines a term used in a statute, judges are bound to follow it, even if dictionaries would point to a different meaning.[8] Take advantage of that rule. If you are drafting a statute and have a particular meaning of a word in mind, put that definition in the statute.

Use one word when one word will do

Judges like to apply a rule called the surplusage canon. It states that legislators intend that every word in a law must be given meaning and effect and that no word in a statute should be given a meaning that causes it to duplicate the meaning of another word in the statute. The practical impact of this rule is that judges often go *searching for* multiple meanings of different words in a series, even if the legislators who drafted and voted for the bill harbored no such intent.

I have my doubts about whether this assumption reflects how actual legislators think and act. In a survey of Minnesota legislators conducted a few years ago, legislators reported unfamiliarity with the surplusage canon and said that redundant words and words with overlapping meaning are often used in a statute to make certain that a single meaning is clear; in other words, legislators use a "belt and suspenders" approach.[9] But that doubt aside, the surplusage canon is commonly used.

So what should legislators who wants some control over the laws they are drafting do? Look for strings of nouns or verbs in a statute and think hard about how you want them to be understood—as separate and distinct concepts or as redundant or mutually reinforcing terms?—and choose your language accordingly. When in doubt, err on the side of using one word if that will get the job done.

Beware of lists

Lists are a common feature of statutes and also a common source of dispute and confusion. Consequently, courts have developed several rules for understanding lists.

For instance, courts use the associated words canon,[10] which says that words grouped in a list should be given related meanings. (A perfect example of the Connections game applied to statutory interpretation.) Sounds like common sense, right?

Let's take an example: Suppose the Legislature passed a law that says, "A person must carry explosives into a mine in a canister or container." Later, someone carried an explosive into a mine in a cloth bag and a tragedy ensued. Is this a violation of the law?

One person might answer "No, a cloth bag is a container and the statutory text says 'container.'" Another person, applying the associated words canon, might say, "Hold on, a cloth bag is nothing like a canister. This statute only authorized people to use containers with a strength like that of a canister to carry explosives into mines." This is not so easy to decide.

Notably, legislators' intuitions on the topic are split. In the survey, one-third thought that a cloth bag was a "container" for purposes of the statute and two-thirds thought it was not.

Courts also use the *ejusdem generis* canon when faced with a statutory list.[11] This canon applies to lists that start by identifying two or more specific things and then end with a general catch-all phrase. The *ejusdem generis* canon instructs courts to apply the general catch-all only to things of the same general kind or class as the things specifically mentioned.

For instance, if a statute said that a "tax credit may be used to support the manufacture of automobiles, trucks, tractors, motorcycles, and other motor-powered vehicles," should a judge conclude that a manufacturer of airplanes is eligible for the tax credit? An airplane is a motor-powered vehicle by any ordinary understanding of that phrase, but an airplane is not used to travel on land like automobiles, trucks, tractors, and motorcycles. Did the Legislature intend the phrase "other motor-powered vehicle" to be read literally or more narrowly?

A legislator who wants to control how a statute is applied in the wild should bear these two canons of construction in mind and avoid using lists—especially non-exclusive lists of examples—where possible. If you mean that explosives should only be carried in containers of a certain strength, say that. If you mean that the tax credit should apply to all motor-powered vehicles wherever they are used, then just use the words "motor-powered vehicle" without a list of examples. If you mean to limit the tax credit to vehicles used on land, say that.

Pay attention to how courts have understood words in other, related statutes

The Minnesota Supreme Court had a case where a person was found sitting in another person's vehicle but had not moved it anywhere.[12] The person was charged with theft of a motor vehicle in violation of a statute that provided that a person who "takes or drives a motor vehicle without the consent of the owner... knowing or having reason to know that the owner... did not give consent" commits criminal theft. Minn. Stat. §609.152,

subd. 2(a) (2016). Was the person properly found guilty because he "took" the car?

The Court found dictionary definitions of "takes" unhelpful because some definitions suggested that to take something requires some motion or movement of the thing while other definitions suggested that a person takes something when the person exercises dominion over it.[13] Instead, the Court looked to a prior case[14] where it had interpreted the word "takes" in a tangentially related statute—the robbery statute—which provided:

> Whoever, having knowledge of not being entitled thereto, *takes* personal property from the person or in the presence of another and uses or threatens the imminent use of force against any person to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property is guilty of robbery....

Minn. Stat. §609.24 (2016). In the prior case, the Court held that a person "takes" something, for purposes of robbery, when that person exercises dominion over it.[15] Accepting that meaning as a definitive judicial interpretation of the word "takes" in the context of theft-related statutes, the Court held that simply sitting in a car without moving it constitutes theft of a vehicle.[16]

What is the lesson for legislators and others drafting statutes? Ask the people sponsoring and drafting the bill or legislative staff how courts in the past have defined terms in related areas of law—both related statutes and related common (judge-made) law. If that is the meaning intended in the new statute, great. If not, use a different word or (once again) expressly define in the statute how you want the term to be understood.

Consider the atypical situation

Legislators have a difficult job. Often, they are trying to solve a very specific problem but have to write a statute that applies generally. Of course, being human, legislators and those helping them draft statutes cannot anticipate every future circumstance where their general law may be applied. But taking a bit of time to consider the atypical situation can help head off future statutory interpretation problems.

For instance, the Minnesota Supreme Court faced a dispute between a condo association and the developers and builders of the condo building over structural problems that affected the entire building (as opposed to a single unit).[17] The Court had to decide the date on which the 10-year statute of repose for breach of warranty started to run.[18]

The statute directed that no action for a breach of warranty could be brought more than 10 years after the "warranty date."[19] The statute defined "warranty date" as "the date of the initial vendee's first occupancy of the dwelling."[20] It defined "dwelling" as a "new building, not previously occupied, constructed for the purpose of habitation...."[21] "Building" was not defined. Finally, the statute defined "initial vendee" as "[a] person who first contracts to purchase a dwelling from a vendor for the purpose of habitation...."[22]

For a single-family home (which presumably is what legislators had in mind when drafting and debating the statute), determining the warranty date is easy: It's the date when the first purchaser of a newly constructed home occupies the new home. But as the Court concluded, determining the warranty date for a condo building—which has several different dwellings within a single building—is not so clear cut, because the initial occupation of each condo unit might occur at a different time.

The builder and developer argued that there must a single date for the entire building because the statute of repose runs from the date of the first occupancy of the "dwelling," which is defined as a building. The condo owners countered that the builder's and developer's interpretation ignores the definition of "initial vendee." In a condo, no one buys the entire building to live in it—there are several separate units of habitation. Under the builder's interpretation, there can never be an initial vendee at all because no one buys the entire building to live in it.

The Court ultimately concluded the language was ambiguous and turned to other clues, like legislative history, to resolve the dispute. But for purposes of this article, the point is this: Had legislators stepped back for a moment and thought about how the statute of repose provision would play out for dwellings other than single-family homes, the entire dispute could have been avoided.

The lesson—which is easily stated and harder to implement—is to consider those other, less obvious, circumstances where the law you are drafting may apply. If you are legislating about housing, take a moment to think about all the different types of housing that exist. If you are regulating restaurants, think about the different types of restaurants that exist and make sure the language is sensible when applied to each type. Sometimes that will require more nuanced, specifically crafted bill language.

Read bill language that is not struck-through or underlined

One of the most common sources of statutory confusion arises when statutes are amended. As anyone who has spent time reading legislative bills and amendments knows, new statutory language is underlined and language to be deleted is struck-through. I know from experience that legislators' eyes are drawn to the underlined and struck-through provisions and the debate, for good reason, is often focused there. It is important, however, not to neglect the rest of the language because it often happens that the amended portions—while clear in that narrow context—can also change the meaning (or at least raise doubts about the meaning) of other, existing parts of the law or vice versa.

Here's an example: The Minnesota Supreme Court faced the question of what the state had to prove to convict a person for first-degree criminal sexual conduct under Minn. Stat. §609.342, subd. 1(h) (2018).[23] The statute was structured in a common way starting with a general description of the fundamentals of the crime and then listing a series of additional specific circumstances, one of which must be proved. It provided:

> Subdivision 1. Crime defined. A person who engages in *sexual penetration* with another person, *or in sexual contact* with a person under 13 years of age as defined in section 609.341, subdivision 11, paragraph (c), is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists: ...
>
> (h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age *at the time of the sexual penetration*, and:
>
> (i) the actor or an accomplice used force or coercion to accomplish the penetration;
>
> (ii) the complainant suffered personal injury; or
>
> (iii) the sexual abuse involved multiple acts committed over an extended period of time.

Id., subd. 1 (2018) (emphasis added).

In the initial general description of the crime, then, the statute allowed for two types of conduct to constitute first-degree criminal sexual conduct: sexual penetration or sexual contact. On the other hand, the specific circumstance set forth in subpart (h) required that certain conditions existed "at the time of the sexual penetration." The Court was left to resolve the question: is subpart (h) limited to sexual penetration?

The Court answered that question "Yes."[24] But more importantly for our purposes, how did that confusion come to be? The statutory history holds the answer.

The language of subdivision 1(h) originally appeared in a different statute from the general criminal sexual conduct statute: the intrafamilial sexual abuse statute. The intrafamilial statute made it a first-degree crime to engage in sexual penetration with a person with whom you have a familial relationship and treated sexual contact short of penetration with the same person as a lesser crime.[25] The general criminal sexual conduct law, however, treated sexual contact as well as sexual penetration with younger children outside the family as a serious first-degree crime.[26]

In 1985, the provisions of the intrafamilial sexual abuse statute were merged verbatim into the general criminal sexual conduct statute as subdivision 1(h).[27] That subdivision repeated, in a specific circumstance, the "penetration" element included in the statute's general definition.[28] Maybe no one caught the redundancy because the language in the general definition was not underlined. Or maybe they saw the redundancy and did not care.

In 1994, the general introductory portion of the statute was amended to expand first-degree criminal sexual conduct to include not just sexual penetration, but also sexual contact with someone under 13 years of age.[29] The bill made no changes to any of the specific circumstances identified in the bill, so no underlines or strike-throughs appeared in that part of the bill, which included the redundant penetration language in subdivision 1(h).[30] And ultimately, the penetration language in subdivision 1(h) (which did not include sexual contact) resulted in the confusion we faced decades later.

The lesson is that context matters. When reviewing bill language, do not just focus on what is new and what is being deleted. Rather, read the entire provision that is being amended and make sure the changed language fits with the existing language.

Mind the modifiers

Minnesota's peeping statute provides as follows:

> A person is guilty of a gross misdemeanor who:
> (1) enters upon another's property;
> (2) surreptitiously gazes, stares, or peeps in the window or any other aperture of a house or place of dwelling of another; and
> (3) does so with the intent to intrude upon or interfere with the privacy of a member of the household.[31]

After reading this statute, ask yourself: Does the state have to prove that the defendant had the requisite intent when the defendant entered the property *and* when the defendant gazed, stared, or peeped? Or is it enough to prove that the defendant had the requisite intent only when the defendant gazed, stared, or peeped?[32]

This type of question is among the most common sources of statutory interpretation confusion that Minnesota courts face—and it is an especially acute problem in criminal cases where *mens rea* is at issue. Does an intent or knowledge requirement apply to *all* the elements of a crime or just to some?

To resolve this question, courts often turn to grammatical rules that no judge wants to apply and no legislator I know ever considered.[33] Should we apply the series qualifier rule, which directs that when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a qualifier normally applies to the entire series? Or should we apply the last antecedent rule, which points in the opposite direction by telling us that a limiting phrase ordinarily modifies only the noun or phrase that it immediately follows? What should we make of commas and semicolons?

Please don't make judges undertake such exercises in sentence diagraming—exercises that we would rather leave in the mists of fifth-grade English class. Instead, pay close attention to modifying words and phrases. If there are multiple elements or factors set forth in a statute, use more words, if necessary, even to the point of repeating the modifier for each element or factor to which it applies.

Use express language to change the common law or create a private right of action

Another common tool judges use to resolve statutory interpretation disputes are strict-construction presumptions judges makes that the Legislature does not intend to do certain things unless it has expressly declared an intent to do so or such an intent is otherwise "clearly indicated" by the language of the statute. For instance, if there is a dispute over whether a statute changed the prior common law, courts presume that the Legislature did not intend such a change and will construe the statute narrowly.[34] The rule also applies when there is a question of whether a statute creates a private right of action; courts presume the Legislature did not.[35]

Determining whether the Legislature "clearly indicated" an intent to abrogate the common law or to create a private right of action—when the statutory language does not expressly do so—leaves substantial room for judges to maneuver. For instance, the Minnesota Supreme Court has said that "our presumptions regarding the [continuation of the] common law cannot undermine legislative intent. Although we have said that we construe statutes in abrogation of the common law 'strictly,' we do not construe them 'so narrowly' that 'we disregard the Legislature's intent.'"[36] That standard is not a model of precision. Accordingly, judges may and do interpret a statute more *or* less broadly than the Legislature intended—and all without ever looking to other indications of legislative intent like legislative history or the purpose of the statute.

Legislators who do not wish to leave to a judge's discretion the question of whether a statute abrogated the common law or created a private right of action have an easy remedy: If you want to get rid of a common law rule or create a private right of action, say so in the statute.[37] And if you do not want to create a private right of action or to abrogate common law rights and remedies (which might parallel those created in the statute), say so.

Statements of legislative purpose and public policy are a legislator's friend

This may be the most controversial tip in this article. The general consensus among Minnesota legislators and others at the Capitol long has been that statements of legislative purpose and statements of public policy are a mistake. I beg to differ. Statements of legislative purpose and statements of public policy *protect* a statute from erroneous judicial interpretation and give the Legislature *more* control over statutory meaning.

Here is the reality: Despite all best efforts, some statutes will be ambiguous. And what do judges do in that situation? They try to divine the Legislature's purpose in enacting the statute.[38] That, of course, gives judges flexibility to choose the public policy purpose that the judge prefers. Moreover, courts have developed all sorts of rules and presumptions to help in that project—rules and presumptions that may have nothing to do with the purpose of the Legislature when it enacted a particular statute. For example, judges say they favor the public interest as against any private interest (even for statutes that are intended to serve a private interest).[39] Remedial statutes are construed liberally in favor of the remedial purpose (which begs the questions: what is a remedial statute, and how does one determine which of several potential remedial purposes is to be favored?).[40] Tax laws are to be construed in favor of the taxpayer.[41]

Statements of purpose and public policy provide clear textual guidance to courts in a way that limits judicial discretion. For instance, the Minnesota Workers Compensation Act was enacted to balance the interests of employers and employees when a worker is injured on the job. In light of that balance, the statute expressly provides:

> It is the intent of the legislature that chapter 176 be interpreted so as to assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. It is the specific intent of the legislature that workers' compensation cases shall be decided on their merits and that the common law rule of "liberal construction" based on the supposed "remedial" basis of workers' compensation legislation shall not apply in such cases. The workers' compensation system in Minnesota is based on a mutual renunciation of common law rights and defenses by employers and employees alike.... Accordingly, the legislature hereby declares that the workers' compensation laws are not remedial in any sense and are not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand.[42]

This language leaves little room for judges to impose their policy preferences in favor of workers or employers. Courts know what the Legislature's priorities are.

The Minnesota Human Rights Act also provides statutory guidance to judges and lawyers. Minn. Stat. §363A.02 currently states:

> Subdivision 1. Freedom from discrimination
> (a) It is the public policy of this state to secure for persons in this state, freedom from discrimination:
> (1) in employment because of race, color, creed, religion, national origin, sex, gender identity, marital status, disability, status with regard to public assistance, sexual orientation, familial status, and age; (2) in housing and real property because of race, color, creed, religion, national origin, sex, gender identity, marital status, disability, status with regard to public assistance, sexual orientation, and familial status...
> (b) Such discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy. It is also the public policy of this state to protect all persons from wholly unfounded charges of discrimination. Nothing in this chapter shall be interpreted as restricting the implementation of positive action programs to combat discrimination.
>
> Subdivision 2. Civil right.
> The opportunity to obtain employment, housing, and other real estate, and full and equal utilization of public accommodations, public services, and educational institutions without such discrimination as is prohibited by this chapter is hereby recognized as and declared to be a civil right.[43]

This language provides a lot of useful information to judges interpreting the Human Rights Act. It tells us the purpose of the prohibitions on discrimination is both to protect individuals and to preserve our democratic institutions. It instructs that the Legislature did not intend the statute to outlaw consideration of race, religion, sex, disability, or other identified characteristics in an effort to address disparities based on historical or institutional discrimination and prejudice. And in another provision of the Human Rights Act, the Legislature expressly declared that the provisions of the statute "shall be construed liberally for the accomplishment of the purposes thereof."[44]

While each of these public policy positions concerning Minnesota's workers compensation and human rights statutes may be reasonably debated, these statements of purpose ensure that the branch of government best and most properly situated to make those decisions—the Legislature—remains in control.

Conclusion

Better communication among the three branches of government is critical to providing Minnesotans with the humane, effective, and efficient government they deserve. Better communication is most likely when each of the branches has a better understanding of how the other branches operate. Judges and lawyers would be well served to pay more attention to how legislators and agencies do their respective jobs. Likewise, legislators and others who work in the legislative branch will serve their constituents better if they understand how the judges who will inevitably be reviewing their work go about their jobs.

Legislators are elected to do a hard job—solving problems facing Minnesotans by balancing varied competing values and public policy interests. The Legislature has the institutional tools to best accomplish that work. These tips are offered to help legislators and those who work with them accomplish their goals. Hopefully these tips will also help legislators think more carefully about what they are, in fact, trying to accomplish when drafting and enacting statutes. ▲

PAUL THISSEN is an associate justice of the Minnesota Supreme Court. Thissen served in the Minnesota House of Representatives from 2003-2018, including as speaker of the House, while maintaining a litigation and transactional practice in the Twin Cities.

paul.thissen@courts.state.mn.us

NOTES

[1] *See State v. Thonesavanh*, 904 N.W.2d 432, 436 (Minn. 2017) (noting that *The American Heritage Dictionary* defines the word "takes" in over 80 ways—including 61 definitions when the word is used as a transitive verb—and that *Webster's Third New International Dictionary* has over 90 definitions of the word "take").
[2] *State v. Nelson*, 842 N.W.2d 433, 436 (Minn. 2014) (quoting Minn. Stat. §609.375, subd. 1) (emphasis added).
[3] *Id.*
[4] *Id.* at 436–37.
[5] *Id.* at 444 (Dietzen, J., dissenting).
[6] *Id.* at 444. Three justices dissented from the case; Justice Dietzen reasoned that "care and support" referred specifically to monetary child support. *Id.* (Dietzen, J., dissenting). Justice Lillehaug and Chief Justice Gildea would have affirmed on different grounds, without reaching the issue of whether "care" and "support" were distinct elements. *Id.* at 451–52 (Lillehaug, J., dissenting).
[7] Act of May 12, 2014, ch. 242, §1, 2014 Minn. Laws 1 (codified as amended at Minn. Stat. §609.375 (2022)).
[8] *State v. Fugalli*, 967 N.W.2d 74, 77 (Minn. 2021).
[9] The survey was conducted from April to June 2019 as a senior project by Ethan Less. I served as an advisor to Mr. Less on the project. Mr. Less provided the survey to every member of the Minnesota House and Minnesota Senate. The response rate was 15%. Mr. Less also conducted follow-up narrative interviews with several legislators. The survey results are available from the author. The survey was inspired by the excellent and illuminating work of Abbe Gluck and Lisa Schultz Bressman. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part 1*, 65 Stan. L. Rev. 901 (2013).
[10] *See, e.g., State v. Friese*, 959 N.W.2d 205, 213 (Minn. 2021).
[11] *See, e.g., State v. Sanschagrin*, 952 N.W.2d 620, 627 (Minn. 2020).
[12] *State v. Thonesavanh*, 904 N.W.2d 432, 434 (Minn. 2017).
[13] *Id.* at 436.
[14] *Id.* at 438 (citing *State v. Solomon*, 359 N.W.2d 19, 21 (Minn. 1984)).
[15] *Solomon*, 359 N.W.2d at 21.
[16] *Thonesavanh*, 904 N.W.2d at 438.
[17] *Village Lofts at St. Anthony Falls Ass'n v. Housing Partners III-Lofts, LLC*, 937 N.W.2d 430, 435 (Minn. 2020).
[18] *Id.* at 442.
[19] Minn. Stat. §541.051, subds. 1, 4 (2018).
[20] Minn. Stat. §327A.01, subd. 8 (2018).
[21] Minn. Stat. §327A.01, subd. 3 (2018).
[22] Minn. Stat. §327A.01, subd. 4 (2018).
[23] *State v. Ortega-Rodriguez*, 920 N.W.2d 642, 645 (Minn. 2018).
[24] *Id.* at 647.
[25] Minn. Stat. §§609.3641–.3644 (1984).
[26] Minn. Stat. §§609.342–.345 (1984).
[27] Act of May 31, 1985, ch. 286, §15, 1985 Minn. Laws 1299, 1306 (codified at Minn. Stat. §609.342 (1985)).
[28] *Id.*
[29] Act of May 10, 1994, ch. 636, art. 2, § 34, 1994 Minn. Laws 2170, 2206 (codified at Minn. Stat. §609.342 (1994)).
[30] *Id.*
[31] Minn. Stat. §609.746 (2022)
[32] *See State v. Pakhnyuk*, 926 N.W.2d 914, 927 (Minn. 2019).
[33] *See, e.g., State v. Galvan-Contreras*, 980 N.W.2d 578, 584 (Minn. 2022).
[34] *Jepsen as Trustee for Dean v. County of Pope*, 966 N.W.2d 472, 484 (Minn. 2021).
[35] *Becker v. Mayo Found.*, 737 N.W.2d 200, 207 (Minn. 2007).
[36] *Jepsen*, 966 N.W.2d at 484 (quoting *Swanson v. Brewster*, 784 N.W.2d 264, 280 (Minn. 2010)).
[37] *See, e.g.*, Minn. Stat. §325G.207, subd. 3 (2022) (expressly creating a private right of action for violations of assistive device warranty statute).
[38] Indeed, the Legislature has directed the courts to do just that in Minn. Stat. §645.16 (2022).
[39] *See* Minn. Stat. §645.17(5) (2022). Of course, as any legislator knows, there are often multiple and sometimes competing public interests implicated in a statute.
[40] *See S.M. Hentges & Sons, Inc. v. Mensing*, 777 N.W.2d 228, 232 (Minn. 2010).
[41] *Charles W. Sexton Co. v. Hatfield*, 116 N.W.2d 574, 580 (Minn. 1962).
[42] Minn. Stat. §176.001 (2022).
[43] Act of May 19, 2023, ch. 52, art. 19, §45, 2023 Minn. Laws 1, 327 (amending Minn. Stat. § 363A.02 (2022)).
[44] Minn. Stat. §363A.04 (2022)).

CRIME AND PUNISHMENT, *revised edition*

A survey of Minnesota's most important criminal law changes of 2023

BY ELIZABETH A. ORRICK ✉ eorrick@bkdefense.com

The 2023 legislative session was busy, with a record-breaking number of bills. In the end, 75 new chapters of law were adopted. In the criminal sector, numerous laws were added, existing laws modified, and some laws repealed. This article aims to highlight some of the more important changes affecting the rights of citizens throughout the state.

Cannabis laws

Some of the biggest updates to criminal law last year resulted from Minnesota's becoming the 23rd state to legalize recreational marijuana. The final bill, HF100, came to 321 pages and legalized possession and use of marijuana for Minnesotans over 21 years old. (For a more comprehensive account of the law's provisions, see "From 0 to HF100: Legal cannabis comes to Minnesota," September 2023.) The law allows Minnesotans to possess or transport up to two ounces of cannabis flower in a public place, up to eight grams of THC concentrate, and edible cannabis products infused with up to 800 milligrams of THC. Possession and transportation of marijuana are now permitted in a motor vehicle, though the product must be either in its sealed container or package or in an area not normally occupied by the driver or passengers. Using or possessing cannabis products is still prohibited in schools, state correctional facilities, on federal property, or in a location where the product smoke or vapor could be inhaled by a minor. It is also worth noting that if an individual is caught with a greater amount of cannabis products than allowed by law, they could face up to felony-level charges.

Cultivating marijuana is also now legal, meaning Minnesotans can break out their gardening gloves and grow up to eight cannabis plants in their residence, with no more than four being mature plants at one time. Residents may keep up to two pounds of cannabis flower in their homes. Although cannabis plants may be grown indoors or outdoors, there are restrictions on visibility and accessibility of the plants. An individual may face a felony-level charge if they are caught cultivating more than 23 cannabis plants or a gross-misdemeanor charge if they are found cultivating between 16 and 23 cannabis plants. The law is silent, however, when it comes to charging levels for individuals found cultivating nine to 15 plants.

Significant changes were also made in the realm of expungements. The Adult-Use Cannabis Act mandates automatic expungements of low-level cannabis convictions. The onus is on the Minnesota Bureau of Criminal Apprehension (BCA) to locate eligible cases and notify parties. According to the BCA, it is estimated that between 60,000 and 70,000 Minnesotans will be eligible for automatic expungement of their cannabis convictions.[1] The law also created a Cannabis Expungement Board to review felony-level cannabis convictions for expungement eligibility or resentencing. Unlike the traditional expungement process, the Cannabis Expungement Board presumes that a felony cannabis conviction expungement is in the public interest "unless there is clear and convincing evidence that an expungement or resentencing to a lesser offense would create a risk to public safety." In analyzing risk to public safety, the board considers whether the conviction involved the use of a weapon or assaultive behavior.

Drug paraphernalia

By repealing Minnesota Statute section 152.092, Minnesota became the first state to fully legalize the possession of drug paraphernalia, including hypodermic syringes and needles. It is also no longer illegal to possess paraphernalia that has residual amounts of one or more controlled substances in it under Minnesota statute section 152.025. In other words, any type of drug residue in paraphernalia cannot be used as a basis to bring a controlled substance charge. What is a "residual amount," you ask? Well, that remains to be defined.

Catalytic converter theft

To stem the rise in thefts of catalytic converters, the Minnesota Legislature added restrictions on the purchase or acquisition of the devices. It is now illegal for an individual who is not a registered scrap metal dealer to possess a catalytic converter that is not attached to a motor vehicle and is not certified for reuse as a replacement part. It is also "unlawful for a scrap metal dealer to purchase or acquire a used catalytic converter not attached to a motor vehicle" unless the seller can provide title or registration to prove ownership.[2] The penalties for violating the law range from a misdemeanor for one catalytic convertor to a 20-year felony for 70-plus catalytic convertors. In addition to the statutory changes, the Commissioner of Public Safety was given $600,000 to ensure compliance for 2024 and 2025.

Carjacking

Following an increase in carjacking offenses statewide, the Minnesota Legislature decided to make "carjacking" a more clearly defined crime with stiff penalties attached. Until this year, the crime of carjacking did not technically exist but was instead charged in conjunction with Minnesota robbery laws. Under the new law, a third-degree carjacking offense carries a maximum sentence of 10 years while a felony first-degree offense carries a maximum sentence of 20 years, on a par with aggravated robbery and third-degree murder.

Organized retail theft

Noticing a rise in organized smash-and-grab retail thefts, lawmakers made organized retail theft its own crime—with stiff penalties. In contrast to standard shoplifting charges, organized retail theft focuses on a person's intent to resell stolen goods rather than to keep them for personal use. Organized retail theft will typically involve an underlying criminal enterprise employing groups of individuals to steal large quantities of merchandise for subsequent sale via online auction or to other retailers. According to a report from the National Retail Federation, incidents of organized retail theft contributed to a $94.5 billion loss in 2021 (though the organization subsequently retracted its initial claim that organized theft accounted for "nearly half" that figure).[3]

The level of charges a person could face depends on the value of property stolen. For example, if the stolen property is valued at more than $5,000, individuals involved face a possible 15-year felony sentence.

"Peeping Tom" laws

Following the Minnesota Supreme Court's decision in *State v. McReynolds,*[4] wherein the court determined that a man who used his cellphone to record a woman without her consent could not be convicted under the language in Minnesota's "Peeping Tom" statute, the Minnesota Legislature moved to close a loophole in the law. Under the previous law, a person only violated the statute if they gazed upon someone or recorded images "through the window or any other aperture" of a house or dwelling. The revised law now criminalizes the recording or broadcasting of images of another without consent wherever a person would have an expectation of privacy.

Aiding and abetting felony murder

Under previous Minnesota murder laws, a person could be convicted of murder even if they did not intend for anyone to die but were somehow indirectly connected to the crime. For example, a person could be charged with aiding and abetting felony murder if they were unknowingly sitting in the getaway car during the commission of a felony-level crime. Lawmakers realized the potential for unjust sentences for such individuals and reframed the law

to focus on intent. The bill, HF1406, now limits the charge of felony murder to individuals who commit murder or directly aid and abet murder "with intent to cause the death of a human being."[5]

The new law is retroactive, meaning that people who had been convicted under the old law are immediately eligible for resentencing and could get credit for time served and be released from prison.

No-knock warrants

No-knock warrants that allow police to enter premises without first loudly and clearly announcing their presence have been hotly debated for years. As of July 2023, a court cannot issue a no-knock warrant unless the court determines that there is probable cause to believe that "the search cannot be executed while the premises is unoccupied" and that "the occupant or occupants in the premises present an imminent threat of death or great bodily harm to the officers executing the warrant or other persons."[6] These requirements are significantly stricter than the prior rule, which allowed a court to approve a no-knock warrant when police could demonstrate that they would be unable to detain a suspect without such a warrant.

Probation reduction and prisoner rehabilitation

The Minnesota Rehabilitation and Reinvestment Act (MRRA) provides a path for early release for many inmates. It requires the Minnesota Department of Corrections to develop a rehabilitation plan for every inmate with at least one year of their sentence left to serve. Such plans might, for instance, include recommendations for substance abuse treatment programs, medical and mental health services, or vocational and educational aid, among other rehabilitative programs. The MRRA also allows for the reduction of a criminal sentence for individuals who make progress toward rehabilitation.

The Department of Corrections has stated that it will take time before the MRRA changes take effect and are fully implemented. When that will happen and how its progress will be monitored remains to be seen. ▲

Elizabeth Orrick is an associate attorney at Brandt Kettwick Defense, where she represents clients facing criminal charges from misdemeanors to felonies. She graduated from Mitchell Hamline School of Law in 2021 and clerked at the Minnesota Court of Appeals.

NOTES

[1] *BCA Prepares to Implement Clean Slate, Adult-Use Cannabis Expungements*, Department of Pub. Safety Blog, *https://dps.mn.gov/blog/Pages/20230609-bca-prepares-clean-slate-adult-use-cannabis-expungements.aspx*

[2] Minn. Stat. §325E21, subd. 13.

[3] "National Retail Federation retracts stats after theft war of words," Forbes 12/8/2023 *https://www.forbes.com/sites/markfaithfull/2023/12/08/national-retail-federation-retracts-stats-amid-theft-war-of-words/?sh=49f7d54c1596*

[4] 973 N.W.2d 314 (Minn. 2022).

[5] Minn. Stat. §609.05, subd. 2a.

[6] Minn. Stat. §626.14, subd. 3.

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

Criminal sexual conduct: Previous predatory crime qualifies for engrained offender sentencing enhancement if committed before sentencing. Appellant was convicted of second-degree criminal sexual conduct and the district court imposed an enhanced sentence, finding appellant was both a dangerous offender and an engrained offender. Appellant appealed his conviction and sentence.

To be considered a "dangerous offender" at sentencing, "at the time of sentencing," the offender must have "two or more prior convictions for violent crimes." The dangerous offender statute, Minn. Stat. §609.1095, defines "prior conviction" as one "that occurred before the offender committed the next felony resulting in a conviction and before the offense for which the offender is being sentenced." The district court used a 2010 criminal sexual conduct conviction and 2017 second-degree assault conviction as the prior offenses. However, the 2017 conviction was based on an offense that occurred in 2016. The offense in this case occurred in 2015. Thus, appellant only had one prior conviction for a violent crime under section 609.1095 and the district court erred in determining he met the criteria to be sentenced as a dangerous offender.

But the district court's finding that appellant should be sentenced as an engrained offender was found to be correct. An offender convicted of criminal sexual conduct is eligible for an enhanced offense as engrained offender if they are a "danger to public safety" and the factfinder determines "the offender's criminal sexual behavior is so engrained that the risk of reoffending is great without intensive psychotherapeutic intervention or other long-term treatment or supervision extending beyond the presumptive term of imprisonment and supervised release." Minn. Stat. §609.3455, subd. 3a(a).

An offender may be a danger to public safety if, among other possibilities, they previously committed a predatory crime. A "predatory crime" includes second-degree assault (appellant's 2017 conviction), but not second-degree criminal sexual conduct (appellant's 2010 conviction). Appellant argues his assault conviction does not qualify because it was committed after the 2015 criminal sexual conduct offenses. Section 609.3455 directs the district court to impose an enhanced sentence if it "determines" the offender is a public safety danger. The use of the present tense form of "determines" signifies that the time frame for assessing the offender's danger "is the point in time when the fact finder makes that determination." The court holds that the statute's plain meaning "is that the predatory offense must have been committed before 'the fact finder determines that the offender is a danger to public safety.'" Appellant's assault offense was committed before the sentencing phase in this case, so the district court properly found he was a danger to public safety.

The court also finds ample support in the record for the district court's determination that appellant's criminal sexual behavior was so engrained as to warrant extended supervision. As the record also contains sufficient evidence to support his conviction, both appellant's conviction and sentence are affirmed. ***State v. Balsley***, A23-0133, 2023 WL 8361314 (Minn. Ct. App. 12/4/2023).

Procedure: Reversal of conviction is not required for an unfulfilled promise in a plea agreement if the record does not clearly reveal the agreement's terms. Appellant pleaded guilty to two counts of third-degree criminal sexual conduct, in two separate cases, pursuant to a plea agreement that resolved both cases and that, appellant argues, called for concurrent stayed prison sentences. He was instead sentenced to consecutive stayed prison sentences. The plea petition in each case stated the agreed-upon sentence in one case was as follows: "10 years of supervised probation. Guideline stay of execution with cap of 90 days jail." Each petition also said the sentence in the second case was as follows: "10 years of supervised probation, guideline stay of execution with cap of 90 days jail, concurrent." At the sentencing hearing, the pros-

ecutor made conflicting and confusing statements about whether the agreement called for concurrent or consecutive sentences.

Where a promise made in a plea agreement is not fulfilled, "the defendant cannot be said to have voluntarily entered into the plea agreement." A direct appeal challenging the validity of a guilty plea is appropriate where the record is complete. Here it is not. The record is not clear as to whether the parties agreed that appellant's two 90-day probationary jail terms would be concurrent. The proper avenue for appellant's challenge is a postconviction petition, as postconviction proceedings allow for the presentation and evaluation of matters not of record. Thus, appellant's convictions are affirmed.

Court finds, however, that the district court erred by failing to state its reasons for imposing consecutive stayed sentences. Under the sentencing guidelines, the presumptive sentence is a concurrent stayed sentence, so the district court could impose a consecutive sentence only by departing from the guidelines. The district court never stated its intention to depart, nor did it state any reasons for a departure. The court affirms appellant's convictions but reverses the sentences and remands for imposition of concurrent stayed prison sentences. ***State v. Arola Johnson***, A23-0134, 2023 WL 8360167 (Minn. Ct. App. 12/4/2023).

■ **Right to a fair trial: New trial granted due to prosecutor's statements during closing that appellant lost the presumption of innocence before deliberations.** Appellant was charged with second-degree criminal sexual conduct following allegations that he abused his girlfriend's 11-year-old daughter. At trial, during its rebuttal closing argument, the state told the jury, "[Appellant] no longer has that presumption... He no longer has that presumption of innocence. He has been proven guilty beyond a reasonable doubt... he no longer has that presumption of innocence." The jury found appellant guilty of one count of second-degree criminal sexual conduct. The court of appeals affirmed appellant's conviction.

The Supreme Court examines whether the state's presumption of innocence statements deprived appellant of his 6th Amendment right to a fair trial. Because defense counsel did not object to the state's closing argument, the Court applies the modified plain error test, which requires (1) appellant to demonstrate the prosecutorial misconduct was plain error; (2) the state to thereafter demonstrate the error did not affect appellant's substantial rights; and (3) the reviewing court to determine if ensuring fairness and the integrity of the judicial system requires addressing the error. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006).

The Court finds that the state's statements were not consistent with Minnesota law. A defendant is not proven guilty until a jury has deliberated and reached the conclu-

sion of guilt. Until this conclusion is reached, a defendant retains the presumption of innocence. This error was plain because it contravenes well-established law.

The Court also finds the evidence against appellant was not strong, as it consisted primarily of uncorroborated, inconsistent reports by the alleged victim regarding acts from many years prior. Although the trial court gave a pattern instruction on the presumption of innocence, the Court finds it was not specific enough to remedy the state's error, as it failed to correct the state's misstatement or clarify that appellant retained the presumption of innocence. The Court finds a reasonable likelihood that the state's misstatement may have had a significant effect on the jury and, therefore, appellant's substantial rights were affected.

Finally, the Court finds it is necessary to address the state's error to ensure fairness and the integrity of the judicial proceedings. Remanding for further proceedings allows the state to still seek justice for the alleged victim, while enforcing the constitutional protections afforded to all criminal defendants. ***State v. Portillo***, A21-1621, 2023 WL 8610196 (Minn. 12/13/2023).

■ **Firearms: Statute prohibiting possession of a firearm without a serial number is not unconstitutionally vague.** The state appeals the dismissal of a charge against respondent of possessing a privately made firearm lacking a serial number. The Minnesota Court of Appeals finds the relevant charging statute, Minn. Stat. §609.667(3), not unconstitutionally vague and finds probable cause to support the charge, reversing and remanding to the district court.

Section 609.667(3) prohibits "receiv[ing] or possess[ing] a firearm that is not identified by a serial number." "Serial number" is the number required under 26 U.S.C. §5842. Section 609.667(3) incorporates the definition of "serial number" used in the federal law, but it does not limit its application only to firearms required to have a serial number by federal law. Section 609.667(3) is not vague because it plainly "prohibits the possession of any firearm that is not identified by serial number, regardless of whether federal law would require a serial number for a particular firearm." Section 609.667(3), then, applies to privately made firearms.

The record shows respondent knowingly possessed a firearm and that the firearm had no serial number. Thus, there was probable cause to support the charge against respondent. ***State v. Vagle***, A23-0863, 2023 WL 8706087 (Minn. Ct. App. 12/18/2023).


Samantha Foertsch
Bruno Law PLLC
samantha@brunolaw.com


Stephen Foertsch
Bruno Law PLLC
stephen@brunolaw.com

Employment & Labor Law

JUDICIAL LAW

■ **Wage payment claim; non-employee not entitled to sue.** A claim of failure to pay compensation under the state Payment of Wages Act, Minn. Stat. §181.79, failed because

the claimant was not an "employee" of the nonprofit organization for which he performed services, while also being on its board of directors. The Minnesota Court of Appeals upheld a post-trial ruling of the Hennepin County District Court setting aside the jury verdict in favor of the employee. ***Pakonen v. Housing Alternatives***, WL 2023 7292822 (Minn. Ct. App. 11/6/2023) (unpublished).

■ **Disability lawsuit; failure to state claim.** A Dakota County employee's disability discrimination lawsuit, which included breach of contract and negligence claims, was dismissed for failure to state a claim. The Minnesota Court of Appeals affirmed dismissal by the Dakota County District Court for failure to plead sufficient facts that the claimant had a "disability" recognized under the federal Americans with Disabilities Act or the parallel provision of the Minnesota Human Rights Act. ***Banks v. Dakota County Board of Commissioners***, WL 2023 8178145 (Minn. Ct. App. 11/27/2023) (unpublished).

■ **Employment discrimination; summary judgment affirmed.** An insufficient appeal doomed an employment discrimination claimant seeking to overturn summary judgment. The 8th Circuit held that the appeal did not preserve a challenge to the refusal to allow amendment of the complaint and that judgment was proper on the merits. ***Hossan v. Job Service of North Dakota***, WL 2023 8232205 (Minn. Ct. App. 11/28/2023) (unpublished) (*per curiam*).

■ **Age bias retaliation; partial reversal.** A woman who was fired after her employer offered her several alternatives, then changed its position and required her to accept either a demotion or a resignation with severance, lost her age discrimination claim. Affirming a lower court ruling, the 8th Circuit Court of Appeals held that the employers' concern over the employee's work performance was not pretextual. But it reversed and remanded dismissal of a retaliation claim due to the timing of the discharge, which supported an inference of retaliation. ***Lightner v. Catalent CTS***, WL 2023 8885025 (8th Cir. 12/26/2023) (unpublished).

■ **Overtime pay; settlement bars appeal.** An appeal of the settlement of an overtime wage claim under the Fair Labor Standards Act, 29 U.S.C. 201, *et seq*. barred an appeal by the employer of a pre-settlement order for partial summary judgment for the employee. The 8th Circuit dismissed the appeal because the settlement "dispensed" with the claims and, thus, the prior ruling was not a final order subject to appellate jurisdiction. ***Folta v. Norfolk Brewing***, WL 2023 8858748 (8th Cir. 12/22/2023) (unpublished).

■ **Retaliatory termination; no pretext.** The termination of multiple employees by a company that had a contract to maintain engines for the U.S. Air Force, after the employees had been discussing unionization and had met with union officials, did not constitute an improper retaliatory termination in violation of the National Labor Relations Act. The 8th Circuit Court of Appeals, granting a petition by the company, overruled the

determination by the National Labor Relations Board (NLRB) that the claimed reason for the termination—poor performance by the employees—was a pretext for retaliation. There was insufficient evidence to demonstrate that management's poor performance claim was a pretext for retaliation due to the consideration of unionization by the employees, the court reasoned in setting aside the NLRB decision. ***Strategic Technology Institute, Inc. v. National Labor Relations Board***, 87 F.4th 900 (8th Cir. 2023).

No return-to-work date; termination upheld. An employee who was out on short-term disability for nine months and did not respond to her employer's request for a return-to-work date was properly terminated. The 8th Circuit, upholding a lower court ruling, held that the termination of the employee the day after she told her company that her doctor had not released her to return to work, did not constitute unlawful discrimination based upon disability. ***Johnson v. Midwest Division-RBH, LLC***, WL 2023 8535262 (8th Cir. 2023) (unpublished).

Discrimination claim; summary judgment upheld. An employee who did not establish any basis to reverse a trial court's summary judgment on a discrimination claim lost an appeal. The 8th Circuit, upholding the lower court, ruled that summary judgment was appropriate and was not refuted by any cognizable arguments on appeal. ***Nahum v. LMI Aerospace, Inc.***, WL 2023 8469936 (8th Cir. 2023) (unpublished) (per curiam).

Ride-sharing dispute; dismissal of contract claim upheld. A dispute between a driver for a vehicle ride-sharing company and the company was maintainable for breach of contract and breach of the implied duty of good faith and fair dealing regarding a refusal by the company to arbitrate. Affirming in part, reversing in part, and remanding a ruling of the Ramsey County District Court, the Minnesota Court of Appeals held that the claim for breach of contract was maintainable, although a number of other claims were properly dismissed. ***Mariano v. Raiser***, WL 2023 8536448 (Minn. Ct. App. 12/11/2023) (unpublished).

Marshall H. Tanick
Meyer, Njus & Tanick
mtanick@meyernjus.com

Environmental Law

JUDICIAL LAW

8th Circuit orders EPA to revisit ban on chlorpyrifos pesticide. In "the latest round in the battle over chlorpyrifos," the 8th Circuit found that the Environmental Protection Agency's (EPA) ban on chlorpyrifos—a pesticide used in a variety of agricultural applications—was arbitrary and capricious in violation of the Administrative Procedures Act (APA).

Nearly two dozen agricultural groups petitioned the 8th Circuit to review whether the EPA violated the APA when it banned the use of chlorpyrifos for agricultural purposes in 2021. The ban was the result of a decade-long petition by various environmental groups, which the EPA recognized had "had raised 'risk concerns' about how chlorpyrifos impacted children, including through drinking water, but [] was not sure what to do about it." Eventually, the environmental groups grew impatient awaiting the EPA's decision and petitioned the 9th Circuit to require the EPA to respond. The 9th Circuit ordered the EPA to "revoke all chlorpyrifos tolerances or modify them if it could certify that the tolerances so modified were safe," within 60 days following the court's order. In response, the EPA revoked all tolerances, and ended the use of chlorpyrifos in the United States.

In the instant (8th Circuit) case, agricultural groups petitioned for review of the EPA's decision ending the use of chlorpyrifos in the United States. They argued that the EPA acted "arbitrarily and capriciously" in violation of the Administrative Procedures Act when it revoked all tolerances of chlorpyrifos. The EPA, in turn, argued that in view of the short time frame to act given by the 9th Circuit, the EPA did not have time to modify tolerances of chlorpyrifos to levels it deemed safe, and therefore had no choice but to revoke all tolerances for all uses.

In beginning its review, the 8th Circuit recognized that "any tolerance the EPA 'establish[es] or leave[s] in effect' must be 'safe.'" Said another way, the EPA was tasked with figuring out all the ways chlorpyrifos residue could reach people, sum them together, and then add the extra exposure from the tolerance under consideration. The court cited a report where "the EPA had uncovered 11 high-benefit agricultural uses that were likely to be safe if it revoked others." This demonstrated that the EPA could modify tolerances. Therefore, the revocation order was arbitrary and capricious. The 8th Circuit remanded back to the EPA and instructed the EPA that "more than just modification is on the table. The agency remains free to exercise its discretion as long as it considers all 'important aspect[s] of the problem' and gives a reasoned explanation for whichever option it chooses." ***Red River Valley Sugarbeet Growers Association v. Regan***, 85 F.4th 881 (8th Cir. 2023).

The Supreme Court declines to take up CERCLA contribution limitations case. The United States Supreme Court recently denied *certiorari* in a case finding that a declaratory judgment on liability was sufficient to trigger the three-year statute of limitations for seeking contribution under section (g)(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9613(f). The issue in the case was whether CERCLA requires more, such as a decision that imposes recoverable costs or damages, to trigger the Section 113 statute of limitations.

The case involved the Kalamazoo Superfund site in Michigan, which was contaminated with polychlorinated biphenyls, or PCBs, from over a century of paper mills operating in the area. The U.S. EPA added the site to the National Priorities List in 1990, and the same year, Georgia Pacific and two other paper companies not at issue in the current case entered an administrative order on consent with the state of Michigan to clean up the site. Five years later, in 1995, Georgia Pacific and the two other companies brought cost recovery actions under CERCLA section 107, 42 US.C. §9607, against additional paper companies. The additional companies countersued. Following a trial, the district court in 1998 issued an order finding several companies, including Georgia Pacific, liable for the PCB contamination at the site. The 1998 liability order was a "bare bones" declaratory judgment on liability; it did not determine the amount of the costs or damages. *Georgia-Pacific Consumer Products v. NCR Corporation*, 32 F.4th 534 (6th Cir. 2022).

In 2010, Georgia Pacific filed an action under CERCLA section 113(f), seeking

contribution for its response costs from three other companies–NCR Corporation, International Paper, and Weyerhaeuser. At issue was whether the 1998 liability order had triggered CERCLA's three-year limitations period for section 113(f) contribution actions. 42 U.S.C. §9613(g)(3)(A) (providing that "[n]o action for contribution for any response costs or damages may be commenced more than 3 years after... the date of judgment in any action under this chapter for recovery of such costs or damages"). If so, Georgia Pacific's contribution claims were time-barred. Georgia Pacific argued that even if the 1998 liability order started the limitations period for contribution claims against some potentially responsible parties, it did not do so for NCR Corporation, International Paper, and Weyerhaeuser, because they were not parties to the earlier litigation. In addition, Georgia Pacific argued that the bare-bones 1998 liability order did not trigger the section 113(g) three-year period because it was simply a determination of liability, not an action "for recovery of such costs or damages," §113(g)(3)(A), as the judgment awarded no response costs or damages.

The 6th Circuit disagreed. First, the court held that "[i]t does not matter for §113(g)'s purposes whether the particular contribution action is pursued against a party to the liability-assigning judgment, or against a non-party to that judgment." The statute focuses on "*what* was settled," not "*who* settled the cost-recovery action" (emphasis in original) and thus bars actions beyond the statutory period against nonparties to the original judgment as well as parties. Second, the court was not troubled by the "bare bones" nature of the 1998 liability order. Acknowledging the lack of case law on the issue, the court looked to its 2007 decision on a closely related CERCLA provision, the three-year statute of limitations in 42 U.S.C. §9613(g)(3)(B) that begins to run by entry of a judicially approved settlement. In *RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552 (6th Cir. 2007), the court held that a consent decree settlement with EPA regarding CERCLA liability was sufficient to trigger the limitation period, even though the amount of the costs or the identities of the possible contributing parties were not yet known. Based on this precedent, the court held that in the current case, the 1998 liability order had commenced the limitation period and Georgia Pacific's contribution claims were time-barred. The court summarized its holding as follows:

"[W]hen a party assumes an obligation to pay response costs, including future costs, the statute of limitations for contribution actions regarding those response costs begins to run. And that is the case even when the specific amount owed in response costs is not yet known, or when all parties who could face contributory liability are not yet identified..."

The significance of the Supreme Court's decision to deny *certiorari* is that at least in the 6th Circuit, it leaves in place a requirement that parties held liable for Superfund response costs must bring actions for contribution even before the extent of the response costs is decided. Potentially responsible parties should thus consider bringing contribution actions against other potentially responsible parties at the earliest point possible after being found liable, without waiting until the payment of response costs is settled. ***Georgia-Pacific Consumer Products v. International Paper Company***, No. 22-465, 601 U.S. __ (U.S. 10/2/2023).

Not so fast: Minnesota Court of Appeals concludes that city did not adequately consider project's potential effects on wildlife or cumulative potential effects. On 11/27/2023, the Minnesota Court of Appeals, for a second time, reversed and remanded the City of Eagle Lake's determination that an environmental impact statement (EIS) was not required for a proposal to construct a motorsports park on agricultural land.

The Minnesota Environmental Policy Act (MEPA) establishes a formal process for investigating the environmental impacts of major development projects. The purpose of the review is to provide information about a project's environmental impacts before approvals or necessary permits are issued. MEPA imposes a set of procedural requirements on responsible governmental units (RGUs) for the environmental review of major governmental actions. MEPA defines government action as "activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated, or approved by units of government including the federal government." Minn. Stat. §116D.04, subd. 1a(d).

MEPA requires distinct types of environmental review depending on the nature of the project being proposed. Under Minn. R. 4410.1000, an environmental assessment worksheet (EAW) must be prepared for any project that meets or exceeds the thresholds of any of the EAW categories listed in Minn. R. 4410.4300 or any of the EIS categories listed in Minn. R. 4410.4400. An EAW is defined as "a brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for the proposed project." Minn. Stat. §116D.04, subd. 1a(c).

Minn. Stat. §116D.04, subd. 2a(a), provides that, where there is potential for significant environmental effects resulting from any major governmental action, the action be preceded by a detailed EIS prepared by the RGU. The EIS provides detailed information about the extent of potentially significant environmental impacts of a proposed project, presents alternatives to the proposed project, and identifies methods for reducing adverse environmental effects. Minn. R. 4410.2000, subp. 1. The EIS is not meant to approve or deny a project, but instead to function as a source of information to guide approval and permitting decisions.

The threshold question in determining whether a major government action requires an EIS is whether that proposed project has the potential to significantly affect the environment. Minn. R. 4410.1700, subp. 7, requires RGUs to consider the following factors when determining whether a project has the potential for significant environmental effects:

A) type, extent, and reversibility of environmental effects;

B) cumulative potential effects. The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with other contributions to the cumulative potential effect; the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and the efforts of the proposer to minimize the contributions from the project;

C) the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority. The RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project; and

D) the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.

In February 2019, a developer proposed construction of a private three-mile motor sports driving track and related facilities on a site of approximately 230 acres in Eagle Lake, MN. In addition to the driving track, the project would include a track clubhouse, car condos, a restaurant, a 70-unit hotel, a golf course, and related parking lots.

The City of Eagle Lake is the RGU charged with determining what environmental review is required. Pursuant to Minn. R. 4410.4300, subp. 36, an EAW is required for projects that may convert 80 or more acres of agricultural land to a different use. Because of the nature and size of the project, the city hired a consultant to prepare an EAW. Several state and county agencies, as well as members of the public, submitted comments addressing the EAW. In May 2020, based on the EAW and related public comments, the city council determined that the project did not have the potential for significant environmental effects and therefore an EIS was not required for the project to move forward.

Citizens Against Motorsports Park (CAMP) and two individuals appealed the city's initial negative declaration on the need for an EIS, arguing that the city's decision was arbitrary and capricious and unsupported by substantial evidence. CAMP also challenged the city's procedure and analysis of noise impacts on humans and wildlife, waste storage and disposal, land alterations, and wetlands. On 4/26/2021, in an unpublished opinion, the Minnesota Court of Appeals concluded that the city's negative EIS declaration was arbitrary and capricious, and reversed and remanded for a new EIS determination. The court found that the city failed to rely on substantial evidence to determine the project's potential effects on wildlife and failed to consider the project's cumulative effects on climate change. The court reasoned that the city made no attempt to identify, survey, or catalog wildlife in the project area. The court also noted that the city failed to address the potential harm from the project's vehicular and human traffic or automobile exhaust fumes, which were identified by state and county officials. The city further concluded that it was unlikely that noise-sensitive wildlife would be impacted by the project, though without having conducted a study of the project's noise impact on wildlife. The court also found that the city failed to adequately respond to concerns regarding climate change and the project's cumulative potential effects, as required by Minn. R. 4410.1700, subp. 4 (requiring specific responses to all substantive and timely comments on the EAW).

Following the court's decision, the city's consultant prepared a supplemental EAW to further evaluate whether the project has the potential for significant environmental effects. The supplemental EAW concluded that the project would not increase known wildlife disturbances to a level that would affect wildlife on Eagle Lake, and that the project's contribution to greenhouse gas (GHG) emissions in the area would be "negligible."

On 12/5/2022, the city council approved findings of fact and a decision on the need for an EIS. Based on the information generated through the supplemental environmental-review process, the city council again determined that the project did not have the potential for significant environmental effects and therefore an EIS was not required for the project to move forward.

CAMP appealed the city's second negative declaration on the need for an EIS, arguing that the city's decision was arbitrary and capricious and unsupported by substantial evidence because the city did not adequately consider the project's potential effects on wildlife or cumulative potential effects. On 11/27/2023 the court, for a second time, reversed and remanded the city's determination that an EIS was not required for the project.

The court found that the city's second negative declaration on the need for an EIS was unsupported by substantial evidence in part because the city made no attempt to identify, survey, or catalog the wildlife in the project area. The court reasoned that neither the EAW nor the supplemental EAW contained a complete discussion of the species that use or inhabit the project site, a portion of which would be paved over to accommodate the track, track clubhouse, car condos, parking lots, and other elements of the project. The court noted that although the supplemental EAW did list some species that have been observed in or near Eagle Lake in the past, it failed to identify the species currently known to use or inhabit the area. The court explained that without knowing which species use or inhabit a project area, an RGU cannot ascertain the type, extent, and reversibility of environmental effects on wildlife in that area, and therefore cannot determine whether the project has the potential for significant environmental effects.

The court also found that the city's second negative declaration failed to address the project's potential for cumulative effects from GHG emissions. The supplemental EAW included a discussion of GHG emissions, and an estimate that the project would increase GHG emissions in the area by 35,221.87 metric tons of carbon dioxide-equivalent per year. Even though the supplemental EAW indicated that the project "needed to be near the Mankato Regional Airport" because it would be a "destination course," the estimate did not include anticipated GHG emissions from visitors who would reach the project through the Mankato Regional Airport. The court stated that, by declining to consider how regional air travel to the project would affect the project's overall GHG emissions, the city failed to address an important aspect of the problem and ignored evidence in the record.

The court did not express an opinion about whether an EIS is required. The project is no longer being pursued by the developer. ***In re Determination of the Need for an Environmental Impact Statement for the Mankato Motorsports Park***, No. A23-0091 (Minn. Ct. App. 11/27/2023).

ADMINISTRATIVE ACTION

MPCA issues site-specific standard framework for Class 4A wild-rice sulfate standard. In December 2023, the Minnesota Pollution Control Agency (MPCA) released its Framework for Developing and Evaluating Site-Specific Sulfate Standards for the Protection of Wild Rice. The framework is the agency's latest step to address the implementation of Minnesota's Class 4A 10 mg/L sulfate water quality standard in Minn. R. 7050.0224, subp. 2, adopted in 1973, which applies to Class 4A waters "used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels." MPCA undertook an expansive rulemaking in late 2017 to revise the wild-rice sulfate standard and identify waters subject to the revised standard.

However, following an adverse administrative-law-judge report, MPCA abandoned the rulemaking in 2018. Since then, MPCA has issued various statements regarding how the agency will implement the sulfate standard and has identified close to 2,400 waters MPCA has determined are "used for production of wild rice" and thus subject to the standard. This list includes 32 water bodies the U.S. EPA in 2021 added to Minnesota's 2020 Impaired Waters List due to measured sulfate levels in excess of 10 mg/L. Presumably recognizing the current paucity of feasible sulfate-treatment technologies, the MPCA in 2023 initiated a series of public meetings to help the agency develop a framework for regulated parties seeking a less stringent site-specific standard (SSS) for sulfate in a particular waterbody.

MPCA's framework (1) outlines the process of applying for a SSS, including state and federal review; (2) describes MPCA's interpretation of the wild rice beneficial use protected by the sulfate standard; and (3) identifies the monitoring and other information that must be developed to support a SSS application. Each of these is discussed below.

Process involved in seeking an SSS: The framework indicates that MPCA will evaluate SSS applications under the standards of Minn. R. 7050.0220, subp. 7, which require the applicant to demonstrate that the proposed SSS is "more appropriate" then the existing sulfate standard and will protect the Class 4A wild-rice beneficial use. If MPCA determines a proposed SSS should be advanced, it will initiate a public notice and comment period and then send the SSS to the U.S. EPA for review under 40 C.F.R. §131.21. EPA must then approve (within 60 days) or disapprove (within 90 days) the proposed SSS based on the standards for approving state water quality standards, such as whether the SSS protects the designated use and is based on sound scientific rationale. 40 C.F.R. §131.11(a)(1). The SSS does not take effect until after it is approved by EPA.

MPCA's interpretation of the wild rice beneficial use: In the framework, MPCA sets forth its interpretation of the beneficial use protected by the Class 4A sulfate standard.

Under Minn. R. 7050.0224, subp. 2, Class 4A waters of the state "must be such as to permit their use for irrigation without significant damage or adverse effects upon any crops or vegetation usually grown in the waters or area." The rule then creates a subclass of Class 4A waters to which the 10 mg/L sulfate standard applies—that is, "water used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels." MPCA's interpretation of the key phrase "production of wild rice" is that it refers not only to the intentional cultivation of wild rice in agricultural paddies, but also to wild rice in naturally occurring stands; the 10 mg/L sulfate standard, MPCA indicates, is intended "to protect the continued generation of wild rice biomass, and any proposal for a site-specific modification of that standard must demonstrate that the continued generation of wild rice biomass will be protected." MPCA's interpretation does not address the standard's seasonal component ("during periods when the rice may be susceptible to damage by high sulfate levels"). The framework notes that MPCA is "taking an expansive approach" to identifying waters that are "used for production of wild rice" and thus subject to the sulfate standard; for example, MPCA indicates that "documentation of current or historical wild rice presence—recorded observations, harvest histories, measurements of population extent or other wild rice growth metrics, or other reliable evidence—is sufficient to consider a waterbody to be a water used for the production of wild rice."

Note that Minn. R. 7050.0224, subp. 1 creates a separate narrative nondegradation standard for "selected wild rice waters [that] have been specifically identified [WR]" in chapter 7050; the "quality of these waters and the aquatic habitat necessary to support the propagation and maintenance of wild rice plant species must not be materially impaired or degraded." In the late 1990s, MPCA formally designated 24 waters as [WR] waters protected by this standard. *See* Minn. R. 7050.0470, subpart 1. In the framework, MPCA states that it interprets part 7050.0224 as making the 24 [WR] waters subject both to the narrative standard in part 7050.0224, subp. 1 as well as the 10 mg/L Class 4A sulfate standard.

Information needed to support an SSS application: The bulk of the framework focuses on the types of information MPCA will accept to support a successful SSS application. Much of the information relates to demonstrating that the beneficial use will be protected, which means that the proposed SSS "will allow wild rice to not only persist in the short term but also to sustain itself—undergo production across multiple growth cycles and generations—into the long-term future." MPCA anticipates that the most SSS applicants will attempt to demonstrate that the existing ambient sulfate concentrations in a wild rice water above 10 mg/L supports wild rice and that this existing concentration should be the SSS. To make this demonstration, applicants must provide

"long-term monitoring of both surface water sulfate concentrations and the wild rice population." MPCA strongly recommends that "long term" wild-rice monitoring should involve collecting "consecutive annual population data spanning at least the most recent ten years or two boom-bust cycles, whichever is shorter."

In the 2017 proposed wild rice rule, MPCA embraced a sediment-based equation to predict site-specific sulfate concentration values. The agency has now backed off that approach. The framework indicates that while the equation as well as other aspects of sediment and porewater chemistry analysis can be considered as part of an SSS application, MPCA "does not support their use as a primary means to derive" the SSS.

The framework directs SSS applicants to consider other types of wild rice information, including but not limited to:

- historical data and information concerning the water's wild rice population and the local water chemistry;
- chemical, hydrological, and biological data from on-site monitoring and recent studies to demonstrate consistency with current scientific knowledge;
- sulfate levels within a larger geographic context; and
- non-sulfate confounding factors, both natural and anthropogenic, that may interfere with wild rice growth, such as modified hydrology, aquatic invasive species, competing vegetation, shoreline development, boat traffic, and climate change. Note, however, MPCA's position that even if these types of confounding factors inhibit wild rice growth, this cannot be a basis for a less stringent sulfate SSS.

While the framework addresses primarily applications for an SSS that is less stringent than the 10 mg/L sulfate standard, it also notes that the framework can be used to seek a SSS that is *more* stringent, which could arise when the wild-rice beneficial use is not being met. In this case, the applicant would need to demonstrate that excess sulfate is a primary cause of the non-attainment.

Finally, MPCA emphasizes that the framework is simply guidance and should not be construed as a rulemaking proposal or as altering or superseding the statewide 10 mg/L Class 4A sulfate standard. For this reason, MPCA expects to "periodically update this document in response to new scientific findings or the emergence of other relevant information." MPCA, **Framework for Developing and Evaluating Site-Specific Sulfate Standards for the Protection of Wild Rice**, *available at www.pca.state.mn.us/sites/default/files/wq-s6-66a.pdf.*

■ **EPA releases draft guidance on applying *County of Maui* functional-equivalent standard.** On 11/21/2023, the EPA released draft guidance for applying the U.S. Supreme Court's 2020 ruling in *County of Maui v. Hawaii Wildlife Fund,* 140 S. Ct. 1462 (2020).

In *Maui*, the Hawaii Wildlife Fund and several other environmental groups challenged the County of Maui's wastewater reclamation facility's practice of discharging partially treated sewage into groundwater. The polluted water then traveled through groundwater to the Pacific Ocean. The County of Maui asserted that it did not need a National Pollutant Discharge Elimination System (NPDES) permit for this discharge under the Clean Water Act (CWA) because the discharge was not an "addition of any pollutant to navigable waters from a point source." *See* 33 U.S.C. §1311(a); 33 U.S.C. § 1362(12). The environmental groups asserted that this practice by the County of Maui was a discharge of a pollutant to the navigable waters from a point source, for which a permit is required under the Clean Water Act. *See* 33 U.S.C. §1311(a); Id. § 1362(12).

The *Maui* Court agreed with the petitioners that the discharge was a point source discharge that required an NPDES permit. In doing so, the Court held that the CWA could apply to discharges to groundwater that ultimately reached surface water, if the discharge to groundwater was the "functional equivalent" of a discharge to surface water. But the Court acknowledged that not all discharges to groundwater that ultimately reach surface waters would be point source discharges. To determine whether a discharge was the "functional equivalent" of a point source discharge that required a permit under the CWA, the Court identified seven non-exclusive factors that should be considered: "(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity." The Court added that transit time and distance travelled are typically the most important factors.

The EPA's draft guidance explains how operators of facilities that discharge to groundwater should evaluate whether a discharge to groundwater is the functional equivalent of a direct discharge that requires an NPDES permit.

For the most part, the EPA draft guidance reiterates the Supreme Court's announcement that the functional equivalent analysis must be done on a case-by-case basis for each facility. The relevance of the factors and the weighing of the relevant factors are both highly dependent on site-specific considerations. In some cases, the EPA acknowledged, transit time and distance travelled may be the only considerations, whereas in others, more factors may come in.

The EPA draft guidance explains that the *Maui* factors should each be examined together and on a continuum. If it takes a long time for the discharge to reach the navigable waters, and/or if the discharge travels a long distance, then the discharge may not be the functional equivalent of a direct discharge. Conversely, if it takes a short time and/or if the discharge travels a short distance, then the discharge may be the functional equivalent of a direct discharge to the navigable waters. Similarly, the EPA draft guidance elaborates that a discharge through a porous subsurface material provides evidence that the discharge may be the functional equivalent of a direct discharge. And a higher mass of pollutant(s) reaching the navigable waters and/or a higher concentration of pollutant(s) reaching the navigable waters similarly provides evidence that the discharge may be the functional equivalent of a direct discharge. Unfortunately, for facility operators seeking certainty about whether their facility might be the functional equivalent of a direct discharge, the EPA draft guidance provides no insight into what distances or travel times are "short" or "long," how porous subsurface material

might have to be to support a finding that discharge is the functional equivalent of a direct discharge, nor how high the mass or concentration of pollutants must be to support a finding that discharge is the functional equivalent of a discharge to the navigable waters.

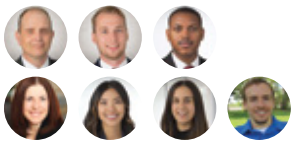
Amid this nebulous guidance, though, the EPA included several specific points. If the spread of pollutants from a source by groundwater moves in a contaminated zone—that is, a plume—it will be important to consider how the plume disperses before the pollutants reach groundwater. If the plume has minimal dispersion before entering a navigable water, that provides evidence that the discharge may be the functional equivalent of a direct discharge.

The EPA draft guidance also explains that evaluating constituent pollutants may be helpful to the functional equivalence analysis in some situations. A functional equivalent analysis may be based on an analysis of one constituent pollutant when that pollutant is a reasonable indicator for other constituent pollutants. If the analysis indicates that the discharge of an indicator pollutant is the functional equivalent of a direct discharge, then the facility must submit a permit application for that pollutant and the other pollutants with similar characteristics.

And the EPA outlines the information that may be provided for consideration in a functional equivalence analysis, emphasizing that this is merely an illustrative list and that this information is not all needed in any particular case. Potentially helpful information might include: discharge location, transit time, distance travelled, flow characteristics, shallow subsurface geology and hydrology characterization, a description of pollutant-specific dynamics along the groundwater flow path, treatment technologies, effluent characteristics, and an explanation of the permittee's functional equivalent of a direct discharge analysis, among other information.

In concluding, the EPA identifies two factors that are not relevant to the functional equivalent analysis: intent of the discharger and whether or not a state groundwater protection program exists. Thus, according to the EPA guidance, it is not a defense to a failure to obtain an NPDES permit that the operator did not intend to pollute the navigable waters, and the existence of a state groundwater protection program does not obviate the need for an NPDES permit.

The EPA's draft guidance on the application of the functional equivalence standards highlights that facilities that discharge from point sources to groundwater should examine what happens to the discharge after it reaches groundwater and consider whether the discharges might be considered the functional equivalent of a discharge to surface water.



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Federal Practice
JUDICIAL LAW

Arbitration; delegation clause; impact of later contract. The Supreme Court recently granted *certiorari* on the following question: "Where the parties enter into an arbitration agreement with a delegation clause, should an arbitrator or a court decide

whether that arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation?"

The federal appellate courts and multiple state courts are divided on this issue. ***Suski v. Coinbase, Inc.***, 55 F.4th 1227 (9th Cir. 2022), *cert granted*, 143 S. Ct. 521 (2023).

Prior grant of *certiorari*; mootness. In May/June 2023, this column noted the Supreme Court's grant of *certiorari* to resolve a circuit split on the issue of standing for an ADA "tester." Following oral argument, the Court recently dismissed the case as moot. ***Acheson Hotels, LLC v. Laufer***, 144 S. Ct. 18 (2023).

Fed. R. Civ. P. 12(b)(2) and 12(g)(2); *prima facie* case; preponderance of the evidence; no waiver. Affirming the dismissal of an action for lack of personal jurisdiction, the 8th Circuit rejected appellant's argument that the defendant had waived its personal jurisdiction defense by not raising it in its motion to vacate a default that had been entered against it. The 8th Circuit also found that if a district court decides a Fed. R. Civ. P. 12(b)(2) motion on a fully developed record, the plaintiff must establish personal jurisdiction by a preponderance of the evidence rather than only having to make a *prima facie* case. ***Hawkeye Gold, LLC v. China Nat'l Materials Indus. Import & Export Corp.***, ___ F.4th ___ (8th Cir. 2023).

No conflict of interest for expert witness. Reviewing for abuse of discretion and affirming a district court's denial of the plaintiffs' motion to disqualify the defendants' Minnesota-based expert witness who had participated in a lengthy conference call with plaintiffs and their counsel to explore the possibility of acting as their expert, but had never been retained, the 8th Circuit agreed that there was no evidence of a "confidential relationship" between plaintiffs and the expert, and criticized plaintiffs for failing to identify "specific confidential information" that they allegedly had conveyed to the expert. ***Tumey, LLP v. Mycroft AI, Inc.***, 84 F.4th 775 (8th Cir. 2023).

Appeal dismissed for lack of jurisdiction; settlement; mootness. Where the parties settled an FLSA action after the district court ruled on cross-motions for summary judgment but before judgment was entered, and the settlement agreement claimed to preserve the defendant's right to pursue a jurisdictional argument on appeal, the 8th Circuit dismissed defendant's appeal for lack of jurisdiction, finding that the settlement rendered the appeal moot, and that parties "cannot avoid mootness by agreement." ***Folta v. Norfolk Brewing Co.***, ___ F.4th ___ (8th Cir. 2023).

Dismissal of complaint with prejudice; no abuse of discretion. Characterizing plaintiff's claim of "unfair surprise" as "facetious," the 8th Circuit found that a district court did not abuse its discretion in dismissing plaintiff's amended complaint with prejudice where plaintiff never sought to further amend her complaint in the nine months between defendants' filing of their motion to dismiss and the district court's dismissal, and then failed to seek relief in the district court under Fed. R. Civ. P. 60(b). ***Hennessey v. Gap, Inc.***, 86 F.4th 823 (8th Cir. 2023).

Fed. R. Evid. 201; Fed. R. Civ. P. 12(b)(6); requests for judicial notice granted and denied. A recent decision by Judge Wright granting in part and denying in part various parties' request for judicial notice in conjunction with defendants' Fed. R. Civ. P. 12(b)(6) motions should be required reading for counsel considering making or opposing similar requests. ***Kloss v. Argent Trust Co.***, 2023 WL 8603131 (D. Minn. 12/12/2023).

Fed. R. Civ. P. 56(d); pre-discovery summary judgment not premature. Awarding pre-discovery summary judgment to defendants in a patent infringement case, Judge Tostrud rejected the plaintiff's argument that summary judgment was "premature," finding that the information the plaintiff claimed it needed was either "publicly available" or would "not help it oppose summary judgment." ***Heartland, Inc. v. Povolny Specialties, Inc.***, 2023 WL 7168914 (D. Minn. 10/31/2023).

Jurisdiction; pleading on information and belief; multiple cases. Where the plaintiff invoking CAFA jurisdiction amended her complaint to allege the citizenship of the defendant limited liability company on information and belief, Magistrate Judge Leung determined that the plaintiff's jurisdictional allegations were sufficient. ***Hudgins v. Radius Global Solutions, LLC***, 2023 WL 7299902 (D. Minn. 11/6/2023).

In contrast, Magistrate Judge Micko found that allegations regarding the citizenship of members of the defendant limited liability company made "upon information and belief" were insufficient to establish diversity jurisdiction, and ordered the plaintiff to amend its complaint within 14 days. ***Caerus Corp. v. ICON Med. LLC***, 2023 WL 7299151 (D. Minn. 8/28/2023).

Motion to compel; privilege log insufficient. Finding that defendants' original and supplemental privilege logs were "insufficient" where they did not "identify any named individuals that are attorneys and failed to provide a meaningful description of the scope of each document," Magistrate Judge Leung directed the defendants to "provide a sufficient privilege log that complies with all applicable rules and law." ***Corning, Inc. v. Wilson Wolf Mfg. Corp.***, 2023 WL 8271691 (D. Minn. 11/30/2023).

Fed. R. Civ. P. 12(f); motion to strike allegations in complaint denied. Magistrate Judge Brisbois denied plaintiffs' motion to strike allegations in counterclaims, finding that the allegations at issue were minimally relevant, and that the plaintiffs "failed to demonstrate that they suffer sufficient prejudice" from those allegations. ***J. Swanson & Co. v. Rejuvenating Nutrition Coaching, LLC***, 2023 WL 7299145 (D. Minn. 10/12/2023).

Fed. R. Civ. P. 5.2; motion to redact hearing transcript denied. Finding that plaintiffs had failed to establish the required "good cause," Judge Tostrud denied their motion to redact the transcript of a motion hearing. ***Ecolab Inc. v. IBA, Inc.***, 2023 WL 7091853 (D. Minn. 10/26/2023).

Fed. R. Civ. P. 12(b)(3); 28 U.S.C. §1404(a); motion to transfer granted. Declining to reach defendant's Fed. R. Civ. P. 12(b)(3) motion, and instead granting its motion to transfer pursuant to 28 U.S.C. §1404(a), Judge Frank found that a forum selection clause was "presumptively valid and enforceable," was "not a contract of adhesion," and that the plaintiff's fraud

allegations did not alter that analysis where there was no allegation that the forum selection clause was procured by fraud. ***LeRoy v. MAXmotive, LLC***, 2023 WL 7412489 (D. Minn. 11/9/2023).

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

Intellectual Property

JUDICIAL LAW

Patent: Failure to object at trial waives basis for new trial. Judge Wright recently denied plaintiff CellTrust Corporation's motion for judgment as a matter of law and motion for new trial and to alter or amend judgment. CellTrust sued ionLake, LLC and its governing members for infringement of two patents related to a system to track mobile communications and meet audit compliance requirements. Following a jury trial, judgment was entered in favor of defendants, finding that no infringement occurred and that the asserted claims were invalid. CellTrust filed a motion for judgment as a matter of law and a concurrent motion for a new trial and to alter or amend judgment. In arguing for a new trial, CellTrust argued that defendants made improper arguments that warrant a new trial, including "accusing CellTrust of abusing the patent system, misleading the Patent Office, willfully deceiving Defendants, hiding evidence, being self-enriching outsiders, and threatening Defendants' livelihoods." Defendants argue that CellTrust failed to object to the complained-of statements, which constitutes waiver, and that the jury instructions cured any potential prejudice. The court's review of the record found that CellTrust did not properly preserve objections to the comments it now complains of post-trial and that the court's general instruction to the jury that attorney statements are not evidence weigh against a new trial. The court further found that CellTrust failed to show that any arguably improper statements permeated the entire trial or were so prejudicial to have clearly affected the verdict. Accordingly, in rejecting CellTrust's arguments, including improper arguments at trial, the court denied CellTrust's motion for a new trial. ***Celltrust Corp. v. Ionlake, LLC***, No. 19-cv-2855 (WMW/DJF), 2023 U.S. Dist. LEXIS 217510 (D. Minn. 12/6/2023).

Patent: Denial of motion to supplement claim construction record. Judge Nelson recently denied defendant Suncall Corporation's motion to supplement the court's record on the parties' Markman claim construction briefing. Plaintiff Hutchinson Technology Inc. (HTI) sued Suncall for patent infringement related to patents for hard disk drive suspension assemblies. The court held a claim construction hearing on 10/18/2023. Thereafter, Suncall took the depositions of several HTI witnesses, including the named inventors on HTI's asserted patents. On 12/13/2023, Suncall moved to supplement the motion record, and HTI opposed on the same day. Suncall argued that good cause existed to supplement the record because Suncall could not have elicited the testimony earlier due to HTI's delays in disclosing documents related to the conception and reduction to practice of the asserted patents. HTI argued that the parties' Joint Claim Construction Statement, including identification of extrinsic evidence, was due in April 2023, but that Suncall did not seek the inventor's testimony until after the Markman briefing was completed. The court may grant a motion to supplement the record at its discretion, as part of its inherent power to manage its own docket. The court found Suncall lacked good cause to supplement the record because Suncall understood that its decision not to take the inventor depositions earlier would preclude the testimony from being submitted with the Markman briefing. The court also noted that as inventor testimony is extrinsic evidence, the additional testimony is unlikely to meaningfully assist the court with construction of the patent terms. Accordingly, the court denied Suncall's motion to supplement the claim construction record. ***Hutchinson Tech. Inc. v. Suncall Corp.***, No.: 0:21-cv-02618-SRN-DLM, 2023 U.S. Dist. LEXIS 222403 (D. Minn. 12/14/2023).

Joe Dubis
Merchant & Gould
jdubis@merchantgould.com

Probate & Trust Law

JUDICIAL LAW

District court not required to allow interested persons to present evidence or testimony in guardianship cases. The district court appointed the respondent's significant other as her emergency guardian. The emergency guardian then petitioned for appointment as the respondent's general guardian. The respondent's daughter filed her own petition for the emergency appointment of a guardian for the respondent, which was denied. At the hearing on the emergency guardian's petition for appointment as general guardian, the district court asked if there was any objection to the emergency guardian's petition. The respondent's daughter objected and was provided an opportunity to explain her objection. After hearing the daughter's objection, the district court granted the emergency guardian's petition and denied the daughter's request for a continuance to consult an attorney. On appeal, among other things, the daughter

argued that the district court erred by not receiving evidence at the hearing. The Minnesota Court of Appeals cited to the probate code and found that "the district court had discretion to decide whether to allow persons other than the petitioner and the respondent to participate in the hearing and to determine any conditions on their participation." Because there is no statutory requirement to allow an interested person to present evidence at a guardianship hearing, the court of appeals found that the district court did not err when it did not take or receive evidence at the hearing. ***In re Guardianship of Jill Lee Osufsen***, No. A23-0596, 2023 WL 8180379 (Minn. Ct. App. 11/27/2023).

Jessica L. Kometz
Bassford Remele
jkometz@bassford.com

State Appellate Practice

MN SUPREME COURT

Notable decisions: An individual may bring a private action under Minn. Stat. §8.31, subd. 3a to compel a healthcare provider to disclose that individual's medical records under the Minnesota Health Records Act, Minn. Stat. §144.292, subd. 5. But no private right of action to compel disclosure of health records exists under the Minnesota Health Care Bill of Rights, Minn. Stat. §144.651. A divided Minnesota Supreme Court revived four separate putative class action lawsuits against major healthcare providers, seeking redress for the alleged under-disclosure and/or untimely disclosure of medical records as required by the MHRA. Plaintiffs' complaints sought to enforce the MHRA through Section 8.31, subd. 3a, the private attorney general statute, or the Minnesota Health Care Bill of Rights. Each complaint was dismissed at the Rule 12 stage for a failure to state a claim. The Minnesota Court of Appeals affirmed. The Supreme Court granted review and reversed, finding that (1) the MHRA provision governing disclosure of, and patient access to, healthcare records is a law prohibiting unfair practices in trade, business, or commerce and thus falls within the scope of those laws that the attorney general may investigate and enforce pursuant to section 8.31 and (2) failure to comply with the timely disclosure requirements of the Minnesota Health Records Act is an "unlawful practice[] in business, commerce, or trade" under section 8.31, subdivision 1 for which private citizens may seek equitable relief. The Court expressly declined to address whether under-disclosure of medical records was a "practice" or whether the plaintiffs' claims could satisfy the "public benefit" requirement of any private action brought under Section 8.31, subd. 3a. But the Court affirmed the court of appeals as to the other aspect of plaintiffs' claims, finding that the Minnesota Health Care Bill of Rights does not explicitly or implicitly provide a civil cause of action to enforce individual provisions. Justice Anderson dissented from the majority's decision regarding the scope of the private attorney general statute on the grounds that the decision departed from existing "years of precedent narrowly interpreting the private attorney general statute." ***Findling, et al. v. Group Health Plan, Inc., et al.***, A21-1518 (Minn. 12/6/2023).

Notable petitions granted: Supreme Court to consider whether a client can recover legal fees to correct prior lawyer's malpractice, even where malpractice did not result in dismissal of action. The Minnesota Supreme Court accepted review of a dispute between a client and his prior lawyer over whether the client can recover the legal fees incurred to correct the prior lawyer's negligence, despite the fact that the client was ultimately successful in the underlying litigation. The district court dismissed portions of the legal malpractice complaint at the summary judgment stage. Both sides appealed. The court of appeals affirmed the dismissal of the malpractice claims but reversed the district court as to certain fraud claims raised in the complaint. The Supreme Court accepted review of the following issues: (1) Does Minnesota law allow a client to recover attorney's fees as damages when incurred to "correct" a lawyer's proven negligence, even though the client was ultimately successful in the underlying case? (2) Does breach of fiduciary duty—concerning a standard of conduct as opposed to a standard of care—require proof of but-for causation? (3) Can a client bring claims for breach of contract when an attorney's negligence caused the client to incur additional fees, even though the client was ultimately successful in the underlying case? ***Craig A Reichel, et al. vs. Wendland Utz, LTD, et al.***, A23-0015 (Minn. Ct. App. 9/11/2023), *rev. granted* (Minn. 12/19/2023).

Notable petitions granted: Minnesota to evaluate whether to formally recognize a claim for negligent selection of independent contractor. The Minnesota Supreme Court accepted review of a case arising out of an automobile accident, seeking to establish a claim for negligent selection of an independent contractor. Plaintiff's claim is based on Restatement (Second) of Torts §411, which has never been expressly adopted by Minnesota courts. But at least one Minnesota federal district court has predicted the Minnesota Supreme Court would recognize a cause of action for negligent selection. The district court dismissed the claim at the summary judgment stage. On appeal, the Minnesota Court of Appeals affirmed the dismissal of the claim, assuming without deciding that the Supreme Court would recognize such a cause of action, and found that there was insufficient evidence of any breach of the standard of care in selecting the independent contractor. The Supreme Court accepted review of the following issues: (1) Whether the Minnesota Supreme Court should formally recognize a claim for negligent selection of an independent contractor. (2) Whether the district court erred in granting summary judgment by determining there was no genuine issue of material fact about whether respondents negligently failed to exercise reasonable care to select a competent and careful contractor. ***Pedro Alonzo, et al. vs. Richard Menholt, et al.***, A22-1796 (Minn. Ct. App. 9/25/2023), *rev. granted* (Minn. 12/27/2023).

Notable petitions denied: Dismissal of intentional tort claims on statute of limitations grounds warranted based on application of the "some damage" rule. The Supreme Court declined to review a case involving the accrual date of intentional torts. Plaintiff was attacked by an unknown assailant in 2017 and commenced suit in 2020 after learning the identity of his attacker. The district court dismissed the action on statute of limitations grounds. On appeal, the court of appeals concluded that plaintiff forfeited any equitable tolling

argument by failing to present that argument to the district court and that, under the "some damage" rule for the accrual of claims, his claims occurred on the date of injury, rather than the date he discovered the identity of his attackers. ***Mark J. Kallenbach vs. Fabrication Station, Inc., Affordable Cabinets and Granite of New Hope and Its Owners, James Lockhart Lang, Deniayous Caleb Buckner, John Doe and Mary Roe,*** No. A23-0046 (Minn. Ct. App. 9/11/2023), *rev. denied* (Minn. 12/27/2023).

MN COURT OF APPEALS

■ **Notable precedential decision: Insured who obtained appraisal award did not prevail in a court action or arbitration proceeding so as to be entitled to additional interest under Minn. Stat. §60A.0811.** North Star Mutual Insurance Company insured PSS Properties, LLC for a commercial building that partially collapsed in 2019. North Star initially paid PSS $97,285.31 as the actual cash value for the loss pursuant to the policy. PSS later demanded an appraisal under the terms of the policy. Following the appraisal in 2022, the appraisal panel awarded PSS a total of $319,342.50 as the actual cash value of the loss. North Star paid the difference, as well as interest under Minn. Stat. §549.09. PSS claimed it was entitled to additional interest pursuant to Minn. Stat. §60A.0811, which permits an insured who prevailed against an insurer in a court action or arbitration proceeding to recover additional interest. North Star denied it was liable for the additional interest, and the district court agreed. The court of appeals affirmed, noting that section 60A.0811 is limited to insureds who receive a decision in their favor from a "court action or arbitration proceeding," which did not include an appraisal conducted pursuant to the terms of an insurance policy. The court of appeals concluded that because an appraisal is a "nonjudicial method" to resolve disputes about the "amount of a loss" alone and does not determine whether the insurer should pay the loss, an appraisal is neither a "court action" nor an "arbitration proceeding" that could result in a final adjudication of a claim. Accordingly, an insured who successfully challenged the amount of a loss in an appraisal did not prevail in securing a final adjudication of a claim against an insurer to be entitled to additional interest under section 60A.0811. ***PSS Properties, LLC v. North Star Mutual Insurance Co.***, A23-0466 (Minn. Ct. App. 12/18/2023)

■ **Notable nonprecedential decision: The statute of limitations is not tolled under the doctrine of fraudulent concealment due to the concealment of facts that are not elements of a cause of action.** In this legal malpractice claim, the Minnesota Court of Appeals affirmed the district court's dismissal of the plaintiff's complaint due to the statute of limitations. The plaintiff alleged claims for legal malpractice arising out of legal representation related to three matters that began in 2009. The court of appeals noted that the six-year statute of limitations for malpractice actions begins to run when the action has accrued. A malpractice claim accrues when all elements of the cause of action—(1) a duty; (2) breach of duty; (3) causation; and (4) damages—have occurred such that the claim could survive a motion to dismiss. Under the facts of plaintiff's case, the court of appeals determined that her causes of action accrued in 2014 at the latest—outside of the six-year limitations period. Plaintiff argued that the attorney's concealment of his methamphetamine addiction, for which he was later disbarred, tolled the accrual of her malpractice claims. The court of appeals disagreed, noting that "the reason for the deficient performance is not an element of legal malpractice." Accordingly, because the alleged concealment of the attorney's substance abuse did not relate to an element of plaintiff's legal malpractice cause of action, the six-year statute of limitations barred plaintiff's claims. ***Nerad v. Magnus, et al.***, A23-0508 (Minn. Ct. App. 12/11/2023).

■ **Notable nonprecedential decision: A facility's speculative projections of future expansion in daily ore-processing rates are insufficient to overturn the MPCA's approval of the facility's application on the grounds of nondisclosure.** As part of the ongoing saga surrounding Poly Met Mining, Inc.'s plans to build a copper-nickel-platinum mine and processing plant in northeastern Minnesota, the court of appeals considered an appeal by writ of *certiorari* from environmental advocacy organizations challenging the Minnesota Pollution Control Agency's (MPCA) supplemental 2021 decision to issue an air-emissions permit to PolyMet for the project. PolyMet disclosed to Canadian regulators in 2018 that it not only had created projections for the project's return on investment at the ore-processing rate included in PolyMet's MPCA permit application, but also for the return at other, vastly increased rates. The organizations alleged that PolyMet's failure to disclose these projections to the MPCA in 2018 demonstrated that PolyMet's application at the lower processing and emissions rates constituted a "sham" permit, and were grounds for the MPCA to deny the PolyMet application for nondisclosure. The court of appeals affirmed the MPCA's decision to issue the permit, noting that nondisclosure is grounds for denial only if the facility failed to disclose all information relevant to the permit. Because a facility's potential future expansion was not relevant to the agency's consideration of the facility's present permit application under the MPCA's regulatory mandate, and because a future expansion would be subject to additional permitting and review requirements, the failure to disclose projections for potential expansion did not constitute nondisclosure warranting reversal of the PolyMet permit. ***In re Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining, Inc.***, A22-0068 (Minn. Ct. App. 12/18/2023).

■ **Notable special term order: A request for attorneys' fees did not affect the finality of a judgment for purposes of appeal.** In an appeal taken from entry of judgment for $352,831.47 following the district court's grant of summary judgment, the Minnesota Court of Appeals considered whether the respondent's request for attorneys' fees following summary judgment deprived the court of appeals of jurisdiction to hear an appeal from the entry of judgment pursuant to the summary judgment order. The court noted that because 1) the fee request was not a "separate claim" which was "independent of the underlying claim," and 2) attorneys' fees were not part of the damages claimed in the underlying complaint, the fee request did not affect the finality of the judgment. The fee request therefore did not deprive the court of appeals of jurisdic-

tion over the district court's summary judgment decision. ***Star Bank v. Anderson, et al.***, A23-1802 (Minn. Ct. App. 12/26/2023).

■ **Notable special term order: An adverse party's apparent failure to receive a notice of appeal served by mail did not deprive the court of appeals of jurisdiction over the noticed appeal.** The district court entered judgment dismissing the plaintiff's complaint on 9/15/2023. The appellant claimed to have timely served a notice of appeal upon respondent's counsel by mail on 11/9/2023—within the bounds of the 60-day appeal period—but respondent's counsel claimed not to have received any notice of appeal until 11/28, and that the appeal must be dismissed as a result. The court of appeals noted that "service by mail is considered complete upon mailing," and that the 11/28 affidavit of service indicated the notice of appeal was mailed on 11/9. Accordingly, respondent's alleged failure to receive the notice of appeal until the expiration of the 60-day appeal period did not deprive the court of appeals of jurisdiction over the judgment dismissing appellant's complaint. ***Carl Green d/b/a Signature Capital v. Regus Group, et al.***, A23-1725 (Minn. Ct. App. 12/26/2023).

Pat O'Neill
Larson King, LLP
phoneill@larsonking.com

Sam Schultz
Larson King, LLP
sschultz@larsonking.com

Tax Law

JUDICIAL LAW

■ **Timely filing essential in property tax valuation appeals.** In *Dianne M. Fennell, Marvin A. Fennell v. County of Washington*, the court instructs that individual taxpayers in Minnesota may challenge property tax valuations, but they must do so on or before April 30 of the year in which the taxes are due. If the taxpayer does not do so, the tax court loses jurisdiction. Here, in challenging Washington County's assessment of the value of their property, plaintiffs provided documentation for two separate tax years. The tax court could not discern from the filings which year the taxpayers intended to appeal. If the earlier tax year, no jurisdiction. If the later tax year, the court would have jurisdiction. The taxpayers did not attend the hearing to explain which tax year they were contesting, but the court gave them 30 days to demonstrate the court has jurisdiction over the claim; otherwise the claim will be automatically dismissed. ***Fennell v. Cnty. of Washington***, No. 82-CV-21-2025, 2023 WL 8854874 (Minn. Tax Dec. 21, 2023).

The court addressed a different timing issue in *Hollydale Land LLC v. Hennepin County.* A special statutory exception exists for changing valuations and classifications under Minnesota's Open Space Law. Here, a golf course that previously qualified for lower property tax rates under the Open Space Law was sold, and Hennepin County sent a new tax valuation after the sale. Under the law, when the property no longer qualifies for the lower tax rates, the difference between the lower tax rate the property was paying and the property's fair market value is taxed for the prior seven years. Instead of the typical April 30 deadline, petitioners have 60 days to initiate an appeal from the date of mailing of the notice of the change in exempt status, valuation, or classification, which allows taxpayers a remedy when the assessor makes changes to the property's status after the typical April 30 deadline. The court found that the petitioners' appeal was governed by the 60-day exception, since the sale ended the property's participation in the Open Space Law. As a result, the plaintiffs' petition was properly filed, and the court dismissed the county's motion to dismiss for lack of jurisdiction. ***Hollydale Land LLC v. Cnty. of Hennepin***, No. 27-CV-21-13386, 2023 WL 8360242 (Minn. Tax 12/1/2023).

■ **First application of Section 7451(b)(1) filing extensions.** In a matter of first impression, the court denied the commissioner's motion to dismiss for lack of jurisdiction in a dispute controlled by 7451(b)(1).

In August 2022, the commissioner mailed to the petitioner a notice of deficiency (NOD). Petitioners must file petitions challenging NODs within 90 days of the commissioner's mailing of the NOD. In this case, the 90th day landed on Thanksgiving, a legal holiday. Subject to §7503, which states "[w]hen the last day prescribed under authority of the internal revenue laws for performing any act falls on... legal holiday, the performance of such act shall be considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday, or a legal holiday." The petitioner was thus entitled to file his petition on Black Friday. Although not a legal holiday, the tax court building was closed on Black Friday. But the electronic filing system was operational. The petitioner did not file his petition on Black Friday, but instead filed his petition on the following Monday. The court had to decide whether the Monday filing was timely.

Section 7451(b)(1) provides extension if "a filing location is inaccessible or otherwise unavailable to the general public on the date a petition is due." "Filing location" is defined as including "the office of the clerk of the Tax Court, or any of the on-line portal made available by the Tax Court for electronic filing of petitions." §7451(b)(2). If a filing location is inaccessible, the filing period is tolled by "the number of days within the period of inaccessibility plus an additional 14 days." §7451(b)(1).

Finding that the office of the clerk of the tax court was closed on Black Friday, the court determined that the petitioner was entitled to an extension of 15 days under section 7451(b)(1) and denied the commissioner's motion to dismiss for lack of jurisdiction. ***Sall v. Comm'r of Internal Revenue,*** 161 T.C. No. 13 (U.S. Tax Ct., 2023).

■ **"Timely mailed, timely filed"—but not if you use FedEx Ground.** The petitioners shipped their petition seeking redetermination 89 days after receiving a notice of deficiency from the commissioner. The shipment, however, arrived on the 91st day, one day after the deadline. Respondents then filed a motion to dismiss for lack of jurisdiction and the petitioners objected to the motion, relying on the "timely mailed, timely filed" rule in section 7502.

Jurisdiction in deficiency cases, according to the court, "is predicated on a valid notice of deficiency and a timely filed petition." The petitioners argued that although their petition arrived on day 91 (one day late), section 7502 preserved the court's jurisdiction. Section 7502(a)(1) states a general rule that when petitions are "delivered by United States mail... the date of the United States postmark stamped on the cover... shall be deemed to be the date of the delivery." §7502 (a)(1). Had petitioners mailed the petition through a "designated

delivery service," the court would retain jurisdiction. Unfortunately for petitioners, instead of using FedEx 2-Day delivery shipping (a "designated delivery service" under Section 7502(f)), petitioner used FedEx Ground.

Since FedEx Ground service is not a "designated delivery service" and the petition was not received within the 90-day period, the court declared that its hands were tied and dismissed the petition for lack of jurisdiction. ***Nguyen v. Comm'r,*** T.C. Memo. 2023-151 (U.S. Tax Ct., 2023).

Scope of limited partner exceptions and inquiries in limited partner's role in partnership level proceedings. The petitioner filed timely challenges to the commissioner's notices of final partnership administrative adjustment and the court addressed cross-motions for summary judgment (or partial summary judgment). in *Soroban Capital Partners v. Commissioner*.

Petitioner Soroban is the general partner and tax matters partner of an investment firm organized as a limited partnership under Delaware law. The partnership also includes five limited partners, of which two are single-member LLCs. These two are disregarded for federal tax purposes, and therefore Soroban is considered to have three limited partners for federal tax purposes.

At issue is the fact that "Soroban included the guaranteed payments distributed to the [limited partners] in its net earnings from self-employment, but it failed to include their distributed shares of ordinary business income." The respondent's adjustment to Soroban's net earnings included the distributive shares of ordinary business income of limited partners. The court therefore had to determine whether the limited partners were "limited partners, as such" as used in section 1402(a)(13) and whether they were properly entitled to the limited partner exception.

Generally, the code requires partners to include their distributive shares of partnership income in net earnings from self-employment (§1402(a)). But section 1402(a)(13) provides an exception for limited partners when "the distributive share of any item of income or loss of a limited partner, such as, other than guaranteed payments... to that partner for services actually rendered to or on behalf of the partnership to the extent that those payments are established to be in the nature of remuneration for those services."

"[L]imited partners, as such" is not defined, but the legislative history suggests the exception was enacted to "exclude earnings that are of an investment nature." (*Id*. at 4, *See* H.R. Rep. No. 95-702, pt. 1 at 11, *as reprinted in* 1977 U.S.C.C.A.N. at 4168.) The court determined the scope of the limited partner exception in a 2011 case, *Renkemeyer v. Comm'r of Internal Revenue,* 136 T.C. No. 7 (U.S. Tax Ct., 2011), and deemed the intent of section 1402(a)(13) "to ensure that individuals who merely invested in a partnership and who were not actively participating in the partnership's business operations... would not receive credits towards Social Security coverage," and further held that "[t]he legislative history... does not support a holding that Congress contemplated excluding partners who performed services for a partnership in their capacity as partners... from liability for self-employment taxes." *Renkemeyer*, at 150.

In the instant case, the court agreed with respondent's argument that a functional analysis test similar to that outlined in *Renkemeyer* should be applied. Yet before the court could analyze the roles of the limited partners, it first faced a jurisdictional conundrum. The current proceedings were conducted under the unified audit and litigation procedures enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), which "provides a method for making adjustments at the partnership level." *Id*. at 8. "The Tax Court has jurisdiction over a TERFRA partnership-level proceedings when the tax matters partner or another eligible partner timely petitions the Court for a readjustment." §6221. Thus, a determination of jurisdiction to analyze the roles of the limited partners "turns on the question of whether [the] determination is a partnership item."

Section 6221provides "the tax treatment of any partnership item (and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item) shall be determined at the partnership level. Further, [p]artnership items are those items that are more properly determined at the partnership level, whereas affected items are items that are affected by partnership items." §6231(a)(3) and (5). The court reasoned that whether a partnership item is an item requires two determinations: first, that it is required to be considered for the partnership's taxable year under subtitle A, and second, that regulations provide [the item] is more appropriately determined at the partnership level. *Soroban*, at 8.

Quickly determining that the guaranteed distributive shares are a partnership level item, the court concluded it had jurisdiction to analyze the limited partners' roles in these TEFRA proceedings and that it must apply a functional analysis test to determine whether the limited partners are "limited partner[s], as such" under section 1402(a)(13). The petitioners' motion for summary judgment was thus denied and the respondent's motion for partial summary judgment was granted. ***Soroban Capital Partners v. Commissioner***, 161 T.C. No. 12 (U.S. Tax Ct., 2023).

Morgan Holcomb, Leah Olm (not pictured), and Adam Trebesch
Mitchell Hamline School of Law

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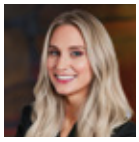


Kyle Hahn and **Brittany Deane Salyers** joined Halunen Law in the employment law practice group.

Jessica Anderson and **Jacob Gray** joined Kutak Rock as associates. Their practice areas include labor and employment law, health care, corporate, employee benefits, and litigation.


Randall L. Seaver joined Moss & Barnett in the firm's litigation and business law practice areas. **Aylix K. Jensen** has been elected a shareholder of the firm. Jensen focuses her practice on consumer litigation and regulatory matters.


Olivia Liz-Fonts and **Leah J. Christenson** became associates of Bassford Remele. Liz-Fonts focuses on professional liability, employment law, trust and estates litigation, and commercial litigation. Christenson is a litigator, focusing her areas of practice in general liability, construction, trust and estates litigation, and professional liability.


Gov. Walz appointed **Dean Eyler, Kristen Marttila,** and **Dominick Mathews** as district court judges in Minnesota's 4th Judicial District. The seats will be chambered in Minneapolis. Eyler is a partner at Lathrop GPM, where he litigates commercial and intellectual property disputes. Marttila is a partner at Lockridge Grindal Nauen PLLP, where her practice focuses on antitrust and other consumer-oriented class actions. Mathews is a principal attorney at the Hennepin County Attorney's Office.

Gov. Walz appointed **Krista Marks** as district court judge in Minnesota's 1st Judicial District. Marks, who will replace Hon. Arlene M. Asencio Perkkio, will be chambered in Hastings in Dakota County. Marks is an assistant public defender in the 4th Judicial District Public Defender's Office.

Gov. Walz appointed **Allison Whalen** as district court judge in Minnesota's 8th Judicial District. Whalen will replace Hon. David L. Mennis and will be chambered in Swift County. Whalen is an assistant county attorney in the Stevens County Attorney's Office.

Sara P. Boeshans was appointed as executive secretary to the Minnesota Board on Judicial Standards. Boeshans replaces Ret. Judge Thomas M. Sipkins.

Kaitlyn Schammel joined Fafinski Mark & Johnson, PA as an associate in the HR and employment practice group.

Stinson LLP welcomed new associates in its Minneapolis office as part of the firm's fall associates class of 2023: **Jennifer Brown, Adam Mikell, Ben Parker,** and **Zack Taylor.** The firm also announced that **Nathaniel Donoghue, Andrew Glasnovich,** and **Jessica Knox** were elected to the firm's partnership.

Mary Frances Price was the recipient of the Mary Alice Gooderl Award, presented the Minnesota State Bar Association Elder Law Section to acknowledge outstanding contributions to the field of elder law. Price is a member of Moss & Barnett's estate planning and wealth preservation team.


Jeffrey Dilger and **Alice Kirkland** have been elevated to shareholder status at Littler. Both practice employment and labor law.


Allison Dohnalek and **Melissa Watton** joined Best & Flanagan in the firm's litigation and employment law practice groups.

David M. Cialkowski was appointed co-vice chair for the Committee to Support the Antitrust Laws (COSAL) Amicus Committee. COSAL was established in 1986 to promote and support the enactment, preservation, and enforcement of a strong body of antitrust laws in the United States. Cialkowski is a partner at Zimmerman Reed.

Benjamin R. Cooper joined Zimmerman Reed in the Minneapolis firm's consumer protection, privacy and data breach, and antitrust practices.


Zachary Armstrong and **Mitchell Sullivan** were promoted to partner status at DeWitt LLP. Armstrong is a member of the litigation, intellectual property litigation, and transportation & logistics practice groups. Sullivan is an attorney supporting the real estate and business practice groups.

Kala Swenson and **Jack Schugel** joined Collins, Buckley, Sauntry & Haugh PLLP. Swenson will practice primarily in the area of family law. Schugel will practice in the areas of family law and civil litigation.

Scott Johnson joined Heimerl & Lammers, LLC in the firm's personal injury law practice.

Steven C. Kerbaugh and **Leah D. Leyendecker** were elected to the partnership at Saul Ewing. Kerbaugh is a member of the labor and employment practice, and Leyendecker is a member of the corporate practice.




Christine W. Chambers, Ken J. Kucinski, Perssis Meshka, and **Shannon A. Nelson** were elected as shareholders at Arthur, Chapman, Kettering, Smetak & Pikala, PA.

Peter M. Lindberg has become a shareholder with Cousineau Malone. Lindberg's practice focuses on personal injury/wrongful death, property damage, subrogation, and insurance coverage litigation.

Honsa Mara & Kanne was certified as a women's business enterprise through the Women's Business Enterprise National Council. Honsa Mara & Kanne is a boutique family law firm in Minneapolis.

Nathan D. Louwagie was elected to be a firm shareholder at Carlson Caspers. Louwagie is a registered patent attorney.




Leah Kippola-Friske and **Walter T. Cosby III** joined Maslon LLP. Kippola-Friske joins as a partner in the litigation group. Crosby joins the corporate & securities group. **Evan Nelson** and **Michael Sheran** were elected to the firm's partnership. **Maslon LLP** also announced that it moved to new offices in Capella Tower in Minneapolis. The 35,000-square-foot space comprises two floors and will house approximately 140 staff and attorneys.

Jennifer Zwilling was elevated to principal at Jackson Lewis PC. Zwilling's practice is focused on labor and employment law.





Faegre Drinker announced the promotion of five attorney members to firm partner: **Sarah Armstrong, Anthony Finnell Jr., Roger Maldonado, Jeffrey Thiede,** and **Cyri Van Hecke.**

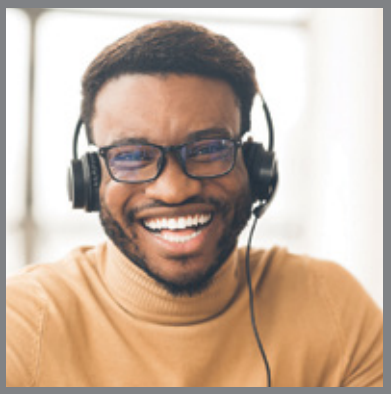
In memoriam

CAROL ANN ELLINGSON died on June 16, 2023. She loved learning, earning master's degrees in theater and creative writing along with a law degree from Harvard. She put her knowledge to good use, writing plays, opening a dinner theater, acting in musicals, and practicing law in a multinational law firm and later in a small law firm with her husband, Richard Bend.

THOMAS A. ZIPOY, age 57, of Kimball, died August 27, 2023. He earned his law degree from the University of Minnesota Law School in 1992. After some years of practicing law, he began his private practice at Zipoy Law Office in St. Augusta.

RAYMOND F. SCHMITZ died on December 13, 2023. He received a law degree from the University of Minnesota in 1970 and subsequently was hired as an assistant county attorney for Olmsted County. He was later elected county attorney for six terms and, after serving the county for 36 years, retired in 2006.

RUSSELL MORGAN SPENCE, SR. passed away at age 86 on December 27, 2023. He graduated from William Mitchell College of Law. He then joined a Minneapolis law firm as an investigator, working his way up to becoming a named partner at Meshbesher & Spence, Ltd.



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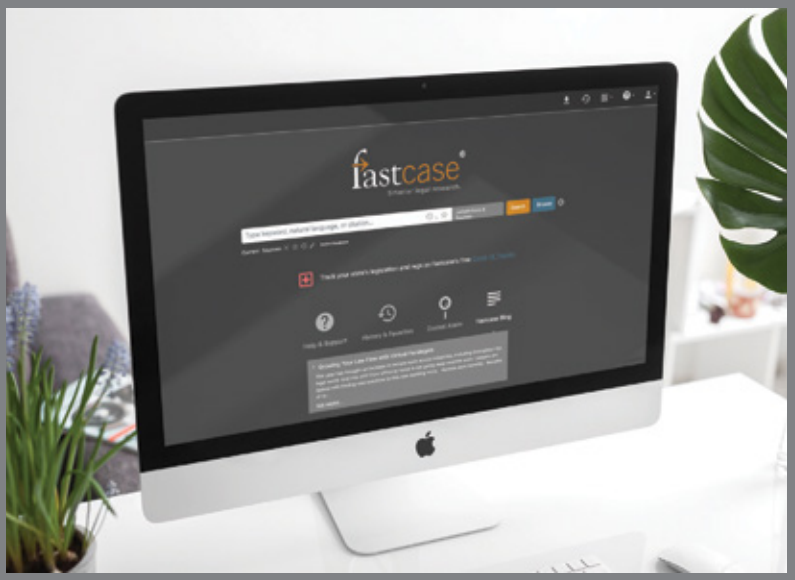

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ASSOCIATE ATTORNEY
Campbell Knutson, PA, one of Minnesota's leading municipal law firms, is seeking a prosecution associate attorney to start immediately. Our firm's practice is dynamic and growing. Prosecution associates will handle non-felony cases from start to finish. This includes reviewing cases for charging, drafting formal complaints, all discovery, any pretrial motions and memorandums of law, court appearances at all pretrial or contested hearings and jury or court trials. Prior experience with governmental representation is useful, but not required. Prior legal experience of one to five years is preferred, but not required. Campbell Knutson, PA offers a collegial and team-oriented atmosphere and an excellent benefits program. Salary is based on knowledge, skills, abilities, and years of practice. Interested applicants should email a resume, cover letter, and writing sample to: Elliott Knetsch (eknetsch@ck-law.com). The position is open until filled.

IMMEDIATE OPENING—LITIGATION ATTORNEY
Rock Hutchinson PLLP, representing a range of food, beverage, and agribusiness clients, from Fortune 500 to startups, seeks an experienced litigator with over five years' experience to join our team. Practice areas: commercial, employment, product liability, and corporate/shareholder disputes. Email: thutchinson@rockhutchinson.com

TRIBAL ATTORNEY
Ho-Chunk Nation Department of Justice is seeking full time attorneys for entry level in-house positions. Salary based on experience. Health, dental, and other benefits after 90-day probation period. For more information on position or application process, contact Marissa Dickey at: 715-284-3170 or Marissa.dickey@ho-chunk.com.

LITIGATION ATTORNEY
Small, growing litigation firm with national personal injury defense practice seeking a lawyer with 5 to 15 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.

FAMILY LAW ATTORNEY
White & Associates is seeking an attorney with three to five years' experience in family law. We offer a competitive wage, 401(k), and flexible hours. Please send resume to: s.white@whitelegalmn.com.

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Anishinabe Legal Services is looking to hire a highly motivated attorney to provide civil legal assistance and court representation to program clients before area Tribal Courts, State Courts, and Administrative Forums. This attorney will be housed out of our main administrative office on the Leech Lake Reservation in Cass Lake, Minnesota. Primary duties will include handling a wide variety of civil matters before State and Tribal Courts. Compensation: $70,000/year + D.O.E. Generous benefit package includes individual and family health and dental insurance, paid time off, and life insurance. To Apply: Please email a cover letter, resume, and three references to Litigation Director Valerie Field, at: vfield@alslegal.org. Applications will be accepted until the position is filled.

ASSOCIATE ATTORNEY
A progressive and dynamic general practice seeks a new associate attorney to join our team. Case work will focus on family law with some exposure to criminal and other practice areas. We offer an open and affirming, family friendly workplace, a competitive salary with bonus potential, full benefits which include health/dental, PTO, sick time, 401(k) with 3% company matching. Our new team member will work from our St. Cloud and Brainerd offices with some flexibility for remote work. Much higher earning potential after one year of employment based on percentage pay scale. MN Law License required. Great pay incentives, insurance benefits, flexible schedule, in a positive team environment. Please send resume and cover letter to: lawyer@edshawlaw.com.

ASSOCIATE GENERAL COUNSEL, THE KINETIC GROUP
Anoka, MN. Have a passion for the hunt/shoot industry? Come work for The Kinetic Group! We are seeking an associate general counsel with eight plus years of legal experience, ideally from a combination of law firm and corporate legal departments. This position will have responsibility for a wide variety of general legal matters affecting the company, with a strong emphasis on intellectual property (IP) matters. The successful candidate requires a strong background in developing and managing IP legal strategy,

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REAL ESTATE FINANCE ASSOCIATE

Maslon LLP is seeking an associate attorney to serve in a hybrid position supporting the firm's growing financial services and real estate practice groups. Ideal candidates will have at least one to three years of substantive commercial lending and/or commercial real estate transactional experience, including drafting and negotiating loan documentation, title and survey review, commercial leasing, and review of due diligence materials. Candidates will have a unique opportunity to work on a wide variety of complex commercial lending and real estate-related transactions in a collaborative environment among professionals who take the time and energy to support each other's professional goals. Experienced candidates with a background in either discipline and a willingness to expand their practice are encouraged to apply. What sets Maslon apart is the quality of our relationships, with our clients and with each other. We are large enough to handle the most challenging legal matters, allowing us to sustain a diverse and sophisticated practice, yet we are small enough to recognize and respect the individuality of our clients, lawyers and staff. Since Maslon's inception in 1956, the founders made respecting and fostering diversity, equity, inclusion, and community involvement an expected practice within the firm—principles which the firm has proudly carried forward. In furtherance of those goals, Maslon proudly achieved Midsize Mansfield Certification Plus status after completing a rigorous 18-month collaboration with Diversity Lab to track, measure, and achieve diversity in leadership. The Mansfield certification recognizes the structural changes and actions taken by Maslon over the evaluation period to ensure consideration of at least 30% women lawyers, underrepresented racial and ethnic lawyers, LGBTQ+ lawyers, and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitches, lateral lawyer hiring, and more. For more information, visit us at www.maslon.com. To apply, please send a resume and cover letter to Angie Roell, Legal Talent Manager, at: angie.roell@maslon.com. EOE. No third-party recruiter submissions accepted.

DUAL ATTORNEY/ ASSISTANT COUNTY 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.

IN-HOUSE CORPORATE ATTORNEY

Federated is seeking an attorney to provide timely legal counsel, vendor contract review/negotiation, as well as other general in-house legal work. You will be working directly with internal business partners and the legal team. No billable hours! Minimum Requirements:Juris Doctorate and current license to practice law in Minnesota. Licensed attorney with two plus years' experience. Please apply at https://careers-federatedinsurance.icims.com/jobs/4561/in-house-corporate-attorney/job

MINNEAPOLIS – STAFF ATTORNEY – TRUSTS AND ESTATES

Robins Kaplan LLP is looking for a staff attorney with two to four years of experience in estate planning, probate, trust administration, guardianships/conservatorships, and related tax areas. Apply at: https://www.robinskaplan.com/careers/current-openings.

CORPORATE ATTORNEY

We are seeking an experienced, highly service-oriented corporate attorney who has strong experience for our dynamic and growing firm. About Our Firm: In this role, the attorney will work within our collaborative environment where everyone is valued for his or her diverse talents and contributions. This environment allows us to deliver the best results to our clients and colleagues alike, just as we have done for the last 70 years. We are advocates in the law but also maintain a strong foothold in supporting charitable causes through advocacy, volunteerism, or offering legal education to individuals and local businesses. It is important to the sustainability of our firm that all attorneys and staff share the same values as our firm, with active participation in organizations throughout Minnesota and Wisconsin. Position: Corporate Attorney. Eckberg Lammers, PC is seeking a talented and experienced corporate attorney to join our dynamic legal team. As a prominent law firm serving the needs of small and medium-sized businesses, Eckberg Lammers is committed to providing top-tier legal services from incorporation to dissolution. If you are a licensed attorney with three to five years of experience and are licensed in the states of Minnesota and Wisconsin, we invite you to apply for this exciting opportunity. Responsibilities: 1) Provide comprehensive legal advice and support to small and medium-sized businesses throughout their lifecycle, including incorporation, contract drafting and negotiation, regulatory compliance, and dissolution. 2) Collaborate with clients to understand their business objectives and provide strategic legal solutions tailored to their specific needs. 3) Conduct legal research and analysis to ensure clients are informed of relevant laws and regulations affecting their business operations. 4) Draft and review a variety of legal documents, including contracts, agreements, and corporate governance documents. 5) Represent clients in negotiations, mediations, and other legal proceedings, ensuring their interests are effectively advocated for. Qualifications: 1) Juris Doctor (J.D.) from an accredited law school. 2) Active license to practice law in the states of Minnesota and Wisconsin. 3) Three to five years of experience practicing corporate law, with a focus on small and medium-sized businesses. 4) Strong knowledge of business and commercial law, including corporate governance, contract law, and regulatory compliance. 5) Excellent communication and negotiation skills. 6) Ability to work independently and collaboratively in a team-oriented environment. Eckberg Lammers offers an inclusive work environment with opportunity for growth and development in addition to competitive compensation and benefits offerings, including 401(k), health insurance, life insurance, vacation and sick-time. For more information about Eckberg Lammers, visit our website: www.eckberglammers.com Please send your cover letter, salary requirements and resume to Kariin Berkland at: HR@eckberglammers.com Eckberg Lammers

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LITIGATION ASSOCIATE
Maslon LLP is seeking an associate with two to three years of litigation experience to work in its litigation practice group. This position offers the opportunity to practice across a variety of general civil litigation matters in state and federal courts, including business litigation, construction and real estate litigation, insurance coverage litigation, and tort and product liability litigation. A successful candidate will be a highly motivated self-starter who is able to work well in a fast-paced environment. Excellent writing, oral advocacy skills, and academics are required. Clerkship and previous court experience is a plus, but not required.For more information, visit us at www.maslon.com. To apply, please send a resume and cover letter to Angie Roell, Legal Talent Manager, at: angie.roell@maslon.com. EOE. No third-party recruiter submissions accepted.

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