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VOLUME LXXVII NUMBER VII
AUGUST 2020
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Bench&Bar OF MINNESOTA

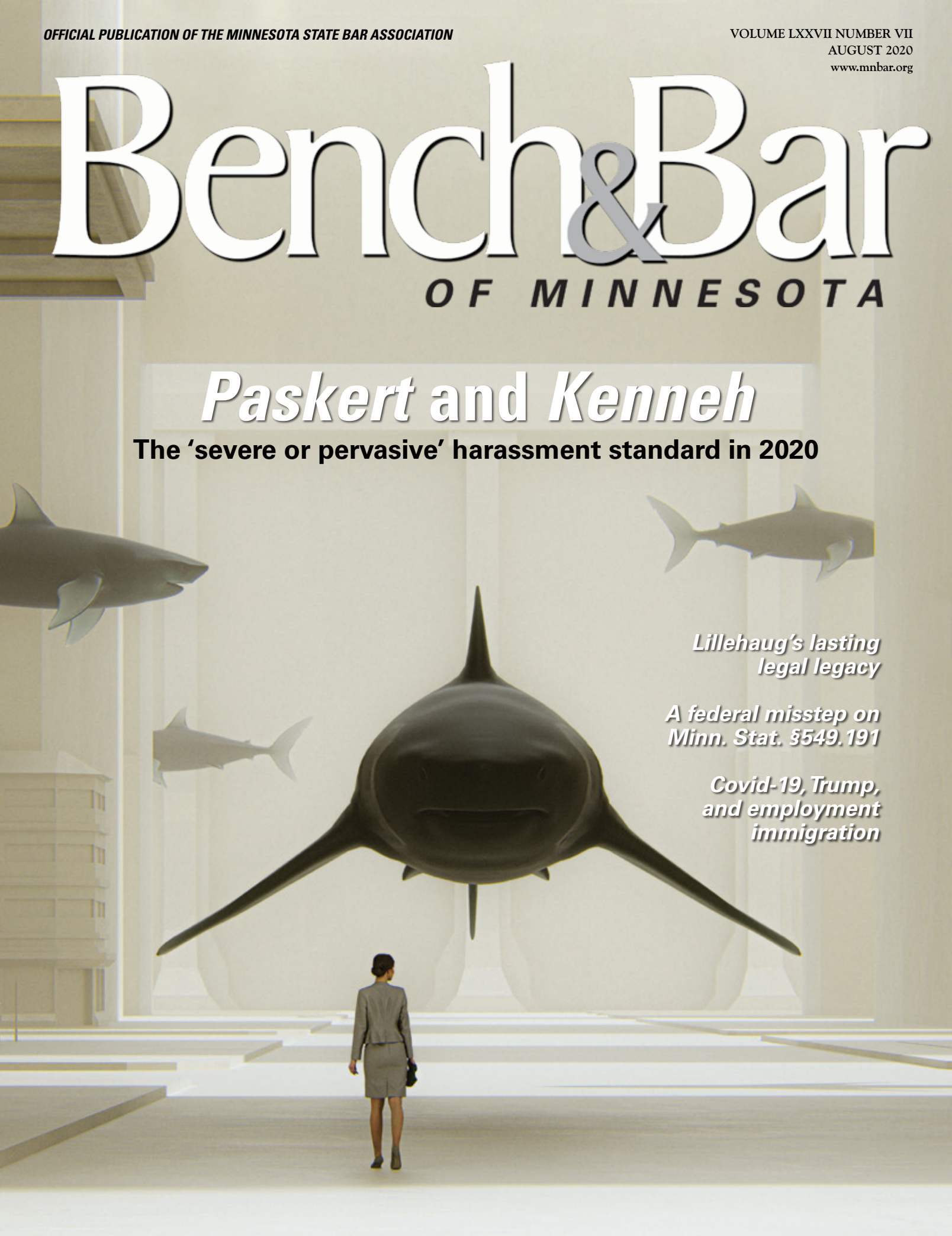
Paskert and *Kenneh*

The 'severe or pervasive' harassment standard in 2020

Lillehaug's lasting legal legacy

A federal misstep on Minn. Stat. §549.191

Covid-19, Trump, and employment immigration



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ON THE COVER

24 *PASKERT* AND *KENNEH*

The 'severe or pervasive' standard in 2020

Minnesota moves forward on workplace harassment; the 8th Circuit doubles down

By Sheila Engelmeier and Heather Tabery

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"Ordinary equality"

August 2020 marks the 100th anniversary of a historic change to the U.S. Constitution, the ratification of the 19th Amendment. The substance of the amendment—a mere 28 words—provides "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." As Carrie Chapman Pratt, a prominent figure in the women's suffrage movement, noted, "The vote is the emblem of your equality, women of America, the guarantee of your liberty."

While the battle for the right to vote actually began many years before, the 1848 Seneca Falls convention marked a turning point in the women's suffrage movement. The convention resulted in the adoption of the "Declaration of Sentiments," which called for equality between the sexes, including the right to vote. Over the next seven decades, suffrage supporters tirelessly lectured, wrote, marched, lobbied, and practiced civil disobedience in an effort to secure that right.[1] The 19th Amendment was officially certified by the Secretary of State on August 26, 1920. With its ratification, the face of the American electorate was forever changed. In the November 1920 elections, more than 8 million women in the United States voted for the first time.[2]

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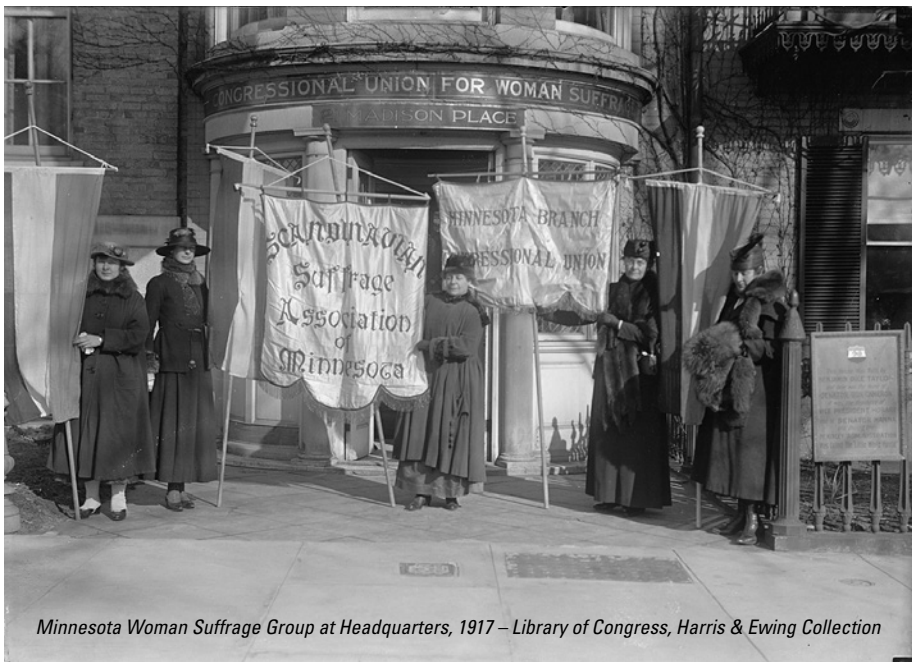
The importance of the 19th Amendment has not been forgotten. In fact, a Gallup poll conducted at the end of the 20th century revealed that passage of the 19th Amendment was observed to be "one of the most important events in the century," second only to World War II.[3]



Minnesota Woman Suffrage Group at Headquarters, 1917 – Library of Congress, Harris & Ewing Collection

What is often overlooked about this historic event, however, is that while the amendment opened the door for women to share their voices in the political process, the harsh reality is that it did little to advance this same opportunity for women of color in our country. After the amendment's passage, a number of voter suppression measures persisted or were newly implemented across the country—particularly in the south, which limited Black women's access to ballot boxes by means that included poll taxes, literacy requirements, and grandfather clauses. Indigenous women and Latinas met a similar fate. The struggle for voter equality for these citizens persisted for decades despite the passage of the 19th Amendment, and similar although less overt efforts aimed at limiting poll access for people of color persist today.

As we look toward the 2020 election, I firmly believe that as lawyers we have a unique opportunity to play an important role in protecting, advocating for, and highlighting the significance of the right to vote, not just for women but for all eligible voters. While lawyers clearly have divergent positions on political issues and candidates, there is (or should be) a universal interest among us regarding the importance of protecting this "emblem of equality."

One way lawyers can help protect the right to vote is to volunteer as election judges. According to the Secretary of State's Office, Minnesota requires approximately 30,000 election judges to work at the roughly 3,000 polling places for each statewide election. Election judges perform many functions, from greeting and registering voters to distributing ballots and helping with vote tabulation. The need for election judges in 2020 is anticipated to be greater than ever due to the challenges created by covid-19. Many individuals who have previously served as election judges are retirees. Because individuals in this age group are more vulnerable to covid-19, it is likely to affect their ability to serve in the upcoming primary election in August and the general election in November. If you are able and willing to serve as an election judge, I encourage you to contact the Secretary of State's Office for more information. The MSBA is currently exploring options for securing CLE credit for special training that may be offered to attorneys interested in this role; please watch for additional information on this issue in the coming weeks.

As lawyers we have a unique opportunity to play an important role in protecting, advocating for, and highlighting the significance of the right to vote, not just for women but for all eligible voters.

Even if CLE credit is not an option, please consider serving in this important role.

Alice Paul, another instrumental leader in the women's suffrage movement, observed that while "[m]ost reforms, most problems are complicated... there is nothing complicated about ordinary equality." By all accounts, the effort required to secure passage of the 19th Amendment took an extraordinarily long time and was extremely complicated. I must admit that, like Paul, I find it odd that it would take so long to achieve such "ordinary equality" for women. Similarly, it troubles me that there remain so many other ways in which our society, including the legal profession, is still lacking in equality for women. But I am encouraged by the significant strides that have been made in this regard and the clear desire of many individuals and organizations, including the MSBA, to continue to work toward gender equity. ▲

Notes

[1] If you are interested in learning more about the women's suffrage movement, I highly recommend the 2004 HBO film *Iron Jawed Angel.* Albeit historical fiction, it is very informative and demonstrates the great sacrifices made by supporters of the movement to secure passage of the 19th Amendment.

[2] See *https://www.history.com/topics/womens-history/19thAmendment-1* (last accessed 7/9/2020); *https://www.archives.gov/exhibits/featured-documents/amendment19* (last accessed 7/9/2020).

[3] *https://www.gallup.com/poll/3427/most-important-events-century-from-viewpoint-people.aspx* (last accessed 5/27/2020).

HISTORY: The Minnesota Woman Suffrage Association

By Eric W. Weber

From 1881 to 1920, the Minnesota Woman Suffrage Association (MWSA) struggled to secure women's right to vote. Its members organized marches, wrote petitions and letters, gathered signatures, gave speeches, and published pamphlets and broadsheets to force the Minnesota Legislature to recognize their right to vote. Due to their efforts, the legislature approved the 19th Amendment in 1919.

In the 1870s, women across Minnesota organized local women's suffrage groups. In 1875, the Minnesota Legislature recognized women's right to vote in school board elections. Many women, however, wanted to vote in all elections. Seeing the need for a statewide agency, 14 women formed the MWSA. Among the founders were Harriet Bishop and Sarah Burger Stearns. Stearns became the organization's first president. By 1882, the MWSA had grown to 200 members. In 1885, MWSA president Martha Ripley convinced the American Woman Suffrage Association (AWSA) to hold their annual convention in Minnesota. This national event demonstrated the importance of the MWSA. It also drew the attention of Minnesota's male lawmakers. The MWSA eventually became a chapter of the National American Woman Suffrage Association (NAWSA), which formed in 1890.

In 1893, the MWSA convinced the Minnesota Senate to take up women's suffrage. President Julia Bullard Nelson worked with Ignatius Donnelly, a Populist state senator. The Populists regularly supported a women's suffrage plank. Nelson herself was a Populist school superintendent candidate in 1894. Nelson and Donnelly initially sought the vote for women in municipal elections. However, the Senate went further. Its members voted to remove the word "male" from the state's voting requirements. The bill passed 32-19. However, this change did not pass the House. That chamber did not have time to take it up before the legislative session ended. Even if it had passed the House, however, the voters of Minnesota would have had to approve it before it became law.

After the failure of the 1893 amendment, the movement continued. However, the MWSA was unable to build on its earlier success. The MWSA and its ally, the Political Equality Club, placed women's suffrage before the state Legislature every session. Each time, the bill either died in committee or was defeated.

During the 1910s, the movement picked up momentum again. In 1914, Clara Ueland organized a parade through Minneapolis of over 2,000 suffrage supporters. Ueland became MWSA president that same year. This event gave the movement renewed attention. During this period, the MWSA had to contend with a rival organization, a Minnesota branch of the National Women's Party (NWP). The NWP was more radical than the MWSA. It was much more likely to take direct action, such as hunger strikes, than the MWSA. Even though they disagreed on tactics, the two organizations often worked together.

By 1919, 30,000 women across the state officially belonged to local suffrage associations. They joined the MWSA, the NWP, and other organizations. Their numbers and continued activities convinced lawmakers to act. In 1919, the Minnesota Legislature recognized women's right to vote in presidential elections. The same year, the Legislature ratified the 19th Amendment. It did not take effect until 1920, however, when the required two-thirds of the states approved it. With their right to vote secured, the MWSA became the Minnesota League of Women of Voters. On the lawn of the Minnesota State Capitol is a memorial to the MWSA. ▲

Editor's note: *This piece is reprinted from the Minnesota Historical Society's MNopedia* (mnopedia.org)*, an online encyclopedia of state history, under a Creative Commons license.*

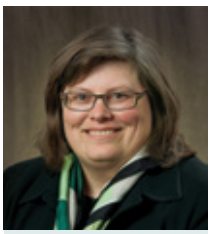
Challenging clients in challenging times

We all know these are not the typical halcyon days of summer. Between the continuing covid-19 pandemic, community wounds from George Floyd's death, and the economic recession, people are struggling in many ways. Recently I was talking with Joan Bibelhausen, the executive director of Lawyers Concerned for Lawyers, and she suggested an article on a topic she knows some lawyers find particularly challenging these days: clients and boundaries. Joan approaches this topic from a wellbeing perspective; I will address it from an ethics perspective.

The preamble to the Minnesota Rules of Professional Conduct (MRPC) identifies four main representational functions performed by attorneys. Most people understand that lawyers act as advocates for their client's interests and negotiators on their client's behalf, and these are two of the four roles set out in the preamble.[1] Lawyers also act as evaluators of their client's legal affairs. The fourth function that lawyers are expected to perform is to serve as counselor or advisor to their clients. Often overlooked is Rule 2.1, MRPC, which provides good guidance regarding this role.

The advisor's duty

What does it mean to be an advisor consistent with the ethics rules? Rule 2.1 provides that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." The comments to Rule 2.1 expand on what this looks like.



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.

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- In general, a lawyer is not expected to give advice until asked by the client.
- A lawyer ordinarily has no duty to initiate investigation of a client's affairs or give advice that the client has indicated is unwanted.
- A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.
- Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations such as cost or effects on other people are predominant.
- When a request is made by a client inexperienced in legal matters, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.
- When a matter is likely to involve litigation, it may be necessary to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.
- Where consultation with a professional in another field is something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations from experts.

Boundary issues

All this probably seems straightforward enough. Because we are problem solvers at heart, however, our role as advisor can lead to blurred lines and boundary issues with clients. This may be particular true in times of upheaval. It's very difficult to give candid advice that may be unpalatable to someone who is already struggling. Perhaps this means you put off that difficult conversation. Time passes and it becomes even more difficult to have that conversation, because you also have to acknowledge your lack of diligence in not calling sooner. No matter how many times we tell ourselves that bad news does not get better with age, the self-talk does not make it easier to pick up the phone. While most clients appreciate your candor, some do not—a fact that should not deter you from your ethical obligation to give that candid advice. Nothing good comes from attempting to shelter a client from news they may not like.

Challenging times lead to other forms of boundary issues. Sometimes lawyers, when business slows down, take on matters they know in their heart they should not undertake. Good client screening remains as important today as at any time. Listen to those internal warning signs. Are you lawyer number three? Is the main complaint about prior counsel fee-related? Are you having a difficult time getting enough information to really understand the status of the matter? Even though business may be slow, think very carefully before you ignore your instinct just because someone is willing to pay you.

Another boundary issue is the urge to discount your services in challenging times. So many people are struggling, and of course it is difficult to afford a lawyer. I have been fortunate to make a good living and I would hate to have to pay any rate I have ever charged for my legal services. While you may be tempted to discount your fees, think twice before doing so. A bad financial arrangement between a lawyer and client can end poorly, and all too often proves the maxim that no good deed goes unpunished. This is not to say that financial adjustments should not be made as a courtesy, given the extraordinary times in which we find ourselves; just be careful.

Zealous advocacy has its own boundary challenges. Sometimes in discipline cases we see lawyers who are so invested in their client's matter that they forget their own role, as stated in Rule 2.1, MRPC: to exercise independent professional judgment. Should you really be supporting your client's desire to

leave no stone unturned and only rubble behind you? As the comments to Rule 2.1 suggest, have you discussed with your client reasonable alternatives? I know it's nice to have someone paying you to turn over all those stones, but is that consistent with the exercise of your independent judgment? And have you provided your candid advice on the topic? The first comment to Rule 1.3, MRPC, reminds us that "[a] lawyer is not bound… to press for every advantage that might be realized for a client." Pursuing a matter with "commitment and dedication" does not mean no holds barred, and it certainly does not include offensive tactics or preclude courtesy and respect toward all.

This is always true, but it takes on particular import in these times when almost everyone is struggling in some manner. Do not forget to afford others the courtesies you hope will be afforded to you. Your opposing counsel may be caring for stir-crazy minor children, bad-tempered teens, or parents who are not taking the care they should. Or your opposing counsel may be alone, sad, and feeling disconnected. I know your client might not care, but you have professional discretion. Are you exercising it wisely and appropriately?

Boundaries are necessary not only to manage our own well-being but as a precaution against complaints and discipline. Each year the most frequently violated rules are Rule 1.3, MRPC, on diligence, and Rule 1.4, MRPC, on communication. This makes sense. It's hard to force yourself to work on a file where the client is a challenge, you have to deliver bad news, or nothing can really be done to help. If you are losing money on the deal, it becomes even more challenging. If you have not established good boundaries, it can be particularly difficult. Each time I speak on this topic, my advice is to pick up the file you hate that sits on the corner of your desk and just face it, warts and all. Sometimes, if boundaries are really an issue, the best thing you can do for yourself and your client is to withdraw, provided you can do so consistent with Rule 1.16, MRPC.

We have an ethical duty as advisors to exercise independent professional judgment and render candid advice. This is not an easy task, and can be particularly hard in challenging times. Please make sure you are taking care of your own well-being and maintaining good client boundaries. If you need assistance, be sure to check out the resources of Lawyers Concerned for Lawyers at *www.mnlcl.org*. (And remember, all communications with Lawyers Concerned for Lawyers are confidential, and Rule 8.3(c), MRPC, exempts communications with lawyer assistance programs from the duty to report professional misconduct.) They have several resources related to covid-19 and well-being. You also can always call our ethics hotline at 651-296-3952. We are here to help you navigate these boundaries ethically. ▲

Notes

[1] *See also* Martin Cole, *The Lawyer as Advisor*, Minnesota Lawyer, at *lprb.mncourts.gov/articles*

Cyber risk:

Is your data retention policy helping or hurting?

This past June, several U.S. law enforcement agencies were the victims of a largescale data breach resulting in 296 GB of data being stolen. The National Fusion Center Association stated that "dates of the files in the leak actually span nearly 24 years—from August 1996 through June 19, 2020." The statement went on to say that personally identifying information was leaked along with other types of files.[1] The incident was an act of hacktivism and purportedly sought to reveal internal government workings to the public, including details relating to its covid-19 response.

This incident reveals a critical piece of cybersecurity strategizing that sometimes gets overlooked—the value of the data retention policies. Data retention policies outline what types of data are actively being stored, how long that data should be stored, and how it should be destroyed or relocated at the end of that time. Part of the severity of this attack stems from the fact that these agencies were retaining so much old data—data that should have been periodically audited and reviewed. While data is a critical asset, only retaining what is absolutely necessary mitigates the risks associated with a breach.

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.

Within the legal community, attorneys are held to a high standard when it comes to protecting client data. And one size does not fit all: It's complicated knowing when it is appropriate to discard old client files, especially given ethical requirements and the possibility you'll need certain case files in the future. Depending on the jurisdiction, retention policies—and the length of time attorneys are required to hold on to files—may vary. Furthermore, different types of cases and circumstances require different approaches to file retention. A records retention schedule may spark fears that files will be deleted or discarded before it's appropriate to do so. But law firms are also likely to run the risk of holding on to more information than necessary, and for an indefinite period of time.

Creating a legally sound records retention and destruction policy better protects clients from having their information compromised. Essentially, the less data a law firm houses on its servers (or in their storerooms, in the case of paper copies), the more able they are to manage and secure that data. Communicating the records retention policy to clients helps to protect against prematurely deleting client information. In the File Retention booklet distributed by Minnesota Lawyers Mutual, it is recommended that a letter notifying the client be sent prior to its scheduled deletion or destruction date: "The letter should tell the client they are welcome to pick up their file, in its entirety, before a certain date and that failure to do so will result in the file being destroyed. It is also a good practice to include a 'consent to destroy' form."[2] This measure provides an added layer of caution in executing a firm's data retention policy while still working to minimize the amount of data that a firm retains on behalf of its clients.

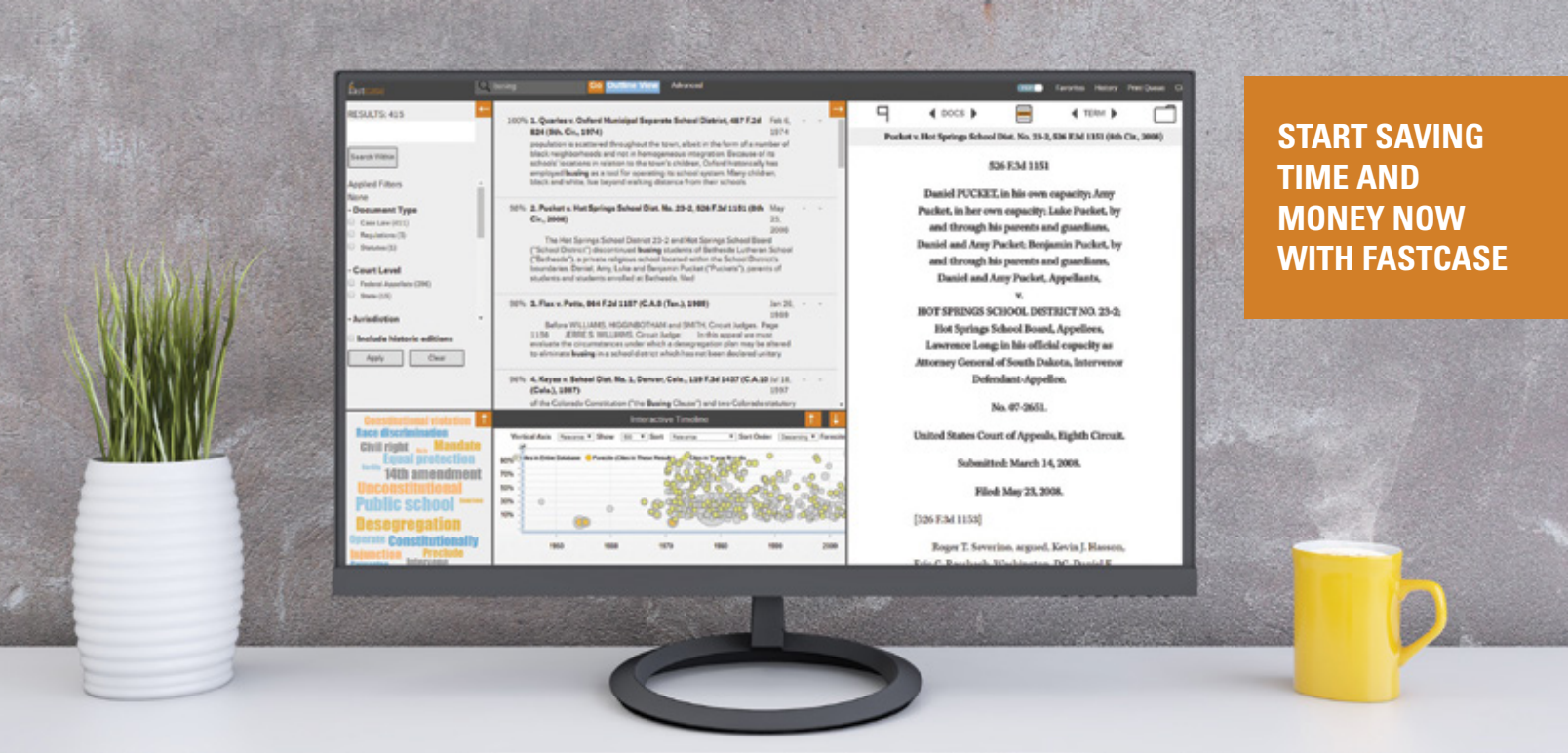
It should also be noted that the digital destruction of files is more complex than pressing the 'delete' button. Best practices should be followed in forensically destroying data, and any files that are deleted should be recorded for future reference.

While regularly reviewing stored data and creating a record retention policy is important in mitigating the risks associated with data breaches, it remains true that firms are often required to store large amounts of data even for cases that have closed. The key steps in creating a cybersecurity culture focused on protecting client data include: access controls to sensitive data; encryption; and employee education and training about social engineering and the threats associated with the Internet of Things. Appropriate physical security measures should be enacted to best secure physical files and storerooms. While data is a critical asset in any organization, the legal community is especially tasked with safeguarding its data and managing it with the utmost care. Implementing a data retention policy is an important part of that effort. ▲

Notes

[1] *https://thehackernews.com/2020/06/law-enforcement-data-breach.html*

[2] *https://www.mlmins.com/Library/File%20Retention%20Booklet.pdf*



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

Dear managing partner:

The view from an associate's desk

I became a lawyer because I didn't want to be another millennial living in my parents' basement. When I graduated with my bachelor's degree, journalism was thought to be a dying art and my journalism degree wasn't going to help me pay off my private school student debt.

My experience in private practice began September 4, 2019. Since then I have seen children lose their siblings, attorneys fail to know the nuances of the applicable law, parents triumph over their addictions, and courts decide the fate of the families. I wasn't sitting second chair observing a partner with the knowledge and skill-set to prepare me for these realities. I was *the* attorney. Professional ups and downs experienced while representing heartbroken parents were a reality of my first court-appointed contract.

Looking to the end of my law school career, I applied for nearly 20 clerkships, most of which did not want me. Trial team and law review were not on my resume.

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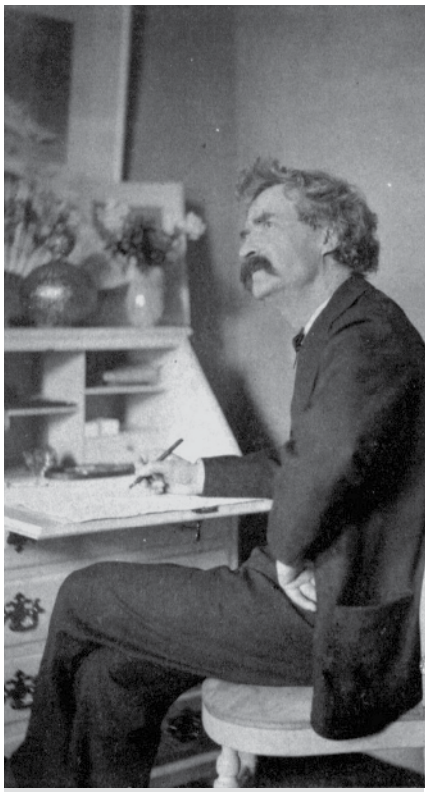
My first clerkship interview required me to travel to Hawaii. After my arrival, the judge told me his sole interest in me was curiosity. He wanted to know what a girl from South Dakota wanted from a clerkship in a state so far from home. I did not know how to tell him I would clerk anywhere that would see me as an asset rather than a law review reject.



"A good lawyer knows the law; a clever one takes the judge to lunch."
— Mark Twain

The other side of the bench

One chief judge saw my potential. I became a judicial law clerk for five judges across 11 counties. The chief judge helped shape my expectations of the legal profession and encompassed what I wanted from a mentor. He taught me about courtroom decorum, forming legal arguments, and buying a house. Thanks to him, I now know, rural Iowa has a yacht club.

Every judge who hires a law clerk bears the cross of direct impact on the quality of the legal profession. Law clerks go on to be ideal law firm hires. Their skills set them apart from those colleagues who have only been in front of the bench. They have been behind it. The person a judge hires will see the good, the bad, and the ugly of legal practice. Law clerks mimic what they know and what they see. If informality and bare bones filings are commonly accepted, the law clerk and soon-to-be new lawyer is shoved down an embankment of low expectations, lack of knowledge, and unprofessional informality.

Thankfully, my clerkship experience taught me high expectations of practice. I learned how to choose my weapon—pen or speech. When both are ripe for application, timing is key. The expectations of a judge directly model the quality of advocacy in the room, whether it's in chambers or a courtroom. Stiff black suits and a level demeanor at counsel table are not just formalities; sometimes they are the only thing that persuades clients to trust their lawyer.

In my year as a law clerk, strong legal arguments often crossed my desk. I wrote rulings addressing multiple issues of constitutional law. The chief judge corrected me when I was wrong. He encouraged me when I was right. This law review reject left her post having written over 500 pages in one year.

Moving on

It was not long until the sun set on my days as a law clerk. An "outstate" firm found me. At the advice of the judge who mentored me, and with the support of the partners at my small firm, I took a county contract as a parents' attorney.

On my first day of practice, I had six open files and a high number of court dates. During my first week of practice, I was in court on two matters. In the first month, I appeared in court two days a week.

Clerking taught me two things: (1) attorneys must respond to the unpredictable, and (2) attorneys should not be afraid of the courtroom.

Child protection law is an area characterized by unpredictability and instability. The platform on which these parents stand moves like tectonic plates under the earth's crust. Case law, statutes, administrative rules, and bench books intersect with chemical dependency, poverty, mental illness, illiteracy, and heartbreak, causing earth-shattering results. Each day in court there is a surprise.

One thing my clerkship did not teach me was how to utilize staff, manage phone calls, and console clients all while learning a complex, always changing area of the law. Court-appointed work was baptism by fire, and it worked.

Just as a judge paints the landscape of decorum, a law firm partner sculpts zealous advocacy and workplace competency. The ideal associateship straddles the fine line between dependency and autonomy.

Some advice for not-new lawyers

If I could write a letter to managing partners across Minnesota, it would begin:

> *Dear Managing Partner,*
>
> *If you hire me, you will set the standard of what I expect from my profession. How you prepare a case, what cases you let me work on, whether you look at the rules or rely on your memory. I am taking note. I will practice like you. Would you retain you?*

I asked a few other local associate attorneys to offer their two cents as well.

Samantha Berglin, a public defender in Clay County, found her passion for public defense prior to attending law school and attributes her passion in part to the mentorship she has received from the chief public defender and the intern supervisor in her office.

"Supervisors have to try to get to know the people they interview or hire and avoid 'cookie cutter' interview questions," Berglin notes. "Ask questions like 'who is your hero and why?', or 'what motivates you or what do you do when you are not at work?'" According to Berglin, the happiness of a new lawyer—and the employer's best chance of retaining them—comes from a supervisor who shows they are interested in the new lawyer first, and in filling office space second.

Kelsey Knoer is an associate at Boyce Law Firm. Prior to going into private practice, she clerked for the United States District Court in South Dakota, and worked for the United States Department of Defense, Office of General Council in Arlington, Virginia as a legal extern. Asked what advice she would give law firms about hiring associates, she states, "Don't just tell me what to do. Tell me why you do it."

Knoer suggests that partners redline the changes they make before walking a new associate through each change with an explanation. "Don't just change them and ship the documents off," said Knoer. "Explain 'is it about style or is it about what you think the judge or the client will like?'

"So many upper-level attorneys take the decisions they make for granted," she goes on, "because they've been making them for so long. But unless I know why they're making a decision, I will never know when to make that decision again."

Abbie Olson, an attorney at the Maschka, Riedy, Ries and Frentz law firm, says, "Hiring managers should take into consideration that many new associates do not have networking or marketing experience and may have issues adhering to the old standards." The old standards include things such as being expected to attend a firm- or bar association-sponsored happy hour or events that happen after hours or on weekends.

"It was always very difficult for me to attend happy hour or evening events," she notes, "because it meant I had to find and then pay for a babysitter. I think firms could do a better job of supporting associates in identifying individual marketing and networking possibilities that will work for them. Especially for those of us practicing outstate." ▲

'Being an advocate for others was extremely appealing'

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Why did you go to law school?

I always had a fascination with the practice of law, but it wasn't until I saw the movie *A Civil Action* that I knew I wanted to be a litigator. The idea of making a career out of being an advocate for others was extremely appealing. Looking back 10 years later I'm happy to report that I love litigating as much as I thought I would.

What's it been like for you practicing in the pandemic?

Like many of us, I've been mostly working from home. Thankfully, modern technology has made the transition to working from home fairly easy. Further, the courts and opposing counsel's willingness to have things like depositions and hearings remotely has been extremely helpful. However, I miss the energy of downtown Minneapolis in the summer and being able to interact in person with my colleagues at Bassford Remele. I also miss being in the courtroom.

Congratulations on your election as chair of the New Lawyers Section for 2020-21. Tell us a little about the section's plans for the year.

Thank you. The section doesn't kick into gear until August, but we've already been hard at work to address the impact the pandemic is having on law students and recent graduates. I anticipate there will be broad consensus that we continue to put our resources toward helping the members most affected by the pandemic.

We also expanded our diversity committee and are putting together a new pro bono initiative that better connects lawyers with pro bono needs. This is an effort I'm particularly excited about.

One concern I have is the pandemic's impact on our ability to remain a place for students and new lawyers to feel comfortable networking and getting a foothold in the legal community. We're going to have to get creative with virtual social engagements and other things. Fortunately our social committee is more than up to the task of handling this problem.

You've been actively involved in volunteering at the MSBA for a few years now. How does bar membership serve you in your career?

The MSBA has been a great resource and I've made a lot of great friendships through it. First and foremost, I've enjoyed participating in various sections to advocate for issues I think are important. I've also used CLEs and the MSBA's various legal research tools, and I enjoy the networking events the MSBA puts on.

What's the best professional advice you ever received?

A law school professor use to hammer home the point that your reputation an attorney is everything. As I continue to grow in my career, I realize truer words have never been spoken. The legal community is small and people are not quick to forget when an attorney makes bad-faith arguments, acts unethically, or is a jerk.

How do you like to spend your time when you're not working?

I'm currently training for the Twin Cities "virtual" marathon. It will be my first marathon, and the training is taking up a good amount of time. I also enjoy going up north, playing hockey, and pretty much anything else I can do outdoors. ▲

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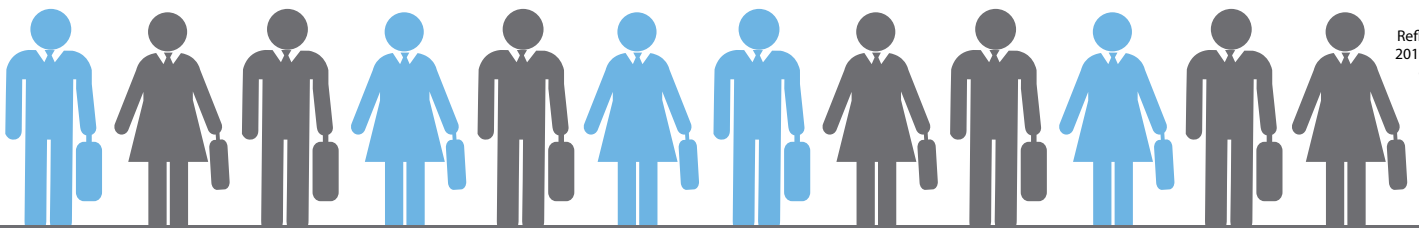

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Lillehaug's Lasting Legal Legacy

Departed from the state Supreme Court after seven years, Justice David Lillehaug has made a deep and long-lasting mark on Minnesota law

By Marshall H. Tanick

Justice David Lillehaug's appointment to the Minnesota Supreme Court by Gov. Mark Dayton in June 2013 set the capstone to a distinguished legal career. Born in Waverly, Iowa, Lillehaug grew up in Sioux Falls, South Dakota, and later graduated from that city's Augustana University (where his father was a distinguished music professor and band leader) and Harvard Law School. His achievements included working as a top aide to former Vice President Walter Mondale in his unsuccessful campaign for the presidency in 1984, serving about four years as a U.S. Attorney for the District of Minnesota under President Bill Clinton, and a solid 15 years in private practice, highlighted by his representation of political figures in contested election recounts—most famously Al Franken in his squeaking recount victory in the 2008 U.S. Senate election, and later Gov. Dayton in his arduous gubernatorial recount win two years later.

Although a staunch DFLer before his elevation to the bench, Justice Lillehaug carved out a reputation there for nonpartisan judicial craftsmanship, authoring a number of major decisions that involved a wide variety of issues, along with a smattering of concurrences and some notable dissents. His opinions are characterized by clarity, fidelity to the language of statutes and other provisions, deference to legislative and administrative agencies, and aversion to hyper-technicality. He has also used his position on the bench as a bully pulpit, taking a leadership role in confronting stress and burnout in the legal profession.

In recognition of his lifelong contributions to the legal community and support for legal scholarship and the profession, this spring the student-run Law Review at Mitchell Hamline Law School established a Justice David Lillehaug Service Award for significant lifetime achievements.

Stepping down from the bench at the end of July, following his Parkinson's Disease diagnosis about a year ago, the Edina resident, who turned 66 in May, plans to continue being active in civic, community, legal, and possibly political activities, along with spending more time with his family—wife Winifred Smith and daughter Kara, an attorney herself.

His departure this summer provides an opportune occasion to review some of his eclectic body of work on that tribunal, although space limitations prevent doing complete justice to the scope of his contributions.

Criminal cases

As a former prosecutor, Justice Lillehaug is well-versed in criminal law, a trait he displayed in his decisions for the Court.

Some unusual issues arose in one of the criminal cases decided by Justice Lillehaug. In ***State v. Curtis***,[1] where the defendant was convicted of first-degree murder in Ramsey County District Court, the defendant appealed on two grounds: 1) a juror who realized during the trial that she knew a witness should have been removed for bias; and 2) the trial court improperly excluded evidence under the *Spreigl* doctrine of an alternative perpetrator who allegedly participated in an unsolved shooting shortly before this murder occurred.

Writing for a unanimous court, Justice Lillehaug rejected both claims. While the trial court "could have done more extensive questioning" of the juror and made specific findings, the absence in the record of any actual bias warranted upholding the trial court's discretion not to remove the juror. Excluding the alternative perpetrator evidence despite the *Spreigl* doctrine, which permits evidence of prior crimes, was not erroneous because the defendant "did not show by clear and convincing evidence that the [alternative perpetrator] participated in that shooting," which preceded the incident in question by about a month. Since it was not "'highly probable' or even more likely than not" that the claimed alternative perpetrator was involved in the prior shooting, the trial court did not abuse its discretion in barring that evidence.

One of his final criminal case rulings occurred in another odd case, involving the seizure under a search warrant of the files of an attorney who represented a pair of clients in an investigation for controlled substances. In that case, ***In re K.M. v. Burnsville Police Department***,[2] he upheld a ruling of the Dakota County District Court regarding the seizure of the evidence on grounds that it was being held in "good faith" as evidence by the police. While searching an attorney's office raises "many concerns," it was not necessary to announce guidelines for such occasions because the expedited process in the lower court, coupled with the limited factual record, does not provide an "appropriate occasion" to do so.

The Court, therefore, limited its decision to the propriety of the seizure under Minn. Stat. §626.04, which authorizes police to seek an *ex parte* hearing in coordinating an ongoing investigation. The decision was without prejudice to issues that may arise "in the pending criminal case," or, for that matter, with respect to potential civil claims.

Another search warrant issue arose in a non-criminal context in ***City of Golden Valley v. Wiebesick***,[3] which involved a question under the search and seizure provision of Article 1, §2 of the Minnesota Constitution, regarding whether administrative search warrants for a city to inspect a rental unit for housing code violations must be supported by "individualized suspicion" of a code violation or can be done on a more generic basis. Writing for the majority, Justice Lillehaug deemed the issuance of the warrant and its ensuing search proper because the municipality's housing code contained reasonable standards in establishing the minimum standards for issuance of a search warrant to detect housing code violations. He rejected the proposition that a warrant could not be issued unless there was "individualized suspicion" regarding the facility to be searched—which, he wrote, would make it more difficult to get such a warrant for "routine" inspections and, therefore, endanger the public's health and safety. Because the U.S. Supreme Court has interpreted the search provision of the 4th Amendment to allow for such searches, Justice Lillehaug felt that there was no "principled basis to depart from [that] legal framework" and construe the state constitution differently "to protect the privacy, health and safety" of citizens of the state.

Chief Justice Lorie Gildea and Justice David Stras saw it differently, viewing the search as violating "both the warrant and the reasonable requirement of the state constitution."

Civil cases

Justice Lillehaug also authored a number of significant decisions in civil cases. One of the best-known was his ruling this spring upholding the Department of Natural Resources' (DNR) renaming of Lake Calhoun, the largest body of water in Minneapolis, to its original Native American appellation of Bde Maka Ska, in ***Save Lake Calhoun v. Strommen***.[4] Writing for the five-member majority, he rejected the claim that a nearly century-old law, Minn. Stat. §83A.05 subd. 1, bars renaming after more than 40 years. That measure only applies to counties, not the state, due to a 1937 amendment giving the DNR "the power to name and rename (bodies of water), places, and geographic figures regardless of the age of their names."

The issue stemmed from requests by Native American and community activists to replace the designation because its namesake, John C. Calhoun, was a virulent racist and a slaveholder in the 19th century. The case attracted international attention in conjunction with other similar renaming controversies around the U.S. The majority decision rejected a challenge by a group of more than 300 nearby homeowners. Justice Lillehaug dismissed concerns by a pair of dissenters—Chief Justice Gildea and Justice G. Barry Anderson, the two Republican appointees on the tribunal—that the decision would open a floodgate of proposed lake name changes by noting any such issue could be curbed by legislative action restricting "excessive name-changing."

One of his most notable opinions in its effects on the practice of law was his decision for a unanimous court in ***Walsh v. U.S. Bank, N.A.***,[5] which addressed the proper pleading standard for civil cases in Minnesota. The case involved a default on a mortgage issued for residential property in Minneapolis, which precipitated a non-judicial foreclosure by the bank holding the mortgage. The mortgagor had brought an action against the bank seeking to vacate the foreclosure sale, which the Hennepin County District Court dismissed on grounds that its lack of specificity warranted dismissal for failure to state a claim under Rule 12.02(e) of the Minnesota Rules of Civil Procedure.

Rejecting the "plausibility" standard of the U.S. Supreme Court as articulated in a pair of cases known as *Twombley* and *Iqbal*, Justice Lillehaug wrote that the "standard announced" in those two cases does not apply to civil proceedings in Minnesota state court because, under the "plain language" of Rule 8 of the Minnesota Rules of Civil Procedure, "Minnesota is a notice-pleading state," which reflects a "preference for non-technical, broad brushed pleadings." On the merits, the complaint satisfied the "traditional interpretation" of the prior case law and warranted overturning the dismissal.

Justice Lillehaug also wrote the majority decisions for the Court in a pair of significant public sector employment law cases resolving issues of first impression.

In ***Ford v. Minneapolis Public Schools***,[6] he held that the Minnesota whistleblower statute, Minn. Stat. §181.932, is subject to a six-year statute of limitations. He reasoned that the limitations period under Minn. Stat. §541.05, subd. 1(2) for causes of action for a liability created by statute is applicable, rather than the two-year limitation period under §541.07 (1) for personal injury torts. The basis of his ruling was that because the whistleblower cause of action was not recognized in common law, it was a creature of statute. He dispensed with considering the merits of policy arguments for a lesser limitations period, which, he noted, is for the Legislature to consider, "not the judiciary."

In ***Firefighters Local 4725 v. City of Brainerd***,[7] he held that the abrogation by the City of Brainerd of a collective bargaining agreement with the city's firefighters union in the early stages of a three-year contract constituted an unfair labor practice under the Public Employment Labor Relations Act (PELRA), Minn. Stat. §179A.13 (2). Affirming the decision of the Minnesota Court of Appeals, which overturned a ruling of the Crow Wing County District Court, he stated that a "plain reading" of the statute does not turn on whether the city acted to "intentionally interfere" with the rights of its labor union, and he declined to read a "motive element" into the statute because the Legislature did not include one. The decision drew a dissent from Chief Justice Gildea, joined by Justice Anderson, who would have required that an unfair labor practice "be motivated by anti-union animus," which the dissenters deemed lacking in the record.

Good faith complaints by tenants concerning a landlord's failure to comply with state or local laws or the terms of the lease constitute defenses to an eviction action, according to Justice Lillehaug's ruling in ***Central Housing Associates v. Olson***.[8] The Hennepin County District Court had ruled in favor of the tenants, barring their eviction because the landlord retaliated following their "good faith" complaints about defects in the housing, but the appellate court had reversed. Writing for the majority, Justice Lillehaug held that Minn. Stat. §504B.441, which establishes a statutory retaliation defense, is "ambiguous," but a retaliation defense exists under common law. Its applicability under common law sustained the jury's verdict of improper eviction.

Chief Justice Gildea, joined again by Justice Anderson, dissented, declining to recognize a common law retaliation defense because the Legislature had not chosen to create one by statute.

As one who knows his way around the political arena, Justice Lillehaug authored the majority decision for the court this April in ***Cilek v. Office of the Secretary of State***,[9] holding that the Secretary of State may withhold various data about voters from the public. The decision reversed a ruling of the Minnesota Court of Appeals, which had affirmed a decision of Ramsey County Judge Jennifer Frisch (who, coincidentally, had been named to the appellate tribunal by Gov. Walz earlier the same week).

The case involved requests for access by a conservative interest group to a bevy of information about the status of some 5.4 million persons in the statewide data base, as well as reasons for challenges to their registration, and information about voters not currently registered.

Writing for the five-member majority, Justice Lillehaug held that the data was protected from access under the "plain language" of the state election law, Minn. Stat. §201.091, whose specific provisions on voter privacy trump the general position of access under the General Data Practices Act, Minn. Stat. §§13.01, 13.607. He concluded that under those statutory provisions, access is only available to data contained in "public information lists" and that other data is not accessible unless furnished at the discretion of the Secretary of State, who had restricted the broad-based requests in this case.

But the decision had a potential partisan hue, as the four other Democratic appointees to the Court, all placed there by ex-Gov. Dayton, joined in the majority decision over the dissenting opinion of two Republican appointees, Chief Justice Gildea and Justice Anderson, who would have affirmed the lower court decisions under the "central tenet" of accessibility in the Data Practices Act.

Commitment & consequences

Like his colleagues, Justice Lillehaug occasionally differed from the reasoning of the other jurists in concurrent opinions or argued for a different outcome in dissent.

One instance came in ***Binkley v. Allina Health System***,[10] a medical malpractice action brought by a mother for her son's death, after he was refused admittance to an inpatient mental health treatment facility. The Court, in a decision by Justice Anderson, held that the hospital was entitled to immunity for its decision not to admit the son to the facility, under the Minnesota Commitment and Treatment Act, Minn. Stat. §253B.23 subd. 4. While agreeing grudgingly with the decision, Justice Lillehaug noted that the statutory terminology granting immunity from any "civil or criminal liability *under this chapter,* (emphasis supplied)" does not contain an "express abrogation" of common law claims regarding medical malpractice. Since that issue had not been argued by either party, and the opinion of the Court does not foreclose such an argument, he joined the majority,

with the understanding that this "issue awaits another case."

The recurring issue of advising criminal defendants of the potential immigration consequences of a criminal conviction, including deportation, attracted a concurrence from Justice Lillehaug in ***Sanchez v. State***.[11] The Court, in a decision by Justice Stras, affirmed a decision by the court of appeals, which had upheld a Rice County District Court ruling that denied a post-conviction effort to withdraw a guilty plea to a third-degree criminal conduct sexual charge due to alleged failure of counsel to advise the defendant of the immigration consequences.

The majority held that the general warning given to the immigrant of possible immigration consequences did not amount to ineffective assistance of counsel—a decision in which Justice Lillehaug concurred, "but on a different ground." The defendant's guilty plea to the third-degree offense made it "clear as a bell" that he would be deported, a process that started the very same day that he was sentenced. This invoked an "obligation" on the part of counsel to advise him of the consequence. However, the trial court's finding that the defendant had been advised by counsel that he "would be deported" as a result of his plea was not clearly erroneous and, therefore, satisfied upholding the denial of the post-conviction petition.

Dissenting decisions

Justice Lillehaug fell a vote short of convincing the Court to allow expungement of a second-degree burglary conviction in ***State v. S.A.M.***[12] The applicant's conviction was for a felony but deemed to be a misdemeanor because the imposition of the sentence was stayed and the applicant was released from probation. The Olmsted County District Court nonetheless denied a request for expungement, and the appellate court affirmed, as did the Supreme Court in a decision written by Justice Anderson, holding that the circumstances did not make the applicant eligible for expungement under the applicable statute, Minn. Stat. §609.13 (1), §609A.02 (3)(a)(3). The majority reasoned that the underlying burglary offense was "not one of the felonies" listed in the statute that allows for expungement and the treatment of his conviction as a misdemeanor does not yield a different result.

But Justice Lillehaug, joined by Justices Chutich and McKeig, viewed the matter differently. He would have interpreted the statute to allow for expungement and for redacting the conviction, noting that "[b]y shutting the door to expungement for people like S.A.M. in these circumstances, the court reduces opportunities for rehabilitated offenders to become productive members of society." This was, he felt, a "harsh result" that ought to be clarified by the Legislature in order to "reopen this door."

He also dissented in ***Pfeil v. St. Matthew's Evangelical Lutheran Church***,[13] a libel action arising from the ouster of a couple from church in Worthington that led the Court to invoke the "ecclesiastical abstention" doctrine, which bars inquiry into religious doctrines. The tenet invoked by Justice Anderson's majority opinion warranted upholding dismissal of the lawsuit by the Nobles County District Court, which had been affirmed by the appellate court.

But Justice Lillehaug, joined by Chief Justice Gildea, disagreed, bemoaning that the majority's decision "creates what is, essentially, an absolute privilege to defame" in church disciplinary proceedings, regardless of "how false and malicious" the statements are, and "no matter how much the victim is damaged." He and the chief justice would have allowed some of the defamation claims to proceed, based upon "neutral principles of law" that do not lead to "excessive entanglement" with religious precepts.

Conclusion

These decisions are but a few of those authored by Justice Lillehaug in his seven years on the Court. They do, however, reflect the variety of cases he encountered and the vibrancy of his work. ▲

Notes

[1] 905 N.W.2d 609 (Minn. 2018).
[2] 940 N.W.2d 164 (Minn. 2020).
[3] 899 N.W.2d 152 (Minn. 2017).
[4] 2020 WL 2465541 (Minn. 5/13/2020).
[5] 851 N.W.2d 598 (Minn. 2014).
[6] 874 N.W.2d 231 (Minn. 2016).
[7] 934 N.W.2d 101 (Minn. 2019).
[8] 929 N.W.2d 398 (Minn. 2019).
[9] 941 N.W.2d 411 (Minn. 2020).
[10] 877 N.W.2d 547 (Minn. 2016).
[11] 890 N.W.2d 716 (Minn. 2017).
[12] 891 N.W.2d 602 (Minn. 2017).
[13] 877 N.W.2d (2016).

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A MISSTEP ON §549.191

Why recent federal courts in Minnesota are wrong in refusing to apply Minn. Stat. §549.191 to punitive-damages claims in federal court

By Jeffrey P. Justman, Tom Pryor and Joshua N. Turner

In 1986, the Minnesota Legislature passed an important tort reform law that limited abusive pleading practices like frivolous demands for punitive damages. The statute that accomplishes this goal, Minn. Stat. §549.191, prohibits pleading punitive damages in an initial complaint, and requires a motion for leave to add them later, upon a heightened showing. For over 30 years, federal courts in Minnesota applied the requirements of this statute to cases brought in federal court—just as Minnesota state courts (obviously) applied the statute to punitive-damages requests made in state court.

Remarkably, however, this well-settled rule has come into question in recent years. Beginning in 2017, some judges have held that §549.191 does *not* apply in federal court and thus that a party seeking punitive damages in federal court need not satisfy the additional requirements the Minnesota Legislature commanded must be applied in state court. The basis for this about-face? A fractured, 4:1:4 Supreme Court decision in a case called *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*[1] But *Shady Grove* did not even purport to change how to decide whether state laws should apply in federal court under what is known as the *Erie* doctrine.

Now there is a growing class of Minnesota cases holding that §549.191 does not apply in federal court; within the last few months, other judges have joined this chorus, such that one court described the "large majority" of Minnesota federal judges as refusing to apply §549.191 in federal court.[2] These courts are wrong. Nothing in *Shady Grove* changed the *Erie* analysis, which federal courts in Minnesota have faithfully applied for decades. This article explains why federal courts should buck the recent trend and go back to faithfully applying the decades of precedent holding that §549.191 should be applied in federal court. If federal courts in Minnesota continue to read *Shady Grove* otherwise, the 8th Circuit should take the opportunity to correct them.

The legal case for applying §549.191

For over 30 years, section 549.191 has applied in federal courts in Minnesota under the *Erie* doctrine.

Since 1986, a party seeking punitive damages in Minnesota cannot do so in its initial pleading.[3] Instead, only later may that party move to amend the pleading to claim punitive damages, and when she does, she must make out a *prima facie* case for punitive damages.[4] Passed as part of a major tort reform law, §549.191 creates common-sense gatekeeping rules that help prevent frivolous and abusive pleading practices.

Since §549.191 was enacted, those faced with punitive damages in Minnesota *state* courts have universally received the protection §549.191 affords. And for nearly 30 years, those faced with punitive damages in Minnesota *federal* courts enjoyed the same protections. The reason is simple, and hearkens back to a near-century-old line of cases known as the *Erie* doctrine.

As most lawyers learn in law school, the *Erie* doctrine grew out of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and holds that "federal courts sitting in diversity apply state substantive law and federal procedural law."[5] Of course, "classif[ying] a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor," and the application of the *Erie* doctrine has thus presented difficulties for the Supreme Court and lower federal courts.[6] But the fundamental purposes of the doctrine have remained constant: discouraging "forum-shopping" and ensuring equitable "administration of the laws."[7] Thus for example, the *Erie* doctrine frowns upon interpretations of state laws that would create incentives for different results between federal and state courts within the same state.

Erie's framework requires courts to apply a two-part test. First, courts examine whether a given state law (like §549.191) directly conflicts with any federal law or rule.[8] If the state and federal laws may be reconciled, federal courts should apply them both. If they are incompatible, however, the court will apply the federal law or rule so long as it does "not abridge, enlarge or modify any substantive right" created by state law.[9]

For nearly three decades, federal district courts in Minnesota have applied *Erie*'s two-part test to hold that §549.191 applies to punitive-damages claims in federal court, just like it does to the same claims in state court.[10] One of the first and most persuasive district court decisions came from Minnesota's longest-tenured federal judge, Edward Devitt. In *Kuehn v. Shelcore, Inc.*, Judge Devitt determined that there was no "direct conflict" between section 549.191 and any Federal Rule of Civil Procedure, because all potentially conflicting rules could "peacefully co-exist" with section 549.191, just as the substantially identical Minnesota Rules of Civil Procedure do with section 549.191.[11] Further, not applying section 549.191 in federal court would encourage forum-shopping. Judge Devitt persuasively applied the *Erie* doctrine to conclude that the "accident of diversity of citizenship" would not permit a plaintiff to achieve a result in federal court that would otherwise be unavailable to it in Minnesota state court.[12]

The 8th Circuit, while not directly analyzing §549.191 under *Erie*, has implicitly approved the analysis from *Kuehn* and the decisions that followed it. In both *Gamma-10 Plastics v. American President Lines, Ltd.*[13] and *Bunker v. Meshbesher*,[14] the 8th Circuit concluded that §549.191 applied in federal court and affirmed lower court

decisions that denied leave to amend to add punitive damages claims because the movants in those cases did not satisfy §549.191.[15] *Bunker*, for example, held that the "clear and convincing" standard of proof under §549.191's sister statute, §549.20, is "implicitly incorporated into the requirement that the movant present a *prima facie* case of willful indifference" set forth in §549.191.[16] *Gamma-10* analyzed the "policy considerations" in §549.191—to "prevent frivolous punitive damage claims by allowing a court to determine first if punitive damages are appropriate"—and held that federal courts "may not allow an amendment [to add punitive damages] where the motion and supporting affidavits do not reasonably allow a conclusion that clear and convincing evidence will establish the defendant acted with willful indifference."[17] Neither *Bunker* nor *Gamma-10* expressly cited the "*Erie* doctrine," but their analysis implicitly applied it.

What *Bunker* and *Gamma-10* did implicitly, other federal courts applying analogous statutes from other states have done expressly. That is, §549.191 has analogs in other states, and most federal courts addressing these analog statutes also apply them in federal court under *Erie*. For example, federal courts in Colorado, Florida, Idaho, and North Dakota have held that statutes materially similar to §549.191 are substantive under *Erie*, and therefore apply in federal court.[18] Only a minority of federal courts have gone the other way.[19] To date, there are no published federal appellate decisions from these states that are on point.[20]

Only recently have a handful of federal decisions in Minnesota refused to apply §549.191 in state court, and they have done so based on an incorrect reading of *Shady Grove*.

Despite the weight of authority supporting the application of §549.191 in federal court, recent Minnesota district court cases have held that *Erie* precludes the application of §549.191 to punitive-damages requests in federal court.[21] According to these cases, §549.191 conflicts with the requirement in Federal Rule of Civil Procedure 15(a) that motions for leave to amend should be "liberally" granted "when justice so requires."[22] These cases have justified their departure from the district's historical approach to §549.191 by casting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*[23] as a recent "change" in *Erie* jurisprudence. They are incorrect.

As mentioned, *Shady Grove* is a fractured, 4:1:4 decision; it dealt with whether a New York law that altogether prohibited class actions seeking statutory penalties could be applied in federal court. Justice Scalia, writing for four justices, applied the "familiar" two-step framework from the Court's *Erie* decisions, asking whether the "federal and state rules can be reconciled" and if they cannot, "whether the Federal Rule runs afoul of §2072(b)[, the Rules Enabling Act]."[24] Justice Scalia's plurality concluded that Rule 23 and the New York law could not be reconciled because Rule 23 created a "categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," while the New York law on the other hand categorically prohibited a class action if the plaintiff sought a certain type of remedy, even if all of Rule 23's criteria were otherwise satisfied.[25]

Notably, none of *Shady Grove's* three opinions purported to be a sea change in how courts apply the *Erie* doctrine.

The other two opinions in *Shady Grove*—Justice Stevens's concurrence and Justice Ginsburg's dissent—employed the same framework as Justice Scalia's opinion but more strongly emphasized a federal court's responsibility to be sensitive to important state interests and regulatory policies.[26] Justice Stevens agreed that New York's class action statute directly conflicted with Rule 23, whereas Justice Ginsburg would have limited Rule 23 to governing procedural aspects of class litigation while leaving room for New York's statute to control the size of a class-action monetary award.[27] Notably, none of *Shady Grove*'s three opinions purported to be a sea change in how courts apply the *Erie* doctrine. Instead, they simply disagreed about how the familiar, two-part test should resolve the interplay between Rule 23 and the New York law.

Shady Grove was not viewed as a landmark decision in federal practice or procedure at the time. Not surprisingly, therefore, Minnesota decisions immediately following it continued to apply section 549.191 in federal court.[28]

But that all changed in 2017, when some judges began to hold that *Shady Grove* changed the landscape and required that §549.191 *not* apply in federal court under *Erie*. Magistrate Judge Noel, for example, seized upon language in *Shady Grove* and explained that §549.191 and Federal Rule 15 "both address the same subject matter," i.e. amending a complaint.[29] Citing language from both Justice Scalia's and Justice Stevens's opinions, Magistrate Judge Noel concluded that Rule 15 "answers the question in dispute,"[30] and is "sufficiently broad to control the issue before the court."[31] And he concluded that Rule 15 and §549.191 "conflict because the Minnesota procedural rule would not allow for the amendment absent affidavits establishing *prima facie* evidence of deliberate disregard for the rights and safety of others, where the federal rule has no such procedural requirement."[32] Other courts have followed Magistrate Judge Noel's analysis, relying on similar language from *Shady Grove*.[33] Still others, however, have hewed to the decades-old understanding that §549.191 and Rule 15 can peacefully coexist.[34] These conflicting decisions have led to "uncertainty in the law governing the pleading of punitive damages in federal cases in this District."[35]

The Minnesota district courts that have characterized *Shady Grove* as modifying the *Erie* doctrine, and that refuse to apply §549.191 in federal court—including the "large majority" of recent decisions[36]—are wrong.

Federal courts refusing to apply §549.191 after *Shady Grove* are wrong.

The opinions refusing to apply §549.191 to punitive-damages requests in federal court are wrong, for five reasons.

First, they incorrectly assume that *Shady Grove* changed the two-part *Erie* test for determining when a state law may be applied as "substantive" in federal court. All three opinions in *Shady Grove*, by their own terms, applied the Supreme Court's long-established *Erie* analysis, not a new test or standard.[37] There has therefore been no change in law that would justify a departure from longstanding precedent in the District of Minnesota.

Second, these courts incorrectly apply *Erie*'s "direct conflict" test that Judge Devitt first applied 30 years ago, and that each opinion embraced in *Shady Grove*. Judge Devitt was right then, and is right today: nothing in Federal Rule of Civil Procedure 8 or 15 directly conflicts with §549.191.

As to Rule 8, which simply requires a pleading to contain "a short and plain statement of the claim" and "a demand for the relief sought," section 549.191 allows the pleading of punitive damages but prescribes the manner and timing

of pleading them. Nothing in Rule 8 requires the *initial* pleading to state a claim for punitive damages if punitive damages will be sought. Moreover, §549.191 is not unique among state laws imposing burdens on pleading certain claims. Minnesota Statute §544.42, for example, requires "an affidavit of expert review" before a professional malpractice claim can be pleaded, and both the 8th Circuit and Minnesota district courts apply §544.42's requirement in federal court.[38] The result under Rule 8 should be no different for punitive-damages claims.

As to Rule 15, which states that amendment shall be allowed when "justice so requires," §549.191 allows amendment of pleadings to add punitive damages when certain requirements are satisfied; it can peacefully coexist with Rule 15. It takes no leap of imagination to conclude that the Minnesota Legislature found that justice would require amendment only when the requirements of §549.191 are satisfied. Federal Rule 15 governs the amendment of pleadings generally; it does not answer the much narrower and more specific question of *what* a plaintiff must do to satisfy a motion for leave to amend. Courts should not be too eager to find a direct conflict between state laws and federal rules where none exists, especially in matters involving "important state interests and regulatory policies."[39] Federal Rule 15(a)(2) and section 549.191 can peacefully coexist.

Third, as these courts interpret *Shady Grove*, it would silently overrule many other of the Supreme Court's *Erie* decisions, without so much as a word acknowledging that sea change. The decisions holding that §549.191 cannot apply in federal court reach that conclusion by using the "does it answer the same question" test from Justice Scalia's opinion in *Shady Grove*. They reason that because §549.191 purportedly "answers the same question" as Rule 15, it cannot apply in federal court. But almost *every* rule would answer a question implicated by a related state statute or law, including *some that the Supreme Court has long concluded do not conflict with related state rules*. Courts must not give such a literal reading to Justice Scalia's test, lest it implicitly overrule some of the Supreme Court's most longstanding *Erie* cases.

As but one example, consider the Supreme Court's opinion in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555 (1949), a preeminent *Erie* opinion authored by Justice Jackson that is still good law. *Cohen* considered whether a New Jersey statute that imposed heightened pleading requirements for shareholder derivative cases could be applied in federal court. Even though then Rule 23 (now Rule 23.1) "deal[t] with plaintiff's right to maintain such an action in federal court"—and thus under a literal reading of Justice Scalia's test, would have "answered the question in dispute"—the Supreme Court held there was no "conflict with the statute in question" such that both Rule 23 and the statute "all may be observed by a federal court." 337 U.S. at 556. If the recent Minnesota decisions were correct in how broadly to interpret Justice Scalia's "does the rule answer the question in dispute" test, then *Shady Grove*'s plurality opinion would have implicitly overruled *Cohen* and years of other longstanding precedent, without a word. *Shady Grove* should not be interpreted in that way.[40]

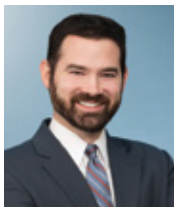
Fourth, these courts ignore the disparate results created by finding a "direct conflict" between §549.191 and Federal Rules 8 and 15, when there is no conflict between §549.191 and the *identical language* of the Minnesota Rules of Civil Procedure. Like its federal counterpart, Minnesota Rule 8.01 *also* requires a

pleading to contain "a short and plain statement of the claim" and "a demand for the relief sought." Minnesota Rule of Civil Procedure 15.01 *also* requires the court to permit amendments "when justice so requires." Minnesota courts have never struggled to enforce these liberal pleading and amendment standards and §549.191's requirements. Neither should federal courts.

Finally, these courts ignore the obvious implications of refusing to apply section 549.191 in federal court: forum-shopping and inequitable administration of the laws. Many years ago, Judge Devitt recognized that applying §549.191 advances the twin aims of the *Erie* doctrine: discouragement of forum-shopping and avoidance of inequitable administration of the laws.[41] Holding plaintiffs to the same requirements in both federal and state court means that there is no tactical advantage to choosing one forum over the other where punitive damages are concerned. Plaintiffs will be unable to game the system by filing frivolous claims for punitive relief in federal court, knowing that they cannot evade Minnesota's common-sense limitations on such practices. Applying section 549.191 in federal court also means that plaintiffs will be unable to obtain a different result in federal court than they otherwise would be able to reach in state court. *Erie* has long sought to eliminate the possibility of "[un]equal administration of justice in coordinate state and federal courts sitting side by side."[42] The only way of achieving that result is to continue the longstanding practice of applying §549.191 in federal court. By contrast, if the "large majority" of recent Minnesota decisions continues not to apply §549.191 in federal court, we can only expect savvy plaintiffs to file frivolous punitive-damages claims in federal court, hoping those claims will exert undue pressure on defendants to settle.

Conclusion

Shady Grove did not reflect a sea change in the *Erie* doctrine, but recent federal courts refusing to apply §549.191 in federal court have incorrectly concluded otherwise. Federal district courts in Minnesota should continue to follow the long-established precedent rather than the new outliers.[43] To the extent that federal courts in Minnesota continue the recent trend of not applying §549.191 in federal court, the 8th Circuit should take up an appropriate case and correct them. ▲



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Notes

[1] 559 U.S. 393 (2010).

[2] *E.g.*, *The Orange Rabbit, Inc. v. Franchoice, Inc.*, 2020 WL 2191947, at 3 (D. Minn. 5/6/2020) (citing cases).

[3] *See* Minn. Stat. §549.191.

[4] *Id.*

[5] *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 416 (1996).

[6] *Id.*

[7] *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

[8] *See Burlington N. R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987) (explaining that the court must first "determine whether, when fairly construed, the scope of a Federal Rule… is sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court, thereby leaving no room for the operation of that law" (internal quotation marks and citation omitted)).

[9] 28 U.S.C. §2072(b); *see also Hanna*, 380 U.S. at 463–65.

[10] A representative sample of such cases includes: *Bhatia v. 3M Co.*, 323 F. Supp. 3d 1082, 1103 (D. Minn. 2018) (Frank, J.); *Target Corp. v. LCH Pavement Consultants*, 960 F. Supp. 2d 999, 1010 (D. Minn. 2013) (Keyes, J.), aff'd, 2013 WL 12320416 (D. Minn. 10/30/2013); *Freeland v. Fin. Recovery Servs., Inc.*, 790 F. Supp. 2d 991, 994 (D. Minn. 2011) (Leung, J.); *Healey v. I-Flow, LLC*, 853 F. Supp. 2d 868, 87273 (D. Minn. 2012) (applying §549.191 in federal court prevents a plaintiff from "brandishing" a claim for punitive damages "as a tool for promoting an advantageous settlement"); *Berczyk v. Emerson Tool Co.*, 291 F. Supp. 2d 1004, 1008 (D. Minn. 2003); *Hern v. Bankers Life Cas. Co.*, 133 F. Supp. 2d 1130, 1134-35 (D. Minn. 2001); *Olson v. Snap Prods., Inc.*, 29 F. Supp. 2d 1027, 1034 (D. Minn. 1998); *Ulrich v. City of Crosby*, 848 F. Supp. 861, 866 & n.5 (D. Minn. 1994) (applying §549.191 addresses the "need under the precepts of Federalism, to prevent forum shopping"); *Sec. Sav. Bank v. Green Tree Acceptance, Inc.*, 739 F. Supp. 1342 (D. Minn. 1990); *Zeeland Indus., Inc. v. de Zeeuw*, 706 F. Supp. 702, 705 (D. Minn. 1989) (MacLaughlin, J.) ("the failure of courts to apply Minn. Stat. §549.191 in federal diversity actions has the potential to significantly influence choice of forum," and thus applying it in federal court).

[11] *Kuehn v. Shelcore, Inc.*, 686 F. Supp. 233, 234 (D. Minn. 1988).

[12] *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *see also Kuehn*, 686 F. Supp. at 234 (holding that the substantial variation in tactical choices "must be eliminated by applying Section 549.191 in this federal diversity action").

[13] 32 F.3d 1244, 1254-55 (8th Cir. 1994).

[14] 147 F.3d 691, 696 (8th Cir. 1998).

[15] A third 8th Circuit decision agreed in dicta that section 549.191 applies in federal court. *See Popp Telecom, Inc. v. Am. Sharecom Inc.*, 361 F.3d 482, 491 n.10 (8th Cir. 2004).

[16] 147 F.3d at 696 (citing *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 154 (Minn. App. 1990)).

[17] 32 F.3d at 1255 (citation omitted).

[18] *See, e.g.*, *Jones v. Krautheim*, 208 F. Supp. 2d 1173, 1174-80 (D. Colo. 2002) (surveying cases and concluding that Colorado Statute §13–64–302.5(3) should be applied in federal court); *Wilson v. Edenfield*, 968 F. Supp. 681, 683-84 (M.D. Fla. 1997) (Florida Statute § 768.72 is "substantive and can therefore be applied to federal court in federal actions"); *Windsor v. Guarantee Trust Life Ins. Co.*, 684 F. Supp. 630, 633 (D. Idaho 1988) (Idaho statute §6-1604(2) "is substantive in nature and therefore controlling in federal court in a diversity case"); *Ruiz v. Quiktrip Corp.*, 826 F. Supp. 1284, 1285 n.1 (D. Kan. 1993) (Kansas Statute § 60-3702 "is substantive in nature and thus governs in diversity cases in Kansas"); *McHugh v. Jacobs*, 450 F. Supp. 2d 1019, 1021 (D.N.D. 2006) (N.D. Cent. Code §32–03.2–11(1) "provides a substantive right and, therefore, applies to this federal court action").

[19] *See, e.g.*, *Metcalf v. Beverly Health and Rehab. Servs.*, 32 F. Supp. 2d 1307, 1307-08 & n.1 (N.D. Fla. 1999) (not applying Florida Statute §768.72); *Belkow v. Celotex Corp.*, 722 F. Supp. 1547, 1551 (N.D. Ill. 1989) (interpreting Ill. Rev. Stat. ch. 110, §2–604.1 as procedural and not applying it); *Pruett v. Erickson Air-Crane Co.*, 183 F.R.D. 248, 250-252 (D. Or. 1998) (reading the Federal Rules of Civil Procedure as "sufficiently broad" enough "to cause a direct collision with" Or. Rev. Stat. §18.535 and thus not applying it).

[20] There are at least two federal appellate courts outside the 8th Circuit to have addressed this issue in unpublished or otherwise vacated opinions. In *Cohen v. Office Depot, Inc.*, 184 F.3d 1292 (11th Cir. 1999), *vacated in part on other grounds*, 204 F.3d 1069 (11th Cir. 2000), the 11th Circuit held that Florida Statute §768.72, which prohibits the pleading of punitive damages in an initial complaint, did not apply in federal courts because it conflicted with Federal Rule of Civil Procedure 8(a)(3). In *Native American Services, Inc. v. Givens*, 213 F.3d 642 (9th Cir. 2000) (unpublished table opinion), however, the 9th Circuit affirmed an order denying leave to amend under Idaho Code §6-1604(2), because it found "no fault" with the determination that a party had failed to comply with §6-1604(2). Judge Devitt noted that this Idaho statute is "virtually identical" to Minn. Stat. §549.191. *Kuehn*, 686 F. Supp. at 235.

[21] *See, e.g.*, *In re Bair Hugger Forced Air Warming Devices Prod. Liab. Litig.*, 2017 WL 5187832, at *4 (D. Minn. 7/27/2017) (hereinafter "*Bair Hugger*"); *Selective Ins. Co. of S.C. v. Sela*, 353 F. Supp. 3d 847, 859 (D. Minn. 2018) (analyzing the analogous requirements for pleading bad-faith denial of insurance benefits under Minn. Stat. §604.18).

[22] *See* Fed. R. Civ. P. 15(a)(2) (noting that the "court should freely give leave [to amend] when justice so requires").

[23] Supra note 1.

[24] 559 U.S. at 398, 410.

[25] *Id.* at 398.

[26] *Id.* at 422 (Stevens, J., concurring); *id.* at 437 (Ginsburg, J., dissenting).

[27] *Id.* at 446.

[28] *Bhatia v. 3M Co.*, 323 F. Supp. 3d 1082, 1103 (D. Minn. 2018) (Frank, J.); *Target Corp. v. LCH Pavement Consultants*, 960 F. Supp. 2d 999, 1010 (D. Minn. 2013) (Keyes, J.), aff'd, 2013 WL 12320416 (D. Minn. 10/30/2013); *Freeland v. Fin. Recovery Servs., Inc.*, 790 F. Supp. 2d 991, 994 (D. Minn. 2011) (Leung, J.); *Healey v. I-Flow, LLC*, 853 F. Supp. 2d 868, 87273 (D. Minn. 2012) (applying §549.191 in federal court prevents a plaintiff from "brandishing" a claim for punitive damages "as a tool for promoting an advantageous settlement");

[29] *In re Bair Hugger Forced Air Warming Devices Prod. Liab. Litig.*, No. MDL152666JNEFLN, 2017 WL 5187832, at *3–4 (D. Minn. 7/27/2017).

[30] *Id.* (quoting *Shady Grove*, 559 U.S. at 393 (Scalia, J.)).

[31] *Id.* (quoting *Shady Grove*, 559 U.S. at 421 (Stevens, J.)).

[32] *Id.* at 4.

[33] *See, e.g.*, *Rogers v. Mentor Corp.*, No. 12-CV-2602 (SRN/SER), 2018 WL 2215519, at *6 (D. Minn. 5/15/2018) (Rau, Mag. J.), *aff'd sub nom. Urbieta v. Mentor Corp.*, No. CV 13-1927 ADM/LIB, 2018 WL 3475484 (D. Minn. 7/19/2018) (Montgomery, J.); *Shank v. Carleton Coll.*, No. 16-CV-1154 (PJS/HB), 2018 WL 4961472, at *4 (D. Minn. 10/15/2018) (Bowbeer, Mag. J.), *aff'd*, 329 F.R.D. 610 (D. Minn. 2019).

[34] Order Dated 3/8/2018, *In-line Packaging, LLC v. Graphic Packaging Int'l, LLC*, No. 15-cv-3183 (ADM/LIB) (D. Minn.) [Doc. No. 534] (Brisbois, Mag. J.)

[35] *Benner v. Saint Paul Public Schools, I.S.D. #625*, 407 F. Supp. 3d 819, 825 (D. Minn. 2019).

[36] Supra note 2.

[37] There is some debate regarding whether Justice Scalia's plurality or Justice Stevens's concurrence controls. Under the *Marks* doctrine, most federal courts have found that Justice Stevens's concurrence controls. *See Davenport v. Charter Commc'ns, LLC*, 35 F. Supp. 3d 1040, 1050 (E.D. Mo. 2014) (collecting cases and quoting *McKinney v. Bayer Corp.*, 744 F. Supp. 2d 733, 747 (N.D. Ohio 2010), for the proposition that "Justice Stevens' opinion is the narrowest and, thus, controlling opinion").

[38] *Sandhu v. Kanzler*, 932 F.3d 1107, 1116 (8th Cir. 2019) ("Glow's failure to comply with Minn. Stat. §544.42. mandates dismissal of this claim."); *Afremov v. Sulloway & Hollis, P.L.L.C.*, 922 F. Supp. 2d 800, 817 (D. Minn. 2013) (Schiltz, J.) ("Afremov's failure to comply with §544.42 means that all of Afremov's claims against Harrington and Lonergan must be dismissed.").

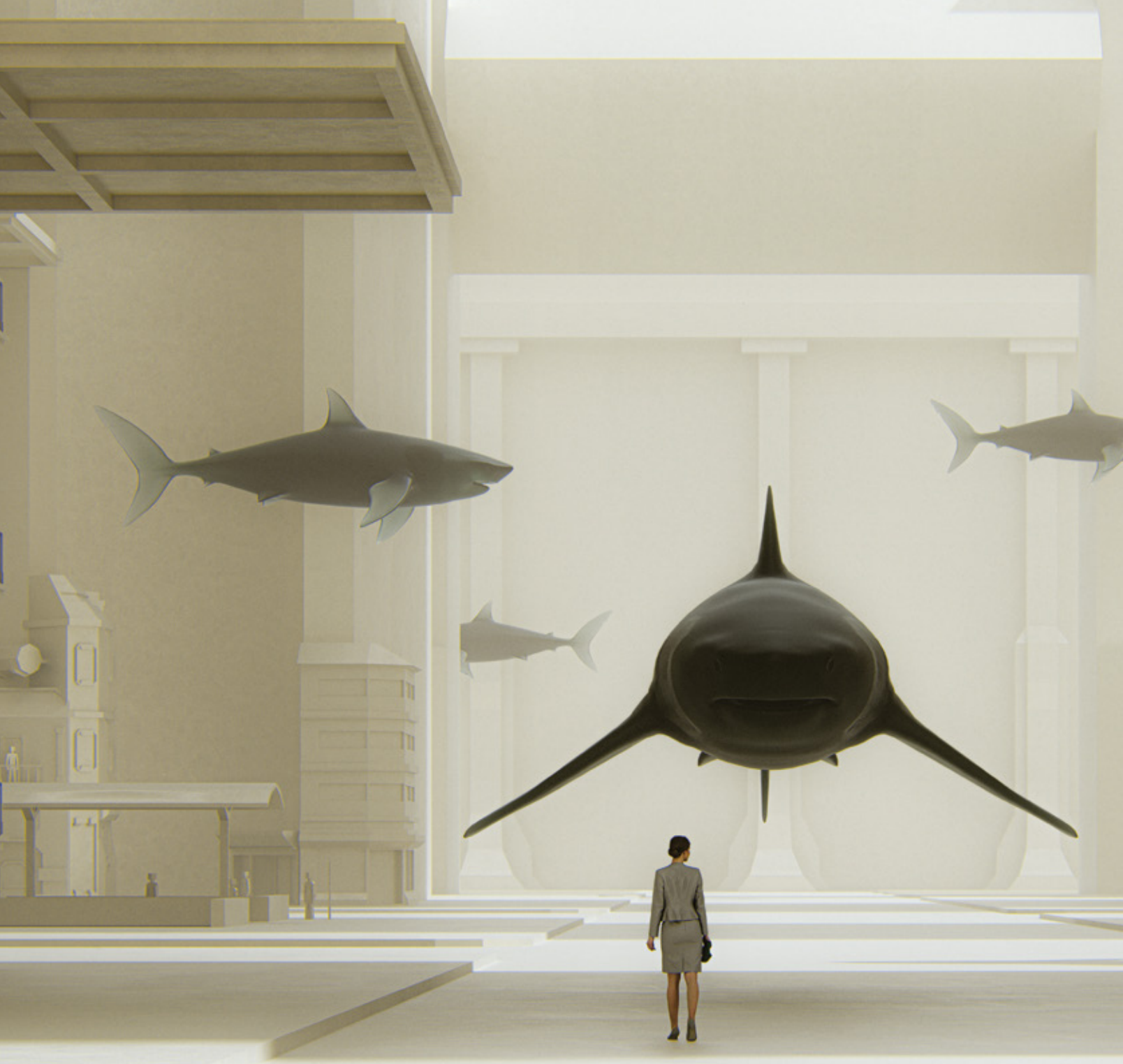
[39] *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 n.7 (1996).

[40] *See Fargo Women's Health Center v. Schafer*, 18 F.3d 526, 539 (8th Cir. 1994) (refusing to interpret one Supreme Court decision "as having overruled *sub silentio* longstanding Supreme Court precedent").

[41] *Kuehn*, 686 F. Supp. at 235; *see also Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

[42] *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

[43] *See, e.g., Rilley v. Money-Mutual, LLC*, 2018 WL 6920764, at *5-*7 (D. Minn. 12/13/2018).

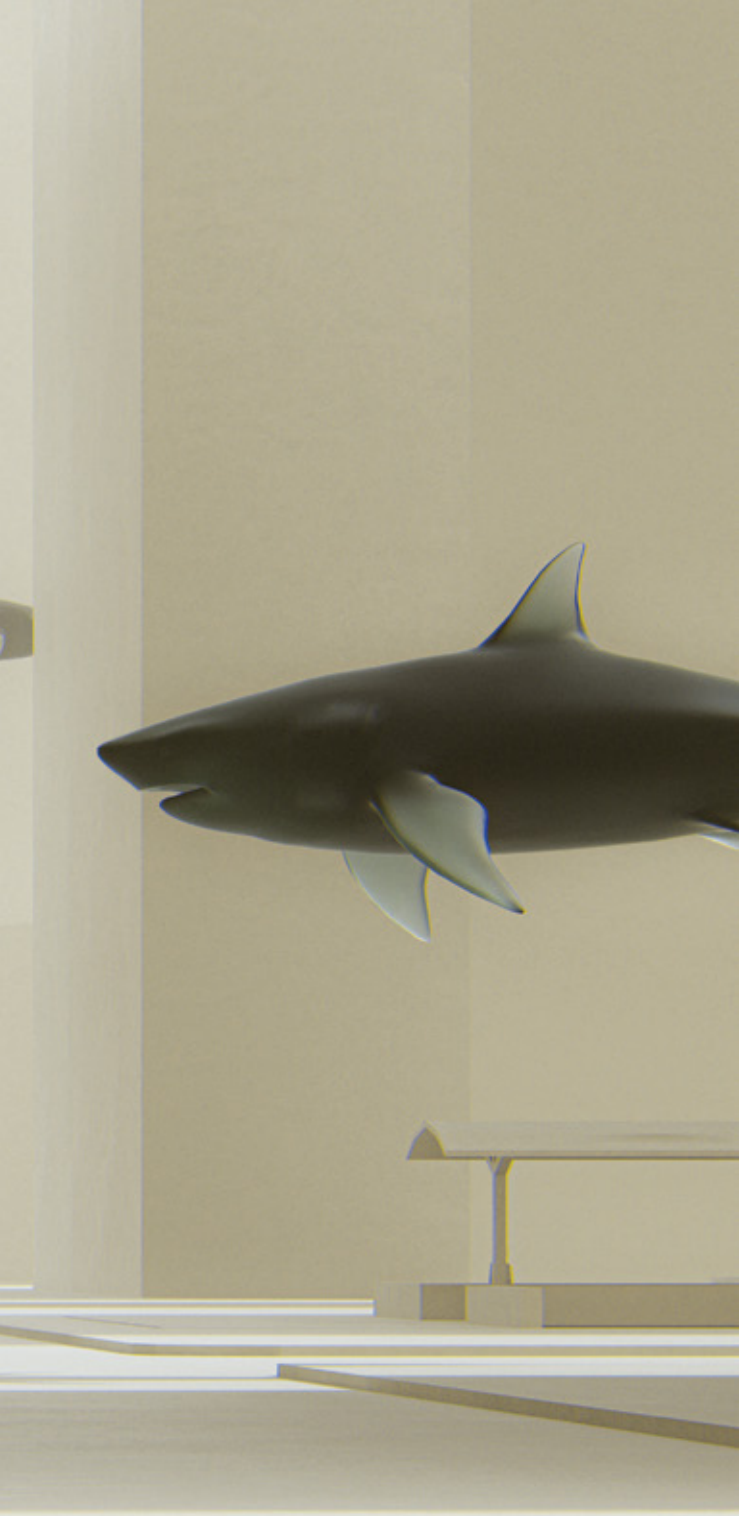


Paskert and *Kenneh:*

The 'severe or pervasive' standard in 2020

Minnesota moves forward on workplace harassment; the 8th Circuit doubles down

By Sheila Engelmeier and Heather Tabery



The severe or pervasive standard has been a topic of debate in Minnesota and elsewhere for years, never more so than in the wake of #MeToo.

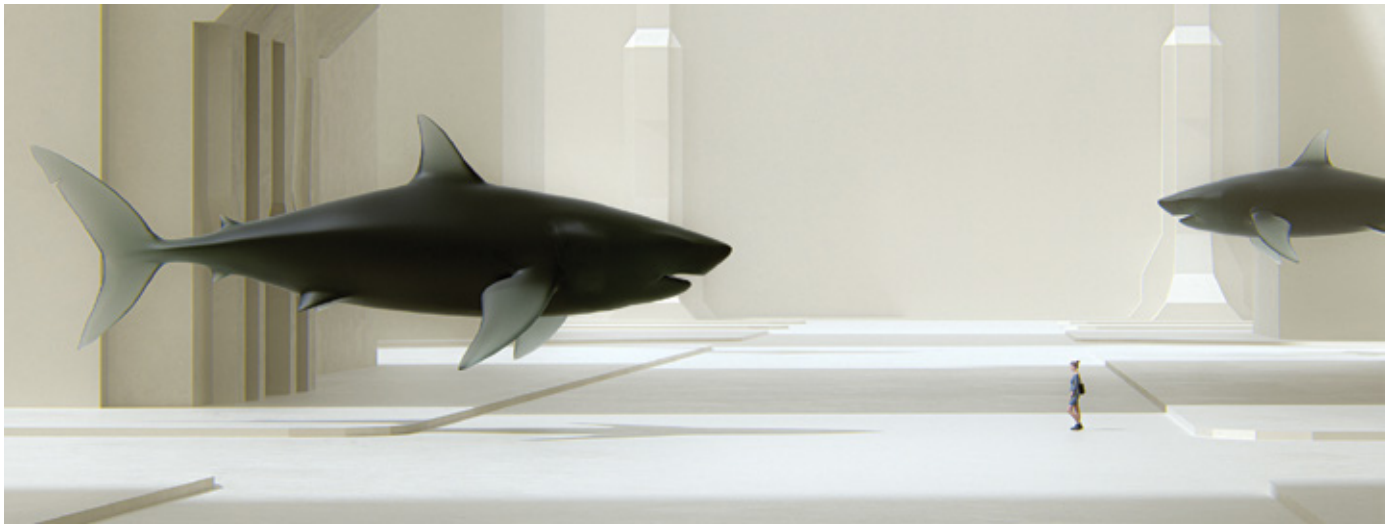
About two years had passed since the launch of the #MeToo movement when the Minnesota Supreme Court heard oral arguments in *Kenneh v. Homeward Bound* in late 2019. Since then a great many observers have awaited the Court's pivotal decision in the case, which posed the question of how the "severe or pervasive" standard applies to harassment claims under the Minnesota Human Rights Act (MHRA). Generally, to be actionable under either the MHRA or federal anti-discrimination law (Title VII), harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment or create an abusive working environment. The severe or pervasive standard has been a topic of debate in Minnesota and elsewhere for years, never more so than in the wake of #MeToo. Some other states, most notably New York, have statutorily abandoned or adjusted the standard, which allows judges to dismiss harassment cases even when the workplace misconduct is egregious.[1]

Although the phrase "severe or pervasive" does not appear in the MHRA,[2] the requirement that workplace misconduct be severe or pervasive before it creates an actionably hostile environment developed in federal case law and seeped into Minnesota common law. (A detailed history of the "severe or pervasive" standard is set forth in our previous Bench & Bar Online article, "Severe or Pervasive: Just How Bad Does Sexual Harassment Have to Be in Order to Be Actionable?"[3])

By comparing the facts considered on summary judgment or a motion to dismiss to the facts of previously dismissed cases, the courts over time set an extremely high bar for plaintiffs to prove a hostile work environment. The plaintiff's attorneys in *Kenneh* argued the Minnesota Supreme Court should lower that bar or eliminate the severe or pervasive standard entirely for harassment claims under the MHRA. The defense argued, among other things, that any change to the standard was not the province of the Court and required legislative action.

As we waited for the *Kenneh* decision, the 8th Circuit Court of Appeals decided *Paskert v. Kemna-ASA Auto Plaza, Inc.*[4] on February 13, 2020, doubling down on the notion that the severe or pervasive standard sets a tremendously "high threshold," at least in federal courts applying federal law in this jurisdiction. (Notably, *Paskert* also dismissed an Iowa statutory harassment claim.)

In its June 3 *Kenneh* decision, the Minnesota Supreme Court did not eliminate the severe or pervasive standard, but in stark contrast to *Paskert*, it effectively lowered the standard applied to the MHRA, stating it must evolve to meet societal expectations. The Minnesota Supreme Court also cautioned courts against taking jury trials away from those making harassment claims under the MHRA and noted that the federal jurisprudence does not bind courts interpreting Minnesota law. Two jurisdictions with two very different results means the difficulties with the severe or pervasive standard may live on.



A brief history of the severe or pervasive standard [5]

Almost 35 years ago, the 8th Circuit Court of Appeals noted that making the *prima facie* case for a hostile environment harassment claim under Title VII requires the employee plaintiffs to prove: (1) they belong to a protected group; (2) they were subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a "term, condition, or privilege" of employment; and (5) the employer knew or should have known of the harassment in question and failed to take proper remedial action.[6] (The fifth element now differs depending on whether the alleged perpetrator is a peer, supervisor, or alter ego of the employer.)

Courts have long acknowledged that anti-discrimination laws exist to protect employees from unlawful discrimination (and unlawful harassment), but the U.S. Supreme Court cautioned that they are not meant as a "general civility code." In 1986 the Court declared that in order to prove the fourth element (that the harassment affected a "term, condition, or privilege" of employment), the harassment must be "sufficiently *severe or pervasive* 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[7] (Emphasis added.) To meet the standard, the plaintiff must prove the harassment was both objectively and subjectively unreasonable, meaning that a reasonable person would find the conduct offensive and that the plaintiff actually did so.[8]

Since *Meritor*, courts have struggled to articulate what the severe or pervasive standard means. In 1993 the U.S. Supreme Court attempted to clarify and admitted the standard "is not, and by its nature cannot be, a mathematically precise test.… [W]hether an environment is 'hostile' or 'abusive' can be determined by looking at all the circumstances.… These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[9]

Courts, over the years, have borrowed from the federal jurisprudence interpreting Title VII when analyzing harassment claims under the MHRA. The federal jurisprudence in the 8th Circuit, and the Minnesota cases borrowing from that case law, became more and more restrictive about what was enough to be severe or pervasive. We have reached the point in federal jurisprudence where conduct meeting the elements of criminal sexual assault may not be enough. Over the last two decades, most hostile environment cases in the 8th Circuit and in Minnesota state courts end when the employer wins a motion for summary judgment. (Remarkably, some cases were dismissed on the pleadings.)

The federal jurisprudence in the 8th Circuit, and the Minnesota cases borrowing from that case law, became more and more restrictive about what was enough to be severe or pervasive. We have reached the point in federal jurisprudence where conduct meeting the elements of criminal sexual assault may not be enough.

What do courts say is not enough to be severe or pervasive?

Boorish behavior, horseplay, teasing, bad taste and flirting are not sufficiently severe or pervasive. Squeezing an employee's nipple while stating "this is a form of sexual harassment" is not enough. A manager asking an employee to watch pornographic movies and masturbate is not enough. And so much more.[10]

In *Duncan v. General Motors Corp.*,[11] the jury had awarded plaintiff a seven-figure verdict. The allegations the jury credited involved 10 incidents over a three-year period wherein she was propositioned; made to work on a male employee's computer with a screen saver of a naked woman; unnecessarily touched on the hand; and asked to type a document entitled "He-Men Women Hater's Club," including statements such as "sperm has a right to live" and "all great chiefs of the world are men." A co-worker kept a pacifier shaped like a penis in his office.[12] The 8th Circuit Court of Appeals overturned the jury verdict, concluding that the plaintiff failed to show the alleged harassment was so severe or pervasive as to alter a term, condition, or privilege of her employment.[13]

A plaintiff alleging a greater number of harassing incidents generally is more likely to survive summary judgment than one

who alleges a smaller number of specific instances, even if they are severe.[14] In theory, even a single incident of extremely severe conduct should be enough to support a hostile work environment claim.[15] Indeed, multiple courts have stated a single act of sexual assault can be actionable harassment.[16] To state a claim based on a single incident, the conduct generally must involve violence or a serious threat of violence. Even then few cases resolve in favor of the plaintiff.

In *Paugh v. P.J. Snappers*, a female went to a restaurant/bar to apply for a job and consumed alcohol given to her by a male manager.[17] The facts presumed as true in *Paugh* are these. The male manager made advances on her and rubbed her shoulders as she drank. The applicant went to the restroom and returned to the bar to continue drinking. Her next memory was waking up the following morning in the male manager's bedroom. A rape kit revealed more than one man's semen inside her. The court considered the applicant an employee for purposes of summary judgment, but held the plaintiff failed to establish the male manager's conduct in making advances and rubbing her shoulders at the restaurant qualified as sufficiently severe or pervasive to affect the terms, conditions, or privileges of her employment. It also determined that, since the rape took place off-premises, it was outside the scope of his employment.

In *Anderson v. Family Dollar Stores of Ark., Inc.*,[18] the plaintiff alleged the following. Over the course of a five-week training period, her supervisor rubbed her shoulders, back, or hands; cupped her chin in his hand; tried to flirt with her; and on one occasion told her, "I can make or break you." After the training period was over, he continued to harass her. She called him to discuss a workplace issue and he told her she ought to be with him where he was, in a Florida motel room, "in bed with me with a Mai Tai and kicking up." During another work call he told her, "I'll deal with it, baby doll," and on another occasion referred to her as "honey." Finally, when she complained to him about a workplace injury, the supervisor "grabbed her arm, pulled her back to the storeroom, pushed her, and in a mean tone asked, 'Are you going to work with me? Are you going to be nice? Are you going to fit into my group? ... [N]ow you're telling me your back is hurt?... [Y]ou're just nothing but trouble... You're just not going to be one of my girls, are you?'" and then fired her. The 8th Circuit Court of Appeals held the supervisor's conduct, while "ungentlemanly," was not severe or pervasive.

In the current social climate, it is fair to say that any of the aforementioned examples would be considered sexual harassment in casual conversation among most people. If someone tweeted the facts of any of these cases, the bad actor would likely be fired or at least intensely shamed on social media.

Paskert v. Kemna-Asa Autoplaza, Inc.

Paskert was a female used car sales associate in Iowa. The following facts were presumed true. Paskert was hired to sell cars, complete collections work, and prepare cars for sale. She could not complete her training because when she tried to shadow superiors, Burns and Bjorkland, while selling cars on the lot, Burns would send her back inside to answer the phone. Burns frequently lost his temper, ridiculed and screamed at employees, referred to female customers using derogatory names, and threw objects in the office. Burns's treatment of women was demeaning, sexually suggestive, and improper. Burns said he "never should have hired a woman" and wondered aloud if he could make Paskert cry. Burns openly bragged at work about his purported sexual conquests. On one occasion, Burns attempted to rub Paskert's shoulders and said he was going to hug her.

On another occasion, Paskert criticized the way Burns treated women and wondered how his wife tolerated such behavior. Burns replied, "Oh, if you weren't married and I wasn't married, I could have you… You'd be mine… I'm a closer." Both Paskert and Bjorkland reported Burns's behavior to management, and, thereafter, Burns assigned Paskert a different job title and pay structure, which Paskert understood to be a demotion. Paskert accepted the changes, and three days later she was fired for insubordination and "refus[ing] to discuss what was bothering her on Friday, November 6th." Burns further justified the termination by criticizing Paskert's sales record and use of profanity at work.

Paskert filed a complaint with the Iowa Civil Rights Commission (ICRC) alleging a hostile work environment and later sued in federal district court alleging a hostile work environment and retaliation. The district court granted summary judgment for the defendant, finding in part that Paskert failed to show defendant's conduct was sufficiently severe or pervasive to constitute a hostile work environment under Title VII or the Iowa Civil Rights Act. Paskert appealed.

The 8th Circuit Court of Appeals, citing *Meritor* and *Harris*, noted, "Although the Supreme Court's precedent is clear that 'Title VII comes into play before the harassing conduct *leads to a nervous breakdown*,'… our Eighth Circuit precedent sets a high bar for conduct to be sufficiently severe or pervasive in order to trigger a Title VII violation." (Emphasis added.) The court relied on its precedent, noting that some conduct well beyond the bounds of respectful and appropriate behavior is nonetheless insufficient to violate Title VII because it is not severe or pervasive enough, including graphic sexual propositions and even incidental unwelcome sexual contact.

Specifically, "In light of these precedents, Burns's alleged behavior, while certainly reprehensible and improper, was not so severe or pervasive as to alter the terms and conditions of Paskert's employment." The court noted Paskert "only" alleged one instance of unwelcome physical conduct and one or two statements by Burns that he could "have Paskert." The court said "all of this behavior is inappropriate and should never be tolerated in the workplace, but is not nearly as severe or pervasive as the behavior found insufficient in *Duncan*… [Employer] and Burns should both be embarrassed and ashamed for how they treated her. Nevertheless, we may only ask whether their behavior meets the severe or pervasive standard applied by this circuit, and it does not." The 8th Circuit Court of Appeals affirmed summary judgment.

Paskert suggests the 8th Circuit Court of Appeals is unfazed by social norms and that #TimesUp has not yet found its way into the federal jurisprudence.

Kenneh v. Homeward Bound

Assata Kenneh worked as a program resource coordinator at Homeward Bound, a nonprofit organization that operates residential care facilities for people with disabilities. In her case, the following facts were presumed true. Shortly after she started working she met the maintenance coordinator, Anthony Johnson, who worked at multiple sites and was not at her location every day. Between February and June 2016, Kenneh experienced multiple incidents of sexualized or intrusive behavior. The first time they met, Johnson complimented Kenneh on her haircut, asked her who cut her hair and where she lived, and offered to cut her hair at her home or his, which alarmed Kenneh. Not long afterward, Johnson walked up to Kenneh as she struggled to open her desk drawer and offered to help. As she started to move out of his way, he told her she did not need to move because he "likes it pretty all day and all night" and he liked "beautiful women and beautiful legs." Kenneh got out of her chair anyway, and while he was working on her desk, Johnson began talking to her in a seductive tone and licked his lips in a suggestive manner.

About a month later, Johnson blocked Kenneh's office door with his body. She made the excuse that she was going to get a drink from the gas station in order to leave her office to avoid him. In a sexually suggestive voice, Johnson insisted on taking her to the onsite vending machine instead. She complied and on their way back she suggested he take home some cake from a party that day. Johnson said, "I don't eat any of this." Kenneh asked what he meant; he said, "I will eat you—I eat women." Kenneh quickly walked back to her office alone. A week later, Johnson drove up alongside Kenneh's car while she was buying gas, asked her where she was going, and left immediately after her without putting gas in his car.

The next day, Kenneh told her supervisor about Johnson's actions and conduct. Her supervisor asked her to make a written complaint and she complied. Human Resources conducted an investigation, but Johnson denied each incident, so Homeward Bound informed Kenneh the investigation was inconclusive, but assured her that he would receive additional sexual harassment training and be instructed not to be alone with Kenneh. Thereafter, Johnson began to stop by Kenneh's office more frequently. He would block her door, make gestures with his tongue simulating oral sex, and call her "sexy," "pretty," or "beautiful" every time he saw her despite her requests that he stop. He would stand in her doorway watching her, and although Kenneh tried to ignore him, he simulated oral sex with his tongue when she made eye contact. Kenneh complained on two more occasions, but nothing was done. One day, she arrived late to work and was unprepared for a meeting. She told her supervisor that she did not want to go to work because of Johnson and asked to be transferred so she could avoid interactions with him. Homeward Bound denied her request and terminated her employment.

Kenneh sued Homeward Bound for sexual harassment in violation of the MHRA. The district court granted summary judgment to Homeward Bound, concluding Kenneh failed to allege conduct sufficiently severe or pervasive to support a claim for sexual harassment. The Minnesota Court of Appeals affirmed.

The Minnesota Supreme Court found the evidence offered by Kenneh sufficient to withstand summary judgment on her claim for harassment under the MHRA, and concluded that the conduct alleged by Kenneh was sufficiently severe or pervasive for a reasonable juror to find the work environment to be hostile or abusive. The Court, however, declined to discard the severe or pervasive precedent "because the [standard] continues to provide a useful framework for analyzing the objective component of a claim for sexual harassment under the [MHRA]."

The Court's decision lowered the severe or pervasive standard as applied to the MHRA. It further specifically acknowledged that the MHRA provides greater protection than the federal law. Thus, *Kenneh* means that what is "severe or pervasive" under the MHRA is a less stringent standard than set forth in the federal jurisprudence.

The nuance

Unlike Title VII, the MHRA defines sexual harassment as "unwelcome sexual advances… or communication of a sexual nature when… that conduct or communication has the purpose or effect of substantially interfering with an individual's employment… or creating an intimidating, hostile, or offensive employment… environment."[19] In declining to abandon the severe or pervasive standard entirely, the Court cited its earlier decision in *Goins v. W. Grp.*,[20] which quoted *Meritor*: "We have held that discriminatory conduct 'is not actionable unless it is "so severe or pervasive" as to "alter the conditions of the [plaintiff's] employment and create an abusive working environment."' Yet, the Court acknowledged that the severe or pervasive standard originated in federal case law involving harassment claims under Title VII.

Paskert suggests the 8th Circuit Court of Appeals is unfazed by social norms and that #TimesUp has not yet found its way into the federal jurisprudence.

The *Kenneh* Court also pointed out that its reliance on federal law in interpreting the MHRA has not been absolute, recognizing "significant differences" between the MHRA and Title VII—among them that the MHRA defines sexual harassment. Kenneh and amici argued that the severe or pervasive standard is notorious for being inconsistently applied and lacking clarity, arguing the federal courts tend to interpret "severe or pervasive" archaically, which is directly at odds with Minnesota's statutory directive to construe the MHRA liberally.[21] The Court cited *stare decisis* and the Legislature's ability to alter what the courts have done as reasons why it chose not to overturn precedent,

but noted *stare decisis* is a guiding policy, not an inflexible rule or a shield for errors of law.

The Court said the severe or pervasive standard reflects a "common-sense understanding that, to alter the conditions of employment and create an abusive working environment, sexual harassment must be more than minor: the work environment must be both objectively and subjectively offensive in that a reasonable person would find the environment hostile or abusive and the victim in fact perceived it to be so." But the Court used *Kenneh* as an opportunity to "clarify how the severe-or-pervasive standard applies to claims arising under the [MHRA]."

The Court made clear that its continued use of a more flexible, fact-sensitive severe or pervasive standard does not mean that courts are bound to the conclusions of federal courts when deciding cases under the MHRA. Instead, "For the severe-or-pervasive standard to remain useful in Minnesota, the standard must evolve to reflect changes in societal attitudes towards what is acceptable behavior in the workplace. As we recognized 30 years ago, the 'essence' of the [MHRA] is 'societal change'; '[r]edress of individual injuries caused by discrimination is a means of achieving that goal.'"

In addition to criticizing federal case law such as *Duncan*, the Minnesota Supreme Court was critical of the Minnesota Court of Appeals' decision in *Geist-Miller v. Mitchell*,[22] noting that the court "brushed aside" unacceptable behavior as "an unsuccessful pursuit of a relationship." This suggests that, under the severe or pervasive standard now applicable to the MHRA, such conduct would be actionable. This is a significant departure from the federal jurisprudence, where courts have not adjusted the severe or pervasive standard to reflect social attitudes toward what is acceptable behavior in the workplace. In fact, they have done the opposite: Over the course of 30 years, as more and more behaviors became socially unacceptable in the workplace, the federal courts defined more and more *narrowly* the conduct that can reach severe or pervasive's "high threshold."

The *Kenneh* Court directed courts interpreting the MHRA thus:

- "Each case in Minnesota state court must be considered on its facts, not on a purportedly analogous federal decision."
- "[W]e caution courts against usurping the role of a jury when evaluating a claim on summary judgment.... If a reasonable person *could* find the alleged behavior objectively abusive or offensive, a claim is sufficiently severe or pervasive to survive summary judgment (emphasis added)."[23]

In short, *Kenneh* reminds factfinders that they must consider the context in which the behavior occurred, the totality of the circumstances, and the case's particular facts; it cautions against courts making credibility determinations. Further, the *Kenneh* decision reminds judges interpreting the MHRA that summary judgment is inappropriate when reasonable minds might differ.

Conclusion

Although the Kenneh decision is nuanced in its lowering of the severe or pervasive standard, it amounts to a significant shift for hostile environment claims under the MHRA. How long it will take for a similar sentiment to reach the 8th Circuit or other federal circuits—or whether it ever will—remains unknown. The Minnesota Legislature and Congress still have the ability to provide additional clarity or guidance on the severe or pervasive standard. For now, the bar remains high in federal court interpreting Title VII. But in cases under the MHRA, there is a new paradigm, designed to evolve in step with societal changes and less stringent than the federal courts' historical view of severe or pervasive. ▲

Notes

[1] *See, e.g.*, A08421 *https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A08421&term=0&Summary=Y&Memo=Y*. Similarly, Minnesota judges have advocated for a reduced standard when interpreting MHRA harassment claims for years (*see, e.g.*, Justice Page's dissent in *LaMont v. Ind. Sch. Dist. #728*, 814 N.W.2d 14, 24 (Minn. 2012) and Justice Wright's dissent in *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 804 (Minn. 2013)).

[2] The word "harassment" appears nowhere in Title VII, unlike the MHRA. The concept arose in the case law interpreting Title VII's prohibition of gender discrimination.

[3] Bench & Bar Online, March 2020. *https://www.mnbar.org/archive/msba-news/2020/01/21/severe-or-pervasive-just-how-bad-does-sexual-harassment-have-to-be-in-order-to-be-actionable*.

[4] 950 F.3d 535 (8th Circuit, 2020).

[5] For a detailed history of state and federal law on this issue, see 4/26/2018 testimony before the Minnesota House Civil Law and Data Practices Committee regarding HF4459. *https://www.youtube.com/watch?v=GDQtCudBZl8*
(Co-author Sheila Engelmeier's main testimony, starting at the 6:00 minute mark and ending at 34:00, describes the relevant law; later, other employment law experts also testified).

[6] *Moylan v. Maries Cnty.*, 792 F.2d 746, 749 (8th Cir. 1986).

[7] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

[8] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

[9] *Harris* at 22-23.

[10] Supra note 3.

[11] 300 F.3d 928 (8th Cir. 2002).

[12] *Id.* at 931-932.

[13] *Id.* at 933-934.

[14] Supra note 3, pp. 25-33.

[15] *Id.*, pp. 12, 20-23.

[16] *See, e.g.*, *Moring v. Ark. Dep't of Corr.*, 243 F.3d 452, 456–57 (8th Cir. 2001); *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 969–70 (D. Minn. 1998) (collecting cases).

[17] No. 2004-T-0029, 2005 WL 407592 (Ohio App. 2/18/2005).

[18] 579 F.3d 858, 860 (8th Cir. 2009).

[19] Minn. Stat. §363A.03, subd. 43(3).

[20] 635 N.W.2d 717 (Minn. 2001).

[21] *See* Minn. Stat. §363A.04.

[22] 782 N.W.2d 197 (Minn. App. 2010).

[23] 944 N.W.2d 222 (Minn. 2020).

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COVID-19, Trump, and Employment Immigration

2020 has been a year like no other for employers and their lawyers

By Robert P. Webber and Candelario Arredondo

The July 4 weekend is traditionally viewed as the middle of summer and the middle of the calendar year. This year, though, looking back to January is like looking back on another world. It's been a year of unprecedented challenges, and those challenges have extended to employers and their lawyers trying to navigate U.S. immigration law matters. So much has occurred, both in response to the pandemic and as a result of the Trump Administration's strongly held policy positions on limiting immigration, that it would be nearly impossible to provide a comprehensive review of the many changes in immigration law and policy so far in 2020. This article focuses on employment-based immigration—issues related to the ability of U.S. employers to hire and retain foreign national workers. We seek to highlight some of the major changes and forecast where things may go from here.

Covid-19 related changes

Somewhat surprisingly, many of the changes in immigration law related specifically to covid-19 provided additional flexibility in view of the complex new realities thrust upon the U.S. workforce (both employers and employees) by the pandemic and the related shutdown and stay-at-home orders. While there were significant negative changes in the spring, like closing U.S. consulates worldwide (something that continues to a large extent now), shuttering U.S. Immigration Services offices nationwide, and closing the U.S./Canada and U.S./Mexico borders for non-essential travel, there were also developments that were generally considered positive and demonstrated the Trump Administration's understanding of the temporary new reality. Among the positive developments:

- flexibility in I-9 documentation compliance;
- authorization to use scanned signatures for petition and application filings;
- use of 'digital' approval notices for PERM labor certification applications;
- flexibility on deadlines to respond to requests for evidence; and
- waiver of biometrics (fingerprints) and in some instances waiver of interviews for cases where such things were previously required.

On the specific issue of I-9 documentation compliance flexibility, in March the Immigration and Customs Enforcement (ICE) agency announced flexibility for employers inspecting documents for I-9 compliance. That flexibility was extended all the way into mid-July and allows for the remote inspection of identity and employment eligibility documents required for new hire I-9s. There are strings attached, but this accommodation works well for businesses operating remotely. The altered I-9 rules also provided flexibility in responding to E-Verify tentative non-confirmations.

Policy-related changes

Despite some positive flexibility by the Trump administration, as mentioned above, the year has mainly been marked by negative policy developments consistent with the president's restrictive attitude toward immigration. Early in the year, the major developments in employment-based immigration involved the new electronic registration process for the H-1B cap lottery and the rollout of Form I-944 for immigrants seeking to establish that they will not become public charges.

The H-1B cap electronic registration process was not without problems, but overall it seems to have functioned and served its purpose—or, perhaps more accurately, its flaws were overshadowed by the all-encompassing concerns for the pandemic this spring throughout the United States. H-1B cap cases are

in process now and employers should be hearing more in the coming weeks on whether the administration has once again tightened adjudication standards.

The new Form I-944 did face a court challenge, but the Trump administration has prevailed (so far) and Form I-944 now must be submitted with all I-485 adjustment of status applications. Form I-944 is intense and burdensome. (Some might say this is a feature, not a bug.) Form I-944 is an 18-page form with 15 pages of detailed instructions. The form covers a wide range of issues, seeking information on an immigrant's income, assets, debts, credit score/credit rating, history of public benefits (if any), health insurance, education, language ability, and skills, among other things. This new form has been required since February and as of July 4, very few (if any) I-485 applications supported by Form I-944 have actually been adjudicated. The second half of this year will tell us much more about how USCIS will interpret Form I-944.

The most recent policy development, as of early July, is the June 22 White House proclamation limiting work visas. The proclamation implicates nearly all new H-1B, H-2B, J-1, and L-1 visas through the end of this calendar year. The Trump administration's theory is that with the U.S. unemployment rate so high, foreign workers should not be admitted into the country to compete with the domestic workforce. While there are some narrow (and ill-defined) exceptions to the June 22 proclamation, it will prove to be a major challenge for employers in a wide range of industries for the rest of the year.

The role of courts

Plaintiffs challenging the Trump administration have been active in the courts this year. Perhaps the most high profile U.S. immigration law case potentially involving employers was the DACA case, *DHS v. Regents of the University of California*, in which the U.S. Supreme Court ruled 5-4 that DACA should remain in place as the Trump administration failed to comply with the appropriate rulemaking to end the DACA program.

In the more narrow area of H-1Bs, a class action lawsuit, *ITServe Alliance v. Cissna*, was settled favorably for the plaintiffs. The settlement led to an important USCIS policy memorandum on June 17 that creates more certainty for H-1B petitioners (employers) on the issues of third party placement and employer/employee relationships. Specifically, the June 17 memorandum rescinded USCIS policy guidance on third party placements going back to 2010 and also rescinded a contracts and itinerary requirement created by USCIS in February 2018.

While the *ITServe Alliance* class action provided positive visibility on some issues, H-1B employers still face challenges on the administration's novel interpretations of what constitutes a "specialty occupation," including the aggressive use of the U.S. Department of Labor's Occupational Outlook Handbook (OOH) to designate some positions as not eligible for H-1B classification. Individual, single-plaintiff lawsuits have made progress and pushed back on the "specialty occupation" issue and there is one class action pending for market research analysts, but it remains to be seen whether USCIS will back down from its recent approach to what constitutes a specialty occupation.

What may be coming

Looking ahead, there are still three months until the election and five months until a new president is sworn in. There is no indication that President Trump's administration will let up on its policy agenda to restrict immigration.

Our predictions for the remainder of 2020 include:

- In the area of temporary work visas, including H-1B and L-1 visas, because of the June 22 proclamation limiting visa stamping at U.S. consulates, we expect more challenges from USCIS in processing extension petitions for people already in the United States, including many more RFEs (requests for evidence). This will be particularly relevant, and frustrating, to large employers that would traditionally rely on blanket L petition processing directly at U.S. consulates abroad.

- There will likely be more interest in O-1 visas, since O-1 visas are not subject to the June 22 proclamation limiting work visas. These visas are available to people who can demonstrate they are extraordinary in their field—a high standard, to be sure.

- In the area of PERM labor certification processing, it is definitely possible that the U.S. Department of Labor will institute new and burdensome requirements for testing the local labor market, including possible supervised recruitment, to obtain PERM approvals.

- Because of budget challenges at USCIS, we expect to see slow processing across the board. This will create complications for people who need receipts and approvals to extend driver's licenses or to be eligible to travel or seek new employment. Delays in processing receipts, petitions, and applications have already been occurring for months but as of early July, USCIS plans a major furlough of thousands of employees nationwide in early August that will clearly further exacerbate the existing delays and backlogs.

While the year so far has been unprecedented and challenging, there is sadly no reason to believe that we are done. More change in immigration law is likely coming. Employers and their lawyers will need to stay attentive to the changes and plan ahead. Filing renewals and extensions early for existing employees and using premium processing whenever available will hopefully minimize distress. And increasingly, positioning cases for litigation may be an important aspect of responsible immigration practice. ▲

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Landmarks in the Law

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

CRIMINAL LAW

JUDICIAL LAW

■ **Privilege: Order for subpoena is necessary to obtain privileged records from rape crisis counseling center.** Respondent was charged with criminal sexual conduct for allegedly engaging in nonconsensual sexual penetration and contact with two women while working as a massage therapist. The Program to Aid Victims of Sexual Assault (PAVSA) assisted the women in reporting the incidents to the police and respondent moved for an *in camera* review of all PAVSA's records relating to the women, under Minn. R. Crim. P. 9.01, subd. 2(3). The court ordered PAVSA to produce the records for *in camera* review, and PAVSA petitioned for a writ of prohibition preventing enforcement of the order.

The court of appeals notes that Rule 9.01, subd. 2, requires the state to assist a defendant in obtaining access to discovery in the possession of governmental agencies not within the prosecutor's control, upon the defendant's motion and showing of good cause. However, PAVSA is not a governmental agency, so the state is under no obligation to produce PAVSA's records.

Instead, to obtain PAVSA's records, respondent was required to obtain a court order for a subpoena, as required by Minn. R. Crim. P. 22.01, subd. 2(c). Respondent did not comply with Rule 22.01, subd. 2(c), nor did the district court issue a subpoena. As such, the district court's order requiring PAVSA to produce records was unauthorized by law. The court of appeals grants PAVSA's writ of prohibition, but "express[es] no opinion… on whether the district court should grant a subpoena for the records, if presented with a proper motion, or on the possible outcome of any *in camera* review, if ordered." ***In re Program to Aid Victims of Sexual Assault***, 943 N.W.2d 673 (Minn. Ct. App. 4/13/2020).

■ **DWI: Proof that operator knew controlled substance was in his body is not required.** Appellant was convicted of driving under the influence of a controlled substance after entering a guilty plea. However, on appeal, he argues his plea was inaccurate and invalid, because he did not admit he knew or had reason to know his body contained a schedule I or II controlled substance. When entering his plea, appellant admitted amphetamine was present in his body when he operated a motor vehicle, but said nothing about whether he was aware of its presence in his body at that time.

Minn. Stat. §169A.20, subd. 1(7), criminalizes driving, operating, or being in physical control of a motor vehicle with any amount of a schedule I or II controlled substance, including amphetamine, in the body. Section 169A.20, subd. 1(7), does not contain a *mens rea* element, requiring only a general intent to do the act described therein. Generally, strict liability crimes—those that dispense with *mens rea*—are generally disfavored, and courts interpret statutes silent on intent to contain a *mens rea* requirement. However, in section 169A.46, subd. 2, the Legislature provided an affirmative defense to drivers charged under section 169A.20, subd. 1(7), which the court of appeals takes to mean that the absence of a specified *mens rea* requirement in section 169A.20, subd. 1(7), was not an inadvertent omission.

Moreover, the court finds that a violation of section 169A.20, subd. 1(7), is a public welfare offense, an offense that is not subject to the presumption that the Legislature intended a *mens rea* requirement. The court concluded that the State is not required to prove that the operator of a motor vehicle knew or had reason to know that a controlled substance was in his body to prove a charge under section 169A.20, subd. 1(7). The court finds appellant's guilty plea is supported by a sufficient factual basis, and his conviction is affirmed. ***State v. Schwartz***, 943 N.W.2d 411 (Minn. Ct. App. 4/13/2020).

DWI: License revocation may be used to enhance DWI charge once judicial review has occurred or right to review has been waived. Appellant was arrested for DWI on 10/2/2016, and 12/18/2016. A week after his October arrest, appellant was notified that his driver's license was revoked, and the revocation was sustained in April 2017, after he waived judicial review. For his December DWI arrest, appellant was charged with, among other offenses, second-degree test refusal in August 2017. The charge was enhanced due to appellant's October license revocation. Appellant moved to dismiss the second-degree charge, arguing the license revocation cannot be used as an aggravating factor unless judicial review has occurred or has been waived by the time of the subsequent offense. The district court denied appellant's motion. After a stipulated facts trial, the court found appellant guilty on both counts. The Minnesota Court of Appeals affirmed, holding that "a prior license revocation is present as an aggravating factor to enhance a subsequent DWI offense after a driver receives notice of the revocation."

A person is guilty of second-degree test refusal if they refuse to submit to a chemical test and one aggravating factor was present when the violation was committed. Minn. Stat. §§169A.20, subd. 2; 169A.25, subd. 1(b). A prior driver's license revocation may qualify as an aggravating factor, under Minn. Stat. §169A.03. Various subdivisions of section 169A.03, when read together, provide that a driver's license revocation under the implied consent law (sections 169A.50 to 169A.53) can be used as an aggravating factor for purposes of section 169A.25, subd. 1(b), if the revocation was "present when the violation was committed."

Reviewed or not, a license revocation under the implied consent law comes into existence as of its effective date, which is when the commissioner notifies the person of the intent to revoke their license. Minn. Stat. §169A.52, subd. 6. Nothing in the implied consent law suggests that a revocation must be reviewed by the time a subsequent offense is committed to be used as an aggravating factor.

The Supreme Court previously held, in *State v. Wiltgen*, 737 N.W.2d 561 (Minn. 2007), that using license revocations that were unreviewed at the time of *charging* as aggravating factors violated due process. Thus, a license revocation under the implied consent law is "present" upon its effective date and may be used to enhance a DWI charge once the revocation has been judicially reviewed and sustained or the right to review has been waived.

In this case, appellant's license revocation was present in October 2016, when he received notice of the revocation, which was before he committed the test refusal offense in December 2016. He waived review of the revocation in April 2017, at which point the state could use the revocation to enhance the charge relating to his December 2016 conduct. The Court concludes that the state properly used appellant's license revocation as an aggravating factor. ***State v. Anderson***, 941 N.W.2d 724 (Minn. 4/15/2020).

Evidence: Post-arrest statement to police about purchase of drugs from defendant is admissible under residual exception to hearsay rule. After receiving a tip, police observed appellant selling methamphetamine to L.P. Appellant and L.P. were arrested, after which L.P. submitted to a recorded interview and made several statements regarding the drug transaction. At appellant's trial, the district court admitted L.P.'s statements as substantive evidence under Minn. R. Evid. 807, the residual exception to the hearsay rule. At appellant's trial, L.P. recanted her statements to police and testified she did not purchase methamphetamine from appellant. The jury found appellant guilty of first-degree sale of a controlled substance and second-degree possession of a controlled substance, and the court of appeals affirmed.

Rule 807 allows for the admission of hearsay not specifically covered in other hearsay exceptions "but having equivalent circumstantial guarantees of trustworthiness." The totality of the circumstances surrounding a proffered statement must be examined to determine whether the statement is trustworthy. The district court here balanced the following relevant circumstances: Some of the investigator's questions to L.P. were leading or suggestive, but the interview as a whole was not "entirely leading or suggestive;" although L.P. admitted to just having used drugs and the recording was difficult to hear clearly, she was not obviously impaired; L.P.'s statement was against her penal interest; and L.P. was available for cross-examination at trial. The Supreme Court agrees with the district court's assessment of these factors.

Additionally, while a recantation may lessen the trustworthiness of a statement, the court must determine whether "other uncontroverted evidence discredits the recantation," whether there is a motive to falsely recant, whether there is an inconsistency in the recanted version of the statement itself, and whether the prior hearsay statements are strongly corroborated. Some of L.P.'s original statements were corroborated by other evidence, her recantation came only after urging from a friend, and L.P. had a prior intimate relationship with appellant. These facts are not enough for the Supreme Court to conclude that the district court erred in determining that L.P.'s recantation did not render her prior statements untrustworthy.

The Supreme Court finds the district court properly balanced all of the relevant circumstances of the trustworthiness of L.P.'s statements to law enforcement and, therefore, properly admitted them into evidence under Rule 807. When admitting evidence under Rule 807, a district court should make findings regarding the enumerated requirements of Rule 807, including: (1) "the statement is offered as evidence of a material fact;" (2) "the statement is more probative on the point for which it is offered than any other evidence" procurable "through reasonable efforts" by the proponent; and (3) the general purpose behind the rules of evidence and the interests of justice are served by the admission of the statement. The district court here made findings as to requirements (1) and (2), but not (3). However, this failure does not automatically require reversal, as the appellate courts can independently evaluate the record. Here, the Supreme Court finds that admission of L.P.'s statements serves the purpose of Rule 807 and the interests of justice. ***State v. Vangrevenhof***, 941 N.W.2d 730 (Minn. 4/15/2020).

Evidence: The content of an excerpt of a writing or statement must be examined to determine if contemporaneous admission of additional material is necessary to clarify inaccuracies. Respondent went to trial on a charge of second-degree criminal sexual conduct arising from allegations that he sexually abused his child. Prior to being charged, respondent was interviewed by police and repeatedly denied the allegations, asserting his children's mother fabricated the allegations. At trial, the state requested to play a limited portion of the hour-long interview, specifically, the portion during which the state alleged respondent lied about the living arrangements with his children, to "show[] consciousness of guilt." Respondent asked that the entire recording be played. The district court allowed the state to

play the short portion of the recorded interview. Respondent testified about his repeated denials of the allegations during his police interview, and he was cross-examined about the interview. The jury found respondent guilty. His post-conviction petition was denied, but the court of appeals reversed and remanded for a new trial, finding that the entire interview should have been played.

The Supreme Court, however, reverses the court of appeals. The Court addresses the analytical approach to be used when applying Minn. R. Evid. 106, which provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recording which ought in fairness to be considered contemporaneously with it." As to the fairness requirement, the Supreme Court concludes "that Rule 106 applies when the proposed additional material (1) relates to the facts offered in an excerpt of a recorded statement or writing and (2) is necessary to correct a misleading or distorted impression of facts created by the admitted excerpt or writing." The district court must examine the *content* of the excerpt or writing admitted, rather than the *purpose* for which it was admitted. If the substance of the excerpt so inaccurately or unfairly distorts the evidentiary facts that it requires immediate correction of its content, fairness requires that additional material be contemporaneously admitted.

The Court determines that the district court's consideration under Rule 106 was appropriate and that it did not abuse its discretion in admitting only the excerpt of respondent's interview. The excerpt covered only limited information about sleeping arrangements, and the remainder of the interview was unrelated to that topic. Thus, admitting the entire interview was not necessary to give the jury a full understanding of what respondent said in the excerpt or to clarify a misimpression created by the excerpt. ***State v. Dolo***, 942 N.W.2d 357 (Minn. 4/29/2020).

MIERA: "Any evidence of factual innocence" does not include evidence about victim's prior dishonesty that is unrelated to underlying crime. After a jury trial, appellant was convicted of criminal sexual conduct charges related to reports made by appellant's daughter. His post-conviction petition was granted and his convictions were vacated due to ineffective assistance of counsel. The state did not retry the case and dismissed the charges. The district court denied appellant petition for an order declaring him eligible for compensation under the Minnesota Imprisonment and Exoneration Remedies Act (MIERA), and he appealed.

After being released from incarceration following a reversal or vacation of his conviction, a person may seek exoneration compensation by first petitioning the court for an order declaring them eligible for compensation based on exoneration. "Exonerated" means that "a court… ordered a new trial on grounds consistent with innocence and the prosecutor dismissed all felony charges against the petitioner arising from the same behavioral incident." Minn. Stat. §590.11, subd. 1(b)(1)(ii). The issue here is whether appellant received a new trial "on grounds consistent with innocence."

"On grounds consistent with innocence" is defined to mean either: "(1) exonerated through a pardon or sentence commutation, based on factual innocence; or (2) exonerated because the judgment of conviction was vacated or reversed or a new trial was ordered, and there is *any evidence of factual innocence* whether it was available at the time of investigation or trial or is newly discovered evidence." Minn. Stat. §590.11, subd. 1(c) (emphasis added). The court of appeals holds that, by its plain terms, the phrase "any evidence of factual innocence" means any evidence that shows some fact establishing the absence of the petitioner's guilt.

Here, appellant received a new trial for ineffective assistance of trial. Proving ineffective assistance of counsel did not require appellant to establish his factual innocence. However, in finding appellant's trial counsel was ineffective, the district court noted that his trial counsel failed to procure testimony and documents that related to the victim's character for untruthfulness. Appellant argues this evidence goes beyond mere impeachment evidence and makes it more likely that he did not commit the offenses. The court of appeals finds, however, that evidence showing the victim's pattern of past dishonesty does nothing to show appellant's lack of guilt, but, instead, goes only to her credibility as a witness.

The court of appeals notes that a petitioner may still be able to meet MIERA's exoneration requirement through impeachment evidence. For example, if a witness explained the victim told them the victim had fabricated the entire claim, this is impeachment evidence but also represents "any evidence of factual innocence." Here, however, the victim never recanted her accusations and the accusations were corroborated by other witness testimony. Thus, appellant does not meet MIERA's threshold exoneration requirement, and the district court properly denied his petition. ***Freeman***

v. State, A19-1247, 2020 WL 1983227 (Minn. Ct. App. 4/27/2020).

■ **Homicide: Depraved-mind murder requires the defendant's awareness that his conduct creates a substantial, unjustifiable risk to human life.** While intoxicated, appellant collided with an eight-year-old child and his father while driving a snowmobile at a high rate of speed on a frozen lake. The child later died. Appellant was convicted of seven offenses but sentenced only on one count of third-degree murder and one count of gross misdemeanor criminal vehicular operation.

First, the court of appeals finds that the district court erred in its instructions to the jury as to the *mens rea* element of third-degree murder, but that the error was not plain. Third-degree murder requires the state to prove the defendant (1) caused the death of another, (2) committed an act that was eminently dangerous to others, and (3) evinced a depraved mind without regard for human life. The "depraved mind" element is the equivalent of a reckless standard, and the recklessness definition the court adopts here comports with the most common legal usage of "reckless." The district court did not define "reckless" for the jury, a term for which the ordinary definition differs from the legal definition. Without the legal definition, the jury would have been allowed to find appellant guilty if he acted in a careless manner and knew only that his conduct may result in someone being killed, which is not enough to satisfy the elements of third-degree murder. However, the court of appeals finds that this error by the district court was not plain. The district court's instruction was a verbatim rendering of the third-degree murder model instruction and it did not contravene existing case law. As the error was not plain, it does not require reversal of appellant's third-degree murder conviction.

Next, the court determines that the district court did not abuse its discretion by admitting *Spreigl* evidence of appellant's prior alcohol-related offense. The court also finds the evidence was sufficient to support appellant's third-degree murder conviction, and that appellant failed to demonstrate that the cumulative effect of any alleged prosecutorial errors deprived him of his right to a fair trial.

Finally, the court holds the district court erred by entering two convictions, rather than one, for each of the following offenses: two counts of criminal vehicular operation and two counts of DWI. These four counts arose from the same behavioral incident. Thus, the case is remanded to the district court to vacate one of each of the DWI and criminal vehicular operation convictions. ***State v. Coleman***, A19-0708, 2020 WL 1982274 (Minn. Ct. App. 4/27/2020).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Untimely claims; doctor's case dismissed.** The dismissal of a race and national origin wrongful termination lawsuit by a doctor was upheld because his claims were untimely under federal and state laws. The 8th Circuit confirmed partial summary judgment on grounds that the physician's claims under the federal equal pay act and the state discrimination law were not filed within the statutorily required deadlines. ***Mukherjee v. The Children's Mercy Hospital***, 2020 WL 1813769 (8th Cir. 4/9/2020) (unpublished).

■ **Discrimination and harassment; physician's claims dismissed.** A wrongful termination lawsuit by a physician for racial discrimination retaliation failed. The 8th Circuit affirmed dismissal on grounds that the doctor's poor relationship with co-workers warranted his discharge by the clinic where he worked and was not pretextual, and that a state law claim for a mandatory buyout of his shares in the clinic also was not viable. ***Bharadwaj v. Mid Dakota Clinic***, 954 F.3d 1130 (8th Cir. 4/3/2020).

■ **Whistleblower claim; retaliation rejected.** A wrongful termination retaliation claim by a mortgage underwriter under the Federal False Claims Act was rejected. Affirming dismissal by the trial court, the 8th Circuit Court of Appeals held that there was sufficient evidence of poor job performance and inability to get along with co-workers that prompted the termination. ***Sherman v. Berkadia Commercial Mortgage, LLC***, 956 F.3d 526 (8th Cir. 4/14/2020).

■ **Racial discrimination; retaliation dismissed.** The manager of a bottling plant had his claim of retaliatory firing dismissed after he had been terminated following a complaint regarding racial discrimination. The 8th Circuit, in a ruling written by Judge David Stras of Minnesota, held that the claimant did not show that the discharge was pretextual and was thus barred from pursuing a claim of race discrimination or retaliation. ***Couch v. American Bottling Co.***, 955 F.3d 1106 (8th Cir. 4/16/2020).

■ **Race, gender claims; dismissal affirmed.** Claims of racial and gender discrimination by a supervisor of government services for the needy was dismissed. The 8th Circuit affirmed *per curiam* summary judgment based on the trial court's ruling that the claimant failed to exhaust administrative remedies by not filing a race bias claim with the Equal Employment Opportunity Commission (EEOC) and that there was insufficient evidence of a hostile workplace. ***Reddix v. Arkansas Dept. of Work Force Services***, 2020 WL 1651629 (8th Cir. 4/3/2020) (unpublished).

■ **Pregnancy bias; combination claim rejected.** A woman's claims against Hennepin County under the state pregnancy and parental leave act and whistleblower law were rejected. The Minnesota Court Of Appeals, affirming a ruling of the Hennepin County District Court, held that she was not a covered "employee" under Minn. Stat. §181.94, subd. 2, at the time she requested a pregnancy accommodation and that both of her claims were preempted by the "exclusivity" provision of the Minnesota Human Rights Act. ***Hinrichs-Cady v. Hennepin County***, 2020 WL 1909355 (8th Cir. 4/20/2020) (unpublished).

■ **Human Rights Act; jurisdiction over nonprofit.** The Minnesota Human Rights Act extends to employment discrimination claims by a Native American against a nonprofit organized by a member of the White Earth Band of Ojibwe. The appellate court affirmed a determination by the Becker County District Court that a federal law known as Public Law 280 does not preclude state subject matter jurisdiction because the claimant was a Minnesota citizen and the former employer was a Minnesota nonprofit corporation. ***Campbell v. Honor The Earth***, 2020 WL 1909717 (8th Cir. 4/20/2020) (unpublished).

■ **Unemployment compensation; delivery man's refusal bars claim.** A refusal by an employee to make deliveries as required by his employer precluded his claim for unemployment compensation

benefits. The court of appeals upheld denial of benefits because his refusal to perform the work was based on a dispute with his employer over a bill he had submitted, and not, as he claimed, due to his health. ***Rahn v. Midway Farm Equipment, Inc.***, 2020 WL 1671693 (8th Cir. 4/6/2020) (unpublished).

■ **Untimely appeal; revenue recapture allowed.** A six-year delay in appealing the determination of the Department of Employment & Economic Development (DEED) that an employee must pay back wrongfully received unemployment benefits was time-barred. The appellate court affirmed the determination that DEED could recapture the revenue, because the applicant failed to comply with the applicable 30-day deadline for appealing the determination. ***In re: Abdirahaman***, 2020 WL 1673722 (8th Cir. 4/6/2020) (unpublished).

■ **LGBTQ firing; remand due to *Bostock*.** The dismissal of a discrimination lawsuit by an employee who claimed he was discharged because he is gay was reversed. The 8th Circuit reversed and remanded based on the decision of the U. S. Supreme Court this June holding that LGBTQ status is protected under the Title VII of the Federal Civil Rights Act in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); ***Horton v. Midwest Geriatric Management,*** 2020 WL 3636336 (8th Cir. July 6, 2020) (*per curiam*).

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **10th Circuit rejects EPA's position limiting the scope of Title V reviews.** A three-judge panel of the U.S. Court of Appeals for the 10th Circuit rejected the position recently adopted by the U.S. Environmental Protection Agency (EPA) that when reviewing Clean Air Act (CAA) Title V air emission permits, the agency is not required to reevaluate the substantive validity of underlying Title I preconstruction permits or states' determinations regarding whether a source was properly classified as "major" or "minor." The decision is in marked contrast to a recent decision by the 5th Circuit that deferred to EPA's new policy, *Environmental Integrity Project (EIP), et al. v. EPA*, No. 18-60384 (5th Cir. 5/29/2020) (discussed in this column last month), setting up a circuit-court split that could stamp this issue's ticket to the U.S. Supreme Court.

Title I of the CAA, passed in 1977, establishes the new source review (NSR) program, which requires operators to obtain a preconstruction permit before building a new facility or modifying an old one. States issue NSR permits through EPA-approved state implementation plans (SIPs). Title I establishes significantly more stringent NSR permit requirements for sources classified as "major" (having the potential to emit 100 tons per year or more of any air pollutant) compared to those that are "minor." In 1990, Congress added Title V to the CAA; it was designed to provide each source a single operating permit that consolidates all the various requirements from the source's other air permits, including NSR preconstruction permits as well as applicable state-only requirements. Generally, Title V permits do not add any new substantive requirements beyond those included in the source's underlying permits.

It's relevant to this case that the CAA requires Title V permits to include, among other things, emissions limits, monitoring requirements, and "such other conditions as are necessary to assure

compliance *with applicable requirements of this chapter*, including the requirements of the applicable [SIP]." 42 U.S.C. §7661c(a) (emphasis added). EPA has defined the key term "applicable requirements" to mean, in relevant part, "all of the following as they apply to emissions units in a part 70 source...: (1) Any standard or other requirement provided for in the applicable implementation plan approved... by EPA…" 40 C.F.R. §70.2. In 2017, EPA, in denying a petition to object to a Title V permit for a Utah power plant, announced that it now construes §70.2 such that the requirements described by subsection (1) are merely those contained in the facility's existing Title I permit; if the requirements from the underlying permit(s) are included in the facility's Title V permit, EPA, as part of its review of a Title V permit, will not question the validity of the requirements. *EIP v. EPA* 7. As noted, the 5th Circuit in *EIP v. EPA* deferred to EPA's interpretation.

The 10th Circuit did not. The case at hand, *Sierra Club v. EPA*, involved the renewal of a Title V permit for an industrial plant in Utah. Previously, the state had granted the plant a minor NSR permit to make certain modifications. Utah incorporated the provisions of the minor NSR permit in the proposed Title V permit. EPA did not object to the proposed permit. Sierra Club then filed a petition to compel the EPA to object, arguing in part that the earlier modifications should have triggered major NSR requirements. EPA argued that, consistent with the agency's 2017 policy, it was inappropriate to reevaluate the state's decision of whether major or minor NSR requirements applied.

On review, the court applied "*Auer* deference," stating that it would consider EPA's interpretation of its own regulation, i.e., 40 C.F.R. §70.2, controlling unless it was plainly erroneous or inconsistent with the regulation. *See Auer v. Robbins*, 519 U.S. 452, (1997). But the court also noted that *Auer* deference is only appropriate when the regulation is genuinely ambiguous. Here, the court found that §70.2 "unmistakably requires that each Title V permit include all requirements in the state implementation plan, including Utah's requirements for major NSR." This was clear not only from the language of §70.2(1) ("*any* standard or other requirement provided for in the applicable implementation plan") but also by §70.2(2), which includes as part of "applicable requirements" any "term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking."

This language, the court held, "clarifies that terms in the preconstruction permits supply additional requirements" (and not the *only* requirements, as EPA argued). The court also rejected EPA's arguments that the introductory language "as they apply" in §70.2 limits the scope of "applicable requirements" to only those conditions contained in earlier NSR permits. Likewise, the court was unconvinced by EPA's references to rulemaking history. EPA's interpretation of "applicable requirements," the court held, "conflicts with the unambiguous regulatory definition." Accordingly, the court remanded to EPA for further consideration of Sierra Club's petition. ***Sierra Club v. EPA***, No. 18-9507 (10th Cir. 7/2/2020).

ADMINISTRATIVE ACTION

■ **EPA ending covid-19 enforcement discretion policy.** In late June the U.S. Environmental Protection Agency (EPA) gave notice that it will be terminating its temporary policy allowing for discretionary enforcement of environmental legal obligations during the covid-19 pandemic.

On 3/26/2020, EPA had announced that it would exercise enforcement discretion for noncompliance that resulted from the pandemic. The temporary policy directed entities to make every effort to comply with their environmental compliance obligations. But under circumstances where compliance was not reasonably practicable, the temporary policy directed entities to identify and document the specific nature and dates of noncompliance and identify and document how covid-19 was the cause of the noncompliance. Furthermore, the temporary policy directed entities of noncompliance to document the decisions and actions taken in response to the noncompliance, including the best efforts to comply with their environmental obligations and the steps taken to come into compliance at the earliest opportunity.

Where EPA agreed that covid-19 was the cause of noncompliance, the agency would not seek penalties for violations of routine compliance activities such as monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification. The temporary policy did not apply to any criminal violations or activities carried out under Superfund or RCRA Corrective Action enforcement instruments.

The termination of the temporary policy will take place at 11:59 PM EST, 8/31/2020. After 8/31, EPA will not base any exercise of enforcement discretion on the temporary policy for any noncompliance. In its 6/29 memo, EPA said that it may terminate the temporary policy prior to 8/31/2020, either nationally or at a more local level, depending on changing conditions across the country, the lifting of "stay at home" orders in a state, and the status of federal and/or state covid-19 public health emergency guidelines. If it does terminate the temporary policy early, the agency will provide to the public at least seven days advance notice before official termination of the policy. ***EPA Memorandum, COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program: Addendum on Termination*** (6/29/2020).

■ **Line 3 contested case hearing scheduled.** On 6/3/2020, the Minnesota Pollution Control Agency (MPCA) announced it would be granting a contested case hearing on its draft 401 Water Quality Certification for Enbridge's Line 3 replacement project. The MPCA's announcement came in response to

petitions for contested case hearings received by the MPCA from environmental organizations and Tribal Nations after the MPCA issued a public notice of its preliminary determination to issue the 401 Certification, along with a National Pollution Discharge Elimination System/State Disposal System permit, and a capped air emission permit.

In reviewing the petitions received, the MPCA concluded that the requirements to hold a contested case hearing under Minnesota Rule 7000.1800, subpart 2.A were met with regard to the petition presented jointly by Friends of the Headwaters, Sierra Club, and Honor the Earth, with the White Earth band of Ojibwe and the Red Lake Band of Chippewa Indians (collectively, the Friends of the Headwaters Petition). The MPCA determined that the Friends of the Headwaters petition presented five issues of fact that satisfied the criteria for granting a contested case. The five issues of fact are:

1. Does Enbridge's proposed use of trench methods for stream crossings have temporary or permanent impacts on water quality parameters of concern?
2. Have Enbridge and the MPCA identified the least degrading crossing method that is prudent and feasible for each stream crossing?
3. Have Enbridge and the MPCA undercounted the full acreage of the project's wetland impacts due to flaws in wetland delineation and survey methodologies related to the seasonality of delineation activities?
4. Have Enbridge and the MPCA undercounted the full acreage of wetlands that are physically altered by trenching?
5. Have Enbridge and the MPCA incorrectly determined that the impacts to wetlands that are physically altered by trenching are temporary?
6. Other than these five issues of fact, the MPCA determined that there were no other issues presented in the other petitions that satisfied the criteria required to grant a contested case.

The contested case hearing is set to take place August 24-28, 2020, with the administrative law judge report due by 10/16/2020, and the final decision regarding the 401 Certification due by 11/14/2020. ***In the Matter of the Contested Case Hearing Requests on the Draft 401 Certification for the Line 3 Replacement Project.***

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FEDERAL PRACTICE

JUDICIAL LAW

Notice of appeal; specificity. Rejecting the appellee's argument that the appellant's notice of appeal failed to specifically identify the district court's class certification orders, the 8th Circuit found that a notice of appeal that identified "all previous rulings and orders that led up to and served as a predicate for that final judgment" was sufficient for the appellant to appeal the class certification orders. ***Vogt v. State Farm Life Ins. Co.***, ___ F.3d ___ (8th Cir. 2020).

Motion for summary judgment; sham affidavit doctrine. Rejecting the plaintiff's argument that the defendant had relied on "sham" affidavits in support of its motion for summary judgment, the 8th Circuit found that the affidavits were not "shams," and suggested in *dicta* that the sham affidavit doctrine applies only to affidavits submitted by the party *opposing* summary judgment. ***Button v. Dakota, Minn & E. R.R. Corp.***, ___ F.3d ___ (8th Cir. 2020).

Temporary restraining order; personal jurisdiction. Where the plaintiff commenced an action and sought a temporary restraining order, and the defendants opposed the TRO motion and brought a motion to dismiss for lack of personal jurisdiction, Judge Nelson found that the plaintiff had made a *prima facie* case for personal jurisdiction and granted the TRO, but also indicated that she would take a longer look at the personal jurisdiction issue in conjunction with the defendant's motion to dismiss and the plaintiff's motion for a preliminary injunction, and ordered the parties to meet and confer to address the potential need for jurisdictional discovery. ***3M Co. v. Starsiak***, 2020 WL 3566718 (D. Minn. 6/26/2020).

Standing; preliminary injunction. Where plaintiffs brought an action challenging Minnesota's ballot order statute and sought a preliminary injunction, and an amicus challenged plaintiffs' standing, Judge Nelson acknowledged a circuit split on the issue of what measure of proof applied to the issue of plaintiffs' standing at an early stage in the litigation, held that plaintiffs were not required to prove standing at the preliminary injunction stage "with the same degree of proof" that would be required at the summary judgment stage, and that plaintiffs had provided "ample affidavit evidence" to support standing. ***Pavek v. Simon***, 2020 WL 3183249 (D. Minn. 6/15/2020).

Motion to disqualify counsel; standing; class action opt-outs. In separate opinions in the same MDL, Judge Davis first rejected an attempted mass opt-out of a class action settlement by thousands of class members where the opt-out documents were signed by counsel rather than each plaintiff as required by the settlement agreement.

In the second opinion, Judge Davis denied the defendant's motion to disqualify counsel for the opt-out plaintiffs, finding that the defendant lacked standing to bring the motion because it was not a current or former client of those attorneys, and it did not allege that those attorneys had obtained its confidential information, meaning that

it was the opt-out plaintiffs, rather than the defendant, that had been harmed by their counsel's alleged misconduct. ***In Re: CenturyLink Sales Practices & Sec. Litig.***, 2020 WL 3512807 (D. Minn. 6/29/2020); ***In Re: CenturyLink Sales Practices & Sec. Litig.***, 2020 WL 3513547 (D. Minn. 6/29/2020).

■ **Standing; receipt of text messages; injury; motion to compel arbitration.** Chief Judge Tunheim denied the defendant's motion to dismiss a putative spam text message class action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), finding that the "majority" of courts had found that the receipt of a single text message caused an "injury" sufficient to confer standing and that the plaintiffs had adequately alleged all of the elements of their claim, and also denied defendant's motion to compel arbitration against one plaintiff, finding that the defendant had not met its burden to demonstrate the existence of a contract that required arbitration. ***Pederson v. Donald J. Trump for President, Inc.***, 2020 WL 3047779 (D. Minn. 6/8/2020).

■ **Motion to strike jury demand granted.** Affirming an order by Magistrate Judge Schultz, Judge Wright agreed that plaintiff's jury demand should be stricken where the plaintiff sought the equitable remedy of disgorgement under the Copyright Act. Judge Wright also declined to determine whether the motion to strike was dispositive or nondispositive, finding that because the order involved a "pure question of law," it was subject to *de novo* review in any event. ***Fair Issac Corp. v. FDIC***, 2020 WL 3446872 (D. Minn. 6/24/2020).

■ **Arbitration; litigation waiver; who decides?** Rejecting the defendant's argument that the issue of litigation waiver should be decided by an arbitrator, Judge Magnuson held that the issue was to be determined by the court, and that the defendant had waived any right to arbitrate by litigating motions to compel discovery, a motion to stay, appeals of Magistrate Judge's decisions and a motion for partial summary judgment, and waiting until "after receiving unfavorable rulings" before attempting to invoke its right to arbitrate. ***Borup v. CJS Solutions Grp., LLC***, 2020 WL 2769143 (D. Minn. 5/28/2020).

■ **Discovery; failure to respond; waiver of objections.** Where the defendants failed to respond or object to the plaintiffs' discovery requests within the deadlines set forth in the Federal Rules of Civil Procedure, Magistrate Judge Leung rejected defendants' attempt to establish "good cause" for their failure to respond and found that their failure to serve timely objections resulted in the waiver of any objections, meaning that defendants were required to respond to the discovery requests "in full." ***Laughlin v. Stuart***, 2020 WL 3171326 (D. Minn. 6/15/2020).

■ **Denial of motion to compel arbitration; appeal; stay granted.** Acknowledging "a well-documented circuit split," a split within the District of Minnesota, and the absence of an 8th Circuit decision on point, Judge Tostrud stayed proceedings pending resolution of the defendant's appeal of the denial of its motion to compel arbitration. ***Engen v. Grocery Delivery E-Services USA Inc.***, 2020 WL 3072316 (D. Minn. 6/10/2020).

■ **Motion for leave to conduct expedited third-party Doe discovery denied.** Where the plaintiff sought expedited third-party discovery from Google relating to the identity of numerous John Doe defendants, Magistrate Judge Wright denied the motion without prejudice, finding that plaintiff had not produced the required *prima facie* evidence to support each of its claims, and that the requested discovery was overbroad to the extent that it sought information beyond the name, contact information, and ISP information for each defendant. ***NCS Pearson, Inc. v. John Does (1 through 21)***, 2020 WL 3249292 (D. Minn. 6/16/2020).

■ **Multiple requests for interlocutory appeal denied.** Judge Wright denied plaintiffs' request for entry of judgment pursuant to Fed. R. Civ. P. 54(b) or certification pursuant to 28 U.S.C. §1292(b), finding that the relevant factors weighed against the "extraordinary remedy" of Rule 54(b) relief, and that the plaintiffs had not met their burden on at least two of the three factors governing Section 1292(b) certification. ***In Re Polaris Mktg., Sales Practices and Prods. Liab. Litig.***, 2020 WL 3530624 (D. Minn. 6/30/2020).

Judge Frank denied the defendants' motion to certify five questions for interlocutory appeal under 28 U.S.C. §1292(b), finding that none of the questions involved controlling issues of law, and that further delays in the case, which has been pending for 12 years, would fail to advance the interests of justice. ***United States ex rel. Johnson v. Golden Gate Nat'l Senior Care, L.L.C.***, 2020 WL 3072315 (D. Minn. 6/10/2020).

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INDIAN LAW

JUDICIAL LAW

■ **For purposes of the Major Crimes Act, millions of acres in eastern Oklahoma reserved for the Muscogee (Creek) Nation remain Indian country.** Following a failure to reach a decision last term in *Carpenter v. Murphy* due to Justice Gorsuch's recusal, the Supreme Court held in a 5-4 decision that the Muscogee (Creek) Nation's Reservation had never been disestablished. Following his criminal conviction in Oklahoma state court, the enrolled tribal member McGirt argued that because his conduct occurred within the Creek Reservation, the Major Crimes Act divested the state court of jurisdiction over his crimes, and he should have been tried in federal court. The Supreme Court rejected the state of Oklahoma's arguments, and held that the United States established a reservation for the Creek Nation in the early 1800s through

treaties, Congress did not diminish or disestablish that reservation through any legislative enactments during the allotment era, and historical practice and demographics are not enough, on their own, to constitute disestablishment of an Indian reservation. Justice Gorsuch issued a strongly worded opinion, refusing to elevate "the most brazen and longstanding injustices over the law" and requiring the United States keep its treaty promises. The Supreme Court made its decision under the definition of "Indian country" used in the Major Crimes Act, 18 U.S.C. §1151, but this definition is borrowed and referenced in many other criminal and civil statutes. ***McGirt v. Oklahoma***, No. 18-9526, 2020 WL 3848063 (U.S. 7/9/2020).

■ **Non-federally recognized tribe must exhaust administrative remedies prior to lawsuit.** The District Court for the District of Columbia granted the United States' motion to dismiss a complaint filed by the Mdewakanton Band of Sioux in Minnesota seeking listing as a federally recognized Indian tribe in the Federal Register. The court rejected arguments by the band that the Department of the Interior's administrative process for recognizing Indian tribes was inapplicable due to the band's unique history, and required the band to avail itself of that process before filing suit. ***Mdewakanton Band of Sioux in Minnesota***, No. 19-402 (TJK), 2020 WL 2800615 (D.D.C. 5/30/2020).

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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Patent: Tort claims preempted by patent law.** The Court of Appeals for the 8th Circuit recently affirmed the U.S. District Court for the District of Minnesota's grant of summary judgment in favor of Graphic Packaging Int'l, LLC and against Inline Packaging, LLC. Graphic and Inline compete in the consumer-packaged-goods industry. In 2014, Nestlé held a one-day auction to select a supplier of susceptor sleeves for three product lines: Kahiki, Croissant Pockets, and Hot Pockets. Inline was awarded the business for all three products. Following Graphic's cease-and-desist letter to Inline, Nestlé awarded Graphic a three-year contract. In June 2015, Graphic filed a patent infringement suit against Inline alleging infringement of a utility patent and design patents. Inline brought an *inter partes* review against Graphic's utility patent, which resulted in the invalidation of the patent. In July 2015, while the patent infringement case was pending, Inline filed suit against Graphic alleging antitrust and tortious interference violations. The district court granted Graphic's motion for summary judgment, dismissing all of Inline's claims and denying Inline's motion for partial summary judgment. Inline appealed. On appeal, after first dismissing Inline's antitrust claim, the 8th Circuit affirmed the district court's dismissal of Inline's tortious interference claims. The 8th Circuit noted that federal law preempts state tort liability when a patent holder, in good faith, asserts a warning about pursuing potential patent infringement litigation. Only if the patent owner acts in bad faith does the state claim survive federal preemption. The 8th Circuit concluded that because Inline failed to show that Graphic acted in bad faith, the district court properly dismissed the claim based on preemption. ***Inline Packaging, LLC v. Graphic Packaging Int'l, LLC***, No. 18-3167, 2020 U.S. App. LEXIS 19061 (8th Cir. 6/18/2020).

■ **Patent: Invalidation of patent does not impact breach of contract adjudication.** Judge Frank recently denied Corning Inc.'s renewed motion for summary judgment to dismiss Wilson and Wilson Wolf Manufacturing Corp.'s claims of breach of contract, trade secret misappropriation, and correction of inventorship. Wilson is the founder and CEO of Wilson Wolf, a biotechnology company that develops and manufactures cell-culture devices. Corning is a multinational technology company that, Wilson alleges, developed products using Wilson Wolf's technology after obtaining access under a confidentiality agreement. The technology in question was disclosed in three of Wilson Wolf's patent applications and in a Small Business Innovation Research Grant application that Wilson Wolf filed with the National Institute of Health. On 3/29/2017, the court found that summary judgment was not proper with respect to the contract claim because issues of material fact existed regarding the misuse of confidential information. On 12/26/2017 the United Stated Patent Office's Patent Trial and Appeals Board invalidated Wilson Wolf's patent. Wilson Wolf's request for rehearing and subsequent appeal to the federal circuit were both denied. Corning then renewed its motion for summary judgment. On Corning's renewed motion, the court found that the PTAB's decision had no effect on Wilson Wolf's breach of contract claim. The court reasoned that a question of fact remained as to whether the information covered in the patent was considered confidential information (as protected by the confidentiality agreement) despite the patent being invalidated. ***Wilson v. Corning Inc.***, No. 13-210 (DWF/TNL), 2020 U.S. Dist. LEXIS 105942 (D. Minn. 6/17/2020).

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TAX LAW

JUDICIAL LAW

■ **"Tool plans" face continued scrutiny; Section 6700 penalties upheld.** For several years, the Service has focused enforcement on so-called "tool plans." Such plans purport to receive tax-favored treatment as "accountable plans" under Internal Revenue Code §62(c) and the

accompanying regulations. An "accountable plan" permits employers to reimburse employees without the reimbursement being considered income. For a plan to be an "accountable plan" and receive this tax-neutral treatment, the expenses must be business-related and accounted for properly, and any amounts paid in excess of actual costs must be returned to the company within a specified timeframe.

While many accountable plans are nonabusive, the Service determined that some accountable plans are designed only to evade tax and are abusive. The Service created an enforcement team to ferret out such abusive plans. At issue in these cases are those plans that were designed and operated around a structure that recharacterized a portion of the employee's existing pay as a "reimbursement" for the employee's tools merely to generate tax savings for both the employer and the employee.

Two such cases recently made their way through the tax court. The cases were consolidated for trial but were reported separately. Allen Davison and Bruce LeMay had been friends since the early '90s. In late 1999, the two decided to work together to promote tool plans. Mr. LeMay had worked as an insurance executive and Mr. Davison was an attorney and CPA who at the time worked as a tax partner at Grant Thornton. (Mr. Davison's relationship with GT ended in 2001.) The pair spent months devising the tool plans at issue in this dispute. Despite advice from several firms that the plans would not be respected by the Service (including advice from Grant Thornton, which eventually disavowed the tool plans at issue in this dispute) the pair marketed their tool plans through a company—Cash Management Systems (CMS)—created for that purpose.

CMS had success promoting its tool plans. But eventually clients' returns were audited by the IRS in connection with their participation in the plans. In total 24 CMS client-employers had returns audited by the IRS, resulting in total tax due of $4.5 million.

Although they eventually stopped selling new plans, CMS, Mr. Davison, and Mr. LeMay continued to provide advice to existing clients even as Mr. Davison faced an action by the United States to enjoin him from promoting tax shelters. In addition to the injunction action, the IRS opened a section 6700 penalty examination against CMS, Mr. Davison, and Mr. LeMay regarding the tool program. Section 6700 authorizes the imposition of penalties on those who organize and sell abusive tax shelters.

Ultimately, Mr. Davison was assessed Section 6700 penalties of $36,000 and Mr. LeMay faced significantly higher total penalties (around $180,000). Both petitioned the tax court for review of their respective penalties. Neither succeeded in his challenge, and the tax court upheld the penalties. Both petitioners have filed appeals to the 10th Circuit. ***Davison v. Comm'r***, TCM 2020-058 (T.C. 2020); ***LeMay v. Comm'r***, T.C.M. 2020-059 (T.C. 2020).

■ **What's in a name? Service disputes taxpayers' characterizations of transfers as loans or gifts.** In our introductory income tax classes, we learn that loans are not income. Gifts are not income either. These are easy rules to recite, but the dividing line between loans or gifts on one hand and income on the other is not always easy to divine, as three recent cases illustrates.

In the first case, a taxpaying couple argued that litigation support payments received by the taxpayer husband were not income, but loans. Mr. Novoselsky was a well-known Chicago-area class-action attorney. Under the agreements at issue, individuals not related to Mr. Novoselsky made an upfront payment to support the cost of litigation. If the litigation was successful, Mr. Novoselsky returned the initial payment plus a premium from Mr. Novoselsky's award of attorney's fees and costs. If the litigation was unsuccessful, Mr. Novoselsky had no obligation to repay. Mr. Novoselsky (and his spouse) did not report the payments thus received as gross receipts or income. After an audit, the Service disagreed with Mr. Novoselsky's characterization. To be considered a loan for federal income tax purposes, the recipient must have an unconditional obligation to repay. Since repayment of the litigation support payments was conditioned on the outcome of the litigation, the litigation support payments were not loans for federal income tax purposes. The petitioners were liable for accuracy-related penalties of just over $100,000. ***Novoselsky v. Comm'r***, T.C.M. (RIA) 2020-068 (T.C. 2020).

Just as bona fide loans are not income, gifts are not income. Similarly, though, just as calling something a "loan" does not make it so, labeling a transfer a "gift" does not make it so. In fact, even transfers that might be common law "gifts" might not be "gifts" in the statutory sense, because to be a gift in the statutory sense the donor must make the transfer with "detached and disinterested generosity." In *Kroner v. Commissioner*, a taxpayer was unable to persuade the tax court that the $24 million he had received from an unrelated business associate was a gift for tax purposes. Mr. Kroner did not call the purported giftor to testify and did not provide persuasive documentary evidence that the multi-million dollar transfer was a gift. The failure of the purported giftor to testify is significant, since case law dictates that it is the donor's intent that controls the question of whether a transfer proceeds from the requisite "detached and disinterested generosity" for the transfer to attain gift status. Mr. Kroner instead relied on his own testimony, which the court found "self-serving," and the testimony of two other witnesses whom the court determined to be "simply not credible." ***Kroner v. Comm'r***, TCM (RIA) 2020-073 (T.C. 2020).

While *Kroner* explored the line between gift and income, a different case explored whether transfers made over many years from a mother to an adult child were properly considered loans or gifts. Mary Bolles advanced just over $1 million to her son, Peter, during her lifetime. To determine the proper characterization of the advances, the court applied a multifactor test, including whether: (1) there was a promissory note or other evidence of indebtedness, (2) interest was charged, (3) there was security or collateral, (4) there was a fixed maturity date, (5) a demand for repayment was made, (6) actual repayment was made, (7) the transferee had the ability to repay, (8) records maintained by the transferor and/or the transferee reflect the transaction as a loan, and (9) the manner in which the transaction was reported for federal tax purposes is consistent with a loan. *Citing Miller v. Comm'r*, T.C. Memo. 1996-3, *aff'd*, 113 F.3d 1241 (9th Cir. 1997).

Since the loan from Mary to Peter was in a family setting, the court also applied the "longstanding principle that an actual expectation of repayment and an intent to enforce the debt are critical to sustaining the tax characterization of the transaction as a loan." In this case, the court was not persuaded that Mary had an actual expectation of repayment. The transfers, therefore, were characterized as gifts, not loans. ***Estate of Mary P. Bolles v. Comm'r***, T.C.M. (RIA) 2020-071 (T.C. 2020).

■ **Cleaning services workers independent contractors, not employees.** Comparing the petitioner to a "dispatcher," the tax court rejected the commissioner's argument that the taxpayer had misclassified employees as independent contractors. Ms. Santos owned and operated a

cleaning service that focused on "unit turnover cleaning," which involved cleaning apartments when they were vacant between tenants. Ms. Santos had contracts with numerous apartment complexes and worked with other individuals to provide the necessary cleaning services. Ms. Santos considered the other cleaning providers to be independent contractors. The Service argued that the providers were in fact employees of Ms. Santos's business. Applying well-established common law factors, the court agreed with Ms. Santos. The court found that Ms. Santos credibly testified that she lacked the requisite control over the providers for the providers to meet the "employee" criteria. Ms. Santos, therefore, was not liable for the federal employment taxes as determined by the IRS for the periods at issue. ***Santos v. Comm'r***, TCM (RIA) 2020-088 (T.C. 2020).

More conservation easement cases. Last month we reported on several conservation easement cases, including *Oakbrook Land Holdings, LLC v. Comm'r*, 154 T.C. 25 (TC 2020), in which a divided tax court upheld a regulation setting out rules for charitable donations or conservation easements. Citing *Oakbrook Holdings*, the tax court again upheld the denial of a claimed charitable deduction for a conservation easement. ***Lumpkin HC, LLC, Hurricane Creek Partners v. Comm'r***, T.C.M. (RIA) 2020-095 (T.C. 2020) (finding that "[t]he deed granting the conservation easement reduces the donee's share of the proceeds in the event of extinguishment by the value of improvements (if any) made by the donor" and therefore holding that the taxpayer "has not satisfied the perpetuity requirement of section 170(h)(5)(A)" and thus was not entitled to summary judgment). Several cases involving charitable contribution deductions for conservation easements were reported this month. *See, e.g.*, ***Maple Landing, LLC, Effingham Mangers, LLC v. Comm'r***, T.C.M. (RIA) 2020-104 (T.C. 2020) (granting commissioner's motion for summary judgment in a similar conservation easement dispute); ***Plateau Holdings, LLC, Waterfall Development Manager, LLC v. Comm'r***, T.C.M. (RIA) 2020-093 (T.C. 2020) (holding the IRS property disallowed a claimed $25.5 million deduction and noting that just days prior to the contribution, an investor had acquired, in an arm's-length transaction, a 98.99% indirect ownership interest in Plateau for less than $6 million).

Petitioner raises constitutional defense that evidence of a mailed notice is not sufficient due process, court is unpersuaded. Mr. Olson appealed a tax order dated 9/6/2017, which assessed him for sales and use taxes from December 2013 to December 2016. Mr. Olson runs a farming operation and a heavy construction business in Thief River Falls. Prior to the issuance of the tax order at issue, the commissioner sent Mr. Olson numerous letters concerning an audit for sales and use taxes. After Mr. Olson did not respond to the preliminary audit, the commissioner mailed the disputed tax order. On December 26, 2019, Mr. Olson filed his appeal of the tax order, in which he disputed all the amounts determined in the order. Mr. Olson asserts that he never received the commissioner's tax order and only learned of the tax liability when his bank account was levied by the Department. The commissioner filed a motion to dismiss, stating that the appeal is untimely, and the tax court lacked subject matter jurisdiction over the appeal. The commissioner's motion included an affidavit from an employee who attested to having reviewed the Department's electronic and paper records, which showed the tax order under appeal was printed on 9/1/2017 at 11:04 p.m. and postmarked on 9/5/2017, at 11:10 a.m. Mr. Olson responded to the commissioner's motion, stating that: 1) the tax order was not mailed, and 2) if the court determined that the tax order was mailed, mailing is not constitutionally sufficient due process. On 5/21/2020, Mr. Olson filed a motion for leave to supplement the factual record, and to allow supplemental briefing. In his supplements, Mr. Olson states that he is unable to pay the amount in the tax order without substantial personal and business hardship, and that the court should not grant the commissioner's motion to dismiss because the parties had not argued the case law in detail. The commissioner opposed Mr. Olson's motion for leave.

Minn. Stat. §271.06, subd. 2 (2018) states that a taxpayer has 60 days to appeal an order of the commissioner. Failure to timely file an appeal deprives the court of subject matter jurisdiction. *See Langer v. Comm'r of Revenue*, 773 N.W.2d 77, 80 (Minn. 2009). If the court lacks subject matter jurisdiction, Minnesota Rules of Civil Procedure 12.02(a) allows for a party to move for dismissal.

In the court's analysis, the court stated that under Minn. Stat. §270C.33, subd. 8 (2018), the commissioner need only to establish that the order was mailed with postage prepaid to the taxpayer at the taxpayer's last known address, not actually received. As to Mr. Olson's constitutional defense, the court noted that the Minnesota Supreme Court held that within the tax assessment process, "the due process required is 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *See Turner v. Comm'r of Revenue*, 840 N.W.2d 205 (Minn. 2013).

There was no dispute that all the commissioner's correspondence, including the disputed tax order, used the correct mailing address. Ruling that the commissioner issued her tax order in this case on 9/5/2017, the court stated that the appeal would have been timely if filed no later than Wednesday, 11/8/2017. Mr. Olson's appeal was filed more than two years after the deadline. Therefore, the court found the appeal to be untimely, and the court lacked subject matter jurisdiction. The commissioner's motion to dismiss was granted. ***Olson v. Comm'r of Revenue***, 2020 WL 3455828 (Minn. T.C. 6/15/2020).

Walmart challenges valuation on several Anoka County properties, raises claims of discrimination. Walmart and Anoka County are engaged in a series of valuation disputes with respect to several properties. In one of the disputes, Walmart filed a petition with Anoka County on 4/26/2019 for taxes payable in 2019 (pay-2019 cases). The petition, captioned Chapter 278 Petition, alleged 2 counts: 1) the assessed value of the subject property is greater than the property's market value, and 2) Walmart makes statutory and constitutional unequal assessment claims. Walmart alleges that Anoka County refused to accept "valid fee-simple sales of like properties" in violation of Minn. Stat. section 273.12 (2018), and that the county's actions violate constitutional rights arising under the equal protection and the uniformity clauses of the U.S. Constitution.

Walmart filed a motion to transfer all the pay-2019 cases pending in Anoka County to the district court, stating Walmart is entitled to judicial relief concerning the market value of the subject property and injunctive relief requiring the county to reassess the subject property. The county moved to dismiss the petition, alleging that Walmart failed to comply with the mandatory disclosure rule of Minn. Stat. section 278.05, subd. 6 (2018) for income-producing property. Additionally, the county alleges that Walmart lacks standing to bring a chapter 278 petition because Walmart has not established its interest in the subject property. Walmart contends that it has complied with the mandatory disclosure rule.

Minn. Stat. section 278.01, subd. 1(a) provides that "'[a]ny person having personal property, or any estate, right, title, or interest in or lien upon any parcel of land' may file a petition with respect to the claims set forth in the statute. A lessee who is bound by the terms of a lease has a 'vital interest' to protect and accordingly has standing."

The mandatory disclosure rule specifies that, in cases where the petitioner contests the valuation of income-producing property, certain information must be provided to the county assessor no later than August 1 of the taxes-payable year. Failure to submit the required documentation by the August 1 deadline results in automatic dismissal of the petition unless an exception applies. *See* Minn. Stat. 278.05, subd. 6.

Minn. Stat. section 273.11, subd. 1 (2018), provides that all property shall be valued at its market value. A statutory claim of unequal assessment first requires the taxpayer to establish the overvaluation of the subject property and obtain a reduction of its estimated market value to the actual market value determined by the tax court. *See Chodek v. Cty. of Otter Tail*, No. 56-CV-13-1038 et al., 2017 WL 6813397, at 5 (Minn. T.C. 12/4/2017) (citing *Anacker v. Cty. of Cottonwood*, 302 N.W.2d 342, 345 (Minn. 1981)). *See, also*, *Weyerhaeuser Co. v. Cty. of Ramsey*, 461 N.W.2d 922, 924 (Minn. 1990) (citing *United Nat'l Corp. v. Cty. of Hennepin*, 299 N.W.2d 73, 75-76 (Minn. 1980)). After this requirement is satisfied, the tax court may address the percentage applied by the assessor to the market value of the property involved as compared with the percentage applied to other property of the same class in the assessment district in arriving at the full and true value for tax purposes.

Relief for constitutional claims of unequal assessment is not available unless the petitioner can demonstrate statutory unequal assessment. *See Anacker*, 302 N.W.2d at 344-45. "To make out a case of discrimination in fact, plaintiffs must demonstrate unequal assessment and must demonstrate that inequality exists within the relevant taxing district." *Id.* at 345 (citing *Renneke*, 255 Minn. at 248,

97 N.W.2d at 380).

In a lengthy analysis, the court holds that Walmart failed to disclose information required by the mandatory disclosure act, and therefore, Walmart's claim of excessive valuation in the petition is dismissed. Because a determination of actual market value of the subject property is a prerequisite to a statutory unequal assessment claim, and because Walmart's valuation claim is dismissed pursuant to the mandatory disclosure rule, the court does not address Walmart's statutory unequal assessment claims. *Beet Sugar Coop v. Cty. of Renville*, 737 N.W.2d 545, 561 (Minn. 2007). Additionally, the court did not reach Walmart's constitutional claims for unequal assessment. Relief for constitutional claims of unequal assessment is not available unless the petitioner also demonstrates statutory unequal assessment. Walmart's statutory and constitutional claims of unequal assessment are dismissed.

The court also heard motions on Walmart's motion to transfer and on the county's motion to dismiss. In a separate order, the court denied Walmart's motion to transfer, and granted the county's motion to dismiss. ***Walmart v Anoka Cty***, 2020 WL 3456323 (Minn. Tax Court 6/17/20); 2020 WL 3455834 (Minn. Tax Court 6/17/20); 2020 WL 3455831 (Minn. Tax Court 6/17/20); 2020 WL 3455836 (Minn. Tax Court 6/18/20); 2020 WL 3455827 (Minn. Tax Court 6/19/20).

■ **Onerous service requirements result in dismissal of petitioners' claims.** On 4/30/2018, petitioners filed a petition under Minn. Stat. §278.01, subd. 1 (2018), setting forth numerous claims relating to a parcel of real property located in Hennepin County for taxes payable in 2018. Three days earlier, on 4/27, petitioners deposited in a U.S. Mail box copies of their petition addressed to various Hennepin County officials. The envelopes addressed to the auditor and treasurer, respectively, were post-marked 4/28/2018, and were stamped "Received May 01, 2018" by county officials.

On 10/11/2018, Hennepin County filed a motion to dismiss for lack of jurisdiction, arguing that the petition was not timely served. Petitioners opposed the county's motion. The Honorable Joanne H. Turner heard the county's motion on 11/19/2018. But before Judge Turner could rule, she lost jurisdiction to do so, because the petition was dismissed by operation of law due to the petitioners' failure to pay property tax on the parcel. The case was statutorily reinstated one year later, on 12/30/2019, through a notice of reinstatement and assigned to Judge Delapena.

On 1/17/2020, the county filed a motion to renew its motion to dismiss and requested a telephonic hearing on the motion. Petitioners opposed the request for telephonic hearing, but subsequently filed a request for hearing continuance that included various information unrelated to timeliness of service, requested discovery on matters unrelated to timeliness of service, and requested the hearing be continued for "re-briefing." Petitioners failed to secure a hearing date from the tax court administrator. The court convened the telephonic hearing on the county's motion to dismiss at 9:00 a.m. on 3/18/2020. Petitioners did not attend the hearing.

A property tax petition must be filed and served "on or before April 30 of the year in which the tax becomes payable." Minn. Stat. §278.01, subd. 1(a), (c). To challenge a county's property tax assessment, the petition must be served on the county's auditor, treasurer, attorney, and assessor.

In April 2018, service by mail was governed by Minnesota Rule of Civil Procedure 4.05, which provided in part: "[A]ny action service may be made by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 22 and a return envelope, postage prepaid, addressed to the sender…."

A property tax petition must be served "on or before 4/30 of the year in which the tax becomes payable. In this case, the county auditor and treasurer did not receive petitioners' petition until 5/1/2018, one day after the statutory service deadline. Therefore, service on the auditor and treasurer were untimely. Timely and effective service must be made to all required parties. *See* Minn. Stat. §278.01 (2018).

The court noted that it is unfortunate that the Legislature had chosen to make the service of a property tax petition so difficult by requiring service on four separate county officials. Here, petitioners mailed their petition to the specified officials on 4/27/2018 but only two of the four received the mailing by 4/30. Because petitioners did not timely serve the petition, the court lacked jurisdiction to hear the claim and granted the County's motion to dismiss. ***Johnson v. Hennepin Cty***, 2020 WL 3456316 (Minn. Tax Court 6/18/20).

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JUDICIAL LAW

■ **Statute of limitations; some damage rule of accrual.** In 2009, decedent's pulmonologist informed him that he had calcium deposits on his lungs due to asbestos exposure. In December 2011, decedent was diagnosed with mesothelioma. In January 2012, decedent learned that asbestos exposure had caused his mesothelioma. Decedent died of mesothelioma on 3/1/2015. On 2/23/2018, decedent's wife filed suit against defendant alleging that decedent contracted mesothelioma and died because he was exposed to asbestos-containing products sold by defendant's predecessor. The district court granted summary judgment for defendant, concluding that the statute of limitations barred plaintiff's claim. The court of appeals affirmed.

The Minnesota Supreme Court affirmed. Relying on precedent, the Court held that "because of the unique character of asbestos-related deaths, wrongful death actions brought in connection with those deaths accrue either upon the manifestation of the fatal disease in a way that is causally linked to asbestos, or upon the date of death—whichever is earlier." As a result, plaintiff's cause of action accrued in January 2012, the date decedent was informed that exposure to asbestos caused his mesothelioma. In so holding, the Court rejected plaintiff's contention that plaintiff's "wrongful death claim did not accrue—and therefore the period of limitations did not begin to run—until it was reasonably discoverable that [defendant's] products were the proximate cause of [decedent's] mesothelioma." (Disclosure: The author's law firm, Bassford Remele, successfully represented Respondent Honeywell International, Inc. in this case.) ***Palmer v. Walker Jamar Co.***, Nos. A18-2114; A19-0155 (Minn. 7/1/2020). *https://mn.gov/law-library-stat/archive/supct/2020/OPA182114-070120.pdf*

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B. Steven Messick has formed Messick Law, PLLC. Messick law serves clients in civil, trust and estate, family, elder and special needs, and real estate matters throughout Southern Minnesota and the Metro area.


MESSICK


STELLPFLUG

Janet G. Stellpflug, a veteran of the Minneapolis legal scene, has founded a new boutique commercial litigation firm, Stellpflug Law PLLC, focusing primarily on construction and product liability defense.


BAKKE


HENNESSY

Tal A. Bakke and Kaitlyn E. Hennessy have joined Bassford Remele as associates. Bakke is a litigator who focuses his practice in the areas of commercial litigation, products liability, employment law, and professional liability. Hennessy focuses her practice in the areas of consumer law defense, professional liability, insurance coverage, organizational liability, and construction.

Arthur, Chapman, Kettering, Smetak & Pikala, PA announced the addition of attorneys Roger H. Gross, Marissa K. Linden, Timothy P. Tobin, and R. Stephen Tillitt.

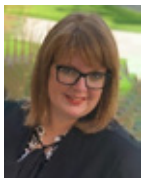

LODOEN

James Lodoen has joined Spencer Fane LLP as a partner in the firm's bankruptcy, restructuring, and creditors' rights practice group.

Victoria A. Elsmore has been named a Fellow of the American Academy of Matrimonial Lawyers. Elsmore is an attorney at Collins, Buckley, Sauntry & Haugh.


WILLIAMS

Stuart Williams has been elected chair of the Minnesota Drug Formulary Committee. Williams is an attorney at Henson Efron.


CHARLES

Gov. Walz appointed Kellie Charles and Edward Sheu as district court judges in Minnesota's 2nd Judicial District. Both seats will be chambered in St. Paul. Charles' appointment will fill a vacancy that occurred upon the retirement of Judge Jennifer Frisch. Charles is currently a senior attorney in the Hennepin County Public Defender's Office. Sheu's appointment will fill a vacancy that occurred upon the retirement of Judge Judith Tilsen. Sheu is currently a partner at Best & Flanagan LLP.


SHEU


BRAND

Gov. Walz appointed Jeanine Brand as a district court judge in Minnesota's 9th Judicial District. Brand will fill the vacancy occurring upon the retirement of the Honorable Paul T. Benshoof. Brand currently serves as an assistant Cass County attorney.

JOHN S. HIBBS, age 85, of Edina passed on May 9, 2020. He obtained his JD in 1960 at the University of Minnesota Law School and practiced tax, corporate, and heath care law for 40 years before retiring in 1999.

ATTORNEY WANTED

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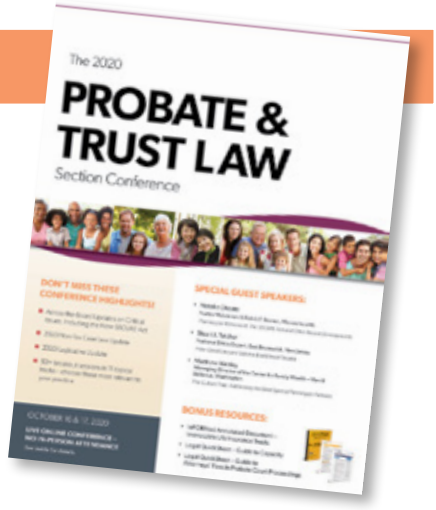

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