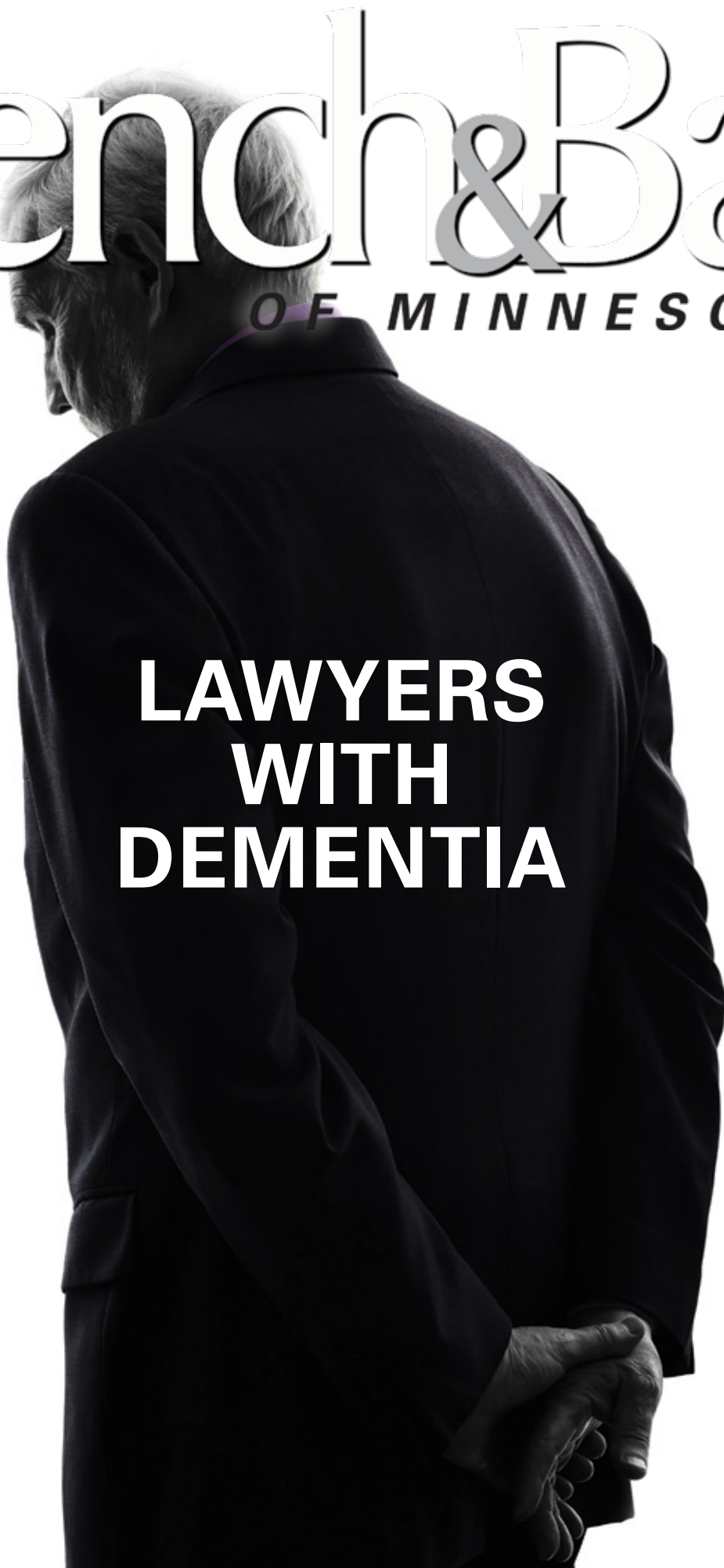


Bench & Bar

OF MINNESOTA

As more attorneys practice into later life, the profession faces a growing challenge

LAWYERS WITH DEMENTIA




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MONDAY NOV. 9

12:00 pm – 1:00 pm

CLE: **Implicit Bias**

TUESDAY NOV. 10

3:00 pm – 4:00 pm

CLE: **How to Develop Yourself Within the Bar**

4:00 pm – 5:00 pm

Networking Open Forum

Chat with managing partners and senior associates to learn what they are looking for from a new attorney.

WEDNESDAY NOV. 11

12:00 pm – 1:00 pm

CLE: **How to Navigate These Challenging Times**

THURSDAY NOV. 12

3:00 pm – 4:00 pm

CLE: **Cooperative Lawyering**

4:00 pm – 5:00 pm

Outstanding New Lawyer of the Year Award Ceremony
+ speed networking event

FRIDAY NOV. 13

12:00 pm – 1:00 pm

CLE: **Lawyer Coaching and Marketing Yourself as a New Attorney**

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LAWYERS WITH DEMENTIA

As more attorneys practice into later life, the profession faces a growing challenge

This article will discuss trends and demographics in the legal profession, how to identify early signs of cognitive impairment or dementia, and ethical issues related to attorneys practicing with memory loss or cognitive impairment.

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By LEANNE FUITH AND SUSAN TROMBLEY

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Pro bono isn't charity. It's part of the profession.

On one of the bookshelves in my office, nestled among photographs of my daughter, a few trinkets and plaques, and a variety of CLE materials, is a framed print entitled "Lawyers' Pledge of Professionalism." I don't recall exactly where I got it; it may have been something I was given in law school, or perhaps when I was sworn into the bar. It has always been on display in my office and, while it's easy to overlook in its nondescript frame, it details in a succinct yet profound way what it really means to be a lawyer:

I pledge to the public, to my colleagues, and to myself, that I will:

REMEMBER that the practice of law is first and foremost a profession, and subordinate business and personal concerns to professionalism concerns.
ENCOURAGE respect for the law and our legal system through my words and actions.
REMEMBER my responsibilities to serve as an officer of the court and protector of individual rights.
CONTRIBUTE time and resources to public service, charitable organizations, and activities in my community.
WORK to make our legal system more accessible and responsive.
RESOLVE matters expeditiously and without unnecessary expense.
KEEP my clients well informed and involved in making the decisions that affect them.
ACHIEVE and maintain proficiency in my practice.
BE courteous to everyone during the course of my work.
HONOR the spirit and intent, as well as the requirements, of the applicable rules of professional conduct, and encourage others to do the same.



DYAN EBERT is a partner at the central Minnesota firm of Quinlivan & Hughes, P.A., where she served as CEO from 2003-2010 and 2014-2019. She also served on the board of directors of Minnesota CLE from 2012-2019.

When my law firm moved to new office space a few years ago, this pledge could have easily joined the box of items retired from display in my new digs. But I never hesitated about finding a spot for it in my new office because it holds a special place in my heart.

Shortly after I started working at the firm, one of the partners used this pledge to explain the importance of doing pro bono work. I have a very vivid memory of Mike Ford, an attorney who served as a mentor to so many attorneys, including myself—and also served as MSBA president (2008-09)—sitting across from me in my office. Mike picked up the

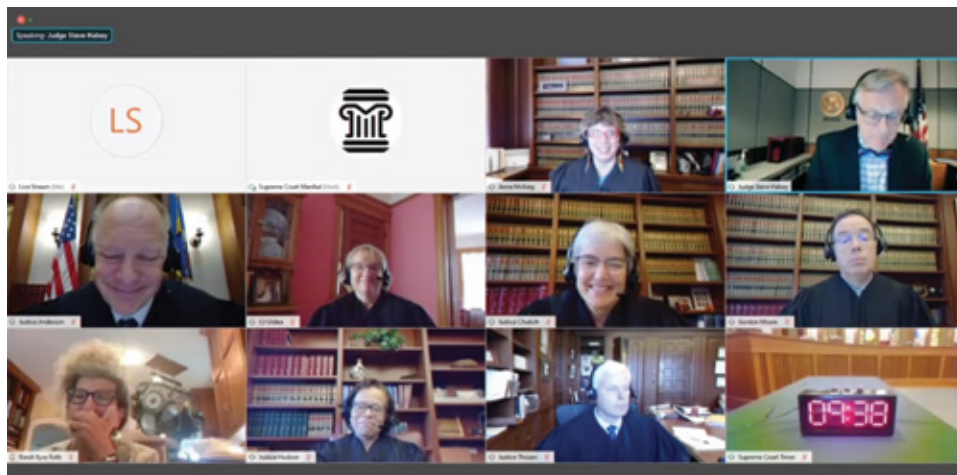
pledge, read it quietly to himself, and put it back down. He then proceeded to engage me in a conversation about what it means to be part of the legal profession. We talked about the importance of knowing the law we practiced, safeguarding client confidences, maintaining a good reputation, and being candid with the court.

Pretty soon, our conversation segued into a discussion of Rule 6.1 of the Rules of Professional Conduct, which states that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year." Mike told me in no uncertain terms that he expected the attorneys in our firm to satisfy this aspirational goal. We talked about how doing pro bono work is part of the social contract, the "deal" between the larger society and the legal profession. On the one hand, attorneys are allowed to self-regulate and control the professional aspects of our practices. On the other hand, the profession agrees to provide all members of society with equal access to the legal system entrusted to us.

Mike was particularly frustrated by the oft-made argument that pro bono was "charity work" and the organized bar had no business telling attorneys how and in what way they should be charitable. Mike was adamant that pro bono representation is not charity; it is part of the deal that we made when we signed up to be officers of the court and members of the bar. I remember him saying we can "do well, by doing good." This discussion with Mike made a lasting impression on me and helped me to understand my professional obligations. I suspect that this is also one of the reasons I came to understand the importance of the MSBA.

Ensuring access to the legal system through pro bono work is woven into the fabric of the MSBA. The Access to Justice Committee (formerly known as the Legal Assistance to the Disadvantaged Committee) works tirelessly to address issues that negatively impact low-income individuals and communities across the state and to identify how lawyers can help reduce the barriers that prevent fair and equal access to the legal system. Every October, the MSBA highlights the importance of pro bono work. This year, Pro Bono Week is October 26-30. In addition to offering a wide variety of programming and CLEs, Pro Bono Week will showcase the "Pro Bono All-Stars"—more than 140 MSBA members who have participated as North Star Lawyers for seven or more years since the start of the program. A panel of some of these all-stars will also be featured and will share tips and ideas for doing pro bono work.

The pandemic and the limited financial resources available to the various legal aid service providers across the state highlight now more than ever the importance of lawyers holding up our end of the social contract. The pledge in my office serves as a daily reminder that it is our professional obligation to engage in pro bono work to ensure equal access to the legal system. I hope you will join me in finding ways to satisfy this obligation. ▲



< September 15:

The Court held a hearing on proposed changes to Rule 5.

Court updates: Remote access, pro bono, Rule 5

The Court's Minnesota Public Access (MPA) Steering Committee, chaired by Judge Peter Cahill, is regularly reporting to the Judicial Council on its progress. Currently in Phase 1, user acceptance testing, training, and communication will be completed in December so the Court can begin piloting the program in January 2021. The second pilot phase is slated to begin in July 2021, with statewide implementation completed by April of 2022. The Court was frustrated (as were MSBA members) by delays over a year ago resulting from its contract with Tyler. Tyler was not able to meet its contract obligations and the Court pivoted to developing software in-house as a result.

On September 15, the Court held a public hearing regarding the MSBA's petition seeking mandatory reporting of pro bono hours and financial contributions to legal services. MSBA President Dyan Ebert and member Tim Droske represented the MSBA at the hearing. You can watch the proceeding online at bit.ly/3hOVikt

Also on September 15: The Court held a hearing on proposed changes to Rule 5 establishing a procedure and fee for *pro hac vice*. The MSBA filed comments in support of the petition, which was filed by the Legal Services Advisory Committee (LSAC). You can watch the proceeding online at <https://bit.ly/33TVW1w>

Pro Bono

Real estate pro bono program

Are you a real estate attorney? Do you want to give back to the community? To provide pro bono services to the disadvantaged, either directly or by consulting with another lawyer?

If so, this should interest you: The Real Property Law Section has partnered with Mid-Minnesota Legal Aid (MMLA) to pilot a project that will identify qualifying clients who have a real estate problem and who do not have the financial means to hire a lawyer. MMLA will perform the intake function for the program, which will include initial communication with the client, collecting basic information from the client, and providing that information to the Section. The Section will reach out to volunteer lawyers to determine who can handle the matter.

Volunteers may sign up to take one or more matters or cases, and might provide brief phone advice, or brief service such as making phone calls or writing a letter, or take a matter or case on a full representation basis—which may mean mentoring or taking a matter or case through a closing or litigation. Volunteers may also sign up to mentor or be mentored on matters or cases, depending on experience. The goal is simply to help as many real estate clients as possible. Want to learn more? Contact Section member John Koneck (612-590-1011 or jkoneck@fredlaw.com).

Pro Bono Week

The MSBA celebrates Pro Bono Week (October 25-31) with a series of free CLE programs to learn from our Pro Bono All-Stars, connect with available volunteer opportunities, learn about best practices for providing remote service, and help you to take concrete action toward addressing racial disparities in our legal system. CLE credit will be available for each program. For details and registration, please visit www.projusticemn.org/probonoweb.

MSBA Pro Bono All Stars

In 2012, the Minnesota State Bar Association created the North Star Lawyers program to recognize members who provided 50 or more hours of pro bono service (the standard in Rule 6.1) in a given calendar year. In conjunction with Pro Bono Week 2020, we acknowledge our long-term North Star Lawyers with a new designation—Pro Bono All-Stars—for members who have participated for seven or more years. Thank you for your consistent service to our community and for helping to make justice more available to low-income Minnesotans. For more information on North Star Lawyers or volunteering for pro bono service, please contact Steve Marchese, MSBA Public Service Director, at smarchese@mnbars.org or 612-278-6308.

Prosecutorial ethics: Holding to account “ministers of justice”

I have been thinking a lot lately about ethics and the criminal justice system. Locally and across the nation we have been seeing what happens when people lose faith in the effectiveness and fairness of the criminal justice system. Many see a system that struggles to hold police accountable for misconduct and disproportionately impacts Blacks and other people of color. Systems are composed of individuals and I know many, many individuals of good faith are asking tough questions about the systemic challenges facing the criminal justice system.

One of the most influential roles in the criminal justice system is the prosecutor. Most of the practicing bar are not prosecutors, granted, but we are all voters and thus have the opportunity to hold elected prosecutors and those who appoint prosecutors to account. I thought it might be helpful to review the ethics rules applicable to prosecutors—both to establish a baseline and to inquire whether the current rules provide a sufficient foundation for today’s challenges.

Minister of justice

Like all lawyers, prosecutors—federal and state—are accountable for all ethics rules, and in addition for a rule specific to prosecutors. While the focus is often on the specific requirements set forth in Rule 3.8, “Special Responsibilities of a Prosecutor,” it bears repeating that prosecutors are subject to the same rules as the rest of us—so issues such as competence, diligence, conflicts, honesty, dealing with unrepresented parties, supervision, and reporting the misconduct of others apply to them as well. Where Rule 3.8 specifically is concerned, Minnesota follows, with some exceptions, the ABA model rule for prosecutors.

The comments to both the Minnesota rule and the model rule start with a well-known precept: “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”¹ This ministerial role is important but undefined, and much has been written about it by scholars. Ministering justice can mean different things, but what I believe is indisputable is a rejection of the idea that the ends justify the means. The focus is not the conviction or the win or even the protection of the public, but rather to guarantee that justice—as we broadly think about it in this country—is done in each case. This is a heavy responsibility.

The particulars

Rule 3.8, in both its Minnesota and ABA versions, sets out specific obligations for the ministers of justice. First, to refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.² This requirement is obvious and foundational. Second, to make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given an opportunity to obtain counsel.³ This is part of the prosecutor’s role in ensuring the integrity of the process. For example, while it might be the job of others to explain how to apply for court-appointed counsel, ultimately the prosecutor must make reasonable efforts to assure this actually happens in all cases. Third, to not seek to obtain from an unrepresented accused person a waiver of important pretrial rights, such as the right to a preliminary hearing.⁴

Fourth, and pivotally, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.⁵ Both state and federal law establish a constitutional due process framework for disclosure obligations. This framework is widely known by shorthand reference to the main underlying case, *Brady*, which held that criminal defendants have a due process right to receive favorable information from the prosecution.⁶ In 2009 the ABA made clear, and I find persuasive, the opinion that Rule 3.8(d) is *not* co-extensive with constitutional case law regarding disclosure, but rather is separate and broader.⁷ The distinction lies in the issue of materiality.

A prosecutor’s constitutional obligation extends only to favorable information that is “material,” or in other words evidence that may affect the outcome. Rule 3.8, however, contains no such limiting language. As noted in ABA Opinion 09-454:

Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial’s outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.⁸

For all of the reasons cited in the ABA opinion, I’m persuaded that this is correct. But the Minnesota Supreme Court has not had an opportunity to address this question, and some states, like Louisiana, disagree.⁹ Many jurisdictions in Minnesota have an open file rule (excepting work product), a practice that is consistent with both constitutional due process requirements and the ethics rules. Not every jurisdiction can say this, however, and I strongly encourage the jurisdictions that can’t to review the ethics requirements in addition to the constitutional requirements.¹⁰



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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Rule 3.8 also emphasizes the timely nature of disclosure. The ABA opinion states that “for the disclosure of information to be timely, it must be made early enough that the information can be used effectively.”¹¹ Effective use encompasses many things beyond just preparation for trial, and they include conducting a defense investigation, determining affirmative defenses or case strategy in general, and (perhaps most importantly) choosing whether to plead guilty.¹²

Minnesota’s Rule 3.8 includes two additional subparts, similar but not identical to the model rule, including Rule 3.8(e) on not subpoenaing defense counsel except under certain circumstances, and preventing extrajudicial statements by staff and others in keeping with the prosecutor’s obligations under Rule 3.6 regarding trial publicity. Interestingly, the ABA model rule includes two *additional* subparts not present in Minnesota’s rule. ABA Rule 3.8(g) and (h) both address a prosecutor’s ethical obligation to take action upon receipt of evidence that casts doubt on whether a defendant committed a crime of which he has been convicted.

Beyond the rules

The prosecutor’s role is so central to the just functioning of the system that many standards exist to guide their conduct. In reviewing those standards, I was struck by two contained in the ABA Criminal Justice Standards for the Prosecution Function. First, a “prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, the prosecutor should stimulate and support efforts for remedial action.”¹³ Second, and particularly relevant today, is “[a] prosecutor’s office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work.”¹⁴

Prosecutors carry a heavy burden as ministers of justice in our system, and there is so much more on the ethical requirements of the job than can be addressed in this column. Hopefully this information provides some guidance on ways the profession, through its votes, can hold these among us to account in performing this critical role. Are there other or different ethical rules that would further this goal? I am interested in your viewpoint. Thank you to all prosecutors who lead as ministers of justice. ▲

Notes

¹ Rule 3.8, MRPC, cmt. [1].

² Rule 3.8(a), MRPC.

³ Rule 3.8(b), MRPC.

⁴ Rule 3.8(c), MRPC.

⁵ Rule 3.8(d), MRPC. Subpart (d) continues, “and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

⁶ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁷ ABA Formal Opinion 09-454, *Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense* (7/8/2009).

⁸ *Id.* at 4.

⁹ *In re Seastrunk*, 2017 BL 374915 (La 10/18/17) (holding ethics rule is no broader than *Brady/Bagley*); See *In re Kline*, 113 A.3d 202 (D.C. 2015) (holding ethics rule requires prosecutor to disclose all potentially exculpatory information in his possession regardless of whether that information meets materiality requirements of *Brady*).

¹⁰ Court rules set forth important requirements as well. Rule 9.01, Minnesota Rules of Criminal Procedure, broadly requires disclosure of “all matters... that relate to the case” without a court order but upon the defendant’s request.

¹¹ ABA Formal Opinion 09-454 at 6.

¹² *Id.*

¹³ ABA Criminal Justice Standards for the Prosecution Function 3-1.2(f) (4th Ed. 2017).

¹⁴ *Id.* at 3-1.6(b).

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Your back-to-school tech brush-up

As covid-19 continues to affect how we carry out our day-to-day activities, many are now considering how best to manage having children return to school, either virtually or in-person or a combination of both. This past spring saw most students sent out of their physical classrooms to learn from home and left parents and teachers needing to figure out new technologies and procedures to enact the drastic change. Now, with classes resumed, some will continue with virtual learning while other students work in their classrooms. Either way, students, teachers, and academic institutions will be facing a new set of cyber challenges.

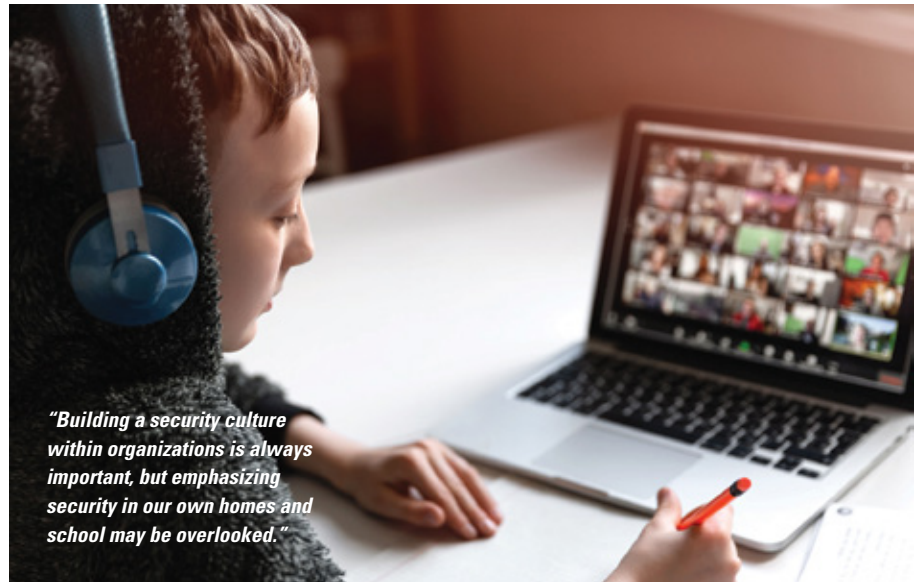
A critical element in how we have remained connected throughout this crisis is video communication technologies, such as Zoom. Zoom will most likely be a standard tool that schools rely on in the coming months. Like any convenience afforded us by technology, however, Zoom is not perfect. Once school started, Zoom suffered outages in multiple parts of the world, leaving many scrambling to connect.¹ The company was able to fix the problem quickly, but to many it felt like a sign of things to come.



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.

Preparing for the worst, and hoping for the best, is a good strategy when dealing with video communication tools.

With that in mind, it is also important to take security precautions when handling this type of software. Since Zoom is fairly ubiquitous now, cybercriminals are taking advantage of the fact that so many people are familiar with it and using it on a regular basis. From Zoom-related malware to



"Building a security culture within organizations is always important, but emphasizing security in our own homes and school may be overlooked."

people attending meetings unannounced, there have been issues that compromise confidential information. As it continues to be tested, Zoom is in the process of improving its security and privacy policies. In a Security Plan Progress Report, the company explained that it now implements passcodes, waiting rooms, and "screen share for host only" set as the default; the company has also improved data control for some users.²

While Zoom-related attacks may be a threat, everyone involved—educators, institutions, parents, and students—should also be made aware of the increased risk of phishing and ransomware attacks. It should be clearly communicated how information from schools will be sent, what type of information can be expected, and how personal information will be requested. Establishing expectations in advance may prove instrumental in preventing clicks on malware links or the sharing of credentials with threat actors. Ransomware attacks are also expected to be a primary threat, as a recent cybersecurity newsletter pointed out: "Cybersecurity professionals expect a spike in ransomware attacks against school districts and universities this fall as new hybrid learning environments go online and unpatched equipment... is reconnected to school networks."³

Managing access controls and school-owned devices will also be

critical as students work remotely. Simple security best practices such as the use of VPNs, multi-factor authentication, avoiding public WiFi, securing endpoints, strong passwords, encryption, and updating software when necessary can also mitigate the cyber risks likely to be prevalent in the coming months. Relaying security information and guidelines clearly to students and families—including the advice to *slow down* before acting on any emails that request personal information—helps to protect students, staff, and school assets.

This fall will be unlike any in memory for many of us as we navigate unprecedented issues to ensure safe and effective learning environments, both in-person and remote. Building a security culture within organizations is always important, but emphasizing security in our own homes and school may be overlooked. Preparation, information sharing, and balancing security with convenience are essential in making the most out of what technology can offer us. ▲

Notes

¹ <https://www.cnn.com/2020/08/24/us/zoom-outage-worldwide-trnd/index.html>

² <https://zoom.us/docs/doc/Ask-Eric-Anything-7-01.pdf>

³ <https://www.bankinfosecurity.com/as-classes-start-schools-face-ransomware-risk-a-14895>

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The background is a complex, abstract collage. It features a large, stylized eye in the upper left quadrant, with a white pupil and a dark iris. The eye is surrounded by various colorful, semi-transparent geometric shapes, including rectangles, circles, and triangles, in shades of blue, green, red, and yellow. The overall effect is a layered, textured composition that suggests themes of perception, investigation, and confidentiality.

MUM'S THE WORD

**How to protect clients' confidential
information in agency investigations
and contested case proceedings**

By Gregory Merz

The Minnesota Government Data Practices Act creates a presumption that the public will have access to the data that government collects and maintains.¹ This presumption advances the public interest in transparency but presents challenges for a private party that is the subject of an agency investigation or involved in a contested case proceeding at the Office of Administrative Hearings. In both scenarios, the private party may be required to provide information to a state agency that it considers to be confidential. Public disclosure may create concerns about competitive harm or other adverse consequences. Understanding how the law limits the information a state agency may properly withhold from the public and how state agencies handle purportedly confidential information will help counsel to maximize the protection of such information from public disclosure.

The Minnesota Government Data Practices Act

Effectively managing confidentiality issues in the context of administrative proceedings requires a working understanding of the Minnesota Government Data Practices Act, which controls access to information in the hands of state agencies.² The purpose of the Data Practices Act is “to reconcile the rights of data subjects to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing. The Act also attempts to balance these competing rights within a context of effective government operation.”³ The Data Practices Act’s scope is broad, governing the disclosure of and access to “all data collected, created, received, maintained or disseminated by any state agency, political subdivision, or statewide system regardless of its physical form, storage media or conditions of use.”⁴ The Act provides that all government data will be accessible to the public unless otherwise provided by law.

The Data Practices Act categorizes all government data as either “data on individuals” or “data not on individuals.” “Data on individuals” includes all government data in which an individual is or can be identified as the subject, unless the appearance of the name or other identifying data can be clearly demonstrated to be only incidental to the data and the data are not accessed by the name or other identifying data of any individual. (An “individual” is a natural person.) The Act

categorizes all other data as “data not on individuals.”

The Act puts “data on individuals” into one of three categories: public data on individuals, private data on individuals, and confidential data on individuals. All data on individuals are “public data” unless otherwise categorized as nonpublic by state or federal law or temporary classification. Private data on individuals are data that under state statute or federal law are: 1) not public; and 2) accessible to the individual subject of the data. Confidential data on individuals are data that under state or federal law are: 1) not public; and 2) not accessible to the individual subject of the data.

As it does for data on individuals, the Act defines three categories of data not on individuals: public data not on individuals; nonpublic data, and protected nonpublic data. Like public data on individuals, public data not on individuals are accessible to the public on request. Nonpublic data are data not on individuals that are made by statute or federal law: 1) not accessible to the public, and 2) accessible to the subject of the data. Protected nonpublic data are data not on individuals that under state or federal law are: 1) not accessible to the public, and 2) not accessible to the subject of the data.

The Act provides for a number of exceptions that categorize specific types of data as either private or nonpublic. Examples of these exceptions include but are not limited to:

- Social Security numbers;
- security information;
- health care data on individuals;
- data regarding internal audits of governmental entities;
- certain licensing data; and
- certain data obtained or produced by granting agencies in response to requests for proposal.

Each exception has its own set of conditions and specified scope.

The most commonly invoked exception in agency investigations of commercial entities is the exception providing that data containing “trade secret information” are either private or nonpublic. That exception defines “trade secret information” to mean “government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that

is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.”⁵

A party seeking the protection of the trade secrets exception bears the burden of establishing each of its elements. Consistent with the presumption that government data will be available to the public, the trade secrets exception—like all of the Act’s exceptions—is applied narrowly. To establish the foundation for the exception, the party must provide facts and concrete detail; conclusory statements may not be sufficient. In most cases, the source of the data and the reasonableness of efforts to maintain the data’s secrecy are usually easy to determine. Disputes regarding the applicability of the exception typically focus on the third element—the independent economic value of the data in question—and it is on that element that trade secrets claims often fail.

But even if no exception applies, that does not end the analysis. The Data Practices Act does not require the disclosure of data that state or federal law makes not public or private. Depending on the nature of the data at issue, there are any number of state and federal laws that might apply to provide a basis to prohibit public disclosure of data obtained by the government as part of an agency investigation. Thus, for example, Minnesota law provides that certain information relating to reports of abuse of a minor or vulnerable adult is confidential; tax return information is private under Minnesota law and confidential under federal law; the U.S. Constitution provides a right to privacy that may provide a basis for preventing the public disclosure of certain information.⁶ Suffice it to say that this is a very small sampling of the types of state and federal laws that may be available to protect the confidentiality of information gathered by the government.

The Act requires that each agency adopt and annually update written data access policies and policies regarding the rights of subjects of data. The Act authorizes the commissioner of the Department of Administration, upon request, to issue written opinions regarding the categorization and access to data. A searchable library of the department’s data practices opinions is available on the internet.⁷

Confidentiality in agency investigations

Minnesota law endows state agencies with broad investigative authority in a wide variety of contexts. Most prominently, the Minnesota attorney general is authorized to investigate whenever he or she has a reasonable ground to believe that any person or entity has violated or is about to violate any state law relating to “unfair, discriminatory, and other unlawful practices in business, commerce, or trade.”⁸ Numerous other state agencies, such as the Department of Commerce, the Public Utilities Commission, the Pollution Control Agency, the Department of Health, and the Department of Human Rights have similar investigative powers.

The Data Practices Act provides an exception from disclosure for “data collected by a government entity as part of an active investigation undertaken for the purpose of the commencement or defense of a pending civil legal action, or which are retained in anticipation of a pending civil legal action,” categorizing such data as confidential (in the case of data on individuals) and protected nonpublic (in the case of data not on individuals).⁹ This exception is subject to a number of limitations. First, notwithstanding this exception, a governmental entity may make investigative data public if it determines that “access will aid the law enforcement process, promote public health or safety or dispel widespread rumor or unrest.”¹⁰ Second, civil investigative data that are presented as evidence in court or made part of the court record are public unless the court takes action to prevent public disclosure. Finally, an investigation becomes inactive and the exception, therefore, no longer applies, when: 1) the agency decides not to pursue a court action; 2) the time to file a complaint has expired; or 3) any appellate rights are expired or exhausted. At that point, the investigative data are subject to public disclosure unless another exception, such as the trade secret exception, applies.

The leading case interpreting the exception for civil investigative data is *In re Glaxosmithkline PLC*.¹¹ In that case, the attorney general served Glaxosmithkline (GSK) with a civil investigative demand that GSK produce documents in connection with the attorney general’s investigation based on the belief that GSK was violating state antitrust laws. Before GSK produced any of the requested documents, GSK and the Attorney General’s Office entered into a confidentiality

agreement, which later became the basis for a protective order. That agreement allowed GSK to designate as confidential any documents for which there was a legal basis to do so and also provided that the attorney general would only use confidential documents for investigation or litigation purposes and could not disclose the documents. The confidentiality agreement permitted the attorney general to challenge the confidentiality designation of documents in a court action.

The Attorney General’s Office subsequently filed a motion in district court seeking a determination that certain documents GSK had designated as confidential did not meet the legal test, under either the Data Practices Act or Minn. R. Civ. P. 26.03, for such protection. Before the court ruled on that the motion, the attorney general filed under seal a complaint against GSK alleging violation of antitrust laws and attached to the complaint a number of documents that GSK had produced on a confidential basis.

The district court ruled in favor of GSK, denying the state’s motion, and, following some procedural wrangling concerning the appealability of the district court’s decision, the issue of the confidentiality of GSK’s documents finally came before the Supreme Court. The Supreme Court found that, while the case between the Attorney General’s Office and GSK was still pending, the investigative data exception applied. Although acknowledging that the investigative data exception permitted an agency to make investigative data public where the agency finds that doing so will aid the law enforcement process, promote public health or safety, or dispel widespread rumor or unrest, the parties’ confidentiality agreement/protective order limited the attorney general’s discretion to make such a finding. Because the confidentiality agreement/protective order vested the district with the power to decide disputes regarding confidentiality of documents, it was up to the district court, not the attorney general, to determine whether the conditions for disclosure of civil investigative data had been met.

As to the confidential documents attached to the attorney general’s complaint, the Court found that those documents had been made part of the court record and, accordingly, no longer qualified for confidential treatment under the civil investigative data exception. The Data Practices Act provides that it does not apply to the judiciary; rather, the

Minnesota Rules of Public Access to Records of the Judicial Branch controlled whether a document filed with the court may be protected from public disclosure.

Confidentiality in contested case proceedings

An agency investigation may result in a contested case proceeding presided over by an administrative law judge (ALJ) at the Office of Administrative Hearings. A contested case enables parties interested in a particular agency action to be heard on the issues. Such a proceeding also assists the agency by developing a factual record that forms that basis of an agency action and by providing the agency with the ALJ’s recommendations regarding disputed issues. Contested case proceedings are adversarial proceedings that are very similar in many respects to cases tried to the court in a judicial forum. Confidentiality issues may arise in contested case proceedings both in the context of discovery and with respect to the evidence that is ultimately admitted into the record that forms the basis for the ALJ’s recommended decision.

The OAH rules require that, upon request, a party must disclose to the requesting party: 1) the name and address of each witness that the party intends to call to testify at the hearing, together with a summary of the witness’s anticipated testimony; 2) any written or recorded statements made by the party or the party’s witnesses; 3) all written exhibits that the party intends to introduce at the hearing. The OAH rules also permit any means of discovery available under the Rules of Civil Procedure. As a practical matter, however, discovery in contested case proceedings is typically more limited, except in large complex cases such as utility cases, where parties file written testimony and discovery is often extensive.

ALJs have authority—similar to that given judges under Rule 26.03 of the Rules of Civil Procedure—to enter protective orders when needed “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense due to a discovery request,” or “[w]hen a party is asked to reveal material considered to be proprietary information or trade secrets, or not public data.”¹² As in cases in a judicial forum, an ALJ will typically allow the parties broad latitude in fashioning a protective order that they believe meets their needs. In most cases, the ALJ will enter a protective order that reflects the parties’ agreement.

However, the fact that the parties have agreed that information exchanged in discovery should be treated as confidential does not mean that the same information will be protected from public disclosure once it is admitted as part of the case record. The OAH is, itself, a state agency subject to the Data Practices Act. Thus, there is a general presumption that all information contained in the record of a contested case proceeding will be accessible to the public and the parties' agreement otherwise is not, by itself, sufficient to overcome that presumption.

An evidentiary hearing in a contested case proceeding, like a trial in a judicial forum, is open to the public. The ALJ may be reluctant to close a hearing in order to protect against the disclosure of confidential information because doing so causes delay and disruption. In that event, it will be the parties' responsibility to structure the presentation of their case in a manner that avoids eliciting testimony that discloses confidential information. For example, counsel may avoid disclosing confidential information on the public record by asking a witness to reference confidential information contained in an exhibit without disclosing the information.

With respect to exhibits containing confidential information, the parties must establish a basis for sealing the exhibits—thus making them inaccessible to the public—that is consistent with the Data Practices Act. The ALJ may require that, for any exhibit that is sealed, the parties provide a public version of the exhibit from which they have redacted all nonpublic information.¹³

PRACTICE POINTERS

1 Before producing confidential documents or other confidential information in response to an agency's request, attempt to negotiate a confidentiality agreement that specifies how the agency will handle confidential information. Issues to be addressed in such an agreement would include: a description of the kinds of information that will be maintained as confidential; how the agency will use confidential information; procedures for challenging a confidentiality designation; and what the agency will do with the information once the investigation is concluded. If unable to come to an agreement, consider going to court to get a protective order.

2 A party claiming protection under an exception from public disclosure needs to provide foundation establishing that the requirements of the exception are satisfied. Exceptions to the general policy that the public will have access to government data are narrowly construed. Particularly with respect to the trade secret exception, a party seeking the protection of the exception must provide concrete evidence showing that the information meets the definition of a trade secret, paying special attention to establishing the independent economic value of the data in question and how the party providing the information will suffer harm if the data are disclosed.

3 When the client's interest in maintaining the confidentiality of information is substantial, counsel must be creative and far-reaching in searching for a legal basis for protecting the information from public disclosure. Even if none of the Data Practices Act's exceptions applies, there may be a state or federal law that does.

4 The parties' agreement regarding how they will handle confidential information in discovery in a contested case proceeding will not be sufficient to protect prevent public disclosure of evidence admitted into the record. In order for exhibits or portions of the hearing transcript to be protected from public disclosure after the hearing record is closed, the party seeking to maintain the confidentiality of the information must move to seal that portion of the record and persuade the ALJ that doing so does not violate the Data Practices Act. Where only part of a document qualifies for protection, the ALJ will only partially seal the document, by redacting any nonpublic information from the public version of the document. ▲

Notes

¹ This article will use the terms "data" and "information" interchangeably. The term "confidential," when used to describe information, refers to information that the source of the information wishes to protect from disclosure.

² Minn. Stat. §13.01, *et. seq.*

³ *KSTP-TV v. Ramsey Cnty.*, 806 N.W.2d 785, 788 (Minn. 2011); *Montgomery Ward & Co. v. Cnty. of Hennepin*, 450 N.W.2d 299, 307 (Minn.1990).

⁴ Minn. Stat. §13.02, subd. 7 (defining "governmental data").

⁵ Minn. Stat. §13.37, subd. 1(b).

⁶ *In re Glaxosmithkline PLC*, 732 N.W.2d 257,

273 (Minn. 2007) (remanding for further consideration whether the associational rights privilege under the First Amendment to the United States Constitution applied to prevent public disclosure of data obtained as part of a government investigation).

⁷ <https://mn.gov/admin/data-practices/opinions/library/>

⁸ Minn. Stat. §8.31, subds. 1, 2.

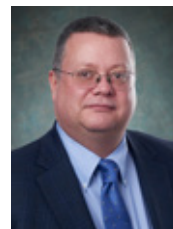
⁹ Minn. Stat. §13.39, subd. 2.

¹⁰ Minn. Stat. §13.39, subd. 2.

¹¹ 732 N.W.2d 257 (Minn. 2007).

¹² Minn. R. part 1400.6700, subp. 4.

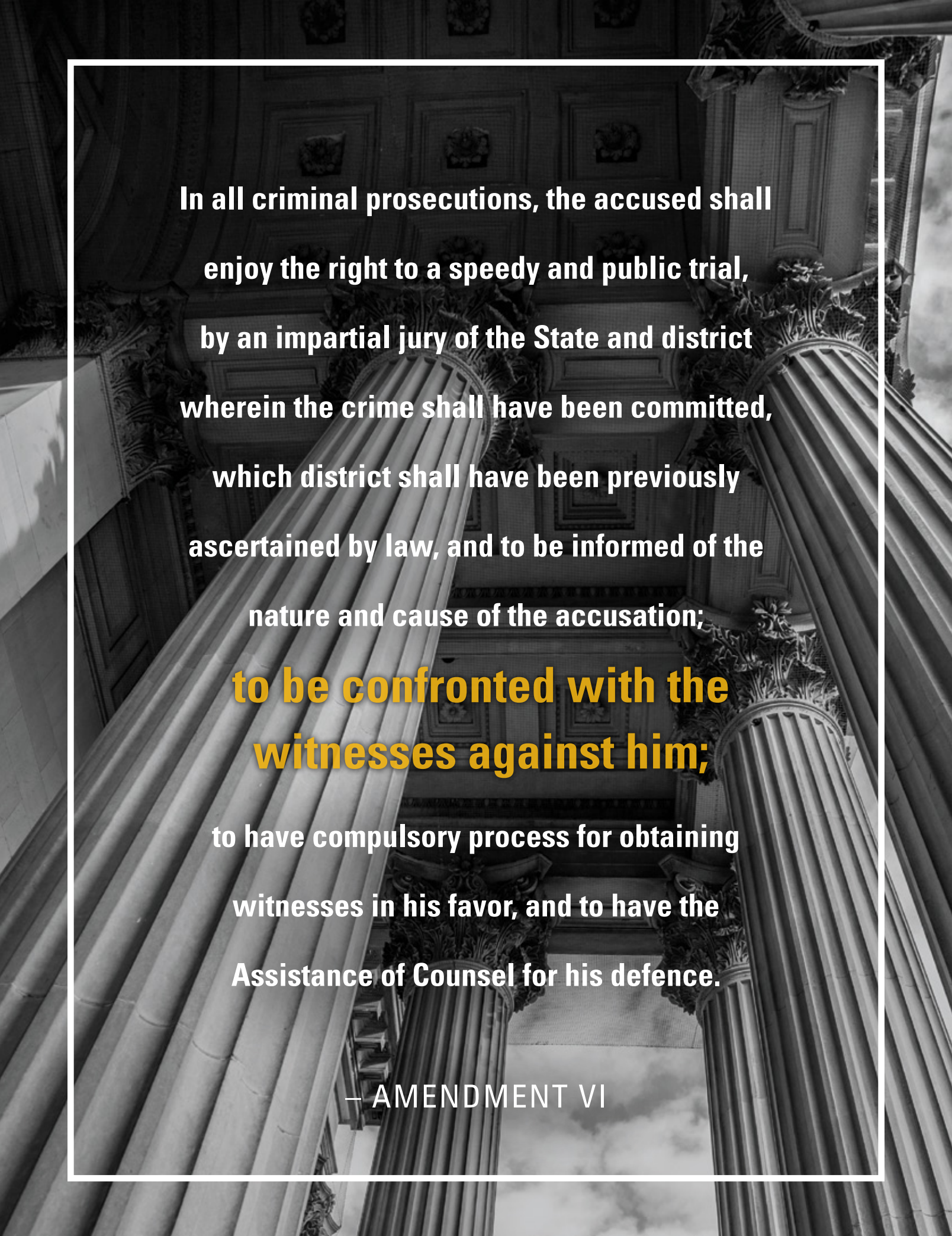
¹³ *Northwest Publications, Inc. v. City of Bloomington*, 499 N.W.2d 509 (Minn. Ct. App. 1993).



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**In all criminal prosecutions, the accused shall
enjoy the right to a speedy and public trial,
by an impartial jury of the State and district
wherein the crime shall have been committed,
which district shall have been previously
ascertained by law, and to be informed of the
nature and cause of the accusation;
to be confronted with the
witnesses against him;
to have compulsory process for obtaining
witnesses in his favor, and to have the
Assistance of Counsel for his defence.**

— AMENDMENT VI

CHILD SEX ABUSE AND THE SIXTH AMENDMENT

*Minnesota courts are
eroding confrontation
clause protections
in cases involving
child witnesses*

BY MATTHEW MANKEY
AND STACY L. BETTISON

In child sex abuse cases, Minnesota courts are slowly eroding the basic right of the Sixth Amendment's Confrontation Clause: that the "accused shall enjoy the right... to be confronted with the witnesses against him."¹ The United States Supreme Court laid down the law in *Crawford v. Washington*: Testimonial statements of witnesses absent from trial are admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.²

Since then, in a series of cases with inconsistent analyses, Minnesota courts have held that statements made by a child in a forensic video interview are nontestimonial and therefore admissible when the declarant is unavailable.³ These forensic video interviews are commonly conducted by CornerHouse or Minnesota Children's Resource Center (MCRC).

These holdings undermine protections dating back to Roman times.⁴ Minnesota courts have failed to acknowledge the state's burden of proving that a particular statement is nontestimonial and therefore does not violate a defendant's Sixth Amendment rights.⁵ Two factors are critical. First, were the statements made to address an ongoing emergency? If not, the statements are testimonial and inadmissible. Second, was the primary purpose for eliciting the statements to establish or prove past events potentially relevant to later criminal prosecution?⁶ If yes, the statements are testimonial and inadmissible. Anything less than an authentic analysis considering these two factors and requiring the state to meet its burden tramples on the due process rights of the accused.

Admittedly, alleged child sex abusers enjoy little public sympathy. Defense counsel who represent such defendants are no stranger to the "How-can-you-represent-them" question. Yet the confrontation clause's protections are no less important or applicable to these defendants. Our civilized society has a compelling interest in caring for our youngest and most vulnerable citizens, yet we must do so in a manner that adheres to the fundamental structure of our civil liberties. The current state of case law protects the former at great expense to the latter.

This article will examine the nature and purpose of forensic interviews, provide examples of specific areas of concern, and review relevant federal and state case law. The authors' intent is to provide a useful outline of relevant issues and draw attention to what's become a fundamental problem for the accused.

Nature and purpose of forensic interviews

Minnesota courts have stated that the primary purpose of a forensic interview is to ascertain the health and well-being of a child (rendering those statements nontestimonial). It is this blanket rule that requires an honest look at what forensic interviews are and what they are designed to achieve.

"Forensic" is defined as "belonging to, used in, or suitable to courts of judicature or to public discussion and debate."⁷ According to National Children's Advocacy Center, a forensic interview is "provided to children who may have experienced abuse or who have witnessed a crime or other violent act."⁸

While physical abuse of a child can be assessed by physical injuries, physical evidence of sexual abuse is rare. Physical indicators are found in 10 percent of girls and rarely in boys, which means sexual abuse is determined by a child's statements and behavior.⁹

Cornerhouse or MCRC is often the first stop after an initial report of sexual abuse reaches law enforcement or other mandated reporter. Whether the first report is at a clinic for a well-child visit, the child's school, or reported directly to law enforcement, the next step is to refer the child to Cornerhouse or MCRC for a forensic interview.

Cornerhouse and MCRC's own public descriptions of how and why they conduct forensic interviews belie the Minnesota courts' blanket rule that statements in a forensic interview are nontestimonial. For instance, Cornerhouse advises caregivers to tell the child they are "coming to Cornerhouse to talk about *what happened*."¹⁰ Cornerhouse further explains that its interviews are conducted by trained professionals "*with the goal of eliciting detailed information that assist child abuse investigations*."¹¹ Cornerhouse does not provide medical evaluations.

MCRC, perhaps being strategic about how it frames the process given confrontation clause concerns, describes its forensic interviews on its website "like a

doctor's appointment."¹² MCRC, housed in Children's Hospitals & Clinics, explains that "during the appointment, your child may be physically examined as well as interviewed by a nurse, nurse practitioner or physician about suspected child abuse." MCRC does not use the term "forensic interview" but instead refers to both the interview and the medical exam as an "evaluation."¹³ Yet in a news article featuring MCRC, representatives state the forensic interview is "to elicit a free-flowing, uncorrupted account of *what happened*," and MCRC staff have acknowledged many of the cases for which they conduct an interview are "essential in prosecution" and "end up in court."¹⁴

The protocols guiding interview processes are purportedly intended to ensure a process that protects the rights of the accused, thus indicating that the statements are considered critical in prosecutions.¹⁵ The *Cornerhouse Forensic Interviewing Protocol: RATA*¹⁶ is a commonly followed protocol designed as a "semi-structured non-directive questioning process for alleged victims of child sexual abuse."¹⁷

Typically, the only person in the room with the child is a trained forensic interviewer, though the other people who need information from the interview (law enforcement and/or child protection, and a county attorney) often watch through closed circuit television from another room.

U.S. Supreme Court confrontation clause jurisprudence

The promise that the accused has a right to confront their accuser in open court is directly stated in the Sixth Amendment and was reinforced by Justice Scalia in *Crawford v. Washington*.¹⁸ His opinion was clear: Use of testimonial statements by witnesses absent from trial must be excluded unless the declarant is 1) unavailable to testify at trial; and 2) the defendant had a prior opportunity to cross-examine the declarant regarding the statement.¹⁹

When *Crawford* was decided, it was widely believed that it would have its greatest impact in cases of domestic assault. In such cases, it is not uncommon for alleged victims to change their story by the time a case comes to trial or to refuse to comply with a subpoena. In such circumstances, prior to *Crawford*, police would often be allowed to testify to what they were told on the night of the arrest. This practice made the hearsay admissible if it was deemed sufficiently reliable.²⁰ *Crawford* changed that.

What *Crawford* did not do, however, was "spell out a comprehensive definition

of 'testimonial'."²¹ That analysis came two years later in *Davis v. Washington/Hammon v. Indiana (Davis)*, in which the Court distinguished between testimonial and nontestimonial statements.²² The Court declined to produce an exhaustive classification of every type of statement, but described the difference between the two, turning on what the primary purpose of the interrogation is:

Statements are nontestimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.²³

Davis made clear that the product of interrogations "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" are testimonial.²⁴ Statements that are neither "a cry for help nor the provision of information enabling officers immediately to end a threatening situation" are testimonial.²⁵

Fast forward to 2015, when *Ohio v. Clark* became the United States Supreme Court case to decide the issue so far unanswered: "whether statements made to individuals other than law enforcement officers would raise similar issues under the Confrontation Clause."²⁶ In *Clark*, the Court held that a three-year-old alleged victim's statements to his preschool teachers identifying the defendant as the person who had caused his injuries were not testimonial because the statements were made during an ongoing emergency, and it needed to be determined if it was safe for the child to return home at the end of the day. Further, there was no indication that the statement was taken for future use in a prosecution but instead to protect the child and finally, the setting was an informal lunchroom or classroom, not a station house.²⁷

The Court also noted that the child's age supported its conclusion: "Statements made by very young children will rarely, if ever, implicate the Confrontation Clause" because they don't understand the criminal justice system.²⁸ Further, historically, according to the Court, statements made in "circumstances like those facing [the child] and his teachers

were admissible at common law." Though the Court declined to adopt a rule that statements made to those other than law enforcement are categorically outside the Sixth Amendment, "the fact that [the child] was speaking to his teachers remains highly relevant:"

Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.²⁹

Minnesota confrontation clause jurisprudence

Minnesota's case law began a notable evolution in child criminal sexual conduct cases beginning in 2005, after *Crawford* but before *Davis*. In early 2005, the Minnesota Supreme Court held in *State v. Wright (Wright I)* that a 911 call reporting an assault and a police interview with the assault victims, conducted soon after the incident, were both nontestimonial.³⁰ That case set forth eight "relevant considerations" to determine on a case-by-case basis the testimonial nature of a statement.³¹

In February 2006, *State v. Bobadilla* built on *Wright I* by holding that statements of a three-year-old child (determined incompetent to testify) to a child protection worker during an interview at the Kandiyohi Law Enforcement Center that implicated the defendant in sexually abusive acts were nontestimonial.³² The interview was conducted in a child-friendly room and was video recorded.³³ The investigating police officer observed the interview behind a one-way mirror.³⁴

The *Bobadilla* Court reasoned that the interview was "initiated by a child-protection worker in response to a report of sexual abuse for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child." Justice Page's lengthy dissent concluded the child's statement was testimonial because it "was made as part of a police interrogation, in the presence of a police officer, to a government official who was taking the statement as a surrogate interviewer for the police."³⁵

Justice Page noted the interview was set up by a county child-protection worker at the request of a Willmar police detective and fit squarely within *Crawford*. Because the interview took place five days after the initial report of abuse at a doctor's office, there was no exigency, and the purpose of the interview served two functions: preliminary fact-finding

and collection of evidence for a future trial.³⁶ Justice Page's dissent illuminates the inconsistent, results-oriented analyses that lead to inconsistent outcomes.

One month later, in March 2006, the Court held in *State v. Scacchetti* (Justice Page) that statements made by a three-and-a-half-year-old child during a medical assessment by a nurse practitioner without law enforcement or other government actor involvement are not testimonial and admission of the statements at trial did not violate the Sixth Amendment.³⁷

In January 2007, the Court considered *State v. Wright* (*Wright II*) to revisit its opinion in *Wright I* in light of the United States Supreme Court's decision in *Davis* (June 2016). The Court held that statements made to the 911 operator were nontestimonial, but that statements made to police on-scene and after the incident occurred were testimonial and their admission at trial violated the Sixth Amendment because they were made after the emergency had abated and concerned past events.³⁸

In August 2007, the Court considered in *State v. Krasky* the very issue raised in this article: whether statements elicited from a child victim by a nurse at MCRC were testimonial and therefore inadmissible.³⁹ Upon receiving a child protection report, a Willmar Police Department detective and Kandiyohi County Family Services worker "decided to have [MCRC] interview and examine" the child.⁴⁰ The county social worker and the child's adoption social worker both watched the videotaped interview from an observation room.⁴¹ The child was also given a physical examination and tested for sexually transmitted diseases.⁴²

The Court concluded the MCRC nurse practitioner is not a government actor, and because the primary purpose was to assess and protect the child's health and welfare (physical examination, STD tests, and recommendation for psychotherapy), the statements were nontestimonial.⁴³ The Court further reasoned that a joint decision to refer the child to MCRC by law enforcement and social services as "the best way to proceed with the investigation" was not problematic because Minn. Stat. 626.556, subd. 10a requires such joint decisions.⁴⁴

Krasky thus further muddled the waters. The statements were considered nontestimonial because of the venue of the interview (a children's hospital) and the fact that no law enforcement was present. Yet the decision to conduct the interview was jointly made by law enforcement and social services. Still, according to the Court, there was no evidence the

interviewer was acting a "proxy" for law enforcement.

Minnesota federal court declines to follow state courts

Meanwhile, nearly a year after *Krasky*, Mr. Bobadilla petitioned for a writ of *habeas corpus*, arguing that the Minnesota Supreme Court unreasonably applied clearly established law in concluding that his right to confrontation was not violated by the introduction of the child victim's out-of-court statement.⁴⁵

Judge Patrick Schiltz held that the child's statement in the forensic interview was inadmissible evidence under *Crawford*, and granted Bobadilla's requested *habeas* relief. Judge Schiltz reasoned that the child's interview was conducted five days after the crime was committed; the detective in charge of the criminal investigation initiated the interview; the county social worker conducted the interview as a "surrogate interviewer" for law enforcement; the interview took place at police headquarters; there was nothing spontaneous or informal about the interview; and there was no evidence the primary purpose of the interview was to assess or respond to imminent risk to the child's health and welfare.⁴⁶

Considering Minn. Stat. 626.566, subd. 10a, and the requirement that law enforcement and local welfare agencies work together upon receiving reports of abuse, the court reasoned that it does not mean "that everything done by a social worker must be for the 'overriding purpose' of protecting the child, any more than it means that everything done by the police officer must be for the 'overriding purpose' of collecting evidence."⁴⁷ Further, the statute requires joint coordination for interviews to avoid multiple interviews of the child.⁴⁸ The requirement that they be recorded allows the social worker to assess immediate needs and preserve the statement so police can use it in their investigation.⁴⁹

Minnesota case law grows more expansive

The current Minnesota landscape is clearly seen in *State v. Glover*, in which the Minnesota Court of Appeals, in an unpublished decision, reversed the pretrial suppression of statements made a five-year-old child in an MCRC interview.⁵⁰ In *Glover*, the child disclosed to an adult friend in January 2016 that the previous summer (2015) the defendant had touched the boy's penis and showed the child pictures of the defendant's penis on his phone.⁵¹ On referral by St. Paul Police, MCRC interviewed the child.⁵²

**Davis made clear
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in order to identify
(or provide evidence
to convict) the
perpetrator"
are testimonial.**

Holding the statements were nontestimonial, the court concluded that the MCRC nurse was not acting as a proxy for law enforcement.⁵³ That was based on testimony of the nurse that the “purpose of MCRC” is for the “assessment and treatment of child sexual abuse” and her testimony that “I don’t do investigation [sic] of child abuse.”⁵⁴ The nurse explained the protocol for questioning and further said that the questions were not directed by law enforcement and that she was thus “seeking truthful answers about what happened to [the child] for the purpose of assessing his health and making recommendations for treatment.”⁵⁵ Accordingly, “Nurse Carney’s primary purpose was medical.”⁵⁶

Conclusion

The testimonial v. nontestimonial determination suffers from Minnesota courts engaging in an “ends justify the means” analysis. Judicial decisions often seem based on emotion—or getting to the “right” result—rather than on a set of well-defined factors that the United States Supreme Court has articulated to ensure a consistent and honest analysis.

Minnesota courts’ biggest failure has been their hardline approach: If there is any inkling the statement has a medical or therapeutic purpose, it will be deemed nontestimonial and admissible. In alleged sex abuse cases of a child, there may be dual purposes—both investigative and medical. The analysis should turn on the two factors set forth at the beginning of this article and that get to the nub of a statement’s testimonial nature: 1) whether it was made during an ongoing emergency; and 2) whether it was made to describe past events. Minnesota has strayed far beyond this straightforward and intellectually honest analysis to the detriment of the constitutional rights of the accused. ▲

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Notes

- ¹ The Sixth Amendment's confrontation clause is binding on the States through the 14th Amendment. See, e.g., *Ohio v. Clark*, 576 U.S. 237, 243 (2015). See also Minn. Const. Art. 1, Sec. 6.
- ² *Crawford v. Washington*, 541 U.S. 36, 68 (2004).
- ³ The child may be unavailable either because the child is deemed incompetent to testify or the parent/caregivers do not allow the child to testify or are otherwise not cooperative.
- ⁴ "The right to confront one's accusers is a concept that dates back to Roman times." *Crawford v. Washington*, 541 U.S. 36, 43, 47 (2004).
- ⁵ *State v. Warsame*, 735 N.W.2d 684, 696 (Minn. 2007).
- ⁶ *Davis*, 126 S.Ct. at 2273-74.
- ⁷ Webster's Ninth New Collegiate Dictionary (1988).
- ⁸ National Children's Advocacy Center, <https://www.nationalcac.org/forensic-interview-services/> (last visited 4/23/2020).
- ⁹ Kathleen Coulborn Faller, "Forty Years of Forensic Interviewing of Children Suspected of Sexual Abuse, 1974-2014: Historical Benchmarks," 4 SOCIAL SCIENCES 34, 36 (12/24/2014).
- ¹⁰ What to know before a forensic interview, CornerHouse, <https://www.cornerhousemn.org/visiting-corner-house-1/common-questions-before-the-forensic-interview> (last visited 4/23/2020) (emphasis added).
- ¹¹ Response Services, CornerHouse, <https://www.cornerhousemn.org/response> (last visited 4/23/2020). These protocols are contained in The Cornerhouse Forensic Interview Protocol: RATAC, see *infra* note 17.
- ¹² Midwest Children's Resource Center, <https://www.childrensmn.org/services/care-specialties-departments/midwest-childrens-resource-center/what-to-expect/> (last visited 4/23/2020).
- ¹³ *Id.*
- ¹⁴ "Their abuse stories are hard to tell. Listening can be just as hard." Pioneer Press, (2/15/2014) <https://www.twincities.com/2014/02/15/their-abuse-stories-are-hard-to-tell-listening-can-be-just-as-hard/> (last visited 4/23/2020).
- ¹⁵ *Id.* The index terms to describe the document at the National Criminal Justice Reference Service include: "Child abuse investigations; Child Sexual Abuse; Criminal investigation; Interview and interrogation; Investigation techniques; Police interview/interrogation of juvenile; Sex offense investigations." *Id.*
- ¹⁶ Jennifer Anderson, Julie Ellefson, Jodi Lashley et al., "The Cornerhouse Forensic Interview Protocol: RATAC, 12." T.M. COOLEY J. PRACT. & CLINICAL L. 193, 193.
- ¹⁷ Abstract, CornerHouse Forensic Interviewing Protocol: RATAC, <https://www.ncjrs.gov/App/Publications/Abstract.aspx?id=258656> (last visited 4/23/2020).
- ¹⁸ 541 U.S. 36 (2004).
- ¹⁹ *Id.* at 59 ("Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only when the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.")
- ²⁰ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (conditioning the admissibility of hearsay evidence on whether 1) the declarant is unavailable to testify; and 2) the statement bears adequate "indicia of reliability"). *Crawford* overruled *Roberts*' two-part test. *Crawford*, 541 U.S. at 68-69. Looking to the historical roots of the confrontation clause, the Court determined that "testimonial" statements are the concern: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required; unavailability and a prior opportunity to cross-examination." *Id.* at 68.
- ²¹ *Id.*
- ²² 547 U.S. 813 (2006). The statement involved in *Davis* was a 911 recording in which the alleged victim said her boyfriend assaulted her. *Id.* at 818. He left the house, and the alleged victim continued to speak with the 911 operator and, upon questioning by the 911 operator, provided identifying information. *Id.* The question in *Davis* was "whether, objectively considered, the interrogation during the 911 call produced testimonial statements." *Id.* at 814. *Hammon*, on the other hand, concerned statements given to police who responded to a domestic disturbance. *Id.* at 819. Upon arrival, the husband and wife were in separate areas of the house, and each was questioned about what had occurred during their dispute. *Id.*
- ²³ *Id.* at 822.
- ²⁴ *Id.* at 826.
- ²⁵ *Id.* at 833.
- ²⁶ 135 S. Ct. 2173 (2015).
- ²⁷ *Id.* at 2181-82.
- ²⁸ *Id.*
- ²⁹ *Id.* at 2182.
- ³⁰ 701 N.W.2d 802, 804 (Minn. 2005).
- ³¹ *Id.* At 812-31. The considerations include:
(1) whether the declarant was a victim or an observer; (2) the declarant's purpose in speaking with the officer (e.g., to obtain assistance); (3) whether it was the police or the declarant who initiated the conversation; (4) the location where the statements were made (e.g., the declarant's home, a squad car, or the police station); (5) the declarant's emotional state when the statements were made; (6) the level of formality and structure of the conversation between the officer and declarant; (7) the officers' purpose in speaking with the declarant (e.g., to secure the scene, determine what happened, or collect evidence); and (8) if and how the statements were recorded.
- ³² *Id.* at 255.
- ³³ *Id.* at 246-47.
- ³⁴ *Id.*
- ³⁵ *Id.* at 258.
- ³⁶ *Id.* at 259.
- ³⁷ 711 N.W.2d 508, 516 (Minn. 2006). The Court applied the eight *Wright I* factors, relying heavily on the fact that the statements were taken largely for medical assessment purposes. *Id.* at 515.
- ³⁸ 726 N.W.2d 464, 475-76 (Minn. 2007).
- ³⁹ 736 N.W.2d 636, 640 (Minn. 2007).
- ⁴⁰ *Id.* at 639.
- ⁴¹ *Id.*
- ⁴² *Id.*
- ⁴³ *Id.* at 642. The Court further reasoned that a joint decision to refer the child to MCRC by law enforcement and social services as "the best way to proceed with the investigation" was not problematic because Minn. Stat. 626.556, subd. 10a requires such joint decisions.
- ⁴⁴ The statute reads: "Subd. 10a. Law enforcement agency responsibility for investigation; welfare agency reliance on law enforcement fact-finding; welfare agency offer of services. (a) If the report alleges neglect, physical abuse, or sexual abuse by a person who is not a parent, guardian, sibling, person responsible for the child's care functioning within the family unit, or a person who lives in the child's household and who has a significant relationship to the child, in a setting other than a facility as defined in subdivision 2, the local welfare agency shall immediately notify the appropriate law enforcement agency, which shall conduct an investigation of the alleged abuse or neglect if a violation of a criminal statute is alleged."
- ⁴⁵ *Bobadilla v. Carlson*, 570 F. Supp. 2d 1098, 1100 (D. Minn. 2008) (*aff'd*, *Bobadilla v. Carlson*, 575 F.3d 785 (8th Cir. 2009)).
- ⁴⁶ 570 F. Supp. 2d at 1107-09. Judge Schiltz found nothing in the record to suggest any imminent risks to the child's health or welfare, nor was there any evidence in the record showing that the overriding or main purpose of the questions asked by the social worker were to assess immediate risks to the child.
- ⁴⁷ *Id.* at 1109-10.
- ⁴⁸ *Id.* at 1110.
- ⁴⁹ *Id.* at 1110-11.
- ⁵⁰ 2018 WL 2090637, at *6 (Minn. Ct. App. 2018).
- ⁵¹ *Id.* at *1.
- ⁵² *Id.*
- ⁵³ *Id.* at *3.
- ⁵⁴ *Id.* at *5.
- ⁵⁵ *Id.*
- ⁵⁶ *Id.* at *6.

LAWYERS WITH DEMENTIA

As more attorneys practice into later life, the profession faces a growing challenge

BY JILL SAUBER

Jack is well-known and even revered in his community. He serves on several community boards; his kids were raised and went to public school in the rural county where he ran a private general law practice until he was elected as a judge. He has been a sitting judge for several decades and has won a reputation for being fair and reasonable and bringing a calm demeanor to the bench. In the past several months, however, Jack has been arriving to the courthouse late and looking a bit disheveled. He cannot seem to remember matters from the morning calendar by the time afternoon rolls around, and he is making more rash decisions. His clerk and court reporter are hesitant to approach Jack about issues as they arise, or the errors they see in his decisions, since he becomes agitated and easily angered.

Unbeknownst to his colleagues, Jack was recently diagnosed with mild cognitive impairment. His wife and adult children are aware of the diagnosis, but everything seems fine to them. At home, Jack may seem a little forgetful, but there are no signs he cannot function normally. Jack's family is not alarmed by his behavior; nor have they intervened about his work, because they aren't aware of any reason to. Jack is 61 years old, and has talked about retiring in recent years, but not recently.



At work, his colleagues are seeing that his executive functioning and high-level decision making is diminished. Although they do not know about the diagnosis, they are aware something is going on. They feel growing concern about his mental capacity and the effect his behavior is having on the public. Jack's colleagues are stuck in a position that many people find themselves in while working with lawyers who suffer from memory loss: What duty does a fellow attorney or judge have to report Jack, and how do they confront him about the increasing deficits in his abilities?

Lawyers with dementia have been a subject of growing concern as the profession ages and as the general public becomes more aware of cognitive decline and memory loss. We have seen the issue covered in pop culture. For instance, on the CBS show *The Good Wife*, in 2010, the founding partner of Stern, Lockhart and Gardner (Jonas Stern) was charged in a DUI and battery incident that actually stemmed from dementia that he kept well-hidden from his partners. The charges were later dropped after a breathalyzer test showed he was sober. The partners noticed a change in his behavior but before they could make any moves to remove him or address possible issues, Stern left to start a new law firm and took clients and a third of the staff with him.

In recent years the ABA and other stakeholders have joined forces, compiled data, prepared reports, and conducted studies on the aging bench and bar, as well as the effects of aging lawyers (with or without memory loss) on the profession as more attorneys practice longer.

This article will discuss trends and demographics in the legal profession, how to identify early signs of cognitive impairment or dementia, and ethical issues related to attorneys practicing with memory loss or cognitive impairment.

Our aging profession

The ABA's 2020 Profile of the Legal Profession includes a number of relevant demographics comparing the American workforce at large to the specific case of lawyers.

- Percentage of US workers age 65 or older: 7 (about 1 in 14).¹
- Percentage of lawyers age 65 or older: 15 (nearly 1 in 6).²
- 2019 (Minnesota) Active Attorneys: 25,823.^{3*}
- Median age of US workers in 2019: 42.3 years.⁴
- Median age of lawyers in 2019: 49.5 years.⁵
- Average U.S. life expectancy in 2017 for individuals age 65 (all races, both sexes): 17.4 years (to projected age of 82.4 years).⁶

About 12 percent of American workers are younger than 25, yet there are very few lawyers under 25, so that could explain part of the median age difference between average workers and lawyers. Also, baby boomers⁷ are aging, and many boomer lawyers are postponing retirement and working into older age (for personal satisfaction, a desire to keep contributing to society, or financial reasons), so the median age has been steadily rising over time. The median age of lawyers was 39 in 1980, 41 in 1991, 45 in 2000, and 49 in 2005.⁸ Our profession is aging.

Indiana University Maurer School of Law professor William D. Henderson proposes two theories for the steadily increasing age of the bar: 1) increased exits from law practice based on gender integration, and 2) slowing absorption of law graduates into the licensed bar. These two theories are not mutually exclusive.⁹

Continuum of cognitive impairment

It is important to understand merely getting older is not a sign of cognitive impairment. Our brains naturally change as we age, but predictable cognitive decline should not interfere with our ability to function normally. "Cognitive impairment" refers to a diminished ability to remember, read, write, problem-solve, perform calculations, and navigate around the environment. Mild cognitive impairment (MCI) can involve impaired functionality in any of those areas, yet not interfere with normal daily activities. Most often issues of MCI involve memory.

Mild cognitive impairment (MCI)

Cognitive impairment occurs on a continuum. A person with a diagnosis of MCI may have full executive capacity and function normally with a very slow progression of brain dysfunction or memory loss. Therefore, a diagnosis of MCI does not necessarily render a person incapacitated or unable to handle their own affairs, but it does make it more likely they will be unable to function normally in the future, depending on the underlying cause of MCI and how quickly the condition progresses.

To be considered MCI, the memory impairment must be more problematic than that associated with normal aging, and some early signs/symptoms include:

- memory loss (such as misplacing items and forgetting recently learned information, conversations, names, etc.);
- language problems (such as trouble finding words);
- disorientation to time (such as forgetting the day of the week or the date);
- impaired sense of direction (such as getting lost in a familiar place);
- changes in personality or mood;
- executive impairment; and
- difficulties with decision making, poor judgment, or impaired organizational skills.

While dementia or Alzheimer's disease can lead to these symptoms, there are many other treatable disorders that may also cause MCI. It is important to speak with a qualified medical professional and rule out other stressors or conditions that can cause these symptoms.¹⁰

NORMAL DECLINE IN COGNITIVE FUNCTIONING¹⁷

Our brains go through natural changes as a part of aging. And there are a number of age-pegged general benchmarks. Here are a few.

AGE 20-30: cognitive functioning at its peak. There is evidence of the beginning of neuronal shrinking by the mid-20s.

≥ AGE 30: a small amount of brain volume has been lost. Although there is no apparent loss of cognition in any broad sense, sophisticated testing can detect small declines.

AGE 40: loss of brain volume continues and may begin to accelerate. Most will notice the slowing of mental processing, and short-term memory tasks are more challenging.

AGE 50: accelerated loss of brain volume begins. Changes in memory and other cognitive capacities become more noticeable. These changes may involve processing speed, multitasking, attention to detail, visuospatial processing, and the ability to place an event in time and place.

AGE 60: brain volume continues to shrink. The hippocampus and the amygdala—the parts of the brain most vital in the integration and formation of short-term memory—are particularly affected. Signs first seen in our 50s become more pronounced: Processing speed slows further; it takes us longer to learn new information or master complex mental tasks; it becomes more difficult to maintain concentration and tune out distractions; “senior moments” become more common.

AGE 70+: people vary widely in cognitive abilities. Many remain sharp until a very advanced age, while others begin to show the wear and tear of life and diseases.

Dementia

Dementia is a general term that identifies or labels a decline in mental ability that is severe enough to interfere with normal daily functioning. Dementia is not a specific disease; the term refers to a wide range of specific medical conditions, including Alzheimer's. It is often referred to as “senility” or “senile dementia,” which reflects the formerly widespread but incorrect belief that serious mental decline is a normal part of aging.¹¹

For an individual to have dementia, at least two of the following core mental functions must significantly impair normal daily activities:

- memory;
- communication and language;
- ability to focus and pay attention;
- reasoning and judgment; and
- visual perception.

There are at least 70 causes of dementia. Some are reversible, but many are not. The most common causes of dementia are Alzheimer's, vascular dementia, alcoholic dementia (also called “wet brain” or Wernicke-Korsakoff Syndrome), and Lewy body dementia. Other mental health or substance abuse issues can mimic or cause dementia.

Researchers have hypothesized that individuals with a higher education are less likely to develop dementia. This could be a result of the brain creating more synapses or because higher levels of educational attainment provide an individual with a certain “cognitive reserve.”¹² There is also speculation that, because people with higher education are more likely to develop healthier lifestyles, their risk of developing dementia is lower.¹³ However, there remains much to learn about dementia in general, including “nature versus nurture” questions.



Although age is not in itself indicative of dementia, we do know that the greatest known risk factor for Alzheimer's is advancing age. Typical onset is after age 65, and the likelihood of developing Alzheimer's doubles every five years after the age of 65. After age 85, the risk reaches nearly 50 percent. As attorneys work into older age, there is a greater concern of dementia. But simply assuming that an older attorney is displaying symptoms of dementia because that person is old is a form of "ageism" worth watching out for. It is important to find out whether forgetfulness or a lack of focus is attributable to personal troubles or other workplace issues unrelated to age.

Evidence suggests that the factors that put you at risk for heart disease may also increase the chance of Alzheimer's and vascular dementia. These factors include lack of exercise, smoking, high blood pressure, high cholesterol, and poorly controlled diabetes. The symptoms of dementia can also be caused by excessive stress.

Some instances of cognitive decline or impairment are reversible, such as when the cause is an independent medical condition, alcohol or drug use, or a situational stressor. An attorney's natural cognitive decline could easily be exacerbated by stress or some other cause, and in many cases a stress-caused decline can be reversed. But we must also recognize that the later stages of life include many such stressors: health and medical challenges; efforts to catch up and regain control of our practices after such an episode; caregiving responsibilities; grief from the loss of a loved one or the loss of one's own health and physical capacity.

The hard truth is that age-related cognitive decline or impairment is not usually reversible. And when it happens, the most likely resolution is for the lawyer to stop practicing.

"Lawyer": An identity crisis

An intelligent attorney who is well-trained in their area of practice may be able to have full conversations with colleagues about a matter without tipping anyone off that they have memory loss. Which is to say, they are often very good confabulators.

"Confabulation" is a symptom of various memory disorders in which made-up stories fill in any gaps in memory. The term was coined by Karl Bonhoeffer, Arnold Pick, and Carl Wernicke in the early 1900s and applied to patients with Korsakoff's syndrome. "Fabrication," "false memory," and "pseudo reminiscence" are sometimes used to describe the same phenomenon. Sometimes you will hear people call it "honestly lying" since the person telling the story or filling in memory gaps does not know they are making it up as they go. Confabulation is often misunderstood, and can occur in numerous types of syndromes, not just MCI or dementia.

"Once confabulation starts," says Joan Bibelhausen, executive director at Minnesota Lawyers Concerned for Lawyers (LCL), the Minnesota Lawyer Assistance Program (LAP), "you encounter big problems." If the affected lawyer is under the mistaken belief that they have full capacity to practice, then the lawyer, when confronted, "may be uncooperative, unwilling to participate, or, worse, may forget they were disbarred!"

Bibelhausen and Nicole Frank, assistant director of the Minnesota Office of Lawyers Professional Responsibility (OLPR), have noted a number of factors that make these situations more difficult to address with older attorneys.

■ **Identity.** The lawyer's identity is directly tied to their title and profession. Being a lawyer is not just a job or career, but a lifestyle and a significant portion of their personal identity.

■ **Denial.** The impaired lawyer may continue to believe they are still functioning at a high-enough level to continue to practice. This is true even in cases where the lawyer has a formal diagnosis of dementia or Alzheimer's.

■ **Legacy.** Often the impaired lawyer has had a long and respected career. "When the attorney is given deference in the firm," Frank says, "then there is stigma or shame surrounding their forgetfulness, and no one wants to address the issues because they respect the attorney."

■ **Protection.** Loyal staff may be protective of the lawyer and attempt to cover for the lawyer's deficits, not recognizing the potential harm to clients and the public posed by the attorney's continued practice of law.

■ **Finances.** The lawyer's real or perceived financial need to continue practicing, to support themselves or dependents, often breeds resistance.

Noticing that an attorney may be confabulating is a nuanced matter. Memory issues could be disregarded completely, or intentionally dismissed to save face—that is, until the problem leads to an ethics or malpractice claim that must be addressed. Lawyers need to be aware of how aging can bring about cognitive changes, and they need to be able to spot health problems in others.

Spotting signs of dementia

"People pick up on signs of dementia when an older attorney becomes forgetful," Frank says. "Maybe the older attorney experiences trouble learning new technology, or they fall and injure themselves at work." More specifically, some early signs a lawyer may suffer from dementia include:

- forgetting court, hearing, or important docket dates;
- failing to recall settled case law in their practice area;
- forgetting colleagues' or clients' names;
- getting lost driving to work;
- arriving or leaving at odd hours;
- falling or injuring themselves at work;
- missing calls or meetings despite having an up-to-date calendar;
- failure to use technology or forgetting how to use technology;
- a decline in the lawyer's writing or ability to form logical arguments;
- appearing disheveled;
- rapid weight loss or gain;
- unexplained irritability; and
- changes to mood or demeanor.

Ethical and malpractice issues

No one wants to see a successful 40-to-50-year legal career end up on the front page of newspapers because of malpractice. In Frank's experience, the ethical issues that arise when a lawyer has dementia are most often caused by forgetfulness/memory issues, being unfamiliar with technology, loss of high-level executive functioning, neglect of client files, competency issues, and lack of diligence in moving files along.

She cites several Minnesota Rules of Professional Conduct that are commonly violated when a lawyer suffers from dementia:

MRPC Rule 1.1 Competence. According to the ABA, the most common ethical problem of a lawyer with cognitive impairment is violating this first rule of ethics.¹⁴ To avoid issues related to competence, have another attorney who is more responsible on client files to provide a "check and balance."

MRPC Rule 1.3 Diligence. To avoid issues related to failing to move a file along in a timely manner, find ways to remind attorneys about deadlines or help ensure the matter is proceeding. For "snowbird" attorneys who have moved or may be practicing in a different time zone, or attorneys who are not in the office full-time, ensure there is a tickling system in place to touch a file regularly. (While many offices are completely remote during the covid-19 pandemic, it is especially important to have good timekeeping and tickling systems in place.)

Comment [5] to Rule 1.3 discusses that "[t]o prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability...." Frank explains that designating a surrogate or having a "mandatory successor" is helpful for a practice transition, especially for solo or small firm practitioners.

MRPC Rule 1.4 Communication. Frank notes that Rule 1.4 is the source of the most complaints—regardless of age or years in practice. To avoid issues related to keeping the client reasonably informed, she recommends keeping on top of new technology training. Regularly follow up with attorneys to ensure they understand how to use the technology (including how to electronically file with the court, record documents, securely email, and dictate) and that the attorney is able to explain the matter to the extent necessary for the client to make an informed decision.

MRPC Rule 1.6 Confidentiality of Information. Loose lips sink ships, as they say, and cognitive decline generally includes a loss of inhibition and, as Frank calls it, "a less disciplined approach to client confidentiality"—likely because the attorney's executive functions are affected by dementia, or in part because of confabulation. Either way, an attorney who is experiencing cognitive decline may divulge confidential client information (knowingly or not) by bragging or telling stories about prior cases.

MRPC Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer.

To avoid missteps in the ethical rules, and to ensure with "reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct," a solo practitioner may choose to transition into a larger firm or bring on a partner to provide the element of oversight. If that is not an option, or the lawyer is too impaired to continue practicing law, they may need to exit practice. In law firm settings, other attorneys have an obligation to report under MRPC Rule 8.3.

MRPC Rule 8.3 Reporting Professional Misconduct.

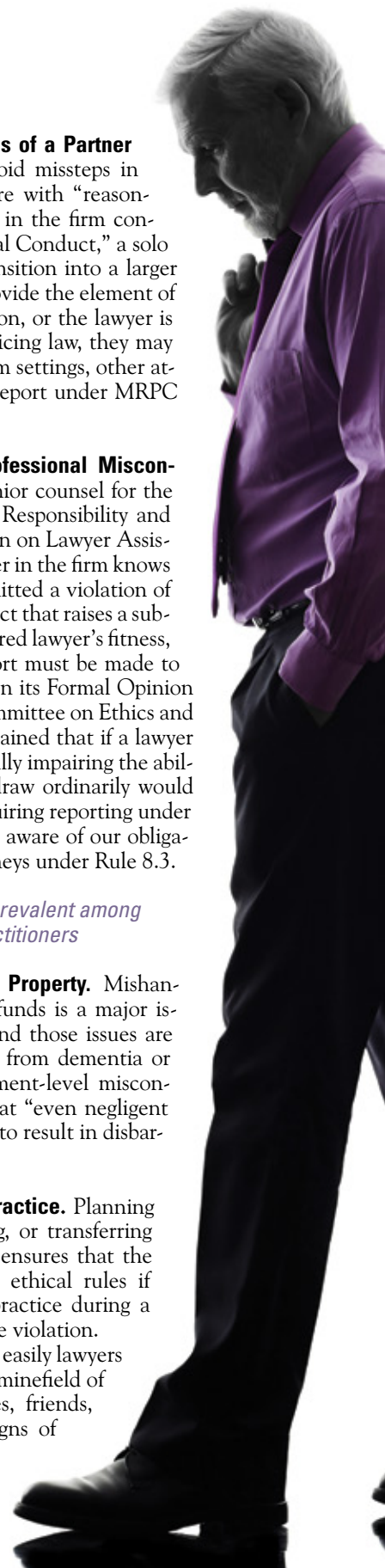
Theresa Gronkiewicz, senior counsel for the ABA's Center for Professional Responsibility and staff counsel for the Commission on Lawyer Assistance Programs, says, "If a lawyer in the firm knows that the impaired lawyer committed a violation of the Rules of Professional Conduct that raises a substantial question as to the impaired lawyer's fitness, pursuant to Rule 8.3(a), a report must be made to the disciplinary authorities."¹⁵ In its Formal Opinion 03-431, the ABA Standing Committee on Ethics and Professional Responsibility explained that if a lawyer suffers from a condition materially impairing the ability to practice, failure to withdraw ordinarily would raise a substantial question requiring reporting under Rule 8.3.¹⁶ All of us need to be aware of our obligations to report our fellow attorneys under Rule 8.3.

Violations that are more prevalent among solo/small firm practitioners

MRPC Rule 1.15 Safekeeping Property. Mishandling trust accounts or client funds is a major issue for solo or smaller firms, and those issues are exacerbated if a lawyer suffers from dementia or memory issues. This is disbarment-level misconduct, and Frank emphasizes that "even negligent mishandling is serious enough" to result in disbarment.

MRPC Rule 1.17 Sale of Law Practice. Planning is vital when dissolving, selling, or transferring a law practice. Early planning ensures that the attorney does not violate the ethical rules if attempting to wind up their practice during a crisis or after another major rule violation.

It is unsettling to realize how easily lawyers with dementia can walk into a minefield of ethical violations. If colleagues, friends, or family are keen to early signs of dementia, and take initiative





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by stepping in to discuss a succession plan or a transition out of practice, the lawyer may be able to avoid the added stress and embarrassment of discipline or lawsuits.

Reporting and intervention are more humane than discipline

Noticing and reporting cognitive impairment in colleagues or partners is a sensitive subject. Unfortunately, there remains a substantial stigma surrounding dementia. A diagnosis can lead to embarrassment, shame, anger, and blame. For those attorneys whose identity is directly tied to being a lawyer, it becomes an existential crisis to acknowledge they may need to put away their briefcases. To make matters even more fraught, many affected lawyers are not even aware of the memory issues they are experiencing. If they are not, even a dementia diagnosis may not overcome their denial that they have any issues that should keep them from practicing.

Confronting a friend or colleague about lapses in memory or issues in practice can cause friction in relationships. Having an “intervention” may be helpful. Or not: If the attorney who is the subject of the intervention subsequently forgets the discussion and returns to work the next week, then everyone is left with a sense of failure and frustration. Lawyer assistance programs hope to reach lawyers with dementia before their condition becomes a professional responsibility or malpractice issue—essentially the same approach they take in cases involving depression or addiction.

Reporting can take several forms. The most obvious, and problematic, is a lawsuit or ethics complaint against the attorney that brings issues to light. Joan Bibelhausen says the issues come to LCL by the following routes (in order of most to least common):

- judges, colleagues within the firm, or colleagues outside the firm;
- family members or personal friends;
- self-reporting (the lawyer goes to LCL with a diagnosis); and
- clients who have filed a complaint with the Office of Lawyers Professional Responsibility about a possible malpractice/ethics issue.

Bibelhausen recalls a judge reporting an impaired lawyer who appeared in court in the morning, at which point the judge ruled on the matter—only to see the lawyer return in the afternoon to argue the same matter. In fact, judges (who see lawyers regularly) are often the ones to spot inconsistencies with past behavior or lapses in judgment or memory.

LCL offers an “intervention” with LCL staff and the impaired lawyer to discuss succession planning and retiring with dignity. It is a softer approach than a perceived “attack” by fellow shareholders or colleagues. Yet for the reasons discussed above, the offer is not always well-received. Likewise, if the impairment is caused by dementia, an otherwise productive intervention may become a forgotten memory for the impaired lawyer. In one intervention, a sitting judge willingly participated in a healthy discussion with colleagues and family about his memory issues and the impairment others were noticing. They were indirectly calling into question his fitness to sit on the bench, but he took it in stride, and agreed that it would be best to retire to avoid the risk of further embarrassment or ethical issues. He agreed on the spot to retire, effective immediately, and everyone left the intervention with an eye toward helping him transition off the bench. Unfortunately, he was back on at work the following Monday.

If you are considering reporting, LCL can help walk through how to discuss the issues with the impaired lawyer. Do not let things slide! Bibelhausen recommends that concerned colleagues first double-check the impaired lawyer’s work and review the situation. Specifically, consider whether the impaired lawyer’s conduct “raises a substantial question as to [his or her] honesty, trustworthiness, or fitness as a lawyer in other respects” and if you have a duty to inform the appropriate professional authority under Rule 8.3(a)-(c) of the MRPC. Potential intervenors should also consider whether there are other underlying reasons why the attorney could be impaired—such as stroke, medication issues/reactions, alcohol or drugs, or extreme stress—that could be treatable.

Right now, reporting goes one way: LCL does not share information with anyone else, and any conversations with them are completely confidential. The OLPR, conversely, does contact LCL when a matter becomes public, after which LCL will reach out to the attorney to provide resources or assistance. Bibelhausen is interested in a rule change that would allow the OLPR to connect with LCL as soon as a malpractice petition is filed. If OLPR is opening a file regarding an issue that LCL is interested in or could assist with, says Bibelhausen, she hopes that eventually LCL will be informed early on so it may assist.

Larger firms have the advantage of more internal resources to help transition a lawyer out of practice, but they only come into play in a timely fashion if colleagues are attuned to early signs of dementia and confront or report colleagues. ▲

DEMENTIA-RELATED RESOURCES

If you're concerned that you, a loved one, or a colleague are experiencing symptoms of cognitive decline, here are some of the key places you can turn for information or support.

Lawyers Concerned for Lawyers (LCL)

LCL can provide an informal assessment of whether an attorney's cognitive functioning has dropped below the level required to effectively practice law. If so, a referral may be made to assist the attorney.

Confidential hotlines:
651-646-5590 or 1-866-525-6466
Email: help@mncl.org
Website: www.mncl.org

Lawyers Professional Responsibility Board (LPRB) / Office of Lawyers Professional Responsibility (OLPR)

In addition to the advisory opinion service available to licensed Minnesota Attorneys, Judges and out of state lawyers regarding compliance with Minnesota's ethics rules, the OLPR also provides a Well-Being Toolkit for Lawyers and Legal Employers. You can find it at the LPRB site under the Lawyer Resources tab.

Obtain a confidential advisory opinion by phone:
651-296-3952 or 1-800-657-3601
TTY users call MN relay service toll free: 1-800-627-3529
Website: lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinions.aspx

ABA Senior Lawyers Division

One goal of the Senior Lawyers Division is to provide enhanced educational opportunities, publications, and other services at minimal cost to its members. Resource topics include retirement, elder law, lawyer wellness, health, pro bono, financial planning, succession planning, elder abuse, ethics, and technology.

Website: americanbar.org/groups/senior_lawyers.html

ABA Commission on Law and Aging

The Commission has a substantial collection of resources, including information on assessment of capacity.

Website: www.americanbar.org/groups/law_aging.html

National Task Force on Lawyer Well-Being

The Task Force was conceptualized and initiated by the ABA Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers (APRL). The task force takes a holistic approach to lawyer well-being, treating it as a continual process of seeking to thrive in each dimension of one's life: emotional, occupational, intellectual, spiritual, physical, and social. The task force has relevant and timely podcasts and blogs, shared resources related to lawyer well-being, and information about relevant conferences or seminars.

Website: lawyerwellbeing.net

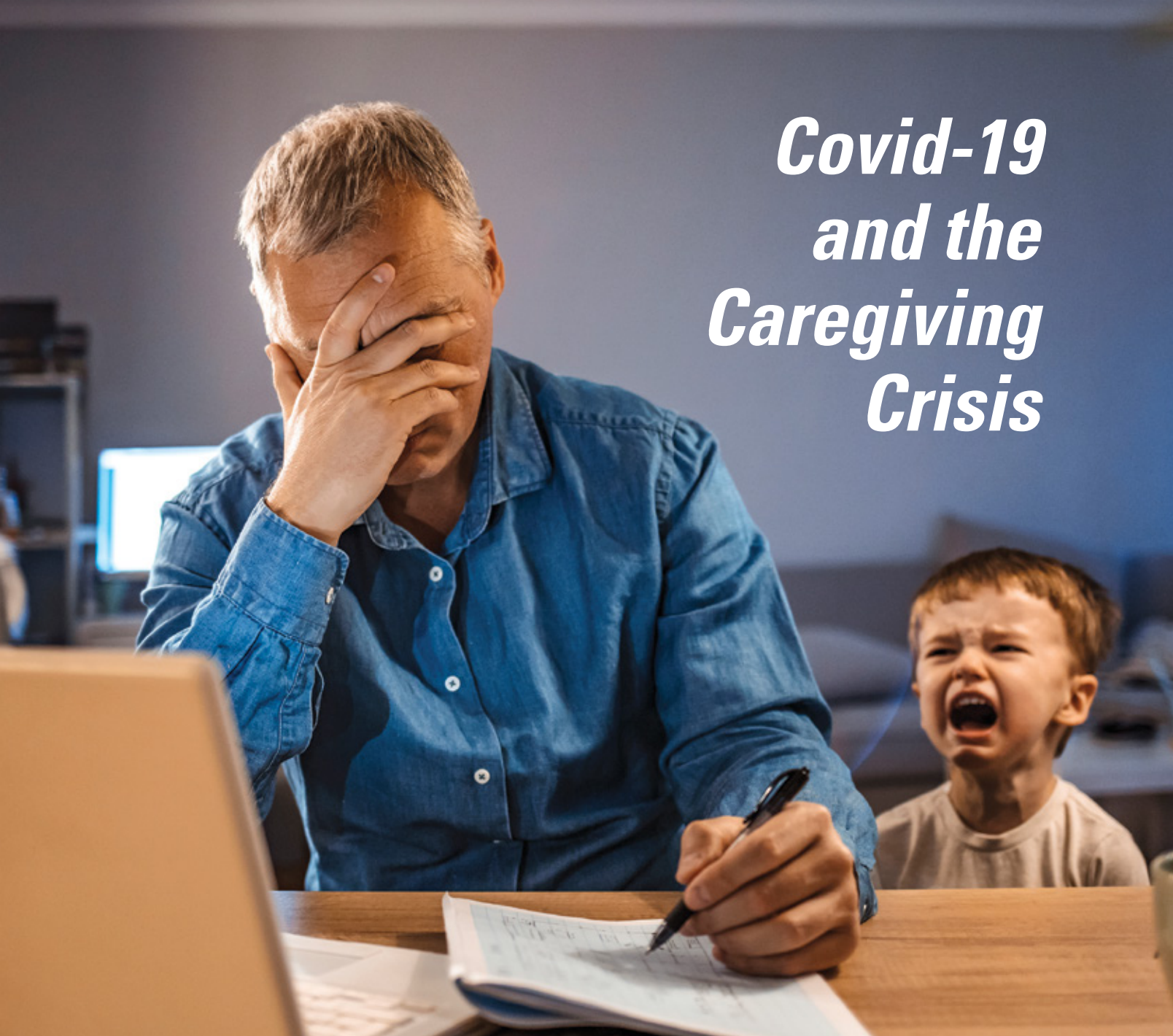
Self-Administered Gerocognitive Exam (SAGE)

Concerned you may have cognitive issues? Want to recommend an assessment to a family member, friend, or colleague that may be having memory or thinking problems? You may want to take or share the Self-Administered Gerocognitive Exam (SAGE). The SAGE test was developed by Dr. Douglas Scharre (MD, Director, Division of Cognitive Neurology at Ohio State University Wexner Medical Center) and licensed to BrainTest.

Website: wexnermedical.osu.edu/brain-spine-neuro/memory-disorders/sage

Notes

- ¹ 2020 ABA Profile of the Legal Profession report (7/28/2020) at 35, https://www.americanbar.org/news/reporter_resources/profile-of-profession/.
- ² *Id.*
- ³ 2019 ABA National Lawyer Population Survey, 10-Year Trend in Lawyer Population by State. *Minnesota no longer tracks resident/non-resident status; the count reflects all active lawyers.
- ⁴ *Id.*
- ⁵ *Id.*
- ⁶ NCHS, National Vital Statistics System, public-use Mortality Files; National Center for Health Statistics. *Health, United States, 2017: Data Finder, Table 4. Life expectancy at birth, at age 65, and at age 75, by sex, race, and Hispanic origin: United States, selected years 1900–2017*; also available at CDC/National Center for Health Statistics, Division of Analysis and Epidemiology (10/30/2019), https://www.cdc.gov/nchs/hus/contents2018.htm#Table_004.
- ⁷ The term “baby boomer” refers to individuals born in the United States between mid-1946 and mid-1964. About 10,000 a day turn age 65 and by 2030, all boomers will be at least age 65. The 2020 Census will provide the most up-to-date count of the baby boom generation, now estimated at about 73 million. U.S. Census Bureau (12/10/2019), <https://www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html>.
- ⁸ *Supra* note 1 at 36.
- ⁹ Henderson, The Legal Whiteboard, Is the Legal Profession Showing Its Age? (10/12/2014) <http://www.billhenderson.com/articles/2013/10/13/is-the-legal-profession-showing-its-age>.
- ¹⁰ ABA Senior Lawyers Division, *Experience*, Volume 25, Number 2, 2015. “Concerns About Cognitive Impairment and Older Lawyers,” https://www.americanbar.org/groups/senior_lawyers/publications/experience/2015/summer/concerns-cognitive-impairment-older-lawyers/.
- ¹¹ Alzheimer's Association, *What Is Dementia?* <https://www.alz.org/alzheimers-dementia/what-is-dementia>.
- ¹² Wilson, Robert S. et al “Education and cognitive reserve in old age.” *Neurology* 92.10 (2019): e1041-e1050. Web. 8/9/2020. <https://n.neurology.org/content/92/10/e1041>.
- ¹³ Eileen M Crimmins, PhD, Yasuhiko Saito, PhD, Jung Ki Kim, PhD, Yuan S Zhang, MS, Isaac Sasson, PhD, Mark D Hayward, PhD, Educational Differences in the Prevalence of Dementia and Life Expectancy with Dementia: Changes from 2000 to 2010, *The Journals of Gerontology: Series B*, Volume 73, Issue suppl_1, May 2018, Pages S20–S28, <https://doi.org/10.1093/geronb/gbx135>.
- ¹⁴ Hudson Jr., David L. (9/1/2018), ABA Journal, “Lawyers and cognitive decline: Diminished capacity may bring ethics problems for sufferers,” https://www.abajournal.com/magazine/article/lawyers_and_cognitive_decline_diminished_capacity_may_bring_ethics_problems.
- ¹⁵ *Id.*
- ¹⁶ ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 03-431 - Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment; as cited in note 14.
- ¹⁷ *Supra* note 10.



Covid-19 and the Caregiving Crisis

BY LEANNE FUITH AND SUSAN TROMBLEY

The covid-19 pandemic has disrupted every aspect of life. Since March 2020, Minnesota families have navigated a new normal that no longer includes access to regular care for their children or other vulnerable family members. At the end of July, Gov. Tim Walz announced a return-to-school framework for the 2020-2021 school year that includes hybrid learning with strict social distancing, and capacity limits or distance learning for most Minnesota school districts. All Minnesota school districts face a likely shift to a distance learning model with little warning if local, regional, or statewide covid-19 metrics worsen significantly.

Amid this uncertainty, employees with caregiving responsibilities are being asked to return to or continue working in the face of quite possibly shuttered schools and the absence of

daycare centers. Parents like Molly and Jim both worked from home prior to the covid-19 pandemic. Under the terms of their employment, they had to have childcare for their seven-year-old son or face termination. In January 2020, Molly began making plans for summer childcare for their son, who has special needs. Then covid-19 hit. Businesses, schools, and childcare centers shuttered almost overnight as people began to work from home. As the weeks passed, it became apparent that summer childcare options would be virtually nonexistent. Fortunately, Molly's company walked back its policy requiring childcare for parents who work at home and Molly's son was able to remain home during the workday. Now, with another school year underway and their son likely unable to return to school in-person on a full-time basis, Molly is once again worried about how she will be able to manage.

With the start of the new school year, Minnesota parents and caregivers are forced to strike a precarious balance between remaining healthy, caring for children and vulnerable family members, and fulfilling their professional and workplace obligations. Similarly, Minnesota employers are balancing the need to return to business as usual with their moral and legal obligations to support their workers during a continuing public health crisis. As the economy reopens with restrictions on school and available childcare, many Minnesota caregivers risk being treated adversely in the workplace because of their caregiving responsibilities—and the foreseeable impacts include workplace discrimination, retaliation, and termination.

Employment laws protecting Minnesota caregivers

Minnesota is among nearly 100 states and cities with laws that prohibit caregiver discrimination, also known as “family responsibilities discrimination.”¹ Caregiver discrimination was on the rise even before the pandemic. Between 1998 and 2012, family responsibility discrimination case filings increased 590 percent while the number of employment discrimination cases filed in federal courts decreased 13 percent.² Employee caregivers are not a protected class under either Minnesota or federal law, so claims for family responsibilities discrimination must be raised under the current protections that exist for employees under the law.

Normally when a child or other family member becomes ill, caregivers experience a challenging but brief impact on their professional commitments—such as reduced working hours or difficulties in performing their jobs. In addition to paid time off, laws like the Family Medical Leave Act³ (FMLA) are in place to protect working caregivers by offering up to 12 weeks of *unpaid* leave to care for the serious medical condition of a family member. Federal and state anti-discrimination laws also prohibit discrimination based on sex, pregnancy, and association with people who have disabilities.

The professional impact of the pandemic on employees with caregiving responsibilities has been significant and protracted. And the protections available

under the law are insufficient to protect Minnesota caregivers who, in the absence of school and daycares, have been forced to take extended time away from their work obligations to care for children. On March 18, 2020, in the early days of the pandemic, The Families First Coronavirus Response Act (FFCRA) was signed into law to bring relief to American workers and promote public health by providing paid leave and expanded unemployment benefits and food assistance for vulnerable children and families.⁴ But the time-limited relief offered by FFCRA failed to take into account the duration of the covid-19 crisis.

The FFCRA, which under current law will be continued only until the end of 2020, requires employers with fewer than 500 employees to provide employees with paid sick leave or expanded family and medical leave for reasons related to covid-19.⁵ Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (which includes being unable to telework) because the employee:

- is subject to a federal, state, or local quarantine or isolation order related to covid-19 or is caring for an individual subject to such an order;
- has been advised by a health care provider to self-quarantine related to covid-19 or is caring for an individual who has been advised to self-quarantine;
- is experiencing covid-19 symptoms and is seeking a medical diagnosis; or
- is caring for a child whose school or place of care is closed or unavailable for reasons related to covid-19.⁶

The FFCRA provides a full-time employee with up to 80 hours of paid leave, and a part-time employee with the number of hours that the employee works on average over a two-week period, for quarantine or isolation orders, self-quarantine, or seeking a medical diagnosis.⁷

A full-time employee who has been employed by the covered employer for at least 30 days qualifies for an additional 10 weeks of partially paid leave at 40

hours per week if the employee is caring for a child whose school or place of care is closed (or whose childcare provider is unavailable) for reasons related to covid-19.⁸ A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.⁹ Employers may not discharge, discipline, or otherwise discriminate against any employee who takes paid sick leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.¹⁰

During the period of allowed leave, employees must be paid at their regular rates (or the applicable minimum wage, whichever is higher) if they are subject to a federal, state, or local quarantine or isolation order related to covid-19, or have been advised by a health care provider to self-quarantine related to covid-19, or are experiencing covid-19 symptoms and seeking a medical diagnosis.¹¹ Caregivers get a lesser deal: Employees who are providing care for others subject to these restrictions or who are caring for a child whose school or place of care is closed or unavailable for reasons related to covid-19 is entitled to be compensated at only two-thirds of their regular rate of pay (or two-thirds of the applicable minimum wage, whichever is higher).¹²

In addition to the FFCRA, employees may also have limited protections under the Americans with Disabilities Act¹³ if they are caregiving for a disabled spouse or child, or the Pregnancy Discrimination Act, which provides protection against discrimination to women on the basis of pregnancy, childbirth, or related medical conditions.¹⁴ Gender discrimination laws may also provide some limited protection if caregivers are retaliated against in the workplace and can demonstrate that the discrimination is occurring to employees of a certain gender with the additional shared characteristic of being a caregiver.¹⁵

The FFCRA provides broader protection than the Family Medical Leave Act¹⁶ (FMLA) and the Minnesota Parental Leave Act,¹⁷ which both grant certain employees rights to take protected leave to care for family members and return to their employment without retaliation, but the FFCRA remains insufficient given the ongoing nature of the pandemic.¹⁸



Impact of covid-19 on primary caregivers in Minnesota families; disproportionate impact on women caregivers and women of color

The caregiver-employee conflict is a problem for most working Americans. A recent study showed that almost every employee will become a caregiver at some point in their career.²⁴ Additionally, an estimated 43.5 million adults provide unpaid care to an adult or child with special needs, and 50 percent of all employees expect to provide elder care in the near future.²⁵

Employees with caregiving responsibilities frequently face adverse actions in the workplace, including exclusion from job opportunities based on assumptions about the employee's caregiving obligations, differential treatment compared to other employees, and materially adverse actions undertaken by their employers.²⁶

Caregivers are protected against discrimination and retaliation by their employers, but litigation involving allegations of caregiving discrimination have been on the rise over the past decade.²⁷ Since April 2020, six dozen coronavirus-leave lawsuits have been filed in federal courts and a spike in litigation is expected this fall before the FFCRA expires.²⁸

Claims of caregiver discrimination are primarily brought by working mothers—and working mothers of color are particularly impacted.²⁹ A growing segment of the workforce (known as the “sandwich generation”) is caring for children and a parent simultaneously.³⁰ Studies show that women who carry significant responsibility in the area of caregiving for children or elderly parents suffer a penalty relative to non-mothers and men; the penalty shows up in the form of lower perceived competence and commitment, higher professional expectations, lower hiring and promotion rates, and lower salaries.³¹

Mothers are disproportionately responsible for most caregiving duty.³² Working women, especially those in jobs with low wages or nontraditional hours—which are often held by women of color—have long struggled to manage work and caregiving.³³ The pandemic has exacerbated those stresses to historic levels.³⁴ In April 2020, the female labor force participation rate dipped below 55 percent for the first time since 1986, and estimates suggest that women's jobs are currently 1.8 times more vulnerable than those of their male counterparts.³⁵

Gaps in the law that leave Minnesota caregivers vulnerable

Despite the expanded protections of the FFCRA, many Minnesota families are still left vulnerable in the current caregiving crisis. Under the FFCRA, covered employers only include certain public employers and private employers with fewer than 500 employees.¹⁹ This leaves employees of private employers with 500 or more employees and most employees of the federal government (who are covered by Title II of the Family and Medical Leave Act) without the expanded family and medical leave provisions of the FFCRA.²⁰

The FFCRA also does not cover grandparents or other non-parental caregivers who work and may also be assisting in the care of their grandchildren. Nationwide, about 1.3 million grandparents in the labor force are responsible for caring for their grandchildren.²¹ In addition, the FFCRA provides an exemption for small businesses with fewer than 50 employees if an employee's required leave due to school closings or childcare unavailability would endanger the viability of the business.²²

Due to the continuing nature of the pandemic and the short-term relief provided by the FFCRA, caregivers whose children cannot return to school or childcare—because those services are unavailable or because the children are immunocompromised—have no safety net under the law beyond the 10 weeks of expanded leave provided by the FFCRA. For most Minnesota families, that expanded leave has ended, or will end very shortly, leaving caregiving employees without legal protection and reliant on the goodwill of their employers as they face an uncertain school year ahead.

Finally, many caregivers face unemployment because of the pandemic and will seek unemployment benefits, but there is continuing uncertainty around how long those benefits will last and how much relief they will provide.²³



In April 2020, the female labor force participation rate dipped below 55 percent for the first time since 1986, and estimates suggest that women's jobs are currently 1.8 times more vulnerable than those of their male counterparts.

Guidance for Minnesota employers (and their lawyers) regarding return-to-work scenarios

Minnesota employers face difficult challenges as the covid-19 pandemic persists. In March 2020, most Minnesota businesses were forced to shutter or convert their operations to remote work under Gov. Walz's emergency peacetime orders. Since that time, many businesses have remained closed and many of those that reopened have been unable to operate at full capacity. Many businesses have also incurred extraordinary expense to convert their operations to remote work and have seen productivity decline as employees navigated fulfilling their workplace responsibilities while caring for children or other vulnerable family members (or themselves if they have become sick).

Six months into the pandemic, Minnesota businesses are developing complex, phased return-to-work scenarios amid increasing case numbers. Businesses are being forced to assess whether they can continue to offer the same level of flexibility to their employees with caregiving responsibilities as they did in the early days of the pandemic. The patchwork federal, state, and local leave laws that have left millions of working caregivers without legal protection have likewise raised questions for employers trying to comply with changing legal requirements and support the caregivers who work for them.

During this time, employers should be careful not to make employment decisions that, even inadvertently, run afoul of the laws protecting caregivers and instead offer their caregiving employees as much flexibility and understanding as reasonably possible under the circumstances.

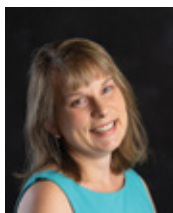
Taking leave to care for children may be the best option for some working caregivers, but it's not a realistic option for many others. Employers should ask or survey their employees who are caregivers about what they need and include them in all planning and decision-making. Where possible, employers should

continue to offer caregivers the option to telework or assist them in exploring work-sharing arrangements or opportunities to reduce hours without sacrificing job security.

Employers should also allow employees with caregiving responsibilities to shift their work hours. Importantly, employers should ensure that the workplace culture gives employees with caregiving responsibilities this flexibility without placing on them an increased burden to participate in day-to-day employment activities, which may be considered discriminatory. Useful steps may include limiting the length of meeting times, avoiding back-to-back meetings where possible, and designating meeting-free time for focused work. These slight shifts in workplace culture benefit everyone in an organization and particularly those employees who are caregivers. Employers should also consider how technology can help employees working non-traditional schedules to more actively engage with management and their colleagues.

Finally, employers should set clear and realistic expectations with their employees for what work needs to be completed and when it should be done, while allowing employees to determine how the work gets done and allowing them to complete work outside of traditional 9:00-5:00 schedules.

The pandemic has pulled back the curtain on the gaps in our nation's childcare system and quickly given rise to a nationwide caregiving crisis. With a lack of traditional childcare and school schedules and the likelihood of increasing rates of covid-19 infections on the horizon, workers with caregiving responsibilities—and their employers—face significant uncertainty and insecurity in the coming months. During this time, employers should offer their workers with caregiving responsibilities as much flexibility as possible and work intentionally to create a workplace culture that establishes clear and realistic expectations and is welcoming and inclusive. ▲



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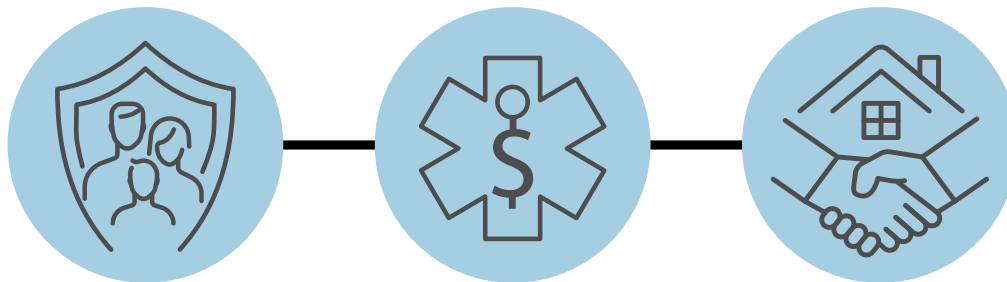
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Notes

- ¹ Suzanne Hultin & Tatiana Follett, State Family and Medical Leave Laws, Nat'l Conference of State Legislatures (8/10/2020), <https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx>.
- ² Cynthia Thomas Calvert, *Family Responsibility Litigation Update 2016*, THE CENTER FOR WORK LIFE LAW, 6 (2016), <https://worklifelaw.org/publications/Caregivers-in-the-Workplace-FRD-update-2016.pdf>.
- ³ Family and Medical Leave Act of 1993, PUB. L. NO. 103-3, 107 Stat. 6 (1993).
- ⁴ Families First Coronavirus Response Act, PUB. L. NO. 116-127, 134 Stat 178 (2020).
- ⁵ *Id.* at 189.
- ⁶ *Id.* at 195-196.
- ⁷ WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR, FAMILIES FIRST CORONAVIRUS RESPONSE ACT: EMPLOYER PAID LEAVE REQUIREMENTS, <https://www.dol.gov/agencies/whd/pandemic/ffcr-a-employer-paid-leave>.
- ⁸ 134 Stat 178, 189-190.
- ⁹ *Id.*
- ¹⁰ *Id.* at 196-197.
- ¹¹ EMPLOYER PAID LEAVE REQUIREMENTS, *supra* 8.
- ¹² It is worth noting that covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA (emphasis added). Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage. EMPLOYER PAID LEAVE REQUIREMENTS, *supra* 8.
- ¹³ Americans With Disabilities Act, 42 U.S.C. §12101 et seq. (2018).
- ¹⁴ Pregnancy Discrimination Act, PUB. L. NO. 95-555, 92 Stat. 2076 (1978).
- ¹⁵ Minn. Stat. §363A.08 (2018).
- ¹⁶ 107 Stat. 6. Ironically, the FMLA specifically says “due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.” *Id.* §2(a)(5).
- ¹⁷ Minn. Stat. §181.941 (2018).
- ¹⁸ *New York v. United States Department of Labor et al.*, No. 20-cv-3020, 2020 WL 4462260 (S.D.N.Y. 8/3/2020). Judge J. Paul Oetken of the U.S. District Court for the Southern District of New York vacated four sections of the FFCRA that, among other things, excluded workers from virtually the entire health-care sector from the FFCRA's benefits and allowed employers to deny leave if they didn't have work available. Although it may be appealed, for the moment the court's decision expands relief to American workers but leaves open many questions for employers who are trying to comply with the law. On 9/11/2020, the Department of Labor issued a temporary rule revising portions of the FFCRA in response to the 8/3/2020 decision from the United States District Court for the Southern District of New York.
- ¹⁹ EMPLOYER PAID LEAVE REQUIREMENTS, *supra* 8.
- ²⁰ While not covered by the expanded family and medical leave provisions of the FFCRA, federal employees covered by Title II of the Family and Medical Leave Act are covered by the FFCRA's paid sick leave provision. EMPLOYER PAID LEAVE REQUIREMENTS, *supra* 8.
- ²¹ NAT'L FAMILY CAREGIVERS MONTH: NOVEMBER 2019, U.S. CENSUS BUREAU, <https://www.census.gov/newsroom/stories/2019/family-caregivers.html> (last visited 8/1/2020).
- ²² 134 Stat 178, 199.
- ²³ Tom Crann & Megan Burks, “DEED Commissioner: Other Aid, Jobs Available to Minnesotans if \$600 Unemployment Boost Expires,” MPR (7/21/2020), <https://www.mprnews.org/story/2020/07/21/deed-commissioner-other-aid-jobs-available-to-minnesotans-if-600-unemployment-boost-expires> (Steve Grove, the Minnesota Department of Employment and Economic Development commissioner, stated that “the whole thesis of the [unemployment insurance] program is that if you're separated from work, through no fault of your own, then you're eligible. And certainly having to stay home and take care of your child in the middle of a pandemic is not something you can control.”)
- ²⁴ Calvert, *supra* 2, at 13.
- ²⁵ *Id.*
- ²⁶ *Id.* at 9.
- ²⁷ *Id.* at 6. Family responsibility cases increased 269% over the last decade.
- ²⁸ “Covid-19 Leave Suits Trickle in With Spike Expected This Fall,” Bloomberg Law, (9/2/2020), <https://news.bloomberglaw.com/daily-labor-report/covid-19-leave-suits-trickle-in-with-spike-expected-this-fall>.
- ²⁹ *Id.* at 31.
- ³⁰ *Id.* at 13.
- ³¹ Claire Cain Miller, “The Motherhood Penalty vs. the Fatherhood Bonus,” N.Y. TIMES (9/6/2014), <https://www.nytimes.com/2014/09/07/upshot/a-child-helps-your-career-if-youre-a-man.html>; see also Shelley Zalis, “The Motherhood Penalty: Why We're Losing Our Best Talent to Caregiving,” FORBES (2/22/2019), <https://www.forbes.com/sites/shelleyzalis/2019/02/22/the-motherhood-penalty-why-were-losing-our-best-talent-to-caregiving/#17bbe8a46e5>. On average, women receive a 4% pay cut for each child they have, while men receive a 6% pay increase for each child they have. Additionally, 71% of mothers with children living at home work for pay. Women are the primary breadwinners in 44% of households with children in Minnesota.
- ³² Terry Gross, “Pandemic Makes Evident ‘Grotesque’ Gender Inequality in Household Work,” NPR (5/21/2020), <https://www.npr.org/2020/05/21/860091230/pandemic-makes-evident-grotesque-gender-inequality-in-household-work>.
- ³³ WOMEN'S BUREAU, U.S. DEP'T OF LABOR, MOTHERS & FAMILIES, <https://www.dol.gov/agencies/wb/data/mothers-and-families> (last visited 8/1/2020).
- ³⁴ *July's Job Report: A Women's Recession*, TIME'S UP FOUNDATION, (8/10/2020) <https://time-supfoundation.org/july-jobs-report-a-womens-recession/> (noting that, in addition to the wage gap, half of Latinx women have had their work hours cut back since the pandemic began and Black women are continuing to see the slowest declines in unemployment during covid-19, while Hispanic women hold the highest unemployment rate).
- ³⁵ Roberta Kaplan & Rachel Tuchman, “#TimesUp During Covid-19—Private Sector's Role in Mitigating Gender Equality Crisis,” Bloomberg Law, (9/3/2020), <https://news.bloomberglaw.com/daily-labor-report/insight-timesup-during-covid-19-private-sectors-role-in-mitigating-gender-equality-crisis>.

PROMOTING LEGAL AID IN A TIME OF CRISIS

BY RANDI ILYSE ROTH



We find ourselves in what many are calling a “horrific opportunity moment.” Following a summer locked down by COVID, and still reeling from the killing of George Floyd, we are all searching for what we can do to build equity and opportunity in our communities.

Our country’s long history of systemic discrimination and our current struggles with a pandemic have resulted in many of our neighbors living in poverty. What can we do to truly make our communities places where *all* can thrive?

Legal services are critical to helping individuals and families achieve stability and economic mobility, and likewise to our community’s health, healing, and future. After many years of service as a member of the Legal Services Advisory Committee (LSAC) of the Minnesota Supreme Court, I am now privileged to begin service as the committee’s chair.

I spent much of my career in legal services work, and now volunteer regularly in the Power-Up Legal Clinic in the Selby-Dale neighborhood of Saint Paul. In the clinic we see the powerful ways that access to legal services boosts families’ abilities to meet their goals. Among the things we are able to do:

- resolve hazardous conditions in housing;
- assist in dealing with domestic violence;
- advise about and resolve immigration concerns;
- enforce our clients’ rights in employment-related concerns such as wage theft, discrimination, and harassment;
- appeal public benefits denials; and
- seek expungement of very old criminal convictions that impede job searches.

Telling the legal aid story

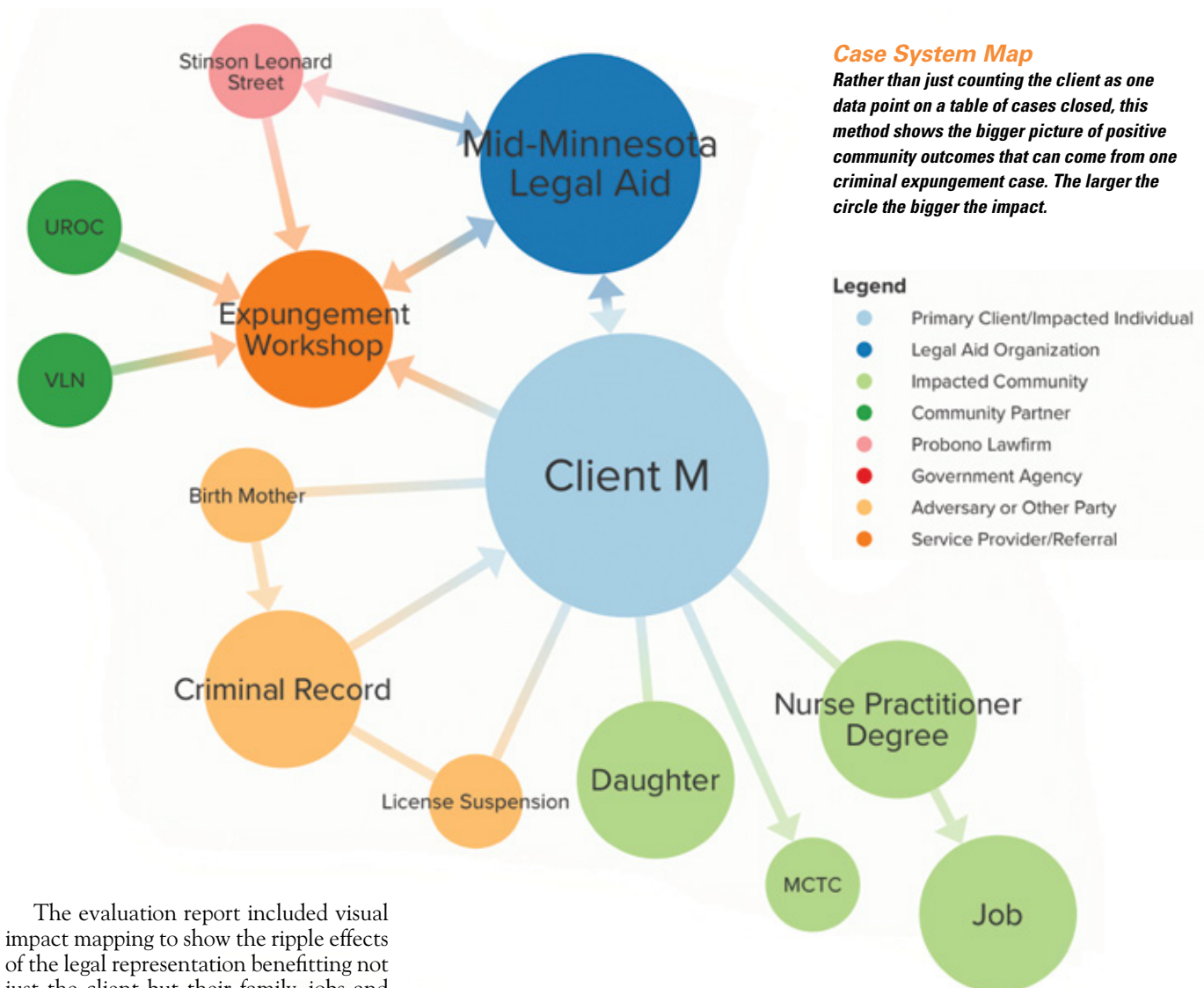
Although legal services are central to individuals’ and families’ efforts to stabilize and achieve a living wage, the critical importance of legal services is a largely untold story.

LSAC recently took a unique and interesting opportunity to learn about and then tell the story. Our committee received supplementary funding of almost \$5 million through a settlement between Bank of America and the Department of Justice. The funds were largely restricted to grants supporting work at the intersection of community economic development and legal aid. LSAC made grants

from this fund totaling \$1,000,000 per year for five years; the grants went to seven grantee organizations across the state. The committee chose to additionally fund an evaluation effort focused on this work. We funded the evaluation for two reasons: first, to give the programs the opportunity to learn about their own effectiveness, and to course-correct if necessary; and, second, to tell the story of legal aid’s proven effectiveness in a new way.

The lead evaluator, Michael Quinn Patton, used a collaborative evaluation design. The seven grantees worked together to articulate what success looks like in this work, to determine what they wanted to learn, and to define the scope of the evaluation. The full report is available at bit.ly/2DZrjZj (PDF).

The evaluation questions came from a social justice, rights-based perspective. This means that the evaluation examines the extent to which, and ways in which, the legal aid initiative and grants support and enhance the legal rights of those in need. The evaluation includes attention to the perceptions and experiences of legal aid clients concerning their legal rights and the social justice outcomes for clients, their family members, and the larger community.



The evaluation report included visual impact mapping to show the ripple effects of the legal representation benefitting not just the client but their family, jobs and community.

Key evaluation findings

Some of the most important findings include:

Legal aid makes all the difference.

For people experiencing poverty, dealing with legal issues effectively can mean the difference between a downward spiral into deeper poverty and a pathway to a better life.

Complex multiple issues. Those seeking legal aid are typically facing multiple issues, are confused about their legal options and rights, and cannot solve other problems they face without getting the legal obstacles removed.

Weave web of community. Legal aid helps weave a community network of support and possibility that builds community cohesion and strengthens social capital, which research shows is critical for vital and thriving communities.

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Impact-mapping by case type. A summary of the Bank of America evaluation and the impact-mapping by case type.

Return on investment. A section on ROI that includes findings from around the country that civil legal aid funding has an ROI of between 290 percent and 900 percent. The most recent Minnesota ROI study showed \$3.94 return for every \$1 invested in civil legal aid.

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Landmarks in the Law

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

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **ERISA benefits; long-term disability claim dismissed.** A decision by a plan administrator of the Employees Retirement & Income Security Act (ERISA) to deny long-term disability benefits to an employee claimant was upheld by the 8th Circuit Court of Appeals. Reversing a decision by U.S. District Court Chief Justice John Tunheim of Minnesota, the court vacated the ruling on grounds that the judge used the wrong legal standard, *de novo* review, rather than abuse of discretion, and overturned the administrative determination denying benefits. *McIntyre v. Reliance Standard Insurance Co.*, 2020 WL 4951028 (Minn. Ct. App. 8/25/2020) (unpublished).

■ **ERISA benefits; breach of duty rejected.** Another ERISA claim was rejected for violation of fiduciary duty in failing to protect plan participants before the disclosure of a fraud scheme. The 8th Circuit upheld a ruling by U.S. District Court Judge Patrick Schiltz in Minnesota holding that the claimants did not “plausibly” plead that a prudent fiduciary would have taken other action, which warranted dismissal on the breach of fiduciary duty claim as well as a duty of loyalty claim that was insufficiently pled. *Allen v. Wells Fargo & Co.*, 967F.3d 767 (8th Cir. 7/27/2020).

■ **Disability discrimination; reasonable accommodation claim denied.** A claimant for disability discrimination under the Minnesota Human Rights Act lost his claim because he was unable to show that reasonable accommodation was appropriate for his disability and that such an accommodation would allow him to perform the essential portions of his job. The 8th Circuit upheld the ruling by Judge Nancy Brasel of Minnesota dismissing the lawsuit. *Collins v. Abbott Laboratories, Inc.*, 2020 WL 5000076 (Minn. Ct. App. 8/25/2020) (unpublished).

■ **Discrimination, harassment & retaliation rejected; women not treated differently.** A woman who claimed sex discrimination, sex harassment, and retaliation lost her claim because she did not show that she met her employer’s legitimate job expectations, or that she was treated differently than similarly situated men. The 8th Circuit, affirming summary judgment, also held that the sexual harassment claim failed because the claimant did not show that she subjectively perceived the alleged harassment as abusive, and there was insufficient evidence of retaliation. *Gibson v. Concrete Equipment Company, Inc.*, 960 F.3d 1057 (8th Cir. 6/3/2020).

■ **Failure to promote; summary judgment upheld.** An employee failed in challenging summary judgment for the employer in a failure-to-promote case based upon sex discrimination. The 8th Circuit upheld a ruling of U.S. District Court Judge Susan R. Nelson in Minnesota that there was insufficient evidence that the actions by the woman’s supervisors were based, in part, on gender animus; her direct sex discrimination and “cat’s paw” theories failed, too. *Pribyl v. County of Wright*, 964 F.3d 793 (8th Cir. 7/13/2020).

■ **Train accident; derailment injury dismissed.** A train employee who was injured during a derailment was unsuccessful in suing his employer under the Federal Employee’s Liability Act (FELA). The 8th Circuit, upholding a lower court’s decision, ruled that the employee did not show that the employer violated safety regulations in the derailment, which may have been caused by a third party criminal act. *Miller v. Union Pacific Railroad Company*, 2020 WL 5032459 (Minn. Ct. App. 8/26/2020) (unpublished).

■ **Age discrimination; Twins’ scout prevails.** A baseball scout for the Minnesota Twins, whose position scouting ball players in Australia was eliminated,

managed to overturn the dismissal of an age discrimination claim. The Minnesota Court of Appeals reversed a lower court decision by Hennepin County District Court, which it said had improperly granted a blanket protective order that prevented the claimant from deposing three club officers and also erred in other discovery rulings, warranting remand.

Norsetter v. Minnesota Twins, LLC, 2020 WL 4932350 (Minn. Ct. App. 8/24/2020) (unpublished).

■ **Counselor's sexual abuse; university not liable.** A claim against a university by a student who alleged that it was vicariously liable because of a counselor's sexual abuse and negligence under the doctrine of *respondeat superior* was unsuccessful. The court of appeals, affirming a decision of the Winona County District Court, refused to apply the doctrine of *respondeat superior* because none of the alleged sexual abuse occurred within the scope of the counselor's employment as a therapist or within work-related limits of time and place. **Doe v. Kirby**, 2020 WL 4932784 (Minn. Ct. App. 8/24/2020) (unpublished).

■ **Rent credits for caretaker; no statutory violation.** The use by a property management company of rent credits as compensation for a property caretaker was valid. Affirming a ruling of the Hennepin County District Court, the court of appeals held that the use of rent credits for compensation did not violate the Minnesota Fair Labor Standards Act (FLSA). **Hagen v. Steven Scott Management, Inc.**, 2020 WL 3956259 (Minn. Ct. App. 7/13/2020) (unpublished).



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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **Minnesota Supreme Court declares viability of MERA citizen suit action against DNR for White Bear Lake groundwater pumping; declines to extend public trust doctrine.** The Minnesota Supreme Court, on 7/15/2020, issued an opinion affirming in part and reversing in part, and remanding ad-

ditional issues to the Minnesota Court of Appeals. In sum, the Court held that appellant homeowner associations stated a claim under the Minnesota Environmental Rights Act (MERA), Minn. Stat. §116B.03, subd. 1, by alleging that the Minnesota Department of Natural Resources (DNR) impaired White Bear Lake by mismanaging the groundwater-appropriations permitting process. The Court also held that the homeowners did not state a claim under the public trust doctrine by alleging that DNR violated the trust by authorizing pumping groundwater for use as a public water supply.

The homeowners initiated the lawsuit in 2013 as lake levels in the relatively shallow and exclusively groundwater and precipitation-fed White Bear Lake reached historic lows. Plaintiffs claimed DNR permitted an unsustainable and increasingly large volume of groundwater to be pumped in the northeast metro area, which relies almost exclusively on groundwater for municipal water supply. DNR's conduct, plaintiffs argued, directly led to the drawdown of White Bear Lake levels and violated both MERA and the public trust doctrine.



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The focus of the MERA part of the Supreme Court's decision focused on the interplay between sections 116B.03 and 116B.10 of MERA. Section 116B.03, subd. 1 establishes a cause of action that any person residing in the state can bring for the protection of natural resources; to a successful plaintiff, the court can grant direct equitable relief necessary to protect the natural resources. Minn. Stat. §116B.07. Section 116B.10, on the other hand, establishes a cause of action against a state agency that has issued an environmental quality permit where the plaintiff claims the permit is inadequate to protect natural resources. However, under section 116B.10, subd. 3, the only available relief for a successful plaintiff (apart from emergency temporary injunctive relief) is for the court to remit the matter to the agency to for further administrative proceedings.

In this case, plaintiffs asserted their MERA claim against DNR over the inadequacy of its water appropriation permits not under the agency-permit provisions of section 116B.10 but under the more general provisions of section 116B.03. The district court held that this was permissible and proceeded to grant direct relief, right down to dictating the times of year that residents in the northeast metro area could operate lawn sprinklers. In reversing the district court, the court of appeals held that this interpretation of MERA effectively rendered section 116B.10 of no effect, contravening principles of statutory interpretation, and would authorize courts to "issue remedies outside of the ordinary administrative process established by the legislature."

The Supreme Court sided with the homeowners. DNR argued that the word "conduct" in the relevant MERA definition of "pollution, impairment, or destruction"—i.e., "any conduct that materially adversely affects the environment or violates environmental statutes, rules, and standards," Minn. Stat. §116B.02, subd. 5—should not be interpreted as including administrative action, such as issuing groundwater appropriation permits. The Court disagreed, concluding that in light of MERA's broad purpose to protect the environment, there was no basis for narrowly interpreting "conduct" as excluding government actions. The homeowners' action was also not precluded, the Court held, by section 116B.03, subd. 1's "no-action" clause, which disallows actions for conduct taken "pursuant to any environmental quality... permit" issued by DNR, among other agencies. The

Court reasoned that DNR's permitting scheme was not undertaken "pursuant to" any permit. Finally, the Court was unpersuaded by DNR's position that the existence of the cause of action under 116B.10 specifically for challenging agency permits meant the homeowners could not also assert a claim under 116B.03. Nothing in section 116B.10, the Court held, precluded an action under 116B.03; plus, 116B.10 does not on its face provide relief for agency conduct violating environmental statutes, rules, and standards, which homeowners also alleged.

With regard to the public trust doctrine—which provides that the state, in its sovereign capacity, holds absolute title to all navigable waters and the soil under them for common use—the Court affirmed the court of appeals but on different grounds. The court of appeals held that the doctrine had never been expanded to resources other than navigable water in Minnesota and could thus not be extended to groundwater in this case. The Supreme Court concluded that the homeowners' claim involved injury to White Bear Lake, a navigable water, arising from the DNR's groundwater permitting practices, not injury to non-navigable groundwater itself. Nonetheless, the Court affirmed the lower court, finding no precedent for extending the judiciary's common-law role in the field of public water, an area of law that has been extensively addressed by the legislative branch, particularly in the balancing of different public uses—including, in this case, balancing the public's use of White Bear Lake water for recreation and aesthetic purposes versus the public's use of hydrologically connected groundwater for municipal water supply.

Justice Anderson offered a spirited dissent, joined by Chief Justice Gildea, to the Court's MERA holding. He concluded that had the Court undertaken "a meaningful statutory analysis," it would have concluded that "conduct" does not include executive branch agency decisions. *White Bear Lake Restoration Association v. Minnesota Dept. Nat. Res. et al.*, 946 N.W.2d 373 (Minn. 2020).

■ **Court of appeals rejects MERA affirmative defense based on economic considerations.** In another recent MERA decision, the Minnesota Court of Appeals issued an unpublished opinion addressing the issue of the appropriate legal standard required to establish whether an affirmative defense has been appropriately made in a civil action brought under the Minnesota Environ-

mental Rights Act (MERA).

The issues addressed in the case arose after the properties known as the Pastoret Terrace and Paul Robeson Ballroom, and the Kozy Bar (collectively, the property), which together were listed on the National Register of Historic Places as contributing structures to the Duluth Commercial Historic District, were damaged by a fire in 2010. The damage caused by the fire resulted in the property's condemnation for human habitation.

The property was tax-forfeited to the state of Minnesota, and subsequently purchased by respondent Duluth Economic Development Authority (DEDA) in 2015. DEDA marketed the property for sale and requested proposals for rehabilitation of the property, or in the alternative, for demolition and construction of new housing. DEDA received three redevelopment proposals, all of which DEDA rejected after finding none of the proposals would create a significant number of new jobs, materially enhance the real estate tax base in the area, deconcentrate subsidized housing, contribute to the vibrancy of the neighborhood, or address the needs identified in the request for proposal. Additionally, the resolution passed by DEDA provided that none of the proposals "provided a sufficient showing of sufficient resources in terms of both personnel and finances to evidence the ability to bring the [p]roposed project to successful completion and operation."

Upon this decision, appellants Eric Ringsred and Respect Starts Here sued DEDA and the city of Duluth, alleging that their actions allowed the property to deteriorate, and that their plans for demolition of the property "constitute[d] a material impairment of the Historic District, which is a protected resource within the meaning of MERA." Appellants sought to enjoin DEDA from demolishing the property, and sought an order requiring DEDA to make the necessary repairs to restore the property to prevent further deterioration.

The district court found that although appellants had made a *prima facie* case that the property was a protected resource under MERA, DEDA had established the affirmative defense that there were no feasible and prudent alternatives to the property's demolition, and that the demolition was consistent and reasonably required for the promotion of public health, safety, and welfare.

On appeal, the Minnesota Court of Appeals found the district court erred with regard to the applicable legal standard to apply when determining whether

an affirmative defense has been established. The court of appeals held that the district court erred in its finding because, although MERA clearly states that “economic considerations alone shall not constitute a defense,” the only considerations discussed by the district court as justification for DEDA’s rejection of the proposals were all economic in nature. The court of appeals, in making its decision, upheld previous Minnesota Supreme Court rulings in which it has been found that the protection of natural resources is to be given paramount consideration, and those resources should not be polluted or destroyed unless there are truly unusual factors present. **Ring-sred v. Duluth Economic Development Authority**, 2020 WL 5104885 (Minn. Ct. App. 8/31/2020).

ADMINISTRATIVE ACTION

■ **EPA issues final significant new use rule for PFAS under TSCA.** The U.S. Environmental Protection Agency (EPA) published a final significant new use rule (SNUR) for long-chain perfluoroalkyl carboxylate (LCPFAC) and per- and polyfluoroalkyl sulfonate chemical substances (PFAS) under the Toxic Substances Control Act (TSCA). 15 U.S.C. §2601 *et seq.*

PFAS substances are a family of man-made chemicals that have been manufactured since the 1940s. These chemicals have historically been used in the production of “nonstick” and “waterproof” manufactured goods and are very resistant to degradation, often persisting in the environment for decades. Studies have found that these chemicals can accumulate in human bodies over time and can lead to adverse human health effects. The main pathway of exposure for humans is through drinking contaminated groundwater; however, PFAS can also be found in food packaging and commercial household products like nonstick cookware, beauty products, stain repellent carpets, and firefighting foam.

The final rule designates as a significant new use manufacturing, importing, processing, or distributing of a certain subset of LCPFAC chemicals for any use that was no longer ongoing after 12/31/2015; and all other LCPFAC chemicals for any use that was no longer ongoing after 1/21/2015. The SNUR requires manufacturers to notify the EPA at least 90 days prior to the commencement of those actions with respect to the covered chemicals. After notification, the EPA will evaluate the significant new use, considering specific parameters such as the projected volume of manu-

facturing and processing of the chemical substance and the extent to which a use increases the magnitude and duration of exposure of human beings or the environment to the chemical substance. Following the determination, EPA may impose conditions of use upon the manufacturer, and will publish a determination on the notice in the Federal Register before the company may begin use of the covered chemicals.

Furthermore, the SNUR removes the exemption for the import of certain products containing PFAS chemicals as a surface coating, and requires 90-day notification for those articles. The SNUR also removes the exemption for the import of carpets containing PFAS chemicals, and requires 90-day notification for any imports of carpets containing PFAS chemicals.

Finally, the March 2020 proposed rule requested comment on whether EPA should adopt a *de minimis* threshold for determining “reasonable potential for exposure” for covered chemicals, as well as whether EPA should include a safe harbor provision for importers of articles that can demonstrate their use was ongoing prior to the effective date of this rule. In this final rule, EPA is not finalizing a *de minimis* threshold or establishing a safe harbor provision.

The final SNUR became effective 9/25/2020. **Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances; Significant New Use Rule**, 85 Fed. Reg. 45109 (7/27/2020).



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FEDERAL PRACTICE

JUDICIAL LAW

■ **Permanent injunction; appeal; mootness.** Where the plaintiff sued its former employee and his new employer on claims arising out of the breach of a noncompete agreement, the district court entered a permanent (albeit short) injunction, defendants filed an appeal from the injunction while portions of the case remained pending in the district court, and the injunction expired while the appeal was pending, the 8th Circuit held that the appeal was moot, but rather than remanding with directions to dismiss the case, the 8th Circuit instead remanded for further proceedings not inconsistent with its opinion. **Perficient, Inc. v. Munley**, ___ F3d ___ (8th Cir. 2020).

■ **Minor plaintiff; parents not permitted to act as counsel.** Distinguishing cases where parents had been permitted to represent their children in actions seeking Social Security benefits, and rejecting the argument that not permitting parents to represent their children denied children their fundamental right to access the courts, the 8th Circuit held that parents could not represent their minor child in a Section 1983 action. **Crozier v. Westside Cmty. School Dist.**, ___ F3d ___ (8th Cir. 2020).

■ **Personal jurisdiction; multiple cases.** Where the plaintiffs’ complaint did not allege any facts suggesting that the defendant New York attorney and his law firm were subject to personal jurisdiction in Minnesota, and it was undisputed that the individual defendant had never entered the state, Chief Judge Tunheim relied on cases holding that an attorney-client relationship with a resident of Minnesota is not sufficient to establish



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personal jurisdiction, also rejected plaintiff attempt to rely on the *Calder* effects test (*Calder v. Jones*, 465 U.S. 783 (1983)), and granted defendants' motion to dismiss for lack of personal jurisdiction. ***Lawhead v. The Law Offices of Joseph Martin Carasso***, 2020 WL 5106817 (D. Minn. 8/31/2020).

Judge Nelson determined that the corporate plaintiff's former president and the new competing company he founded were likely subject to personal jurisdiction in Minnesota on claims arising out of an alleged breach of noncompete and non-solicitation provisions, but that other former employees of the plaintiff were not subject to personal jurisdiction. ***Travel Leaders Leisure Grp., LLC v. Cruise & Travel Experts, Inc.***, 2020 WL 4604534 (D. Minn. 8/11/2020).

■ **Motion to amend to more clearly plead an affirmative defense granted.** Where the defendant's initial answer in a wage and hour action asserted that "certification of a collective action or class action... would constitute a denial of Defendant's due process rights," but did not specifically assert an affirmative defense premised on a lack of personal jurisdiction, Magistrate Judge Schultz found that defendant had pleaded—"however inartfully"—its personal jurisdiction defense in its original answer and granted its motion to amend its answer to "clearly plead" that defense. ***Borup v. CJS Sols. Grp., LLC***, 2020 WL 5047523 (D. Minn. 8/26/2020).

■ **Failure to meet and confer provides a sufficient basis to deny motion.** Denying the plaintiff's motion for leave to file a fourth amended complaint on a number of grounds, Judge Brasel found that the plaintiff's failure to meet and confer provided an independent basis to deny the motion, and rejected the plaintiff's

argument that that an email seeking to "initiate" the meet and confer process fulfilled her meet and confer obligations. ***Yang v. Robert Half Int'l, Inc.***, 2020 WL 5366771 (D. Minn. 9/8/2020).

■ **Fed. R. Civ. P. 30(e); motion to strike deposition errata sheet granted.** While acknowledging the absence of controlling 8th Circuit authority, Magistrate Judge Menendez granted defendants' motion to strike plaintiff's deposition errata sheet, in which the plaintiff attempted to—among other things—change "yes" answers to "no." ***Elsherif v. Mayo Clinic***, 2020 WL 5015825 (D. Minn. 8/25/2020).

■ **Overbroad discovery requests; refusal to "blue pencil."** Finding many of defendants' disputed discovery requests to be overbroad, Magistrate Judge Wright denied defendants' motion to compel responses to those requests, and repeatedly indicated her unwillingness to "blue pencil" the overbroad requests to make them "relevant and proportional." ***Rodriguez v. Riley***, 2020 WL 4747610 (D. Minn. 8/17/2020).

■ **Forum selection clause; expiration of underlying contract.** Enforcing a forum selection clause contained in a contract that had expired, Judge Schiltz found that the forum selection clause "survived any termination of the contract." ***Granite Re, Inc. v. Hutton, Inc.***, 2020 WL 4735309 (D. Minn. 8/14/2020).

■ **Reply brief; waiver of argument.** Judge Montgomery refused to consider an argument defendants raised in support of their motion to dismiss where that argument was raised for the first time in their reply brief. ***Lapushner v. Admedus Ltd.***, 2020 WL 5106818 (D. Minn. 8/31/2020).

■ **Fed. R. Civ. P. 35 medical examination; motion to compel videotaping.** Acknowledging the absence of "clearly established law in this district" and that other courts were "divided" on the issue, Magistrate Judge Leung found that the plaintiff had the burden to show why he should be permitted to videotape the his Rule 35 examination, and that permitting him to record one examination when others had not been recorded "would risk slanting the level playing field that Rule 35 is supposed to create." ***Ellis v. West Bend Mut. Ins. Co.***, 2020 WL 3819410 (D. Minn. 7/8/2020).



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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Patent: Extending stay and injunction pending IPRs.** Judge Schlitz recently extended a stay of the case and denied a motion to dissolve a preliminary injunction. Plaintiff QXMédical, LLC sued defendants (collectively, Teleflex) seeking a declaration that it did not infringe any of Teleflex's patents and that Teleflex's patents were invalid. Teleflex counterclaimed for infringement. In December 2019, as the case moved towards a February 2020 trial, QXMédical moved to stay the action pending *inter partes* review challenges to the patents-in-suit brought by Medtronic in a related action. QXMédical agreed to suspend all sales of the accused device and to waive certain invalidity defenses. The court granted the stay and enjoined QXMédical's sales of the accused device. After the PTAB instituted review on petitions covering six of the eight claims at issue, QXMédical moved to extend the stay and dissolve the injunction. The court agreed that the stay should be extended to take advantage of the efficiencies gained by the IPR process. The court also found that due to the covid-19 pandemic, it would likely be at least a year before the court could resume lengthy civil jury trials.

The court, however, found no "good reason" to dissolve the injunction. The court was not persuaded that denial of Teleflex's motion for a preliminary injunction in the Medtronic case meant the injunction needed to be dissolved in the instant case. In refusing to modify the injunction, the court held QXMédical to the terms of the deal that it offered to induce the court to order a stay. The

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court found that dissolving the injunction would be highly unfair to Teleflex. Teleflex had opposed QXMédical's initial motion for a stay, and the court would not have granted that stay without QXMédical's offer for the injunction. Finally, the court rejected QXMédical's argument that the concessions were not sufficient to continue the injunction and that Teleflex was required to prove it was entitled to a preliminary injunction under the traditional four-factor test. **QXMédical, LLC v. Vascular Sols., LLC**, No. 17-cv-1969 (PJS/TNL), 2020 U.S. Dist. LEXIS 118305 (D. Minn. 7/7/2020).

■ **Patent: Contempt requires actual infringement.** Judge Schiltz recently denied Boost Oxygen, LLC's motion to hold Oxygen Plus, Inc. in contempt. In 2017, Boost sued Oxygen Plus for infringement of a design patent and trade dress related to lightweight portable oxygen canisters. Judge Schiltz found the lawsuit meritless, as Oxygen Plus's product did not infringe Boost's patent or trade dress, but Oxygen Plus did not have money to spend on lawyers so the parties entered a consent judgment and agreed Oxygen Plus would not infringe Boost's patent or trade dress. Boost now moved to hold Oxygen Plus's redesigned product in contempt of the consent judgment. To prove contempt, Boost had to prove (1) the newly accused product is not more than colorably different from the product found to infringe and that (2) the newly accused product actually infringes. The parties agreed that the redesigned mask was not more than colorably different from the original mask but disputed whether the redesigned mask actually infringed. Boost argued Oxygen Plus was collaterally estopped from arguing that its redesigned mask did not infringe Boost's patent. The court disagreed. The issues of the current litigation related to the redesigned mask, not the original mask from the first action. Collateral estoppel did not apply because the issue sought to be precluded was not the same as the issue involved in the prior action and the issue sought to be precluded was not actually litigated in the prior action because consent judgments have no issue-preclusive effects. The court also found Oxygen Plus's redesigned mask did not infringe Boost's patent. Infringement of a design patent is based on the ordinary-observer test, which asks whether an ordinary observer, giving such attention as a purchaser usually gives, would find that the two designs are substantially the same. The court found Oxygen Plus's

redesigned mask was plainly dissimilar to Boost's patented design. **Boost Oxygen, LLC v. Oxygen Plus, Inc.**, No. 17-cv-5004 (PJS/DTS), 2020 U.S. Dist. LEXIS 142722 (D. Minn. 8/10/2020).



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TAX LAW

JUDICIAL LAW

■ **Tax court has jurisdiction over 11 of 16 disputed quarters in a "Section 530 dispute."** Reflectxion Resources, Inc. is a medical staffing agency in an employment tax dispute with the Service. The company employed therapists to fulfill contracts with hospitals, schools, and other healthcare facility clients that sought therapists for temporary staffing and for direct hire purposes. Reflectxion hired both local and "traveling" therapists. The underlying dispute has to do with the characterization of reimbursements for the traveling therapists. This opinion, however, does not reach the merits of the dispute. Instead, the court addressed Reflectxion's "Motion to Determine Jurisdiction."

The jurisdiction dispute arose because Reflectxion partnered with an HR company, Gevity HR, Inc., for 11 of the 16 quarters in dispute. Reflectxion and Gevity had a professional services agreement under which Gevity (not Reflectxion) reported the wages and withholding of Reflectxion's employees on Forms 941, "Employer's Quarterly Federal Tax Return," and Forms W-2, "Wage and Tax Statement." Gevity did this reporting under its own employer identification number (EIN). On those forms the payments for travel reimbursement were not reported as wages subject to employment

taxes. Reflectxion did not deposit any FICA taxes or ITW with the IRS under its own EIN for the Gevity-reported quarters. The parties ended the PSA in quarter 11 of the 16 at-issues quarters.

For the next five quarters, Reflectxion timely filed Forms 941 and issued Forms W-2 to the travel therapists; it did so under its own EIN. On those forms Reflectxion reported the wages it paid to the traveling therapists, but Reflectxion (like Gevity in the previous quarters) did not report or pay taxes on the travel reimbursement payments at issue.

The Service disagreed with the characterization of the travel reimbursement expenses, and following an examination the Service determined that the travel expense reimbursements were subject to employment taxes. Reflectxion contends that the travel expense reimbursements are not taxable for any quarter, and further argues that for the 11 calendar quarters reported by Gevity, the therapists were employees not of Reflectxion but of Gevity and that Reflectxion therefore was entitled to "section 530 relief" from employment taxes under the Revenue Act of 1978, Pub. L. No. 95-600, sec. 530, 92 Stat. at 2885.

"Section 530 relief" refers to the limited statutory relief provided to taxpayers for underpayments of employment taxes that result from employers' mistakes in classifying employees as independent contractors. Employers do not owe employment taxes for workers correctly characterized as independent contractors. However, the line between an employee and an independent contractor is tricky. Section 530 is a Congressional nod to that fraught line-drawing, and the section gives the employer relief from employment taxes even though the actual employment relation would have required the payment of those taxes. Section 530 applies only where the



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employer did not treat the worker as an employee. In this dispute, then, Section 530 might apply for the 11 quarters that the PSA between Reflectxion and Gevity was in force.

If the tax court has jurisdiction over this dispute, or over portions of the dispute, the court's jurisdiction stems from Section 7436, which grants the tax court jurisdiction over cases involving employment taxes. The court has characterized the grant of jurisdiction in Section 7436 as a grant of "limited jurisdiction." For that limited jurisdiction to attach, three requirements must be met: (1) "there must be a certain kind of 'determination'... either a determination that someone is an 'employee' of the person whose return is being audited... or a determination that the taxpayer is not entitled to section 530 treatment." (2) That determination must have been either "in connection with an audit" of the taxpayer's returns or "as part of an examination." (3) There must be an "actual controversy" regarding that audit determination.

The "actual controversy" requirement is at issue requirement in this case. As the court explained, "actual controversy" is a term of art. Relevant to this dispute, "if the IRS makes a purported determination that the taxpayer is not entitled to section 530 treatment, but the taxpayer had not claimed section 530 treatment, then there is no 'actual controversy' about section 530 and no jurisdiction in the tax court."

Applying the jurisdictional rules and Section 530, the court held that it had jurisdiction over the 11 quarters in which Reflectxion considered its workers independent contractors since all three statutory requirements were met: After an audit, the Service issued a determination concerning section 530 relief, as to which there was an "actual controversy."

In contrast, the court did not find jurisdiction as to the five calendar quarters reported by Reflectxion, because, despite the Service's "determinations" concerning the workers' status as employees and concerning section 530 relief, Reflectxion had reported the workers as employees and had never claimed section 530 relief for those reported quarters. Since "it takes two to have a controversy" the court concluded that there was no "actual controversy" on those issues, as required by I.R.C. Sec. 7436(a). The merits dispute is reserved for a future opinion. *Reflectxion Res., Inc. v. Comm'r*, 120 T.C.M. (CCH) 82 (T.C. 2020).

Rejecting commissioner's complaint that the appraisal was "unqualified," taxpaying couple permitted charitable deduction for contribution of land to city; strict compliance not required to satisfy the elements of a qualified appraisal. Peter Emanouil is a real estate developer who purchased nearly 200 acres of undeveloped property in Westford, Massachusetts in 1999. Over the course of the next 10 years, Mr. Emanouil negotiated with the town over the parcel's use; eventually, Mr. Emanouil pursued a development plan called the "Graniteville Woods project." During the extensive negotiations, Mr. Emanouil discussed donations of various parcels to the town. As the Graniteville Woods project progressed, it became clear that not all 200 acres were required for the plan. Mr. Emanouil and his spouse, Mrs. Emanouil, decided to donate the extra acres, divided into two lots, to the town. Mr. Emanouil consulted with his tax advisers about the donation, and was advised that an appraisal was required, which Mr. Emanouil obtained. The couple eventually claimed a charitable donation of \$1.5 million gift for one of

the parcels and a \$2.5 million charitable gift for the second parcel. Due to limitations on claiming charitable contribution deductions, only a portion of each gift could be used in the current tax year, and the couple carried forward the remainders.

After examination, the commissioner argued that the Emanouils failed to properly substantiate their contributions because their appraisals attached to their returns for the years of the contributions did not identify the dates (or expected dates) of the contributions and did not contain statements that the appraisals were prepared for income tax purposes—the appraisals, that is, were not "qualified appraisals." Without a qualified appraisal, a taxpayer may not claim deductions for donations of property in excess of \$5,000. Regulations amplify what must be included in the qualified appraisal. 26 C.F.R. sec. 1.170A-13(c). The Emanouils' appraisal satisfied the requirements in most, but not all, ways.

The tax court nonetheless held that the appraisal was sufficient. The court reasoned that "the taxpayer who does not strictly comply [with the regulation's requirements] may nevertheless satisfy the elements if he has substantially complied with the requirements." The court characterized the specific requirements in the regs as "'directory' (i.e., 'helpful to respondent in the processing and auditing of returns on which charitable deductions are claimed') rather than 'mandatory' (i.e., literal compliance is required)." The court further held that "the fact that a Code provision conditions the entitlement of a tax benefit upon compliance with respondent's regulation does not mean that literal as opposed to substantial compliance is mandated." (Internal quotation omitted.)

The court also rejected the Service's argument that the deduction should be denied because it was made in exchange for permission to pursue Mr. Emanouil's development project. The court was "persuaded by the evidence that Mr. Emanouil's concessions... were those that he and the town expressly negotiated and to which they agreed, and that his contribution [of the parcels] was not a quid pro quo for that approval." The court similarly rejected the Service's argument that the properties were overvalued. Finally, the court concluded, "Since we do not sustain the deficiencies in tax that the IRS determined, penalties do not apply in this case." *Emanouil v. Comm'r*, T.C.M. (RIA) 2020-120 at 34 (T.C. 2020).

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■ Rejecting attorney-petitioner's argument as a "non-starter," tax court upholds accuracy-related penalty.

Nirav Babu was an attorney specializing in tax return preparation. During and following law school, Mr. Babu worked for Instant Tax Services (ITS), which at the time was one of the largest tax return preparation firms in the country. In 2013, following a two-week trial, ITS and related entities were enjoined from "engaging in and facilitating extensive and pervasive tax fraud." Mr. Babu was not a named defendant, but he was singled out in the court's opinion as having been complicit in the abusive conduct in which ITS engaged, and the DOJ would not approve any arrangement that enabled Mr. Babu to take over the tax preparation business formerly conducted by ITS. That business was taken over by Great Tax, LLC, a new tax preparation service.

Shortly after the court issued its injunction against ITS, Mr. Babu formed and became the sole member of Refunds Plus, LLC. Refunds Plus and Great Tax had utilized the same software that ITS had employed. The two companies also had revenue-share (or referral) agreements, and eventually Mr. Babu was authorized to withdraw cash from Great Tax's bank accounts. He had broad authority to make withdrawals: He was permitted access to any Great Tax account and did not need to secure consent from Great Tax before making withdrawals. Mr. Babu wired well over \$3 million out of Great Tax's bank accounts during 2014.

Despite his legal education and extensive experience preparing federal returns, Mr. Babu maintained no formal books or records tracking Refund Plus's income and expenses during 2014. On its 2014 federal income tax return, Refunds Plus checked the box electing the cash basis of accounting and reported that it had zero gross receipts. The parties now agree that Refunds Plus in fact had gross receipts of \$2,819,433 from Great Tax and that Mr. Babu failed to report, on his individual return, \$2,908,220 of flow-through income from Refunds Plus.

The Service issued timely notices of deficiency for 2013 and 2014 to Mr. Babu. Eventually, Mr. Babu and the Service filed a stipulation of settled issues resolving all issues but one—whether Mr. Babu is liable for an accuracy-related penalty with respect to the portion of the 2014 deficiency attributable to his failure to report flow-through income from Refunds Plus. That dispute forms the heart of the tax court's instant opinion.

Mr. Babu contended that he was not subject to the penalty because he relied

on professional advice as to the proper reporting. He also raised an alternative argument: that, because Refunds Plus received no payments directly from Great Tax, Mr. Babu reasonably concluded that Refunds Plus had no gross receipts.

The court made short work of Mr. Babu's alternative argument, finding that Mr. Babu "was a lawyer with at least seven years of intensive experience in the business of preparing federal income tax returns.... His argument, in essence, is that [Refunds Plus] had no gross receipts because he, as [Refunds Plus's] sole member, deposited directly into his bank accounts the fees that [Refunds Plus] was owed for the services it performed. We do not believe that petitioner actually misunderstood the tax law that makes this argument a nonstarter. It is obvious and well established that a shareholder cannot avoid current taxation by diverting a company's gross receipts to himself."

The court was equally vexed by Mr. Babu's argument that he was not subject to the penalty because he relied on professional advice as to the proper reporting. In rejecting this claim, the court had severe language not just for Mr. Babu, but also for the attorney, Chelsea Rebeck, on whom Mr. Babu claimed he was relying for professional advice. In particular, the court rejected Ms. Rebeck's testimony on several points, and found that on the whole, Ms. Rebeck "did not strike the Court as an objective or candid witness." In addition to casting doubts on her credibility, the court also questioned Ms. Rebeck's competence, stating directly, "The theories that Ms. Rebeck offered at trial to justify not reporting [Return Plus's] gross receipts were implausible.... All in all, Ms. Rebeck's testimony raised serious questions as to whether she was a competent professional who had sufficient expertise

to justify reliance." The penalties were upheld. *Babu v. Comm'r*, T.C.M. (RIA) 2020-121 (T.C. 2020).

■ Court reverses commissioner's individual income tax assessment; appellants prove Florida domiciliary.

Appellants Mark L. Zauhar and Sharon R. Zauhar appealed an order from the Commissioner of Revenue determining that Mark was a Minnesota domiciliary resident for tax years 2013 and 2014 and assessing the Zauhars additional Minnesota individual income tax, penalty, and interest.

The Zauhars timely filed 2013 and 2014 Joint Minnesota Individual Income Tax Returns, and indicated that Mark was a "full-year nonresident of MN" and that Sharon was a Minnesota resident. The commissioner audited the returns and requested that Mark and Sharon each fill out and submit a residency questionnaire.

On 9/12/2017, the commissioner issued an order determining that Mark was a domiciliary resident of Minnesota during 2013 and 2014 and assessed the Zauhars \$1,554,206.72 in additional individual income tax, penalty, and interest. The Zauhars timely appealed the commissioner's order directly to the tax court.

All net income of a Minnesota resident individual, wherever earned, is subject to Minnesota income tax. Minn. Stat. §290.014, subd. 1 (2018). Here, "resident" means "any individual domiciled in Minnesota." Minn. Stat. §290.01, subd. 7(a). Minn. R. 8001.0300 (2013) provides that "domicile" is "that place in which a person's habitation is fixed, without any present intentions of removal." *Id.*, subp. 2. "To establish 'domicile,' one must have 'bodily presence'... in a place coupled with an intent to make such a place one's home."

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See *Sanchez v. Comm'r of Revenue*, 770 N.W.2d 523, 526 (Minn. 2009). Once a person's domicile is established in Minnesota, "it is presumed to continue until another domicile is actually established." *Mauer v. Comm'r of Revenue*, 829 N.W.2d 59, 68 (Minn. 2013); see also Minn. R. 8001.0300, subp. 2.

The Minnesota Supreme Court has emphasized that "the proper focus of inquiry is on whether a new domicile has been established elsewhere, not on whether a Minnesota domicile has been abandoned." *Sandberg v. Comm'r of Revenue*, 383 N.W.2d 277, 283 n.7 (Minn. 1986) (citing *Comm'r of Revenue v. Stamp*, 296 N.W.2d 867, 870 (Minn. 1980)). When a Minnesota domiciliary "acquires an out-of-state residence, the issue of whether the person's domicile has changed is 'ordinarily a question of fact'" and the taxpayer has the burden of proving the establishment of a new domicile. *Mauer*, 829 N.W.2d at 67-68; *Sanchez*, 770 N.W.2d at 526.

Minn. R. 8001.0300 sets forth 26 separate considerations to evaluate domicile. The considerations "must be weighed in each particular case" because "[n]o positive rule can be adopted with respect to the evidence necessary to prove an intention to change a domicile[.]" *Mauer*, 829 N.W.2d at 70; Minn. R. 8001.0300, subp. 2. Additionally, the rule provides that an intention to change domicile "may be proved by acts and declarations... acts must be given more weight than declarations." Minn. R. 8001.0300, subp. 2; *Seccomb v. Bovey*, 135 Minn. 353, 356, 160 N.W.2d 1018, 1020 (1917) (noting that a person's conduct is given greater weight than a declaration of domicile).

After an extensive review of the Zauhars' declarations and actions in the years preceding, as well as the tax years at issue, the court determined that the Zauhars presented sufficient evidence proving that Mark Zauhar was a Florida domiciliary in 2013 and 2014. The court reversed the commissioner's assessment of \$327,757.29 in additional Minnesota individual income tax, penalty, and interest for tax year 2013, and of \$1,226,449.43 in additional tax, penalty, and interest for tax year 2014. *Zauhar v. Comm'r of Revenue*, 2020 WL 4912971 (Minn. T.C. 8/19/20).

■ **Court grants petitioners' motion limiting use of confidential commercial information.** IRC Champlin Marketplace and IRC Plymouth Town Center, (collectively, petitioners as relevant here) are each disputing the market value of their subject properties as of 1/2/2018 with Hennepin County. On or about 1/22/2020, the county corresponded by email with petitioners concerning certain document requests. Specifically, the county assessor requested: (1) copies of leases; (2) a summary of updating, renovating, or remodeling of units or common areas exceeding \$5,000 performed since 2016; (3) appraisals performed since 2016; and (4) physical inspections of the subject properties.

The parties corresponded and could not agree on the production of leases (rather than lease abstracts). Petitioners informed the county they were willing to produce the requested leases, appraisals, and information concerning physical conditions subject to discovery protective orders. The parties agreed in principle to submit to the court a proposed protective order concerning the county's requests, but disagreed about the inclusion of language limiting the use of any responsive documents.

Specifically, the parties disagreed about language explicitly limiting its use to this action, "[e]xcept as otherwise expressly permitted by Minnesota law." The county asserts the inclusion of that limitation constitutes a "super-protection" in excess of the Data Practices Act, to which Champlin and Plymouth are not entitled. Petitioners contend the confidential commercial nature of the requested information merits its protection pursuant to Minnesota Rule of Civil Procedure 26.03(a)(7).

Petitioners requested entry of an order providing that, "[e]xcept as otherwise expressly permitted by Minnesota law, nonpublic assessor's data shall be used solely for purposes of this action and Respondent shall not directly or indirectly transfer, disclose, or communicate it or its contents in any way to any person or third party." They also sought an order as to proprietary information granting "protection from any form of direct or indirect transfer, disclosure, or communication by Respondent to any person or third party as nonpublic

assessor's data" under the Data Practices Act. The county proposed an order that prohibits it from "disseminat[ing] data covered under Minn. Stat. §13.51 to any third party except as otherwise permitted by Minnesota law." Regarding proprietary information, the county proposed "protection from any form of disclosure by Respondent as nonpublic assessor's data" under the Data Practices Act. The parties ultimately were unable to reach agreement concerning stipulated protective orders for the court's consideration.

Petitioners filed similar motions or protective orders with respect to the disputed requests on May 13 and May 15. The county opposed both motions and hearings were held on 5/27/2020 and 5/29/2020. Generally, Minn. Stat. section 271.06, subd. 7 (2018), provides that Minn. R. Civ. P. govern the procedures in the tax court, where practicable. Trial courts have "considerable discretion in granting or denying discovery requests." *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn. 1987); *Montgomery Ward & Co. v. Cty. of Hennepin*, 450 N.W.2d 299, 305 (Minn. 1990).

To prevent public disclosure of matters produced in discovery, a party may move for a protective order under Minn. R. Civ. P. 26.03. *State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 686 (Minn. App. 2000). "A district court has 'broad discretion' under Minn. R. Civ. P. 26.03 'to fashion protective orders and to order discovery only on specified terms and conditions.'" *In re Paul W. Abbott Co.*, 767 N.W.2d 14, 17-18 (Minn. 2009) (quoting *Erickson*, 414 N.W.2d at 409). Minnesota law provides, in relevant part, that upon motion by a party, and for good cause shown, the court may make an order to protect a party from embarrassment, including "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way..." Minn. R. Civ. P. 26.03(a)(7).

Petitioners contend that protection is necessary pursuant to Rule 26.03(a)(7) because it is confidential commercial information and they would be harmed if it became available to their competitors or tenants. Petitioners express concern that the county not only could use the information in connection with the cases at issue, but could disclose it, or use it in a manner that causes it to be disclosed, to third parties. In support of the motions, petitioners provided affidavits of the vice president and chief accounting officer of IRC Retail Centers, LLC, which holds an indirect ownership inter-

est in both Champlin and Plymouth.

The court found the affidavits sufficient to establish that both Champlin and Plymouth: (1) consider such information to be confidential commercial information; (2) pursue adequate measures to protect that information from public disclosure; and (3) might be harmed if the information were disseminated to its competitors. Although the county disputes petitioners' request, the county did not submit affidavits contradicting petitioners' affidavits. Accordingly, the court granted petitioners' motions for protective orders. *IRC Champlin Marketplace, LLC v. Hennepin Co.*, 2020 WL 5097109 (Minn. T.C. 8/25/20); *IRC Plymouth Town Center, LLC v. Hennepin Co.*, 2020 WL 5094627 (Minn. T.C. 8/25/2020); *IRC Champlin Marketplace, LLC v. Hennepin Co.*, 2020 WL 5086582 (Minn. T.C. 8/25/20).

ADMINISTRATIVE UPDATES

■ **Back-to-school expenses might result in tax relief.** For Minnesota taxpayers with school-aged children, the back-to-school season probably felt a little different this year, but tax relief remains. The Minnesota Department of Revenue reminds taxpayers that two tax relief programs exist for families with school-aged children: the K-12 Education Subtraction and the K-12 Education Credit. Both programs help lower taxes and may provide a larger refund when you file Form M1, Individual Income Tax. Qualifying taxpayers have a "qualifying child" attending K-12 at a public, private, or qualified home school and the taxpayer must have paid "qualified education expenses" during the year for that child's education. More information about the benefits is available on the department's website.



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TORTS & INSURANCE

JUDICIAL LAW

■ **Insurance; first-party bad faith.** Plaintiff insured suffered a soft-tissue whiplash injury in a 2009 car accident. She subsequently began suffering frequent, intense headaches. In July 2014, after settling with the other driver, the insured sought UIM benefits from defendant insurer, providing medical records and signed

medical record authorizations. After insurer failed to either pay or deny her benefits for over a year, insured sued. A jury awarded her \$1.4 million. She then amended her complaint to assert a first-party bad faith claim under Minn. Stat. § 604.18. Following a court trial, the district court awarded the insured her costs and fees pursuant to §604.18, subd. 2(a). A divided court of appeals affirmed.

The Minnesota Supreme Court affirmed. The Court held that the plain language of §604.18, subd. 2(a) requires a two-prong analysis for which the insured bears the burden of proof, and which is reviewed for clear error. The first prong involves an objective inquiry, which the Court held to be "whether a reasonable insurer under the circumstances would not have denied the insured the benefits of the insurance policy." The factfinder is to "consider the level of investigation a reasonable insurer would have conducted under the circumstances... and how a reasonable insurer would have evaluated the claims in light of that investigation." The second prong is subjective, requiring that the insurer know of, or act in reckless disregard of, the lack of a reasonable basis for the denial. The Court held that the insured must "prove that the insurer knew, or recklessly disregarded or remained indifferent to information that would have allowed it to know, that it lacked an objectively reasonable basis" for its denial. The quality and thoroughness of the insurer's investigation of the actual claim plays a significant role in this analysis. The Court ultimately upheld the district court's decision that the insurer displayed a "reckless indifference to facts and proofs submitted" by the insured, including medical records documenting the increased frequency and intensity of her headaches following the accident.

Justice Anderson, joined by Justice Gildea, dissented, contending that in determining reasonableness, the Court should instead have applied the reasonableness analysis applicable to summary judgment/JMOL, i.e., whether reasonable persons could draw differing conclusions from the evidence. The dissent also argued for a less deferential *de novo* standard of review. *Peterson v. Western National Mutual Ins. Co.*, No. A18-1081 (Minn. 7/29/2020). <https://mn.gov/law-library-stat/archive/supct/2020/OPA181081-072920.pdf>



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LEAH CEEE O. BOOMSMA has joined Bassford Remele as a shareholder. Boomsma practices in complex commercial litigation, with more than 10 years of experience in appeals, dispositive motions, and jury trials.



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SARA WILSON has joined Lommen Abdo in its Minneapolis office. Wilson has unique experience in handling both transactional and litigation matters.

Fredrikson & Byron has elected 12 new shareholders in their Minneapolis office: KATHERINE A. CHARIPAR, MICHAEL R. CUMMINGS, MERCEDES MCFARLAND JACKSON, LYNN S. LINNÉ, KIEL C. MCELVEEN, PARI I. MCGARRAUGH, ALISSA N. MITCHELL, RYAN M. SPANHEIMER, ERIK A. SPLETT, ANUPAMA D. SREEKANTH, JEFFREY J. STEINLE, and KYLE W. UBL.



BRENNAN

JOHN H. BRENNAN has joined the Wayzata firm Sanford, Pierson, Thone & Strean, PLC in an of counsel capacity. Brennan, an MSBA Certified Real Property Law Specialist since 1990 and a Rule 114 Roster Neutral, will continue to arbitrate and mediate real estate-related matters.



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formation of their new firm, Capistrant Van Loh, PA, practicing in Minneapolis. This merger will combine Dan and Traci's many years of dedication and experience in serving family law clients as legal advocates and Alternative Dispute Resolution professionals.

TRACI (THERESA) CAPISTRANT and DAN VAN LOH are pleased to announce the

JACQUELYN LUTZ joined Messick Law, PLLC. Lutz practices exclusively in family law and will be heading the firm's family law division. Prior to joining the firm, she practiced with a family law firm in Oakdale.



LUTZ

ANDREW C. LANDSMAN joined Merchant & Gould PC as senior counsel. Landsman is a registered patent attorney focusing on all aspects of IP law, including procuring and maintaining U.S. and international patents, trademarks, and copyrights.



LANDSMAN

ROXANNE THORELLI has joined Fredrikson & Byron in the mergers & acquisitions, private equity, and public companies groups.



THORELLI

In Memoriam

Willard I. Converse, age 94, passed away peacefully at home in Eagan on August 7, 2020. He graduated *magna cum laude* from the University of Minnesota Law School in 1952. He was a highly respected attorney and practiced law in St. Paul for over 50 years.

Heather Lynn Iannacone, age 72, died peacefully at home on August 14, 2020. She spent several years as a nurse before going to law school. She graduated from William Mitchell College of Law in 1982. She first worked for a law firm and then spent the rest of her legal career working with her husband at Iannacone Law Office.

Judge Doris (Ohlsen) Huspeni, age 91, of Lindstrom, formerly of Minneapolis, died peacefully at home on September 11, 2020. She blazed a trail for women attorneys, graduating as the sole female and top student of her 1970 William Mitchell Law School class. Her career spanned 44 years. 1970-73: assistant state public defender; 1973-74: U of MN associate law professor; 1974-80: family court referee; 1980-82: appointed and served as municipal court judge; 1982-84: appointed and served as district court judge; 1984-2014: appointed and served as Minnesota Court of Appeals judge (active and retired).

Hon. Daniel B. Gallagher, age 91, of Roseville died peacefully on August 31, 2020. He was an attorney in private practice and later a worker's compensation judge for the state of Minnesota.

Walter J. Piszczek died on September 17, 2020. Piszczek settled into retirement on his rural St. Croix River farm after a 30-year career with Northwest Airlines. His professional accomplishments throughout his life include his exploits as a naval aviator, aeronautical engineer with NASA and astronaut candidate, Gemini 7 & 8, Apollo 1 launch preparation engineer, William Mitchell College of Law JD, member of the Minnesota State Bar, senior fellow of the American Institute of Aeronautics and Astronautics, Osceola Village Board Trustee and a valued member of the Osceola Airport committee.

Russell A. Anderson, former chief justice of the Minnesota Supreme Court, died September 15, 2020 at age 78. He served as an associate justice of the court from September 1, 1998 until he was sworn in as chief justice on January 10, 2006. He retired from the Supreme Court on June 1, 2008, at age 66.



SHATONOVA

MARIA SHATONOVA has joined Halunen Law with the employment law practice group. A graduate of Mitchell Hamline School of Law, Shatonova brings commitment to her

representation of individuals who have suffered wrongful termination, discrimination, sexual assault or harassment, or other illegal workplace actions.

Bird, Jacobsen & Stevens, PC has added a shareholder and changed its name. The firm is now known as BIRD, STEVENS & BORGES, PC. The name change comes as the firm welcomes attorney GRANT BORGES as a shareholder. VAN JACOBSEN continues as the firm's managing attorney, a role that he has held for decades. Jacobsen also maintains his full-time law practice.



SCHROMEN

RACHEL T. SCHROMEN was named 2020 Volunteer Attorney of the Year by Cancer Legal Care. Schromen is the owner of Schromen Law, LLC, practicing in the areas of estate planning and

elder law, and provides pro bono estate planning services to cancer patients and survivors through the Cancer Legal Care program.



GARRY

AMBER N. GARRY has joined Arthur, Chapman, Kettering, Smetak & Pikala, PA. She focuses her practice on representing and counseling healthcare providers in claims

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