OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVIII NUMBER VI
JULY 2021
www.mnbar.org

Bench&Bar OF MINNESOTA

MSBA President 2021-22

JENNIFER THOMPSON

Playing the right way

Thank You, Dyan

DYAN J. EBERT

All of us at Quinlivan & Hughes want to say thank you for leading the way for the Minnesota State Bar Association. During a challenging year, you guided the MSBA with strong leadership and championed justice, equality, and professionalism. Well done!

Dyan J. Ebert, President of Minnesota State Bar Association 2020-2021 and shareholder of Quinlivan & Hughes law firm.

QUINLIVAN & HUGHES, P.A.
ATTORNEYS AT LAW

5 LOCATIONS TO SERVE YOUR LEGAL NEEDS

St. Cloud | Long Prairie | Monticello | Little Falls | Walker

Learn more at **Quinlivan.com** or by calling **(320) 251-1414**

OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVIII NUMBER VI
JULY 2021
www.mnbar.org

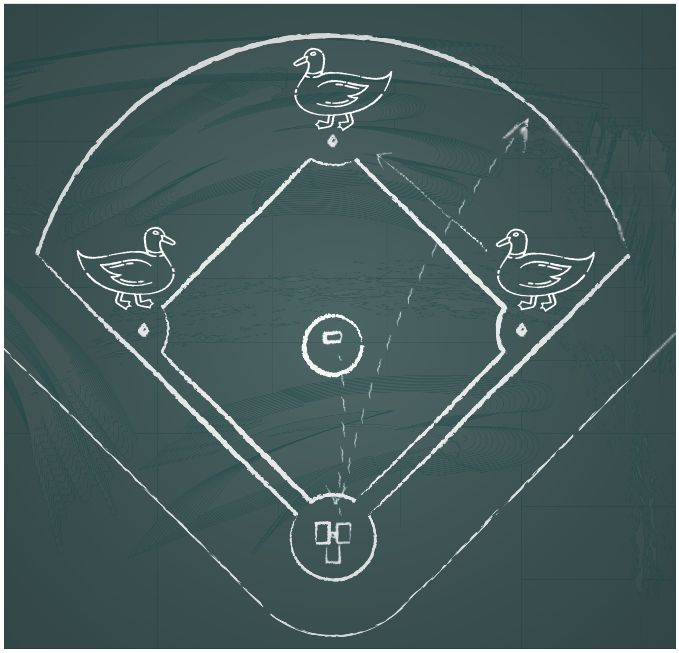
Bench&Bar OF MINNESOTA

Ducks on the pond

My husband, Tony, also an attorney, likes to say that he knew we were meant to be during a date to watch the Minnesota Twins play in the spring of 2001. The Twins were rebuilding a team that no one knew. Their marketing strategy involved introducing each of the key players to fans by teaching us such things as how to spell "Mientkiewicz." As Tony and I sat watching the game that day, I shouted seven words that he maintains sealed the deal for him—"C'mon! We've got ducks on the pond!"

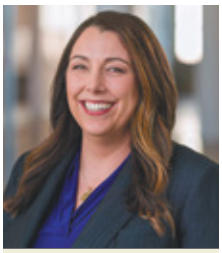
"Ducks on the pond" refers to runners on second and third base who are in scoring position. It's the cheer used to encourage the batter to drive in multiple runs with a single hit. The baserunners are the "ducks," and the base path is the "pond." It's a cheer used when opportunity is great and solid contact can yield big results. It's meant to point out the possibilities that exist and how even seemingly small, strategic effort can be meaningful. The batter doesn't need to hit a bomb of a home run. "Ducks on the pond" is a cheer about excitement for what comes next, and about capitalizing on the work that's already been performed to get a team into an advantageous position. The emphasis is on teamwork.

Opportunity. Excitement. Capitalizing on the strong foundation already in place. Teamwork. Beyond baseball, as our world and our profession emerge from the pandemic, these words certainly also ring true for the possibilities that exist for the MSBA in the next year. C'mon! We've got ducks on the pond!



The year ahead

While it has been difficult to do many traditional things in the past year (or, perhaps better said, to do many things traditionally), the MSBA has been working hard to live its mission of promoting the highest standards of excellence and inclusion within the legal profession, providing valued resources to its members, and striving to improve the law and the equal administration of justice for all. The work done this past year has put the MSBA in a position of great opportunity for the 2021-2022 bar year, and the excitement is palpable.



JENNIFER THOMPSON is a founding partner of the Edina construction law firm Thompson Tarasek Lee-O'Halloran PLLC. She has also served on the Minnesota Lawyers Mutual Insurance Company board of directors since 2019.

Heading into the new bar year, for instance, the MSBA is poised to help lead our profession into the first year of lawyers reporting hours of pro bono service and financial contributions to organizations that provide legal services to people of limited means. This will help our profession gain valuable information about how we are living out our ethical aspirations of helping to bridge the gap in access to justice. Additionally, with the expected return of in-person programing later in the year, we will be ready to greet our members in Greater Minnesota with our very popular One Profession programs, where we will continue to tackle issues of importance to members around the state, such as attracting and retaining lawyers in rural practice. The MSBA is also primed to continue its diversity, equity, and inclusion work, which includes implementing the MSBA's 2021-2024 Diversity and Inclusion Strategic Plan; supporting, amplifying, and collaborating with our affinity bar partners; and striving to promote and foster a justice system that is fair, inclusive, and equitable, while recognizing and honoring that the system has failed to be these things for many.

This past year has been trying, discombobulating, uncomfortable, hard. And it has also been a year where the MSBA—staff, leadership, sections, committees and councils, and members—have been hard at work, setting us up for this moment. We don't need a big home run. Because of the impressive work of so many over the past year, simple, solid contact is going to reap very significant results.

Some might think that my cheer in the spring of 2001 sealed the deal for Tony simply because it highlighted our shared interest in a sport and a team. Maybe. But, also, I think my cheer highlighted our shared desire to live in that moment where we clearly see the possibilities unfolding in front of us and to encourage seizing the moment. That's true in baseball. It's true for the MSBA, too. This year, I'm looking forward to our driving those ducks home. ▲

Bench&Bar OF MINNESOTA

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

Editor
Steve Perry
sperry@mnbars.org

Art Director
Jennifer Wallace

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

MSBA

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

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

MSBA CONVENTION HIGHLIGHTS

Incoming MSBA President Jennifer Thompson and outgoing President Dyan Ebert exchanged gifts and a laugh as Ebert presented Thompson with the president's gavel.

Keynote Speaker Simon Tam discussed his landmark legal battle at the U.S. Supreme Court, which clarified First Amendment rights in trademark law.

In her annual state of the judiciary address, Chief Justice Lorie Skjerven Gildea discussed remote hearings as well as other technology initiatives and the Court's legal paraprofessional pilot project.

Incoming HCBA President Brandon E. Vaughn talked about his work with The Black Big Law Project.

Amran A. Farah, immediate past-president of the Minnesota Association of Black Lawyers, shared her insights on becoming an effective leader in the community.

On June 24-25, the MSBA held its not-quite-post-pandemic 2021 annual convention virtually. In addition to Simon Tam's keynote address and Chief Justice Gildea's state of the judiciary message, the gathering featured ED talks from more than half a dozen MSBA members as well as in-depth sessions on lawyer wellness during the pandemic, Minnesota appellate court updates, and the future of rural law practice.

LAWYERS STEP UP
FOR MINNESOTA

Be a hero in these unprecedented times.
Find your pro bono match at:
LawyersStepUpMN.org

New in 2022:

Minnesota lawyers will report their pro bono hours when renewing their attorney registration

North Star LAWYER

Be recognized by the MSBA for providing 50+ hours of pro bono service annually.
mnbar.org/northstar

Pro bono.
It's part of our profession.

For more information on the new pro bono reporting requirement, visit:
www.mnbar.org/pro-bono-reporting

Small-Firm Security and Privacy
BOOTCAMP

Thursday, July 22
Starting at 7:45 am
Sessions spaced throughout the day

We're covering the basics of cybersecurity and privacy with live walkthroughs of tools that will help you operate securely in post-pandemic workspaces. We'll start with the latest cybersecurity and privacy news at MSBA's Legal Business as Usual webcast. Followed by: a session on cyber-liability insurance; the Do You Know Your Privacy Law? Quiz; the MSBA Advantage cybersecurity partner tradeshow; and more.

No matter your experience with cybersecurity, you'll learn something new.

MSBA

REMOTE PARTICIPATION ONLY

CLE CREDITS
4.0 CLE credit will be applied for

COST
MSBA Member: $50.00
Non-Member: $150.00
Law Student: $25.00

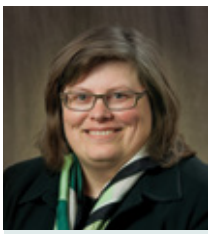
REGISTER
www.mnbar.org/cle-events

The OLPR turns 50!

As I mentioned last month, this year is the 50th anniversary of the creation of the Office of Lawyers Professional Responsibility. In 1971, the Minnesota Supreme Court appointed the first administrative director of the Office, Richey Reavill of Duluth, having created the Lawyers Professional Responsibility Board in 1970. The first meeting of the Board also occurred in early 1971. With half a century of experience, let's take a look at what has changed and what remains the same.

Before the Board and Office

Prior to 1971, the Board of Law Examiners functioned as the bar's primary disciplinary body. This responsibility was shared with the Practice of Law Committee of the Minnesota State Bar Association.[1] Interestingly, BLE also included judicial ethics in its purview until the Minnesota Legislature created the Board of Judicial Standards in 1972. Starting up separate organizations responsible for different aspects of lawyer regulation was largely the byproduct of a seminal 1970 publication from the American Bar Association known as the Clark Report[2] and the passage in 1969 of the ABA Model Code of Professional Responsibility.



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

SUSAN.HUMISTON@COURTS.STATE.MN.US

The Clark Report was very critical of existing efforts by states to discipline attorneys, pointing out large disparities in the handling of discipline from jurisdiction to jurisdiction and within jurisdictions. The report identified 36 separate and significant problems that each state was encouraged to address in its attorney discipline system. Thereafter, many states, including Minnesota, put in place professional staff tasked with discipline and gave thoughtful consideration to the issues raised in the Clark Report and the Model Code.

The beginning

The Office started with a staff of three and received, directly or through the district ethics committees, 400 complaints that first year. At the time, there were approximately 5,000 members of the bar. In that first year the Board held seven panel proceedings involving 10 lawyers, and provided significant support to the various district ethics committees.[3] Approximately 12 percent of complaints resulted in some level of discipline, whether by a district ethics committee—which then could impose discipline—or the Board, which could also impose discipline, or the Court. The primary area of concern raised in complaints was neglect. One of the first orders of business for the Board, it appears, was to recommend a rule change to add public members to the Board. The Court accepted this recommendation and thereafter added three public members, beginning Minnesota's long tradition of active public participation in the attorney discipline process.

The first 10 years of the OLPR saw a quick succession of directors—four in all—until 1979, when that succession slowed down. During that first decade, the Board continued to expand the public's role in the process, implementing the rule—still in effect today—that 20 percent of ethics committee members be nonlawyers. The Rules on Lawyers Professional Responsibility were also changed in 1977 to remove dispositional authority from the district ethics committees, modifying their role to consist of a report and recommendation process that remains in place today.[4] In 1977, the Office first started advertising to the bar the availability of free ethics advice on an informal basis just by phoning us.[5] Then as now, the advice was to review the rules first, but when in doubt, call. We continue to offer this valuable service to all members of the bar.

The '80s and '90s

The 1980s and '90s were decades of expansion. The early '80s saw growth in the Office staff as well as the number of licensed lawyers (approximately 13,000 by 1982) and complaints (up to approximately 1,200 a year), and produced the first signs of a backlog in case processing. By 1989, the Office had grown to a staff of 20 and a budget of $1 million. The attorney population was also rising during this time, as were the services of the Office. The Director was appointed to serve as the director of the newly formed Client Security Board in 1987, and the trust account overdraft program was launched in 1990.

The '80s also saw significant changes in the applicable rules. In 1985, the Court adopted the Minnesota Rules of Professional Conduct, replacing the Code of Professional Conduct. With modest amendments over time, the rules comprising the MRPC have largely stood the test of time, and are the ones we still apply today. The '80s also saw a change in the Rules of Lawyers Professional Responsibility (RLPR)—specifically, a change to require that any investigation initiated by the Director without a complaint receive approval from the Board's executive committee (another rule that remains in place today).

The '90s saw continued growth in the number of attorneys, exceeding more than 20,000 by the end of the decade, an approximately four-fold increase in the first 25 years of the Office's history. The early '90s also saw the appointment of the first woman director, Marcia Johnson, who served from 1992-1997. In a very interesting twist of fate, Ms. Johnson was a Nebraskan, and a products liability lawyer who worked at a large firm.[6] Nineteen years later, I would become the second woman director, and also happened to be originally from Nebraska, and a products liability lawyer from a large firm!

The '90s remain the decade that yielded the most disbarments: 75.

2000 to the present

The last two decades have seen much slower growth in the number of licensed attorneys than during the first half of the Office's existence. The current number of active lawyers is around 25,000, out of approximately 30,000 licensed lawyers. These numbers have remained remarkable steady for much of the last decade. The Office spent 20 years at one location, its longest period of time in one space, before its recent move at the end of December 2020.

The last two decades have been active ones in terms of discipline. From 2000-2009, 327 lawyers were publicly disciplined, an average of 33 a year (from a low of 19 in 2004 to a high of 48 in 2006). From 2010-2019, a total of 403 attorneys were publicly disciplined, an average of approximately 40 per year. During the most recent decade, the annual number of publicly disciplined lawyers ranged from a low of 26 (in 2010 and 2011) to a high of 65 in 2015. Total complaints throughout this period varied by year but were very similar to the average number of complaints received in the 1980s and 1990s (1,100 - 1,200).

Throughout these decades, the Board remained the same size (23 members, with nine public members) and maintained its same structure, sitting in six disciplinary panels. The Office staff grew modestly, from the full time equivalent of 24 in 1999 to the current full time equivalent of 30 in 2021. We have also maintained a robust district ethics committee structure, with strong public participation in each of the 21 district ethics committees.

The last two decades also saw the largest number of claims paid out in one year by the Client Security Board (67 in fiscal year 2017) as well as two years in which payouts exceeded $750,000 in a single fiscal year (2004 and 2017).

Conclusion

This is a very general overview of the last 50 years. But I hope it gives you a sense of how much has changed and how much remains the same. If you have questions about what we do and how we do it, please let me know. More importantly, if you have suggestions for improvement, please let me know that as well. And, remember, we are available to answer your ethics questions: 651-296-3952—a phone number that we have had since the earliest days of the Office, save for an area code change. ▲

Notes

[1] *For the Record, 150 Years of Law and Lawyers in Minnesota, An Illustrated History,* Minnesota State Bar Association, June 1999.

[2] American Bar Association Special Committee on Evaluation of Discipline Enforcement, June 1970 (the "Clark Report").

[3] Professional Responsibility and Discipline, Progress Report, R.B. Reavill, Bench & Bar (Feb. 1972).

[4] Cleary, Edward J. and Wernz, William J. (1999) "Ethics and Enforcement," William Mitchell Law Review: Vol. 25: Iss. 1, Article 14. Available at: *http://open.mitchellhamline.edu/wmlr/vol25/iss1/14* .

[5] R. Walter Bachman, Jr, "Check with Lawyers Professional Responsibility Board Staff on Legal Ethics Question," Bench & Bar (Dec. 1977).

[6] Marcia A. Johnson, "Changes at the Board," Bench & Bar (Dec. 1992).

Improving national cybersecurity

This past May, President Biden issued a document entitled "Executive Order on Improving the Nation's Cybersecurity."[1] In light of the multiple recent large-scale cyber events—including the SolarWinds, Colonial Pipeline, and JBS Meats attacks—the order comes at a particularly critical time. How can our nation improve its cybersecurity posture and its response to incidents when they occur? How should agencies communicate with each other and share information?

The order lays out a roadmap to achieve progress in several key areas. The federal government must:

- adopt security best practices;
- advance toward zero trust architecture;
- accelerate movement to secure cloud services, including Software as a Service (SaaS), Infrastructure as a Service (IaaS), and Platform as a Service (PaaS);
- centralize and streamline access to cybersecurity data to drive analytics for identifying and managing cybersecurity risks; and
- invest in both technology and personnel to match these modernization goals.

Given the rapid evolution of the Internet of Things and the adoption of new technologies within the federal government and government agencies, standardizing incident response procedures and cybersecurity measures is critical. The recent ransomware attack on JBS meatpacking plants strongly demonstrates how cybercriminals can take advantage of vulnerabilities in IoT devices to target critical infrastructure.[2]

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

Standardization

The Biden order stresses the need for standardizing at numerous levels, including contractual requirements for third-party vendors, policies and procedures for cloud technology, and guidelines for enhancing software assessment and supply chain security. Standardization is a cornerstone of any strong cybersecurity program. In previous articles, I've discussed the often disjointed nature of organizational knowledge and procedures, especially in regard to new circumstances that affect security posture, such as cloud migrations and third-party vendor relationships. Standardization allows for better communication, response, and reporting capabilities, especially when faced with a large-scale breach. The order also emphasizes addressing weaknesses in software supply chain security and standardizing software testing and assessment requirements, a proactive measure in mitigating cyber risk.

The order further calls for a standardized response and vulnerability playbook incorporating NIST standards, a move that highlights the government's movement toward improving its proactive and reactive measures. Interpreting the lessons learned in cyber incidents and making them actionable requires a high degree of coordination and centralization across agencies.

In addition to efforts to standardize, the order emphasizes the need to modernize cybersecurity measures as quickly as possible. Its timelines for compliance with critical cybersecurity measures include the implementation of multi-factor authentication and encryption requirements for data both at rest and in transit.

The importance of these measures is underscored by the fact that they are mandatory, and written attestations are required for instances of non-compliance. Classifying and prioritizing data help in determining appropriate processing and storage measures and in establishing appropriate resource allocation. Moreover, the order stresses the need for improved network security and early threat detection. Increased visibility into potential threats and threat hunting activities will contribute to the government's efforts to mitigate cyber risk and control cyber events when they occur.

Public/private collaboration

The order also highlights the importance of visibility and transparency in its cybersecurity measures. This effort extends beyond the government, however, to include the private sector:

> "The private sector must adapt to the continuously changing threat environment, ensure its products are built and operate securely, and partner with the Federal Government to foster a more secure cyberspace. In the end, the trust we place in our digital infrastructure should be proportional to how trustworthy and transparent that infrastructure is, and to the consequences we will incur if that trust is misplaced."[3]

The federal government's commitment to increased visibility and partnership with the private sector is further illustrated by the order's establishment of a Cyber Safety Review Board consisting of members from both the federal government and private entities. Information sharing between the federal government, the private sector, and vendors—as well as between agencies—is better enabled by removing barriers that would otherwise prohibit it as well as by taking steps to standardize cyber language.

The Biden administration order signifies a bold step toward more effectively prioritizing cybersecurity in the United States. Through standardization, modernization, and increased transparency in cybersecurity measures, the nation will be in a better position to improve its cybersecurity posture and respond efficiently to attacks. ▲

Notes

[1] *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/12/executive-order-on-improving-the-nations-cybersecurity/*

[2] *https://kstp.com/news/jbs-meatpacking-plants-return-to-business-after-massive-cyberattack/6129213/*

[3] Supra note 1.

LawPay®

AN AFFINIPAY SOLUTION

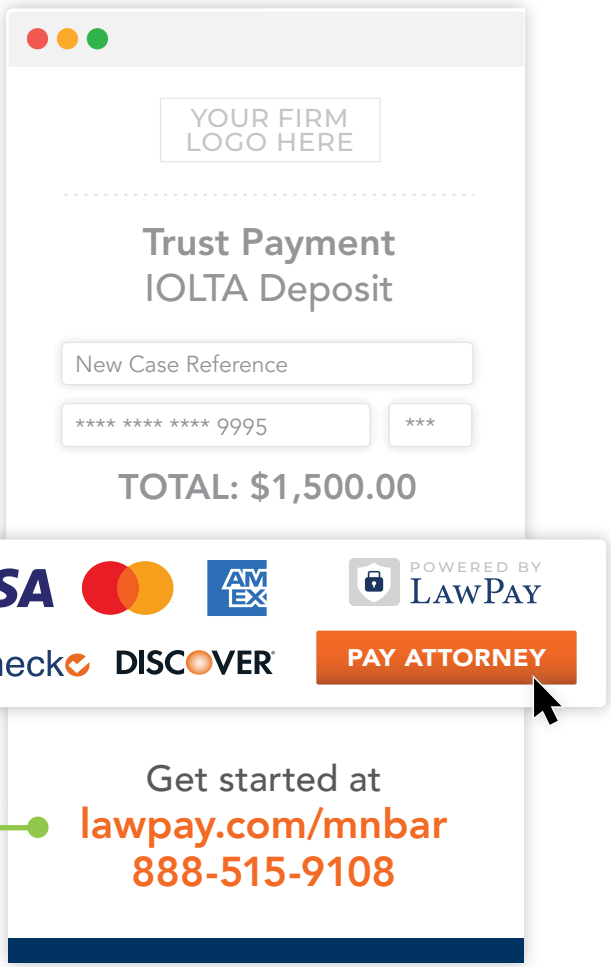
+

MSBA | Proud Member Benefit

> **I love LawPay!** I'm not sure why I waited so long to get it set up.
>
> *– Law Firm in Ohio*

Trusted by more than 150,000 professionals, LawPay is a simple, secure solution that allows you to easily accept credit and eCheck payments online, in person, or through your favorite practice management tools.

- **22% increase in cash flow with online payments**
- **Vetted and approved by all 50 state bars, 70+ local and specialty bars, the ABA, and the ALA**
- **62% of bills sent online are paid in 24 hours**



Get started at
lawpay.com/mnbar
888-515-9108

Data based on an average of firm accounts receivables increases using online billing solutions.

LawPay is a registered agent of Wells Fargo Bank N.A., Concord, CA and Synovus Bank, Columbus, GA.

MSBA PRESIDENT
2021-22

PLAYING THE RIGHT WAY

Jennifer Thompson, softball, and the law

By Amy Lindgren

Photos by Sarah Mayer

Full of life, Thompson laughs a lot, but don't let that fool you. She is a serious and strategic lawyer and business owner.

When it comes to Jennifer Thompson, it seems that everyone has a story to tell. One law partner describes her intense reaction when he failed to score from second on a single in rec league softball, while another partner has seen her gracefully manage sexist assumptions from fellow attorneys. Her sister enjoys telling of a recent trip where Thompson talked the owner of an Arizona mansion into letting their 22 family members stay for a week, and a former law partner remembers her pretend-threat of a copyright infringement action for posting her photo of him asleep at his desk. Whether poignant or admiring or rueful, one thing the stories all seem to have in common: If Thompson is at the center of them, they will make you laugh.

Full of life, Thompson laughs a lot, but don't let that fool you. She is a serious and strategic lawyer and business owner. In conversation, she balances gravitas and lightness, punctuating intense moments with amusing observations. It's not far different from the bigger balance she keeps, with her professional world of construction litigation and practice management providing the perfect counterweight to her fully realized family life. Now, as the incoming president of the Minnesota State Bar Association, Thompson will undoubtedly generate more stories, even as she maintains the delicate equilibrium between work, home, and service to the legal profession.

'Raised well'

In speaking of his law partner's softball prowess, Jason Tarasek notes judiciously, "The four Lehman girls were raised well, by a father who taught them to play softball the right way." Thompson (née Lehman) first invited him to play softball soon after they started working together. As he relates, "I'd only played softball with men and I thought, 'I'm going to have to dial it down in intensity.'" That thought quickly perished after Tarasek found himself on second base when someone hit a single. "I ran to third and stopped and that's when I heard her screaming, 'Tarasek—you have to score on that! Let's GO!!'" It was too late for the startled Tarasek to redeem his gaffe, but not too late to absorb the lesson: Thompson may like to laugh, but she takes her softball *seriously*.

Softball, in this case, could be a metaphor for Thompson's approach to life. Measured and polite in her daily interactions, she can be a potent competitor and advocate for her clients while sometimes surprising with her intensity. As Thompson's sister Allison Nikolic notes, "When you meet Jennifer, if you underestimate her, you will lose." Nikolic is one of the four Lehman sisters "raised well" by parents Paul and Peggy Lehman, an Xcel Energy engineer and a nurse, respectively. Nikolic and Thompson are only 16 months apart, but almost half a generation older than siblings Jessica and Alexis, who came along much later. Allison and Jennifer were born during their parents' "poor" years, when vacations consisted of short car trips and the parents covered child care by alternating work shifts, high-fiving each other as one came in the door and the other left.

Despite their difficult schedules, certain rituals were absolute in the Lehman household. Family dinner every night, even if it meant a 9 p.m. supper; church every weekend; and chores for every family member. Later, as first the older girls and then the younger two grew big enough to swing a bat, summer softball and traveling leagues joined the list of rituals, with one or both parents attending or coaching. Paul Lehman, in particular, threw himself into coaching and organizing leagues, filling the gaps in programs that were not offered for girls at the time. For the athletically inclined Jennifer, the discipline and practice paid dividends when she and her high school slow-pitch team made it into national tournaments. In the years since high school, she has played on teams with her parents, her siblings, her husband, her law partners, and any number of friends and colleagues.

Choosing a profession, starting a practice

Although she had been working as a camp counselor and summer rec leader, Thompson made a different career choice partway through college when she took an office job at the Ramsey County Bar Association. "That was my first exposure to bar associations," she says. "It was fun and collegial. I knew I would go to law school and I knew I wanted to be part of a bar association." She enrolled in law school at Hamline University, where, like law students everywhere, she learned everything she needed to know, but not necessarily the things she would find herself doing for a living. In her case, that meant self-employment and construction law. Even if the courses had been offered, it's not likely Thompson would have imagined hanging out her own shingle, much less representing contractors, homeowner associations, and others involved in the high-stakes building industry. That decision, like the choice to become a lawyer, came through chance exposure. A family friend told her their firm needed a clerk. Ever practical, she took it because, "He asked if I'd be interested in construction law and since it was a job, I was."

It didn't take long for Thompson to fall in love with the field. As she notes, "It's a practice area that has the whole law about it, but then it has this physical component. You get to see things being built—houses, roads, buildings, ethanol plants, stadiums.

Thompson says her plans for the year will fall along these lines: Build from the strategic planning cycle the MSBA is currently in, with an eye toward membership, the leadership pipeline, and equity as key issues.

I'll drive by projects now and just be amazed thinking about the attention and craftsmanship that I certainly didn't appreciate before."

Thompson stayed with the firm, Hammargren & Meyer, PA, through law school, rising to associate attorney and then partner and shareholder over the course of 12 years. Tim Cook, a former partner with the firm who now practices at Cook Law & ADR, PLLC, recalls Thompson as a good lawyer with a solid compass in matters of justice and fairness, but also a surprising gift for burning him with digs. "Oh, she's a terrible trash talker," he reports. "And she always seems so polite. I remember she would threaten to get me on a basketball court to play one-on-one. I never took the bait, but I know I would have won. The beauty is, we'll never know."

Thompson enjoyed the camaraderie of the small firm, but when that firm disbanded, she started her own practice with Patrick Lee-O'Halloran, another of the partners. It's a decision she still sounds surprised by, six years later.

"We started a business with slightly more than 30 days' notice," she recalls. "It was a huge adventure and a ton of work. At the time, I was just coming back from maternity leave and I felt overwhelmed. Normally this would be something I would plan for a year, but we had to make decisions. We had to have malpractice insurance, computers, space…. We just had to decide it."

Indeed, the practice came together so quickly, Lee-O'Halloran joked that their tagline should be, "Hoping to be here tomorrow." They did make it past "tomorrow" and found after the first month that they could afford a legal assistant/office manager. Within a year Jason Tarasek joined them as the third partner.

Thompson Tarasek Lee-O'Halloran (TTLO) soon grew to five and then seven on staff, and established itself as a solid firm in construction law and litigation. Lee-O'Halloran attributes much of their success to Thompson's positive attitude and her penchant for planning. "Jennifer is very strategic and growth-oriented," he says. "Pretty quickly it was, 'What's our one-year plan, our two-year plan, our 10-year plan?' She likes to be strategic and build the framework. She's also willing to do something different if it fits our business model and makes sense."

That willingness to do something different was tested when Tarasek developed a proposal for a second practice area, under the trade name Minnesota Cannabis Law. For Thompson, who had cut her teeth on the relatively conservative field of construction law, the idea was something of a shock. But when Tarasek brought forward the social justice aspect of the issue, she was sold. TTLO could bring experience in construction law and contracts to cannabis growers, while Tarasek could focus his growing expertise in cannabis law on policy issues to ease the unequal burden on minorities under current law.

Tarasek says he isn't surprised that Thompson was swayed by the social justice aspect of the practice area. "Equity is part of her life. She has an African American son. She volunteers to represent kids in the court system. She's been part of the [Minneapolis] Civil Rights Commission. And we've talked about it at work. It's really a core issue for her." To illustrate his point, Tarasek relates a casual conversation he had with Thompson in which he described wearing a jacket with a Black Lives Matter

patch to a big-box home store. "I was telling her that I know for sure I got subpar service from the fellow serving me because of the BLM patch. And she said, 'Well, at least you get to go home and take off the jacket.' And if you think I don't think about that when I go to that store now… She's right, of course."

Not backing down whatsoever

Despite Thompson's concern for equity issues, she's not quick to accept the label for her own experiences. As a woman in both law and construction, Thompson regularly encounters people who are not quite ready for the new world, so to speak. Tara Smith, now a partner in Maxim Smith Family Law, saw Thompson take this in stride when she worked as an office manager in TTLO's early years. Having worked previously as a manufacturer's representative in the construction industry, Smith was familiar with what she saw her boss encounter. "It was really refreshing," Smith says. "Here is this woman who is working in construction law—in this area which is so hard, so dominated by men—and not backing down whatsoever. Not only that, but she would rattle cages. It made me very proud. Of all the areas of law that she could have landed in, to stick with it, that just says something about her."

Some of the stories are easier to understand than others. Lee-O'Halloran remembers Thompson relating an example of old-school thinking when she was first on track as an MSBA officer. "She showed up to one of the events with her badge that said 'MSBA Secretary' and somebody said, 'Thank God you're here. Can you help me print my slides for the presentation?' he relates with a laugh. "She pretty much shrugged that off."

Her husband, Tony Thompson, on the other hand, received a call one day from an attorney she had angered who "asked me to help get her in line." He had resorted to making the call when he couldn't intimidate Thompson by yelling at her in the hall outside a courtroom after she persuaded a judge to rule in her favor in awarding fees. Tony took a light touch in this case, telling the caller simply, "Good luck with that." As he relates, the attorney and Thompson still encounter each other and "she doesn't seem to let it get in her way."

A construction law attorney himself, Tony had run his own practice for several years before taking his current position as a senior investigator for the Minnesota Department of Labor and Industry. As he observes, "We worked on the same kind of cases, so I can say that I know I always skated because I was a guy. People didn't push me, didn't make me jump through a bunch of hoops. Even though she's a much better lawyer, they would push her more."

If there's an answer for why Thompson would seek justice for others but not herself, it may lie in her experience with sports. "She plays to win but she's very even-keeled," Tony says. "She won't argue with the umpire. She just won't do it. I'm more tempted to argue but she always says, 'You've just got to get past that and kick their butts the next inning.'"

Indeed, it was Jennifer's baseball knowledge and competitive spirit that first attracted Tony Thompson to her. They met in law school, where, as Tony recalls, "We sat in the same row. I always sat off to the side trying to stay out of view of the professor, and she always sat dead center, hand raised high." What might have looked like an unlikely pairing blossomed into true romance when Tony took her to a Twins game. "We got a program and she was filling out the scorecard and I was like, 'How does she know to do that?' But then she said, 'There are two players in scoring position' and I thought, 'Oh, I should probably marry her. She knows about baseball.'"

WHAT JENNIFER THOMPSON HAS LEARNED FROM SPORTS

An athlete since her parents first tossed a wiffle ball at her plastic bat, Jennifer Thompson loves the teamwork and competition inherent in sports. Her favorites have always been softball and basketball, but in the right circumstances she'll play anything from tennis to flag football. She's even been known to hit a golf ball around.

Like everyone who is serious about sports, Thompson has learned certain lessons, including some things that she applies to her professional life. Here's what she says:

Being in team sports has taught me…

how to hear feedback, positive and negative, and translate it into something you can use to improve your performance;

how to rally people behind you, how to motivate people, how to encourage people. And how to accept coaching;

that you have to learn devotion to putting in the work to achieve an end. What making that commitment means. You can't show up and play if you haven't put in that kind of time in practice;

how to win and lose gracefully;

that you can be talented in your own right, but it's not going to be enough to advance the goals of the bigger group. You need the team for that.

As Thompson begins her year at the head of the Minnesota State Bar Association, she'll likely lean on her "gleanings" from a lifetime of teamwork and sports. She might even find herself with a new list to carry into the years ahead: *Being MSBA president has taught me…*

During her days as an attorney referral coordinator at the Ramsey County Bar Association, Thompson (rear, 2nd from left) was also a stalwart of the RCBA softball team.

JUST THE FACTS

BIO BITS ON JENNIFER THOMPSON

FAMILY

Raised in Minnetonka, MN by Peggy and Paul Lehman in a family of four sisters (Jennifer, Allison, Jessica, and Alexis)
Married to Tony Thompson, 17 years
Children: Fox, 6; Charlotte, 8; Sebastian, 9

EDUCATION

Juris Doctorate, Hamline University School of Law, 2003
Bachelor of Arts, cum laude, University of Minnesota, 1999
Hopkins High School, 1996

LEGAL CAREER

Partner/co-founder, Thompson Tarasek Lee-O'Halloran PLLC, Edina, since 2015
Attorney and shareholder, Hammargren & Meyer, PA, Bloomington, 2007-2015
Law clerk and associate attorney, Hammargren & Meyer, PA, Bloomington, 2002-2007

ADDITIONAL PRO BONO & WORK EXPERIENCE

MN Lawyers Mutual Insurance Company, Board of Directors member since 2019
Children's Law Center of Minnesota, volunteer attorney since 2016
Association of Women Contractors (AWC), legal advisor since 2012
Minneapolis Civil Rights Commission, vice-chair, 2012
Minneapolis Civil Rights Commission, attorney commissioner, 2011-12
Ramsey County Bar Association, attorney referral service coordinator, 1999-2002

PROFESSIONAL LEADERSHIP ROLES (SELECTED)

Minnesota State Bar Association, president, 2021-2022; Executive Council member since 2018; member of 14 MSBA committees or sections since 2015, including Investment, Budget, Strategic Planning Oversight, Operations, Bylaws, Technology, more
MSBA Budget Committee chair 2019-2020
MSBA Membership Committee chair 2017-2020
MSBA Awards Committee chair, 2018-19
MSBA Construction Law Section chair, 2015-16
National Association of Women in Construction, membership director 2009-10

MEMBERSHIPS & BAR ADMISSIONS

Minnesota Supreme Court
United States District Court, District of Minnesota
Ramsey County Bar Association
Hennepin County Bar Association
Minnesota Women Lawyers

HONORS

Minnesota Super Lawyers List, 2020-21
Minnesota State Bar Association, President's Award, 2018
Minnesota Rising Stars List, Minnesota Law & Politics Magazine (2007-12) and Mpls. St. Paul Magazine (2014-17)
The Top Women Attorneys in Minnesota list, St. Paul Magazine, 2015, 2017; Twin Cities Business Magazine, 2013
Minnesota Women Lawyers, Leadership Project: A Core Development Program for Women Attorneys, selected participant, 2020-21

CIVIC VOLUNTEERING

Church of the Holy Name of Minneapolis, various roles since 2006 (Finance Council, Parish Council, Religious Education, Fall Festival co-chair)

Jennifer and Tony Thompson at home with (l-r) Charlotte (8), Sebastian (9), and Fox (6).

They married not long after graduating from law school, and adopted their son Sebastian a few years later. Baby Charlotte was born to them a year after Sebastian arrived, and son Fox was born two years after that. Family life has been busy, chaotic, and joyful, with both parents indulging a love of parties and elaborate family get-togethers. Faced with the realities of two busy careers and the costs of day care, they extended their family once again after Fox was born by including an au pair in the household. Now, six years later, they have had five au pairs from three different countries. As Jennifer admits, "I was always the one who resisted, but I have to say that having au pairs has been a top experience for us. I can't even put into words how fantastic it's been to get to know these women."

Ready for MSBA leadership year

Partners ready? Check. Husband and kids ready? Check. Au pair in place? Check. It must be time to assume leadership of the state bar association, and Thompson has laid her plans with care. By virtue of her own priorities, she intends to work hard, but not to lose the balance she has so carefully nurtured between her professional and personal lives. If something has to go this year, it may be one or two of the extended family events (you'll have to ask her sister about that mansion in Arizona last year), but she won't sacrifice family dinners or the quality of the work she does. Thompson says her plans for the year will fall along these lines: Build from the strategic planning cycle the MSBA is currently in, with an eye toward membership, the leadership pipeline, and equity as key issues.

In some ways, membership is the topic that informs the others, Thompson says: "We have to think about what our members really want and how we're providing that to them." One part of that goal will be to mind the intersection between equity and the leadership pipeline. "People want to be members of an organization where they can envision being part of the leadership, or where they can support the leadership. In terms of diversity, I don't think we're being reflective of the legal industry when we don't show people who are more diverse in the leadership roles. The MSBA is called upon to be a voice for a lot of different people and we have a lot of work to do there."

Additional topics Thompson wants to explore this year include access to justice, recovery from the pandemic, and, one that may surprise some people, a look at whether the bar exam is still serving its purpose. "Whether that's an appropriate tool for entrance into the profession is an issue that is bubbling up around the country," Thompson says. "Does it protect the public, or does it keep people out? I don't know exactly where it's going to go but it's something that will be looked at."

One thing is certain: When this year is finished there will be more stories, and more softball games will have been played. And no matter who is on second when the next hit comes, the goal-oriented Thompson will most definitely wave them home. ▲

5 ADDITIONAL FACTS ABOUT JENNIFER THOMPSON

1) Friends say she is an addict of Alchemy 365 fitness classes and once held her birthday party at a gym, with workouts preceding the champagne and cheese.

2) She has a reputation as a "trash talker" and might challenge you to go one-on-one on the basketball court to settle a mild dispute.

3) As a teenager, she took her mother's advice and earned the Red Cross babysitter certification.

4) She loves kids and finds it energizing to spend time engaging them in outdoor activities.

5) Her first jobs were as a camp counselor and a parks and rec leader.

Family law: The covid chronicles

In my practice area, the pandemic has had multiple stages. Let's hope we're almost done with them all.

By Traci Capistrant

Family law practitioners—attorneys, mental health professionals and financial folks included—are natural-born fixers. You know the type: the friend who interrupts with multiple ways to "fix the problem" when all you wanted to do was vent. Working in family law is probably its own kind of torture for these folks, because there really are no "fixing the problem" solutions. If one household is now going to live as two, there is going to be frustration, sadness, and financial strain or adjustment all around. Throw in a pandemic and the very definition of "fixing the problem" is turned on its head.

The impact of covid-19 struck us in so many different ways. Businesses were shut down, jobs lost, homes put in jeopardy. Yet some industries and areas of law remained fully engaged and busy. Often the businesses and legal practice areas that thrived were those focused on helping people cope with the strange new world we found ourselves in. The impact on families in transition—either through divorce, separation, or custody and parenting time cases—was not suspended when the world was put on hold. In fact the opposite was true: Family law and its practitioners needed to step up to address rapidly changing issues affecting all families. When the court system shut down for a period of time, this became even more challenging.

First wave: "I lost my job; how do I pay my support obligations?"

In the initial shock over the economic shutdown in March 2020, there was reverberating silence. What did this mean for families who live in two households, often already not on the best of terms? Family law attorneys first heard from their clients when they called in a panic about their inability to meet their spousal maintenance, child support, child care support, or medical support obligations in the face of their lost or reduced employment. A modification of support requires a substantial change in either parties' financial circumstances.[1] A lost job (or reduced hours) typically reflects a substantial change that likely renders appropriate a modification in support obligations. The complexity arose as courts closed their doors and scrambled to figure out how to address existing cases as well as a significant increase in such modification motions.

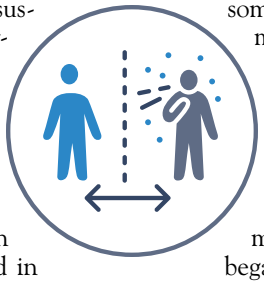
Thankfully, a surprisingly high number of these cases were resolved by agreement. No one was exempt from anxiety about the impact on their jobs and incomes, so there was newfound acceptance and willingness to negotiate to resolve many of these issues. Parties either reached agreement to temporarily reduce or suspend support obligations or participated in mediation to reach those agreements. In other cases, where no agreement could be reached, the best that an obligor could do was to file a motion to preserve the retroactivity of any subsequent motion to modify that might be granted in the future.[2] In those instances, the obligor took the risk of reducing his obligation until he could be heard by the court on the motion to modify. Counsel for parties were advising their clients that the modification would likely be granted, but if that didn't sway them, the future hearing would address it and determine whether an overpayment or underpayment had been made.

The receipt of government stimulus checks raised another financial point of contention. Separated parents often argued over who should be awarded the funds. Again, in most cases this had to be resolved by agreement, given the limited access to courts. But as courts began to weigh in on the issue, the typical response was to share the check equally if there was an equal parenting time schedule and financial contribution, or on a *pro rata* basis if one parent's contact and financial contribution were significantly less.

Second upset: "My co-parent isn't following covid prevention guidelines; what do I do?"

The first positive covid test in Minnesota was confirmed on March 6, 2020. By March 13, Gov. Walz had declared a peacetime state of emergency.[3] Two days later, he announced the temporary closure of all Minnesota K-12 public schools commencing March 18.[4] By March 16, all non-essential businesses were closed[5] and by March 25 Minnesotans were ordered to "shelter in place."[6] Thus began the shutdown of the world as we knew it. What many hoped would last a few weeks, or a few months at the outside, morphed into a long-term change in the way we live our lives.

People's reactions to the pandemic varied widely. Some individuals immediately wrapped up as tight as mummies, went nowhere, and saw no one. Others continued to shop, eat out, and in some cases, flout the face mask mandate that was ultimately imposed by Gov. Walz in July.[7] As the pandemic raged on, many parents began to challenge each other's actions and parenting abilities in light of the many restrictions. Clients began asking how to handle matters if the other parent wasn't complying with the governor's emergency orders or the CDC guidelines. And of course, many families included parents who were essential workers on the front lines, which added another layer for consideration.



With access to courts limited, resolving these situations required negotiations between parties or counsel, or through mediation. Parents working in front-line jobs often understood the risk that they brought to the child, and by extension, to the other parent and their family. They were frequently willing to self-limit contact until they were less at risk. In other cases, the tug of war proved very hard to handle, with no clear guidance from the courts and no hearings available to address the conflicts. Family law practitioners had to think on their feet and do their best to convince their client to do the right thing under the circumstances. Giving advice was complicated by the fact that frequently there were no existing laws to address what was happening with families. Access to justice was

delayed, forcing decisions that were not always popular with both parents—or stalemates not easily broken.

In one case, Mom was strictly following guidelines and sheltering in place. Dad wasn't accepting the "science" and frequently took the child out on errands with him, including in one instance a visit to a gun shop. The best that could be done was sending a letter asking Dad not to take the child out of the home, though it was understood that it might fall on deaf ears. In another instance, Mom worked out of state and worked in an industry where exposure to covid was a real concern. With travel essentially shut down, either here or in the state she was traveling from, her regular parenting time on weekends couldn't carry on. Given the breakdown of relationship between the parents, contact between Mom and the child was cut off for several months. It was an untenable situation for Mom, but Dad's efforts to use her absence and failed parenting time against her are unlikely to be successful when the matter finally gets to court.

Last year my colleagues and I often discussed what we would say to the court by way of explanation for any decisions made during this period of the unknown. One suggested a tongue-in-cheek response: "I'm sorry, your Honor, this was my first pandemic. It was my client's first pandemic, too. We did what we thought was best until we could get the court's input."[8] It was purely a situation of "don't ask for permission, ask for forgiveness."

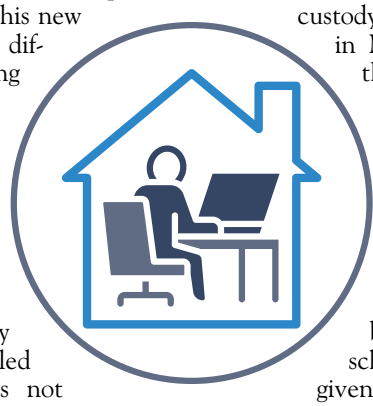
One caveat to the "shelter in place" order from the Walz administration helped in those cases where parents were too frightened to leave the home or feared the other parent's laxity on the rules. Specifically, the order included several exceptions, including the following:

> **Care of others.** Individuals may care for a family member, friend, or pet in another household, and may transport family members, friends, or pets as allowed by this Executive Order, *including the transport of children pursuant to existing parenting time schedules or other visitation schedules pertaining to a child in need of protective services ("CHIPS") proceeding.*[9] (Emphasis added.)

Given that transporting children for parenting time was consider an acceptable reason to leave one's shelter, family law practitioners had a basis for telling clients that parenting time was expected to move forward as the court had ordered.

Take three: New times call for new skills, even (or especially) for the children.

There are many new words and phrases in our lexicon as a result of the pandemic. How many of us thought the phrase "you're muted" would become a fixture of daily interactions? Suddenly we were talking with complete comfort and regularity about "contact tracing," "PPE," "flattening the curve," "social distancing," "distance learning," and "Zoom." For many of us, online meetings were a foreign concept prior to March 2020. As we sit here today more than a year later, most of us have become experts of sorts. But all of this new technology created difficulties and learning curves.



Many clients do not have access to the technology needed to run such programs, especially if they are low-income. There were many first attempts that led to views one does not want to recall, including the insides of clients' nostrils and ears, attorneys appearing as cats, or parties showing up for court in their "comfy" clothes (or driving cars, or performing surgery). Thankfully, technology adapted quickly, as did most families and their children. Courts made clearer their expectations for court appearances. Clients could generally appear even on their phones, eliminating the need for a computer and high-speed internet. In some instances, computer use was made available to those without access to technology.

But that didn't solve all the issues associated with another pandemic novelty, distance learning. When schools were shut down on March 15, 2020,[10] families scrambled to react, as did teachers and administrators. It touched off all manner of disputes in the family law arena. Issues arose based on which parent could be home, the parents' respective approaches to learning, and the technology available in both homes. Given the mad dash to distance learning in the spring of 2020, however, the troubles with school-related issues generally didn't crop up between families just yet. There was too much to figure out and not enough time to determine who was doing it right or better.

That changed as we approached the fall of 2020. The governor's theoretically temporary order on schools ultimately got extended for the remainder of the 2019-2020 school year. When it was clear that school would not resume in the fall, at least in the public schools,[11] the newest pandemic issue arose. Parents differed over distance learning versus in-person learning versus a hybrid of the two. Many private schools remained in-person throughout the pandemic, creating in many families a push to change schools. By the end of the summer, courts were generally back up and running via Zoom or similar conferencing tools, giving families who could not resolve the issue on their own another avenue to pursue.

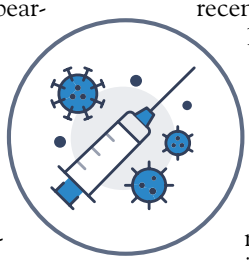
School choice is a legal custody decision.[12] When parents share joint legal custody, a rebuttable presumption in Minnesota,[13] they must make that decision together. But a district court can resolve the issue of school choice, consistent with the child's best interests, when joint legal custodians disagree.[14] While outcomes differed, one district court judge commented, "How will these children be able to transition to new schools and make new friends given that the children will all be isolated at home for on-line learning? Currently, they have friends in [their current] schools who they know—this is [a] great benefit to the children that they will not have in the [new school]."

Statistics have shown that some children thrive with distance learning, but most have suffered greatly. "Kids are not used to learning in isolation. In classrooms today, teachers have students learning in groups, discussing lessons, and asking peers for help."[15] Those moments of working alongside a friend or asking a teacher for guidance allow students to feel connected to others, and this sense of belonging influences students' engagement in class.[16] Parents living in separate homes often have different views on how their child is coping. If the perception is that the child is floundering in this new environment, the push for a change is immense.

As with all aspects of the pandemic, we do not yet know the long-term academic or mental impact on children. Most conflicts over school choice during this time have been well-intentioned, but there is no clear direction on what the right answer is. Many of these decisions have been resolved through mediation or the parties' parenting consultant, with court as the last-ditch stop. In each case, the parents ultimately need to try to make the best choice for their children. In a time of such significant upheaval in

all other aspects of their lives, a change in school may be more than the average child can manage.

Likewise, the choice of distance versus in-person learning has to focus on the child's needs and adaptation to change. Parents are forced to overcome their differences to decide what is best for their children. Nor is this entirely a moot question as the pandemic recedes. From where we sit today, it's impossible to say whether we may see future waves of covid-19 infection driven by the mutated variants of the virus that have been appearing around the world.



Fourth quarter outcomes

As families have struggled with the many issues facing them and their children during this pandemic, the need for therapeutic intervention has increased. As the need has increased, the availability of providers has decreased, a simple fact of supply and demand. Additionally, it is often very difficult to begin therapy with a child via video conference. Rapport between the therapist and the child needs to be developed before most children will open up. Doing that via teleconference during the pandemic proved even more difficult, while play therapy with younger children became impossible. Likewise, family therapy with multiple players also became more difficult and less readily available. As a result, ongoing mental health challenges and family discord have gone unaddressed.

Communities of color have an even more difficult time accessing these needed resources. "Communities of color typically have reduced access to mental health providers, but these kids need support more than ever right now," according to Celeste Malone, an associate professor in the school psychology program at Howard University in Washington, D.C. "They are more likely to have parents who are essential workers and experiences of grief and loss because of covid, plus they are seeing persistent police brutality and unrest."[17]

All of these concerns led to a significant push to returns to schools in-person, but that change took time. Even the St. Paul and Minneapolis public schools didn't reopen until 2021. We all share concern over the long-term impact on this generation of children as they have had to navigate so much with few services available to them. The potential for hidden domestic violence has also weighed heavy, especially for those with limited resources and unstable housing.

At this stage of the pandemic, many family disputes revolve around covid vaccinations. Parents can be at odds over whether to receive the vaccine themselves; it is unlikely that any court would order a parent to be vaccinated against their will. If there is a demonstrable danger as a result, a modification of parenting time could ensue if the matter is brought before a court.

The issue of vaccinating children—at least older children—is currently a fresh source of disputes. The Pfizer vaccine was recently approved for children ages 12-15, and many expect covid vaccines to be made available to younger children as early as this fall. Like school choice, medical decisions are a legal custody issue.[18] If parties cannot agree, the matter can be submitted to mediation, an appointed parenting consultant, or ultimately the court. Generally speaking, the court will likely follow the recommendations of the medical profession and other health organizations such as the Minnesota Department of Health or the Centers for Disease Control and Prevention (CDC), but this is uncertain territory. The only thing the Minnesota Court of Appeals has made clear on the issue of vaccinations is that the courts must base their review upon the best interest factors.[19]

Conclusion

The covid-19 pandemic has been a roller coaster of change in countless ways. Our language has changed, along with our eating habits, our connections with others, and our overall comfort in the world. Family law cases are often fraught with distrust and dislike in the first place; when we were unable even to see our neighbors' and friends' entire faces behind masks or to get closer than six feet apart, the circumstances lent themselves even more readily to a disconnect with others. This lack of face-to-face contact with attorneys, mediators, therapists, and the judiciary has probably also helped suppress the normal pressure and desire to resolve matters amicably. The challenges to family law clients have been immense, oftentimes with no easy or fast answers.

The pandemic journey is not over, though it appears we will have, at minimum, a comparatively trouble-free summer. Moving forward with families in separate households, or those currently in transition to new situations, will require patience from everyone. It will require open-minded thinking and unique solutions to fit each family. ▲

TRACI CAPISTRANT is an attorney and mediator at Capistrant Van Loh, P.A. and focuses her practice on family law. After 30+ years in practice, easing the process of difficult family transitions is her goal and intention. She also works as a parenting consultant, parenting time expeditor, and an early neutral evaluator.

TRACI@CAPVANLOH.COM

Notes

[1] Minn. Stat. 518A.39, subd. 2.
[2] Minn. Stat. 518.39, subd. 2(f) (2018).
[3] Executive Order 20-01, 3/13/2020 Governor's Office.
[4] Executive Order 20-02, 3/15/2020 Governor's Office.
[5] Executive Order 20-04, 3.16.2020 Governor's Office.
[6] Executive Order 20-20, 3/25/2020 Governor's Office.
[7] Executive Order 20-82, 7/22/2020 Governor's Office.
[8] Credit for this brilliant statement goes to Jenna C. Westby, LEGAL*nudge*.
[9] Supra note 6.
[10] Supra note 4.
[11] Executive Order 20-82, 7/30/2020 Governor's Office (Authorizing and Directing the Commissioner of Education to Require School Districts and Charter Schools to Provide a Safe and Effective Learning Environment for Minnesota's Students during the 2020-21 School Year).
[12] Minn. Stat. 518.003, Subd. 3(a) and (b) (2008).
[13] Minn. Stat. 518.17, Subd. 1(b)(9)(2015).
[14] See Novak v. Novak, 446 N.W.2d 422, 424 (Minn. Ct. App.1989).
[15] "Zoom school's mental health toll on kids: Academic and social development are likely to slip during online learning for many students." *APA News*, by Heather Stringer, 10/13/2020. *https://www.apa.org/news/apa/2020/10/online-learning-mental-health*
[16] *Id.*
[17] *Id.*
[18] Minn. Stat. 518.003, Subd. 3(a) and (b) (2008).
[19] *Nieber v. Rebekah Kali Nieber*, Court of Appeals of Minnesota, 4/19/2021, Filed A20-0616.

WE LIVE NOT ALONE

A legacy of environmental racism

By Jessica Intermill

Photo: April 21, 2021 fire at the North Minneapolis Northern Metals plant. Photo courtesy Robert Hilstrom

As Enbridge races to complete its new Line 3 tar sands pipeline across Minnesota, 17-year-old Jaiden Ellington-Vasser grabs a quick bite. School is out for the day, and she has 45 minutes before her clerk shift starts at the grocery store.[1]

Ellington-Vasser knows firsthand that the Public Utilities Commission's decision to approve construction of the new Line 3 pipeline affects far more Minnesotans than the northern landowners and tribes in Enbridge's immediate path. She lives in Webber-Camden, a Minneapolis neighborhood that reflects the city's race-structured past. Every day, Ellington-Vasser lives the unequal *de facto* effects of historical racism that *de jure* decisions continue to project into our future. In late May, she joined seven other youth climate activists to seek leave to file an amicus brief in federal litigation against Line 3.[2] They argued that the U.S. Army Corps of Engineers improperly failed to consider the impact of the Line 3 expansion on urban Minnesotans of color.

Editor's note: *This is the second installment of a two-part article exploring structural bias and racism within the law in the context of the Line 3 oil pipeline expansion. Part 1, published last month and available online at* www.mnbar.org/bench-bar*, examines the agency approval process and the role of the public in that process. Part 2 explores the racialized impact of that facially neutral approval in the context of Minnesota's legal history.*

Invisible lines

Construction of the new Line 3 began in December 2020 to "replace" an aging pipeline of the same name. But the new line will be both wider and longer than the original line and, if operated at capacity, will more than triple the current Line 3's annual greenhouse gas output to 273.5 million tons.[3]

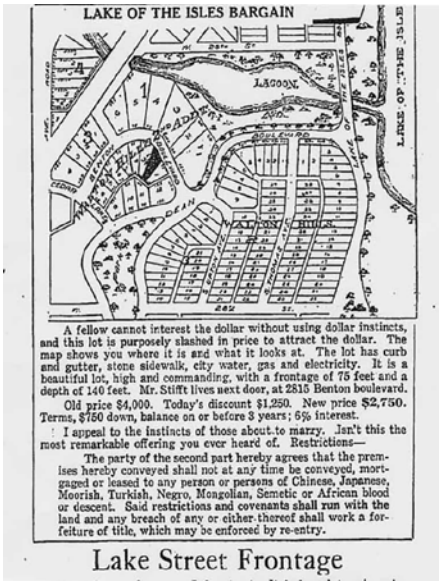
Minnesotans will not bear this greenhouse-gas dump—or the climate change it accelerates—equally. Cities generally warm faster than rural landscapes.[4] And an increasing body of research confirms that *within* cities, "neighborhoods located in formerly redlined areas—that remain predominantly lower income and communities of color—are at present hotter than their non-redlined counterparts."[5]

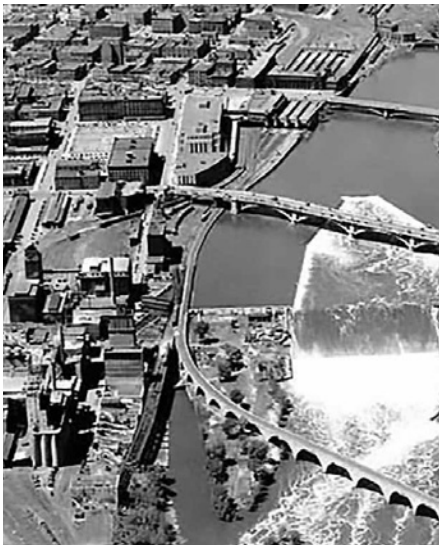
Segregation now

The racialized climate story of Minneapolis began in 1910. When Henry and Leonora Scott sold their property to Nels Anderson, they added a stipulation to the deed that the "premises shall not at any time be conveyed, mortgaged or leased to any person or persons of Chinese, Japanese, Moorish, Turkish, Negro, Mongolian or African blood or descent."[6] The Minneapolis Journal editorial board called for "coordinated action to make neighborhoods all white[,]" and White sellers complied.[7] Racial covenants "changed the landscape of the city" by laying "the groundwork for our contemporary patterns of residential segregation."[8]

The White Minneapolitans' intentions were not novel. As one historian noted, "Since the seventeenth century, Americans had proceeded in law and custom as though the blacks were essentially different."[9] A decade after Thomas Jefferson wrote that "all men are created equal," he noted his suspicion that

> the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind. It is not against experience to suppose, that the different species of the same genus, or varieties of the same species, may possess different qualifications.[10]





Photos courtesy Minnesota Historical Society:
1) Advertisement place by Edmund G. Walton in the Minneapolis Morning Tribune, 1919.
2) Aerial view of St. Anthony Falls looking northwest toward north Minneapolis, 1938.
3) Aerial view of southwest Minneapolis looking south from Lake of the Isles to Lake Harriet, 1940.

Responding to Jefferson, abolitionist St. George Tucker said, "If it is true, as Mr. Jefferson seems to suppose, that the Africans are really an inferior race of mankind, will not sound policy advise their exclusion from a society in which they have not yet been admitted to participate in civil rights...?" Yet, even as he argued for emancipation, the abolitionist wrote that "I wish not to encourage their future residence among us."[11]

The White Minneapolitans' *methods*, though, were new. And they were effective. "As racially restrictive deeds spread, they pushed African Americans into a few small areas of the city. And even as the number of Black residents continued to climb, ever-larger swaths of the city became entirely White."[12]

Through the early and mid-20th century, new methods entrenched the segregation that the covenants began.[13] Race-rioting White property owners, New Deal-era legislation, and "redlined" federal lending laws pushed people of color—and especially Black Minneapolitans—to the areas we now know as Near North (including Ellington-Vasser's Webber-Camden neighborhood), Cedar-Riverside (now a center of the metro's East African population), and Hiawatha (the neighborhood where Minneapolis police killed George Floyd Jr.).[14]

The inequality of this segregation is visible in today's landscape. Southwest Minneapolis neighborhoods enjoy tree-lined parkways in a chain-of-lakes landscape. But Minneapolis zoned the "Black" parts of town for industry and density, and then ran a highway right through the north side.

Even the Mississippi River is different in different zip codes. Southeast of St. Anthony Falls, the river's banks are lined with parkland and the Mississippi National River Recreation Area. Upstream, a Minneapolis-authored report called the riverfront north and west of the falls "the backside of the city."[15]

Over time, segregation's unconstitutionality was no match for its persistence. A University of Minnesota law professor identified government policies and programs that "resegregated" the Twin Cities legally.[16] Although facially neutral, programs that clustered new affordable and subsidized housing in historically "Black" areas (coupled with continuing wealth and income inequalities) served to keep historically marginalized Black, brown,

and indigenous populations out of most suburbs and out of "White" parts of the Twin Cities.[17]

Similarly, facially neutral school-choice and open-enrollment policies facilitated White families' "move from racially integrated schools (or schools in racial transition) to much less racially diverse schools[.]"[18] Today's census maps of the neighborhoods with the highest percentage of non-White residents trace the same lines that the racially restrictive covenants once drew.

Segregation tomorrow

In the first week of June, the Twin Cities had "already tied the record for most 90-degree days at this point in June" and were headed to record the hottest first 10 days of June since recordkeeping began in 1871.[19] Those temperatures came barely a month after the Twin Cities had "smash[ed]" an April high-temperature record.[20]

As extreme heat events like this become commonplace, the continuing impact of Minneapolis's segregated legacy is more than aesthetic. Areas like north Minneapolis that are most urban and industrialized have become "heat islands" that "absorb and re-emit the sun's heat more than natural landscapes" like the south metro's lakes and parks.[21]

The effect is stark. 2016 data from the Metropolitan Council shows that the land surface temperature in heat islands can be more than 10 degrees hotter than other parts of Minneapolis and St. Paul (which are themselves up to 10 degrees hotter than many first-ring suburbs).[22]

This extreme heat is deadly. Minnesota recorded 54 heat-related deaths from 2000 to 2016, and the state Department of Health has noted that the progression of climate change will make this problem worse.[23]

The warming atmosphere also traps air pollution. In 2013 alone, according to a 2019 joint report from the Minnesota Department of Health (MDH) and the Minnesota Pollution Control Agency (MPCA), the health effects of air pollution occasioned 500 hospital stays and 800 emergency room visits, and contributed to the premature deaths of 2,000-4,000 Minnesotans.[24] These health effects, too, are not uniform. Nationally, "Black people are nearly four times [more] likely to die from exposure to pollution than White people."[25] In Minnesota, the ecological effects of heat islands layered on top of historical segregation patterns mean that air pollution trapped by global warming is "inequitably distributed among racial and ethnic groups in the state[,]" and "[p]eople of color experience an undeniable 'pollution disadvantage.'"[26]

Jaiden Ellington-Vasser already lives this pollution disadvantage. She points to the Hennepin Energy Recovery Center located just south of her neighborhood. That plant incinerates waste to generate electricity. Hennepin County pledges that "[a]ir emissions are cleaned and treated so that emissions are consistently below the Minnesota Pollution Control Agency permitted levels."[27] But low is more than none, and the county does not operate garbage burners in southwest Minneapolis.

The Northern Metal Recycling plant is even closer to Ellington-Vasser's home. Community members complained for years about pollution from its metal shredding operation on the north Minneapolis Mississippi riverfront. A consent decree closed the metal shredder in 2019, after a whistleblower revealed that the company altered pollution records.[28] But other operations at the junkyard continued, and after a week-long fire at an exurban facility hampered company operations, a judge allowed Northern Metal to accept scrap in north Minneapolis again.[29] In April 2021, scrap metal and rubbish at the north Minneapolis site spontaneously combusted, blanketing the area with black smoke and chemical odors.[30]

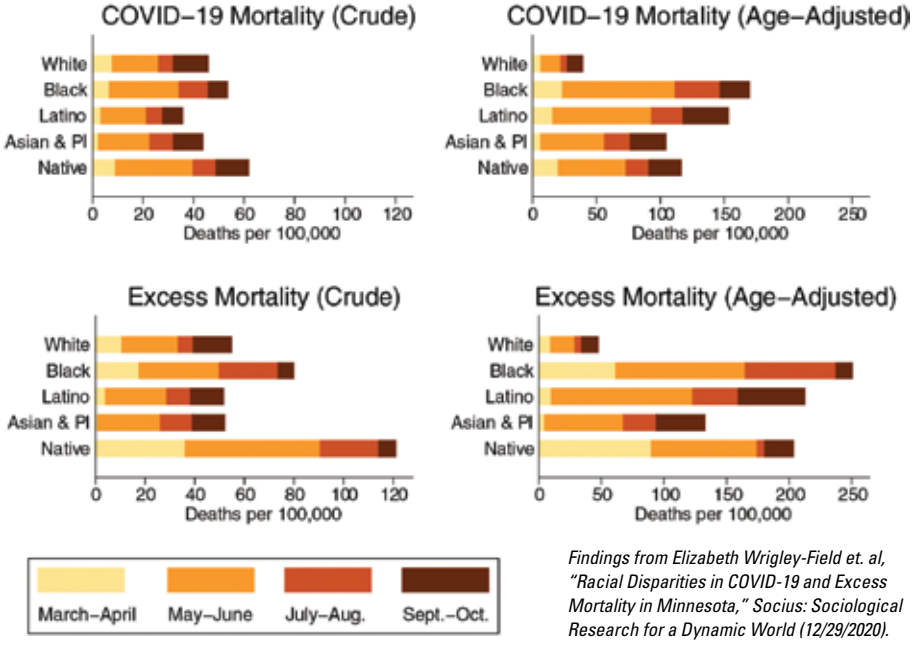
A new Line 3 supercharges these health inequalities with an additional 193 million tons of greenhouse gases.[31]

Segregation forever?

In 2020, it got worse. The covid-19 pandemic exacerbated the deadly effect of the pollution disparity. Ellington-Vasser hasn't been infected with covid-19. "My mom is very protective," she said. But others in her family have. And "one of my close friends, her mom passed away from covid last year. It's really hard for her right now."

Her story is one of the thousands of Minnesotans who died from covid-19. In context, it is a story that happens much more frequently in historically segregated communities. Long-term exposure to particulate pollution increases a person's risk of covid-19 death by a factor of 20. Even a slight increase in air pollution was "associated with a 15 [percent] increase in the Covid-19 death rate[.]"[32]

"North Minneapolis has the worst air in Minnesota," said Ellington-Vasser. "We have a trash burning facility right here. And since we have the worst air in Minnesota, a lot of my friends and family have asthma. And then think about covid. It attacks the lungs. So you have greenhouse gases that are already bad for the air. You add something on top of it: trash



Findings from Elizabeth Wrigley-Field et. al, "Racial Disparities in COVID-19 and Excess Mortality in Minnesota," Socius: Sociological Research for a Dynamic World (12/29/2020).

Today's census maps of the neighborhoods with the highest percentage of non-White residents trace the same lines that racially restrictive covenants once drew.

burning puts toxins in the air. And you keep adding on. It's thing after thing after thing, and they're all connected. They're all connected. And if one thing tips, then what are we going to have?"

For Ellington-Vasser, approval of Line 3 was one more thing. In addition to exacerbating pollution over her home, Line 3 tunnels through the Mississippi River—the drinking water source for Ellington-Vasser's family and the rest of Minneapolis—at multiple points. "It's scary," she says. "To be honest with you, it's very scary."

Her fear finds support in the administrative record of Line 3's approval. The spill analysis for the Environmental Impact Statement that underlies permitting for a new Line 3 specifically *expects* leaks. It concluded that a spill of less than .1 barrel—almost a half gallon—of tar sands crude "might be expected once every four months; a spill of less than 10 bbl [42 gallons], once every 16 months; and a spill of less than 100 bbl [420 gallons], once every 7.5 years." Larger spills can "be expected once in 26 to 99 years somewhere in the state of Minnesota."[33]

In light of this undisputed science, life without Line 3 would be "one less challenge" for Ellington-Vasser. She continued, "For me as an African-American young woman, I have a lot of struggles. With everything going on with George Floyd, there's a lot going on with civil rights and safety, and I don't want to be worried about my health. I'm already worried about all these other things, and I don't want to have to worry about what happens if I turn on the sink water."

On June 1, the same day that Enbridge restarted construction after a planned spring recess, Attorney General Keith Ellison joined Ellington-Vasser and other Youth N' Power leaders on the steps of the Capitol. The group presented Ellison with a copy of their proposed amicus brief. Assistant attorneys general are arguing both sides of a state-court case that pits the Minnesota Department of Commerce against the Public Utilities Commission in Commerce's appeal of the PUC's approval of the Line 3 expansion. When Ellison asked the group what motivated them to get involved in the climate-justice fight, Ellington-Vasser described her own experience learning about the intersection of climate change and environmental discrimination. "Once my eyes were opened," she asked, "how could I close them?"[34]

The stratified reality of Minneapolis is this: Decision-makers pushed Black and brown residents to specific neighborhoods, covered those neighborhoods in concrete and asphalt that created heat islands, zoned the neighborhoods for industry alongside homes and schools, and then approved a pipeline that will accelerate the climate change that traps pollution over these citizens. The discriminatory choices of 20th century Minneapolitans raised the past year's pandemic death toll in historically segregated neighborhoods like Webber-Camden. And although the decision to allow Line 3 was facially race-neutral, laying its environmental effects atop already-created inequalities means that the detrimental health effects of Line 3's air and water pollution will have profound impacts on the Black, brown, and indigenous communities that White Minnesotans isolated alongside industry.

We live not alone

Just two decades after Minnesota's admission to the Union, the Rev. Edward D. Neill and Charles S. Bryant put pen to paper. In 1849, at age 29, Neill had delivered the invocation to the first sitting of Minnesota's territorial legislature; by 1864 he was President Lincoln's private secretary. He wrote mission statements for St. Paul's first public schools, founded Macalester College, and, as a hobby, looted indigenous graves.[35] Bryant was a lawyer who prosecuted settlers' property claims in the wake of the U.S.-Dakota War, which he called "an epoch in the history of savage races."[36] Together, in 1882, Neill and Bryant wrote:

> We live not alone in the present, but also in the past and future. We can never look out thoughtfully at our own immediate surroundings but a course of reasoning will start up, leading us to inquire into the causes that produced the development around us, and at the same time we are led to conjecture the results to follow causes now in operation. We are thus linked indissolubly with the past and the future.
>
> If, then, the past is not simply a stepping-stone to the future, but a part of our very selves, we cannot afford to ignore, or separate it from ourselves as a member might be lopped off from our bodies; for though the body thus maimed, might perform many and perhaps most of its functions, still it could never again be called complete.[37]

Today, 139 years later, our laws dovetail with Neill and Bryant's "causes [then] in operation" to create the "results" that they and other Minnesotans conjectured. Today's Minnesota bar did not invite our state's history of racism and white supremacy, but neither can we ignore it. Facially neutral laws and policies—like the approval of Line 3—cannot be "called complete" if they do not reckon with the past and future to which we are indissolubly linked. ▲

***JESSICA INTERMILL** helps governmental clients build inclusive processes and advises tribes and their partners on federal Indian law matters and treaty rights, and represents Youth N' Power in their amicus participation in federal litigation against the Line 3 expansion. She practices on Dakota land taken by the 1851 Treaty of Mendota.*

JESSICA@INTERMILLLAW.COM

Notes

[1] All quotations from Jaiden Ellington-Vasser are from a 3/23/2021 interview with the author unless otherwise noted.

[2] After the first article in this series went to publication, the author represented these amici, a cohort of the Minnesota Interfaith Power and Light's Youth N' Power program, *pro bono* in federal litigation against the Line 3 expansion. The federal litigation is consolidated under case *Red Lake Band of Chippewa Indians v. United States Army Corps of Engineers*, Civ. 1:20-cv-0317 (D.D.C.), and summary judgment briefing is pending. The author has no role in litigation against the Line 3 expansion that is also currently pending in Minnesota state court.

[3] *See generally,* Jessica Intermill, "When the Public Interest Isn't: Minnesota's approval of a new Line 3," Bench & Bar of Minnesota, May/June 2021 at 22.

[4] A. Borunda, Racist housing policies have created some oppressively hot neighborhoods, National Geographic (9/2/2020), available at *https://www.nationalgeographic.com/science/article/racist-housing-policies-created-some-oppressively-hot-neighborhoods* (last visited 6/8/21).

[5] J. Hoffman, V. Shandas, N. Pendleton, The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas, Climate, Vol. 8, Jan. 2020, at 11, available at *https://www.mdpi.com/2225-1154/8/1/12/htm* (last visited 6/8/2021).

[6] Kirsten Delegard, Racial Housing Covenants in the Twin Cities, MNopeia, available at *https://www.mnopedia.org/thing/racial-housing-covenants-twin-cities* (last visited 6/8/2021).

[7] *Id.*

[8] Mapping Prejudice: What are Covenants, University of Minnesota, available at *https://mappingprejudice.umn.edu/what-are-covenants/index.html* (last visited 6/8/2021).

[9] Reginald Horsman, *Race and Manifest Destiny*, Harvard University Press (1981) at 102.

[10] *Id.* at 101 (quoting Thomas Jefferson, *Notes on the State of Virginia* (1787; reprint ed., Chapel Hill: University of North Carolina Press, 1955)).

[11] *Id.* at 102 (quoting St. George Tucker, *A Dissertation on Slavery With a Proposal for the Gradual Abolition of it in the State of Virginia* (1796; reprint of 1861 ed., Westport, Conn.: Negro Universities Press, 1970)).

[12] Mapping Prejudice: What are Covenants, University of Minnesota, available at *https://mappingprejudice.umn.edu/what-are-covenants/index.html* (last visited 6/8/2021).

[13] For a history of laws that entrenched segregation, *see* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017).

[14] Mapping Prejudice: What are Covenants, University of Minnesota, available at *https://mappingprejudice.umn.edu* (last visited 6/8/2021) (displaying time-lapse map of Minneapolis restrictive covenant usage); Mapping Inequality, University of Richmond, available at *https://dsl.richmond.edu/panorama/redlining/#loc=11/44.972/-93.43* (last visited 6/8/21) (showing Minneapolis redlining); Kirsten Delegard, Racial Housing Covenants in the Twin Cities, MNopeia, available at *https://www.mnopedia.org/thing/racial-housing-covenants-twin-cities* (last visited 6/6/2021) (summarizing the Twin Cities' history of racial covenants); Tom Weber, *Minneapolis: An Urban Biography*, Minnesota Historical Society Press (2020) at 81-82 (describing a 1909 riot and the *Minneapolis Tribune*'s commendation that "the residents of Linden Hills have averted the establishment of a 'dark town' in their midst.") and 93 (describing Black migration from 1910-1940).

[15] Tom Weber, *Minneapolis: An Urban Biography*, Minnesota Historical Society Press (2020) at 159.

[16] Myron Orfield, and Will Stancil, Why Are the Twin Cities So Segregated? 43 Mitchell Hamline L. Rev. 1 (2017).

[17] *Id.* at § III(A)

[18] *Id.* at 35.

[19] Joe Nelson, How close will the Twin Cities come to the record for consecutive 90-degree days?, Bring Me the News (June 7, 2021), available at *https://bringmethenews.com/minnesota-weather/how-close-will-the-twin-cities-come-to-the-record-for-consecutive-90-degree-day* (last visited 6/8/2021).

[20] Paul Huttner, 83 degrees: Twin Cities smashes high temperature record Monday, MPR News (Apr. 5, 2021), available at *https://www.mprnews.org/story/2021/04/05/82-degrees-twin-cities-smashes-high-temperature-record-Monday* (last visited 6/8/2021).

[21] *See* Heat Island Effect, U.S. EPA, available at *https://www.epa.gov/heatislands* (last visited 6/8/21).

[22] Metropolitan Council, Extreme Heat Map Tool, available at *https://metrocouncil.maps.arcgis.com/apps/webappviewer/index.html?id=fd0956de60c547ea9dea736f35b3b57e* (last visited 6/8/2021).

[23] *Extreme Heat Events*, Minnesota Department of Health, available at *https://www.health.state.mn.us/communities/environment/climate/docs/extremeheatsummary.pdf* (last visited 6/8/2021).

[24] Life and Breath, MN Department of Health & MN Pollution Control Agency, available at *https://www.pca.state.mn.us/sites/default/files/aq1-64.pdf* at 1 (last visited 6/8/2021).

[25] Darryl Fears and Brady Dennis, "This is Environmental Racism," The Washington Post, Apr. 6, 2021, available at *https://www.washingtonpost.com/climate-environment/interactive/2021/environmental-justice-race/?utm_campaign=eng-rem-evg&utm_medium=acq-nat&utm_source=facebook&utm_content=climate-environmentalracism&fbclid=IwAR2cqReCXVIgDasbMq0iS3Fneh_mQ6OUDpijij_weSGX7vsDcc73QQAT-Fc* (last visited 4/27/2021).

[26] M. Cecilia Pinto de Moura, Who Breathes the Dirtiest Air from Vehicles in Minnesota, Union of Concerned Scientists, Feb. 3, 2020 available at *https://blog.ucsusa.org/cecilia-moura/who-breathes-dirtiest-air-from-vehicles-minnesota* (last visited 6/8/2021).

[27] Hennepin County Energy Recovery Center, available at *www.hennepin.us/your-government/facilities/hennepin-energy-recovery-center* (last visited6/8/2021).

[28] Marissa Evans, North Minneapolis residents welcome shutdown of metal shredder, Star Tribune (Sept. 30, 2019) available at *https://www.startribune.com/north-minneapolis-residents-welcome-shutdown-of-metal-shredder/561642752/* (last visited 6/8/2021).

[29] Elizabeth Dunbar, Judge allows some Northern Metal operations to resume; city to reinspect Minneapolis site, MPR News (Feb. 28, 2020) available at *https://www.mprnews.org/story/2020/02/28/judge-allows-some-northern-metal-operations-to-resume* (last visited 6/8/2021).

[30] Alex Chhith, Fire knocked down at recycling facility in north Minneapolis, Minneapolis Star Tribune (Apr. 21, 2021), available at *https://www.startribune.com/fire-knocked-down-at-recycling-facility-in-north-minneapolis/600048722/?refresh=true* (last visited 6/8/21).

[31] Minnesota Commerce Dep't, Line 3 Final Environmental Impact Statement at 5-466, Table 5.2.7-12, available at *https://mn.gov/eera/web/file-list/13765/* (last visited 6/8/2021).

[32] D. Carrington, Air pollution linked to far higher Covid-19 death rates, study finds, The Guardian (Apr. 7, 2020), available at *https://www.theguardian.com/environment/2020/apr/07/air-pollution-linked-to-far-higher-covid-19-death-rates-study-finds* (last visited 6/8/2021).

[33] Minnesota Commerce Dep't, Line 3 Final Environmental Impact Statement, Appendix S Baseline Pipeline Spill Analysis at 41, available at *https://mn.gov/eera/web/project-file?legacyPath=/opt/documents/34079/Line%203%20Revised%20FEIS%20Appendix%20S%20Spill%20Analysis.pdf* (last visited 6/8/2021).

[34] Northside Youth File Line 3 Amicus Brief in Federal Court, Deliver a copy to AG Ellison at Minnesota Capitol, Minnesota Interfaith Power & Light (June 1, 2021), available at *https://www.facebook.com/149272995089877/videos/229741975272542* (last visited 6/8/21).

[35] Liam McMahon, Who was Edward Duffield Neill?, The Mac Weekly (Oct. 31, 2019), available at *https://themacweekly.com/76882/neill-hall/who-was-edward-duffield-neill/* (last visited 6/8/21).

[36] Charles S. Bryant & Abel B. Murch, *A History of the Great Massacre by the Sioux Indians, in Minnesota* (1864).

[37] Edward Duffield Neill and Charles S. Bryant, *History of the Minnesota Valley: Including the Explorers and Pioneers of Minnesota* (1882).

MSBA

Find the Right Practice Management Fit for Your Firm

Firms using practice management tools—such as client portals, online payments, and client intake—collect nearly 40% more revenue per attorney.*

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

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

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

Learn more at: www.mnbar.org/Advantage

Clio®

CosmoLex

mycase by appfolio

PRACTICEPANTHER

SimpleLaw.com®
Simple for Lawyers. Simple for Clients.

TIMESOLV

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.

*** MORE ONLINE**
The online version of this section contains additional case note content: mnbar.org/bench-bar

CRIMINAL LAW

JUDICIAL LAW

■ **Post-conviction: Post-conviction relief is not available after a stay of adjudication.** Pursuant to a plea agreement, appellant pleaded guilty to misdemeanor domestic assault, the state dismissed a charge of gross misdemeanor malicious punishment of a child, and adjudication of the domestic assault charge was stayed for one year. Appellant is a citizen of Ireland and lawful permanent U.S. resident, and consulted with an immigration attorney prior to entering his plea. Appellant successfully completed and was discharged from probation, but was then notified of immigration removal proceedings against him. He filed a petition for post-conviction relief seeking to withdraw his guilty plea based on ineffective assistance of counsel, claiming the immigration attorney advised him he would not be subject to presumptively mandatory deportation. The postconviction court denied the petition, as appellant was not eligible for post-conviction relief because he was not convicted of a crime. The court of appeals affirmed.

The Supreme Court holds that the plain meaning of the post-conviction statute requires that a person has a conviction under Minnesota law, and a stay of adjudication is not a conviction. The post-conviction statute, Minn. Stat. §590.01, subd. 1, allows for "a person convicted of a crime" to seek postconviction relief. Section 609.02, subd. 5, explains that a conviction is either a plea of guilty, jury verdict of guilty, or a finding of guilty by the court, once accepted and recorded by the court. The Court finds its holding in *State v. Dupey*, 868 N.W.2d 36 (Minn. 2015), binding. In *Dupey*, the Court considered when a person "has" a conviction, and held that a stay of adjudication under Minn. Stat. §152.18, subd. 1, is not a judgment of conviction or sentence for post-conviction purposes, because there is never an adjudication of guilt. This analysis also applies to determine whether a person has been "convicted of a crime" under section 590.01, subd. 1. To be "convicted of a crime," a person must have a conviction. Thus, as in *Dupey*, appellant's stay of adjudication does not meet the definition of conviction because his guilty plea was not recorded by the district court. The denial of appellant's post-conviction petition is affirmed. ***Johnston v. State***, 955 N.W.2d 908 (Minn. 3/10/2021).

■ **6th Amendment: Motion seeking photos of defendant's arm is not a critical stage requiring the presence of counsel.** Appellant was charged with fourth- and fifth-degree criminal sexual conduct. When the complaint was filed, the state also filed a motion to conduct a physical examination of appellant under Minn. R. Crim. P. 9.02, subd. 2(1), to inspect his arms for scratches and take photographs. Appellant appeared for his first court appearance without an attorney and the court appointed a public defender to represent appellant thereafter. The court also granted the state's discovery motion and photographs of appellant's arm were taken after the hearing. The court later denied appellant's motion to suppress the photographs, finding that appellant's right to counsel did not attach during his first appearance. The photographs were admitted at trial and he was ultimately convicted. The Minnesota Court of Appeals also found no 6th Amendment violation.

The 6th Amendment guarantees the right to counsel at trial and all critical stages before trial. The Minnesota Supreme Court has not yet considered whether a discovery motion for physical examination is a critical stage in a criminal prosecution. The Court finds this situation analogous to *Gilbert v. California*, 388 U.S. 263 (1967), in which the United States Supreme Court found that taking writing exemplars from a defendant is not a critical stage in a criminal proceeding. Like a handwriting sample, there is no "grave potential for prejudice" in the taking of photographs that would prevent appellant's attorney from effectively representing him at trial. Chal-

lenges to authenticity of the photographs, how they were taken, etc. could have been made during cross-examination or in a motion to suppress, or could have been addressed through a defense expert witness. The Court holds the state's motion in this case was not a critical stage in the proceedings. The court of appeals is affirmed. ***State v. Zaldivar-Proenza***, 957 N.W.2d 93 (Minn. 3/31/2021).

■ **Confrontation clause applies to testimonial pre-trial statement by co-conspirator who does not testify at trial.** Appellant was charged with theft and being an ineligible person in possession of a firearm after allegedly stealing a co-worker's gun from their place of employment. He and a co-conspirator gave police conflicting statements about their whereabouts. At trial, the state was permitted to play bodycam video of an interrogation of the co-conspirator. The co-conspirator did not testify at trial. A jury found appellant guilty of both offenses. The court of appeals affirmed his convictions.

In *State v. Brist*, 812 N.W.2d 51 (Minn. 2012), the Supreme Court held that admitting a nontestifying co-conspirator's unwitting statement to a government informant does not violate the confrontation clause, but the Court declines to extend that holding to include *testimonial* statements from a nontestifying co-conspirator. Such statements are still subject to the confrontation clause.

Here, the co-conspirator's statements were in response to direct police questioning and were not made in the course of an ongoing emergency, and, thus, were testimonial. The admission of the statements violated appellant's right to confrontation. However, the Court finds the error harmless, given the amount of additional evidence used to establish a conspiracy. The court of appeals is affirmed. ***State v. Sutter***, A19-1045, 2021 WL 2125795 (Minn. 5/26/2021).

■ **DWI: Court may not enter convictions for both DWI and test refusal arising from the same behavioral incident.** Appellant appealed his convictions for DWI, test refusal, and driving after suspension of his license. Appellant, the state, and the court of appeals agree the district court erred by entering judgments of conviction and imposing sentences for both the DWI and test refusal offenses. Minn. Stat. §609.04 bars "multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). Under *Jackson*, which the court finds controlling in this case, this rule is violated if multiple convictions were entered for offenses that arise under different sections of the same statute, and the offenses were committed as part of a single behavioral incident.

Both DWI and test refusal arise under different sections of section 169A.20. Pursuant to prior appellate court decisions, DWI and test refusal committed as part of a continuous course of conduct arise out of a single behavioral incident. Within a few hours, appellant drove while intoxicated, was arrested, and refused a breath test. This is sufficient to qualify as a single behavioral incident. Thus, the entry of judgments of conviction for both DWI and test refusal violates section 609.04. Remanded for the district court to vacate one of the convictions. ***State v. Bonkowske***, 957 N.W.2d 437 (Minn. Ct. App. 3/15/2021).

■ **DWI: Driver need not know controlled substance was in their body.** Appellant was reported for sitting unresponsive in a running vehicle and was arrested for DWI. Police obtained a warrant to search his blood, which revealed the presence of amphetamine. Appellant pleaded guilty to operating a motor vehicle with a controlled substance in his body. On appeal, he argued that his plea was invalid because he never admitted that he knew or had reason to know that amphetamine was present in his body at the time he was operating the vehicle. The court of appeals affirmed his conviction.

The controlled substance DWI statute, Minn. Stat. §169A.20, subd. 1(7), does not contain a specific intent or knowledge requirement. The Supreme Court finds this omission by the Legislature was intentional. An express knowledge requirement is included for other offenses in the same statute, but not the controlled substance DWI offense. The Legislature also included an affirmative defense to controlled substance (a valid prescription), showing that the Legislature "proactively addressed concerns about imposing strict criminal liability for any blameless conduct." The Court also finds that controlled substance DWI is a public welfare offense, an offense for which the Legislature may dispense with *mens rea* through silence.

Ultimately, the Court concludes that the state need not prove that appellant knew or had reason to know his body contained a controlled substance while operating his motor vehicle. His conviction is affirmed. ***State v. Schwartz***, 957 N.W.2d 414 (Minn. 4/7/2021).

■ **Predatory offender registration: Registration is not required for aiding an offender to avoid arrest where conviction did not arise from the same circumstances as the charged offenses.** After appellant's husband held his former co-workers at gunpoint in a breakroom, appellant helped him flee the state. Appellant's husband was charged with kidnapping, false imprisonment, and threats of violence, and appellant ultimately pleaded guilty to aiding an offender to avoid arrest in exchange for the dismissal of charges of aiding and abetting her husband. The district court ordered appellant to register as a predatory offender and the court of appeals affirmed.

Minn. Stat. §243.166, subd. 1b(a), requires registration as a predatory offender if a person is charged with one or more enumerated offenses and is "convicted of… that offense or another offense arising out of the same set of circumstances." Both kidnapping and false imprisonment convictions require registration, but a conviction for aiding an offender to avoid arrest does not. For the registration requirement to apply to appellant, her aiding an offender to avoid arrest conviction must be based on the same set of circumstances as the kidnapping or false imprisonment charges.

The Supreme Court affirms that the "same set of circumstances" phrase requires that the "same general group of facts gave rise to both the convicted offense and the charged offense," and that "there must be sufficient overlap with regard to time, location, persons involved, and basic facts." Merely *related* circumstances are not enough.

In this case, the offense of conviction—aiding an offender to avoid arrest—occurred after appellant's husband committed kidnapping and false imprisonment. The kidnapping and false imprisonment occurred entirely within appellant's husband's former employer's building, while appellant helped her husband avoid arrest outside of the building by driving hundreds of miles away. Appellant's husband's former co-workers were the victims of his offenses, while the public at large was the victim of the offense of aiding an offender to avoid arrest. The basic facts underlying the kidnapping and false imprisonment offenses are also vastly different from those underlying the aiding an offender to avoid arrest offense. Thus, appellant's conviction for aiding an offender to avoid arrest did not arise from the same set of circumstances as the offenses for which predatory offender registration is required. The court of appeals is reversed and the

district court is directed to vacate its order requiring appellant to register as a predatory offender. ***State v. Berry***, 959 N.W.2d 184 (Minn. 5/5/2021).

■ **Juvenile protective services: Proof that a child actually needs protection or services is not required for offense of encouraging the need for protection or services.** Appellant was charged with contributing to the need for protection or services. The evidence at a bench trial showed he had spent time with his daughter's 10-year-old friend, A.G., and left her a note encouraging her to meet him in the middle of the night at a certain location. A.G. told authorities appellant told her he loved her and wanted to marry her. Appellant made corroborating statements to the county. Appellant also previously gave A.G. a cell phone. A.G.'s legal guardian obtained a harassment restraining order against appellant on A.G.'s behalf. The district court found appellant guilty. The court of appeals reversed, finding the evidence insufficient to prove A.G. was actually in need of protection or services, but also found the evidence sufficient to find appellant guilty of attempt.

Minn. Stat. §260C.425, subd. 1, provides that "[a]ny person who by act, word, or omission encourages, causes, or contributes to the need for protection or services" is guilty of a crime. The issue in this case centers on the meaning of "encourages," which is not defined in chapter 260C. Looking to dictionary definitions of the term, the Supreme Court finds that the focus of the word "is an effort to persuade the listener, to overcome," and whether the listener acts on that effort is immaterial. To require the state to prove a child was actually in need of protection or services would convert "encourages" to "causes," which would alter the meaning of the statute.

The Court finds sufficient evidence to prove appellant encouraged A.G.'s need for protection or services and affirms his conviction. ***State v. Boss***, 959 N.W.2d 198 (Minn. 5/5/2021).

■ **Controlled substances: Child "exposed to methamphetamine" is subjected to risk of harm from the methamphetamine.** Appellant and her nine-year-old son were staying at a residence when a search warrant was executed. In the room where they stayed, police found methamphetamine between a mattress and the wall. Appellant was charged with possession, child endangerment, and knowingly exposing a child to methamphetamine. She appealed her conviction on the methamphetamine exposure charge, arguing her son was never physically subjected to the methamphetamine. The Minnesota Court of Appeals upheld her conviction.

Minn. Stat. §152.137, subd. 2(b), in relevant part, prohibits "knowingly caus[ing] or permit[ting] a child… to… be exposed to… methamphetamine…." "Expose" is not defined in the statute, so the Supreme Court looks to dictionary definitions and various canons of construction, particularly the canon against surplusage. Adopting appellant's interpretation, that "expose" means "physically subjected to," renders the remaining verbs in the statute surplusage. Instead, the court holds that "expose" in section 152.137 means that a child is "subjected to risk of harm from the methamphetamine."

The Court also finds the evidence was sufficient to support the jury's finding that appellant subjected her son to risk of harm from methamphetamine. Her conviction is affirmed. ***State v. Friese***, 959 N.W.2d 205 (Minn. 5/5/2021).

■ **Minnesota Uniform Mandatory Disposition of Detainers Act: UMDDA provides a right to final disposition of untried charges only when the charges remain pending.** In 2017, appellant was charged with domestic assault on June 6, and two DANCO violations on August 18. He made a speedy trial demand on the DANCO violation charges on August 21 and was found guilty of the domestic assault offense on August 25. Appellant requested final disposition of the DANCO violations under the UMDDA, which was received by the state on November 7. The state dismissed the charges on November 13. In 2018, appellant was granted a new trial on the domestic assault charge. On October 25, the state filed a new complaint charging appellant again with the 2017 DANCO violations. Appellant was found guilty of both DANCO charges on 1/18/2019. The court of appeals affirmed.

An imprisoned person may request final disposition of any untried indictment or complaint pending against the person under the UMDDA. Once a request is made, the state must bring the charges to trial within six months, or the case is to be dismissed with prejudice. First, the Supreme Court determines that the UMDDA is ambiguous as to whether a request remains effective even when the state dismisses the pending charges before the end of the six-month period. The Court looks to the legislative purpose and history of both the UMDDA and its counterpart, the Interstate

Agreement on Detainers (IAD), to resolve the ambiguity. Both were passed to ensure "prompt disposition of untried charges for the benefit of prisoners so as to not inhibit their ability to secure certain privileges or participate in various rehabilitative programs."

Here, the state dismissed the DANCO violation charges against appellant shortly after receiving his UMDDA request. At that time, the state did not intend to refile the charges, having secured a conviction on the domestic assault charge. The dismissal of the charges fulfilled the principal purpose of the UMDDA, ensuring appellant did not suffer negative consequences from the pending charges while detained. Thus, the state did not violate appellant's rights under the UMDDA.

Second, a separate analysis shows that appellant's right to a speedy trial was not violated as to the DANCO violation charges. The time between the state's dismissal of the original charges and refiling of new charges do not count in calculating the length of the delay in completing the prosecution, as the dismissal was not done to avoid appellant's speedy trial demand. However, even excluding the time between dismissal and refiling, the delay between the initial filing in August 2017 and the trial in January 2019 was presumptively prejudicial, because it still amounted to nearly six months. While most of the reasons for this delay were the state's responsibility, there is no reason to believe the state acted deliberately to hamper the defense.

Also, while appellant made "insistent and persistent efforts to secure a prompt trial" before the dismissal of the initial charges, he did not reassert his right to a speedy trial after the charges were dismissed (understandably) or after the new charges were filed. The Court also finds no other compelling evidence of prejudice appellant experienced as a result of the delay.

The Court ultimately concludes that, while the delay here was presumptively prejudicial, the state brought appellant to trial quickly enough so as not to endanger the values protected by the right to a speedy trial. Appellant was not deprived of his right to a speedy trial. ***State v. Mikell***, A19-0732, 2021 WL 2125793 (Minn. 5/26/2021).

SAMANTHA FOERTSCH
Bruno Law PLLC
samantha@brunolaw.com

STEPHEN FOERTSCH
Bruno Law PLLC
stephen@brunolaw.com

EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Compulsory arbitration; waiver ruling reversed.** A determination that an employer waived its right to seek arbitration of an employee's claim for violation of the Fair Labor Standards Act (FLSA) for overtime wages as part of a class action was reversed. The 8th Circuit Court of Appeals held that the trial court's determination that the employer waived its right to arbitration was erroneous and the matter was required to be arbitrated. ***Morgan v. Sundance, Inc.***, 992 F.3d 711 (8th Cir. 3/30/2021).

■ **Disability benefits; split ruling by 8th Circuit.** The 8th Circuit Court of Appeals split in its rulings on a couple of long-term disability policy claims by employees.

The use by an insurer of an in-house nurse to review a long-term disability claim was proper. Affirming a lower court judgment, the appellate court held that there was substantial evidence that supported denial of a long-term disability claim and no evidence supporting the claimant's argument that she was entitled to benefits under the policy provided by the employer. ***Roebuck v. USAble Life***, 992 F.3d 732 (8th Cir. 4/1/2021).

A nurse anesthetist who was terminated from unemployment was entitled to short-term and long-term disability benefits under the Employment Retirement Income Security Act (ERISA). Reversing a decision of the lower court, the 8th Circuit held that the insurer abused its discretion in denying benefits on the basis that the claimant was not disabled at the time of his termination. ***Bernard v. Kansas City Life Insurance Company***, 993 F.3d 5882 (8th Cir. 4/5/2021).

■ **Defamation claim against union; case may proceed.** The dissemination by a labor union of statements that the largest private property owner in downtown St. Paul had wrongfully deprived security guards of overtime compensation may proceed as a defamation claim. The Minnesota Court of Appeals, upholding a decision of the Ramsey County District Court, held that the defamation claim against the union was not preempted by federal law, permitting the claim to proceed upon remand to the trial court. ***Madison Equities, Inc. v. SEIU Minnesota State Council***, 2021 WL 1082040 (Minn. Ct. App. 3/22/2021) (unpublished).

■ **Prevailing wage law; district court has jurisdiction.** A challenge to a final determination by a county that had not violated prevailing wage laws in procuring and awarding public contracts involving a yard waste management and hauling company could properly be reviewed by the Ramsey County District Court. The court of appeals held that the state law unambiguously provides for original jurisdiction in the district courts of such actions, warranting dismissal of the county's challenge to the court's authority to hear the case. ***OTI, Inc. v. Ramsey County***, 2021 WL 1167027 (Minn. Ct. App. 3/29/2021) (unpublished).

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

ENVIRONMENTAL LAW

JUDICIAL LAW

■ **2nd Circuit affirms FERC's bright line CWA Section 401 one-year deadline.** In March the United States Court of Appeals for the 2nd Circuit issued a unanimous decision upholding the Federal Energy Regulatory Commission's (FERC) determination that states must act within the one-year deadline established under the Clean Water Act (CWA) when reviewing Section 401 water quality certification requests for proposed natural gas projects.

Section 401 of the CWA prohibits a federal agency from issuing a permit or license to conduct activity that may result in any discharge into waters of the United States unless the state or authorized tribe in which the proposed discharge would occur certifies that the discharge complies with applicable state water quality requirements. 33 U.S.C. §1341, et seq. However, Section 401(a)(1) mandates that if a state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request," then certification requirements are waived for the federal application. 33 U.S.C. §1341(a)(1).

In the 2nd Circuit case, petitioners New York State Department of Environmental Conservation (DEC) and Sierra Club asked the court to vacate FERC's determination that DEC had waived its certification authority for a proposed natural gas pipeline project to be built by National Fuel Gas Supply Corporation and Empire Pipeline, Inc. after DEC denied the project application 36 days after the one-year deadline from receiving the initial application.

The initial application was received by DEC on 3/2/2016, but it became clear that the final determination could not be made within the one-year deadline. Therefore, DEC entered into an agreement with National Fuel to revise the date on which the application was received by DEC to 4/8/2016. On 4/7/2017, DEC denied National Fuel's application, one day prior to the extended one-year deadline.

After the denial of its application, National Fuel asked FERC to declare that DEC had waived its certification authority by not acting within the original one-year time limit (i.e., by 3/27/2017), established when it received the initial application on 3/2/2016. On 8/6/2018, FERC concluded that DEC had waived its authority under Section 401. The court held that DEC could not escape the "bright-line" one-year limit by coordinating with an applicant to alter the date on which DEC received the application.

In making its determination, the court looked at the text and legislative history of Section 401 of CWA. In reviewing the legislative history, the court highlighted the fact that Congress acknowledged that without the one-year limit, there would be no way to guard against a state sitting on its hands and doing nothing, at the expense of the applicant or other states that may be involved in a multistate project. Thus, in specifying a deadline for state action, Congress intended to protect the regulatory structure of the section, and would not permit the arrangement advocated by petitioners, which would introduce the sort of uncertainty that the one-year limitation period was intended to eliminate.

The 2nd Circuit looked to previous case law to make its decision. The court compared this case to the D.C. Circuit case *Hoopa Valley Tribe v. FERC*, wherein the court recognized that the coordinated, repeated withdrawals and re-submissions of certification requests between the applicants and state agencies for over a decade to circumvent the one-year deadline clearly undermined the statutory time limit requirement and congressionally granted authority. 913 F.3d 1099 (D.C. Cir. 2019).

The 2nd Circuit was sympathetic to DEC's argument that states should be afforded flexibility when reviewing Section 401 certification applications, given the complexity of the projects, and the importance of protecting the state's water quality, as well as recognizing that an extra 36 days may be a modest and reasonable extension of the deadline. However, the court ultimately concluded that Section 401's bright-line one-year time limit precludes the deadline-blurring arrangement under review in this case, which would turn the bright-line rule into a subjective standard. The court thus held that the DEC waived its certification authority by failing to act within one year of the actual receipt of the application.

On 3/29/2021, FERC published a final rule amending its regulations under Section 401 of the CWA to establish a categorical reasonable period of time of up to one year deadline for states to act on a request for water quality certification under Section 401 of the CWA for proposed natural gas and liquid natural gas projects. 86 Fed. Reg. 16298 (3/29/2021). The rule will become effective 6/28/2021. ***New York State Dep't of Env't Conservation, et al. v. Fed. Energy Regul. Comm'n***, No. 19-1610-ag (2d Cir. 3/23/2021).

■ **Minnesota federal district court remands climate change case to state court.** In March the United States District Court for the District of Minnesota granted the state of Minnesota's motion to remand to state court a climate change-related case Minnesota brought against the American Petroleum Institute, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Koch Industries, Inc., Flint Hills Resources LP, and Flint Hills Resources Pine Bend.

Minnesota commenced the action in state court, alleging defendants undertook "a widespread campaign to deceive the public about the dangers of fossil fuels and to undermine the scientific consensus linking fossil fuel emissions to climate change." *Minn. v. API* at *2. The state asserted five causes of action for violations of Minnesota common law and consumer protection statutes, alleging (1) violations of Minnesota's Consumer Fraud Act, Minn. Stat. §325F.69; (2) failure to warn under common law theories of strict liability and negligence; (3) common law fraud and misrepresentation; (4) violations of the Minnesota Deceptive Trade Practices Act, Minn. Stat. §325D.44; and (5) violations of the Minnesota False Statement in Advertising Act Minn. Stat. §325F.67. *Id.* at *8. On 7/27/2020, defendants removed the action to federal court, and on 8/26/2020, Minnesota moved to remand to state court.

Defendants claimed federal jurisdiction on seven grounds: (1) The claims arise under federal, not state, common law; (2) the action raises disputed and substantial federal issues that must be adjudicated in a federal forum (the "Grable doc-

trine"); (3) removal is authorized by the federal officer removal statute, 28 U.S.C. §1442(a)(1); (4) federal jurisdiction arises under the Outer Continental Shelf Lands Act, 43 U.S.C. §1349(b); (5) the claims are based on conduct arising out of federal enclaves; (6) the action is actually a class action governed by the Class Action Fairness Act, 28 U.S.C. §1332(d), 28 U.S.C. §1453(b); and (7) the court has diversity jurisdiction under 28 U.S.C. §1332(a), on the theory that the real parties in interest are not the state, but the citizens of Minnesota. *Id.* at *9.

The court methodically analyzed each asserted basis for federal jurisdiction, concluding that none supported federal jurisdiction. In general, while the court acknowledged that "the vast threat of climate change requires a comprehensive federal, and indeed, global response," and while the court admitted "some reluctance in remanding such significant litigation to state court," the court concluded that the state's action is "far more modest than the caricature Defendants present," arising solely under state consumer protection statutes. *Id.* at *36. The limited nature of Minnesota's claims, the court speculated, would likely "restrict the ultimate possible recovery in this case and thus, its possible impact on climate change." *Id.* at *37. But, the court held, that is the choice the state has made. The court concluded that because it does not have original jurisdiction over Minnesota's action, and because the claims neither explicitly raise federal claims nor fall within one of the exceptions to the well-pleaded complaint rule, the court must decline to exercise jurisdiction.

In remanding to the state court, the court also denied defendants' motion for a stay pending the resolution of two federal cases that defendants argued, unsuccessfully, could affect the outcome of the court's decision. ***Minnesota v. Am. Petroleum Inst.***, CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. 3/31/2021).

■ **US Supreme Court holds CERCLA contribution action must be predicated on resolution of CERCLA-specific liability.** In May the United States Supreme Court issued an opinion holding that in order to trigger a right of contribution under section 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), a party must resolve a CERCLA-specific liability; a broader array of settlements involving environmental liability will not suffice. The case involved a long-running dispute regarding liability for environmental hazards at the Ordot Dump in Guam. The dump was constructed by the U.S. Navy in the 1940s; both the U.S. and Guam deposited waste into the dump. In the late 20th Century, the U.S. Environmental Protection Agency (EPA) sued Guam under the federal Clean Water Act (CWA), alleging that Guam was discharging pollutants from the dump into waters of the U.S. without a discharge permit. In 2004, Guam and the U.S. entered a consent decree, settling the litigation and requiring Guam to close and cover the dump.

Over a decade later, Guam sued the U.S., seeking to hold the U.S. responsible for some of the cost of closing and covering the dump. Guam brought two claims: (1) a cost-recovery claim under section 107(a) of CERCLA, which allows a state (or in this case, a territory) to recover clean-up costs from a former owner or operator of the property in question, and (2) a contribution claim under section 113(f)(3)(B) of CERCLA, which provides that a "person who has resolved its liability to the United States... for some or all of a response action or for some or all of the costs of such action in [a] settlement may seek contribution from any person who is not [already] party to a [qualifying] settlement." CERCLA §113(f)(3)(B).

The D.C. Circuit Court of Appeals dismissed Guam's complaint. It stated first that where a person meets the requirements to bring a contribution claim under section 113(f), the person may not bring a cost-recovery claim under section 107(a). Here, the court concluded, while Guam had a contribution claim against the U.S. after it entered the 2004 consent decree with EPA, the three-year statute of limitations for CERCLA contribution claims had long since run. CERCLA §113(g)(3). As a result, the circuit court held, neither of Guam's claims was viable.

The Supreme Court reversed and remanded. Looking at the language of section 113(f) within the greater CERCLA context, the Court held that the requirement that a party has "resolved its liability" in section 113(f) refers to CERCLA-specific liability. For example, the Court noted that section 113(f)(3)(B)'s reference to a party "resolving its liability… for some or all of a *response action*…" echoed repeated uses of the key phrase "response action" in other parts of CERCLA, suggesting the term refers to resolution of CERCLA-specific claims. In addition, the term "resolve" indicates finality, the Court wrote; resolution of related environmental liabilities not specific to CERCLA (e.g., the CWA liabilities in this case), would not be final as to CERCLA because it would leave the settling defendant still potentially liable under CERCLA. "The most natural reading of §113(f)(3)(B)," the Court concluded, "is that a party may seek contribution under CERCLA only after settling a CERCLA-specific liability, as opposed to resolving environmental liability under some other law."

In this case, because Guam's 2004 consent decree with EPA resolved CWA liability, not CERCLA-specific liability, Guam never had a right to bring a contribution claim under section 113(f). Accordingly, Guam was not barred from proceeding with its section 107(a) cost-recovery action against the U.S. ***Guam v. United States***, No. 20-382, __ S.Ct. __; 2021 WL 2044537 (5/24/2021).

ADMINISTRATIVE ACTION

■ **EPA publishes notice of intent to revise 2020 CWA Section 401 Certification Rule.** In June the U.S. Environmental Protection Agency (EPA) published a proposed rule declaring a notice of intent by the agency to reconsider and revise the Water Quality Certification Rule un-

der Section 401 of the Clean Water Act (CWA). 40 C.F.R. §121. EPA is doing so in response to the 1/20/2021 Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which directed the agency to review and take action to revise or replace the 2020 Section 401 Certification Rule.

Section 401 of the CWA prohibits a federal agency from issuing a permit or license to conduct activity that may result in any discharge into waters of the United States unless the state or authorized tribe in which the proposed discharge would occur certifies that the discharge complies with applicable state water quality requirements. 33 U.S.C. §1341, et seq. Furthermore, Section 401(d) allows states to impose conditions upon the certification of the project if it determines the project will have a negative impact on the water quality within the state. 33 U.S.C. §1341(d).

When initially reviewing the 401 Certification Rule, EPA considered many factors in making its determination, including the text of CWA Section 401, congressional intent, the principles outlined in the Executive Order, and other issues that are currently being challenged in court. EPA identified substantial concerns related to specific provisions of the rule, including whether the rule effectively ensures cooperative federalism principles, as well as whether certain procedural components of the rule improve, or impede, the certification and permitting process.

EPA identified 10 key issues on which it would like to receive comments. Some of the key issues identified for potential revision include: the requirement for applicants to submit a prefiling meeting request with the certifying agency 30 days before submitting the water quality certification application; whether the definition and elements of a certification request are too limited to allow the state enough information to review the request; whether states have a sufficient role in determining the timeline for review and whether the rule limits the factors that federal agencies may use to determine a reasonable period of time for a certifying agency to act; whether the current rule's scope of certification is too narrow; and whether the agency should revise the scope to include potential impacts to water quality not only from the "discharge" of the project, but also from the "activity as a whole."

The other key issues on which the EPA solicited feedback include: certification actions and federal agency review; enforcement authority of certification conditions; modifications of certifications and permits to adapt to changing circumstances; the "neighboring jurisdiction" process to determine what federal activity may affect downstream water quality as well as the timeframe in which a federal agency must notify EPA under CWA Section 401(a)(2); receiving any data or information from stakeholders about the application of the 401 Certification Rule; and facilitation and implementation of rule revisions.

The agency is currently hosting web-based listening sessions to solicit feedback, as well as receiving written comments. The public comment period will remain open until 8/2/2021. Docket ID No. EPA-HQ-OW-2021-0302. **86 Fed. Reg. 29541** (6/2/2021).

JEREMY P. GREENHOUSE
The Environmental Law Group, Ltd.
jgreenhouse@envirolawgroup.com

ERIK ORDAHL
Barna, Guzy & Steffen
eordahl@bgs.com

JAKE BECKSTROM *Vermont Law School, 2015*

FEDERAL PRACTICE

JUDICIAL LAW

■ **28 U.S.C. §1447(d); scope of review on appeal.** In November 2020, this column noted the Supreme Court's grant of *certiorari* in a case that raised the issue of whether, when a remand order under 28 U.S.C. §§1442 or 1443 is appealed, the appeal is limited only to consideration of the propriety of the removal under these provisions, or whether the appellate court can consider any issue encompassed by the remand order.

The Supreme Court recently held that the appeal of a remand under Sections 1442 or 1443 permits review of the entirety of the remand order. Justice Sotomayor dissented, asserting that the exception recognized by the majority would "trump the rule," and expressed "fear" that defendants will raised "strained theories of removal" under Sections 1442 or 1443 in an attempt to "circumvent" the bar on appellate review. ***BP P.L.C. v. Mayor and City Council of Baltimore***, 141 S. Ct. 1532 (2021).

■ **Fed. R. App. P. 39(e); district court has no discretion to reduce taxable costs.** In a case involving more than $2.2 million in appeal-related costs, the Supreme Court unanimously held that Fed. R. App. P. 39(e) does not permit a district court to alter a court of appeals' discre-

tionary allocation of taxable costs. ***City of San Antonio v. Hotels.com, L.P.***, 141 S. Ct. 1628 (2021).

■ **Federal jurisdiction over motion to vacate arbitration; grant of *certiorari*.** The Supreme Court recently granted *certiorari* in a case thaat raises the issue of whether the "look-through" jurisdictional analysis adopted by the Court in *Vaden v. Discover Bank*, 556 U.S. 49 (2009), applies to motions to vacate under Sections 9 and 10 of the Federal Arbitration Act.

The circuits are badly divided on this question, with four circuits applying the "look-through" approach and two circuits rejecting that analysis. ***Badgerow v. Walters***, 975 F.3d 469 (5th Cir. 2020), *cert. granted*, ___ S. Ct. ___ (2021).

■ **28 U.S.C. §1782; private arbitration; grant of *certiorari*.** The Supreme Court recently granted *certiorari* in a case that raises the question of whether the discretion afforded district courts under 28 U.S.C. §1782 to render assistance in gathering evidence for use in "a foreign or international tribunal" includes private commercial arbitral tribunals.

The circuits are divided 3-2 on this question. ***Servotronics, Inc. v. Rolls-Royce PLC***, 975 F.3d 689 (7th Cir. 2020), *cert. granted*, 141 S. Ct. 1684 (2021).

■ **Fed. R. Civ. P. 12(f); striking class action allegations.** Following the 6th Circuit, and reversing the district court's denial of a motion to strike class action allegations, the 8th Circuit held that a district court may grant a Rule 12(f) motion to strike class action allegations even prior to a motion for class certification where it is "apparent from the pleadings that the class cannot be certified." ***Donelson v. Ameriprise Fin. Servs., Inc.***, ___ F.3d ___ (8th Cir. 2021).

■ **Motion to dismiss pursuant to Fed. R. Civ. P. 41(a)(2) denied; dismissal with prejudice; no abuse of discretion.** Where the plaintiff moved to dismiss her action without prejudice pursuant to Fed. R. Civ. P. 41(a)(2), the defendant opposed the motion and argued that the plaintiff was attempting to avoid summary judgment, the plaintiff offered no explanation for her request for dismissal without prejudice, and the district court dismissed the action *with* prejudice, the 8th Circuit found no abuse of discretion by the district court where the plaintiff failed to avail herself of multiple opportunities to explain the basis for her dismissal motion. ***Graham v. Mentor Corp.***, ___ F.3d ___ (8th Cir. 2021).

■ **Punitive damages; remittitur; proportionality; *de novo* review.** Where a jury awarded the plaintiff $50,000 in compensatory damages (later reduced to $47,300) and $1,000,000 in punitive damages on one his claims, the defendant moved for remittitur of the punitive damage award on the basis that it was grossly excessive, the district court granted the request for remittitur and decreased the punitive damage award to $236,500 (a 5:1 punitive-compensatory ratio), and the plaintiff appealed the remittitur, the 8th Circuit, reviewing *de novo*, agreed with the district court that the original punitive damage award was "disproportionate," but concluded that an award of $425,700 (a 9:1 ratio) was appropriate. ***Masters v. City of Independence***, ___ F.3d ___ (8th Cir. 2021).

■ **Defamation; pleading requirements under Minnesota law and the federal rules.** Affirming Judge Montgomery's grant of summary judgment to a subset of defendants, the 8th Circuit held that any allegedly defamatory statements that were not alleged with specificity in the plaintiff's amended complaint, and allegedly defamatory statements disclosed during discovery but not incorporated into an amended pleading, were not properly before the Court. ***Sherr v. HealthEast Care Sys.***, ___ F.3d ___ (8th Cir. 2021).

■ **Denial of motion to amend counterclaim affirmed.** The 8th Circuit found no abuse of discretion in Judge Frank's denial of a motion to amend a counterclaim after the close of discovery and on the eve of trial, where the proposed amendment would have required additional discovery. ***Select Comfort Corp. v. Baxter***, 996 F.3d 925 (8th Cir. 2021).

■ **28 U.S.C. §1404(a); forum selection clause; issues of fact.** Where the litigants were parties to an insurance contract that contained a recently added forum selection clause designating Nebraska as the forum for any litigation, but there were issues as to whether the policyholder was properly notified of the new forum selection provision, Judge Magnuson found that a "substantial question" existed regarding the validity of the forum selection clause and denied the defendant's 28 U.S.C. §1404(a) motion to transfer without prejudice. ***Sunlight Logistics, Inc. v. County Hall Ins. Co.***, 2021 WL 1946658 (D. Minn. 5/14/2021).

■ **Voluntary dismissal of federal claims divests the court of subject matter jurisdiction.** Where the plaintiff brought federal and state law claims against non-diverse defendants, moved for summary judgment on its state law claims, and simultaneously sought to dismiss its federal law claims without prejudice, Judge Ericksen found that the dismissal of the federal claims obligated her to dismiss the balance of the action without prejudice where she could "discern no reason to exercise supplemental jurisdiction over the [state law] claims." ***Country Inn & Suites by Radisson, Inc. v. Alexandria Motels, Inc.***, 2021 WL 1617147 (D. Minn. 4/26/2021).

■ **Interlocutory appeal; effect on district court's jurisdiction.** Where two defendants filed an interlocutory appeal under the collateral order doctrine, the remaining parties filed cross-motions for summary judgment, one party questioned whether the appeal divested the district court of jurisdiction over the remainder of the case, and supplemental briefing was ordered on the jurisdictional issue, Judge Nelson determined that it would be "improper" to proceed while the appeal is pending, and stayed the remainder of the action. ***Mille Lacs Band of Ojibwe v. County of Mille Lacs***, 2021 WL 1400069 (D. Minn. 4/14/2021).

■ **Appeal of denial of motion to compel arbitration; effect on district court's jurisdiction.** Where an appeal from the denial of a motion to compel arbitration was filed but the parties were unable to agree on the effect of that appeal on the district court's jurisdiction, Magistrate Judge Leung acknowledged a split in the circuits and within the District of Minnesota as to whether the appeal divested the district court of jurisdiction over the remainder of the case but, finding that a discretionary stay was warranted, declined to reach the jurisdictional issue. ***Benchmark Ins. Co. v. SUNZ Ins. Co.***, 2021 WL 1904927 (D. Minn. 5/12/2021).

■ **Motion for leave to file untimely brief denied; no excusable neglect.** Where counsel for one defendant moved for leave to file an untimely opposition to the plaintiff's motion to compel, blaming his failure on the fact that he had just completed a two-week trial and criticizing plaintiff's counsel for their "lack of professional courtesy," Magistrate Judge Leung denied that motion, finding no excusable neglect where there were three other attorneys assigned to the case, and the motion failed to explain why those

attorneys could not have contacted plaintiff's counsel or the court prior to the deadline to file a response. ***Eng'g & Constr. Innovations, Inc. v. Bradshaw Constr. Corp.***, 2021 WL 1634468 (D. Minn. 4/27/2021).

■ **No subject matter jurisdiction in removed action; dismissal or remand?** Where the defendants removed the action on the basis of diversity jurisdiction, the plaintiff later amended its complaint to add another seemingly diverse defendant, the plaintiff ultimately disclosed that it had members and sub-members who were not diverse from the defendants, and defendants argued that the appropriate remedy was the dismissal (rather than remand) of the action, Judge Schiltz found that 8th Circuit authority "unambiguously holds that where a district court lacks subject-matter jurisdiction over a removed case, remand rather than dismissal is required, even if the plaintiff filed an amended complaint in federal court after the case was removed." ***Marco Techs., L.L.C. v. Midkiff***, 2021 WL 1577653 (D. Minn. 4/22/2021).

■ **FDCPA; attorney's fees; hourly rates.** Rejecting a challenge to the accuracy of plaintiff's counsel's billing records, Judge Nelson granted a motion for attorney's fees in an FDCPA case, approving an hourly rate of $550 an hour for a "very experienced" attorney. ***Hashi v. Law Offices of David M. Katz, P.C.***, 2021 WL 1263720 (D. Minn. 4/6/2021).

■ **Taxable costs; surcharge for expedited and rough ASCII transcripts rejected.** Where plaintiffs filed an objection to the defendant's bill of costs, and the defendants conceded that some of their claimed costs were not taxable but attempted to explain the need for other of their costs, Judge Nelson determined that the cost of certain expedited transcripts was taxable, but reduced the costs claimed for two depositions by 20 percent where the corresponding invoices were not sufficiently itemized, and she "suspect[ed]" that the invoices included nontaxable charges, but Judge Nelson did allow the plaintiffs seven days to produce an itemized invoices to support these costs. ***Grupo Petromex, S.A. v. Polymetrix AG***, 2021 WL 1258334 (D. Minn. 4/5/2021).

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

INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Trademark: Likelihood of confusion may precede the time of purchase under initial-interest theory.** The United States Court of Appeals for the 8th Circuit recently held that a district court erred by granting judgment as a matter of law regarding the issue of consumer sophistication and granting summary judgment rejecting the theory of initial-interest infringement. Select Comfort Corp. and Select Comfort SC Corporation sued defendants Baxter and Dires, LLC for trademark infringement, trademark dilution, federal unfair competition, and false advertising claims, related to the infringement of trademarks such as "SLEEP NUMBER" and "WHAT'S YOUR SLEEP NUMBER." Select Comfort alleged that the defendants purposefully used phrases confusingly similar or identical to Select Comfort's registered trademarks in their website URLs and online advertising. Select Comfort also alleged that the defendants purposefully furthered confusion on their phone lines.

Before considering when confusion must occur to be actionable, the court first determined the sophistication level of the mattress customers. The district court found that mattress customers were sophisticated as a matter of law because mattresses are expensive. The 8th Circuit reversed this ruling as customer sophistication is a jury question, because the expense of mattresses needed to be weighed against the frequency of purchase. Following the precedent in *Sensient Techs. Corp. v. SensoryEffects Flavor Co.*, the district court ruled a theory of initial-interest confusion could not apply because it had found that customers were sophisticated. 13 F.3d 754 (8th Cir. 2010). Due to the 8th Circuit's reversal, the court addressed the novel issue of whether actionable confusion is limited to the time of purchase or if initial-interest confusion is actionable. To protect the goodwill of established marks at all times, the 8th Circuit held that initial-interest confusion is actionable as infringement. The case was remanded for further proceedings. ***Select Comfort Corp. v. Baxter***, 996 F.3d 925 (8th Cir. 2021).

■ **Copyright: Illegal access pertains to authorization rather than motive.** The Supreme Court of the United States recently ruled that an individual does not violate the Computer Fraud and Abuse Act of 1986 (CFAA) by accessing information with an improper motive if the information is otherwise available to

him. Nathan Van Buren was charged with violating the CFAA because his accepting of a bribe to look up an individual in a law enforcement database exceeded his authorized access under 18 U. S. C. §1030(a)(2). The CFAA defines "exceeds authorized access" as "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." §1030(e)(6). On appeal, Van Buren asserted the interpretation adopted by several circuits that one "exceeds authorized access" when one obtains information from somewhere in a computer, such as files, folders, or databases, that are not within the scope of the individual's authorization to use on said computer. The government argued for a broader interpretation of "exceeds authorized access" adopted by other circuits in which individuals would be criminally or civilly liable under the CFAA if information is accessed for an inappropriate reason or improper purpose.

The Court rejected the government's interpretation, as it would find individuals liable under the CFAA for things such as paying bills on their work computers. As both parties agreed that Van Buren was authorized to use the law enforcement database, and under the Court's interpretation Van Buren did not access information on the computer that was off-limits to him, the Court reversed the judgment of the 11th Circuit and remanded the case for further proceedings. ***Van Buren v. United States***, No. 19-783, 2021 U.S. LEXIS 2843 (6/3/2021).

JOE DUBIS & KATHERINE F.K. MARES
Merchant & Gould
jdubis@merchantgould.com

TAX LAW

JUDICIAL LAW

Attorney's travel expenses for "schmoozing a client" not deductible. Section 162 permits a deduction for all ordinary and necessary business expenses. Marketing is often one such deductible expense. But taxpayers bear the burden of proving their right to deductions, and taxpayers must also produce records to substantiate claimed deductions. Substantiation requirements are particularly stringent for meals, entertainment, and travel expenses. Even when a taxpayer has proper documentation, the taxpayer must also show that the expenses were for a business purpose. In this case, the taxpayer was able to show some records to substantiate her trip from Minnesota to New York. She was unable, however, to persuade the court that the trip had a business purpose and her claimed deductions for the trip were denied. The court addressed various other deductions denied on audit, and it found for the Service on most issues. ***Ward v. Comm'r***, T.C.M. (RIA) 2021-032 (T.C. 2021).

Tax opinions as beach reading? Tax court Judge Mark V. Holmes's opinions do not disappoint. This month provides two charming examples. For a primer on rights in music in IP for tax lawyers, *see* ***Est. of Jackson v. Comm'r***, T.C.M. (RIA) 2021-048 (T.C. 2021) (discussing extensive tax dispute involving pop mega-star Michael Jackson's estate and noting that "Jackson's most valuable assets were intellectual property" and explaining that "any tax specialists reading this might benefit from a primer on three key concepts: composer, performer, and right of publicity.") For a history of "frontier pharmacies" and an entertaining discussion of the challenges of proving valuation in small-town Montana, *see* ***Plentywood Drug, Inc. v. Comm'r***, T.C.M. (RIA) 2021-045 (T.C. 2021).

Calculation in ongoing "split-dollar" life insurance arrangement. In a previous case, *De Los Santos v. Comm'r (De Los Santos I)*, T.C. Memo. 2018-155, the tax court determined that petitioners' participation in an employee welfare benefit plan constituted a compensatory "split-dollar" life insurance arrangement under section 1.61-22(b), Income Tax Regs., and that the economic benefits that flowed to petitioners generated current taxable income. In this second opinion, the court computed the exact amounts to be included in petitioners' gross income for each year. ***De Los Santos v. Comm'r***, No. 5458-16, 2021 WL 1345503 (T.C. 4/12/2021).

Investment in solar power scheme designed to "zero out taxes" does not entitle investors to deductions or credits. A Utah businessperson with no engineering experience devised a scheme to sell interests in a far-fetched solar energy project. The project never saw the light of day, but the scheme raised millions from investors eager to "zero out their taxes." The instant case involved the investors—project promoters had already faced separate liability. Although this case involves only two investors in the tax shelter scheme, more than 200 cases involving other investors in the same scheme depend on its outcome. The tax court determined that the investors were not entitled to trade or business deductions, deductions for property held for the production of income, or deductions for passive activity losses. The taxpayers were not entitled to any credits. In this instance, the taxpayers were not liable for penalties because the IRS did not secure timely supervisory approval for them. ***Olsen v. Comm'r***, T.C.M. (RIA) 2021-041 (T.C. 2021).

Tax court determines disclosure of discovery requests. On 4/12/2019, JMIR Marquette Hotel LLC filed a property tax petition for property taxes payable in 2019 for the subject property located at 710 and 730 Marquette Avenue in Minneapolis.

On 9/18/2020, JMIR served its first set of interrogatories and requests for production of documents on the county. The county returned its answers and responses to the requests on 11/2/2020. Over the following months, "counsel for the parties engaged in ongoing communications regarding disputes over the completeness of the County's discovery responses." JMIR alleged that the county failed to provide substantive answers to various interrogatories and document requests. JMIR filed a motion to compel discovery and for attorney fees. On the same day as JMIR's motion, the county served supplemental answers and responses to JMIR's requests. Additionally, the county opposed the motion to compel and a hearing on the motion was set for 1/26/2021.

The purpose of discovery is to exchange relevant information between the parties to prevent surprise and prejudice at trial. *See Gale v. Hennepin Co.*, 609 N.W.2d 887, 891 (Minn. 2000). Generally, trial courts have discretion over whether to grant or deny discovery requests. See generally *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn. 1987). Minn. R. Civ. P. 26.02 provides in part that parties may obtain discovery that is relevant to any party's claim, important to resolving the issues, and possesses a benefit that likely outweighs the burden or expense to the other party. The court can limit discovery methods upon determining that the "discovery is unreasonably cumulative or duplicative, is obtainable from another source, or the burden of proposed discovery is outside the scope." Minn. R. Civ. P. 26.02 (b). Federal rules of procedure may be helpful and instructive when state practices are modeled after federal rules. Federal Rule 26(b) is nearly identical to Minn. R. Civ. P. 26.02(b), in that relevancy is "'broadly construed' and a discovery request should be considered relevant if there

is 'any possibility' that the information sought may be relevant to the claim or defense of any party."

Generally, "the assessed value of property for tax purposes is not admissible as direct evidence of value for purposes other than taxation of that property." *EOP-Nicollet Mall, L.L.C. v. Hennepin Co.*, 723 N.W.2d 270, 283 (Minn. 2006). A petitioner does not have uninhibited access to information used by the county when completing a property assessment. Minn. Stat. section 13.51, subd. 2 states that "certain information collected by the government for assessment purposes is nonpublic data." When determining whether to order disclosure of property assessment data, the court must apply a two-part balancing test: 1) whether the data is discoverable pursuant to the rules of evidence and civil procedure, and 2) whether the benefit of the data "outweighs any harm to the confidentiality interests of the entity maintaining the data." Additionally, the court must determine "whether notice to the subject of the data is warranted," and, if so, "what type of notice must be given." Minn. Stat. section 13.03, subd. 6.

JMIR categorized its requests in three general ways: "1) those concerning physical aspects of the subject property, 2) requests for underlying information, data, and documents about the subject property usable for appraising the market value; and 3) requests for information or documents the County claims are nonpublic or Assessor's data." In a lengthy analysis, the court considered the county's objections on the grounds that the county does not intend to defend its assessed value of subject property based on the physical aspects that JMIR seeks. Further, the county contends that information regarding how the subject property compares to surrounding property is nonpublic information pursuant to Minn. Stat. section 13.51 and asserts that the MGDPA applies.

Concerning the physical aspects of the subject property, the court noted that the county failed to address why that information is not relevant. As such, the court granted in part JMIR's motion pertaining to the physical aspects of the subject property, but denied in part the information that details the assessor's use of the requested information any assessment of the subject property. In applying the balancing test, regarding discoverability, the court agreed with the county that certain information sought by JMIR is overly broad and partially irrelevant. However, the court limited disclosure of specific documents dealing with surrounding properties so long as the county follows any special instructions concerning nonpublic data with the meaning of Minn. Stat. section 13.51. ***JMIR Marquette Hotel LLC v. Hennepin Co.***, 2021 WL 1288720 (MN Tax Court 4/2/21).

■ **Change of counsel does not constitute "good cause."** Allina Health System filed two property tax petitions claiming that its Stillwater facility, located in Washington County, was exempt from property taxes in both 2017 and 2018 as a "public hospital and purely public charity as defined in Article X of the Minnesota Constitution" and Minn. Stat. section 272.02. In separate pretrial motions, the county: 1) moved to consolidate the two petitions and extend the scheduling deadlines into 2022, and 2) moved to compel discovery.

In the county's motion to amend the scheduling order and consolidate the two petitions, the county states that it is represented by new counsel, and the legal strategy of the original counsel is unacceptable to the current counsel. As such, the new counsel "needs additional time implement the case strategy he recommends." The court concluded that continuances must be supported by an affidavit showing good cause. Failure to adequately prepare for trial does not constitute good cause. Minn. R. Civ. P. 16.02. Further, "withdrawal or substitution of counsel does not create any right to continuance of any deadline imposed by a scheduling order." Finding no good cause to amend the scheduling order, the court denied the county's motion.

Generally, the tax court would favor consolidating matters for the "sake of judicial economy unless consolidation would significantly inconvenience or prejudice one of the parties." *Enbridge Energy, Ltd. P'ship v. Marshall Co.*, No. C5-03-133, 2004 WL 434420, at *1. Washington County acknowledges that forcing Allina to conduct additional discovery may be prejudicial, but argues that the benefits of a fuller record outweighs any prejudice to Allina. The court agreed that consolidating matters to re-open discovery in a trial-ready case may prejudice Allina and therefore, denied the county's motion.

Subsequently, the court issued an order the county's motion to compel discovery. In November of 2020, the county sought information concerning Allina's subject property's value and classification. After receiving Allina's responses, the county followed up with a letter stating that deficiencies existed in Allina's responses, and requesting further responses to the county's requests, including certain emails. The county's second request included information and emails about Allina's pricing for services, and services that were provided for free. A hearing was held on 2/2/2021. Minn. R. Civ. P. 26.02 allows parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim of defense." The court may limit discovery methods if the proposed discovery is outside the scope. Rule 26.02 (b).

In response to the county's request for any and all documents evidencing income and operating expenses, Allina disclosed its annual total operating expenses, income statements, financial statements and its Federal Form 990. The county, however, argued at the hearing that it was still entitled to emails concerning income and operating expenses for the property and other financial documents that Allina used to track and analyze income and operation expenses. Following the hearing, the county narrowed its request to include only emails relating to charity care, sliding scale services, and two additional exhibits.

The court concluded that the county's arguments are persuasive regarding Allina's need to search and disclose further emails concerning income and expenses and declined to order Allina to disclose any other financial documents. The court concluded, however, that if a general ledger existed, Allina must disclose it to the county.

The county further requested several documents relating to service pricing of competitors that Allina argued was overly broad and unduly burdensome. Additionally, Allina argued that the county's second set of requests were untimely. The court stated that if a study of competitor pricing existed, Allina must disclose it to the county, but added that searching for emails concerning Allina's pricing structure would be burdensome. The court also agreed that the county's second set of discovery was untimely and denied the county's motion to compel Allina to respond. ***Allina Health System v. Washington Co.***, 2021 WL 1288267 (MN Tax Court 4/2/21), 2021 WL 1709006 (MN Tax Court 4/27/21), 2021 WL 1825690 (MN Tax Court 5/3/21).

■ **Judicial economy wasted by company's lack of response.** Menard, Inc. filed two property tax petitions for taxes payable in 2019 and 2020 for subject property located in Apple Valley. The court filed a scheduling order that cut off discovery by 4/26/2021. In March, Dakota County served Menard with requests and interrogatories, to be due on 4/5/2021. Menard requested and received an extension from the county to 4/13/2021. Menard stated the extension request was to allow settlement discussions to take place. The county refused to partake in settlement discussions until after its assessor had time to review the discovery responses. Menard did not produce discovery by the April 13 deadline, and the county moved the court to compel discovery responses. In its motion, the county used a caption for the Apple Valley cases, as well as West St. Paul cases. Menard objected to the county's motion to compel, stating that the motion was not filed in accordance with the court's motion practice. Specifically, the notice of motion and motion "included a proposed order and affidavit of service captioned for the West St. Paul cases," and was therefore "confusing," and constitutes a "failure of service." A hearing was held on 4/29/2021.

When a party fails to respond to a discovery request, "the party seeking discovery may move for an order compelling an answer or production of documents." Minn. R. Civ. P. 37.01 (b)(2). The court analyzed Menard's arguments, concluding that Menard did not claim that the incorrect attachment deprived the court of jurisdiction, nor did Menard assert that it did not receive the motion to compel. Additionally, counsel for Menard concedes that he was not genuinely confused about the nature of the motion by the attachments. As of the hearing date, Menard has not responded to the discovery request. The court granted the county's motion to compel. ***Menard, Inc. (Store #3047), v. Dakota Co.***, 2021 WL 2216986 (MN Tax Court 5/25/21).

■ **Statutory interpretation; tax court affirmed.** Minnesota imposes an occupation tax on "[a] person engaged in the business of mining or producing of iron ore, taconite concentrates or direct reduced ore." Minn. Stat. §298.01, subd. 4 (2012). Hibbing Taconite Company and United Taconite are engaged in the business of mining and are subject to the occupation tax. The occupation tax statute further directs that the occupation tax shall be "determined in the same manner" as the franchise tax that Minnesota imposes on corporations. Both the franchise tax and the occupation tax are taxes imposed on income. Although a tax on income, neither is designed to be a tax on gross income, and certain deductions are permitted. The deduction in dispute here is the depletion deduction. IRC §611 ("In the case of mines… there shall be allowed as a deduction in computing taxable income a reasonable allowance for depletion…") Corporate taxpayers who are subject to the franchise tax face a limit on the depletion deduction: The depletion deduction must be reduced by 20%. Relying on the statutory phrase "determined in the same manner," the commissioner argued that the franchise tax limit applies to taxpayers subject to the occupation tax.

The Supreme Court disagreed. Reviewing the tax court's statutory interpretation *de novo*, the Court held that the statutory phrase "determined in the same manner" (as the franchise tax) did not require the taxpayers to reduce the depletion deduction claimed under federal law by the percentage that federal law imposes on corporations. The "plain meaning of the language in subdivision 4 of section 298.01," the Court held, "does not require the Taxpayers to reduce the amount of the claimed federal deduction by the percentage imposed on corporations." ***Hibbing Taconite Co., J.V. v. Comm'r***, 958 N.W.2d 325 (Minn. 2021).

■ **Premium tax credits and retroactive Social Security result in surprise tax bill for sympathetic taxpayer.** Taxpayer Connie Sue Heston received advance premium tax credits (APTC) during the 2017 tax year. In September of that same year, Ms. Heston learned that her Social Security Disability application had been retroactively approved and she received a lump-sum Social Security distribution that represented SSDI benefits for three years—2015, 2016, and 2017. The SSDI award entitled Ms. Heston to Medicare coverage, which she received. But she also remained enrolled in her marketplace health insurance plan and Treasury continued to pay a portion of Ms. Heston's premium. Ms. Heston timely filed her 2017 return, and the commissioner issued a deficiency. The deficiency resulted because the commissioner included in Ms. Heston's 2017 household income all of the lump-sum SSDI payment, which pushed Ms. Heston to about 300% of the federal poverty line (FPL). Premium tax credits are available to taxpayers with household income of up to 400% of the FPL, but the credits phase out as income approaches 400%.

The tax court rejected Ms. Heston's argument that because her household income was below 400% of the FPL for most of 2017, she should not be liable for any additional tax relating to the months before she received the lump-sum SSDI payment. As the court notes, Ms. Heston's argument would require household income to be determined on a monthly, not yearly, basis. The court also observed that despite any 86(e) election, for purposes of determining a taxpayer's eligibility for premium tax credits, disability payments must be included in the calculation of household income in the year in which they are received. ***Heston v. Comm'r***, No. 24551-18S, 2021 WL 2000180 (T.C. 5/19/2021) (citing *Johnson v. Comm'r*, 152 TC 121 (2019) (case of first impression holding that 86(e) elections are disregarded for purposes of PTC calculations)).

■ **Ensuring that taxpayers get a "fair shake," court sends CDP back due to SO's abuse of discretion.** Taxpayers Victor and Katherine Mason owed back taxes and did not have the funds to pay. Mr. Mason had retired; Mrs. Mason was about to retire and was wrestling with a gambling addiction. The couple had some equity in their home in Shoreview but were relying on that equity to fund their retirement. When an IRS revenue officer made a field call to the Masons' home and suggested the IRS could seize their home, the couple quickly submitted an offer to compromise the debt.

While the Centralized Office in Compromise (OIC) unit was reviewing the couple's OIC, another part of the IRS began sending collection notices to the Masons. The Masons asked for a hearing with the IRS Appeals Office. The court explains, "What happened then is that the Centralized Unit didn't consider the Masons' offer, but returned it to them. IRS Appeals didn't consider the merits of their offer either, but instead reviewed the decision by the Centralized Unit to return it." Although taxpayers are entitled to have OICs reviewed on the merits, neither unit did so. Noting that "[w]e've had some similar cases, but never one quite like this," the court held that IRS Appeals abused its discretion by reviewing OIC denial decision for abuse of discretion instead of reviewing the Masons' offer on its merits. "We can't guarantee that taxpayers… will have their offer accepted…but we can ensure that they get a fair shake and that the decisions made by Commissioner's employees aren't 'grounded in an error of law.'" ***Mason v. Comm'r***, T.C.M. (RIA) 2021-064 (T.C. 2021).

■ **Penalty improper: RAR can amount to "initial determination" that requires supervisory approval.** The tax court held that the Form 4549, Income Tax Examination Changes, also known as a revenue agent report (RAR), when sent with a Letter 4121, Agreed Examination Report Transmittal, was the "initial determination" by an "individual" to impose a penalty for purposes of section 6751(b). Since supervisory approval must be obtained before a penalty can be assessed under section 6751(b), and the agent did not obtain a supervisor's signature in this case, the taxpayers were entitled to partial summary judgment on this issue. ***Battat v. Comm'r***, T.C.M. (RIA) 2021-057 (T.C. 2021) (citing *Beland v. Comm'r*, No. 30241-15, 2021 WL 777184 (T.C. 3/1/2021) for proposition that "[p]roviding the opportunity to consent to assessment of tax and penalty is a 'consequential moment' and "[a] signed, completed RAR sent with a Letter 4121 provides the requisite definiteness and formality to constitute an 'initial determination' for purposes of [the penalty]").

MORGAN HOLCOMB
Mitchell Hamline School of Law
morgan.holcomb@mitchellhamline.edu

SHEENA DENNY
Mitchell Hamline School of Law
sheena.denny@mitchellhamline.edu

TORTS & INSURANCE

JUDICIAL LAW

■ **Insurance; products-completed operations & *Miller-Shugart* agreements.** Plaintiff commenced suit against a contractor alleging it suffered damages as a result of faulty construction. Plaintiff's claims included alleged damages to the contractor's work, as well as damages to other materials and structures caused by the contractor's work. The contractor tendered the claims to defendant insurer, who defended the case under a reservation of rights but declined to indemnify, alleging a "your work" exclusion barred coverage. As a result, plaintiff and the contractor entered into a *Miller-Shugart* agreement. The *Miller-Shugart* agreement did not purport to allocate damages between damages to the contractor's work and damages to the surrounding materials and structure. The district court found defendant's insurance policy provided coverage for the claims and found the *Miller-Shugart* agreement enforceable. The court of appeals reversed, holding some damages—those to the contractor's work—were excluded. Because the *Miller-Shugart* agreement did not allocate damages, the court of appeals held it was unreasonable and unenforceable.

The Minnesota Supreme Court affirmed in part, reversed in part, and remanded for further proceedings. The Court initially held "that the plain language of [the "your work" exclusion] bars coverage for the claimed property damage to [the contractor's] own work, notwithstanding the products-completed operations hazard." As a result, the Court found that the *Miller-Shugart* agreement encompassed both covered and uncovered claims. However, the Court went on to hold, at least in the context of a case involving a single defendant, "that the failure to allocate between covered and uncovered claims does not make the *Miller-Shugart* settlement agreement per se unreasonable."

The Court went on to set forth the test to be applied on remand: "We hold that determining the reasonableness of an unallocated *Miller-Shugart* settlement agreement involves a two-step inquiry. The district court first considers the overall reasonableness of the settlement. If the settlement is reasonable, the district court then considers how a reasonable person in the position of the insured would have valued and allocated the covered and uncovered claims at the time of the settlement." With respect to the first step of the inquiry, the "relevant evidence regarding reasonableness includes 'the customary evidence on liability and damages,' as well as the risks of going to trial, 'the likelihood of favorable or unfavorable rulings on legal defenses and evidentiary issues if the tort action had been tried,' expert legal opinions, and 'other factors of forensic significance.'" Evidence relevant to the second step of the inquiry may include: "(1) information that was available to the parties at the time of the settlement regarding the underlying facts, (2) materials produced in discovery and any court rulings in the underlying litigation, (3) evidence of how the parties and their attorneys evaluated the claims at the time of the settlement, and (4) expert testimony about the value of the settled claims." Finally, the Court noted that "the district court typically will consider the reasonableness and allocation issues at the same time" and that the judgment creditor will bear the burden of proof on reasonableness and allocation. ***King's Cove Marina, LLC v. Lambert Commercial Constr. LLC***, A19-0078 (Minn. 4/14/2021). *https://mn.gov/law-library-stat/archive/supct/2021/OPA190078-041421.pdf*

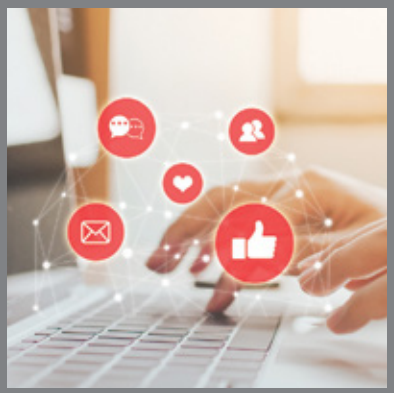
JEFF MULDER
Bassford Remele
jmulder@bassford.com

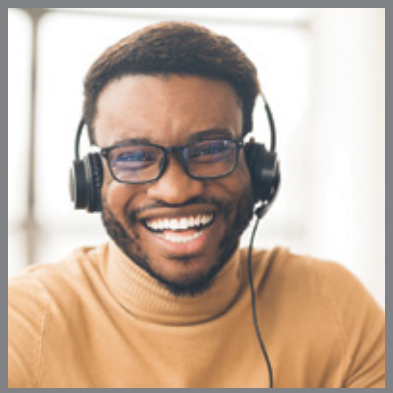
MSBA

Free

MEMBER RESOURCES

Visit www.mnbar.org/guide to learn more about the free tools and resources available to MSBA members.





fastcase®
Smarter legal research.

ONLINE LEGAL RESEARCH

Unlimited access to one of the largest law libraries in the world.

mnbar.org/fastcase

Court Ops

COURT OPINIONS BY EMAIL

Appellate opinions from Minnesota and U.S. 8th Circuit courts, as they happen.

mnbar.org/courtops

eBOOKS

A full library including Legal Ethics, Land Use Law, Judges' Preferences, and IOLTA guides.

mnbar.org/ebooks

practicelaw

PRACTICE RESOURCE LIBRARY

2,500 + legal forms, guides, court rules, and more.

mnbar.org/practicelaw

communities at
my.mnbar.org

DISCUSSION GROUPS

Member-only forums, Q&A, and networking for specific practice areas.

my.mnbar.org


HOPPE

Lousene M. Hoppe started her tenure as president of the National LGBTQ+ Bar Association Board of Directors. Hoppe, a shareholder at Fredrikson & Byron, is a litigator and criminal defense attorney who represents corporations and individuals accused of health care fraud, financial or tax crimes, and criminal felony and misdemeanor cases.


PEARSON

Gov. Tim Walz appointed Shawn Pearson as district court judge in Minnesota's 6th Judicial District. Pearson will be replacing Hon. Shaun R. Floerke and will be chambered in Duluth in St. Louis County. Pearson is an attorney who represents parents in child protection (CHIPS) matters in northern Minnesota.

Brittany Kennedy joined Maslon LLP. Her expertise spans general corporate law, banking and lending, contracts, and mergers and acquisitions. She has particular skill working in real estate transactions.


KENNEDY

James C. Kovacs joined Bassford Remele as an associate. Kovacs is a litigator focusing his practice in appellate law, construction, general liability, and insurance coverage.


KOVACS

Fisher Bren & Sheridan LLP announced the addition of three new attorneys: Matthew P. Lawlyes, John F. Thomas, and Nora J. Steinhagen. Lawlyes has experience in civil litigation and insurance coverage. Thomas has experience with large construction companies, international manufacturers, complex construction, contract, tort, and other litigation matters. Steinhagen recently earned her JD from the University of Minnesota Law School.


MACRAE

Meagher + Geer announced that Sinloria Macrae has been promoted to associate attorney. Macrae began her career with the firm in 2018 as a law clerk, and now joins the commercial litigation, construction, professional liability, and products liability practice groups.


HUEPENBECKER

Kirstin E. Huepenbecker joined Baker Vicchiollo Law LLC as an attorney leading the trusts and estate practice, including estate planning, wills, trusts, probate, trust administration, estate tax planning, and LLC formation.


MCFARLAND

Zachary S. McFarland joined Fredrikson & Byron as an associate in the litigation group. McFarland represents clients on a variety of litigation-related matters and delivers unique perspectives and solutions in his work with clients.


WILLIAMS

Robert Q. Williams joined Best & Flanagan with the firm's real estate practice group. Williams advises businesses and institutions in all manner of commercial real estate transactions.


SCANLAN

Kelsey M. Scanlan joined Moss & Barnett, A Professional Association with the firm's wealth preservation and estate planning team.


SOFIO


JOHNSON


STECKLER

Lommen Abdo announced the addition of three new lawyers: Kelly Sofio, Wade Johnson, and Jon Steckler. Sofio has over 20 years of experience in her defense practice, with a focus on automobile insurance law. Johnson practices in the areas of construction defect litigation, premises liability, product liability, and catastrophic injury matters. Steckler's practice is focused on commercial and business law and litigation.

William Bornstein joined Zelle LLP. He is a litigator whose experience includes a wide range of complex commercial litigation matters.


PATTNI

Gov. Walz appointed Bhupesh Pattni as district court judge in Minnesota's 6th Judicial District. Pattni will be replacing Hon. Mark M. Starr and will be chambered in Hibbing in St. Louis County. Pattni is an attorney at Trenti Law Firm and the 6th District Public Defender's Office.


ALI

Imran Ali joined Eckberg Lammers as a shareholder and director of law enforcement education & training. He joins the firm after serving over 17 years as a felony-level prosecutor.

We gladly accept press releases and announcements regarding current members of the MSBA for publication, without charge.
Email: bb@mnbars.org

Tracy Rae Podpeskar, age 43, a lifelong resident of Virginia, MN, passed away unexpectedly on December 4, 2020. Before, during, and after law school, Podpeskar was employed by the Trenti Law Firm in Virginia, working her way up from legal secretary to law student intern, to associate attorney, to partner in the firm in 2012.

Timothy John Dwyer, age 73, died on May 14, 2021. He received his law degree from William Mitchell College of Law and practiced for almost 50 years in St. Paul in the beloved, historic Hamm Building.

Scott Paul Miller, age 52, of Tyler, MN, passed away on May 26, 2021. He was the founding attorney for his law firm, Miller Legal Strategic Planning Centers, PA, and was passionate about helping his clients.

Daniel P. McGowan, age 75, of St. Paul, died on May 18, 2021. After graduating from the University of Minnesota Law School, McGowan served as county attorney for Chisago County. He later followed in the footsteps of his father, a four-term state legislator, and joined the office of the Minnesota State Senate Counsel, where he served for nearly 40 years until his retirement.

A. Larry Katz died unexpectedly on May 31, 2021, at the age of 88. He poured his heart and soul into his work as an attorney for 64 years. He earned a juris doctor degree in 1957 from the University of Minnesota Law School and was selected to *Super Lawyers* 1991, 1993-2021.

Harold Haakon Sheff, age 74, of St. Paul, passed away on May 26, 2021. He began his law career in 1973 as an assistant county attorney for Anoka County before moving into private practice at Olson, Gunn & Seran in 1980. In 1990, he joined the firm now known as Smith Gendler Shiell Sheff Ford & Maher and continued to practice property tax law until his death.

Paul Albert Ampe of Upsala, MN died on March 19, 2021. After graduating from William Mitchell College of Law, he opened his own law practice in Albany, MN, where he practiced for over 38 years.

John Leo "Jack" Devney died June 17, 2021. After working as an attorney in Alaska, Devney returned to Minnesota to become special assistant attorney general. He left public service in 1969 and joined Briggs & Morgan, where he enjoyed a long and productive career.

Classified Ads

For more information about placing classified ads visit: www.mnbar.org/classifieds

ATTORNEY WANTED

IS IT TIME TO MOVE your practice to the suburbs? Hellmuth & Johnson, one of Minnesota's 25 largest law firms, maintains a convenient, suburban location in its own five-story office building in Edina at the intersection of Highways 494 and 169. Hellmuth & Johnson seeks practice groups, partners and senior associates who value excellence in the practice of law, and want to be a part of a growing and profitable law firm that rewards individual performance with a dynamic compensation plan and partnership opportunities. All practice areas will be considered. Direct inquiries to Chad A. Johnson, Managing Partner, 8050 West 78th Street, Edina, MN 55344, or cjohnson@hjlawfirm.com.

▲▲▲▲▲

ASSISTANT ATTORNEY GENERAL – eDiscovery and Litigation Support. The Office of the Minnesota Attorney General is seeking an attorney with an interest in Minnesota's Government Data Practices Act and at least 1 year of civil litigation experience or equivalent, to join our eDiscovery and Litigation Support Division. The successful candidate will serve as the AGO's Data Practices Compliance Official. As the Data Practice Compliance Official, the attorney will handle and process all data practices requests as well as litigate data practices disputes. This is an exciting opportunity for a qualified professional to join a highly committed team that handles important eDiscovery and litigation support for the State of Minnesota. The Data Practices Compliance Official will serve as the dedicated attorney for all data practices requests, assess the merits and scope of the requests, work and coordinate with all AGO colleagues to review, classify, and redact the data, track data requests, respond to each data request, conduct data practices training for AGO colleagues, respond to data practices questions from the public and AGO colleagues, represent the AGO on data practice disputes, and other projects or assignments. The applicant will be responsible for reviewing and holding in confidence highly sensitive information and materials. Moreover, the applicant must be prepared to handle any litigation related to data practices disputes on behalf of the AGO. The Data Practices Compliance Official must be comfortable with learning and using technology. Requirements. Applicants should be highly attentive to detail, have demonstrated ability to handle highly sensitive information, 1 year of civil litigation experience or equivalent, good academic credentials, excellent written and oral communication skills, strong research and analytical abilities, good judgment and character, and a strong professional work ethic is essential. Applicants must be able to serve the public with a high level of distinction. Why Work with Us. The Office of Attorney General Keith Ellison — one of Minnesota's largest public law offices — has a clear mission: we help Minnesotans afford their lives and live with dignity, safety, and respect. We are a dynamic group of dedicated professionals who could all work elsewhere but choose public service as a calling, and we are actively building an internal culture that supports that calling. We offer a great benefits package! The State of Minnesota offers a comprehensive benefits package including low cost medical and dental insurance, employer paid life insurance, short and long-term disability, pre-tax flexible spending accounts, retirement plan, tax-deferred compensation, generous vacation and sick leave, and 11 paid holidays each year. Service with the Office may qualify applicants to have part of their student loans forgiven under the federal student loan forgiveness program that applies to state government employees. (For more information, visit https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service). Applications. Priority will be given to applications received by June 25, 2021, and we will continue to accept applications until the position has been filled. Attorneys wishing to apply should submit a cover letter and resume that includes relevant civil litigation experience, and a writing sample excerpt (no longer than 5 pages) to: Office of the Minnesota Attorney General, Attn: June Walsh, 75 Rev. Dr. Martin Luther King Jr. Blvd., Suite 102, St. Paul, MN 55155 ag.jobs@ag.state.mn.us. Note: The Attorney General's Office greatly encourages, celebrates and values diversity. It is an equal opportunity employer which does not discriminate on the basis of race, creed, color, national origin, religion, sex, marital status, sexual orientation, gender identity, age, disability, or military status. If you need reasonable accommodation for a disability, please call June Walsh at (651) 757-1199 or (800) 627-3529 (Minnesota Relay).

▲▲▲▲▲

ATTORNEY GENERAL Keith Ellison is accepting resumes on a rolling basis from attorneys at all levels of experience who are interested in a career of public service and representing the government in significant lawsuits to help Minnesotans afford their lives and live with dignity and respect. Assistant Attorneys General appear on behalf of the State of Minnesota in administrative, state, and federal district and appellate courts in a wide variety of case types. The work of the Office of the Attorney General protects public safety, everyday consumers and workers, the environment, and the State and its various agencies and boards. Attorneys can expect excellent litigation experience in handling their own cases and helping to build and create a better, safer, and more equitable Minnesota. Requirements. Applicants should be committed to public service on behalf of all Minnesotans, have demonstrable litigation or law school experience, strong research, writing, and communications skills, good work ethic, character and judgement, and a strong professional

drive. Why Work with Us. The Office of Attorney General Keith Ellison—one of Minnesota's largest public law offices—has a clear mission: we help Minnesotans afford their lives and live with dignity, safety, and respect. We are a dynamic group of dedicated professionals who could all work elsewhere but choose public service as a calling, and we're actively building an internal culture that supports that calling. We offer a great benefits package! The State of Minnesota offers a comprehensive benefits package including low cost medical and dental insurance, employer paid life insurance, short and long-term disability, pre-tax flexible spending accounts, retirement plan, tax-deferred compensation, generous vacation and sick leave, and 11 paid holidays each year. Service with the Office may qualify applicants to have part of their student loans forgiven under the federal student loan forgiveness program that applies to state government employees. (For more information, visit https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service). Applications. Cover letters, resumes, along with writing samples not to exceed 5 pages will be reviewed on a rolling basis and should detail your relevant experience, academic credentials, and preferred practice areas/divisions where you would like to be considered. Please send materials to: Office of the Minnesota Attorney General, Attn: June Walsh, 75 Rev. Dr. Martin Luther King, Jr. Blvd., Suite 102, St. Paul, MN 55155, ag.jobs@ag.state.mn.us. Note: The Attorney General's Office greatly encourages, celebrates, and values diversity. It is an equal opportunity employer which does not discriminate on the basis of race, creed, color, national origin, religion, sex, marital status, sexual orientation, gender identity, age, disability, or military status. If you need reasonable accommodation for a disability, please call June Walsh at (651) 757-1199 or (800) 627-3529 (Minnesota Relay).

▲▲▲▲▲

ASSOCIATE ATTORNEY opening at Gregerson, Rosow, Johnson & Nilan with 0-5 years of experience in downtown Minneapolis. The Firm is a general practice firm with an emphasis on municipal law and litigation. Excellent research and writing skills are required. Applicants should submit a cover letter, resume, writing sample, and references to contactus@grjn.com or by mail: Hiring Shareholder Gregerson, Rosow, Johnson & Nilan, Ltd., 100 Washington Avenue South, Suite 1550, Minneapolis, MN 55401.

▲▲▲▲▲

RAJKOWSKI HANSMEIER LTD., a regional litigation firm with offices in St. Cloud, MN and Bismarck, ND, has an opening for an associate attorney with 2-4 years' experience to join its team of trial attorneys. Our firm has a regional practice that specializes in the handling of civil lawsuits throughout the State of Minnesota, North Dakota and Wisconsin, including a significant volume of work in the Twin Cities. We offer a collegial workplace with experienced trial attorneys who are recognized leaders in their field of practice. We are seeking an associate who has relevant experience, strong motivation and work ethic along with excellent communication skills. Our lawyers obtain significant litigation experience including written discovery, motion practice, depositions coverage, trial and appellate work. We try cases and are committed to training our younger attorneys to provide them with the skills to develop a successful litigation practice. Competitive salary and benefits. Please submit resume, transcript, and writing sample to: Human Resources, Rajkowski Hansmeier Ltd., 11 Seventh Avenue North, St. Cloud, MN 56302. 320-251-1055, humanresources@rajhan.com. EOE

▲▲▲▲▲

ARTHUR, CHAPMAN, KETTERING, Smetak & Pikala, PA is a team-oriented firm committed to providing our clients with superior legal services and we are seeking a highly motivated attorney to join our busy civil litigation practice. The ideal candidate will possess anywhere from 5-12 years of practical litigation experience. Candidates should have excellent research and writing skills, possess a strong attention to detail, be resourceful, and be genuinely interested in litigation work. Candidates with both Minnesota and Wisconsin licenses will take preference. Our Firm is dedicated to creating a collegial, diverse workplace and we offer a competitive compensation/benefits package. If you are interested in joining our team, please specify this position in your cover letter and send along with a resume, salary expectations, and writing sample(s) in confidence to: Arthur, Chapman, Kettering, Smetak & Pikala P.A. Human Resources Recruiting@ArthurChapman.com Equal Opportunity Employer.

▲▲▲▲▲

EDINA FIRM SEEKS litigator with three years' experience. Primary practice areas include civil litigation, real estate, business and commercial law, and bankruptcy. Competitive salary and benefits. Send resume and cover letter to: bdanner@morrislawmn.com.

ANISHINABE LEGAL SERVICES Staff Attorney – FTE (salaried), Anishinabe Legal Services is seeking a highly motivated attorney to provide civil legal assistance and court representation to program clients before area Tribal Courts, State Courts, and Administrative Forums. This attorney will be housed out of our main office on the Leech Lake Reservation in Cass Lake, Minnesota. Primary duties will include handling a wide variety of civil matters before State and Tribal Courts. Compensation: D.O.E. Generous benefit package includes individual and family health and dental insurance, paid time off, and life insurance. To Apply: Please email a cover letter and resume to Executive Director Cody Nelson, at: cnelson@alslegal.org. Applications will be accepted until the position is filled.

▲▲▲▲▲

BLETHEN BERENS, a mid-sized, full-service law firm, is seeking an attorney with at least five years of business and commercial law experience. This position will be located in our Mankato office. Our business and commercial law attorneys represent small to mid-market businesses in a wide variety of industries across Minnesota. Qualified candidates must have significant experience not only in business and commercial law, but in counseling clients, relationship building and business development, will have a strong commitment to legal excellence, and will possess the ability and desire to work efficiently within the firm's team based approach to confidently serve our clients. Blethen Berens provides unparalleled legal services to meet a full range of business and individual needs. Smart, experienced and responsive, we serve clients throughout Minnesota with dedication, energy and a track record of success. Based in Mankato and New Ulm, we invest in our community and are committed to supporting the region's health and vibrancy. All applicants should send a resume and cover letter to: Lisa Jasperson, Director of Office Administration, at: ljasperson@blethenberens.com. To learn more about our firm please visit our website at: www.blethenberens.com.

▲▲▲▲▲

BOYCE LAW FIRM, LLP, in Sioux Falls, South Dakota has an opening in its trusts & estates practice area for a lateral attorney with 3-10 years of experience in private practice or relevant experience in the trust industry. Qualified candidates will have a background in advanced estate planning and/or trust administration, superior communication skills, and be highly self-motivated. Ideal candidates will have an existing book of transferable business and LLM in Taxation. Boyce Law Firm LLP is a top-rated, multi-specialty law firm. Compensation will be commensurate with education and experience. Benefits include generous 401K, health insurance, annual CLE tuition, professional dues and memberships and numerous incidentals. Confidential inquiries, including resume and cover letter should be directed to Jennifer Bunkers, Boyce Law Firm, LLP, PO Box 5015, Sioux Falls, SD 57117-5015 or to: jebunkers@boycelaw.com. For more information about Boyce Law Firm, please visit: www.boycelaw.com.

▲▲▲▲▲

CREDIT UNION attorney (Banking, Real Estate and Contracts (FT or PT). Responsible for assisting general counsel, management, and staff with consumer and business banking laws, real estate and general lending matters, and contracts. An appreciation for the credit union philosophy of people helping people, the benefits of cross-departmental relationships and effective communication necessary. MN or WI license preferred. Location: Duluth or Isanti, MN. Visit: www.membersccu.org to apply.

▲▲▲▲▲

LARKIN HOFFMAN, one of the largest full-service business law firms in Bloomington Minnesota, is seeking a highly motivated associate with three plus years of experience to join our Corporate team. Candidates should have experience in general business transactions, contract matters, corporate law and governance, mergers and acquisitions including M&A documentation and due diligence. We are looking for an attorney with outstanding academic credentials, drafting skills, communications skills, a dedication to client service and a commitment to excellence in the practice of law.

Larkin Hoffman offers a collegial and energetic work environment with attorneys who are recognized leaders in their areas of practice. We are motivated to attract and retain talented and diverse attorneys into our growing firm and are committed to the training and professional development of our attorneys. Working at Larkin Hoffman has the benefit of being located in a prime office location outside the downtown core at Normandale Lake Office Park for easy access with complimentary parking. If you are interested in joining our team, please send your resume and cover letter to hr@larkinhoffman.com.

▲▲▲▲▲

SAUL EWING ARNSTEIN & LEHR is hiring! The firm's growing Minneapolis office is seeking a corporate associate with 4-7 years of experience. The ideal candidate will have in-depth general corporate experience as well as either M&A, private equity, finance, and/or venture capital experience. Location is flexible (opportunity also available in Chicago, Baltimore, DC). Candidates should apply online at: www.saul.com/careers or contact meri.kahan@saul.com with questions.

▲▲▲▲▲

TRIAL GROUP NORTH, an insurance defense firm located in Duluth, Minnesota is looking for an Attorney interested in working with our Civil Litigation and Workers' Compensation teams. One or more years of experience is preferred, but will consider recent graduates, especially those with experience clerking. Ability to thrive in a high-volume practice and great organizational skills is a must. The firm offers a competitive salary and benefits along with the opportunity to work with accomplished attorneys and staff in the practice area. Please submit a cover letter, resume and references to: jdf@trialgroupnorth.com.

▲▲▲▲▲

VOGEL LAW FIRM is seeking a Business & Corporate Law attorney for its Bismarck office. Vogel is a full-service law firm with nearly 50 attorneys in Bismarck, Fargo, Grand Forks, Moorhead, and Minneapolis offices. We serve clients in North Dakota, South Dakota, Montana, Minnesota, and beyond. Local and out-of-state applicants welcomed. If you've been thinking about a move back to Bismarck or North Dakota, now is your opportunity. The ideal candidate will have experience and expertise as a transactional corporate attorney including forming business entities, mergers/acquisitions, regulatory compliance, and reviewing and negotiating various business-related contracts. This is a partnership track opportunity in a growing office that offers a collaborative, team-based

approach to practicing law. The position requires at least five years of relevant experience; however, Vogel will also consider training a new or recent graduate who shows both a demonstrated interest in business/corporate law and living and practicing in Bismarck. Vogel provides its attorneys with substantive mentorship, client interaction, as well as marketing and client development assistance. If you have excellent writing skills, strong academic credentials, and integrity, please visit www.vogellaw.com to learn more about us. Your application must include a cover letter, resume and writing sample directed by email to: Rebecca Blanshan, rblanshan@vogellaw.com. All applications and inquiries will be held in strict confidence. An Equal Opportunity and Affirmative Action Employer.

▲▲▲▲▲

WORKERS' COMPENSATION attorney. Arthur, Chapman, Kettering, Smetak & Pikala, PA is a mid-sized law firm seeking an attorney to join our busy Minnesota and Wisconsin Workers' Compensation Practice Group. We are a team-oriented firm committed to providing our clients with superior legal services. Candidates must be currently licensed in either Minnesota or Wisconsin, and be committed to obtaining a license in the other state. Candidates must also possess a strong work ethic with excellent communication and writing skills. Candidates with workers' compensation experience preferred. Our firm offers a competitive compensation/benefits package and is dedicated to creating a collegial, diverse workplace. Salary is commensurate with experience. If you are interested in joining our team, please send your cover letter, resume, writing sample, and salary expectations in confidence to: Arthur, Chapman, Kettering, Smetak & Pikala PA, Human Resource recruiting@arthurchapman.com, www.arthurchapman.com, Equal Opportunity Employer.

▲▲▲▲▲

WANTED — PERSONAL INJURY Attorney for Bolt Hoffer Boyd Law Firm. We are a growing, entrepreneurial law firm looking for another experienced Personal Injury Attorney to support and expand that practice. The candidate would be involved significantly with our nation-wide railroad litigation practice, which includes FELA claims, as well as injury/wrongful death claims associated with crossings, pedestrians, and rail passengers. Candidate will assist with the partners' cases as well as maintain their own caseload. For more information about the firm see our website: www.bolthoffer.com. Benefits package includes salary, performance incentives, employee health and disability insurance, paid parking, as well as a 401k/profit sharing plan. Requirements and Qualifications: The candidate must: Be highly motivated to learn our railroad litigation and personal injury practice, and eventually develop new business opportunities. Have at least 1-3 years prior experience as an attorney, preferably in personal injury law. Be able to demonstrate good writing skills. Have good verbal communication skills. Please send your cover letter, resume and salary expectation to: eric.wiederhold@bolthoffer.com

▲▲▲▲▲

MEDICAL MALPRACTICE Lateral Associate Attorney / Junior Partner. Arthur, Chapman, Kettering, Smetak & Pikala, PA is a mid-sized defense law firm located in downtown Minneapolis. This is an opportunity for a hard-working attorney to complement a growing medical malpractice team and integrate into a solid book of existing medical malpractice business. This is a great opportunity to ultimately assume a book of business. We seek a highly motivated lateral associate or junior level partner with at least three years of medical malpractice, products liability, and/or professional liability law related experience to join our growing litigation practice group. Preferred experience includes deposition and trial experience. Candidates should have excellent writing skills, and possess a strong attention to detail. A strong work ethic and the ability to thrive in a team-oriented atmosphere are essential. We are motivated to attract and recruit talented and diverse attorneys. Salary is commensurate with experience. If you are interested in joining our team, please send your resume, cover letter, writing sample(s), and salary expectation in confidence to: Arthur, Chapman, Kettering, Smetak & Pikala PA, Human Resources recruiting@arthurchapman.com, www.arthurchapman.com, Equal Opportunity Employer.

ESTATE PLANNING AND TAX. Federated is seeking an attorney to provide legal advice to the Life Company regarding advanced life insurance sales. This person will also need to provide training and case support in basic needs and estate planning/business succession planning, and oversee the development of research, sales tools, and marketing materials for the Life Company. This position requires an individual with strong communication and relationship building skills in a fast-paced, customer-focused environment. Responsibilities also include: Provide direction to life staff and supervise special projects. Advise and assist management, sales representatives, and clients on estate business planning issues. Train sales representatives on advanced life and retirement issues to improve life and disability sales, and oversee the investigation and resolution of complaints. Monitor company procedural and compliance issues pertaining to life, disability income, and retirement products. Required Qualifications: Juris doctorate and current license to practice law in Minnesota. Prefer designations including CLU or ChFC, and/or LLM degree in estate planning or taxation. Minimum of 3-5 years' work experience in general business environment demonstrating estate planning, taxation, or advanced underwriting knowledge. https://careers-federatedinsurance.icims.com/jobs/3143/job.

▲▲▲▲▲

LITIGATION ATTORNEY — Winthrop & Weinstine, an entrepreneurial, full-service law firm in downtown Minneapolis, has an excellent opportunity for an associate attorney with 4-5 years of experience on its well-recognized litigation team. Our litigation practice is fast paced, very collaborative, devoted to excellent client service, and involves sophisticated high-end matters for a wide range of businesses. Qualified candidates will be highly motivated, have excellent academic credentials, strong analytical abilities, excellent oral and written skills and will be a self-starter. It is highly preferred that the candidate have front-line experience in motion practice, depositions and discovery, hearings, ADR and trials. Winthrop & Weinstine offers competitive salary and benefits and a team approach to providing our clients with top quality service. EOE. Please apply at: https://bit.ly/3iiTO5S

MASLON IS SEEKING a lateral attorney with no less than five years of employment counseling experience to join its Labor & Employment Law practice. Our lawyers represent employers in virtually all aspects of their employee and labor relations. Qualified candidates must have significant counseling experience with superior knowledge of the law, a strong commitment to client service, the ability to work efficiently to help our clients problem solve, communication and drafting skills that inspire the confidence of our clients, a willingness to generate publications and speak in public to help our clients stay on top of workplace developments. For more information, visit us at: www.maslon.com.

FOR SALE

PRACTICE FOR SALE. The partners in a general practice with an emphasis in family law and estate planning are retiring after a combined 70 plus years of practice. Anyone interested in stepping into the existing operation and office space with equipment and furnishings in a north suburban area is invited to call 763-780-8262. Serious inquiries only please.

OFFICE SPACE

MINNETONKA SUITES and Individual Offices for Rent. Professional office buildings by Highways 7 & 101. Conference rooms and secretarial support. Furnishings also available. Perfect for a law firm or a solo practitioner. Office with 10 independent attorneys. Call 952-474-4406. minnetonkaoffices.com

▲▲▲▲▲

MENDOTA HEIGHTS office-sharing arrangement. Private furnished office, private reception area with separate entrance, support staff workstation, shared conference room, shared copier and work station area, shared storage room, shared kitchenette, free parking. Located near intersection of Highway 35E and Highway 13. Rent $1,000 per month. Call Lynne at: 651-554-9159.

▲▲▲▲▲

NORTH METRO suburban law firm at 694 and Lexington Avenue offers attractively furnished office space including windowed offices and cubicles in a Class A office building. Amenities include workroom, conference rooms and lunch/break room. Underground parking available. Please email: cghimenti@hansendordell.com for more information.

▲▲▲▲▲

SHARED OFFICE space and shared support staff available with a successful immigration and personal injury attorney. Modern, attractive building at the intersections of Highway 100, 694, and 94 in Brooklyn Center twenty (20) minutes away from the courthouses in Minneapolis and Anoka. The office is located at 6160 Summit Drive North, Brooklyn Center. Contact: ewiafe@ernestwiafelaw.com Phone: (651) 321-4713 and eric@eric-richardlaw.com Phone: 612-250-2492

▲▲▲▲▲

WHITE BEAR LAKE offices – all inclusive. office space located at 4525 Allendale Drive. Rent ($700 – $950/month) includes telephone system, internet, color copier, scanner, fax, conference room, receptionist, kitchen, utilities and parking. Contact Nichole at 651-426-9980 or nichole@espelaw.com

▲▲▲▲▲

EDINA OFFICE space available. Our professional, innovative and unique office space contains private offices, office suites, open workspaces, and multiple meeting rooms, all offering state-of-the-art technology and enhanced safety precautions, along with premium amenities. Learn more at Collaborativallianceinc.com or email: ron@ousky.com

POSITION AVAILABLE

THE CITY ATTORNEY is a professional position responsible for conducting, coordinating, and monitoring legal matters on behalf of the City and providing leadership and oversight to the City Attorney's Office. This is an at-will position reporting to the Council and Mayor and administratively to the City Administrator. Other primary responsibilities include giving legal advice concerning City government to the Council, Mayor, City Administrator, City department personnel and other City boards, commissions, and committee members. The City Attorney represents the City and its boards, commissions, and committees in litigation before state and federal courts and before regulatory agencies. The incumbent is responsible for the preparation of all legal documents such as findings of fact, contracts and ordinances for the City and its boards, commissions, and committees. For more information and to apply online, visit: www.rochestermn.gov

▲▲▲▲▲

WANTED: STAFF Attorney or paralegal, to assist low-income clients in northwest Minnesota with a focus on elder law and public benefits. Full-time or part-time and/or remote work options may be available. For more information about the firm and the position see our website: www.lsnmlaw.org. Requirements and Qualifications: Law degree and a license to practice law in Minnesota or candidate for admission. Provisional hiring contingent upon taking and passing the Minnesota bar examination is possible. For a paralegal, preferably eligible for the Minnesota Legal Paraprofessional Pilot Project. Application deadline: July 2, 2021 or until filled. Please send your cover letter, resume and three references to: ahoefgen@lsnmlaw.org.

PROFESSIONAL SERVICES

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

▲▲▲▲▲

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

▲▲▲▲▲

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

▲▲▲▲▲

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

MINNESOTA CLE'S SEASON PASS PROGRAM IS ALL NEW!

3 New Season Pass Options With NEW BENEFITS and LOWER PRICES

Find the Pass That Works Best for You!

FEATURES			
In-Person Seminars – Live and Replay	Unlimited	50% off	Unlimited
Online Seminars – Webcasts and On Demands	50% off	Unlimited	Unlimited
Skills Training	50% off	50% off	Included
eCoursebook Collection	Included	Included	Included
LinkedLaw Deskbook Library	50% off	50% off	Included
Other Minnesota CLE Publications (includes Automated Document Systems)	50% off	50% off	50% off
$50 or $100 Discount for Current or Previous Season Passholders**	Yes	Yes	Yes
My CLE Credit Tracks Minnesota CLE courses attended.	Yes	Yes	Yes

** Depends on previous Pass expiration date and purchase date of new Pass.

For more information or to order, visit www.minncle.org.

Healthy Firm. Happy Firm.

MSBA

Your employees are the driving force of your law firm. Let us help you serve them by providing quality, customizable health care. The MSBA Association Health Plan for member employers with 2 or more employees offers:

- Competitive and flexible coverage
- Savings on administrative costs with potentially lower premiums
- Simple online enrollment platform

If you're not the benefits decision maker, please share this ad with your HR representative or agent/broker.

MSBA ASSOCIATION HEALTH PLAN IS FULLY ACA-COMPLIANT,
SPONSORED BY THE MINNESOTA STATE BAR ASSOCIATION.

LEARN MORE
about flexible health care options including 6 plan designs and 8 provider networks.

VISIT:
MSBAinsure.com/happy

CALL:
888-264-9189

Medica

Mercer

Program Serviced by Mercer Health & Benefits Administration LLC
AR Insurance License #100102691 • CA Insurance License #0G39709
In CA d/b/a Mercer Health & Benefits Insurance Services LLC