OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVI NUMBER III
MARCH 2019
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Bench&Bar OF MINNESOTA

ABA Formal Opinion No. 483, data breaches, and you

Substantial completion and liquidated damages

An interview with Justice Paul Thissen of the Minnesota Supreme Court

The Music Modernization Act, explained

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Save the dates for these Certification events!

Calling all MSBA Board Certified Legal Specialists: Make plans now to attend our 2019 recognition seminar and social, coming up on Thursday, April 25, at the Minneapolis Woman's Club (410 Oak Grove Street). Registration begins at 2:30 pm. Attend one or both CLE sessions. The first program is from 3 to 4 p.m., and the second program is from 4 to 5 p.m. with a social following at 5 p.m.

Another upcoming date to note: The next Civil Trial Certification Exam will be on Saturday, April 13th from 8:30 am to 3:30 pm. The examination, while rigorous, is intended to confirm the knowledge of civil trial law you have already attained during your years of practice. The exam consists of fact patterns about Trial Practice, Evidence, and Ethics, followed by short answer questions. The exam is open book. Examinees may bring their Federal Rules of Evidence, and either the ABA Model Code of Professional Responsibility, Model Rules of Professional Conduct, or the MN Rules on Lawyers Professional Responsibility.

The deadline to apply for the Certified Civil Trial Specialist exam is March 15. For more information visit *www.mnbar.org/certify* or contact Sue Koplin, director of legal certification, at *skoplin@mnbars.org* or (612) 278-6318. ▲

Minnesota State Bar Association
Certified ▲ Specialist

MEET THE STAFF: ***MSBA Certification Director Sue Koplin joined us in September 2018, succeeding longtime Director Jessica Thomas following her retirement. Sue comes to the MSBA from a diverse background. She has been a licensed Minnesota attorney for over 22 years. After serving as a law clerk for Minnesota's 10th Judicial District in Washington County, she went on to practice law for four years at two small firms in Le Sueur and Edina. Later, Sue spent several years as an attorney editor and author at Thomson Reuters, both in-house and on a contract basis. She loves to travel, downhill ski, play tennis and other sports, watch her teenage boys play sports in all seasons, and take her beloved black Lab for walks.***

Court denies MSBA petition on admission to the bar

On February 14, the Minnesota Supreme Court issued an order denying, without prejudice, the MSBA's petition to amend the Rules for Admission to the Bar (File No. ADM10-8008). The requested amendments would have allowed law students to take the bar exam prior to completion of all course work and graduation from law school, provided certain criteria were met. Reducing the time between law school graduation and admission to practice would allow new attorneys to move more quickly into the job market, enhancing their ability to repay student loans.

The Court referred the petition to the director of the Board of Law Examiners to convene an *ad hoc* committee to evaluate whether to recommend a possible pilot project, and if so, to create the rules and the criteria for evaluation that would apply. The MSBA will have two representatives on the *ad hoc* committee. The director's report and recommendations are due by March 1, 2020. The MSBA wishes to thank Michael Boulette, Sarah Soucie Eyberg (who also chaired our Early Bar Exam Committee), and George Henry for drafting the petition. ▲

Meet the Bar rolls on

The MSBA, HCBA, and RCBA's popular Meet the Bar events were held at the University of St. Thomas School of Law on February 12 and at Mitchell Hamline on February 19. Sections and affinity bars were invited to send representatives to speak with students, and the MSBA provided free professional headshots. The 131 students who attended were very appreciative of the opportunity to talk with practitioners and obtain a complimentary headshot. A heartfelt thanks to the MSBA members who took time out of their busy schedules and braved the snowy weather conditions to appear at these events. ▲

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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@mnbar.org or at the postal address above.

Private discipline in 2018

In 2018, 117 files were closed by the Office of Lawyers Professional Responsibility (OLPR) with the issuance of an admonition, a form of private discipline reserved for professional misconduct that is isolated and non-serious.[1] This number is up from private discipline in 2017 (90 admonitions), but on par with 2016 and 2015. Additionally, 14 files were closed with private probation, the same number as in 2017. Private probation, which must be approved by the board chair, is generally appropriate for attorneys with more than one non-serious violation who may benefit from supervision.

This sampling of admonitions is offered to highlight issues that lead to private discipline.

The no-contact rule

Rule 4.2 provides that:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[2]

Periodically, lawyers are disciplined for violating this rule. In 2018, the Minnesota Supreme Court affirmed an admonition where an attorney communicated with a represented co-defendant immediately following one party's settlement of the case.[3] The Court's opinion is illuminating because it walks through the elements of the rule violation (ongoing representation, merits of the matter, and knowledge of representation), and rejects respondent's attempts to narrowly interpret the rule. The case also illustrates the extensive remedies available in Minnesota to respondents subject to private discipline—the right to appeal to a panel of the Lawyers Board and to the Minnesota Supreme Court itself—and it reminds us that technical violations of the rule are still rule violations warranting discipline.

SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

Lesson: Always clarify with counsel—not the represented party—the scope of the representation so you do not violate the no-contact rule.

Confidentiality

All information relating to your representation of a client is confidential under the ethics rules.[4] Because it is confidential, information relating to the representation should not be disclosed unless it falls within one of several specifically enumerated exceptions to the confidentiality rule.[5] One of the exceptions is to prove that services were rendered in an action to collect a fee.[6] In sharing confidential information, it's important to bear in mind that you should only be sharing information necessary to establish your claim. An attorney was recently admonished when his response to LawPay went beyond proof of services rendered, delving into confidential communications relating to the representation that had little to do with the fee dispute. Specifically, the response to LawPay—and a third party who had referred the client to the attorney—quoted and enclosed unredacted attorney-client communications relating to the merits of the claim the attorney was handling. In the lawyer's view, the information demonstrated the unrealistic expectations of the client. LawPay, in contrast, was basically looking for a copy of the signed fee agreement and proof of services rendered, such as invoices, which respondent did *not* provide.

Lesson: Tread carefully when disclosing information relating to your representation to third parties, making sure there is an exception that will cover your disclosure—and only disclose the information necessary to address the issue at hand.

Misuse of "evidence"

Rule 4.4(a) provides:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.[7]

In a harassment restraining order proceeding, an attorney met with the opposing *pro se* party and advised the party that the lawyer intended to admit into evidence at the upcoming hearing a police report involving the *pro se* party's boyfriend (who was not the subject of the HRO). The report disclosed confidential medical information about the boyfriend unrelated to any issue in dispute in the HRO proceeding. The *pro se* party agreed to dismiss her HRO because she did not want the medical information, which was embarrassing, to be part of the court record.

During the ethics investigation, the attorney was unable to present credible arguments as to why the information was potentially admissible or relevant, leading to the conclusion that its use in negotiations had no substantial purpose other than to embarrass the *pro se* party sufficient to prompt the dismissal of the HRO. This matter also presented a close question as to whether the rule violation was isolated and non-serious, given that the attorney's action led directly to the dismissal of a pending proceeding.

Lesson: Make sure you have a meritorious, good faith basis for the means you are using to accomplish your client's goals.

TREAD CAREFULLY WHEN DISCLOSING INFORMATION RELATING TO YOUR REPRESENTATION TO THIRD PARTIES, MAKING SURE THERE IS AN EXCEPTION THAT WILL COVER YOUR DISCLOSURE.

Conclusion

Private discipline is just that—private.[8] With few exceptions, unless an attorney provides written authorization, the Office does not disclose private discipline to third parties. Fortunately, most attorneys who receive admonitions often have no further disciplinary issues. However, if an attorney engages in further misconduct, prior private discipline may be relevant in determining the appropriate level of discipline for subsequent conduct, and may be disclosed if future actions result in public proceedings.[9] ▲

Notes

[1] Rule 8(d)(2), Rules of Lawyers Professional Responsibility (RLPR).

[2] Rule 4.2, Minnesota Rules of Professional Conduct (MRPC).

[3] *In re Charges of Unprofessional Conduct in Panel File No. 41755*, 912 N.W.2d 224 (Minn. 2018).

[4] Rule 1.6(a), MRPC, provides "a lawyer shall not knowingly reveal information relating to the representation of a client."

[5] Rule 1.6(b), MRPC, lists 11 exceptions authorizing disclosure of confidential information.

[6] Rule 1.6(b)(8), MRPC, comment [9].

[7] Rule 4.4(a), MRPC.

[8] Rule 20(a), RLPR. Note, Rule 20 addresses in detail the circumstances under which the OLPR may disclose information to third parties and others involved in the lawyer regulation system.

[9] Rule 19(b)(4), RLPR.

Third-party vendors and risk management

It's always scary to think that sometimes data breaches aren't the result of "hacking" so much as user error. Rubrik, a security and cloud management firm, recently learned this the hard way, when a misconfigured server exposed data belonging to major clients.[1] As organizations use increasingly complex technology to handle increasingly vast amounts of client data, it is becoming more and more difficult to keep up with security demands.

As Rubrik was recently reminded, security demands include proper configuration and hardware setup as well as more advanced security measures of the sort I have mentioned in previous articles. Many organizations overlook the fact that third-party vendors can cause just as much damage in the event of a breach as an internal cybersecurity event. Reputationally, operationally, and financially, where the breach originated doesn't matter as much as who the breach is going to impact most. If the answer is an organization's major clients, I am willing to bet those clients won't care either.

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 trials. He is a member of the MN Lawyers Professional Responsibility Board.

Managing third parties

Most organizations have some degree of third-party involvement in managing internal systems and cloud services, or in helping conduct some operational function. When entering into agreements for these services, it's advisable to have a designated person who is responsible for overseeing the agreement process and guiding the management and review of third-party risk. All third-party vendor relationships come with a degree of risk, regardless of the service they are providing. In the massive Target data breach of 2013, it was a third-party that compromised Target's data, affecting millions of its customers. Keep in mind that this third party provided HVAC and refrigeration services.[2] It goes to show that regardless of the company, third-party involvement always comes with dangers and requires continuing oversight past the initial stages of the agreement. Cyber risk management calls for separate ownership of different levels of risk, including third-party relationships.

Once a responsible person or group is designated for the management and overview of third-party relationships, one key task is to keep track of where organizational data resides. Record where the data is being stored, what type of data it is (especially if it's highly confidential or protected), and how the data is being protected by each vendor. Try to limit which vendors have access to sensitive data and incorporate ongoing reviews and audits as part of continued due diligence. Prior to entering into any new agreements, thoroughly research the prospective party's stance on cybersecurity issues and how they have handled any past incidents. What controls are used for sensitive data and who has access to systems? Do they audit their third-party subcontractors? Do they have an incident response plan? Is it readily available for review? Does it comply with the standards of the internal response plan in place? Asking the right questions can help determine whether the value of a third-party agreement is worth the risk from the outset.

Assessing risk

Service-level agreements should be created in compliance with the same security protocols and policies that regulate internal operations. When an organization trusts an outside source with its data or allows it access to the organization's networks, that source is now an element of its risk profile. If that vendor is vulnerable, so are you. If that vendor has a weak security posture, so do you, no matter how stringent your internal policies are. In addition to the reputational, financial, and operational risks that may be incurred from a third-party security incident, legal risks must also be taken into account—especially in light of HIPAA and GDPR regulations. Transparency about reporting data breaches is critical when it comes to working with third-party vendors; immediate notification of cyber events should be a stipulation of any agreement. Contractual considerations should include access requirements, reputation of the third party, liability, audit procedures, and termination of access to data when the agreement is cancelled or expires.

It is impossible to ensure perfect security, but organizations can take measures to mitigate the risks associated with advanced technology systems and growing volumes of data. Whether it's ensuring proper configuration of systems or controlling access, third-party vendor agreements introduce another element of risk to your organization that may be difficult to fully account for or control. Considering each level of risk, including legal obligations, and promoting regular audits under the supervision of a single responsible individual within the organization can assist in identifying and mitigating the risks associated with third-party involvement. That also includes trying to ensure that the third party has the same dedication to developing cultures of security that your organization does. ▲

Notes

[1] Kelly Sheridan, "Rubrik data leak is another cloud misconfiguration horror story," Dark Reading (1/30/2019). *https://www.darkreading.com/cloud/rubrik-data-leak-is-another-cloud-misconfiguration-horror-story/d/d-id/1333767*

[2] Brian Krebs, "Target hackers broke in via HVAC company," Krebs on Security (2/14/2014). *https://krebsonsecurity.com/2014/02/target-hackers-broke-in-via-hvac-company/*

Welcome to the New Age:

The Music Modernization Act

The federal Music Modernization Act signed into law in late 2018 is the first major update to music copyright law in decades. It heralds a new era in which rights management and royalty collections will be streamlined, and creators will be better compensated for their music.

Introduced in the U.S. House of Representatives in December 2017 by Reps. Doug Collins (R-GA) and Hakeem Jeffries (D-NY), H.R. 4706 became known as the Music Modernization Act of 2017.[1] The bill underwent months of analysis and revisions, taking input from music publishers, composers, record labels, digital music providers, performing rights organizations, rights administrators, and trade associations.

What emerged was omnibus bill H.R. 1551, known as the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA).[2] The act combined the December 2017 legislation—retroactively named the Musical Works Modernization Act[3]—with the Classics Protection and Access Act[4] and the Allocation for Music Producers Act.[5] The resulting bill—lauded for its extensive bipartisan support as well as an unprecedented level of cooperation amongst music industry participants—was signed into law on October 11, 2018.[6]

ALEXANDRIA MUELLER graduated cum laude from Mitchell Hamline School of Law in 2016 and practices entertainment law in Minneapolis. She is currently vice-chair of the Sports, Art & Entertainment Law Section of the MSBA.

The MMA's primary aim is to update the framework that governs sound recording licenses and royalties. For purposes of music copyright, there are two incarnations of the works involved: the recorded music and the underlying composition that is embodied in the recording. The rights for the recording are often owned by different parties than the rights for the underlying composition, and the existing copyright laws often placed sound recording owners at a disadvantage when it came to collecting royalties.

Public performance royalties are generated whenever music is performed live or is broadcast, such as on television or terrestrial[7] radio. Performance royalties are collected on behalf of composers and publishers by performing rights organizations (PRO).[8] A PRO issues licenses to broadcasting entities, typically using a blanket license[9] that grants permission to use any of the music in the PRO's catalog for a set fee.[10]

Digital age challenges

Under the 1976 Copyright Act, there are no performance royalties for the use of the sound recording, only for the use of the composition.[11] This means that while the songwriters and publishers receive royalties for broadcasts, recording artists and record labels do not.[12] Enter the internet. In 1995, Congress created a digital performance right for sound recordings, and since then, sound recording owners and recording artists have been entitled to performance royalties for sound recordings transmitted over the internet.[13]

Complicating matters still further is the classification of a digital music provider as interactive or non-interactive.[14] In addition to paying performance royalties, interactive streaming services such as Spotify are required to obtain mechanical licenses, which is the same license required to distribute music in a physical format or for a download. Mechanical licenses historically have been cleared on a song-by-song basis, and the system for obtaining them is simply not capable of handling the volume of licenses required for digital music providers. To make matters worse, there is not a centralized database that lists owners of sound recordings, so the digital music providers cannot easily determine who to contact or pay for many recordings and have resorted to filing millions of notices of intent (NOI) with the Copyright Office.[15] Under the NOI process, copyright owners cannot retroactively collect royalties if they are later identified, leading to the so-called royalty "black-box," and millions of dollars unpaid to rights holders.[16]

The new regime

The MMA addresses these problems in several ways. First, it establishes a new administrative organization for mechanical licenses, called the Mechanical Licensing Collective (MLC).

The MLC will allow digital music providers to obtain blanket licenses, which will cover permanent downloads, limited downloads, and interactive streams. The MLC will also create and maintain a publicly accessible database of sound recordings and musical works that includes their owners and respective ownership shares. In addition to benefiting the digital music providers, this centralized information will expedite all mechanical licensing in the U.S.

Once the blanket license becomes available, the Copyright Office will no longer accept notices of intent from digital music providers. In the case of works whose owner cannot be identified, the MLC will hold royalties in escrow for three years, after which it will simply disburse the funds to copyright owners based on market share. Like the licenses issued by the PROs, the MLC rates will be determined by the Copyright Royalty Board,[17] but the MMA makes some changes to the process, including a rotation of the judges for rate court proceedings, and establishing a willing buyer/willing seller standard.

Pre-1972 recordings and royalty splits

The second part of the MMA (The Classics Protection and Access Act) concerns pre-1972 sound recordings. Sound recordings were not given copyright protection until 1972, meaning any recording made before February 15, 1972 falls outside of federal copyright laws.[18] This created a problem for sound recording owners in attempting to prevent others from using or duplicating the recordings, and a patchwork of state laws emerged to try to address the problem. The MMA ensures that legacy artists are compensated for pre-1972 sound recordings used in non-interactive digital transmissions, and grants remedies to sound recording owners under federal law.[19]

Finally, the MMA's third section (the Allocation for Music Producers Act) codifies an existing practice of compensating music producers out of a portion of an artist's royalties. Artists who have agreed to royalty splits with their producers will provide SoundExchange (the entity responsible for collecting and distributing digital performance royalties for sound recordings) with a letter of direction that enables SoundExchange to pay the producer directly.[20] In the absence of a letter of direction, SoundExchange will automatically deduct 2 percent of royalties for any sound recording fixed before November 1, 1995 and allocate these funds to producers involved in making that recording.[21]

The MMA is a significant step in addressing several issues faced by the music industry. The Register of Copyrights is currently in the process of designating the MLC.[22] On February 4, 2019, the National Music Publishers Association (NMPA), Nashville Songwriters Association International (NSAI), and the Songwriters of North America (SONA) submitted their MLC proposal, the second proposal submitted for consideration.[23] The first proposal was submitted by the American Mechanical License Collective (AMLC).[24] The Register of Copyright is accepting proposals until March 21, 2019[25] and is expected to designate the MLC later this year,[26] meaning the database construction could commence shortly thereafter. Blanket licenses should become available in 2021. ▲

Notes

[1] *See* H.R. 4706, CONGRESS.GOV, *https://www.congress.gov/bill/115th-congress/house-bill/4706/text*.

[2] *See* H.R. 1551, CONGRESS.GOV, *https://www.congress.gov/bill/115th-congress/house-bill/1551/titles*

[3] (H.R. 4706/S.2334).

[4] (H.R. 3301/S.2393).

[5] (H.R. 881/S.2625).

[6] (Public Law No: 115-264).

[7] Terrestrial radio is also referred to as 'traditional' radio, meaning radio transmitted via radio broadcasting towers, as opposed to internet or satellite radio.

[8] In the U.S. the PROs are the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc. (BMI) and SESAC, Inc.

[9] A blanket license is "a non-exclusive license that authorizes a music user to perform ASCAP [or BMI] music, the fee for which does not vary depending on the extent to which the music user in fact performs ASCAP [or BMI] music." Consent Decree, *U.S. v. ASCAP,* 2001 WL 1589999 (S.D.N.Y. 6/11/2001).

[10] Composers can only belong to one PRO, so many broadcasters obtain blanket licenses from both ASCAP and BMI in order to have a wider selection of music available to them.

[11] *See* 17. U.S.C. §114(d).

[12] "This arrangement is the result of a long-standing argument made by terrestrial broadcasters that performers and labels benefit from the free promotion received through radio play. Broadcasters contend that airplay increases album sales, which leads to compensation for performers and record labels. As a result, broadcasters have, for decades, convinced Congress that they should be exempt from paying the public performance royalty for sound recordings." *Public Performance Right for Sound Recordings,* FUTUREOFMUSIC.ORG, *https://futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings.* The U.S. is an outlier in this regard—most other countries do pay royalties for performance of the sound recording. *Id.*

[13] In 1995, Congress passed the Digital Performance Right in Sound Recordings Act which added a performing right for sound recordings in §106, entitling recording artists to royalties for the performance of a sound recording if it is transmitted over the internet, and doesn't fall into one of the exemptions in §114.

[14] Interactive (user-selected) streams are sometimes referred to as on-demand streams. U.S.C. §114(j)(7). Noninteractive streams "are very generally defined as those in which the user experience mimics a radio broadcast. That is, the users may not choose the specific track or artist they wish to hear…." *Licensing 101,* SOUNDEXHANGE.COM, *https://www.soundexchange.com/service-provider/licensing-101/* .

[15] Rep. Doug Collins (R-GA), *The Music Modernization Act Will Provide a Needed Update to Copyright Laws,* The Hill (1/10/2018), *http://thehill.com/blogs/congress-blog/technology/368385-the-music-modernization-act-will-provide-a-needed-update-to*. *See* 17 U.S.C §115(b).

[16] *Id.*

[17] This applies to ASCAP and BMI, which operate under consent decrees.

[18] *See A Study on the Desirability and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction,* COPYRIGHT.GOV *https://www.copyright.gov/docs/sound/pre-72-report.pdf.*

[19] Public Law No: 115-264 §202. This section pre-empts existing state and common law claims. *Id.*

[20] Public Law No: 115-264 §302.

[21] *Id.*

[22] *See Request for Information on Designation of Mechanical Licensing Collective and Digital Licensee Coordinator,* FEDERALREGISTER.GOV *https://www.federalregister.gov/documents/2018/12/21/2018-27743/request-for-information-on-designation-of-mechanical-licensing-collective-and-digital-licensee.*

[23] *See The NMPA Submits Their Mechanical Licensing Committee (MLC) Proposal — And Calls for a No-Bid Contract,* DIGITALMUSICNEWS.COM, *https://www.digitalmusicnews.com/2019/02/04/nmpa-mechanical-licensing-committee-mlc-mma/* .

[24] *Id. See also Lobbying for Spots on the Music Modernization Act's Licensing Collective Heats Up,* BILLBOARD.COM, *https://www.billboard.com/articles/business/8491190/lobbying-spots-music-modernization-act-licensing-collective-heats-up.*

[25] *See Request for Information on Designation of Mechanical Licensing Collective and Digital Licensee Coordinator,* FEDERALREGISTER.GOV *https://www.federalregister.gov/documents/2018/12/21/2018-27743/request-for-information-on-designation-of-mechanical-licensing-collective-and-digital-licensee.*

[26] Public Law No: 115-264 §102.

'I find value in helping people who help others'

IRENE KAO is the intergovernmental relations counsel at the League of Minnesota Cities, where she advocates on behalf of cities at the state Legislature and serves as legal counsel for the lobbying department. The League of Minnesota Cities is a membership organization serving over 830 cities through advocacy, education, and risk management. For more information, see www.lmc.org.
IKAO@LMC.ORG

Why did you go to law school?

As a high school student and the first in my family to go to college, I said I wanted to go to law school. At that time, I said it because I was involved in mock trial and speech, but I didn't really know why I wanted to go to law school. In college, I changed my mind and ended up going to graduate school and working at colleges and universities. It was great working to help students at an individual level, but I didn't feel like I was able to help at a larger organizational or societal level. So I went to law school.

Tell us a little about your job with the League of Minnesota Cities, and what you find appealing about government relations work.

The League of Minnesota Cities, as a membership organization, provides education, risk management, and advocacy for all cities throughout every corner of the state. I work with small cities—such as Funkley, population 10—to our largest members of Minneapolis and St. Paul. No matter the size or where they are located in Minnesota, I have learned that cities want to serve their communities the best they can.

When people think of lobbyists, they may think of political fundraisers and favor-swapping. One of the many things I enjoy about lobbying for the League is that we don't have a PAC. It isn't money that we rely on; instead, our political capital is in the expertise of our members. City officials, elected and appointed, are intimately familiar with their local communities. It's my job to help legislators understand how their bills impact the local communities in their districts.

What's the best advice you ever received?

"Say what you mean and mean what you say." I first heard this piece of wisdom when I was a teenager. It means even more now, given my line of work. I want cities to be the best they can be. That means when cities want to serve their residents and communities in better way, I attempt to smooth the way through new laws and advocacy at the state capitol. But it also means that if cities do something wrong or need to change, I need to acknowledge that as well. Reputation and credibility are cornerstones of being an effective lobbyist and lawyer. Heeding these wise words from my teenage years helps me be steadfast with these cornerstones.

You have been a devoted volunteer at bar groups like the MSBA and the Minnesota Asian Pacific American Bar Association. What have you found most valuable about your involvement in bar groups?

Helping where I can. We are fortunate to be lawyers. The law affords us a lot of knowledge, and therefore power. We use that knowledge and power to help our clients and society on a daily basis. But how do we help one another?

Be it providing a different perspective when I served on the MSBA Council, facilitating comprehensive board policy review with MN CLE in service as board chair, or helping diverse candidates with the judicial appointment process through the Minnesota Asian Pacific American Bar Association or the Infinity Project, I find value in helping people who help others every day.

It's a bonus that I get to meet great people along the way, some of whom have become my closest friends.

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

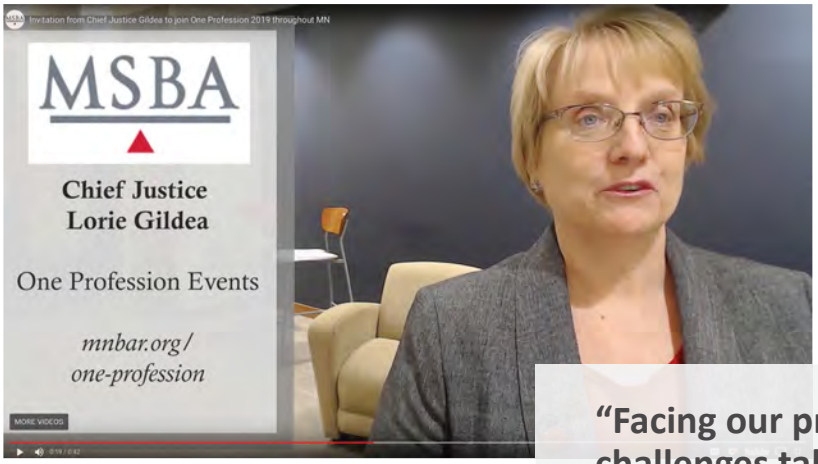
Outside of work, my bar activities, and being a supportive parent, I like to unwind by watching great television series, such as *Killing Eve, Sherlock,* and *Luther*. These shows are a good reminder that you don't have to be perfect to be great at what you do. Being flawed is what makes the main characters so endearing. ▲

ONE Profession

One Profession.
One Day.
Coming Your Way.

The MSBA's One Profession events bring together judges and lawyers for one day each year to discuss the issues and opportunities facing the legal profession around Minnesota. These programs are open to all lawyers—MSBA members and non-members alike.

Join your colleagues for presentations, panel discussions, and conversations with attorney thought leaders. Each One Profession event is unique—tailored to reflect the interests and concerns of its regional constituents.



MSBA Minnesota State Bar Association

Upcoming One Profession Events

MARCH 22
9th Judicial District, Bemidji

MARCH 28
5th Judicial District, Mankato

APRIL 26
3rd Judicial District, Rochester

MAY 17
7th Judicial District, Long Prairie

JULY 11
10th Judicial District, Coon Rapids

OCTOBER 25
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No, You Can't Call Him an

on Facebook

Counseling clients about social media and divorce

By Tifanne Wolter

Divorce is one of the most stressful and painful experiences a person can undergo. And in the age of social media, where people often feel compelled to broadcast every little detail about their lives to the whole planet, the experience can become even more fraught. There is significant risk to clients who choose social media as the avenue to convey their feelings and document their actions in this difficult time. While it is human to want to share your pain and anger, social media records can find their way into court pleadings and proceedings. Judicial officers will be displeased to read posts that criticize, demean, or otherwise case a negative light on the other party.

A person's social media footprint looms so large as a potential factor in divorce that, prior to meeting with a client, I'll often do an assessment of her social media presence. I'm looking for existing issues, but also to get a handle on personality and temperament. I much prefer to have a sense of what I can expect and to determine whether coaching will be needed on any issues. Social media is often an outlet for clients to keep in communication with supportive friends or family. But posts that may seem harmless or newsworthy to the client may prove to be unpleasant or damaging in the eyes of others. If I had a nickel for every time I had to say, "No, Janice, you can't call him a SOB on Facebook," chances are I'd have a nice place in the Caribbean by now.

Unless I see a significant problem, the initial consultation isn't typically the place to talk about social media or the related problem of disentangling a couple's digital resources. As a divorce attorney, I may be the first person with whom a client has even talked about a divorce. An initial consultation is often highly emotional and sometimes the client is overwhelmed with information just about divorce laws and the process itself. Once retained, however, I will schedule a time where we discuss social media, communication by email and text message, and access to online accounts. It may even be helpful to create a handout or post a blog entry on your website to which you can refer clients.

First things first

Social media can be a great way to connect with people—but in a divorce, it is one of the most common traps a client can fall into. Drunken vacation photos, memes about parents who just want to keep the kids for child support (or other memes that point blame at ex-spouses), and tweets generally badmouthing people related to the divorce are not helpful in the divorce process. Opposing counsel and judicial officers will see this communication adversely.

It's also important to learn whether the client's children are on social media, and if necessary take steps to prevent their exposure to this kind of content. Back in the days when MySpace was popular, I had an opposing party who liked to write erotica. She had a pseudonym with a MySpace profile. But the parties' children, who ranged in age from eight to 14, were "friends" with the account she created under her pseudonym (along with a lot of other creepy people). We were able to use this as evidence in our custody case.

By its nature, social media creates a sort of cocoon that makes it easy for a client to believe all of his or her friends are loyal, caring individuals. This is a myth. I talk with clients about asking their friends never to publish compromising pictures or posts involving the client. More importantly, clients must understand the importance of managing their own online behavior and hewing to best practices during the divorce proceedings.

If they can't, then I advise them to stop using social media entirely—cold turkey. It's the only way to guarantee that no new damaging information from those outlets will ever end up in front of a judicial officer. A client can deactivate their profiles for a period of time. When cases are extremely contentious and you have a client whose posts are continuing to ratchet up the conflict, this may be the best practice.

Stop sharing digital accounts

Couples frequently share digital accounts. One of the first things I advise is to change *all* passwords—this means every account, including social media, email, patient health records, credit cards, and financial accounts in the client's own name. It seems like an obvious task, but at a time when the client is overwhelmed and stressed, it often gets forgotten or delayed. This simple action can prevent a lot of trouble down the road. I always advise clients to make the change significant, not just one letter or number. Do not pick a password that has personal significance that a spouse could guess, such as a child's birthdate or a pet's name. Also, it is not wise to write it down somewhere that the spouse could find it. If your client needs help remembering passwords, suggest downloading a password keeper app for their phone. Reading someone else's email without permission is a crime under the Electronic Communications Privacy Act (18 U.S.C. §2510).

I once had a situation where a client had followed my advice and changed his email password, but because he had only changed one number in the password, his wife was able to access his email account. She read every email that he and I had exchanged, and even forwarded a few to herself. My client reported the illegal access to his local police department but was dismissed as a disgruntled soon-to-be-ex-spouse. Getting a police department to investigate and a prosecutor to charge the crime is difficult. Knowing this, it's important for clients to take changing passwords seriously to protect their private information and communications with their attorney. Clients might consider creating an entirely new email address that their spouse does not know about, just for attorney-client communications.

DO NOT EVER ADVISE YOUR CLIENT TO DELETE POSTS. DELETING A POST IS SPOLIATION OF EVIDENCE. INSTEAD, THEY CAN CHANGE THE PRIVACY SETTINGS SO THAT THE POST IS ONLY VISIBLE TO THEM.

Sometimes a divorcing couple still shares a residence. This may mean that they share a computer or other electronic device. I advise clients to delete all saved passwords. Saving passwords for websites saves time, but they can also be used by an unscrupulous spouse to gain access to accounts and information. And clients must also keep in mind that there are many ways passwords may be saved. The individual website may save the password, but the web browser might also save the password. Instruct your client to review the browser settings and delete the passwords saved there. Next have them delete their "cookies" in order to remove the passwords saved on the individual websites.

More do's and don'ts

Accounts and information may be shared across several devices. Apple products users need to pay special attention to this. For example, text messages and emails sent from an iPhone may show up on an iPad or a Mac computer.

I once had a client who could not figure out how her spouse knew information from text messages that she had sent to close friends and family members. It turned out that her Apple account was linked to her daughter's iPad, and her husband read all of her text messages when the daughter brought the iPad to his house during parenting time. Another client's teenage daughter found out her mother was having an affair in a similar way. The daughter was using her mother's Mac Book while her mother was texting with her paramour on her iPhone, and the daughter read all of the text messages being sent back and forth while she was using the computer to do her homework.

Often, clients may want to move on to their next relationship while the proceedings are ongoing, and will turn to online dating to meet new people. Dating profiles will often contain information that paints the client or opposing party in a very good light, true or not. This profile data is public. If a party embellishes their profile to indicate they are wealthy, childless, or the owner of multiple homes or properties, problems will certainly arise. For instance, while your client may want potential dates to believe he makes $750,000/year, if his pleadings state he's self-employed and doesn't make any money, this will be problematic.

I generally advise clients to watch everything that they do on the internet. Even their Craigslist postings or eBay transactions may prove significant. The last thing you want to see is your client selling all of the parties' personal property on the Facebook Garage Sale Group. I recently had a case in which my client's former neighbors called him to let him know there was a lot of traffic coming and going from the house. He discovered his wife had posted a liquidation sale on Craigslist. She was selling everything.

GoFundMe or other fundraising websites are another great resource for mining information. If one of the parties starts up a GoFundMe campaign to raise money for legal fees and posts it all over Facebook, someone is going to see it and share it with the opposing party. A party that starts up a GoFundMe campaign usually has a story to go along with their request for money—often embellished in order to elicit sympathy—and those statements can be used against them.

Limiting any damage

Despite all of your warnings, divorce is painful and messy. Emotions run high, and clients will make missteps. When that happens, the most damaging thing your client can do is try to cover it up or hide it. Do not ever advise your client to delete posts. Deleting a post is spoliation of evidence. Instead, they can change the privacy settings so that the post is only visible to them.

Whatever emerges from social media or other internet sources, your client needs to take responsibility for the issue and explain why the action was taken. If your client sends their spouse inflammatory text messages or emails, for example, advise your client to immediately stop the behavior. The client should apologize for the communications and then simply quit the offending behavior. If they own up to it and the behavior stops, those offensive communications could become a blip on the radar at trial. In other words, bury the bad communication in a stack of good communication.

One slip-up is unlikely to be the death of your case. We can all certainly understand that people get frustrated and sometimes reach their breaking point. Sometimes when that happens they act out in a manner that they should not—and usually would not. If counterproductive behavior becomes habitual, though, your client will have a significant problem.

Ultimately, the best advice we can give our clients in a digital world is to imagine their judicial officer is sitting over their shoulder, watching every post, email, and communication. It's difficult for clients to turn off the emotions that come with the most stressful events of their lives—but as counsel, we can help them understand how significant it can be when they make mistakes, and help them navigate the digital world as safely as possible. ▲

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Social media and discovery

If you discover that the opposing party in a case has posted something improper on social media, you will need to obtain a copy of that post in a manner that is authenticated and admissible. You can do this in one of three ways. First, you can get the information by obtaining the consent of the opposing party (a release of information). Second, you can subpoena the provider. Finally, you can request that the opposing party produce the data.

If you are able to get a release of information from the opposing party, this might be the best way to obtain the evidence. Most attorneys would probably think that subpoenaing the information directly from the provider is the best practice. It's not. For example, Facebook, the largest social media provider, takes the position that the Stored Communications Act (18 U.S.C. § 2701) protects them from having to provide access to specific information or posts based on a civil subpoena. They will respond only to federal or California subpoenas. If the subpoena comes from another state, the subpoena needs to be domesticated by a California court.

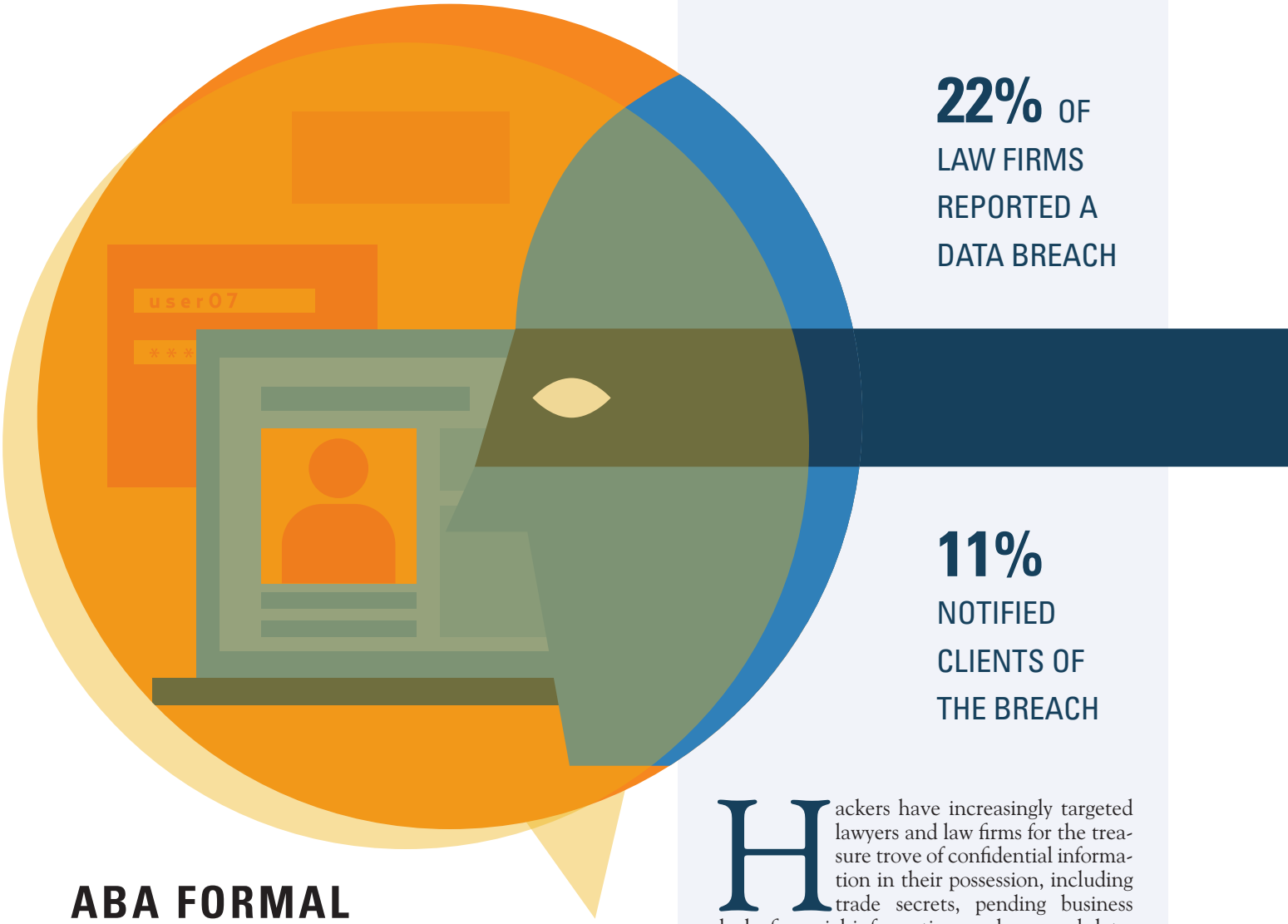
Even then, Facebook will only provide what is called a "neoprint" of the user's basic information. Facebook will also charge a processing fee for the subpoena. The amount they charge changes from time to time, and at one time was as much as $500. And you will likely have to work with a California attorney to have your subpoena domesticated in California. It's extremely costly and it's unlikely to give you the information you need.

The better practice is to send a Request for Production to the opposing side requesting that the opposing party "download their Facebook information." To do this, instruct the opposing party to go to *www.facebook.com/settings* and click on "your Facebook information." Next, they will click on "view" under the category "Download Your Information." Facebook will allow the user to create an html file that will download posts, photos and videos, comments, likes and reactions, friends, following and followers, messages, groups, events, profile information, pages, marketplace activity, payment history, saved items and collections, your places, apps and websites, and other activity.

You will need to instruct the opposing party on the date range that you want information from, and all of the categories of information you want them to select along with the quality and format of the information. For example, you might send a request that requires the opposing party to download their Facebook information from January 1, 2018 to February 20, 2018 in the categories of posts, photos and videos, comments, likes, and reactions in a high quality html file. Facebook will then create the html file with the requested information. That file can then be saved by the user and provided to you. If you have a Facebook account, I recommend that you consider doing a download of your own data to see how the process works.

If you have already obtained the post that you want to authenticate through your own Facebook sleuthing, or you have obtained it through your client or your client's friend, you can authenticate the post through a Request for Admissions. Requests for Admissions are permitted under Minn. R. Civ. Pro 36.01 to verify the genuineness of any documents described in the request. A copy of the document must be served with the request. The opposing party then has 30 days to respond to the Request for Admissions, in writing, or the requests are deemed to be admitted. A party must be truthful in their answers to the Request for Admissions; if they are not, the court has the authority to deem the matter admitted or require that an amended answer be served.

If you know social media evidence is going to be important in your case, make sure that you plan your discovery strategy early. Obtaining the social media evidence directly from the opposing side is usually going to be the best way to authenticate it. If you need to engage in formal discovery, make sure to leave enough time to allow the opposing side to respond. ▲



22% OF LAW FIRMS REPORTED A DATA BREACH

11% NOTIFIED CLIENTS OF THE BREACH

ABA FORMAL OPINION NO. 483, DATA BREACHES, AND YOU

What's your plan? New ethics opinion requires lawyers to take steps to protect client data from cyber threats.

By Kevin P. Hickey and Jeff Alluri

Hackers have increasingly targeted lawyers and law firms for the treasure trove of confidential information in their possession, including trade secrets, pending business deals, financial information, and personal data. These attacks have resulted in numerous data breaches compromising confidential client information at firms of all sizes in recent years. According to the American Bar Association (ABA) 2017 Legal Technology Survey, 22 percent of responding law firms reported a data breach at some time, a substantial increase from 14 percent the year before.

Law firm security breaches were not limited to larger firms that might be expected to have more valuable data. Rather, law firms of all sizes, including solo practitioners, suffered data breaches. The highest rate of data breaches was in law firms with 10-49 attorneys, at 35 percent. Because of these security breaches, 17 percent of law firms reported the breach to law enforcement and 11 percent notified clients of the breach.

These ever-increasing threats are constantly changing and are limited only by the imaginations of the hackers and cyber-thieves behind them. While there has always been a legal and ethical basis for protecting client data from these threats, this responsibility has been made even clearer by the issuance of ABA Formal Opinion No. 483.

FORMAL OPINION NO. 483

The ABA's Standing Committee on Ethics and Professional Responsibility has recently issued an ethics opinion addressing a lawyer's duties to protect against data breaches. ABA Formal Opinion No. 483 provides:

> *Model Rule 1.4 requires lawyers to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.*

This opinion is grounded in three fundamental ethical principles. First, a lawyer's duty of competence under Model Rule 1.1 requires the lawyer to provide competent representation to a client. The comment to this Rule makes it clear that this duty of competence includes "the benefits and risks associated with relevant technology…." From a practical standpoint, this duty of competence includes an obligation to monitor for a data breach, stopping and restoring any such breach, and determining what occurred so that any harm or loss can be assessed and corrected.

Second, the opinion is based on a lawyer's duty of confidentiality under Model Rule 1.6. The comments to this Rule emphasize that a lawyer must take reasonable measures to safeguard client information and protect it from unauthorized access or disclosure. This does not mean that the lawyer's information systems must be impenetrable. Instead, the comments provide a multi-factor "reasonable efforts" approach that includes consideration of the sensitivity of the information, the likelihood of disclosure, and the costs and difficulties of employing additional safeguards.

Third, the opinion is grounded on a lawyer's duty to keep clients reasonably informed regarding their matter under Model Rule 1.4. This duty requires the lawyer to communicate with clients about a data breach. This includes a duty to notify clients of a data breach when it involves or is likely to involve material client confidential information.

What this opinion makes clear is that lawyers need to have a detailed plan in place to: (1) assess whether a data breach has occurred involving material client information; (2) notify clients of any such breach; and (3) to take reasonable steps to address the situation. Many lawyers and law firms do not have such a plan, or the plan is not updated to reflect the latest cyber security threats. (See also Robert Cattanach and Samir Islam, "Preparing for a Hack of Your Law Firm," B&B Sept. 2017.) Formal Opinion No. 483 is a call to all lawyers and legal organizations to develop or update such a plan in order to comply with ethical obligations to clients. In short, lawyers and legal organizations must be prepared to protect against and respond to a cyber security incident.

DEVELOPING AN INCIDENT RESPONSE PLAN

Developing an incident response plan is not as painful as it sounds. The plan will necessarily evolve over time as technology changes and new threats arise. The starting point is that lawyers should collaborate with their IT professionals and others in the field to gain insight and knowledge that will form the basis of the plan. Key personnel from the organization and its vendors should be included in developing the plan.

The first step is to form an incident response team that may consist of the firm administrator, head of IT, general counsel, the managing partner, or other key personnel. While it is common for "incidents" to be handled by the IT department or vendor, developing a plan is a shared responsibility that should not be placed solely on the shoulders of IT. Each member of the team should have a clearly defined role to allow the team to move quickly and competently to address a threat or breach.

With the team formed, the next step is to document all of the ways the firm interacts with its employees and its clients. In the event a breach affects any of these communication systems, what is the backup plan to communicate? Document all mission-critical systems and note weaknesses in the systems to ensure the firm can mitigate incidents properly.

The next step is to begin drafting the incident response plan. The plan should be very detailed and address all foreseeable contingencies. The National Institute of Standards and Technology (NIST) cybersecurity framework 1.1 is a critical resource in developing a plan and should be carefully followed. In general, the plan should focus on five main areas: assess, contain, communicate, document, and mitigate.

1

ASSESS

The entire organization should be educated on how to quickly identify and assess a potential breach. The organization should implement a security awareness program that includes regular and relevant education on the latest cyber security threats. This should include raising awareness by testing vulnerabilities through a mock phishing exercise or other programs. All lawyers and other end-users should be trained to report anything unusual while using their computer systems or other devices.

Establishing a baseline is critical to effective assessment of the breach. The organization needs to know how something normally behaves to recognize that it is no longer doing so. This means documenting and tracking behavior on a network to recognize changes as well as having a firm grasp of fundamentals to know when something is amiss. For end-users, this means recognizing abnormal behavior and reporting it immediately to IT and other firm personnel as identified within the plan.

2

CONTAIN

It doesn't take long for bad actors to make things a lot worse. Containment should focus on preventing further harm. The best way to contain the threat is to restrict access by closing open network ports, changing passwords, suspending elevated privilege accounts, or isolating the computer(s) from the network.

Take caution in the actions during containment and make sure to thoroughly communicate. While these actions may prevent the bad actors from causing more damage, they can also interfere with employee productivity. IT should discuss the potential impact of these actions with firm management to ensure continuity of mission-critical functions during containment.

3

COMMUNICATE

Formal Opinion No. 483 emphasizes the importance of communication in the event of a breach. Lawyers are required to act promptly and responsibly in notifying clients of a breach. It is equally important to increase internal communication to ensure everyone is aware of the situation and is working together to help mitigate further risk.

Outline communication details in the plan and identify a point person to coordinate communication throughout the remediation of the breach. Identify who will communicate with clients, personnel, vendors, and law enforcement if necessary. Draft or form communications are advisable to expedite notification if a breach occurs. If the breach impacts any communication system, make sure there is a back-up method to communicate (for example, use texting if the email system is compromised). The bottom line is that everyone must know who to communicate with, how to communicate with them, and when to communicate.

4

DOCUMENT

It is extremely important to document each step taken during an incident. Not only can this help with communication, it can also help to mitigate the current problem and prevent the next one. This may include imaging the affected computer(s) for later analysis.

The document phase should identify what computer(s) were accessed, the origin of the attack, whether malware was used, connections made to and from the system, and finally, whether data was taken, altered or destroyed. If confidential client information has been compromised, this information must be immediately identified and documented so that any harm can be assessed and mitigated, and so that the client can be adequately informed of the impact of the breach.

5

MITIGATE

Common mitigation techniques focus on the removal of malware and/or ransomware, patching vulnerabilities, shutting down any improper access that may have been gained during the incident, and resetting passwords. It is very common to identify additional vulnerabilities during the mitigation process. These vulnerabilities should be documented and addressed promptly.

CONCLUSION

Formal Opinion No. 483 makes it clear that now, more than ever, lawyers and legal organizations must be fully prepared to address a cyber security incident. Developing a comprehensive incident response plan is a necessary first step. But beyond that, lawyers should strive to create an organizational culture of security and privacy through response plans, ethical and legal compliance, and best practices. ▲

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SUBSTANTIAL COMPLETION AND LIQUIDATED DAMAGES

A road not taken

By Isak Hawkinson

Substantial completion dates frequently coincide with liquidated damages provisions in construction contracts; a contractor's failure to meet the deadline set by the former can prompt the enforcement of the latter.[1] Both substantial completion and liquidated damages provisions can spawn litigation, but despite their connection, Minnesota case law examining liquidated damages provisions when substantial completion is in dispute is surprisingly thin.

This article first briefly examines substantial completion dates and their relation to liquidated damages provisions. Second, it proposes that by placing substantial completion at issue in litigation, contractors may take advantage of a relatively untraveled avenue in preventing the assessment of liquidated damages.

Substantial completion

Substantial completion is a significant milestone under most construction contracts.[2] "As a general rule, substantial completion is defined as that point in the construction where the work is sufficiently complete that the owner may occupy or utilize the work for the use for which it was intended." What *actually* constitutes substantial completion depends almost

SUBSTANTIAL COMPLETION

Generally, a significant consequence of achieving substantial completion under a construction contract is that the owner is no longer entitled to assess liquidated damages.

LIQUIDATED DAMAGES

Liquidated damages represent a prior agreed-upon measure of damages and a fixed sum payable to a party when actual damages are difficult to ascertain or prove in the event of a breach.

entirely on the circumstances surrounding a particular construction project. This reality often leads parties to specifically define substantial completion in their contracts.[3] Evidence of substantial completion includes the issuance of a certificate of occupancy or design-professional approval, but such evidence is not determinative.[4]

A substantial completion date serves a variety of purposes, implicating both present and future legal consequences.[5] For example, the substantial completion date can trigger statutes of repose, support breach of contract actions, and cause major payments to contractors to become due.[6] Substantial completion dates—or rather, the failure to meet them—can also trigger negative incentives as well, namely liquidated damages provisions.[7]

Liquidated damages

Liquidated damages represent a prior agreed-upon measure of damages and a fixed sum payable to a party when actual damages are difficult to ascertain or prove in the event of a breach.[8] Owners concerned with timeliness and risks associated with completion delay are attracted to liquidated damages provisions.[9] Owners opt for liquidated damages because they obviate the need for the nonbreaching party to prove actual damages upon breach.[10] Under Minnesota law, liquidated damages provisions are presumed valid.[11] Nevertheless, contractors challenge their enforceability as unreasonable penalties, and such provisions cannot be designed to create windfalls for owners.[12]

Generally, a significant consequence of achieving substantial completion under a construction contract is that the owner is no longer entitled to assess liquidated damages.[13] In limited situations, a breaching party may argue it achieved substantial completion, preventing the enforcement of a liquidated damages provision tied to substantial completion. Because substantial completion must be at issue in addition to the assessment of liquidated damages, though, litigation addressing this argument specifically is uncommon.[14] For a thorough discussion of this argument, practitioners must venture outside Minnesota.

An Illinois case, *Stone v. City of Arcola*, provides such an example.[15] In *Stone*, a court upheld a trial court determination that a sewage treatment facility was substantially complete nearly a year prior to the issuance of a substantial completion certificate, despite unfinished chlorine and alum systems.[16]

Because the sewage facility had been operational in the interim period, the contractor prevailed, and the court halted liquidated damages accordingly. *Stone* is interesting because although the court upheld the trial court's findings as to the date of substantial completion, it overturned the trial court's holding regarding the enforceability of the liquidated damages clause. The liquidated damages were enforceable, but limited by the substantial completion date.

Relying on the same principles as *Stone*, a Minnesota court should reach the same holding in a similar case. In Minnesota, courts are willing to use substantial completion to prevent the assessment of liquidated damages, but Minnesota litigants have yet to present a case where the argument is fully elaborated.[17]

In addition to attacking liquidated damages provisions as unenforceable, contractors seeking to prevent the assessment of liquidated damages provisions can expand their potential for success by placing the substantial completion date at issue. Certainly, from an owner's perspective, artful contract drafting can mitigate the risk that substantial completion is litigated. But, in a fast-paced and high-pressure industry like construction, the realities on the ground do not always mirror the plans. When the right facts arrive, placing the date of substantial completion at issue to prevent the assessment of liquidated damages could yield success for contractors in Minnesota. ▲

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Notes

[1] Barry B. Bramble & Michael T. Callahan, *Construction Delay Claims* §2.04 (6th ed. 2018).

[2] 3 Philip L. Bruner & Patrick J. O'Connor Jr., *Bruner & O'Connor Construction Law* §8:23 (2018).

[3] *Id.*; *e.g.*, "When CONTRACTOR considers the entire Work ready for its intended use, CONTRACTOR shall notify COUNCIL in writing that the entire Work is substantially complete (except for items specifically listed by CONTRACTOR as incomplete) and request that COUNCIL issue a certificate of Substantial Completion. Within a reasonable time thereafter, COUNCIL, CONTRACTOR, and A/E shall make an inspection of the Work to determine the status of completion. If COUNCIL does not consider the Work substantially complete, COUNCIL will notify CONTRACTOR in writing giving the reasons therefor. If COUNCIL considers the Work substantially complete, COUNCIL will notify CONTRACTOR in writing and shall fix the date of Substantial Completion. There shall be attached to the notice a tentative list of items to be completed or corrected before final payment." *Frontier Pipeline, LLC v Metropolitan Council*, No. 62-CV-08-2263, 2009 WL 5454450 (Minn. Dist. Ct. 11/19/2009).

[4] Bramble, *supra*; 3 Bruner & O'Connor, *supra* §8:23; *see also Stone v. City of Arcola,* 536 N.E.2d 1329 (Ill. App. 1989).

[5] Bramble, *supra*.

[6] Minn. Stat. §541.051; *Ross v. Hallmark Homes of Minneapolis, Inc.* 843 N.W.2d 798, 802 (Minn. Ct. App. 2014) (discussing certificates of occupancy in relation to substantial completion and Minnesota's statute of repose); Bramble, *supra*.

[7] 3 Philip L. Bruner & Patrick J. O'Connor Jr., *Bruner & O'Connor Construction Law* §8:26 (2018); Bramble, *supra*.

[8] *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 262 (Minn. 2005).

[9] 2 Philip L. Bruner & Patrick J. O'Connor Jr., *Bruner & O'Connor Construction Law* §7:196 (2018).

[10] *Id.*

[11] *In re Bowles Sub Parcel A, LLC*, 792 F.3d 897, 901 (8th Cir. 2015) (citing *Gorco Constr. Co. v. Stein*, 99 N.W.2d 69, 74 (Minn. 1959)).

[12] Minnesota courts have employed the Restatement of Contracts §339 (1932) to determine if a liquidated damages provision is valid or an impermissible penalty. This test provides, "(1) An agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation." See *Gorco Const. Co. v. Stein*, 256 Minn. 476, 482, 99 N.W.2d 69, 74–75 (1959) (discussing reasonableness of liquidated damages) and more recently, *Schmit Towing, Inc. v. Frovik*, No. A12-0989, 2012 WL 6652637, at *3 (Minn. Ct. App. 12/24/2012) for its application.

[13] 3 Bruner & O'Connor, *supra* §8:26.

[14] *See* 7 Philip L. Bruner & Patrick J. O'Connor Jr., *Bruner & O'Connor Construction Law* § 21:3 (2018). Perhaps many issues surrounding substantial completion are resolved in ADR. Over the last two decades traditional arbitration has begun to fall out of favor with the construction industry, but it currently remains the dominant dispute resolution process in the field. *Id.*

[15] *Stone v. City of Arcola,* 536 N.E.2d 1329 (Ill. App. 1989).

[16] *Id.* at 1338.

[17] *Johnson Bros. Corp. v. Rapidan Redevelopment Ltd. P'ship*, 423 N.W.2d 725, n.2 (Minn. Ct. App. 1988) (addressing in a footnote that a dispute exists regarding substantial completion, but it is not a genuine issue on appeal); *Lunda Const. Co. v County of Anoka*, No. 02-CV-17-244, 2018 WL 3309037, at *7 (Minn. Dist. Ct. 2/2/2018) (rejecting that the project had been substantially completed and liquidated damages could not be assessed).

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'MY FIRST FEW MONTHS HAVE BEEN AMAZING'

An interview with Justice Paul Thissen of the Minnesota Supreme Court

By Jon Schmidt

Justice Paul C. Thissen was appointed to the Minnesota Supreme Court in 2018 by Gov. Mark Dayton. Prior to joining the Court, Justice Thissen had spent 15 years as a member of the Minnesota House of Representatives, including two years as speaker of the House. While serving in the Minnesota Legislature, he was a partner at Ballard Spahr (formerly Lindquist & Vennum) from 2010 to 2018, and at Briggs and Morgan from 1993 to 2010. Justice Thissen also spent a year in the appellate division of the Minnesota State Public Defenders Office (1998-99). After graduating from the University of Chicago Law School, he clerked for the Honorable James Loken at the 8th Circuit Court of Appeals.

Justice Thissen and I recently had a chance to discuss his first few months on the Court, as well as the experience of being in different rooms "where it happens."

JON SCHMIDT: You are now several months into your tenure on the Minnesota Supreme Court. What have the first few months been like so far? Perhaps a bit quieter than your previous jobs?

JUSTICE PAUL THISSEN: My first few months have been amazing. People on the court—staff and other justices—have been incredibly welcoming and helpful. The job has certainly been both challenging and exhilarating. I've been surprised at how much not just the law but legal reasoning itself has changed over the years. There is so much more significance placed on close textual analysis. On the other hand, the art of understanding law from a common law perspective—as a series of stories and decisions that have developed over time—seems somewhat a lost art among some practitioners. Maybe it's Westlaw and other technologies, which allow lawyers to grab a cite to support a legal principle without really digging in and understanding why that principle mattered in the first place.

You are absolutely right that the job is quieter than either politics or a law firm practice, but in many ways that is a wonderful gift. I keep telling people that for the first time in a while, I really have the time to think instead of constantly reacting to the latest development. But I do miss getting out and talking to Minnesotans about what's going on in their lives in the way I used to. I hope to spend more time out among Minnesotans in 2019. I think it's really important that the Court and judges stay grounded and accessible that way.

SCHMIDT: You have been active during oral arguments, asking a fair number of questions. What have you found the most (and least) helpful during arguments?

JUSTICE THISSEN: I've been somewhat surprised at how helpful and important oral argument is. I've found it gives me a chance to zero in on the issues that really matter and to test ideas for resolving the case on the people who best know the case. I tend to start with the facts and the basic law and try to reach a basic hypothesis about the case first. Then, of course, I do a deep read of the parties' briefs and the opinions of the Court of Appeals and district court. Oral argument is a chance to push on (and hopefully fill in) gaps between the various approaches to resolving the case, as well as to figure out where agreements between the parties and concessions may exist.

I am certainly not breaking new ground here, but the most helpful thing a lawyer can do during oral argument is actually answer the questions from the bench. It's surprising how often advocates fail to do that, and it's also surprising how refreshing it is when an advocate gives a straightforward and simple answer. Understand what concessions you can make and still win the case. Be ready with a one- or two-sentence articulation of the legal rule you believe the Court should adopt to resolve the case in your favor—that, ultimately, is what the court is looking for. And the thing I wish more advocates would do is to listen carefully enough to questions to know when a question is a softball or at least supportive of his or her position. Stated another way, don't always assume that questions coming from the bench are adversarial.

SCHMIDT: How do you think your legislative experience will influence your approach to statutory questions that come before the Court?

JUSTICE THISSEN: Our job first and foremost in statutory interpretation cases is to implement the intent of the Legislature. The courts (along with the Legislature in Chapter 645) have constructed a complex superstructure of canons and other rules that is intended to drive the analysis of legislative intent. Those rules are important and helpful, but as any advocate knows, our canons of construction and other rules can also be used selectively to reach a certain result. Judges have to guard against that vigilantly.

Based on my own experience, I know that legislators are not sitting at the Capitol consulting dictionaries or arguing over grammatical rules. And often the unforeseen circumstances under which the Court is called upon to interpret statutory language was not considered by the Legislature. But our job is still to implement the Legislature's intent. Legislating is a more practical process aimed at trying to fix a perceived problem. And so I try to first understand the problem the Legislature was trying to fix and the solution it reached and proceed with my analysis accordingly. As an aside, the plain words of the statute do resolve the question of interpretation more often than not, but as a former legislator there have admittedly been times that I've been appalled and embarrassed at how poorly and confusingly some state statutes have been drafted.

SCHMIDT: To quote Lin-Manuel Miranda, you have been, and currently are, "in the room where it happens." I have to imagine that conferencing a case as a Minnesota Supreme Court Justice is very different from the conversations that occur when finalizing legislation. Can you talk about the difference (and similarities) in "how the sausage gets made" when it comes to those discussions, compromises, and approaches to decision-making?

JUSTICE THISSEN: You are right that it is a very different process. There are only seven of us involved and each of us has closely considered the case and come to our individual initial conclusions. We are representing our best thinking as individuals when we enter the room and we speak to each other candidly. In contrast, legislative leaders, and the governor and his commissioners, are representing much larger constituencies—their caucuses, their constituents, their parties—which puts a limit on decision-making authority and also limits candor. And there is no staff in the room here—just the seven justices. That makes a big difference. I have been so impressed at the magic that happens when, as justices, we put our minds together, draw on one another's insights and reach a stronger conclusion than any of us would likely have reached on our own. And a big part of that is that as a Court (unlike the reality of the legislative process), we are all genuinely playing on the same team, if that metaphor is apt. It should go without saying, but it's true that a Minnesota Supreme Court conference is obviously less partisan and political than end-of-session negotiations.

In addition, the fact that the Legislature and the judiciary have distinct roles makes the process of reaching decisions different. The Legislature deals in the big picture; judges deal with cases between specific individuals involving specific facts. The Legislature is there to represent the voice of the people. In addition, while the Court is charged with implementing that voice, a critical role of judges is to protect other voices that are sometimes not heard when "the people speak." We're there to protect the fundamental individual and political rights of those not in the political majority at any given time.

And that leads to the thing that is not different in the two situations. In each room, I feel both the incredible honor and privilege of being there and the heavy responsibility of doing my best to reach the right decision.

SCHMIDT: The ComMN Law podcast has analyzed some of your tweets. Who on Twitter do you find most interesting? And where do you find your "this day in history at the Minnesota Supreme Court" material?

JUSTICE THISSEN: I have pretty drastically changed my Twitter feed over the last six months. I got rid of a lot of the political stuff, which rarely has much that is useful or interesting. Longreads is great to follow—it has introduced me to lots of interesting authors and essays. The Economist's Twitter feed. New Scientist's Twitter feed. I think Jason Isbell is funny and I love his music, so that's a win. I like to follow Timberwolves developments and commentary.

I do my own research for the "on this day in Minnesota Supreme Court history" tweets. I love Minnesota history. I love to pull over at the roadside historic markers, and I carry two books in my car—a list of all the historic markers and a book on Minnesota place names. This is an incredibly cool and varied state with thousands of disturbing or funny or thought-provoking stories sitting out there waiting to be retold. And I find that Minnesota Supreme Court cases are another great point of entry into that history. I'm constantly delighted to find a case that lends some insight into a historical incident or gives me a chance to learn more about a famous (or not so famous) character in Minnesota's history. I also find that the evolution of our state Constitution and statutes, and what that evolution says about our changing values, is fascinating. And a good reminder that how things are today is not how they have to be.

SCHMIDT: You are a big music fan. What are your top 10 all-time albums?

Impossible.

SCHMIDT: I'm guessing that Bruce Springsteen is going to land in at least one of your top all-time albums. How has Springsteen been a soundtrack throughout your life? What is it about his music that speaks to you?

JUSTICE THISSEN: I have been a fan—a committed fan—for several decades. A big part of the appeal of Springsteen's music is just that. Songs remind me of friends and places and moments; rocking my kids to sleep by singing "Thunder Road" and "The River." And his music has matured as I've grown. His version of "Real World" from the Christic Institute shows in 1990 (you can find it on YouTube) is a beautiful rendition and among the most realistic visions of what being a grown-up means. His music introduced me to worlds I did not know existed growing up

in Bloomington. I wouldn't have found Flannery O'Connor or Walker Percy or Alejandro Escovedo or John Ford or Reinhold Niebuhr—so many artists and ideas—without Springsteen.

I'm constantly moved by his tempered optimism, his faith that individual lives matter and are valuable, his belief that mercy matters as much as—or as a part of—justice, and his commitment to creating communities based on our broadly shared ideals rather than (as is too often the case these days) a narrow set of interests. I also believe strongly that our families and the places where we grew up are an important part of who we are, and Springsteen captures that as well. As Springsteen once said of Bob Dylan, he is like the brother I never had.

SCHMIDT: At the press conference when you were appointed to the Supreme Court, and again at the investiture ceremony, you mentioned two people as being very influential on your legal career: 8th Circuit Judge James Loken and Tim Thornton, a partner at Briggs and Morgan. What have you learned from them?

JUSTICE THISSEN: Judge Loken and Tim Thornton are both incredibly important to me as teachers and legal mentors. They share that essential characteristic that is so important for success—each is comfortable with himself. Each is genuine. Each is a great writer. And the most important lesson that each taught me about the law can be summed up in one word: *Think.*

SCHMIDT: Early in your career you spent some time in the Appellate Public Defender's Office. What were some of your biggest takeaways during that time?

JUSTICE THISSEN: Both my time at the Appellate Public Defender's Office and the decade I spent working with colleagues at Briggs and Morgan on a Texas death penalty case deeply affected how I view what access to justice really means. The obstacles, unfairness, and almost chilling indifference to the individual life at stake that I encountered in the Texas proceeding deepened my sense of responsibility to make sure that individual lives—particularly those who are shunned by society—are truly seen by the courts. I believe we do a better job of that in Minnesota, but it is hard work and we can always strive to be better. Mercy and compassion are important components of a "justice system." And I firmly believe that while holding individuals accountable when they break the law is important, it is just as important, really more important, to hold the government accountable when it fails to live up to its obligations under the law.

SCHMIDT: You and your wife, Karen, have juggled extremely busy careers while raising three wonderful children, one of whom just started college. Do you have tips for those of us who are trying to navigate busy law careers and still be involved parents?

JUSTICE THISSEN: Don't worry about always earning A's in a B-minus world. There are going to be times when the shirts don't get to the dry cleaners or the lawn does not look perfect. And that does not make you a bad person. The reality is that Karen and I are unbelievably blessed. Our family has been healthy. We've had access to great educations and secure jobs with decent benefits, jobs that challenge us every day. We have a great network of friends and family to lean on when needed. There are so many people who live under much greater day-to-day pressure than we do.

SCHMIDT: If they made a movie of your life, what actor (or actress) would you want to play you and why?

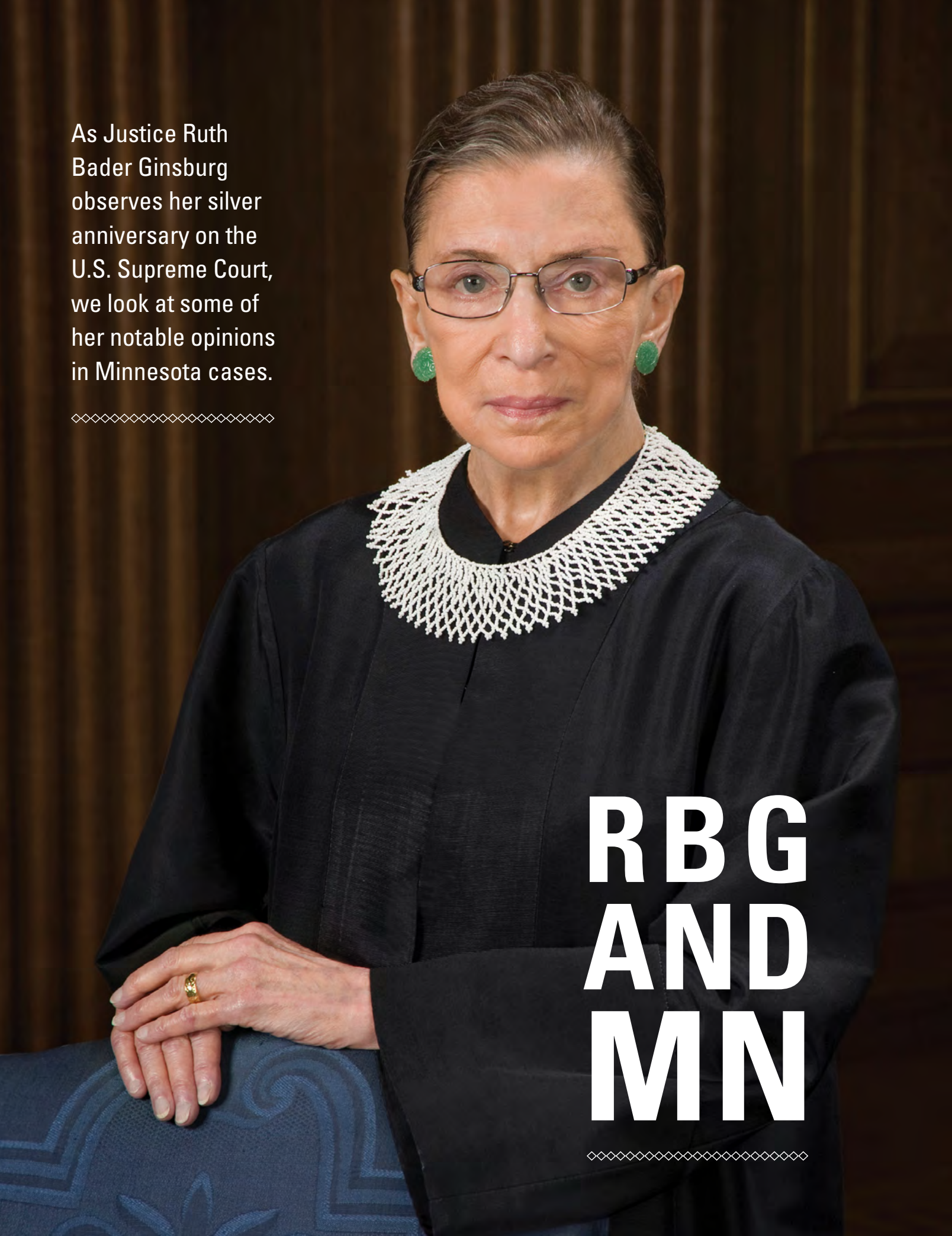
JUSTICE THISSEN: I'm not sure about that, but I think Jeff Bridges is the greatest living American actor (i.e., captures what it is fundamental about America) and Robert Redford, across his career, has played the characters who I would most like to be.

SCHMIDT: You have travelled Minnesota and know the state well. What are your favorite spots for: a burger? Malt? Piece of pie? A cup of coffee? Pizza? French fries? A beer on a patio? Breakfast spot? Concert? Vacation get-away? Fishing spot? A day trip (starting from Minneapolis)?

JUSTICE THISSEN: My favorite food is pizza, far and away, and I am partial for personal reasons to the Leaning Tower of Pizza followed by a stop at the CC Club (although in my memory nothing will ever beat Shakeys in Richfield (R.I.P.) for the best pizza experience). I love seeing shows at the Turf Club and seeing Prince at Paisley Park was amazing, but the best shows I've seen in Minnesota over the last three-plus decades repeatedly have been at First Ave, so it's hard to beat that.

Justice McKeig will be happy to know my favorite fishing has been on Leech Lake out of Federal Dam. My favorite drives are along Highway 16 in the Driftless area in southeastern MN, the Glacial Ridge Trail in western Minnesota, and through the woods along Highway 1. And there is no more paradigmatic Minnesota experience than the Giant Slide at the Minnesota State Fair. I've been on the slide 51 of my 52 years on this earth (an exception for my honeymoon). ▲

***JON SCHMIDT** is an assistant Hennepin County attorney in the Special Litigation Division—Appeals Unit, focusing exclusively on criminal appeals. Prior to joining the Hennepin County Attorney's Office, Jon was a shareholder at Briggs and Morgan, P.A., with a varied appellate and litigation practice. He lives in St. Paul with his wife (Ramsey County Judge Sara R. Grewing) and their two kids.*



As Justice Ruth Bader Ginsburg observes her silver anniversary on the U.S. Supreme Court, we look at some of her notable opinions in Minnesota cases.

RBG AND MN

By Marshall H. Tanick and Cathy E. Gorlin

Justice Ruth Bader Ginsburg, in the midst of her 25th term on the U.S. Supreme Court, has become an iconic figure. A documentary about her, *RBG*, won strong reviews and did well at the box office and in TV ratings when shown on CNN last summer.

Another movie, this one a Hollywood biopic starring the award-winning British actress Felicity Jones, was similarly well-received when it came out near the end of 2018. *On the Basis of Sex* dramatizes Justice Ginsburg's work as a civil rights attorney in the 1970s, when she took on and prevailed in ground-breaking gender discrimination cases, co-authoring the prevailing brief in *Reed v. Reed*.[1] This was the first time the high court recognized gender discrimination as a violation of the equal protection clause of the 14th Amendment; the film also depicts her successful oral argument in *Moritz v. Commissioner of lnternal Revenue,*[2] which applied that concept in a case concerning discrimination against men denied tax deductions for in-home care they provided even as women care-givers were allowed the deduction.

Those cases jump-started her career as a high profile litigator, mainly dealing with women's rights, before her appointment to the 2nd Circuit Court of Appeals, where she served for 13 years prior to being appointed to the Supreme Court shortly before the beginning of the 1994-95 term.

In recent years, she has gained unusual renown for a Supreme Court jurist. Some years ago, a poll indicated that more American adults could name the Three Stooges than could identify a single member of the Supreme Court. But Justice Ginsburg, who makes a concluding cameo in the Hollywood film, has broken through that name recognition barrier.

Justice Ginsburg's heightened identity is attributable to several factors: her background of overcoming discrimination due to gender and religion; her outgoing personality; and, more fundamentally, the quality of her written opinions, especially some of her dissents. One of those dissents, in an equal pay discrimination case called *Ledbetter v. Goodyear Tire & Rubber Co.*,[3] provided the fodder for a subsequent law that extended the statute of limitations for gender disparity claimants.[4]

Having recovered from three broken ribs suffered in an early November fall in her office and then removal of two cancerous nodes on her lungs a month later, she is the oldest justice currently serving. But Justice Ginsburg, who is turning 86 in March, remains at the height of her jurisprudential skills and public acclaim in most quarters as she and her colleagues begin rolling out rulings in the 2018-19 term.

As Justice Ginsburg proceeds with her silver anniversary on the high court, her impact has gone well beyond the gender discrimination focus of her pre-judicial career portrayed in cinema, as reflected in this eclectic collection of real Minnesota cases.

Concluded cases

The 2017-18 term that concluded last summer featured a pair of cases from Minnesota, both raising constitutional law issues—though neither elicited a written utterance from Justice Ginsburg.

In ***Minnesota Voters Alliance v. Mansky***,[5] 138 S.Ct. 1876 (2018), she joined without comment the seven-member majority ruling authored by Chief Justice Roberts, invalidating on 1st Amendment vagueness grounds a Minnesota law, Minn. Stat. §211B.11, subd 1, that barred wearing "political badges or apparel at voter polling places." She strayed from her usual alliance with the liberal wing of the Court, two of whom (Sonia Sotomayor and Stephen Breyer) dissented, writing that the State Supreme Court should have been asked to clarify its interpretation of the statute.

Likewise, in ***Sveen v. Melin,*** 138 S.Ct. 1815 (2018), she was a silent member of the 8-1 majority that upheld the Minnesota law automatically revoking a divorced spouse as a life insurance beneficiary under Minn. Stat. §524.2-804, subd. 1, which was challenged under the "impairment of contract" clause of Article I, Section 10, of the federal Constitution, which bars any state law "impairing" a contractual obligation. Only Justice Neil Gorsuch dissented from the majority opinion written by Justice Elena Kagan, reversing an 8th Circuit holding that had overturned a decision by U.S. District Court Judge David Doty. Agreeing with Judge Doty, SCOTUS upheld the retroactive application of the Minnesota law to a divorced spouse four years after the policy was initially purchased.

First forays

Not long after her investiture on the high court, Justice Ginsberg made her first foray into Minnesota jurisprudence. She started meekly with an unusual written concurrence in a denial of *certiorari* (a process almost always devoid of written opinions) in ***Davis v. Minnesota***.[6] Writing near the end of her first year on the bench, she concurred with the refusal to hear a challenge of a prosecutor's attempt to peremptorily strike an African American and member of the Jehovah's Witness faith as a juror in a robbery case in Ramsey County District Court. She explained that *certiorari* was improper because the existing rule limiting exclusion of jurors on racial grounds did not "extend to religious affiliation."

Three years passes before she really made her mark in a Minnesota case, and it was a big one. In ***U.S. v. O'Hagan***,[7] a criminal securities trading fraud case against a prominent Minneapolis lawyer, she authored a lengthy opinion for the unanimous Court. The decision by Justice Ginsberg, who has shown an affinity for securities cases, overturned reversal of the verdict by the 8th Circuit on grounds that "trading on the basis of material, non-public information [does] involve a breach of duty of confidentiality" that gives rise to criminal culpability. Justice Ginsburg's decision for the Court adopted a broad "misappropriation theory" extending to any material "deception" in connection with a securities transaction, even in the absence of "an identifiable purchaser or seller."

She followed that decision with another majority opinion during the next term in ***Regions Hospital v. Shalala***.[8] On behalf of a 6-3 majority, her opinion upheld the right of the government to "re-audit" a hospital's entitlement to reimbursement for certain costs incurred under the Medicare program. This time, she affirmed an 8th Circuit ruling that the "re-audit" was not impermissibly retroactive.

A decade passed before Justice Ginsburg delivered another majority decision in a Minnesota case. ***Greenlaw v. United States***[9] overturned a decision of the 8th Circuit making a *sua sponte* 15-year increase in the sentence of a Minnesota gang member convicted of multiple drug and firearms offenses, without any request by the government to do so. In a 7-2 ruling, she reasoned that the trial court's mistake in calculating the sentence too lightly for several drug and firearms offenses did not justify the appellate court departing from the "requisite role of neutral arbitrator of matters the parties present" in advance of a cross-appeal by the government. Since the government had not appealed the sentence imposed by U.S. District Court Judge Joan Ericksen in Minnesota, there "was no occasion" for the court of appeals to tack on 15 years to the lower court's determination.

Concurring cases

The 2008 *Greenlaw* case was the last Minnesota matter to date in which Justice Ginsburg has written the majority decision. But she has concurred in several others.

In ***Raygor v. Regents of University of Minnesota***,[10] she delivered the decisive vote by concurring in a desultory 5-4 decision involving the University of Minnesota, a first-time litigant before the high court. The case posed a rather mundane issue of supplemental federal court jurisdiction over a state law claim coupled with a defective federal law claim challenging the compulsory early retirement program for university faculty. The issue—whether the statute of limitations was tolled in the state law claim during the pendency of the federal claim—was resolved in the negative by the Minnesota Supreme Court, which had reversed a ruling of the court of appeals overturning a dismissal by the Hennepin County District Court. The high court affirmed, and Justice Ginsburg's concurrence argued that the applicable statute for supplemental jurisdiction over state law claims, 28 U.S.C. §1367(a), does not express an intent to toll in "unmistakably clear… language."

Justice Ginsburg issued one of four concurring decisions late in the 2015-16 term in ***U.S. Army Corps of Engineers v. Hawkes Co., Inc.***,[11] in which the justices unanimously held that a jurisdiction decision by the Army Corps of Engineers under the Clean Water Act is reviewable as a "final agency action" under the Federal Administrative Procedure Act, §5 U.S. §704. Her concurrence only addressed one matter: a disinclination to rely upon a claimed agreement between the Corps and the government because of the scant briefing on the issue.

She concurred a month later in consolidated DWI litigation entitled ***Birchfield v. North Dakota***,[12] which included a Minnesota case, *Bernard v. Minnesota*. A unanimous Court ruling established that law enforcement personnel may conduct warrantless breath tests of suspected intoxicated drivers, but must obtain a warrant for "more intrusive blood testing." Justice Ginsburg joined the concurrence of Justice Sonia Sotomayor, which observed that law enforcement officers must have "tools to combat drunk driving," while fretting that the extension of "warrantless searches" undermines the 4th Amendment protection against unreasonable searches and seizures.

Dissenting decisions

It may be Ginsburg's dissents that are most enduring, like the one in the *Ledbetter* litigation. She was one of three dissenters in ***Minnesota v. Carter***,[13] in which the Court reversed the Minnesota Supreme Court and upheld a warrantless search of a pair of visitors to a facility where cocaine was being distributed. While the majority rejected a 4th Amendment defense, she lamented in the dissent that the ruling "undermines… the security of short term guests [and]… the home resident, as well."

She also dissented from a five-member majority in opining in favor of a rule prohibiting candidates for state judicial offices from expressing views on controversial issues in ***Republican Party of Minnesota v. White***.[14] The "announce" rule was stricken by a one-member majority of the Court for violating the 1st Amendment, although Justice Ginsburg was one of four dissenters who would have affirmed the 8th Circuit ruling upholding the proscription in order to assure "an independent, impartial judiciary." ▲

Notes

[1] *Reed v Reed*, 404 U.S. 71(1971).
[2] *Moritz v. Commissioner of Internal Revenue*, 469 F. 2nd 466 (10th Cir. 1972).
[3] *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).
[4] The Lilly Ledbetter Fair Pay Act, amending 42 U.S.C. §2000 (e)(5)(e).
[5] *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876 (2018).
[6] *Davis v. Minnesota*, 511 U.S. 1115 (1994).
[7] *U.S. v. O'Hagan*, 521 U.S. 179 (1997).
[8] *Regions Hospital v. Shalala*, 522 U.S. 448 (1998).
[9] *Greenlaw v. United States*, 554 U.S. 237 (2008).
[10] *Raygor v. Regents of University of Minnesota*, 534 U.S. 533 (2002).
[11] *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807 (1998).
[12] *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016).
[13] *Minnesota v. Carter*, 525 U.S. 83 (1998).
[14] *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

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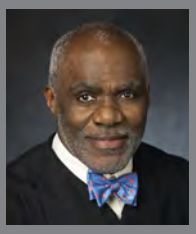

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Burglary: Misdemeanor trespass not lesser-included offense of first-degree burglary. Appellant pleaded guilty to first-degree burglary while possessing a firearm and being an ineligible person in possession of a firearm. He argues on appeal that his plea to first-degree burglary was inaccurate and invalid. Specifically, he claims his plea testimony negated the element of entering the building "without consent" and failed to demonstrate he "committed a crime while in the building." Appellant was found on a cot in a boarded-up tribal house with a revolver and heroin nearby, and a needle and money in his pants pocket. Appellant was ineligible to possess a firearm at that time.

Appellant testified at his plea hearing that his cousin used to be a tenant of the building but that he knew it was owned by the Leech Lake Housing Authority at the time he entered it. On appeal, he argues he had a claim of right to enter the house because he believed he had his cousin's permission, and the first-degree burglary statute requires proof he entered without a claim of right, as trespass is a lesser-included offense of burglary. However, the court of appeals clarifies that misdemeanor trespass is not a lesser-included offense of burglary, because the burglary statute, Minn. Stat. § 609.582, subd. 1, plainly does not require proof that a defendant entered a building without a claim of right. Appellant testified he did not enter the house with the legal possessor's consent.

Appellant also argues that because he possessed a firearm *before* entering the building, he had already committed the crime of being a felon in possession when he entered, and therefore did not commit a crime while in the building. The court of appeals rejects this argument, concluding that, even though appellant possessed a firearm before he entered, he still possessed the firearm inside the building, which is sufficient to satisfy the first-degree burglary element of committing a crime while in the building. Appellant's conviction is affirmed. ***State v. David James Jones***, Nos. A17-1840, A17-1841, __ N.W.2d __, 2018 WL 6442304 (Minn. Ct. App. 12/10/2018).

Controlled substances: Knowledge another person is storing meth paraphernalia in private bedroom of child's home insufficient to prove crime of storing meth paraphernalia in a child's home. Appellant and her two children temporarily stayed at her mother-in-law's house with appellant's husband, who permanently lived at the house. Appellant's husband allowed a drug dealer to live in the basement rent-free to satisfy a debt he owed to the dealer. Appellant was aware the dealer dealt drugs out of the basement. After an anonymous tip and a garbage pull, police searched the house, finding methamphetamine and drug paraphernalia in the dealer's bedroom in the basement, as well as marijuana and a pipe in appellant's bedroom upstairs. Appellant admitted to taking a hit from a methamphetamine pipe in the dealer's bedroom at one time. Appellant was charged with various drug offenses, including storage of methamphetamine paraphernalia in a child's residence. A jury found appellant guilty.

Minn. Stat. §152.137, subd. 2(a)(4), provides, "No person may knowingly engage in any of the following activities in… the residence of a child[:]… storing any methamphetamine paraphernalia." "Engage in" and "storing" are not defined, but the court of appeals employs dictionary definitions of the words to determine their ordinary usage and concludes that the statute is not ambiguous and that the statute's plain meaning "prohibits a person from *participating* and *taking part in* the activity of keeping methamphetamine paraphernalia for future use in a child's residence" (emphasis added). Thus, mere knowledge that another person is storing paraphernalia in a private bedroom of

the home is insufficient.

Ultimately, the court of appeals finds that the circumstances proved at trial "do not preclude a reasonable inference that [appellant] did not participate in the activity of storing methamphetamine paraphernalia in the home." There was no evidence that appellant shared the room with the dealer, that she had any ownership or control over who could live in the house, or that the bedroom was not the dealer's private space. Appellant's conviction is reversed. ***State v. Jessica Lynn Maack***, No. A18-0315, 2018 WL 6729763 (Minn. Ct. App. 12/24/2018).

■ **Criminal sexual conduct: Criminal sexual conduct with vulnerable complainant excused when complainant is actor's spouse at time of offense.** The state appeals from the pretrial dismissal of criminal sexual conduct charges against respondent. Respondent was charged with third-degree and fourth-degree criminal sexual conduct for encounters with G.H., who functions at the mental capacity of a seven- to eight-year-old and who the state alleged was "mentally impaired, mentally incapacitated, or physically helpless." Shortly before trial, respondent and G.H. married. The district court granted respondent's motion to dismiss, finding that Minn. Stat. §609.349 prohibits criminal culpability if the complainant is the actor's legal spouse.

Both parties on appeal argue the statute is ambiguous, but the state argues it excuses criminal sexual conduct only if the defendant and victim are married at the time of the offense, while respondent argues the defendant and victim need only be married at any time before trial. The court of appeals agrees the statute is ambiguous, but holds that only one construction is reasonable: the protections accorded a legal spouse in section 609.349 apply only *if the actor is married to the victim at the time of the alleged offense*, unless the couple is legally separated (emphasis in original). Such a construction harmonizes the entire text of the statute and gives effect to the Legislature's intent to protect vulnerable adults.

Because respondent and G.H. were not married at the time of the offense, the legal-spouse provision of section 609.349 does not excuse his conduct, and the district court's pretrial dismisses of the charges against respondent are reversed. ***State v. Gosewisch***, Nos. A18-1142, A18-1143, 2018 WL 6837739 (Minn. Ct. App. 12/31/2018).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Disability discrimination; missing work bars claim.** An employee who was fired for taking multiple periodic absences due to an incurable condition lost her disability discrimination claim. The 8th Circuit ruled that the employee's claim under the Americans with Disability Act (ADA) lacked merit because she did not provide medical verification for missing work due to a flare-up after she had been placed on a "last notice." ***Lipp v. Cargill Meat Solutions Corp.,*** 911 F.3d 537 (8th Cir. 12/19/18).

■ **Sex harassment; "severe & pervasive" prevails.** The familiar standard of "severe and pervasive misconduct" was not satisfied by a sexual harassment claimant. The Minnesota Court of Appeals rejected an invitation to abandon that test for hostile workplace claims and upheld summary judgment because the employer took prompt remedial action after learning of the employee's allegations against a maintenance employee at the nonprofit facility where they worked. ***Kenneh v. Homeward Bound, Inc.,*** 2019 WL 178153 (Minn. App. Ct. 01/14/2019) (unpublished).

■ **Breach of contract; LLC not employer.** A breach of contract action failed against an LLC; the action arose out of the failure by a mechanic to complete a repair project while representing that he was acting on behalf of the LLC. The court of appeals affirmed a lower court ruling that the default judgment obtained against the mechanic could not be collected against the LLC because there was no evidence that the mechanic was actually an employee of the LLC. ***Takuanyi v. Mobil Auto Rescue & Repair,*** 2019 WL 272882 (8th Cir. 1/22/2019) (unpublished).

■ **Unemployment compensation; quitter loses benefits.** A claimant laid off from his previous machinist job who began working as a machinist for a different company, then quit in order to participate in the Dislocated Worker program, hoping to obtain more lucrative employment elsewhere, was denied unemployment compensation benefits. The

appellate court held that the employee's explanation of why he quit his job was insufficient to allow him to obtain benefits because he voluntarily resigned his employment. ***Pernu v. Cragin Machine Shop,*** 2019 WL 272893 (8th Cir. 1/22/2019) (unpublished).

■ **Unemployment compensation; cashiers lose claims.** A pair of cashiers lost their claim for unemployment compensation.

A grocery store cashier who took two bottles of soda pop without paying for them was denied benefits. Citing its practice of upholding denials of benefits for "minimal" value theft, the court of appeals ruled the employee committed disqualifying "misconduct." ***Steiger v. Cub Foods***, 2019 WL 115338 (Minn. App. Ct. 01/07/2019) (unpublished).

A cashier whose testimony vacillated was not entitled to unemployment compensation after he was discharged for a multitude of infractions. The appellate court upheld denial of benefits and of a request for a new hearing. ***Ka v. Lonvigan's Service Center***, 2019 WL 272882 (8th Cir. 1/22/2019) (unpublished).

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **Minnesota state law governing vehicle air pollution control systems held preempted by the Clean Air Act.** In an unpublished opinion, the Minnesota Court of Appeals dismissed the Minnesota Attorney General's claims that car manufacturer Volkswagen Group violated a Minnesota law that prohibits tampering with air pollution control systems by finding the Minnesota law was preempted by the Clean Air Act (CAA). Section 209(a) of the CAA provides that states may not enforce standards relating to emission controls of new motor vehicles. Minnesota alleged, however, that Volkswagen tampered with *used* vehicles and thus argued that its state law claims pursuant to Minnesota's anti-tampering laws was not preempted by the CAA. *See* Minn. Stat. §325E.0951, subd. 2(a) and Minn. R. 7023.120).

The state prevailed in district court, overcoming Volkswagen's argument that the tampering claims were preempted by the CAA. On appeal, the court found Minnesota's law, if upheld, would regulate thousands of vehicles on a model-wide basis. This intrusiveness into the nationwide regulatory scheme of the CAA, the court held, was an obstacle to the execution of the purposes and objectives of the CAA as EPA, not the states, was delegated the power by Congress to regulate such nationwide conduct. The appellate court also found that the preemption doctrine prohibited the state's enforcement action, holding that if the state's claims were allowed to proceed, the state's efforts could interfere with the federal government's ability to reach a settlement with Volkswagen. ***State v. Volkswagen Aktiengesellschaft,*** No. A18-0544, 2018 WL 6273103 (Minn. Ct. App. 12/3/2018) (unpublished).

■ **7th Circuit appeal set to widen circuit split of CWA groundwater jurisdiction.** On 11/14/2018, the U.S. District Court for the Central District of Illinois held that discharges of pollutants into groundwater are not subject to liability under the Clean Water Act (CWA). The court granted defendant's motion to dismiss due to lack of subject matter jurisdiction.

The CWA prohibits the discharge of a pollutant from any point source into navigable waters without a permit. 33 U.S.C §§1251, et seq. In this case, the defendant, a retired coal-fired power plant, held a permit from the Illinois Environmental Protection Agency allowing limited discharge of certain pollutants from specific points into the Middle Fork of the Vermilion River. However, the power plant also stored millions of tons of coal ash in three unlined pits on its property. Plaintiff alleged that, for years, water from two of those coal ash pits leached contaminants and pollutants—such as arsenic, boron, lead, and sulfate— into the groundwater. The pollutants flowed down-gradient, through the groundwater, eventually reemerging from numerous unpermitted seeps on the riverbank of the Middle Fork and into the river.

In its analysis, the court turned to its circuit for precedent. The 7th U.S. Circuit Court of Appeals decided a very similar case involving oil-polluted water collecting in artificial retention ponds, which eventually seeped into groundwater. *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994). The circuit court held that the CWA does not assert "authority over ground waters, just because these may be hydrologically connected with surface waters." *Id.* at 965. Thus, in *Prairie Rivers*, the district court held that offending discharges made into groundwater that somehow later find their way into surface waters are not in violation of the CWA. *Prairie Rivers Network*, 2:18-cv-02148 at 14.

On 12/14/2018, plaintiff filed a notice of appeal to the 7th Circuit. If the appellate court affirms the decision, it will further the already clear circuit split on the issue. On one end of the spectrum, in addition to *Oconomowoc* of the 7th Circuit, the 4th Circuit and 6th Circuit have recently considered whether leachate into groundwater from coal ash pits is a violation of CWA, and both have rejected it. *Sierra Club v. Virginia Elec. & Power Co*, No. 17-1895, (4th Cir. 2018); *Kentucky Waterways All. v. Kentucky Utilities Co.*, No. 18-5115, (6th Cir. 2018); *Tennessee Clean Water Network v. Tennessee Valley Auth.*, No. 17-6155, (6th Cir. 2018).

On the other hand, the 4th Circuit and 9th Circuit have found that CWA applies to pollutants discharged, via a point source, into groundwater, when those pollutants reach navigable waters. *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637 (4th Cir. 2018); *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018).

In both the *Kinder Morgan* and *County of Maui* cases, petitions for *certiorari* have been filed with the U.S. Supreme Court. On 1/3/2018, the Solicitor General submitted an amicus brief supporting Supreme Court review to resolve the circuit split. ***Prairie Rivers Network v. Dynegy Midwest Generation, LLC***, No. 2:18-cv-02148, (C.D. Ill. 2018).

ADMINISTRATIVE ACTION

■ **EPA proposal rejects public-health benefit determination underlying Obama-era mercury emission standards for coal plants while retaining the standards.** On 12/28/2018, the U.S. Environmental Protection Agency (EPA) announced a long-awaited proposed rule setting forth the agency's reconsideration of the agency's 2011 mercury and air toxics standards (MATS), which limit mercury emissions from coal-fired power plants. EPA's proposal would retain the 2011 standards but would revise the underlying cost-benefit analysis upon which the agency based its original finding that the rule was "appropriate and necessary" under the Clean Air

Act's section 112 hazardous air pollutant (HAP) regulations. In promulgating the 2011 MATS, EPA estimated that complying with the standards would cost utilities $9.6 billion per year while mercury reductions realized as a result of the MATS would result in annual public health benefits of only $6 million. However, because the utilities, in reducing mercury emissions, would necessarily also be significantly reducing emissions of fine particulate matter (PM2.5) (which is not a HAP under section 112), the overall annual public health benefits, factoring the "co-benefits" of reducing PM2.5, would be between $37 billion and $90 billion.

In the current proposed rule, EPA concludes it was inappropriate for the agency to consider these co-benefits and that, as a result, the original "appropriate and necessary" finding was erroneous. Nonetheless, EPA proposes to keep the MATS in place, citing a 2008 decision from the D.C. Circuit Court of Appeals, *New Jersey v. EPA*, which held that a source category cannot be removed from regulation under section 112 merely because the original listing was found to be in error. Reaction from the power sector is likely to be mixed because in many cases, the technology updates needed to comply with the MATS were completed years ago. Meanwhile, environmental groups are decrying the precedent that would be set by not considering co-benefits when determining public health impacts in future rulemakings. According to an EPA fact sheet, the agency will be receiving public comments on the proposed rule for 60 days following publication in the Federal Register, which was anticipated to occur in mid-February 2019.

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FAMILY LAW

JUDICIAL LAW

When considering a motion to modify permanent spousal maintenance, a district court may not impute income to a recipient based on an alleged failure to rehabilitate. The parties divorced in 2012. After a two-day trial, the district court granted wife permanent spousal maintenance of $10,000 per month. In determining the amount of wife's maintenance award, the court found her capable of earning approximately $30,000 per year, but expressed that in the future wife might expect to earn as much as $50,000 per year. Despite this possibility, the district court did not fashion a step-down in spousal maintenance to account for these increased earnings, instead simply leaving the award open to future modification. Wife elected not to return to the workforce, despite the court's finding she had the ability to do so.

Several years later, husband experienced health problems that required him to sell his business and reduce his work-

ing hours. Husband moved to modify or terminate spousal maintenance, primarily citing the reduction in his income. The district court agreed husband has experienced a substantial change in circumstances sufficient to modify maintenance, and adjusted the maintenance award accordingly. In determining the amount of the modified award, the district dourt took notice of wife's failure to seek employment, and imputed income to her of $50,000 per year—consistent with what wife might have expected after several years of experience.

Wife appealed and the Minnesota Court of Appeals reversed. While recognizing that even permanent spousal maintenance recipients may have a duty to increase their earning potential in some circumstances, the appellate court held that when modifying spousal maintenance, a district court may not impose such an obligation where the original maintenance award did not. In support of its holding, the court of appeals distinguished permanent maintenance awards from temporary awards, which assume a recipient will progress toward self-sufficiency. The court further contrasted permanent maintenance awards, which expressly impose an expectation of rehabilitation by imposing automatic (or step-down) reductions in spousal maintenance over time. However, where a district court does not expressly require a permanent maintenance recipient to increase her earning capacity, a court may not later impute income to a recipient who elects not to do so. Instead, the court must reevaluate the recipient's ability to self-support independently and based on the circumstances that exist at the time maintenance is modified. ***Madden v. Madden***, No. A18-0505, ___ N.W.2d ___ (Minn. Ct. App. 2/4/2019).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **9 U.S.C. §1; arbitration; "contracts of employment"; threshold issues of arbitrability.** The Supreme Court unanimously held that it is up to a court—and not an arbitrator—to determine whether a dispute falls within 9 U.S.C. §1's exception for "contracts of employment" for certain transportation workers, even where the parties have agreed that an arbitrator is to decide threshold issues of arbitrability. ***New Prime, Inc. v. Oliveira***, 139 S. Ct. 532 (2019).

■ **9 U.S.C. §16(a)(2); arbitration; appealable order.** Where the defendants obtained a stay of litigation pending arbitration, the district court entered a stay, the defendants asserted counterclaims in the arbitration, the plaintiff sought relief from the stay and an order requiring the defendants to pursue their counterclaims in the litigation, the district court issued an order declaring that certain counterclaims "were not before the arbitration panel" and that others "remain in arbitration" but the district court did not purport to issue an injunction, and the plaintiff appealed, the 8th Circuit looked to the "substance" of the district court's order, and determined that it was an "injunction against arbitration" appealable pursuant to 9 U.S.C. §16(a)(2). ***Meierhenry Sargent LLP v. Williams***, ___ F.3d ___ (8th Cir 2019).

■ **42 U.S.C. §1988; attorneys' fees.** In October 2017, this column noted Judge Nelson's award of more than $900,000 in attorney's fees and expenses to the plaintiffs under 42 U.S.C. §1988, even after reducing plaintiffs' fee request by more than 50 percent.

Not satisfied with the reduced fee award, the defendant appealed, arguing that Judge Nelson had failed to impose additional reductions for excessive argument preparation and travel time. However, the 8th Circuit affirmed the award in its entirety, finding no abuse of discretion in Judge Nelson's billing reductions, and noting that it has repeatedly held that counsel can be compensated at their regular hourly rate for travel time. ***Safelite Group, Inc. v. Rothman***, ___ F. App'x ___ (8th Cir. 2019).

■ **Fed. R. Civ. P. 26(a)(2)(C); non-reporting employee expert; waiver of privilege.** Magistrate Judge Leung granted the bulk of the plaintiffs' motion to compel production of documents authored or received by one defendant's non-reporting employee expert, agreeing with a number of other decisions that have held that "designating an individual who is also a percipient witness to the facts at issue as a non-reporting expert waives privilege and work-product protections." ***City of Wyoming v. Procter & Gamble Co.***, 2019 WL 245607 (D. Minn. 1/17/2019).

■ **Late-filed counterclaim stricken; no justification for late filing.** Where one defendant was served with the summons and complaint on 8/24/2018, that defendant did not file his answer and counterclaim until 61 days later, the plaintiff moved to strike the counterclaim as untimely, and the defendant declined to respond to that motion, Chief Judge Tunheim granted the motion to strike, finding that the defendant's "failure to move for an extension of time justifies striking his counterclaim," and that "because [the defendant] failed to explain his late filing, there is no evidence for the Court to consider regarding prejudice, the reason for the delay, and whether he acted in good faith." ***Larsen v. Isanti County***, 2019 WL 332203 (D. Minn. 1/25/2019).

■ **Counsel sanctioned for violation of protective order.** While finding that the plaintiff had suffered no prejudice and rejecting the plaintiff's request for a monetary sanction of $20,000 and the reimbursement of certain attorney's fees and costs, Magistrate Judge Menendez did sanction defendants' counsel $500 for its improper use of documents produced by the plaintiff with a "confidential" designation in one action in support of a summary judgment motion in a separate action brought by the same plaintiff. ***Smith v. Bradley Pizza, Inc.***, 2019 WL 430851 (D. Minn. 2/4/2019).

■ **Fed. R. Civ. P. 45(f); motion to transfer subpoena-related dispute denied.** After communicating with the magistrate judge handling the underlying litigation, Magistrate Judge Menendez denied a motion to transfer a dispute related to the timing of a Minnesota witness's deposition to the Middle District of Florida pursuant to Fed. R. Civ. P. 45(f), and ordered that the deposition be taken within 21 days of her order. ***Entrust DataCard Corp. v. Atlantic Zeiser, GMBH***, 2019 WL 181531 (D. Minn. 1/14/2019).

■ **Orders related to the sealing and unsealing of documents.** While acknowledging the public's "common-law right of access to judicial records," Magistrate Judge Menendez ordered the continued sealing, pursuant to Local Rule 5.6, of eight documents filed under temporary seal in connection with defendants' motion for summary judgment, finding the interests of student and teacher confidentiality outweighed the "generally strong public interest." ***Benner v. St. Paul Public Schools***, 2019 WL 259637 (D. Minn. 1/18/2019).

Also acknowledging the public's "common-law right of access to judicial records," Magistrate Judge Wright ordered the unsealing of legal memoranda and excerpts from deposition transcripts despite the defendant's objection, finding that the defendant had not met its burden to demonstrate that the documents contained "proprietary policies or procedures" that could place it "at risk of competitive disadvantage" if disclosed. ***Micks v. Gurstel Law Firm, P.C.***, 2019 WL 220146 (D. Minn. 1/16/2019).

■ **Orders relating to costs.** Judge Montgomery rejected most of one defendant's challenge to the clerk's denial of more $372,000 in ESI-related costs, awarding that defendant just over $42,000 in ESI expenses that were analogous to the "exemplification" or copying of documents and were therefore taxable under 28 U.S.C. §1920(4), but found that costs relating to ESI "processing" were not taxable. ***In re Wholesale Grocery Prods. Antitrust Litig.***, 2019 WL 413554 (D. Minn. 2/1/2019).

Judge Schiltz denied the plaintiff's motion to review the taxation of slightly more than $2,300 in costs for deposition transcripts, rejecting the plaintiff's argument that the depositions were not "reasonably necessary," and also finding that the plaintiff had "provided no evidence" that he could not pay the costs now or in the future. ***Svendsen v. G4S Secure Solutions (USA) Inc.***, 2019 WL 277605 (D. Minn. 1/22/2019).

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INDIAN LAW

JUDICIAL LAW

■ **Tribes are "stateless" for purposes of diversity jurisdiction.** The plaintiff brought a negligence claim against a tribal entity and two private insurance companies in federal court. The defendants moved to dismiss for lack of subject-matter jurisdiction. The district court agreed that the parties were not diverse. It explained that a tribe's "presence destroys complete diversity" because Indian tribes are "neither foreign states, nor citizens of any state." ***Dettle v. Treasure Island Resort & Casino***, No. 17-cv-2327 (SRN/TNL), 2019 WL 259652 (D. Minn. 1/18/2019).

■ **New limitations on Tribal Lifeline subsidy are arbitrary and capricious.** In 2000, the Federal Communications Commission began the Tribal Lifeline program, which offers a $25-per-month subsidy for telecommunications service for consumers on tribal lands. In 2017, the FCC adopted two limitations to the program. First, it limited the subsidy to service providers with their own facilities, excluding providers that resell services provided over other carriers' facilities. Second, it limited the subsidy to rural areas. The petitioners challenged these limitations under the Administrative Procedures Act, and the District of Columbia Circuit Court of Appeals concluded that both limitations were

arbitrary and capricious. It vacated the 2017 limitations and remanded for a new notice-and-comment-rulemaking proceeding. ***National Lifeline Association v. Federal Communication Commission***, ___ F.3d ___ (D.C. Cir. 2019).

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INTELLECTUAL PROPERTY

JUDICIAL LAW

Patent: Irreparable harm found where patentee forced to compete against infringing product. Judge Nelson recently granted a permanent injunction for patent infringement. Solutran sued US Bank and its subsidiary for infringing Solutran's patent for electronically processing paper checks. A jury found in favor of Solutran and awarded it royalties and lost profits. Solutran later moved for a permanent injunction barring US Bank from offering its infringing check processing service. The court wrote that it was persuaded by substantial trial evidence showing that Solutran and US Bank were direct market competitors. Solutran was forced to compete against an infringing product, and this favored a finding of irreparable harm. Though the jury did not find that there was a two-supplier market, the court held that such a determination was not required for a finding of irreparable harm. Additional evidence showing that Solutran did not license its product also weighed in favor of finding irreparable harm. Furthermore, the jury's $1.3 million lost profits award implied that money damages were inadequate to repair Solutran's losses and that US Bank's infringement had caused damage to Solutran's brand recognition and loss of prospective business. The court noted that additional harm to Solutran's brand name and growth prospects was unaccounted for in the jury's verdict. Though US Bank offered to pay an ongoing royalty, it also had indicated that it would not cease offering its infringing products until the appeals process concluded, which further weighed in favor of granting injunctive relief. ***Solutran, Inc. v. US Bancorp & Elavon, Inc.***, Docket No. 447, Case No. 0-13-cv-02637-SRN-BRT (D. Minn. 12/11/2019).

Patent: Venue improper despite forum selection clause in product licensing agreement. Judge Schiltz recently granted a motion to dismiss patent infringement claims, finding improper venue despite the parties entering into a forum-selection clause. ARP Wave and its subsidiary manufacture and distribute devices that electronically stimulate muscles. ARP Wave sued its Austin, Texas-based licensee for patent infringement, breach of contract, and misappropriation of trade secrets. Defendants sought dismissal of the claims for improper venue. Plaintiff argued that the parties' product leasing and licensing agreements included a forum-selection clause that made "[v]enue for the enforcement of the agreement" Hennepin County, Minnesota, Federal or State District Court. Under 28 U.S.C. §1400(b), however, a patent-infringement action may only be brought (1) in the judicial district where the defendant resides or (2) in any judicial district in which the defendant has committed acts of infringement and has a regular and established place of business. ARP Wave did not dispute that, in the absence of the forum-selection clause, venue for the patent infringement claims was not proper in Minnesota. The court found the patent infringement claims did not relate to the parties' agreements, as the agreements did not mention the patents, which issued after the agreements were signed. The forum-selection clause, therefore, was not applicable. The court dismissed the patent infringement claims for improper venue but retained jurisdiction over the contract claims, which are governed by the forum-selection clause, and the trade secret claims, which were found to be related to the enforcement of the contract. ***ARP Wave, LLC v. Salpeter***, No. 18-CV-2046 (PJS/ECW), 2019 WL 403712 (D. Minn. 1/31/2019).

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REAL PROPERTY

JUDICIAL LAW

Condominiums; statute of repose. Village Lofts at St. Anthony Falls in Minneapolis consists of a seven-story building (A) and a six-story building (B). Building A was issued partial certificates

of occupancy in 2002, 2003, and 2006. Building B was issued a certificate of occupancy and a certificate of substantial completion in 2004. The association discovered alleged defects in the buildings in 2014 and 2015.

The court of appeals affirmed the district court's grant of summary judgment to the developer, architect, contractor, and three subcontractors on the basis that the statute of repose in Minn. Stat. §541.051 subd. 1(a) barred common-law claims. The court held that Building A was substantially completed in September 2002, even though only a single unit was covered by the partial certificate of occupancy, because purchases were already being closed and deeds were recorded shortly thereafter. The court further held that the building was substantially completed no later than 2003 because the vast majority of units had been covered by certificates of occupancy. The association did not appear to seriously challenge the statute of repose issue as to Building B.

However, the court of appeals reversed the summary judgment as to the breach-of-statutory-warranty claims, holding that Minn. Stat. §541.051 subd. 4 requires a determination of each applicable warranty date. The district court held that the term "dwelling" in Minn. Stat. §327A.01 means "building," and the relevant warranty date applies to an entire building, not particular units. The court of appeals reversed, holding that the district court's interpretation is too strict in the case of multi-unit condominium buildings. It would result in some units, which were first sold years after the first unit was sold, receiving less than the statutory 10-year warranty period. ***Village Lofts at St. Anthony Falls Association v. Housing Partners III-Lofts LLC***, ___ N.W.2d ___, No. A18-0256, 2019 WL 418521 (Minn. Ct. App. 2019).

■ **Americans with Disabilities Act.** The Federal District Court dismissed an ADA complaint against TCF Bank as moot. The plaintiff's complaint alleged deficient disabled parking signs, a physically hazardous parking lot surface, a hazardous curb ramp, and that the designated parking spaces and aisles had too great of a slope. TCF hired a certified accessibility specialist and remedied several of the alleged architectural barriers. The specialist determined, however, that the curb ramp did not create such an obstruction as to constitute an ADA violation. The plaintiff sought to avoid the mootness issue by seeking, in the court's words, "policy changes within TCF to ensure future ADA compliance." The court determined that the plaintiff was not entitled to this relief because TCF redressed the alleged deficiencies in a swift manner and the court believed TCF would act swiftly in the future. ***Boitnott v. TCF Banking & Savings, F.A.***, No. 18-3062, 2018 WL 6727067 (D. Minn. 12/21/2018).

■ **Zoning.** United States Solar Corporation obtained a reversal of the Carver County Board of Commissioner's denial of a conditional use permit for a solar garden. The board denied the application on the grounds that the risk of stray voltage was not mitigated. At oral argument, the board conceded that four other putative grounds for denial were not factually supported. The board's decision was based upon "concerns" about the "potential" for stray voltage, without satisfactory observational or expert testimony. ***U.S. Solar Corp. v. Carver Cnty. Bd. of Comm'rs***, No. A18-0111, 2018 WL 6729753 (Minn. Ct. App. 12/24/2018).

■ **Easements.** The Minnesota Court of Appeals affirmed dismissal of a request for an injunction to prohibit a landowner from putting sod anywhere within a driveway easement. The easement in question is a long shared driveway benefitting two homes close to a public road and one home farther in the woods. The easement covers a width of 24 feet, but is paved only to a width of 12 feet. The owners of the homes nearer the public road have been covering the remainder with sod, but the owners of the home farther away sought to prevent the laying of sod. The district court and court of appeals held that sod on the unpaved portion of the easement does not constitute an improper encroachment or unreasonably interfere with the use of the easement as a driveway. ***Athanasakoupolous v. Bogart***, No. A18-0045, 2018 WL 6729752 (Minn. Ct. App. 12/24/2018).

■ **Eviction expungement.** Courts have inherent authority derived from the Minnesota Constitution to control court records, and therefore expunge criminal records. In a case of first impression for the court of appeals, it was asked to hold that Minnesota courts have inherent authority derived from the Constitution to likewise expunge eviction records, even where there is no statutory authority provided under Minn. Stat. §484.014 subd. 2. The district court did not make any decision as to whether it has such

inherent authority, and the court of appeals remanded with instructions to make such a determination. ***At Home Apartments, LLC v. D.B.***, No. A18-0512, 2019 WL 178509 (Minn. Ct. App. 1/14/2019).

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TAX LAW

JUDICIAL LAW

■ **Property tax: Internet not decreasing all big-box stores' valuation.** Lowe's Home Centers, LLC challenged the 2015 property valuation for their Plymouth store location. Lowe's is a big-box home improvement store with many locations across North America. The location in Plymouth is placed at an ideal location with large traffic flow and favorable population and income demographics. However, Lowe's expert claims that the development of the internet and webstores are devaluing big-box stores. In the property valuation, this claim was brought up twice: with the sales approach and with functional obsolescence in the cost approach. In support, a Fortune magazine article reporting on how the internet has radically transformed retail and listing store closings across all major big box store categories was cited. The tax court held that even if this evidence gave some limited weight to the conclusions about a general national decline in big-box retailing, there was no data indicating that this national trend applies to big-box home improvement stores, performing well and located in good retail locations in Minnesota or local markets in the 2015 valuation year. Thus, the tax court valued the property closer to the Hennepin County's appraisal of $12 million rather than the $5 million appraisal developed by Lowe's. ***Lowe's Home Centers, LLC v. Hennepin Cnty***, No. 27-CV-16-04306 (Minn. T.C. 1/17/2019).

■ **Property tax: Sales comparison not ideal for big-box store valuation.** Menard, Inc. challenged the 2014 and 2015 property valuation for their Coon Rapids store location. The three approaches to property valuation are the sales, income, and cost approaches. Both the sales approach and the cost approach, in determining the land value, use sales comparisons to value the property. However, the tax court held that sales comparisons were not the best indicators of the property's value. First, the tax court agreed with Menard's expert that big-box stores do not buy from one another. They all use prototype designs, so all store locations look the exact same. This results in a lower demand for a big-box store to buy from another because they would have to incur the cost of tearing down the old building. Next, the tax court found that when the big-box stores do sell a store, they place many deed restrictions on the property. This would severely lower the value of the property and not allow the sales to be an accurate reflection of the property's value. Lastly, the tax court held that when a big-box store does sell a store, it is because it was placed in a failed location. Typically, big-box stores build a location with no plan to sell. So, it is difficult to compare the poor locations to ideal locations, such as the one in this case. However, the tax court held that the sales comparisons could be adjusted enough to determine the land value under the cost approach but use other methods to determine the building's valuation. Taking all of this into account, the tax court lowered the property value from the County's appraisal of $15 million to $12 million. ***Menard, Inc. v. Anoka Cnty***, Nos. 02-CV-15-2043 & 02-CV-16-1997 (Minn. T.C. 1/15/2019).

■ **Property tax: Taxation of former pipeline abatement systems.** After several years of treating them as exempt from taxation, the Commissioner of Revenue in 2017 denied the exemption of Enbridge Pipelines, LLC property used to control erosion during and after construction of two pipelines. Pipelines are taxable personal property, unless they are used to abate or control pollution. Minn. Stat. §272.02, subd. 9 & 10. The commissioner contended that the property was removed from the pipeline system and thus taxable. The tax court disagreed, finding no evidence in the record that the devices were removed from the pipeline and no statutory authorization to tax personal property formerly used for the abatement of pollution. Therefore, the tax court granted summary judgement for Enbridge. ***Enbridge Pipelines, LLC v. Comm'r of Rev.***, No. 9081-R (Minn. T.C. 1/23/2019).

LOOKING AHEAD

■ **Minnesota House looking to conform.** On January 22, the House Taxes Committee began a two-day briefing from the nonpartisan House Research Department regarding state/federal tax conformity issues. If no changes are made, Minnesota will receive an additional $650 million in tax revenue compared to last year. Both the DFL committee chair and the Republican lead are optimistic that they can get a nonpartisan bill passed. It appears they may be using the bill that was vetoed last session by then-Gov. Mark Dayton as a starting point. One major change contained in that bill would have switched the starting point for Minnesota taxes from federal taxable income to federal AGI. Currently, Minnesota is one of only five states that use federal taxable income as a starting point, while 28 states use AGI.

■ **Other tax bills introduced.** Rep. Greg Davids, R-Preston, introduced HF351, which would expand the sales tax exemption for equipment bought by local fire departments. The expanded exemption would include purchases made on their behalf by the Department of Public Safety and provide an exemption for equipping and resupplying

ambulances and first responder vehicles. Another House bill, HF37, sponsored by Rep. Jerry Hertaus, R-Greenfield, would expand the stillborn tax credit to those stillbirths that happened out-of-state. This would mainly benefit those western Minnesotans who go to Fargo hospitals, or other border cities.

■ **Trust tax: Can states tax trusts based on beneficiaries' in-state residency?** The United States Supreme Court will hear a trust tax case originating from North Carolina. The question posed in the case is whether the due process clause prohibits states from taxing trusts based on trust beneficiaries' in-state residency. This issue arises when a trust is created in one state and the named beneficiary resides in another state. In such instances, can that other state then tax the trust even though the trust is only a resident in the state where it was formed? The Supreme Court will have to establish what minimum contact or nexus is required for a state to tax a trust. This question has reached nine other state supreme courts. Four of them have said that this is enough nexus, while five have said it is not enough. Recently, this issue reached the Minnesota Supreme Court in *Fielding*, a case in which the justices held that there was not sufficient nexus for the trusts to be taxed in Minnesota.

JESSICA DAHLBERG
Grant Thornton
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MATTHEW WILDES
Mitchell Hamline School of Law

TORTS & INSURANCE

JUDICIAL LAW

■ **Negligence; third-party's liability for fault of employer.** Plaintiff suffered workplace injuries while working aboard a flatbed trailer being pulled by a tractor driven by an employee of defendant, a third party. Pursuant to the loaned-servant agreement, the insurer of plaintiff's employer paid workers' compensation benefits to plaintiff. After settling his workers' compensation claim, plaintiff sued defendant for negligence, and defendant brought a third-party action against plaintiff's functional employer. Defendant and plaintiff's employer's insurer settled their respective contribution and subrogation claims before trial in a "reverse-Naig" agreement.

The jury found plaintiff 5% at fault, plaintiff's functional employer 75% at fault, and defendant 20% at fault. The district court entered judgment against defendant in the amount of 20% of the damages awarded to plaintiff after offsets for workers compensation benefits were applied.

The Minnesota Court of Appeals reversed. Relying on the decision in *Lambertson v. Cincinnati Welding Corp.*, 257 N.W.2d 679 (Minn. 1977), the court held that "the procedure for allocating damages between an employer and a third party when workers' compensation benefits have been paid is distinct from a comparative-fault apportionment under Minn. Stat. §604.02[.]" As a result, it could not be utilized "to reduce the damages awarded to [plaintiff] based on the percentage of fault allocated to [plaintiff's functional employer]," meaning defendant was liable for 95% of the damages awarded to plaintiff remaining after offsets were applied. In so holding, the court rejected defendant's argument that *Lambertson* had been overruled by the 2000 amendment to the workers compensation act, the 2003 amendment to Minn. Stat. §604.02, and by the decision in *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68 (Minn. 2012). With respect to Minn. Stat. §604.02 and *Staab*, the court found them inapplicable because there was no common liability between defendant, a third-party tortfeasor, and plaintiff's employer. ***Fish v. Ramler Trucking, Inc.***, No. A18-0143 (Minn. Ct. App. 1/22/2019). *https://mn.gov/law-library-stat/archive/ctappub/2019/OPa180143-012219.pdf*

■ **Innkeeper negligence; primary assumption of risk.** Plaintiffs' son was an off-duty employee of defendant bar. Two individuals, who arrived intoxicated, continued to drink at defendant's establishment. After the individuals became unruly, plaintiffs' son assisted a bar employee in escorting them outside. Once outside, plaintiff's son and the other individuals fell. Plaintiffs' son suffered severe head injuries, resulting in his death. Plaintiffs then sued defendant for innkeeper negligence and violation of the Dram Shop Act. The district court granted summary judgment to defendant, holding that the innkeeper negligence claim was barred by primary assumption of risk, and plaintiff had failed to establish proximate cause on the dram shop claim. The Minnesota Court of Appeals reversed.

The Minnesota Supreme Court affirmed the decision of the court of appeals. With respect to the claim for innkeeper negligence, the Court noted that "[t]his is the first case in which we have been asked to extend the doctrine to foreclose claims arising out of the operation and patronage of bars." The Court declined to extend the doctrine, reasoning that "[t]he doctrine of assumption of risk is not favored, and should be limited rather than extended." The Court further noted "we have never considered operating and patronizing bars to be inherently dangerous activities" and that the "operation and patronage of bars is not—and should not be—a contact sport." Regarding the dram shop claim, the Court held there was sufficient evidence on the issue of foreseeability to create a disputed issue of material fact precluding summary judgment. ***Henson v. Uptown Drink, LLC***, No. A17-1066 (Minn. 1/23/2019). *https://mn.gov/law-library-stat/archive/supct/2019/OPA171066-012319.pdf*

JEFF MULDER
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ABA-ONU


HINRICHS


KLANDER

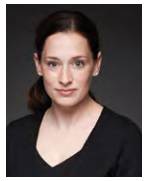

PENNY SAYLER


STEWART

Uzodima Franklin Aba-Onu, Christine E. Hinrichs, Jessica L. Klander, and Amie E. Penny Sayler have been elected shareholders at Bassford Remele. The firm also announced that Sheri L. Stewart has joined as an associate.


CHAD


GLEASON,


MAYER

Eric R. Chad, Mark L. Gleason, and Anneliese S. Mayer were promoted to partners at Merchant & Gould, a national intellectual property law firm.

Thibodeau, Johnson and Feriancek, PLLP and the Reyelts Law Firm announced the formation of Trial Group North, effective January 1, 2019. The main office will remain in Duluth, with another location in the Minneapolis-St. Paul area. The new firm will include 11 attorneys and 11 paralegals and administrative staff.


SANDEEN

The U.S. Department of State and the J. William Fulbright Foreign Scholarship Board announced that Sharon K. Sandeen, the Robins Kaplan Distinguished Professor in Intellectual Property Law at Mitchell Hamline School of Law, has been awarded the Fulbright-Hanken Distinguished Chair in Business and Economics for 2019-20. Her host institution is the Hanken School of Economics, Department of Accounting and Commercial Law, located in Helsinki, Finland.

Christopher Vatsaas has been named a partner at Chestnut Cambronne PA. He has been practicing family law for the past six years.


VATSAAS


ADAMS


HOKANS


LEVINSON


TROJE

Fredrikson & Byron announced that Beverley L. Adams, Christian V. Hokans, Kenneth S. Levinson, and Alyssa M. Troje have joined the firm. Adams joins the employment & labor, litigation, and health care groups as of counsel. Hokans joins as an associate in the firm's litigation group. Levinson, an experienced tax and transactional attorney, joins as senior of counsel. Troje, a MSBA Certified Real Property Law Specialist, joins as a senior associate in the firm's real estate group.


DAHL

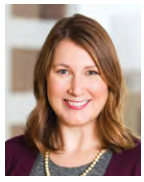
Rachel M. Dahl has been named partner at Hellmuth & Johnson. Dahl is a member of the firm's estate planning team.


FENEIS

Josh Feneis has joined Lommen Abdo P.A., practicing in the areas of family law and business litigation.


CRAIN

Amanda R. Crain has joined Halunen Law in its employment practice group.

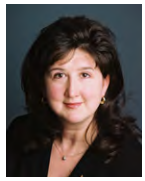

NILSSON

Melissa Nilsson is now a qualified neutral under Rule 114 of the Minnesota General Rules of Practice by the Minnesota Judicial Branch's Alternative Dispute Resolution Program. Nilsson is a shareholder at Henson Efron, practicing family law.


THOMSON

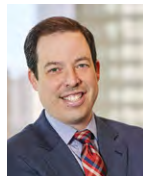

SCHWARTZ

Richard T. Thomson and Amy L. Schwartz have joined Ballard Spahr's consumer financial services group in Minneapolis.


KUBES

Kristine Kubes, principal of Kubes Law Office, PLLC, has been chosen as chair-elect of the American Bar Association Forum on Construction Law, the largest construction law association in the world. She will serve as forum chair beginning in September 2019.


BEIER


KELLY


NUFFORT

Jesse Beier, Cameron Kelly, and Lauren Nuffort became shareholders of Lommen Abdo, P.A. Beier and Kelly practice primarily in the area of estate planning, while Nuffort practices as a litigator.


SCOTT

Robert T. Scott has been named a shareholder attorney at Flaherty & Hood, P.A. Scott joined the firm in 2007 and is currently the firm's lead litigation attorney as well as a city attorney and special legal counsel for numerous cities throughout Minnesota.


MILLER

Michael M. Miller has joined Sieben Edmunds as a named partner. He will chair the firm's civil litigation team and continue to handle personal injury matters.


SEIFERT

James Seifert, former executive VP, corporate secretary, and general counsel of Ecolab, has joined Fafinski Mark & Johnson.


SCHMID


TOPKA

Lauri Ann Schmid and William M. Topka have become shareholders at Dougherty, Molenda, Solfest, Hills & Bauer PA. Schmid practices in the areas of estate planning and corporate and consumer bankruptcy. Topka practices in the area of litigation, focusing on personal injury, commercial, and real estate law.


DEUHS

Joseph J. Deuhs, Jr. has joined Barna, Guzy & Steffen, Ltd. as an attorney in the firm's real estate/banking department.


EMERY

Scott Emery has joined Henson Efron. Emery has over 20 years of experience and focuses his practice on tax issues.


MURO LAMERE

Melissa Muro LaMere has been named a 2019 Top Lawyer Under 40 by the Hispanic National Bar Association. Muro LaMere is an attorney at Maslon LLP, focusing her practice on employment litigation and business litigation.


EISENMENGER


CUNNINGHAM

Heimerl & Lammers announced that Jenna Eisenmenger has been promoted to partner within the firm, and Taylor Cunningham has joined the firm as an attorney practicing personal injury and employment law.


HOPPE


SAMANT

Lousene M. Hoppe was named a member of the 2019 class of fellows, participating in a landmark program created by the Leadership Council on Legal Diversity (LCLD) to identify, train, and advance the next generation of leaders in the legal profession. And Gauri S. Samant was named a member of the 2019 class of Pathfinders, an LCLD program designed to train high-performing early career attorneys. Both are attorneys at Fredrikson & Byron.


KNAPP

The board of trustees at Mitchell Hamline School of Law selected Professor Peter B. Knapp, currently associate dean for academic affairs, to become interim president and dean of the law school beginning July 1, 2019.


MOODY

William R. Moody has been made a shareholder of Fitch, Johnson, Larson & Held, PA. The firm also announced that Shaun M. Parks and Gregory L. Singleton joined the firm.

Saul Ewing Arnstein & Lehr has opened an office in Minneapolis. This new office, the firm's 16th, will be staffed by eight new partners: Maxwell J. Bremer, Alfred W. Coleman, Samuel W. Diehl, Stephen R. Eide, Kermit J. Nash, Nancy Quattlebaum Burke, Douglas M. Ramler, and Andrew J. Daly.


KOOPMANN


RAJKUMAR

Barry Koopmann has been elected managing partner and Roshan Rajkumar has been elected co-managing partner at Bowman and Brooke LLP.

Ronald L. (Ron) Simon, age 84, of Hopkins, died November 12, 2018. After service in the U.S. Army, he practiced law in Minneapolis as a trial lawyer and sports agent. As a sports attorney, he was proud to have represented first-round draft picks in all four major professional sports. He wrote a book entitled *The Game Behind the Game*, colorfully recounting many of his negotiations on behalf of professional athletes.

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NAPLES, Florida-based probate, real estate and estate planning attorney licensed in Minnesota and Florida. Robert W. Groth, PA (239) 593-1444; rob@grothlaw.net

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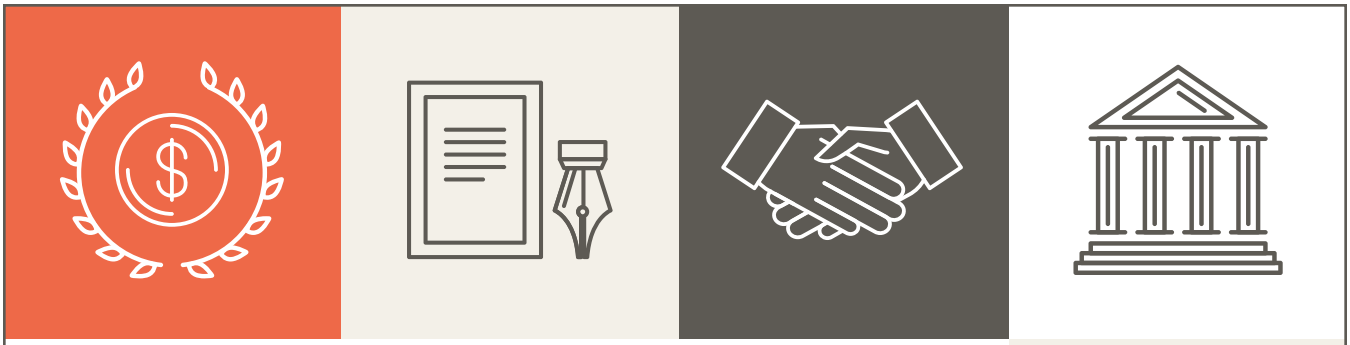

IOLTA Questions?

MSBA

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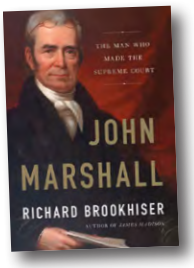
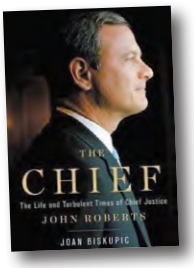


Richard Brookhiser
John Marshall: The Man Who Made the Supreme Court
(Basic Books, $30)

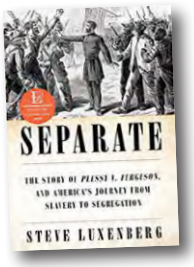
In 1801, a genial and brilliant Revolutionary War veteran and politician became the fourth chief justice of the United States. He would hold the post for 34 years (still a record), expounding the Constitution he loved.

Before he joined the Supreme Court, it was the weakling of the federal government, lacking in dignity and clout. After he died, it could never be ignored again. Through three decades of dramatic cases involving businessmen, scoundrels, Native Americans, and slaves, Marshall defended the federal government against unruly states, established the Supreme Court's right to rebuke Congress or the president, and unleashed the power of American commerce. For better and for worse, he made the Supreme Court a pillar of American life. In *John Marshall*, award-winning biographer Richard Brookhiser vividly chronicles America's greatest judge and the world he made.



Joan Biskupic
The Chief: The Life and Turbulent Times of Chief Justice John Roberts
(Basic Books, $32)

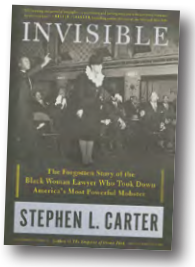
John Roberts was named to the Supreme Court in 2005 claiming he would act as a neutral umpire in deciding cases. His critics argue he has been anything but, pointing to his conservative victories on voting rights and campaign finance. Yet he broke from orthodoxy in his decision to preserve Obamacare. How are we to understand the motives of the most powerful judge in the land? In *The Chief*, award-winning journalist Joan Biskupic contends that Roberts is torn between two, often divergent, priorities: to carry out a conservative agenda, and to protect the Court's image and his place in history. Biskupic shows how Roberts's dual commitments have fostered distrust among his colleagues, with major consequences for the law.



Steve Luxenberg
Separate: The Story of Plessy v. Ferguson, and America's Journey from Slavery to Segregation
(W.W. Norton & Company, $35)

Plessy v. Ferguson, the Supreme Court case synonymous with "separate but equal," created remarkably little stir when the justices announced their near-unanimous decision on May 18, 1896. Yet it is one of the most compelling and dramatic stories of the nineteenth century, whose outcome embraced and protected segregation, and whose reverberations are still felt into the twenty-first.

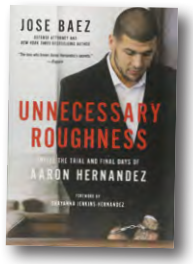
Separate spans a striking range of characters and landscapes. Wending its way through a half-century of American history, the narrative begins at the dawn of the railroad age, in the North, home to the nation's first separate railroad car, then moves briskly through slavery and the Civil War to Reconstruction and its aftermath, as separation took root in nearly every aspect of American life. Award-winning author Steve Luxenberg draws from letters, diaries, and archival collections to tell the story of *Plessy v. Ferguson* **through the eyes of th**e people caught up in the case.



Stephen L. Carter
Invisible: The Forgotten Story of the Black Woman Lawyer Who Took Down America's Most Powerful Mobster
(Henry Holt and Co., $30)

She was black and a woman and a prosecutor, a graduate of Smith College and the granddaughter of slaves, as dazzlingly unlikely a combination as one could imagine in New York of the 1930s—and without the strategy she devised, Lucky Luciano, the most powerful Mafia boss in history, would never have been convicted. When special prosecutor Thomas E. Dewey selected twenty lawyers to help him clean up the city's underworld, she was the only member of his team who was not a white male.

Eunice Hunton Carter, Stephen Carter's grandmother, was raised in a world of stultifying expectations about race and gender, yet by the 1940s, her professional and political successes had made her one of the most famous black women in America. Her triumphs were shadowed by prejudice and tragedy, but she remained unbowed.



Jose Baez
Unnecessary Roughness: Inside the Trial and Final Days of Aaron Hernandez
(Hachette Books, $27)

When renowned defense attorney Jose Baez received a request for representation from Aaron Hernandez, the disgraced Patriots tight-end was already serving a life sentence for murder. Their partnership culminated in a dramatic courtroom victory, a race to contest his first conviction, and ultimately a tragedy, when Aaron took his own life days after his acquittal. This riveting, closely-observed account of Aaron's life and final year is the only book based on countless intimate conversations with Aaron, and told from the perspective of a true insider. Written with the support of Hernandez's fiancée, *Unnecessary Roughness* takes readers inside the high-profile trial, offering a dramatic retelling of the race to obtain key evidence that would exonerate Hernandez, and later play a critical role in appealing his first conviction.

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– Cheryl Ischy, Legal Administrator
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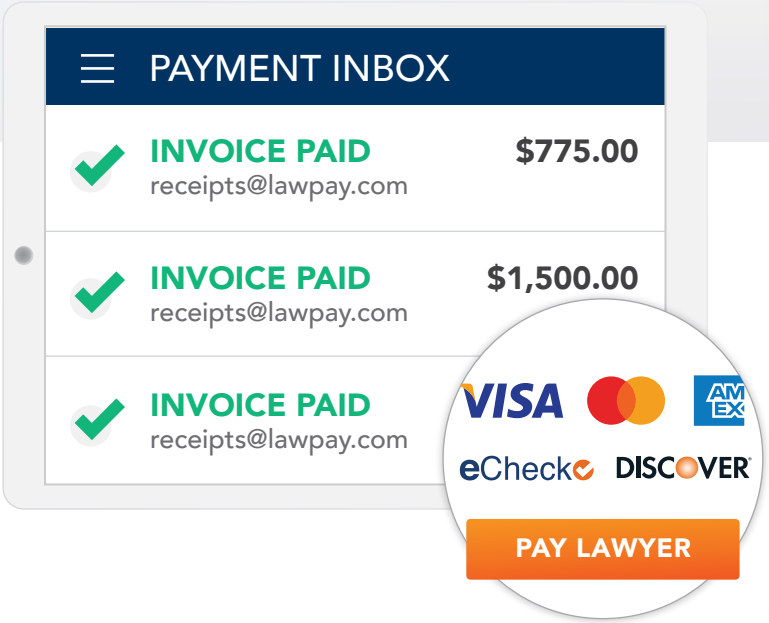

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